

WORKERS' COMPENSATION SEMINAR 2023

LIVE CLE Seminar at Chase Center on the Riverfront

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

TUESDAY, MAY 2, 2022 | 8:30 A.M. - 4:30 P.M.

6.5 hours of CLE Credit including 1.0 hour of Enhanced Ethics for
Delaware and Pennsylvania Attorneys

7.0 DE Insurance Continuing Education licensee credits including 1.0 credit in Ethics

Visit <https://www.dsba.org/event/workers-compensation-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.*

DELAWARE STATE BAR ASSOCIATION

CONTINUING LEGAL EDUCATION

WORKERS' COMPENSATION SEMINAR 2023

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

CLE SCHEDULE

8:30 a.m. – 8:45 a.m.

Opening Remarks

Sean P. Gambogi, Esquire
Kimmel, Carter, Roman, Peltz & O'Neill, P.A.
Section Chair of the Workers' Compensation Section

8:45 a.m. – 9:15 a.m.

Address from the Industrial Accident Board

The Honorable Mark Muroway
Chairman, Industrial Accident Board
Christopher F. Baum, Esquire
Delaware Department of Labor

9:15 a.m. – 10:00 a.m.

A Done Deal – Commutations, MSAs and Global Settlements

Frederick S. Freibott, Esquire
The Freibott Law Firm, P.A.
Christian G. McGarry, Esquire
Elzufon Austin & Mondell, P.A.
Samuel D. Pratcher III, Esquire
Pratcher Krayer LLC
Gregory P. Skolnik, Esquire
Heckler & Frabizzio, P.A.

10:00 a.m. – 10:15 a.m. | Break

10:15 a.m. – 10:45 a.m.

Quirky Permanent Impairments – IAB Consideration of Unscheduled Losses

Maria Paris Newill, Esquire
Heckler & Frabizzio, P.A.
Cassandra F. Roberts, Esquire
Elzufon Austin & Mondell, P.A.
Walt F. Schmittinger, Esquire
Schmittinger & Rodriguez, P.A.

10:15 a.m. – 10:45 a.m.

Market Price – Issues Involving Vocational Rehabilitation, Labor Market Surveys and Return to Work Evidence

H. Garrett Baker, Esquire
Elzufon Austin & Mondell, P.A.
Heather A. Long, Esquire
Long & Greenberg, LLC
Ellen Lock, CDMS, CCM
Barbara Riley, EdD, CRC, NCC

11:15 a.m. – 12:00 p.m.

Keynote Address The Art of Bench and Bar Relations

The Honorable Gary F. Traynor
Supreme Court of Delaware

12:00 p.m. – 1:00 p.m. | Lunch (provided)

1:00 p.m. – 1:30 p.m.

Case Law Update

John J. Ellis, Esquire
Heckler & Frabizzio, P.A.
Caroline A. Kaminski, Esquire
Doroshow, Pasquale, Krawitz & Bhaya

1:30 p.m. – 2:15 p.m.

Whoops I Did It Again – The Legal Implications of Successive Injuries

Ross C. Karsnitz, Esquire
Morris James LLP
Andrew M. Lukashunas, Esquire
Tybout, Redfern & Pell
Keri L. Morris-Johnston, Esquire
Marshall Dennehey Warner Coleman & Goggin
Stephen T. Morrow, Esquire
Rhoades & Morrow LLC

2:15 p.m. – 2:30 p.m. | Break

2:30 p.m. – 3:30 p.m.

The Good Doctor – Application & Evaluation of The Guides to Permanent Impairment 5th and 6th Editions

Jeffrey S. Meyers, MD
John B. Townsend III, MD

3:30 p.m. – 4:30 p.m.

Ethics and the Duty to the Tribunal and Opposing Counsel

James R. Donovan, Esquire
Doroshow, Pasquale, Krawitz & Bhaya
Benjamin K. Durstein, Esquire
Marshall Dennehey Warner Coleman & Goggin
Christopher T. Logullo, Esquire
Cobb & Logullo
Michael I. Silverman, Esquire
Silverman McDonald & Friedman

4:30 p.m. | Adjournment

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Leroy A. Tice, Esquire is a Delaware native and proud alumnus of Delaware State University where he earned a *B.A.* in Political Science and was a member of the Pi Sigma Alpha Political Science Honor Society. Mr. Tice earned his *Juris Doctor* from the Seton Hall University School of Law where he served as a Public Interest Fellow in Columbia, South Carolina performing death penalty appellate work; as a Seton Hall Law Teaching Fellow with a Constitutional Law concentration; as Law Clerk to the Hon. Jose L. Linares of the United States District Court for the District of New Jersey; and was the Raymond Del Tufo, Jr. Award Winner for achievement in Constitutional Law.

Mr. Tice is licensed to practice law in Delaware and New Jersey. His primary practice area is personal injury with a focus on major motor vehicle collision, medical negligence and workers' compensation. Mr. Tice is former counsel for the Delaware House of Representatives, Democratic Caucus and Deputy Commissioner of the Wilmington, DE Public Works Department. He is presently the Chairman of the City of Wilmington, Licenses and Inspection Review Board.

In his efforts to play a role in the revitalization of Wilmington, DE, Mr. Tice is a founding partner of WTR Partners, a real estate development enterprise focusing on market rate and affordable multi-family, mixed use projects. He is also, the developer/owner of DE Slider Company, an acclaimed one-of-a-kind slider/small plates restaurant located in downtown Wilmington, DE.

Mr. Tice's current non-legal affiliations include the Delaware State University Board of Trustees; Seton Hall University Law School Board of Visitors; East Side Charter School Community Advisory Board; and the Philadelphia Freedom Theater Board of Directors.

Opening Remarks

Sean P. Gambogi, Esquire

Kimmel, Carter, Roman, Peltz & O'Neill, P.A.

*Section Chair of the
Workers' Compensation Section*

Address from the Industrial Accident Board

The Honorable Mark Murowany
Chairman, Industrial Accident Board

Christopher F. Baum, Esquire
Delaware Department of Labor

Mark Murowany

Originally from South Jersey and a product of public schooling, Mark has graduated from the University of Delaware (History and Economics), Masters in Public Administration -Rutgers University. He has also attended Georgetown School of International Affairs and Delaware Law School.

Mark has a work history both in the private and public sectors. He has worked in the construction field and financial services. He has held licensing as an insurance broker for more than 25 years. Mark served as Deputy Auditor of Accounts and Deputy for Captive Insurance (DOI). Mark also has served as a Training Director with NCCVTSD.

During his lifetime, Mark has served over one dozen community organizations. He presently sits on the Delaware Humanities and Maplewood Senior Housing boards. He is a resident of Wilmington and was appointed to the Industrial Accident Board in June of 2017 and became the Board's Chair in July of 2018.

Christopher F. Baum has been the Chief Hearing Officer for the Industrial Accident Board of the State of Delaware since October of 2005. He was educated at Fordham University (B.A. 1982; J.D. 1985). Formerly, he was a law clerk in Superior Court assigned to asbestos litigation. He then went into private practice as an associate attorney with Tunnell & Raysor in 1987 before becoming an Assistant County Attorney with New Castle County in 1989. Mr. Baum first became a Workers' Compensation Hearing Officer in December of 1997 before being promoted to Chief Hearing Officer in October of 2005.



State of Delaware
Department of Labor

**25th Annual Report
on the
Status of Workers' Compensation
Case Management**

January, 2023

2022 Highlights

The Department of Labor is proud of the continuing progress in the processing of workers' compensation cases. The Department wants to thank the members of the Industrial Accident Board for their hard work in adjudicating cases, the Workers' Compensation Oversight Panel for their substantial efforts in fine-tuning the Health Care Payment System, and the members of the Delaware General Assembly for their ongoing support.

Reflecting on the work accomplished in 2022, several issues stand out as having tremendous and far-reaching effects on Workers' Compensation in Delaware:

1. OWC continues to work to address the problem of employers operating in Delaware without workers' compensation insurance coverage with the hiring of 3 (one for each county) Labor Law Enforcement Officers in Spring of 2021. Our efforts began and continue with steps to educate employers about workers' compensation and what is required of them. The efforts of this unit secured over 344 Workers Compensation policies that covered previously uninsured employees working in the State of Delaware. This also generated income for the Workers' Compensation Fund (see #3).
2. From an operational standpoint, the Office of Workers' Compensation has continued its modernization efforts. The Office of Workers' Compensation has finished the process of digitizing all purged files. In 2019, the launch of accepting Petitions electronically was introduced through the on-line portal system. The submission of First Report of Injuries and requests for public documents capabilities is available in the portal, as well. The online portal is used by insurance carriers to submit direct paid loss information and the statement of premiums. The self-insured businesses use the online portal to submit payroll classifications. This electronic submission is in lieu of paper document submission which then required staff to input the data. In September of 2022, the OWC completed the process with PMA (a third-party

administrator for the State of Delaware and others) of a daily file exchange of First Report of Injuries. This resulted in a 30% increase in electronic filings. The Office of Workers' Compensation introduced a new email box for the acceptance of Agreements & Receipts, and First Report of Injuries. This new process has proven effective as the turnaround time from mail submission to completion is cut in half. In the beginning of 2023, we will be adding a Pre-trial Memo email box. The processing of agreement and receipt documents was transferred from the fiscal unit to the Workers' Compensation unit in the Fall of 2021. The OWC revamped all forms to ensure consistency and made them all available on the website in a PDF format.

3. The Workers' Compensation Fund (Second Injury Fund) is a fund that the Department of Labor, Office of Workers' Compensation oversees. The Workers' Compensation Fund provides lost wage payments to Claimants either while litigation is pending or when Claimant has incurred a second injury. In the summer of 2021 the Office of Workers' Compensation has obtained dedicated legal resources for the Workers' Compensation Fund. Based on the efforts of the group, the OWC was able to reduce the tax assessment to Insurance carriers by 1% for 2022. The tax assessment is based on Insurance carriers Statement of Premiums for policies written.
4. In 2022, the OWC outfitted the 3 Hearing rooms (2-Wilmington Fox Valley & 1 Dover) with video equipment in accordance with SB94. This allowed for virtual hearings. In the fall of 2022, the IAB and OWC started holding motion days via video. Protocols are in place for pro-se claimants and disfigurement petitions.
5. The OWC will continue to look for ways to streamline processes as we modernize technology for the benefit of both staff and members of the public.

The Office of Workers Compensation takes pride in its updated website full of valuable information and links, including a list of available services, the ability to search for employer insurance coverage, access to the Workers' Compensation Act, frequently asked questions, and forms:

<http://dia.delawareworks.com/workers-comp/>

Workers' Compensation Oversight Panel (WCOP)

On October 31, 2022, the Insurance Commissioner announced that workers' compensation rates for 2023 would decrease on average 19.72% for the residual market and 14.76 % for the voluntary market. This is the sixth consecutive year Workers' Compensation insurance rates have dropped. OWC will continue to provide the administrative support necessary for the Workers' Compensation Oversight Panel to further its efforts at reducing costs associated with the past increases in workers' compensation rates.

Health Care Payment System - Year in Review 2022

The Delaware Workers' Compensation Health Care Payment System (HCPS) marked its thirteenth anniversary on May 23, 2022. The 6 major components of the HCPS, which fall under the purview of the Workers' Compensation Oversight Panel and its subcommittees, are:

1. A Fee Schedule
2. Health Care Practice Guidelines
3. A Utilization Review program
4. A Certification process for health care providers
5. Forms for employers and health care providers
6. Data Collection

Workers' Compensation Oversight Panel:

The 24 member WCOP contains representatives from the medical, legal, labor, business, and insurance communities, including the Secretary of Labor and Insurance Commissioner. Since its expansion in July 2014, the Panel has convened without one of the "insurance carrier" representatives. Currently, the Panel has two Public Member vacancies and one Medical Society – At Large vacancy.

In 2022, the WCOP met 4 times. Its subcommittees met 8 times; smaller groups of the subcommittees met 14 times.

The WCOP is in the process of updating/revising the Practice Guidelines and the Introduction & Fee Schedule Guidelines bringing them up to date with current medical guidelines and procedures. The Practice Guidelines and Introduction & Fee Schedule Guidelines were last updated in 2016. All proposed updates/revisions have been approved by the WCOP. The WCOP is in the process of completing the Regulatory Flexibility Analysis and Impact Statement Form to have the updates/revisions published for public comment.

Medical Component:

The OWC medical component supports the operations of the HCPS. In 2021, the medical component fielded a significant number of telephone calls, letters, and electronic mail regarding the HCPS. These contacts primarily came from the “providers,” “carriers,” “other states/entities,” and “general” categories. Provider certification represented the largest number of contacts.

The Department of Labor’s website contains comprehensive information on all five components of the HCPS, as well as links to send e-mail questions, subscribe/unsubscribe to the ListServ, download the current certified health care provider list, view frequently asked questions, download the fee schedule data, download forms, access the Administrative Code (“the regulations”), access to the Workers’ Compensation Act and complete the required continuing education course for certified health care providers.

Utilization review:

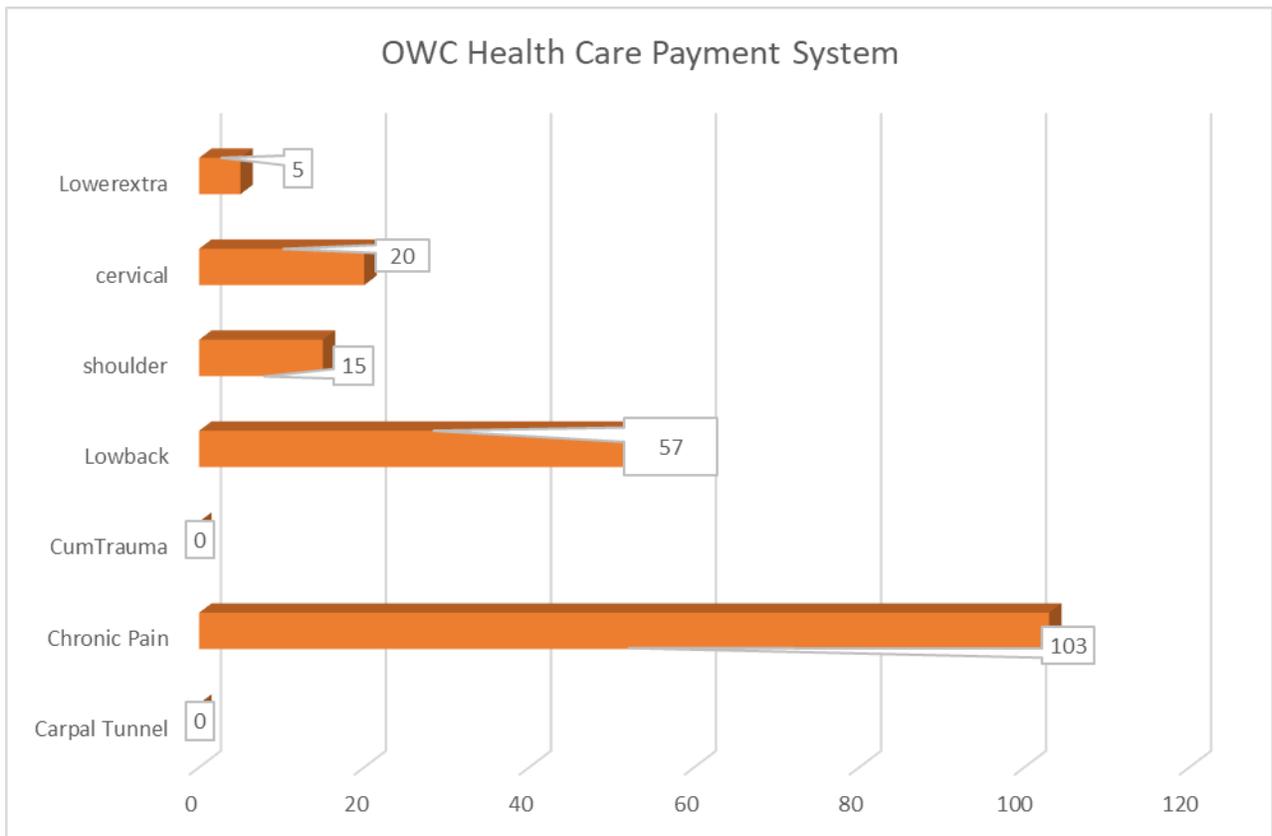
UR provides prompt resolution of compliance issues related to proposed or provided health care services within the practice guidelines for those claims acknowledged as compensable. Parties may appeal UR determinations to challenge the assumption that treatment specified within a practice guideline is the only reasonable and necessary course for a specific worker’s injury. OWC deems a UR request “ineligible” when the request falls outside the specified purview of UR or does not comply with the “required content, presentation and binding method” for materials submitted for review. The like-specialist reviewer deems a UR request “non-applicable” when the appropriate practice guideline does not address the treatment under review.

In 2021, OWC received 249 requests for utilization review. In 2022 YTD, OWC received 176 requests for utilization review, which constituted an 29.32% decrease. In 2021, OWC received 158 Petitions to Appeal a Utilization Review. These appeals were filed in approximately 63.45% of the cases where utilization review had been requested. The vast majority of these appeals were later withdrawn prior to being heard by the Industrial Accident Board. In 2022, OWC

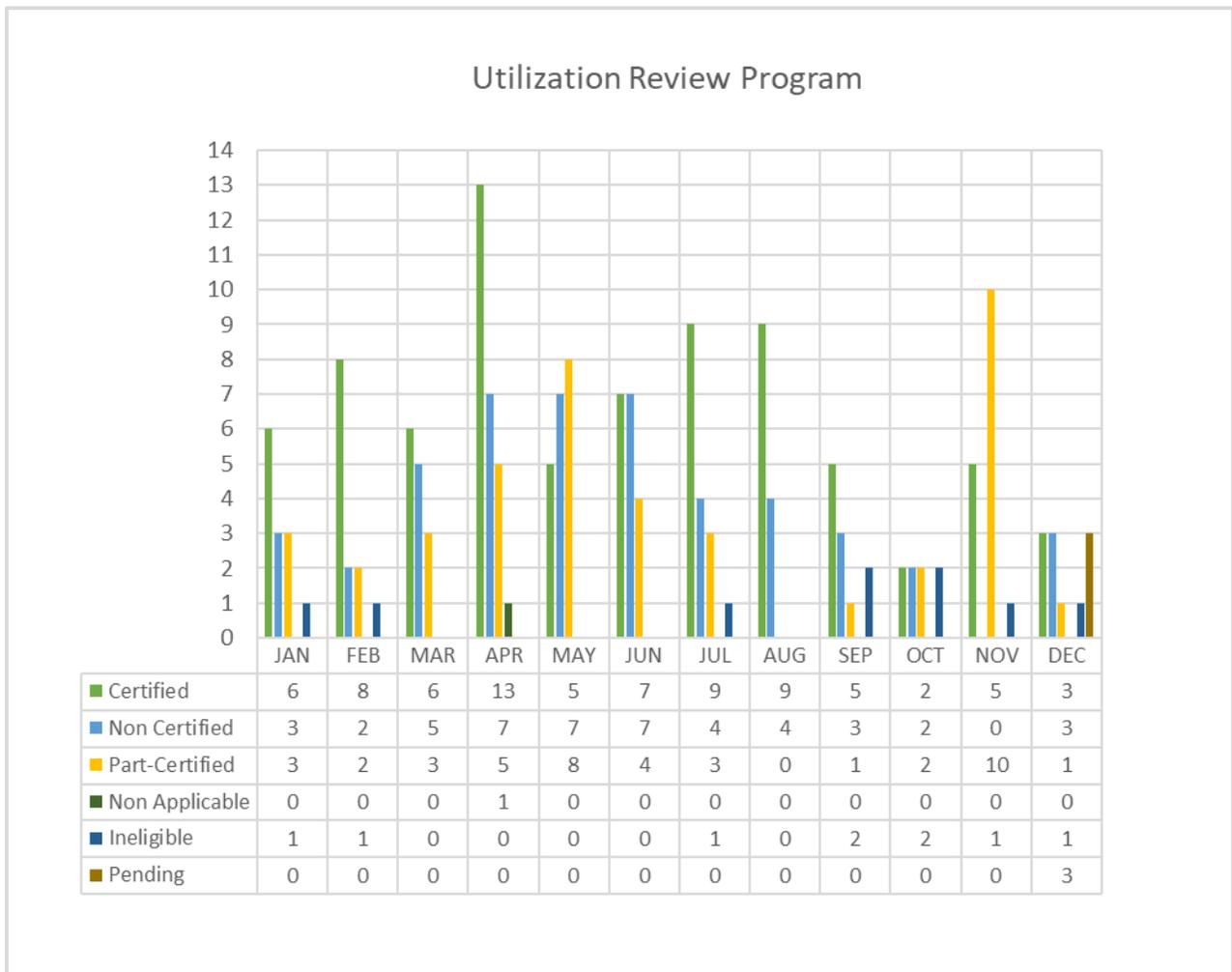
received 104 Petitions to Appeal a Utilization Review. The percentage rate of appeal for 2022 was approximately 40.91%.

Similar to the prior year, the great majority of appeals filed were later withdrawn before going to a hearing with the Industrial Accident Board.

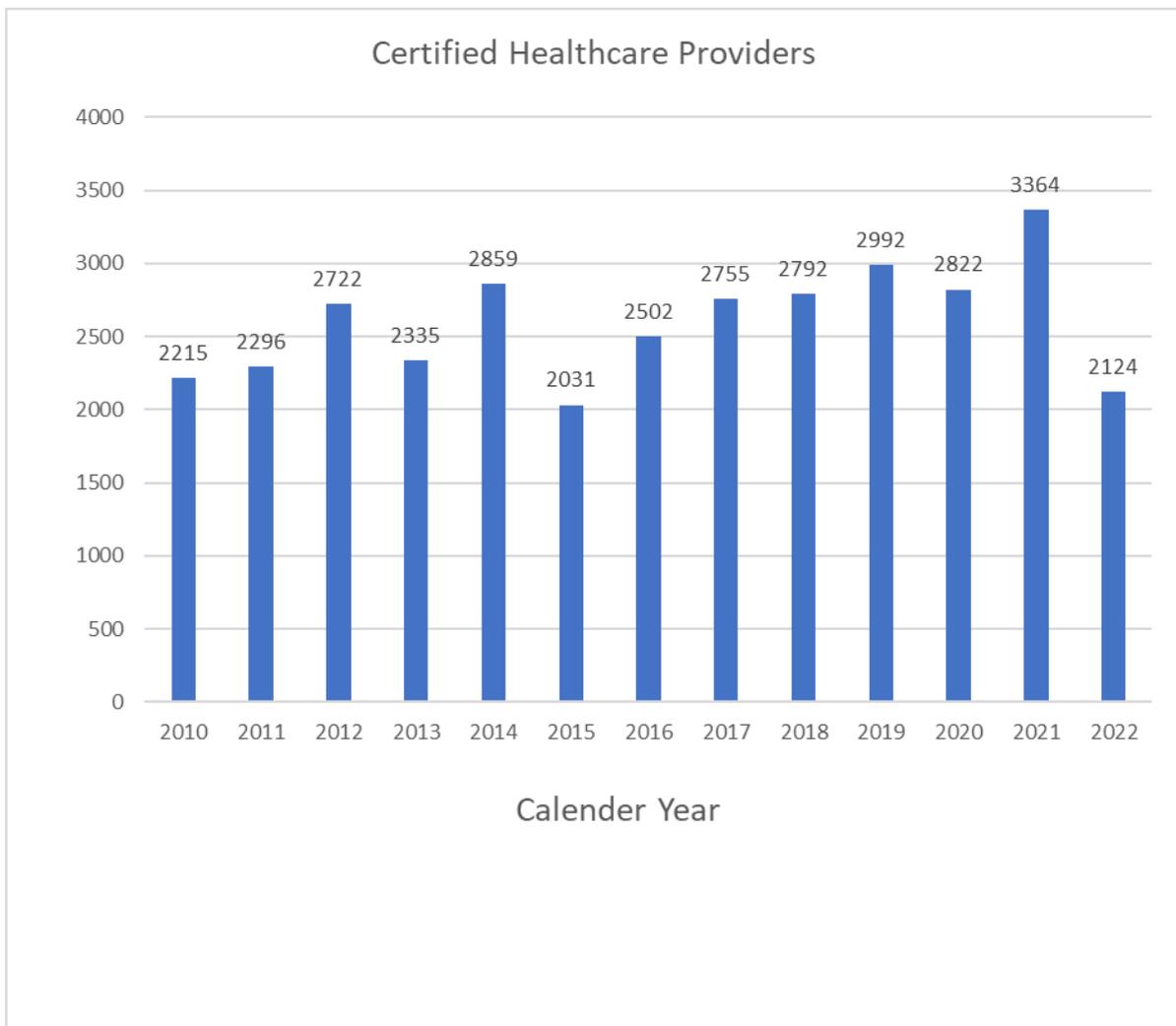
Chronic pain treatment, particularly pain medication, continued in 2022 to represent the treatment most challenged through utilization review. OWC participates on the Prescription Drug Action Committee (PDAC), which continued moving forward its recommendations to reduce prescription drug abuse in Delaware.



The OWC Utilization Review program continues to expand electronic processing of the requests for utilization review. The review requests continue to be sent to all our UR contractors via secure email instead of certified mail. All these processes allow the contractor to receive the UR request in a shorter period and OWC has been able to realize a large cost savings by no longer sending the large number of documents included in a UR request through certified mail. In addition to sending UR requests via secure email, additional savings have been attained by scanning and storing all UR files on a shared network drive eliminating the need for storage of paper files.



The number of certified health care providers has decreased within the last year. In 2021 there were 3,364 certified providers and that number has decreased by 36.86% to 2,124 active providers in 2022. There are 39 areas of practice represented among the certified providers. Biennial compliance with the statutorily mandated continuing education course was the most common reason providers lost their certification. The anchor date for completion of the course will remain the provider’s professional license renewal date. 2022 marked the ninth year of this change, which helps providers’ better track the recertification deadline, also the Workers Compensation Provider Certification Course was revamped to reflect any Workers Compensation regulation that may have occurred during the previous and current year.



Office of Workers' Compensation

Workers' Compensation Specialists

The workers' compensation Specialists scheduled 3,997 hearing in 2022. They also met with over 20 unrepresented (pro-se) claimants that were applying for workers' compensation benefits. The Specialists also field escalated calls from claimants, employers, attorneys and insurance companies during the course and scope of their daily job function.

OWC Labor Law Enforcement Unit:

Since its inception in Spring of 2021, the departments three LLEOs have continued to positively impact the workers within the State of Delaware. In 2022 they were credited with securing 344 WC insurance policies from employers who previously were not covered and therefore not paying the Statement of Premium Tax to the WC Fund. This equates to a minimum estimate of 2,560 employees who were previously not covered in the event of an industrial work accident. The officers mailed over 1,000 compliance letters and scheduled 68 hearings to compel employers to provide employees WC insurance. As a result of those hearings, the Industrial Accident Board assessed fines totaling \$455,500.00 against non compliant employers.

OWC Administrative Support Unit:

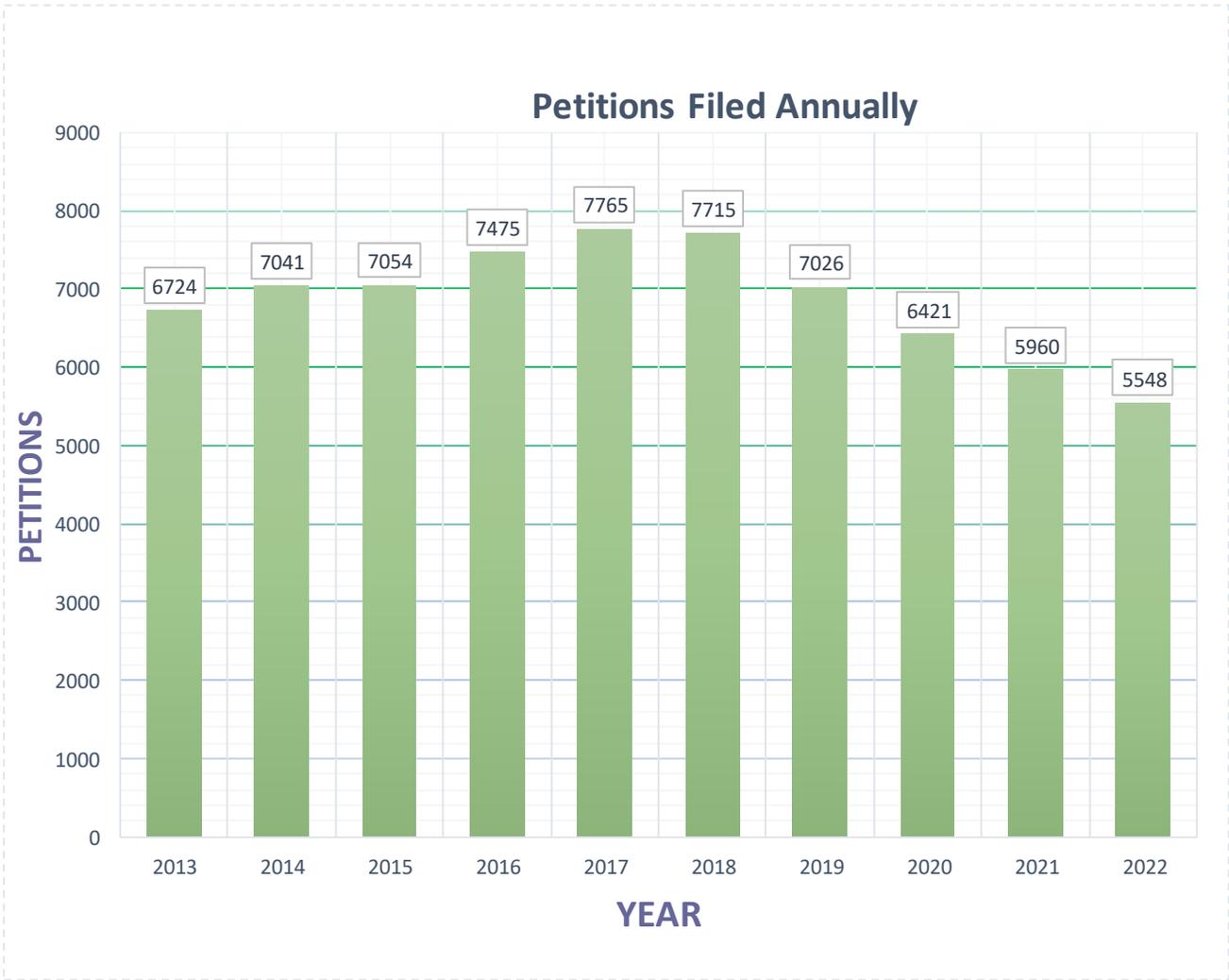
The Office of Workers' Compensation processed 2156 requests for copies of public documents. This is down 22% from last year. OWC processed 12,038 First Report of Injury. This represented a 7% decrease in reported injuries for 2022 vs 2021. The OWC processed 3241 agreements and 4656 receipts. The office answered 4702 calls, which represents 80% of all calls coming into the IA main number speaking to a live person.

The OWC was also tasked with collection of the semi-annual tax assessment based on Statement of Premiums (revenue for the Workers' Compensation Fund),

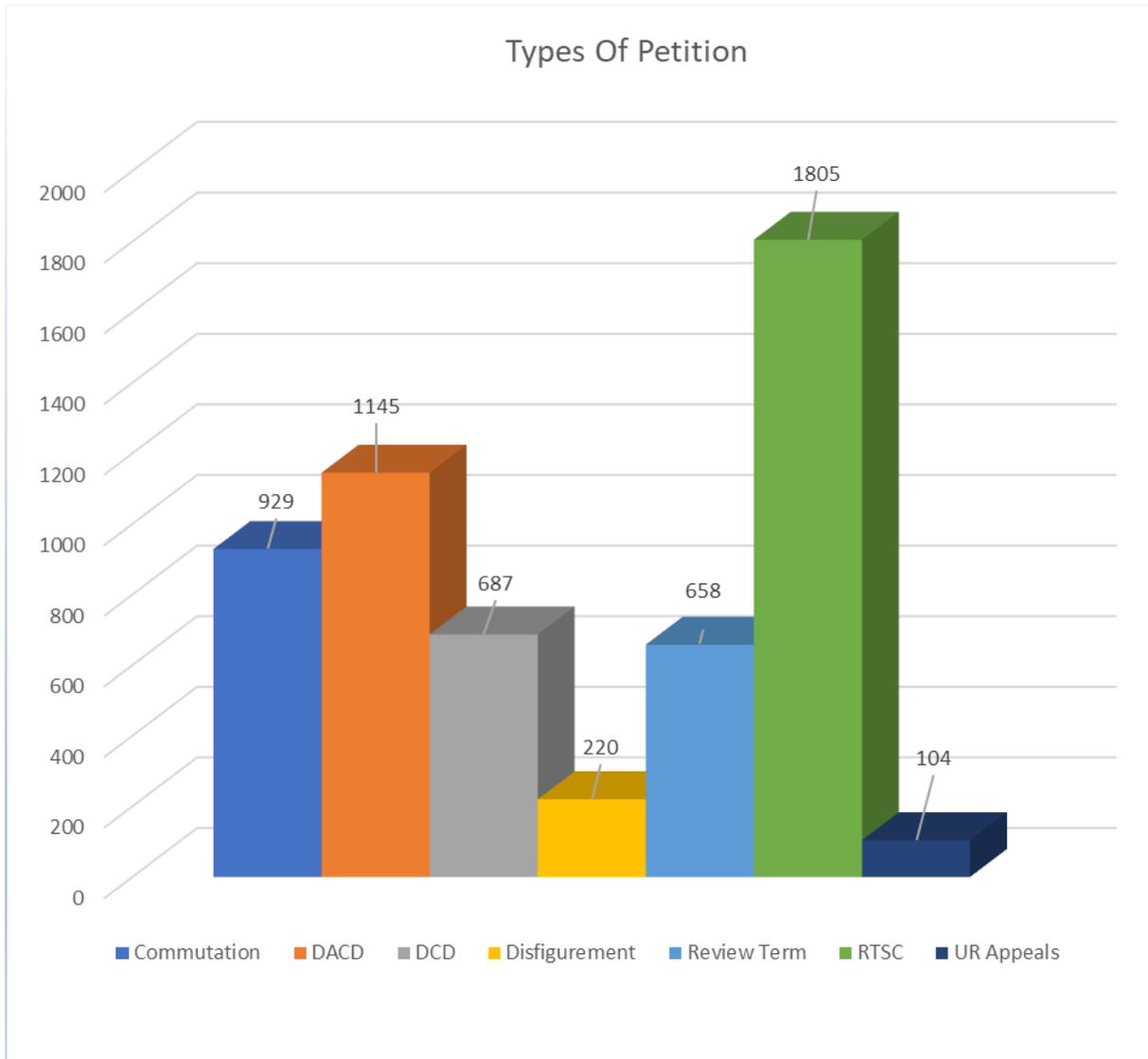
the semi-annual Administrative Assessment based on the operating expenses of the unit as it relates to the Direct Paid Losses of the Insurance companies (the OWC funding source for our daily operations) and the quarterly self-insured tax which goes to the general fund.

Petitions Filed Annually

During 2022, a total of 5548 petitions were filed. This is a decrease of 7% compared to 2021. Filed petitions have continued to drop since the high in 2018.



Types of Petitions

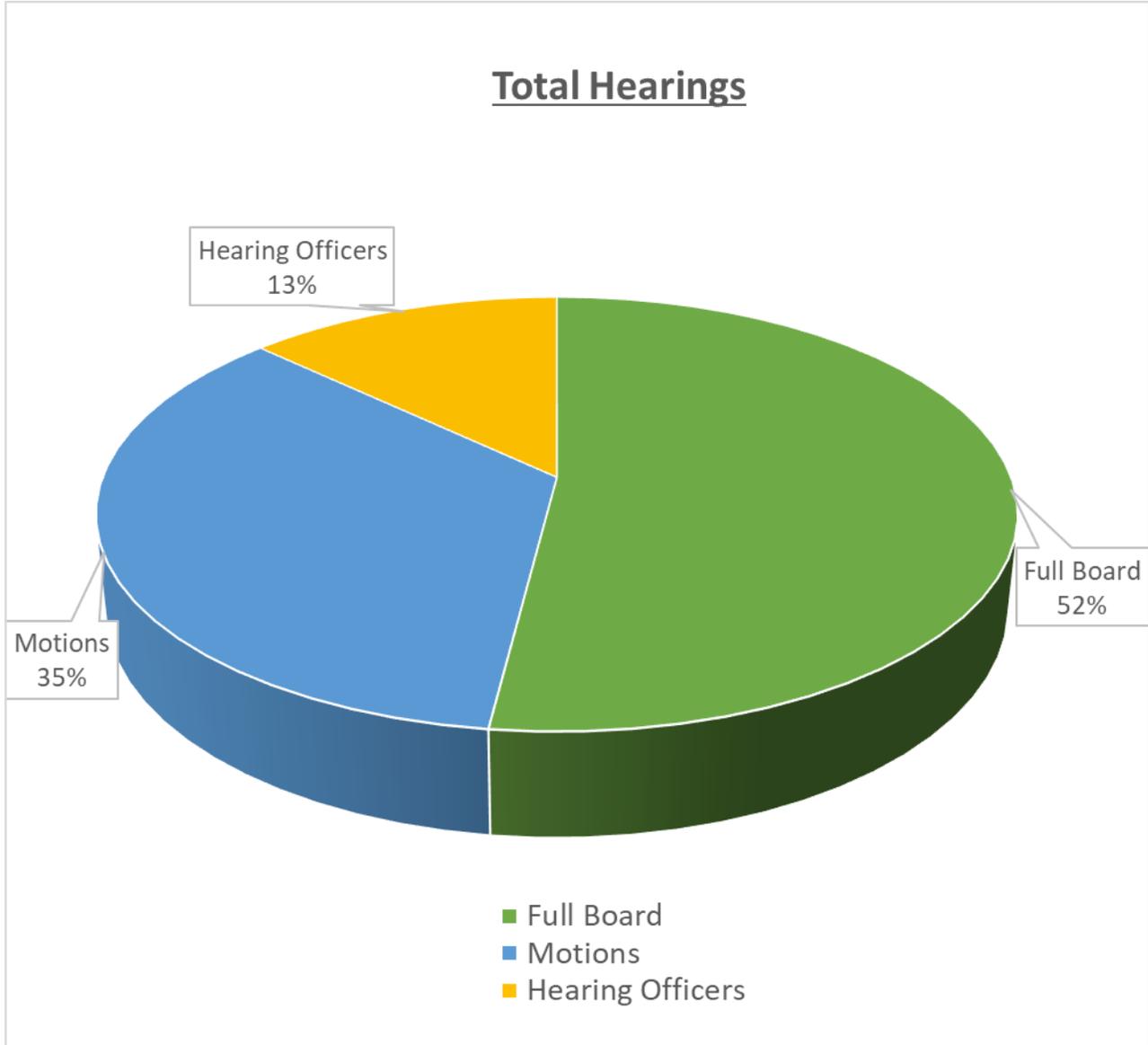


Petitions Heard by the Board/Hearing Officers

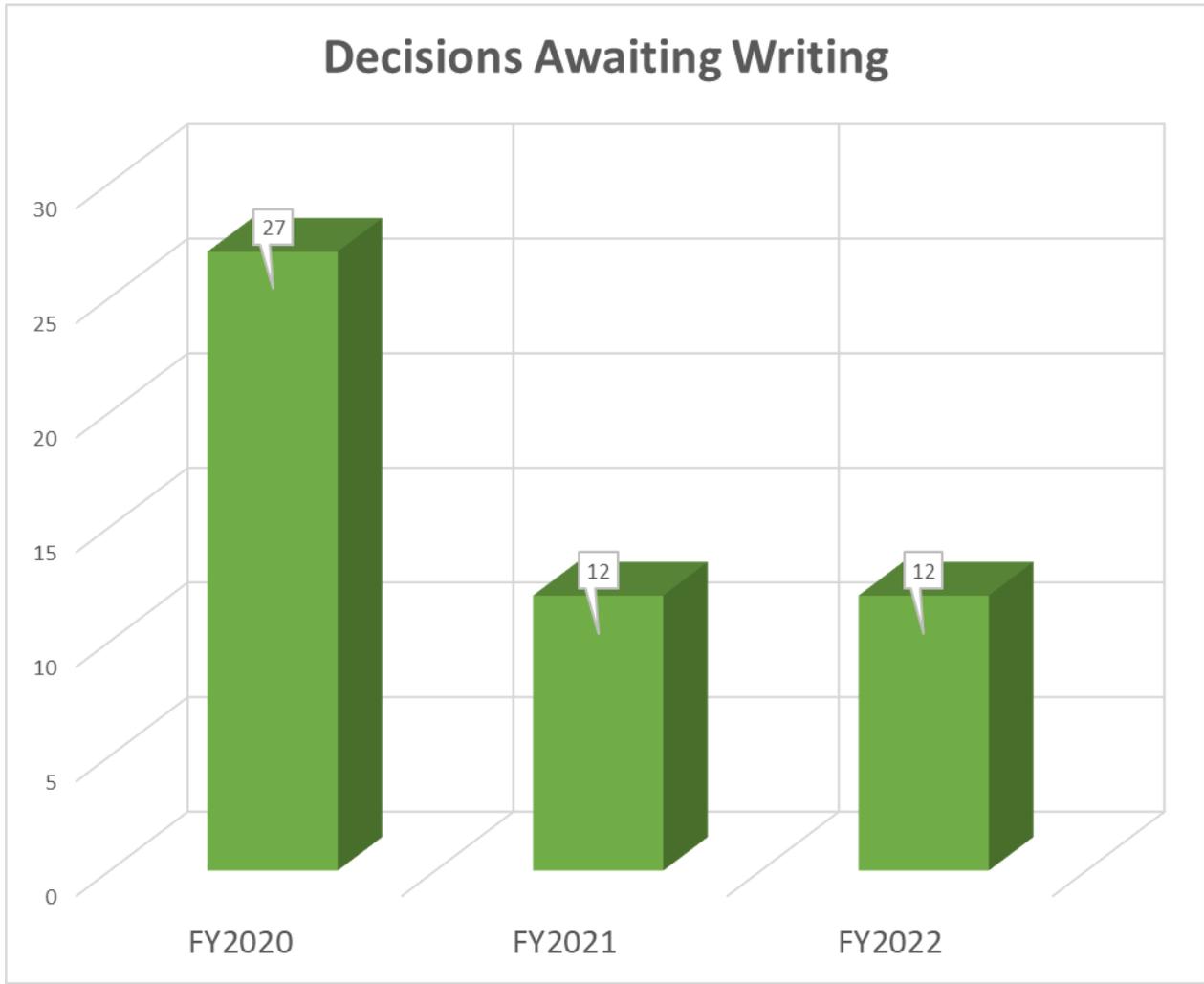
As seen in the chart on page 11, the number of petitions filed annually decreased 7% in calendar year 2022, as compared to 2021; while there was a decrease of 5% in Petitions heard in FY22. This statistic is for all petitions regardless of hearing type.



285 Merit hearings were conducted in 2022, of which 57 were conducted by solo Hearing Officers. Of the 285 Merit Hearings, 44 had multiple petitioners heard. There were 932 commutations reviewed by a solo Hearing Officer in 2022. This represents a 18% increase in commutation settlements.

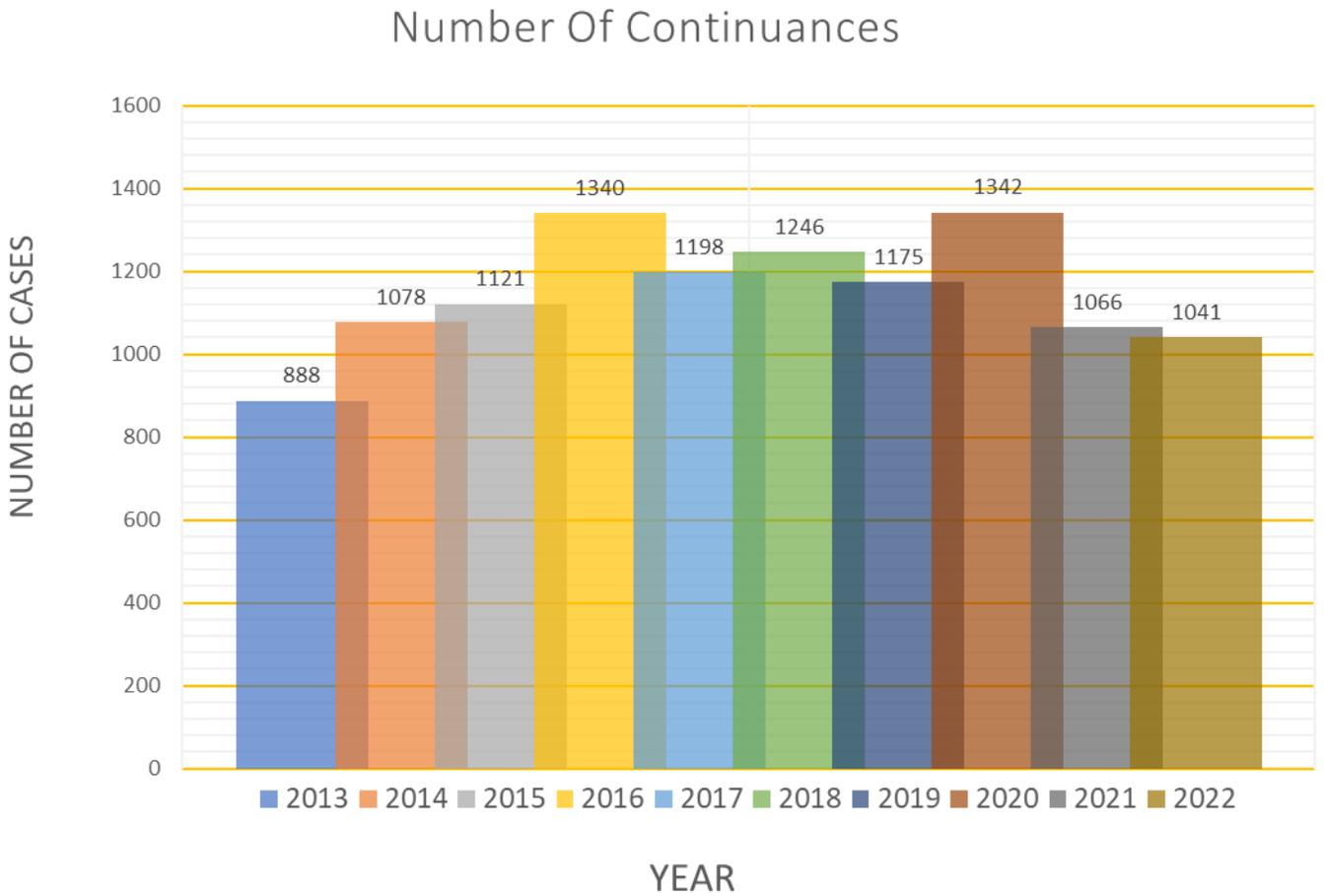


Currently, there are 12 decisions in the queue awaiting writing. During the year of 2021 and going into 2022, the OWC is “cleaning up” the entries of consolidated hearings to reflect a more accurate chart in our SCARS system.

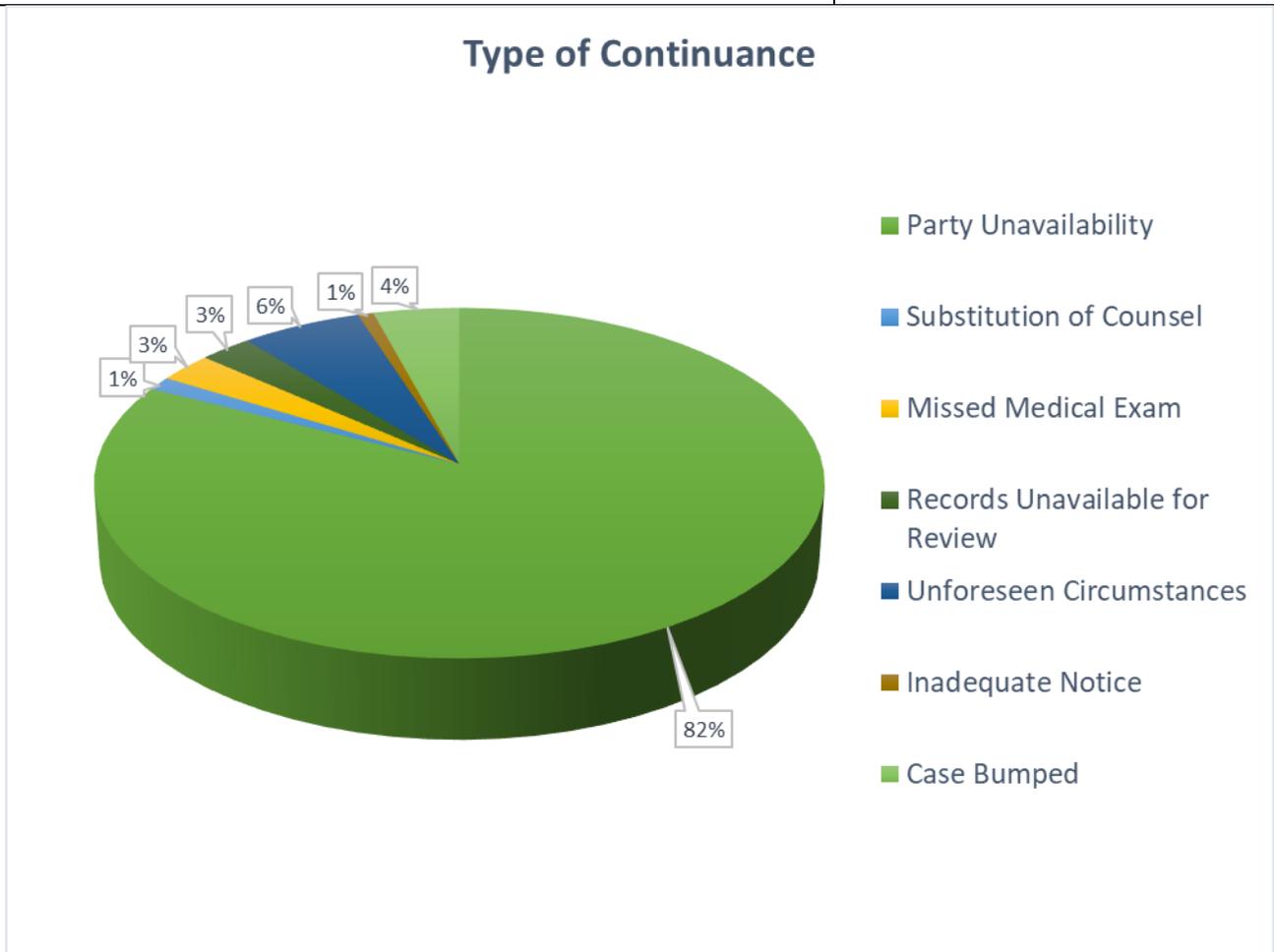


Continuances

In 2022, a total of 1,041 continuances were granted, which represents a 2% decrease from the 1,066 continuances granted in 2021. The vast majority of continuances continue to be caused by the unavailability of a medical witness and due to the pandemic.



Grounds for Continuances	Number of Occurrences
The unavailability of a party, attorney, material witness or medical witness for reasons beyond their control (illness, conflicting court appearance, emergency)	859
A justifiable substitution of counsel for a party	13
Any unforeseen circumstance beyond the control of the parties:	
• Employee missed employer-scheduled medical exam	28
• Records unavailable for review by parties prior to hearing	27
• Unforeseen circumstances	62
• Inadequate notice	8
• <i>Case bumped</i>	44



Board Member Activities

The following table shows the number of days individual board members were scheduled to conduct hearings, as well as the number of days they actually conducted hearings in 2022. Scheduled days versus actual days differ due to case settlements and continuances.

Board Member	Number of Days Scheduled to Conduct Hearings	Number of Days Actually Conducted Hearings
Daniello*	76	21
Dantzler	122	47
D'Anna	160	61
Freel*	32	17
Hare	125	70
Hartranft	151	56
Hayes*	100	37
Mauil	131	55
Mitchell	178	66
Murowany	164	76
Wilson	166	47
Total:	1405	553

- J. Daniello rejoined the IAB from April, 2022 till October 24,2022
- V. Hayes was appointed to the IAB effective February, 2022
- B. Freel was rehired effective November 9, 2022

The following table shows the number of Hearings on the Merits conducted by each Board Member where a decision has been rendered. This chart does not include Legal Hearings; and multiple petitions heard within the same hearing.

Two members of the Board sit for each Hearing.

Board Member	Number of Hearings on the Merits
Daniello	17
Dantzler	25
D'Anna	44
Freel	13
Hare	49
Hartranft	47
Hayes	28
Maul	37
Mitchell	56
Murowany	54
Wilson	28
Total	398

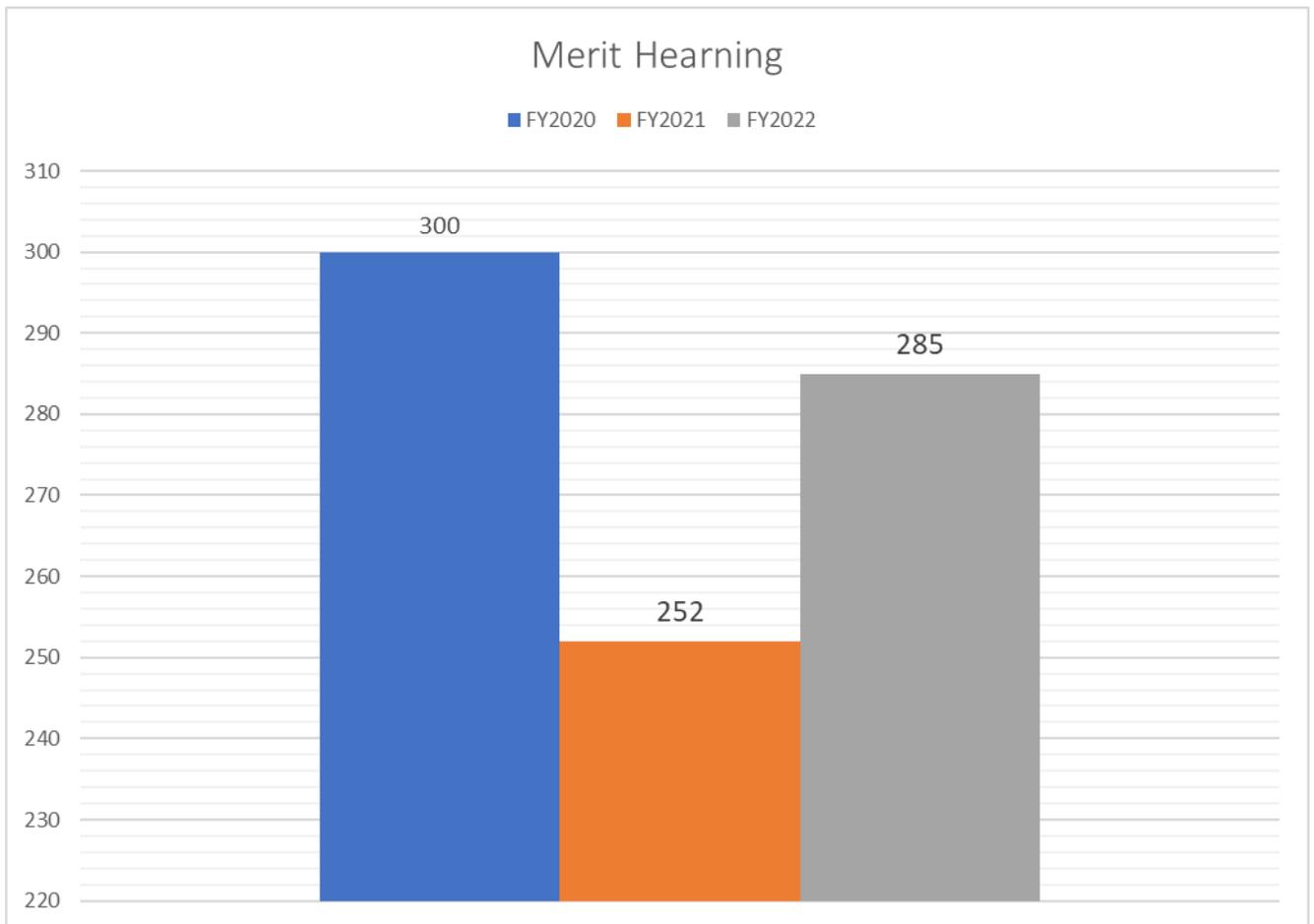
Completed Caseload of Individual Hearing Officers

Hearing Officer	Number of Decisions, Orders and Rearguments Written
E. Boyle	33
J. Bucklin	41
A. Fowler	43
S. Mack	29
J. Pezzner	37
J. Schneikart	32
H. Williams	46
K. Wilson	38
C. Baum, Chief	72
Total	371

In 2022, a hearing officer conducted one workers' compensation mediation pursuant to DEL. CODE ANN. tit. 19, § 2348A. It was concluded successfully.

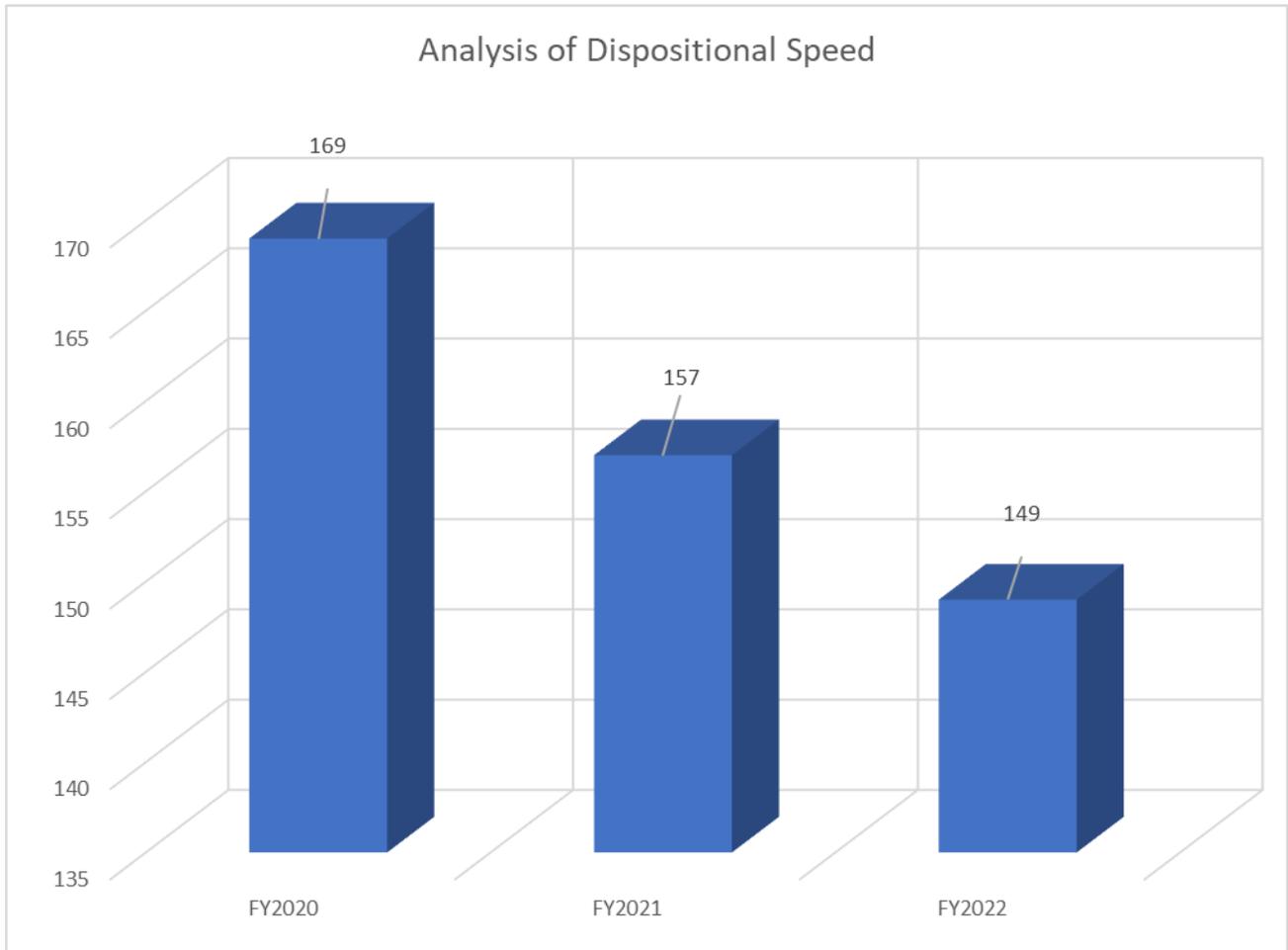
Compliance with Hearing & Decisional Deadlines

In 2022, 285 cases were heard which required a written decision within 14 days from the IAB or hearing officers. The number of appeals continued to remain low, with only 35 appeals in 2022.



Analysis of Dispositional Speed

In 2022, the average dispositional speed for processing all petitions (from the filing of the petition to the issuance of the decision) was 149 days, compared to 157 in 2021. A slight improvement (5%). The agency is continuing its efforts to find innovative ways to reduce this number by processing cases more quickly and efficiently and increasing the speed of decisions.



Summary of Appeals

(Status of appeals taken as of December 31, 2022)

In the last five years, the Board (or Hearing Officers) have rendered 1,494 decisions on the merits. Of those decisions, 208 (approximately 13.92%) were appealed (an average of 41.6 per year). 180 of those appeals have been resolved. Only 30 decisions have been reversed and/or remanded, in whole or in part. This represents a “reversal rate” of only about 2.01% of all decisions rendered in those five years.

Year Appeal Taken In:	2018	2019	2020	2021	2022
Total Number of Decisions:	338	358	254	269	275
Total Number of Appeals:	46	47	45	35	35
Affirmed:	15	14	22	14	4
Reversed and/or Remanded:	10	9	6	4	1
Dismissed/Withdrawn:	21	23	17	16	4
Pending: ¹	0	1	0	1	26

¹ For purposes of these statistics, an appeal is no longer considered “Pending” once a Superior Court decision has been issued. Some Superior Court decisions have been appealed to the Delaware Supreme Court. If a Supreme Court decision is different from that given by the Superior Court, the statistics will be updated to reflect the final holding. Therefore, for example, while no cases are “Pending” from 2018, some of those appeal results may change in the future because of decisions by the Supreme Court.

Summary of Appeals, Five Year Cumulative

(Status of appeals taken as of December 31, 2022)

Five-Year Cumulative	
Total Number of Decisions:	1494
Total Number of Appeals:	208
Affirmed:	69
Reversed and/or Remanded	30
Dismissed/Withdrawn	81
Pending:	28

Departmental Recommendations

Outreach:

OWC continues to work to address the problem of employers operating in Delaware without workers' compensation insurance coverage. Our efforts began and continue with steps to educate employers about workers' compensation and what is required of them. New pamphlets and videos are planned for 2023 to give employers an understanding of the requirements of the State of Delaware. This educational tool will address requirements for both in-state employers and employers out of state that are conducting business within Delaware. OWC is also reviewing current workers' compensation statutes to ensure that they contain the tools necessary to pursue non-compliant companies.

Self-Insurance:

The Office of Workers' Compensation is continuing its review of the workers' compensation self-insurance program in its entirety. When an employer is self-insured, the employer takes on the liability of paying any costs associated with a workers' compensation injury suffered by one of its employees instead of those costs being handled through an insurance carrier. OWC's immediate concern is to address the resulting situation for workers' compensation claimants when a self-insured employer files for bankruptcy. Even though self-insured employers are required to post a surety bond, OWC is finding that the bond amount is insufficient to cover the payment of all workers' compensation claims remaining after the company files for bankruptcy. This includes both payment for medical expenses as well as any indemnity benefits payable to the injured worker.

Another concern is how our statutes do not specify how the bond amount is to be calculated for self-insured employers. OWC is looking at having some consideration of the size of the company and the nature of the company's work.

A third area to be addressed is how the current statutes do not adequately address the way claims are to be paid from the bond proceeds when a self-insured employer does file for bankruptcy. OWC would also like to address the lack of requirements for an employer to be granted self-insured status as well as the lack of a periodic review of an employer's self-insured status and whether that status or bond amount continues to be appropriate for the employer.

Workers' Compensation Act:

The WC Act in its entirety has not had a major revision since 1997. The OWC is looking to update the Act in its entirety. These modifications are necessary to conform and update with changes in technology, agency responsibilities as well as the Workers' Compensation Environment/Landscape.

A Done Deal – Commutations, MSAs and Global Settlements

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Samuel D. Pratcher III, Esquire
Pratcher Kraye LLC

Gregory P. Skolnik, Esquire
Heckler & Frabizzio, P.A.

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

ALBERT KOTT,)	
)	
Employee,)	
)	
v.	)	Hearing No. 1369712
)	
CONCRETE WALLS INC.,)	
)	
Employer.)	

ORDER

This matter came before the Board on June 28, 2018, on a motion by Albert Kott (“Claimant”) seeking enforcement of a commutation agreement with Concrete Walls Inc. (“Employer”). Claimant alleges that the parties reached a meeting of minds on a commutation settlement of Claimant’s claim in 2014. Employer maintains that Claimant rejected the offer in 2014 and no new agreement has since been entered into.

Background: There is very little dispute over the background facts. Claimant was injured in a compensable work accident on May 23, 2011. In May of 2014, Employer extended an offer to Claimant, through his counsel at the time, to commute the claim for \$100,000.00. In June of 2014, Employer’s counsel confirmed with Claimant’s then-counsel that Claimant had agreed to commute his claim for \$100,000.00. Commutation documents were prepared and sent to Claimant’s then-counsel. While reviewing the documents, Claimant became dissatisfied with the amount he would net from the commutation sum because his surgeon held a significant lien over the proceeds. Claimant represents that this misunderstanding as to Claimant’s share was an honest misunderstanding between himself and his then-counsel. Claimant refused to execute the commutation documents. Claimant’s then-counsel subsequently withdrew from representing Claimant in September of 2014.

Claimant's present counsel assumed representation of Claimant in April of 2015. Former counsel sent current counsel a letter explaining about the negotiated commutation and that Claimant no longer wished to proceed with the settlement.

In August of 2015, Claimant's current counsel contacted Employer's counsel and asked whether the offer of a global commutation was still good. By e-mail dated August 14, 2015, Employer's counsel responded that the offer was no longer open. It further explained that any future offer would be considerably smaller because now there was no surgery claim or medical bills in issue. By letter dated August 27, 2015, Employer formally extended a new offer of commutation in the amount of \$7,500.00. Employer did not receive a response to this offer. A follow-up letter dated November 19, 2015, was sent repeating the offer of \$7,500.00 and asking for a response. This letter noted that if no response was received within ten business days the file would be closed.

By letter dated October 3, 2016, Claimant's counsel wrote to Employer's counsel asking whether Employer would again be willing to resolve the matter through a global commutation. By letter dated November 21, 2016, Employer's counsel sent a copy of the prior letter from November of 2015 and again asking Claimant's counsel as to Claimant's position as to the offer of \$7,500.00. Employer's counsel received no response. By letter dated December 13, 2016, Employer's counsel again requested a response and notified Claimant's counsel that if no response was received within 30 days the file would again be closed. No response was received.

In May of 2018, Claimant filed the present motion seeking to enforce the \$100,000.00 commutation from 2014.

Analysis: It has long been established that, if parties reach a meeting of the minds on a settlement, the Board can enforce that settlement even if a party then has second thoughts. *See Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998) (Board may approve and enforce an agreement if the Board finds that “the parties had reached a meeting of the minds as to all material terms and had entered into a binding agreement notwithstanding the absence of a formal contract.”).¹ *See also Johnson v. Food Lion*, C.A. No. N13A-08-010, Scott, J., 2014 Del. Super. LEXIS 3413, at *11 (April 14, 2014); *Soto v. Pettinaro Construction*, Del. IAB, Hearing No. 1256246, at 2 (October 2, 2009)(ORDER); *Woodall v. Diamond State Port Corp.*, Del. IAB, Hearing No. 1191596, at 2-4 (August 8, 2002)(ORDER); *Curry v. Wendover, Inc.*, Del. IAB, Hearing No. 1119976, at 11 (March 22, 2001), *aff’d*, Del. Super., C.A. No. 01A-04-003, Del. PESCO, J. (August 23, 2001)(ORDER).

The threshold issue, then, is whether the parties in this case reached a meeting of the minds on all material terms of the alleged settlement. If it is found that there was a meeting of the minds, the next issue would be whether the Board would *approve* the proposed commutation. *See Johnson*, 2014 Del. Super. LEXIS 3413, at *14-*15 (after finding meeting of minds, the court considers whether there was substantial evidence that the commutation was in the claimant’s best interest).

Claimant argues that Employer’s June 16, 2014 letter confirming the commutation settlement and the preparation of the commutation documents establish that an agreement was reached between the parties. Claimant argues that the fact that Claimant, on June 16, 2014,

¹ In *Anchor Motor Freight*, it was found that the parties had reached a meeting of minds as to a commutation, but that the employee died before the commutation was formally approved by the Board. The Supreme Court found that the Board retained the authority “to approve an agreement on compensation or other benefits regardless of whether the claimant has died.” *Anchor Motor Freight*, 716 A.2d at 158. “The employer had made a bargain that, in hindsight, was not as beneficial as originally anticipated. We do not think it serves the purposes of the Workers’ Compensation Act to allow parties to avoid their commitments based on the fortuity of whether a claimant dies before the Board acts.” *Anchor Motor Freight*, 716 A.2d at 158-159.

withdrew his pending Utilization Review appeal concerning Claimant's November 2013 surgery made the commutation agreement binding.

The Board disagrees. Claimant himself rejected the 2014 commutation settlement. Claimant's own motion makes it clear that this was not a situation where Claimant agreed to a resolution and then had "second thoughts." Rather, there had never been a true meeting of minds. Claimant, in his motion represents that "while the parties were editing, revising, and finalizing the settlement documents, Claimant became concerned after learning he would receive a very small portion of the Commutation proceeds—after realizing that his surgeon retained a significant lien over the proceeds." *Claimant's Motion*, at ¶5. The motion goes on to state that "Claimant's misunderstanding regarding his share of the Commutation proceeds was not the fault of [his prior attorney] but an honest misunderstanding." *Claimant's Motion*, at ¶6. Clearly, then, Claimant *never truly agreed to the actual settlement offer*. There was an honest misunderstanding as to the terms of the settlement. Once Claimant learned what the true terms of the commutation offer entailed (namely that he would only get a small portion of the proceeds because of the surgeon's lien), he rejected the offer. Thus, there never was a meeting of minds as to the 2014 offer.

This conclusion is reinforced by the subsequent actions of the parties. Claimant's counsel, in August of 2015, asked Employer whether the prior offer was still open and was informed that the offer was withdrawn. No mention was made by either party suggesting that there was a binding agreement in 2014. In fact, Employer then extended a new offer. Over a year later, in October of 2016, Claimant's counsel again asked Employer whether it would be interested in commuting the claim. Once again, there was no suggestion from either side that a

binding agreement existed in 2014. Once again, Employer extended the \$7,500.00 offer it had first offered in August of 2015.

Accordingly, the Board is satisfied that the parties never reached a true meeting of the minds as to a commutation settlement in 2014. Claimant chose to reject that offer. Claimant's Motion to Enforce Commutation Settlement is denied.

IT IS SO ORDERED this 6th day of July, 2018.

INDUSTRIAL ACCIDENT BOARD


PETER W. HARTRANFT


IDEL M. WILSON

Mailed Date: 7-9-18

bc
OWC Staff

Christopher F. Baum, Hearing Officer for the Board
Patrick K. Gibson, Attorney for Claimant
William R. Baker & Kenneth L. Wan, Attorneys for Employer

ELIZABETH BROWNING, Employee,
v.
SCHNEIDER NATIONAL, INC., Employer.

INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

Hearing No. 1215693

Mailed Date: November 24, 2010
November 23, 2010

ORDER

This matter came before the Board on October 21, 2010. The primary issue for this Order is whether the Industrial Accident Board has jurisdiction to determine whether the parties entered into a valid agreement for commutation of benefits.

Background: Elizabeth Browning ("Claimant") was injured on July 25, 2002, while she was working for Schneider National, Inc. ("Employer").¹ The injury was acknowledged as compensable and Claimant began to receive workers' compensation benefits including compensation for total disability paid at the rate of \$491.57 per week. On May 3, 2010, Employer filed a Petition for Review seeking to terminate Claimant's total disability benefits.

The parties agree that they entered into negotiations for a commutation of benefits. Claimant alleges that the parties reached agreement for commutation of indemnity benefits only. Employer argues that the negotiations were for commutation of both indemnity and medical benefits. It disputes that any agreement was reached for commutation of indemnity benefits alone.

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Claimant filed a complaint in Chancery Court for specific performance of the alleged settlement agreement, classifying the agreement as a contract between the parties. Chancery Court declined to rule on the matter because the Court was not satisfied that Claimant did not have an adequate remedy at law. Employer then requested a legal hearing in front of the Board concerning the issue. Claimant, however, wishes to proceed in Superior Court, alleging that the Board lacks jurisdiction to hear the matter.

The Board requested legal memoranda from the parties on the issue. This is the Board's decision following review of the parties' submissions.

Analysis: Pursuant to the Workers' Compensation Act, the Board "shall have jurisdiction over cases arising under Part II of this title and shall hear disputes as to compensation to be paid under Part II of this title." DEL. CODE ANN. tit. 19, § 2301 A(i).

Claimant argues that "Part II of this title" refers only to Subchapter II of Chapter 23, namely sections 2321 to 2334, inclusive.² Claimant asserts that a commutation of compensation is found in "Part III," namely under section 2358.

Claimant's argument in this regard is misdirected. "Subchapter II" of Chapter 23 is not the same thing as "Part II of this title" as that phrased is used in section 2301A. In fact, the phrase means exactly what it says: Part II *of this title*, not "of this chapter." The title in question is Title 19 of the Delaware Code. That title ("Labor") currently consists of four parts. Part I contains "General Provisions" (Chapters 1 through 17 of the title). Part II pertains to Workers' Compensation and comprises Chapters 21, 23 and 26.³ Part III of Title 19 pertains to Unemployment Compensation (Chapters 31, 33 and 34). Part IV is the Workplace Fraud Act (Chapter 35).

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In short, section 2301A's reference that the Board has jurisdiction over cases arising under "Part II of this title" means that the Board has jurisdiction over any action arising under all of Chapter 23, including all its Subchapters. This includes the provisions pertaining to benefits under the Workers' Compensation Act (Chapter 23 of Title 19) and the commutation of those benefits.

In fact, there are a number of decisions that recognize the Board's ability and responsibility to determine if parties' have reached a settlement concerning compensation under the Act. In *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154 (Del. 1998), the issue was whether the parties had agreed to modify the claimant's benefits. The claimant, in fact, died before any signed agreement could be executed much less approved by the Board. The Supreme Court found that the Board had the authority "to approve an agreement on compensation or other benefits regardless of whether the claimant has died." *Anchor Motor Freight*, 716 A.2d at 158. The Board did not need to find that a formal written agreement existed. All it needed to find was that "the parties had reached a meeting of the minds as to all material terms and had entered into a binding agreement notwithstanding the absence of a formal contract." *Anchor Motor Freight*, 716 A.2d at 156.⁴ See also *Curry v. Wendover, Inc.*, Del. Super., C.A. No. 00A-03-004, Del Pesco, J., slip op. at 4-5 (November 16, 2000)(stating that the Board had a responsibility to decide whether, in fact, an agreement had been reached

between the parties; "If the Board finds there was an agreement, then it can approve the agreement without the signature of the claimant.").

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It is clear, therefore, that the Board has jurisdiction to determine if the parties have reached an agreement as to a commutation on benefits. However, Claimant alleges that she has a right to choose her own forum and that this, at heart, remains a contract dispute between herself and Employer. The flaw in this argument is that this is, at heart, an agreement with respect to benefits under the Workers' Compensation Act. While parties may propose a commutation of benefits, it is the Board's function to approve such a commutation. *See* DEL. CODE ANN. tit. 19, § 2358. In short, there cannot be an enforceable commutation of benefits until the Board finds that a commutation exists. *See Anchor Motor Freight*, 716 A.2d at 158 ("As noted above, agreements between the parties must be approved by the Board before they are final and binding."). Claimant simply has no other forum until the agreement between the parties is determined to be final and binding, and that cannot happen until the Board approves it.⁵

In line with *Anchor Motor Freight*, the Board has long held that, if the parties have reached a meeting of the minds on a settlement, the Board will enforce that settlement even if a party then has second thoughts, provided that the Board finds that an agreement as to a commutation of benefits meets the requirements of section 2358. *See, e.g., Soto v. Pettinaro Construction*, Del. IAB, Hearing No. 1256246, at 2 (October 2, 2009)(ORDER); *Klenk v. The Medical Center of Delaware*, Del. IAB, Hearing No. 946781, at 29 (February 22, 2007); *Woodall v. Diamond State Port Corp.*, Del. IAB, Hearing No. 1191596, at 2-4 (August 8, 2002)(ORDER); *Curry v. Wendover, Inc.*, Del. IAB, Hearing No. 1119976, at 11 (March 22, 2001), *aff'd*, Del. Super., C.A. No. 01A-04-003, Del Pesco, J. (August 23, 2001)(ORDER).

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Finally Claimant asserts that, if the Board does have jurisdiction, then a legal hearing in front of the Board is not the appropriate procedure. Rather, the question of whether there is a binding agreement between the parties is a question of fact that requires the presentation of evidence. On this, the Board is in agreement. The issue is a factual one requiring the presentation of witnesses and evidence.

Accordingly, the Board finds that it has jurisdiction over the issue and, indeed, as explained in *Anchor Motor Freight*, there legally can be no binding commutation of benefits between the parties until the Board finds

and approves such commutation. The matter needs to be scheduled for an evidentiary hearing at which the parties may present evidence concerning whether there has been a meeting of minds on the subject and, if so, whether the alleged commutation should be approved.

IT IS SO ORDERED this 23rd day of November, 2010.

INDUSTRIAL ACCIDENT BOARD

/s/ _____
LOWELL L. GROUNDLAND

/s/ _____
JOHN D. DANIELLO

Mailed Date: 11-24-10

/s/ _____
OWC Staff

Christopher F. Baum, Hearing Officer for the Board
Matthew R. Fogg, Attorney for Claimant
Daniel L. McKenty, Attorney for Employer

Notes:

¹ Claimant alleges that she hurt her low back in two work accidents, one on November 8, 2001, and the other on July 25, 2002. However, the current motion is with respect to IAB No. 1215693, which pertains to the latter date of accident.

² Subchapter III begins with section 2341. There currently are no sections 2335 through 2340.

³ Currently, there are no provisions in Chapters 21 and 26, so "Part II" is essentially just Chapter 23 of Title 19.

⁴ The Court agreed that, if it was found that the parties did not intend to be bound until there was a formal written agreement, then no agreement could be found until such a formal agreement was executed. That, however, would require the parties to "positively agree that there will be no binding contract until the formal document is executed." *Anchor Motor Freight*, 716 A.2d at 156. Otherwise, all that is required is a meeting of minds as to all material terms.

⁵. Claimant cites *Huffman v. C.C. Oliphant & Son, Inc.*, 432 A.2d 1207 (Del. 1981), for the proposition that a claimant can have a cause of action in Superior Court separate from an action in front of the Board. In *Huffman*, however, it was not disputed that the parties had an agreement in place. The Board agrees that, if there is a binding agreement between the parties, enforcement of that agreement can be had through other means than a motion in front of the Board, such as an action in Superior Court for wage collection. *See Huffman*, 432 A.2d at 1210. However, it must first be determined that there is a binding agreement between the parties and, as discussed above, that cannot exist until the Board finds it.

ELIZABETH BROWNING, Employee,
v.
SCHNEIDER NATIONAL, INC., Employer.

INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

Hearing No. 1215693

Mailed Date: June 10, 2011
June 9, 2011

ORDER

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board for a Legal Hearing on June 2, 2011, in the Hearing Room of the Board, in New Castle County, Delaware.

On April 13, 2011, Elizabeth Browning, ("Claimant"), requested a legal hearing seeking to limit the admissibility of prior settlement negotiations at the upcoming evidentiary hearing which has been scheduled for June 23, 2011 in order to determine whether the parties have entered into a valid agreement for commutation of Claimant's benefits. Schneider National, Inc., ("Employer"), opposes the motion to limit evidence.

On July 25, 2002¹ Claimant sustained a work related injury. Employer accepted the injury as compensable and paid workers' compensation benefits including medical expenses and total disability at the compensation rate of \$491.57 per week. On May 3, 2010 Employer filed a Petition to Terminate Claimant's total disability benefits and the parties entered into negotiations for a commutation of benefits. Claimant argues that an agreement was reached for commutation

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of indemnity benefits, while Employer maintains that the negotiations were for commutation of both indemnity and medical benefits.

By way of procedural history, Claimant previously filed a complaint in Chancery Court for specific performance of the alleged settlement agreement, classifying the agreement as a contract between the parties. The court initially declined to rule on the matter because it was not satisfied that Claimant did not have an adequate remedy at law. Employer requested a legal hearing before the Board concerning the issue, and Claimant sought to proceed in Superior Court. Ultimately, the Board determined that it has jurisdiction over the matter and affirmed this decision after Reargument.

See *Elizabeth Browning v. Schneider National*, Del. IAB, Hearing No. 1215693 (November 23, 2010 & January 13, 2011). Employer's request for an evidentiary hearing was granted subject to a potential stay if Claimant should request one after filing a Superior Court action. *Id.* However, on April 5, 2011 an opinion letter was issued by Chancery Court denying Claimant's Motion to Transfer the case to Superior Court, and dismissing the case for lack of jurisdiction. *Browning v. Schneider Nat'l Carriers, Inc.*, C.A. No. 5791 (Del. Ch. April 5, 2011). An evidentiary hearing has now been scheduled before the Industrial Accident Board for June 23, 2011, in order to determine whether the parties have entered into a valid agreement for commutation of benefits.

Claimant argues that at this evidentiary hearing the Board should only consider as evidence a letter sent by Employer's prior counsel dated May 4, 2010. Claimant maintains that the letter set forth the terms of the settlement offer in unambiguous terms, which Claimant accepted via an e-mail dated May 18, 2010, and a letter dated May 20, 2010. Claimant argues that the May 4, 2010 letter was completely integrated and unconditionally accepted. Thus, evidence of prior negotiations is not admissible to contradict a term of the writings.

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Employer, on the other hand, maintains that the Board must consider the negotiations prior to the May 4, 2010 letter in order to determine whether a settlement agreement was reached. Employer relies upon certain provisions of the Workers' Compensation Act for the premise that the Board has original jurisdiction over the matter. See DEL. CODE ANN. Tit. 19, § 2301(A)(i); DEL. CODE ANN. Tit. 19, § 2538. Employer also relies on *Lemon v. Brandywine Dialysis Center* for the assertion that the Board has jurisdiction to hear and decide the issue of whether a settlement has been reached. *Lemon v. Brandywine Dialysis Center*, 508 A.2d 892 (Del. Super. Ct. 1986). Alternatively, should the Board find that the law of contracts applies Employer maintains that the Board should allow the extrinsic evidence because it is necessary to determine whether there has been a true meeting of the minds. The extrinsic evidence must be allowed into evidence in order for the Board, the finder of fact, to make its determination.

After careful consideration of briefing and oral argument of the parties, the Board finds that evidence of prior settlement negotiations is admissible at the upcoming June 23, 2011 evidentiary hearing for the reasons set forth below.

Claimant propounds that the law of contracts governs this case and so maintains that the May 4, 2010 letter set forth a clear, valid offer containing

all material terms, which was accepted, and thus a contract was formed. Claimant relies on the Parol Evidence Rule which bars evidence of additional terms to a written agreement when the agreement is a complete integration of the agreement of the parties. *Peden v. Gray*, 886 A.2d 1278, *2 (Del. 2005). Parol evidence may not be used to interpret a contract or search for the parties' intentions where the contract is clear and unambiguous on its face. *Teeven v. Kearns*, 1993 WL 1626514, at *3 (Del. Super. Ct.), citing *Pellaton v. Bank of New York*, 592 A.2d 473, 478 (Del. 1991). On the other hand, parol evidence is admissible to resolve a contractual term that is ambiguous. *Eagle Industries, Inc. v.*

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DeVilbiss Health Care, Inc., 702 A.2d 1228, 1232 (Del. 1997)("When the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings, there is ambiguity. Then the interpreting court must look beyond the language of the contract to ascertain the parties' intentions.").

A contract is not rendered ambiguous simply because the parties disagree as to the meaning of its terms. *See Rhone-Poulenc Basic Chem. Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del.1992)("A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction."); *Curry v. Moody*, 48 Cal.Rptr.2d 627 (Cal.Ct.App. 1995)("When the parties dispute the meaning of a contract term, the trial court's first step is to determine whether the term is ambiguous ..."). "Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *Id.*

Despite its name, the Parol Evidence Rule is not a discretionary rule of evidence, but rather an element of substantive contract law. *See Karger v. Wangerin*, 230 Minn. 110, 40 N.W.2d 846, 849 (1950).

The Board, however, does not agree that the law of contracts governs in this specific instance because the crux of the matter is an agreement with respect to benefits under the Workers' Compensation Act and while the parties may propose a commutation of benefits, it is still the Board's function to approve such a commutation. *See DEL. CODE ANN. Tit. 19, § 2538*. In other words, there cannot be an enforceable commutation of benefits until the Board finds that a commutation exists. *See Anchor Motor Freight v. Cibattoni*, 716 A.2d 154, 158 (Del. 1998).

As the Board has noted in its previous Order there are a number of decisions which recognize the Board's ability to determine if the parties have reached a settlement concerning

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compensation under the Workers' Compensation Act (Chapter 23 of Title 19). See *Elizabeth Browning v. Schneider National*, Del. IAB, Hearing No. 1215693, 3 (November 23, 2010). For example, in *Anchor Motor Freight v. Ciabattoni* claimant was deceased and the Court found that the Board did not need to determine whether a formal written agreement existed, but rather whether "the parties had reached a meeting of the minds as to all material terms and had entered into a binding agreement notwithstanding the absence of a formal contract." *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998). As to the case at hand the Board believes that in order to determine if the parties have reached a meeting of the minds the Board must consider all evidence of prior negotiations, and not simply one letter.

For the sake of argument, however, even if Claimant is correct in her reliance on the Parol Evidence Rule, the Board would still allow evidence of prior negotiations into the record due to ambiguity in the May 4, 2010 document. "[A] contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *AT & T Corp. v. Lillis*, 953 A.2d 241, 252 (Del. 2008). Whether a contract is ambiguous is a question of law for the Court to decide. *Kelly v. Blum*, 2010 WL 629850, at *7 (Del.Ch.). The Court will attempt to interpret the contract consistent with the parties' intent and will look to the words of the contract as the most objective indicia of intent. *Id.*

In considering the provisions set forth in the May 4, 2010 letter the Board finds ambiguity. For example, the introductory paragraph refers to previous discussions regarding a "full and final lump-sum commutation" settlement resolution in this case, recognizing that a Medicare set aside would be required. Then paragraph one refers to payment in the amount of \$320,000.00 to resolve all past, present and future indemnity benefits of any kind or nature for worker's compensation claims. Paragraph five indicates that the settlement is contingent upon

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the standard commutation Stipulation and Order for indemnity and medical benefits being approved by the Board. The last paragraph on page two refers to an indemnity only lump-sum commutation, an MSA assessment and a

lump-sum commutation settlement resolution with regard to medical for that amount. Finally, the next to last paragraph of the document emphasizes that Employer's preference is to pursue a "full and final commutation" settlement resolution, indicating that if Employer cannot do so then the incentive to pursue a commutation is significantly impacted. The Board determines that sufficient ambiguity exists within this document concerning the term "full and final commutation" to warrant the introduction of extrinsic evidence relative to the intentions and understanding of the parties at the time the settlement negotiations occurred.

The Board has determined though that in this instance the Parol Evidence Rule does not apply. As such the Board further relies on Industrial Accident Board Rule 14(B) for its authority to allow evidence of prior settlement negotiations into the record at the upcoming evidentiary hearing. Rule 14(B) states the following:

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 as long as such a disregard does not amount to an abuse of its discretion.

The Board finds that evidence of prior settlement negotiations possesses probative value related to the heart of the matter, or the determination of whether there is a valid commutation agreement. Consideration of this evidence is reasonable and relevant in determining whether there has been a meeting of the minds as to all material terms and whether a binding agreement has been entered into by the parties.

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Lastly, Administrative Agencies such as the Board operate less formally than courts of law. *Standard Distributing Co. v. Nally*, 630 A.2d 640, 647 (Del. 1993). The rules of evidence do not apply strictly to adjudication by administrative agencies. *Id.* In fact, all evidence which could conceivably throw light on the controversy should be heard by an Administrative Board. *Ridings v. Unemployment Ins. Appeal Bd.*, 407 A.2d 238, 240 (Del. Super. Ct. 1979). As such, the Board will consider all evidence, including verbal or written communication, having to do with settlement negotiations. This also includes the document referred to in Employer's brief regarding whether Employer's prior counsel had authority to offer the terms and conditions as stated in the May 4, 2010 letter.

Browning v. Schneider Nat'l, Inc. (Delaware Industrial Accident Board, 2011)

In conclusion, the Board finds that evidence regarding prior settlement negotiations, including verbal and written correspondence, is permissible at the upcoming evidentiary hearing. Thus, the Board **DENIES** Claimant's request to limit the admissibility of prior settlement negotiations at the June 23, 2011 evidentiary hearing.

IT IS SO ORDERED THIS 9th DAY OF JUNE, 2011.

INDUSTRIAL ACCIDENT BOARD

/s/ _____
JOHN D. DANIELLO

/s/ _____
TERRENCE M. SHANNON

Deborah J. Massaro, Esquire, Hearing Officer for the Board

Mailed Date: 6-10-11

/s/ _____
OWC Staff

Matthew R. Fogg, Esquire, for Claimant
Daniel L. McKenty, Esquire for Employer

Notes:

¹ Claimant also sustained a work related injury in a separate incident on November 8, 2001.

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

CAROLYN KING,)	
)	
Employee,)	
)	
v.	)	Hearing No. 1459090
)	
AMAZON.COM,)	
)	
Employer.)	

ORDER

This matter came before the Board on November 9, 2017, on a motion by Amazon.com (“Employer”) seeking enforcement of a commutation agreement with Carolyn King (“Claimant”). Employer alleges that a workers’ compensation insurance adjuster and Claimant reached a meeting of minds on a commutation settlement of Claimant’s claim before Claimant was represented by counsel. Claimant denies that any meeting of the minds took place.

Evidence: Claimant testified that she is a high school graduate and attended the Bradford Business School. She previously worked for Bank of America. In 2015, she began to work for Employer. She reported having had a workplace injury on May 21, 2017. She began to exchange e-mails with the adjuster for Sedgwick (Employer’s insurance carrier). The adjuster’s name was Sherri Yilmaz. Claimant was provided with the criteria for resolving the claim.

By e-mail to Ms. Yilmaz dated July 24, 2017, Claimant noted that Employer had told her that her workers’ compensation claim had been denied and that she would “go under short-term disability.” Claimant asked Ms. Yilmaz why Ms. Yilmaz had not told her that the claim had been denied. Ms. Yilmaz’s response is undated, but she explained that Claimant’s claim had

“never been denied” but that it was “accepted without prejudice per the letter I sent you.”¹ An offer was made to Claimant to resolve the claim. By e-mail dated August 28, 2017, Claimant wrote that she was “leaning towards the settlement.” On August 30, Claimant wrote that she had received a voicemail from Ms. Yilmaz and that “proceeding w the settlement is fine.” Ms. Yilmaz replied that she would have “the attorney” issue the settlement documents and that he would be in touch in the next week.

On September 8, 2017, Claimant sent an e-mail indicating that she had not yet heard from the attorney’s office. By letter dated September 9, Employer’s attorney sent the draft settlement documents to Claimant. In mid-September, Claimant had a teleconference with Employer’s attorney to go over the documents. The attorney then e-mailed to her revised documents, specifically noting that there was a “new #15 in the Affidavit” and requesting that she have everything signed and notarized.² Claimant did not sign these documents and she obtained counsel to represent her on September 19, 2017.

Claimant stated that she was told that, as part of the proposal, she would have to resign from her employment. She did not want to do that and she had told the adjuster that she did not want that. When she got the documents, the resignation language was in there. Claimant denies that she ever agreed to resigning.

¹ Employer did provide a copy of a “Section 2362 Notice” sent to Claimant. The copy provided to the Board is apparently dated August 25, 2017, which seems late to be the letter referred to by Ms. Yilmaz. However, it serves as an example of the sort of letter she is referring to. It recites the wrong date as to when they received notice of the claim (alleging they received notice on March 24, 2017, even though the claimed injury did not occur until May 21, 2017), but it does state that the claim is “denied” on the basis of “causation.” Although the box is not formally checked off, this notice does then reference that some benefits were being paid without prejudice. These payments included the charges for: Dr. Rudnick through July 13, 2017; Dr. Kim through July 28, 2017; an MRI done on August 3, 2017; and ATI Physical Therapy through July 26, 2017. The notice goes on to state that the “specific benefits being paid are as follows: 6/9/2017-8/03/2017.”

² In the original draft, as provided to the Board, Paragraph 15 in the Affidavit read “After careful consideration and with the full understanding set forth above, I believe it is in my best interest to have the workers’ compensation benefits Commuted.” The revised version of this paragraph as referenced in the attorney’s e-mail to Claimant does not appear to have been provided to the Board.

Claimant agreed that she saw Dr. Adam Rudnick on September 6, 2017, at which time she indicated that she had had 80% to 85% improvement of her low back complaint. The doctor released her to return to unrestricted work. She returned back to work with Employer. On September 27, 2017, she went back to Dr. Rudnick stating that she hurt her back pushing a cart and this time the pain went from her lumbar up to her neck. He sent her back to physical therapy, which this time referenced cervical and mid-back complaints (when previous treatment had been limited to the low back).

Claimant stated that, although she has been working for over thirty years, she had never made a workers' compensation claim before. While she has education, she received no training in workers' compensation law.

Claimant maintained that she was still disabled from the work accident in August of 2017. Near the end of August, Ms. Yilmaz explained that the workers' compensation claim had been denied and that she had never believed Claimant. Ms. Yilmaz told her the next direction to take was to either apply for short-term disability or accept a commutation. She did not explain that Claimant had the right to consult an attorney and have a hearing on her claim. When Claimant asked why she had to do this or why she had to resign from employment, she was told that she would hear from Employer's attorney and they would discuss it. On August 31, Ms. Yilmaz stated that "we're done" and Claimant had no further communication with her. When Claimant spoke with Employer's attorney about the documents in September, she felt rushed and intimidated. However, the documents that he originally sent to her did not have the resignation language in it and she was relieved by that. When he then sent her revised documents, those documents contained the resignation language.

Sherri Yilmaz testified that she is employed by Sedgwick and is the assigned adjuster for Claimant's case. She has been a workers' compensation adjuster for four years. She stated that at first the claim was denied but payments were made without prejudice, as set forth in the August 25, 2017 Section 2362 Notice. Later, denials were made with no further notice. An investigation had been done of the claim and some red flags were noted. There were no witnesses to the alleged accident and it was discovered that Claimant had had a prior low back injury five years earlier.

Ms. Yilmaz confirmed that she was in phone and e-mail contact with Claimant. On August 24, 2017, she proposed a global settlement to Claimant, informing her that the claim was being denied and no more "payments without prejudice" would be made. Ms. Yilmaz denies that she told Claimant that she had never believed her. Claimant called Ms. Yilmaz and Ms. Yilmaz told her that her options would be to accept short-term disability or reach a global settlement of the workers' compensation claim. Because the claim was being denied, those were the only options offered. It was laid out to Claimant what the carrier would pay for or not pay for. Claimant negotiated a longer payment of medical expenses. Ms. Yilmaz did tell Claimant on numerous occasions that resignation from Employer was part of the terms. On August 30, Claimant accepted and confirmed that acceptance in an e-mail. Ms. Yilmaz confirmed that the commutation documents would be prepared and Claimant could go over the terms with Employer's attorney. After receiving Claimant's acceptance, benefits were paid for another month based on the agreement.

Ms. Yilmaz believed that Claimant understood that resignation was part of the deal and the resignation was to be effective as of August 30, 2017. Claimant never told Ms. Yilmaz that she objected to that provision. The first that Ms. Yilmaz heard that Claimant objected to

resignation was at this hearing. Ms. Yilmaz later learned that Claimant had actually returned to work (and Employer had allowed it).

Ms. Yilmaz stated that, if Claimant had agreed to accept short-term disability benefits, she would not have had to resign. It was only by accepting the commutation of the workers' compensation claim that would require her to resign.

Analysis: It has long been established that, if parties reach a meeting of the minds on a settlement, the Board can enforce that settlement even if a party then has second thoughts. *See Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998) (Board may approve and enforce an agreement if the Board finds that “the parties had reached a meeting of the minds as to all material terms and had entered into a binding agreement notwithstanding the absence of a formal contract.”).³ *See also Johnson v. Food Lion*, C.A. No. N13A-08-010, Scott, J., 2014 Del. Super. LEXIS 3413, at *11 (April 14, 2014); *Soto v. Pettinaro Construction*, Del. IAB, Hearing No. 1256246, at 2 (October 2, 2009)(ORDER); *Woodall v. Diamond State Port Corp.*, Del. IAB, Hearing No. 1191596, at 2-4 (August 8, 2002)(ORDER); *Curry v. Wendover, Inc.*, Del. IAB, Hearing No. 1119976, at 11 (March 22, 2001), *aff'd*, Del. Super., C.A. No. 01A-04-003, Del. Pesco, J. (August 23, 2001)(ORDER).

The threshold issue, then, is whether the parties in this case reached a meeting of the minds on all material terms of the alleged settlement. The Board is satisfied that there was no true meeting of minds in this case.

³ In *Anchor Motor Freight*, it was found that the parties had reached a meeting of minds as to a commutation, but that the employee died before the commutation was formally approved by the Board. The Supreme Court found that the Board retained the authority “to approve an agreement on compensation or other benefits regardless of whether the claimant has died.” *Anchor Motor Freight*, 716 A.2d at 158. “The employer had made a bargain that, in hindsight, was not as beneficial as originally anticipated. We do not think it serves the purposes of the Workers’ Compensation Act to allow parties to avoid their commitments based on the fortuity of whether a claimant dies before the Board acts.” *Anchor Motor Freight*, 716 A.2d at 158-159.

The first problem stems from the carrier's informality in negotiating. Despite submitting a chain of e-mails that discuss settlement, none of the submitted e-mails contain any terms of that discussion. At one point (August 28, 2017) Claimant requested that Ms. Yilmaz forward her "offer." Ms. Yilmaz's response was that she would call and, based on an e-mail from Claimant, a voicemail was left. In other words, in the materials submitted into evidence no written documentation of what was actually offered or negotiated existed prior to Employer's attorney providing written commutation documents to Claimant in September of 2017. However, when those written documents were provided, it is apparent that they did not contain all the alleged agreed terms. Employer's counsel revised one of the paragraphs. While that revised paragraph was not presented to the Board, Claimant states that the revision put in the language about resignation. There is no contrary evidence. Indeed, both Claimant and Ms. Yilmaz agree that the issue of resignation was discussed (although they disagree as to whether Claimant agreed to it or not). In fact, the first set of documents provided to Claimant did not contain resignation language (*see* Employer's Exhibit 1). Thus, it is consistent with both Ms. Yilmaz's testimony and Claimant's testimony that the revision made by Employer's attorney added such language.

In short, there was a verbal discussion of terms. No written confirmation of those terms was provided prior to the draft commutation documents provided by Employer's attorney. As such, Claimant's statement that proceeding with the settlement was "fine" is ambiguous because it does not state what terms are actually being agreed to. The draft commutations documents were then amended (suggesting that what was originally sent in September did not accurately reflect any final agreement). Claimant then refused to sign after that amendment. This is a reasonable and believable stance for Claimant to take, because there is no obvious reason why Claimant, able to continue working, should voluntarily choose to become unemployed. It

appears, from the submitted evidence, that the revision to the documents was with respect to the resignation requirement and, based on Ms. Yilmaz's testimony, the carrier considered that to be an important term of the settlement.⁴ As such, the evidence does not support the conclusion that any "meeting of the minds" was reached with regard to this term and, because the carrier considered it to be a material term, no binding agreement could have been entered into.

The Board also observes that, even if it were to have found a meeting of the minds, that would only be a threshold issue. The next issue would be whether the Board would *approve* the proposed commutation. *See Johnson*, 2014 Del. Super. LEXIS 3413, at *14-*15 (after finding meeting of minds, the court considers whether there was substantial evidence that the commutation was in the claimant's best interest). The Board's authority to commute workers' compensation benefits is limited by statute.

Such commutation may be allowed if it appears that it will be for the best interest of the employee or the dependents of the deceased employee, or that it will avoid undue expense or hardship to either party, or that such employee or dependent has removed or is about to remove from the United States or that the employer has sold or otherwise disposed of the whole or the greater part of the injured employee's or the dependents of a deceased employee's business or assets.

DEL. CODE ANN. tit. 19, § 2358(a). Delaware case law has observed that the primary purpose of the Workers' Compensation Act ("the Act") is to provide an injured employee with periodical payments "to preclude any possibility of an imprudent employee . . . wasting the means provided for his support and thereby becoming a charge on society." *Molitor v. Wilder*, 195 A.2d 549, 552 (Del. Super.), *aff'd*, 196 A.2d 214 (Del. 1963). As such, commutations (particularly when one of the parties opposes it) are not favored and should only be granted after a showing of

⁴ Employer itself, in the meantime, allowed Claimant to return to work, raising a question as to whether Employer itself knew what terms its own insurance carrier was insisting on. Employer apparently did not have a problem with letting Claimant return to work even if its insurance carrier did.

“unusual circumstances” where the reasons are “sound and convincing.” *Molitor*, 195 A.2d at 552. As always, the burden of proof rests with the petitioner. *D&M Contractors, Inc. v. Forlano*, 283 A.2d 843, 846 (Del. Super. 1971); DEL. CODE ANN. tit. 29, § 10125(c).

While Section 2358 lists several bases for when a commutation might be deemed appropriate, only one of them is applicable in the current case: if the commutation is deemed to be in Claimant’s best interest.⁵ “Whether commutation is in the best interest of the claimant or will avoid undue hardship and expense to either party depends on the totality of circumstances in each case.” *General Foods Corp. v. Meekins*, Del. Super., C.A. No. 86A-AU-1, Ridgely, J., 1988 WL 15335 at *2 (February 11, 1988). For example, in the *Johnson* case, the Board noted that the employer denied compensability of the claimed injury. In light of the uncertainty of the claimant receiving *any* benefits, a lump sum commutation was found to be in the claimant’s best interest. *Johnson*, 2014 Del. Super. LEXIS 3413, at *16.

In this particular case, the Board is disturbed by the carrier’s requirement that Claimant resign from employment. By no reasonable stretch of the imagination can Claimant becoming unemployed be considered to be in Claimant’s best interest. This is particularly true under the facts of this case when the evidence is that, if there was not a workers’ compensation commutation, Claimant would *not* be required to resign. Ms. Yilmaz stated that, if Claimant chose to go on to short-term disability rather than accept a workers’ compensation commutation, there would be no resignation requirement. Thus, it appears that the resignation requirement is linked to this being processed *as a workers’ compensation case* rather than any physical or other employment issue connected to Claimant herself. As mentioned earlier, Employer in fact allowed Claimant to return to work after this alleged commutation was agreed to. Thus, there is

⁵ There is no suggestion that the proposed commutation would prevent any “undue” expense or hardship to either party; Claimant is not leaving the country; and Employer is not selling the business.

no suggestion that Claimant is unable to perform the duties of her job. The appearance in this case is that the only reason for the “required” resignation is because Claimant was accepting workers’ compensation benefits.

• Pursuant to the Act,

[i]t shall be unlawful for any employer or the duly authorized agent of any employer to discharge or to retaliate or discriminate in any manner against an employee as to the employee’s employment because such employee has claimed or attempted to claim workers’ compensation benefits from such employer Any claim of an employee alleging such action by an employer shall be filed with the Superior Court within 2 years of the employer’s alleged action.

DEL. CODE ANN. tit. 19, § 2365

The Board does not take a position on whether the current situation violates this provision. The statute makes it clear that jurisdiction over such an issue rests with Superior Court, not the Board. However, the Board references this provision as evidence that the expressed intent of the Act is that employees are *not* to be forced to lose their jobs just because they sought to enforce their legal workers’ compensation rights. This supports the Board’s view that forcing Claimant to resign employment, at least when she does not truly wish to end her employment, is not in Claimant’s best interest. It is certainly not a necessary or required part of a workers’ compensation action.

Accordingly, the Board finds that, in this case, there was no meeting of minds of the parties as to a commutation of benefits. Even if there had been a meeting of minds, the Board is not persuaded that the commutation terms are in Claimant’s best interest.

Attorney’s Fees & Credit: Claimant’s counsel seeks an attorney’s fee for his efforts in this matter. Employer objects on the basis that this order does not grant any benefits to

Claimant. There is a hearing scheduled on Claimant's initial Petition to Determine Compensation Due on February 1, 2018.

A claimant who is awarded compensation is generally entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller." DEL. CODE ANN. tit. 19, § 2320. However, the Board agrees with Employer that it has not awarded Claimant any benefits in this order, nor has it found that Claimant has a compensable injury. As such, an award of attorney's fees under section 2320(10) is inappropriate at this time. However, should Claimant prevail on her petition on the merits, the time spent by counsel in defending against this motion may be included in his recitation of time spent preparing for the hearing in counsel's affidavit for attorney's fees submitted at the time of the merit hearing.

There remains an issue concerning some payments made by Employer. Some payments were made "without prejudice." The Act provides that "[a]n employer or insurance carrier may pay any health care invoice or indemnity benefit without prejudice to the employer's or insurance carrier's right to contest the compensability of the underlying claim or the appropriateness of future payments of health care or indemnity benefits." DEL. CODE ANN. tit. 19, § 2322(h). The section describes the mechanism for how to make such a payment. The statute clarifies that if an employer/carrier makes such a payment, then that payment is not "subject to return, recapture or offset, absent a showing that the claim for payment was fraudulent." DEL. CODE ANN. tit. 19, § 2322(h)(2). On the other hand, no properly made payment without prejudice "is admissible as evidence to establish that the claim is

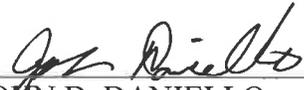
compensable.” DEL. CODE ANN. tit. 19, § 2322(h)(3). Obviously, the “payments without prejudice” made in the current case are to be treated as set forth in the Act.

However, in this case apparently some payments were made after the carrier believed that an agreement had been reached on the commutation. While these payments were not formally made using the “payment without prejudice” procedure, it is also equally clear to the Board that those payments cannot be considered an admission of liability by Employer. They clearly were made in error, based on a mistaken belief that a commutation of benefits had been reached.

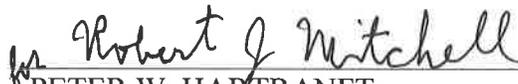
The simplest way to handle such payments is to hold that such payments will be treated as advanced payments for benefits if Claimant should be successful on her petition (*i.e.*, act as a credit). If, after the hearing on the merits, it is determined that Claimant is not entitled to any benefits, then those payments shall be reimbursed by Claimant.

IT IS SO ORDERED this 7th day of December, 2017.

INDUSTRIAL ACCIDENT BOARD



JOHN D. DANIELLO



PETER W. HARTRANFT

Mailed Date: 12/8/17



OWC Staff

Christopher F. Baum, Hearing Officer for the Board
Paul A. Wernlé, Jr., Attorney for Claimant
John Ellis, Attorney for Employer

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

GLENDON CHMIELEWSKI, III,)	
)	
Employee,)	
)	
v.	)	Hearing No. 1279417
)	
JOSEPH T. RICHARDSON, INC.,)	
)	
Employer.)	

ORDER

This matter came before a Hearing Officer on a request by the parties for a commutation of all future workers' compensation benefits of Glendon Chmielewski, III ("Claimant") with respect to an August 19, 2005 work accident that occurred while Claimant was employed by Joseph T. Richardson, Inc. ("Richardson").

Commutation of benefits may be granted provided that the Board is able to conclude that such commutation is in the best interest of the claimant or will avoid undue expense or hardship to either party. *See* DEL. CODE ANN. tit. 19, § 2358.

In this case, Claimant alleges that he suffered a partial amputation of his left index finger while working for Richardson. In June of 2006, the Board concluded that Claimant was injured within the course and scope of his employment and that he did not forfeit his right to workers' compensation benefits. *Chmielewski v. Joseph T. Richardson, Inc.*, Del. IAB, Hearing No. 1279417 (June 7, 2006)(ORDER).

The proposed commutation is for the amount of \$27,000.00 and is for all benefits, including for total and partial disability, permanent impairment, disfigurement and medical expenses. The only reason given in the submitted documents to explain why such a

commutation is in Claimant's best interest is that "Liberty Mutual has offered to commute benefits in the amount of \$27,000.00." Claimant goes on to state that he understands that that amount will be reduced by any weekly disability benefits that are paid out until the commutation is approved.

Merely repeating the amount of the commutation does not, in any way, explain why such a commutation is in Claimant's best interest. Essentially, the "explanation" merely states that Claimant is commuting his benefits for a certain sum because a certain sum has been offered to commute his benefits. This circular reasoning is no explanation at all. There needs to be some explanation as to why Claimant does not believe he needs to preserve his right to future benefits.

In addition, later in his affidavit, Claimant recites his intended use of the commutation money is "to pay my medical bills and set aside for any additional surgery." This makes no sense. One of the workers' compensation benefits that he is trying to commute is the right to have the employer pay his medical expenses (including any additional surgeries) that are causally related to the work injury. If Claimant wants such expenses paid, it would be more reasonable *not* to commute that benefit. Certainly, Claimant's statement does not serve as an explanation as to why this commutation is truly in his best interest.

Because of the failure of the submitted forms to explain why a commutation is in Claimant's best interest, the commutation is denied. This denial is without prejudice to the parties re-filing with corrected documents that provide more explicit explanations as to why the commutation should be granted.

IT IS SO ORDERED this 13th day of October, 2006.

INDUSTRIAL ACCIDENT BOARD

15/
CHRISTOPHER F. BAUM
Workers' Compensation Hearing Officer

Mailed Date:

OWC Staff

Mary Sherlock, Esquire, for Claimant
Christopher T. Logullo, Esquire, for Richardson

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

DAVID HALD,)	
)	
Employee,)	
)	
v.	)	Hearing No. 1284845
)	
HOCKESSIN SANITATION,)	
)	
Employer.)	

ORDER

This matter came before a Hearing Officer on a request by the parties for a commutation of all future workers' compensation benefits of David Hald ("Claimant") with respect to a December 26, 2000 work accident that occurred while Claimant was employed by Hockessin Sanitation ("HS").

Commutation of benefits may be granted provided that the Board is able to conclude that such commutation is in the best interest of the claimant or will avoid undue expense or hardship to either party. *See* DEL. CODE ANN. tit. 19, § 2358.

The proposed commutation is for the amount of \$8,500.00 and is for all benefits, including for total and partial disability, permanent impairment, disfigurement and medical expenses. The only reason given in the submitted documents to explain why such a commutation is in Claimant's best interest is that "Liberty Mutual has offered to commute benefits in the amount of \$8,500.00." Claimant goes on to state that he understands that that amount will be reduced by any weekly disability benefits that are paid out until the commutation is approved.

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

ELIZABETH BROWNING,)	
)	
Employee,)	
)	
v.	)	Hearing No. 1215693
)	
SCHNEIDER NATIONAL, INC.,)	
)	
Employer.)	

ORDER ON CLAIMANT’S MOTION FOR REARGUMENT

Following a motion hearing held on October 21, 2010, the Board issued an order dated November 23, 2010, in which it held that it had jurisdiction to determine whether Elizabeth Browning (“Claimant”) and Schneider National, Inc. (“Employer”) had entered into a valid agreement for commutation of benefits. The Board noted that both the statutory language of section 2358 of title 19 of the Delaware Code as well as Supreme Court precedent, *see Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 158 (Del. 1998), make it clear that agreements between parties must be approved by the Board before they are considered final and binding.

Claimant requests reargument. Claimant wishes to pursue an action in Superior Court to enforce the alleged settlement under a contract action. Claimant asserts that, at most, the Board has concurrent jurisdiction with Superior Court and that the Board should defer to the Superior Court in this matter.

The issue before the Board on October 21, 2010, was whether the Board had jurisdiction to hear the matter and the Board found that it did. While the Board certainly believes, in light of section 2358 and the Supreme Court’s pronouncement in *Anchor Motor Freight*, that Claimant’s argument that she has a binding settlement contract is premature because, under the Act, such

agreements are not final and binding until the Board approves them, the Board does not presume to tell Superior Court what cases it may take. However, at the time the Board issued its Order, no Superior Court case was pending in this matter. As far as the Board has been able to determine up to this time, there still is no Superior Court filing by Claimant with respect to this matter. There is no basis for the Board to stay its action based on a mere potential of a Superior Court filing.

If Claimant should carry through with her intention to file in Superior Court, the Board would then entertain a motion to stay proceedings. That has nothing to do with the Board's November 23rd Order. There is no basis to alter the Board's ruling in the Order. As such, Employer's request for an evidentiary hearing on the issue should be scheduled, subject to a potential stay if Claimant should request one after filing her Superior Court action. Claimant's Motion for Reargument is denied.

IT IS SO ORDERED this 13th day of January, 2011.

INDUSTRIAL ACCIDENT BOARD

/s/

LOWELL L. GROUNDLAND

/s/

JOHN D. DANIELLO

/s/

OWC Staff

Mailed Date:

Christopher F. Baum, Hearing Officer for the Board
Matthew R. Fogg, Attorney for Claimant
Daniel L. McKenty, Attorney for Employer

C

**BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE**

JAMES WILLIAMS,)	
)	
Employee,)	
)	
v.	)	Hearing No. 1245696
)	
TARGET,)	
)	
Employer.)	

DECISION ON PETITION FOR COMMUTATION

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause, came before the Industrial Accident Board on Monday July 13, 2015, in the Hearing Room of the Board, in Wilmington, Delaware.

INDUSTRIAL ACCIDENT BOARD

PRESENT:

LOWELL L. GROUNDLAND

OTTO R. MEDINILLA

Eric D. Boyle, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

James Williams, *pro se*

Christian G. McGarry, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

James E. Williams, Sr. (“Claimant”) injured his low back in a compensable work accident on December 7, 2003 whilst in the course and scope of his employment with Target (“Employer”). Thereafter Claimant was paid benefits for his injury including temporary total disability and medical expenses. On September 17, 2014, Claimant filed a Petition for Commutation of Benefits seeking to commute all remaining benefits due for his December 7, 2013 accident. Previously in 2008 the parties entered into a stipulated commutation of benefits in the amount of \$30,000.00. This commutation specifically excluded medical benefits. *Williams v. Target*, Del. IAB, Hrg.No. 1245696 (May 8, 2008)(“Stipulation and Order of Commutation”). At that time a separate stipulation was entered into dismissing Claimant’s pending Petition to Determine Additional Compensation Due. As part of that stipulation Claimant agreed that injuries to the cervical spine and shoulders were not related to the 2003 accident at Target. *Williams v. Target*, Del. IAB, Hrg.No. 1245696 (May 8, 2008)(“Order of Dismissal with Prejudice”). Claimant previously filed a Petition for Commutation of Benefits on January 6, 2014 seeking to commute his medical benefits. Employer opposed the request for commutation and the Board held that Claimant presented insufficient medical evidence to support his request and denied the Petition. *Williams v. Target*, Del. IAB, Hrg.No. 1245696 (June 24, 2014). Claimant’s present Petition seeks a commutation of medical benefits and is opposed by Employer. A hearing was held on Claimant’s petition on July 13, 2015. This is the Board’s decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant was sworn in and testified that he has been having problems getting his medication from the insurance carrier. He has been dealing with an adjuster named Janet Cohen for over two years. He always has had trouble getting in touch with her. Claimant testified that

he then started communicating with Mr. McGarry (Employer's counsel) and after that he was able to get his medication.. However, Claimant is once again having problems getting his medications. Claimant stated that he is taking Opana, 15 mg two times per day, Gabapentin two times a day, although he doesn't recall the dosage, and Voltarin gel. He's getting these prescriptions from Dr. Xing. Claimant explained that he gets his prescriptions from the doctor and goes to the pharmacist who calls for authorization. The pharmacist then can't get a hold of Ms. Cohen for authorization. There is also another company called Cyprus who is a middleman but won't authorize prescriptions. Claimant has been taking the medication prescribed by Dr. Xing since January and when he can't get his medication he starts going through withdrawals.

Claimant is asking for a settlement because he is tired of fighting with the insurance company. He has been fighting with them for a long time and is worn-out. Claimant was asked why he feels a lump sum settlement is in his best interest. Claimant testified that it would eliminate having to fight for his medications. He will no longer have to deal with the insurance company. He can't get any help and can't get an attorney. Claimant also wants to move and needs money for that as well. Claimant has not received any notes indicating that his prescriptions were being denied. Claimant indicated that he brought documentation of the Medicare set-aside which was done by his lawyer in 2008. The letter states that Medicare set-aside for his medical expenses would be \$270,000. Claimant needs to settle his case because dealing with the insurance company is ruining his life. Claimant was asked what he was looking for to settle the case and he demanded \$20 million for his settlement.¹

Dr. Jeffrey Meyers, a physician board certified in physical medicine and rehabilitation, testified by deposition on behalf of the Employer. Dr. Meyers examined Claimant on two

¹ While he was stating his case Claimant became agitated, picked up his documents and left the hearing room. Subsequently, Employer introduced the deposition testimony of Dr. Meyers into evidence then the Board closed the hearing to deliberate.

occasions, June 6, 2012 and February 10, 2015. Dr. Meyers testified primarily concerning the necessity for ongoing medical care, to include prescriptions by Dr. Xing. Dr. Meyers also provided a history of Claimant's medical treatment both by history and from the medical records. Claimant initially injured his low back when a box fell on him while he was bending over. Claimant ultimately had surgery, a discectomy, at L5-S1 in December 2004. Despite this procedure his symptoms of low back and lower extremity pain continued. Claimant then treated with Dr. Bandera until 2008, and with his primary care physician. Claimant also saw Dr. David Mattingly in Pennsylvania. In addition to his low back pain Claimant also reported to Dr. Meyers that he had neck pain going down both upper extremities. In 2012 claimant was taking a number of narcotic medications to include OxyContin 40 mg twice a day, oxycodone as needed, Mobic, Voltarn gel as well as other medications. Following the examination in 2012 Dr. Meyers felt that the medication that Claimant was on at the time should be titrated with an ultimate goal to wean him off narcotic medications. His physical examination at the time was normal.

At the 2015 examination Claimant provided Dr. Meyers with an updated history including his temporary move to Michigan to care for his sick mother. He had been treating with Dr. Mattingly prior to the move and subsequently treated with several physicians in Michigan. While he was in Michigan Claimant sought to obtain medical marijuana from his physician. Claimant moved back to Pennsylvania in late 2014 and briefly treated with Dr. Bandera and followed up with Dr. Mattingly whose office is near Claimant's home in Ambler Pennsylvania. Initially Claimant was taking no medications for his neck and back pain although he was reportedly using marijuana for pain control. Around the time of his evaluation with Dr. Meyers in February of 2015 Claimant began treating with Dr. Xing. Dr. Meyers reviewed a note dated Wednesday, February 11, which was the day after his evaluation of Claimant, in which Dr. Xing

indicated that the Claimant told her he stopped using marijuana, so she was going to reinstate Claimant on narcotic medications. Dr. Meyers also reviewed several drug screens which were positive for marijuana or THC in January of 2015. Dr. Meyers disagreed with Dr. Xing's decision to resume narcotic medications. Dr. Meyers felt that Claimant was evidencing drug seeking behavior and it was a concern with regard to narcotic use. Dr. Meyers did not believe that Claimant required narcotic pain medication to control symptoms. He noted that Claimant told him on February 10 that he was not taking any narcotics and when compared with the prior evaluation in 2012 when he was on high dosages of narcotics the pain levels were the same. Dr. Meyers again indicated that he felt Claimant should not be taking narcotics and should be weaned off narcotic medication or not placed on narcotic medication again by Dr. Xing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Commutation

Claimant has filed a Petition to commute, ie; accept a lump sum payment at present value, his remaining benefits. Having already entered into a stipulated commutation for all of his indemnity benefits, the present petition addresses only medical benefits. Employer opposes this commutation request. The Board's authority to commute worker's compensation benefits is limited by statute. The statute governing commutations states in pertinent part:

“Such commutation may be allowed if it appears that it will be for the best interest of the employee or the dependents of the deceased employee, or that it will avoid undue expense or hardship to either party, or that such employee or dependent has removed or is about to remove from the United States or that the employer has sold or otherwise disposed of the whole or greater part of the

injured employee's or the dependents of a deceased employee's business or assets.”

Del.Code Ann.tit. 19, § 2358. Because Claimant has filed the current petition, he has the burden of proof. DEL. CODE ANN. tit. 29, § 10125(c). The two parameters for a commutation that apply in this case are whether it would be in Claimant's best interest or whether it would avoid undue hardship to either party. For this determination the Board must look at the totality of the circumstances in this case. *General Foods Corp. v. Meekins*, Del. Super., C.A. No. 86A-AU-1, Ridgely, J., 1988 WL 15335 at *2 (February 11, 1988). In its' decision following the previous commutation hearing the Board set forth a detailed analysis of the factors or evidence to consider under the above standard. *Williams v. Target*, Del. IAB, Hrg.No. 1245696 at 4,5 (June 24, 2014). The Board references that decision but will not repeat the analysis here because Claimant presented essentially the same arguments in favor of a commutation then as now. Last year Claimant presented little evidence to support his request for a commutation and his petition was denied.

Even if the Board were to conclude that a commutation was in Claimant's best interest, Claimant has not presented any evidence upon which to calculate what the amount of the commutation might be. Claimant referenced a Medicare Set-aside calculation from 2008.² Claimant has also set forth his demand of twenty million dollars, which clearly indicates to the Board that Claimant does not understand just what he can obtain via a commutation at this stage. Also it should be noted that in the previous stipulated commutation Claimant settled all benefits except medical benefits for \$30,000. Claimant has not presented any evidence of the costs of his ongoing medication and treatment for the Board to make any calculation for future medical

² Claimant previously established that he is receiving Social Security Benefits, which for the most part requires a settlement money to be set aside in a separate bank account to protect Medicare's interests.

benefits. By contrast Employer, although it asserts that no treatment related to the 2003 accident has thus far been denied, submitted testimony from their medical expert, Dr. Meyers, questioning the necessity of ongoing or future medical treatment, including prescriptions. Without expert medical testimony to establish exactly what type of treatment Claimant requires in the future and how much the expenses for that treatment might be, the Board has no way of determining the value of a commutation that might be in Claimant's best interest. The Board has no alternative but to find that Claimant has failed to meet his burden to prove that a commutation of his medical benefits should be granted.

There is no question that Claimant is frustrated by his dealings with the carrier, in particular over his prescriptions. During the Board's questioning of Claimant counsel for the Employer explained that the carrier has been attempting to obtain the records from Dr. Xing and this could be one explanation for the delay in authorizing Claimant's prescriptions. He further noted that Claimant has chronic pain issues with his neck and upper extremities that are not related to the 2003 accident and the carrier needs to ascertain that the treatment and/or prescriptions are indeed for the low back and not these other conditions. Dr. Meyer's testimony does shed light on this issue. Claimant only began treating with Dr. Xing in February and had in fact been taken off narcotic medication because of marijuana use. Dr. Meyers also pointed out that he is on significantly less medication now than when he examined him in 2012, and yet has similar pain complaints.

In order to facilitate the processing of Claimant's prescriptions the Board issued an Order compelling Dr. Xing to provide her treatment records within 10 days after the hearing date.³ However Claimant must understand that at this point any commutation would be limited to present and future medical expenses and an assessment of the amount of these expenses must be

³ The Board's Order to Compel was issued separately from this decision.

provided by Claimant's physician or other medical expert who could provide testimony on Claimant's behalf. In addition Claimant has to convince the Board that a lump sum payment for future medical expenses would be in his best interest or would avoid undue hardship. It was Claimant's burden to prove his claim by a preponderance of the evidence. Based on the evidenced presented Claimant failed to meet his burden of proof that a commutation of his medical benefits would be in his best interest, or to provide a sum for said commutation based on competent medical evidence. As a result Claimant's Petition for Commutation is therefore, **DENIED.**

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Claimant's Petition for a Commutation of Benefits is hereby **DENIED.**

IT IS SO ORDERED THIS 7th **DAY OF AUGUST 2015.**

INDUSTRIAL ACCIDENT BOARD


LOWELL L. GROUNDLAND


OTTO R. MEDNILLA

I, Eric D. Boyle, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.



Mailed Date: 8-11-15


OWC Staff

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

JAMES E. WILLIAMS, SR.,)
)
 Employee,)
)
 v.) Hearing No. 1245696
)
TARGET,)
)
 Employer.)

DECISION ON PETITION FOR COMMUTATION OF BENEFITS

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on January 10, 2019, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

MARK MUROWANY

VINCENT D'ANNA

Christopher F. Baum, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

James E. Williams, Sr., Claimant *Pro Se*

Christian G. McGarry, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

James E. Williams, Sr. ("Claimant") was injured in a compensable work accident on December 7, 2003, while he was working for Target ("Employer"). The acknowledged injury was to the low back. His average weekly wage at the time of the injury was \$290.69, resulting in a compensation rate for total disability of \$193.79 per week.

In 2008, the parties entered into a commutation of indemnity benefits (including total disability, partial disability, permanent impairment and disfigurement benefits) for \$30,000.00. Excluded from that commutation was medical expenses for treatment to the low back. This petition was presented to the Board and approved. *See Williams v. Target*, Del. IAB, Hearing No. 1245696 (May 8, 2008)("Stipulation and Order of Commutation"). At the same time, an order was entered by the Board dismissing a pending Petition to Determine Additional Compensation Due stating that "Claimant now agrees to stipulate that the neck/cervical spine and shoulders are clearly unrelated to the December 7, 2003 work event." *Williams v. Target*, Del. IAB, Hearing No. 1245696 (May 8, 2008)("Order of Dismissal With Prejudice").

In 2014, Claimant filed a Petition for Commutation seeking to compel the commutation of his right to payment of medical expenses for treatment of the low back. Employer opposed the petition. After reviewing the factors to be considered in granting a commutation, Claimant's petition was denied on the basis of insufficient evidence. *See Williams v. Target*, Del. IAB, Hearing No. 1245696, at 5-7 (June 24, 2014). Claimant filed another Petition for Commutation which was heard by the Board in 2015. One again, it was denied on the basis that Claimant had failed to show that a commutation of medical benefits would be in his best interest. *Williams v. Target*, Del. IAB, Hearing No. 1245696, at 8 (August 7, 2015).

On June 21, 2018, Claimant once again filed a Petition for Commutation. Employer disputes that a commutation of medical benefits is appropriate at this time. A hearing was held on Claimant's petition on January 10, 2019. This is the decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant testified that he has been disabled ever since the accident in December of 2003. He asserts that he felt forced to take the 2008 commutation of indemnity benefits because he needed to feed his family. He does not feel that that 2008 commutation was fair. He requests that the Board reconsider that commutation.

With respect to medical treatment, Claimant states that he went to a pharmacy and was told that his file was "closed" at the end of May 2018 and his medications were denied. It has also been hard to get payment of therapy. He has been seeing Dr. Bruce Grossinger for pain management since 2007 and sees him on a monthly basis. Claimant notes that he has recently been divorced from his wife, so he is now without medical insurance.

Claimant states that he has tried to secure an attorney to help him but none are interested in the case at this time.

Claimant agrees that he does not know the value of his case. He is on Social Security Disability, and he understands that a Medicare Set-Aside ("MSA") would have to be prepared. He wants Employer to obtain an MSA plus an additional settlement for Claimant himself.

Employer's counsel represents that he does not know why the pharmacy should have denied payment, because Employer is not currently disputing Claimant's treatment. However, Claimant periodically goes a long time with no treatment and possibly the carrier's file just got closed from inactivity. Counsel notes that his own file in the case was closed in 2016 because of inactivity. This does not mean that the claim is being denied—it is just that it takes some time to

re-open a file after it has been closed. Counsel states that Dr. Grossinger's bills for office visits have been paid through at least October of 2018. Claimant's treatment is not being contested.

Claimant confirmed that, through the efforts of Dr. Grossinger, his medications are now mailed directly to the house so that he no longer has to go through a pharmacy. He is, however, tired of having to deal with the carrier and insurance issues. He figures that an MSA will "get rid of the middle man" and he wants an additional settlement because he needs some more money.

Employer's counsel represents that Employer did investigate an MSA in the past and the required allocation was in excess of \$300,000.00. In light of the fact that Claimant has had long periods of not seeking medical treatment, the carrier was opposed to such a high amount. That MSA calculation included a potential spinal cord stimulator that a prior doctor had suggested.

Claimant notes that his current doctor is not recommending a spinal cord stimulator and he believes that such expenses should be subtracted from the MSA calculation.¹

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Commutation

In this case, Claimant seeks to force a commutation of his right to have medical treatment expenses paid. Delaware case law has observed that the primary purpose of the Workers' Compensation Act ("the Act") is to provide an injured employee with periodical payments "to preclude any possibility of an imprudent employee . . . wasting the means provided for his support and thereby becoming a charge on society." *Molitor v. Wilder*, 195 A.2d 549, 552 (Del. Super.), *aff'd*, 196 A.2d 214 (Del. 1963). As such, commutations (particularly when one of the parties opposes it) are not favored and should only be granted after a showing of "unusual circumstances" where the reasons are "sound and convincing." *Molitor*, 195 A.2d at 552. As

¹ It is not relevant to the Board's decision in this matter, but the Board needs to make clear that it has no authority to tell Medicare what Medicare should or should not consider in calculating an MSA. That is solely Medicare's decision.

always, the burden of proof rests with the petitioner. *D&M Contractors, Inc. v. Forlano*, 283 A.2d 843, 846 (Del. Super. 1971); DEL. CODE ANN. tit. 29, § 10125(c). “Whether commutation is in the best interest of the claimant or will avoid undue hardship and expense to either party depends on the totality of circumstances in each case.” *General Foods Corp. v. Meekins*, Del. Super., C.A. No. 86A-AU-1, Ridgely, J., 1988 WL 15335 at *2 (February 11, 1988).

The Board has previously recited the factors to be considered in a commutation in its prior decisions in this matter and that analysis is incorporated here. Claimant recites frustration with dealing with the insurance carrier. As the Board has previously recognized, it can consider the amount of psychological stress or agitation caused to a claimant by the litigation. However, general allegations of psychological benefit unsupported by psychological testing or evidence as to actual suffering of mental anguish due to the legal proceedings are not sufficient to support a commutation. *See Kandravi v. Beebe Hospital*, Del. Super., C.A. No. 94A-10-005, Ridgely, J., 1995 WL 411736 at * 4 (May 26, 1995). “[D]eciding whether commutation is in a claimant’s best interest based upon psychological benefit involves a very case specific judgment.” *Boney-Nearhos v. Southland Corporation*, Del. Super., C.A. No. 001-07-005, Vaughn, J., 2001 WL 1482937 at * 3 (July 31, 2001). While the Board understands Claimant’s frustration and irritation with the insurance process, he has not provided the Board with the level of evidence necessary for it to approve a commutation on that basis.

It also should be noted that some of the frustration Claimant has experienced in the past seems to have been relieved to some extent by his coming under the care of Dr. Grossinger. Claimant, in the past, had trouble with a doctor who did not provide proper billing under the workers’ compensation system. *See Williams v. Target*, Del. IAB, Hearing No. 1245696, at 6 (June 24, 2014). Dr. Grossinger, however, is a certified workers’ compensation practitioner. He

is submitting his bills properly and they are being paid by the carrier. Dr. Grossinger has also aided Claimant by getting Claimant signed up with a mail-order delivery of medications. Thus, Claimant no longer has to worry whether an individual pharmacy will recognize his claim.

Claimant expresses financial need. Certainly financial need can support a commutation. However, in the present situation the only workers' compensation benefit that Claimant has is medical treatment expenses. Claimant asks the Board to reconsider the 2008 commutation, but the Board lacks the authority to open up such an agreement after all this time. That commutation was granted in good faith by the Board based on the evidence presented to it at the time. The Board cannot now revoke it.

Thus, the only financial consideration the Board could grant is for payment of medical expenses. From that perspective, the Board concludes that it would actually be against Claimant's best interest to commute the medical expenses and provide him with a cash sum. Claimant admits that, since his divorce, he no longer has health insurance. In other words, he has no other way to pay for his medical treatment. As stated above, one of the clear purposes of the worker's compensation system is "to preclude any possibility of an imprudent employee . . . wasting the means provided for his support and thereby becoming a charge on society." *Molitor*, 195 A.2d at 552. Claimant clearly has an ongoing need for medical care and Employer is accepting that it needs to pay for that treatment. Employer has not challenged Claimant's care from Dr. Grossinger. It is not disputing the medication expenses. The Board finds that it is better for Claimant to retain his right to have his medical care paid for by workers' compensation insurance than to commute the claim and create the potential that he will have insufficient funds to pay for his future medical treatment.

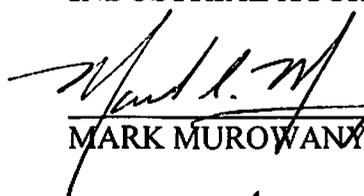
For these reasons, the Board finds that Claimant has not met his burden of proof that a commutation is in his best interest at this time.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Claimant's petition is denied.

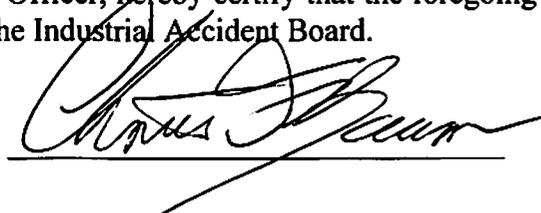
IT IS SO ORDERED THIS 7th DAY OF FEBRUARY, 2019.

INDUSTRIAL ACCIDENT BOARD


MARK MUROWANY


VINCENT D'ANNA

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



Mailed Date: 2-8-19

bc
OWC Staff

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

JEREMY JONES,)	
)	
Employee,)	
)	
v.	)	Hearing No. 1343978
)	
TRANS CARGO,)	
)	
Employer.)	

ORDER

This matter came before the Board on September 30, 2021, on a motion by Jeremy Jones (“Claimant”) to enforce a commutation agreement between himself and Trans Cargo (“Employer”).

Background: The basic background facts for this motion are largely undisputed. Claimant was injured in a compensable work accident on October 7, 2009, while he was employed by Employer. The acknowledged injuries were to the neck (cervical spine), low back (lumbar spine), head/brain, right upper extremity and face. Claimant continued to receive medical treatment over the years.

The parties began to negotiate a commutation settlement of the claim in late 2019 through 2020. In June of 2020, Employer offered to commute the claim for \$50,000.00. In July of 2020, Claimant responded with a counter-offer of \$135,000.00. On November 5, 2020, Employer raised its offer to \$65,000.00. On December 28, 2020, Claimant countered with an offer of \$125,000.00 to Employer. However, Claimant told his counsel’s office on that same day that, while he was hoping for an offer in the \$90,000.00 to \$100,000.00 range, if Employer offered something in the \$75,000.00 to \$80,000.00 range he would agree to it.

On January 4, 2021, Employer's counsel sent an e-mail stating that he had authority to offer \$75,000.00 for a full and final commutation. This e-mail was sent at 2:40pm. Based on the instructions his client had given him on December 28, Claimant's counsel responded at 2:51pm on January 4 accepting the \$75,000.00 offer. On January 5, Employer's counsel sent out a confirmation letter for the \$75,000.00 settlement.

However, unbeknownst to either counsel, Claimant himself had died on January 1, 2021.

On May 14, 2021, Employer's counsel sent a letter noting that they had "recently" become aware that Claimant had died on January 1. As such Employer was taking the position that, because Claimant had died prior to Employer extending the \$75,000.00 counter-offer on January 4, there was no agreed-upon settlement prior to Claimant's death and it was Employer's position that Claimant's counsel's authority to act on behalf of Claimant terminated with his death.

Claimant's counsel argues that, as of December 28, he had authority from Claimant to settle the claim for \$75,000.00 and that authorization survived Claimant's death. As such, Claimant's counsel argues that the commutation settlement was validly offered and accepted.

Claimant's mother opened Claimant's Estate in July of 2021 and she was appointed administratrix of Claimant's Estate on July 22, 2021. On that same date, Claimant's counsel e-mailed Employer's counsel. Without waiving the argument that there already was a valid offer and acceptance of \$75,000.00, Claimant's counsel maintained that Employer never rescinded the January 4th offer and that the representative of Claimant's Estate was now officially accepting the offer.

Employer argues that, under settled contract law, the death of either party causes any offer to automatically lapse, so that no formal rescission was needed. One cannot legally have a meeting of minds when one of the parties is dead.

Claimant argues that the offer was not made conditional on Claimant being alive.

Analysis: It has long been established that, if parties reach a meeting of the minds on a settlement, the Board can enforce that settlement even if a party then has second thoughts. *See Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998) (Board may approve and enforce an agreement if the Board finds that “the parties had reached a meeting of the minds as to all material terms and had entered into a binding agreement notwithstanding the absence of a formal contract.”). In *Anchor Motor Freight*, it was found that the parties had reached a meeting of minds as to an agreement concerning future compensation, but the employee died before the agreement was formally approved by the Board. The Supreme Court found that the Board retained the authority “to approve an agreement on compensation or other benefits regardless of whether the claimant has died.” *Anchor Motor Freight*, 716 A.2d at 158. “The employer had made a bargain that, in hindsight, was not as beneficial as originally anticipated. We do not think it serves the purposes of the Workers’ Compensation Act to allow parties to avoid their commitments based on the fortuity of whether a claimant dies before the Board acts.” *Anchor Motor Freight*, 716 A.2d at 158-159.¹

In these types of situations, the Board follows the approach taken in *Johnson v. Food Lion*, C.A. No. N13A-08-010, Scott, J., 2014 Del. Super. LEXIS 3413 (April 14, 2014). The threshold issue is whether the parties reached a meeting of the minds on all material terms of the alleged settlement. If it is found that there was a meeting of the minds, then the next issue would

¹ The Supreme Court did not consider the agreement in that case to be a “commutation,” even though both the Board and Superior Court had characterized it as such. *Anchor Motor Freight*, 716 A.2d at 157 & n. 7. Superior Court had recognized that, by statute, the Board could approve a commutation if it was in the best interest of the employee or of the dependents of a deceased employee. *Anchor Motor Freight*, 716 A.2d at 157 (citing Del. Code Ann. tit. 19, § 2358). The Board does not find the difference between an agreement as to compensation (as was in issue in *Anchor Motor Freight*) and a commutation of benefits (as is in issue here) to be significant.

be whether the Board would *approve* the proposed commutation as being in the best interest of the employee or the dependents of a deceased employee. *See Johnson*, 2014 Del. Super. LEXIS 3413, at *14-*15 (after finding meeting of minds, the court considers whether there was substantial evidence that the commutation was in the claimant's best interest).

The Board will first consider the issue of whether an enforceable agreement had been reached with Claimant himself. The question of Claimant's Estate will be considered later.

It is beyond dispute that no agreement was reached by the parties prior to Claimant's death. An offer was made by Employer on November 5, but that was rejected by Claimant's counteroffer of \$125,000.00 on December 28. That offer was not accepted by Employer. While the Board accepts that Claimant had authorized his counsel to accept an offer of \$75,000.00 or more, no such offer was extended during Claimant's lifetime.

This raises the issue of the effect of Claimant's death on the attorney-client relationship with his counsel and whether counsel retained the authority to accept an offer on Claimant's behalf subsequent to Claimant's death.

It has long been recognized that the general rule is "that upon the death of a client, a pre-existing attorney-client relationship is completely severed and any action taken on behalf of the deceased client by his former attorney is a nullity." *Hoffman v. Cohen*, 538 A.2d 1096, 1100 (Del. 1988)(citing *In re Cahoon's Will*, 82 A.2d 920, 922 (Del. Super. 1951)). There can be exceptions to this general rule, *see, e.g., Coleman v. Durden*, 338 A.2d 570, 570-71 (Del. 1975) (per curiam)(representation pursuant to contract of insurance when the client does not retain or control attorney in performance of his services does not terminate with death of the client); Supr. Ct. R. 7(f) (if client dies prior to filing appeal, attorney of record for the deceased may still file the appeal

within the time period prescribed by law). The Board, however, can find no such exception applicable to the present situation.

Rather, the situation bears some similarity to an incident in *Paolozzi v. Barber*, 260 A.2d 176 (Del. Ch. 1969). *Paolozzi* concerned stockholders' derivative actions against multiple defendants. One of the defendants moved to vacate approval of a settlement reached between the plaintiffs and other defendants. With regard to the plaintiff Thomas Paolozzi, Chancery Court observed:

The stipulation of settlement was filed by counsel on September 12, 1968; the settlement hearing was held on December 10, 1968; the order of approval was signed on January 6[, 1969]; and Federman filed his motion to vacate on March 21[, 1969]. Counsel for Thomas Paolozzi, plaintiff in C.A. 1410 suggested upon the record on April 15, 1969 that Paolozzi died on February 26, 1967. In short, Paolozzi died more than 18 months before the stipulation of settlement was signed.

It is no answer to say that Paolozzi's death is irrelevant because the actions were consolidated and there were live plaintiffs in C.A. 1429 and 1456. The point is that there was not a plaintiff in C.A. 1410. And I have difficulty in understanding how the Court can settle a case without one. And while the action is derivative, counsel derive their agency and authority from a plaintiff-stockholder. [Citation omitted.] While the relationship between a party and counsel sometimes may be somewhat loose, it certainly does not follow that his death is a matter of legal indifference.

Paolozzi, 260 A.2d at 179.

The Board therefore concludes that, even though Claimant granted authority to counsel to accept an offer prior to his death, Claimant's death divested counsel of the legal authority to accept that offer. Counsel's authority was contingent on the existence of an attorney-client relationship and, upon the death of the client, the attorney-client relationship "is completely severed and any action taken on behalf of the deceased client by his former attorney is a nullity." *Hoffman*, 538 A.2d at 1100.²

² The parties spent some time at the hearing discussing whether there was a "mutual mistake of fact" to defeat an agreement. There is no need for the Board to reach this issue because, on January 4, 2021,

The next issue is whether Claimant's Estate could accept the offer of commutation. In analyzing this argument, one fact must be kept clearly in mind: Employer made no offer at all directly to Claimant's Estate as the Estate. In other words, once Employer knew of Claimant's death, Employer did not engage in any action suggesting that it was extending an offer to the Estate. The only offer in question is the one extended to Claimant on January 4, 2021. Claimant's Estate's argument is only that this offer to Claimant was never rescinded by Employer and that, therefore, Claimant's Estate could then accept it on behalf of Claimant.

The Board disagrees. "It is elementary law that in order to constitute a contract there must be an offer made by one person to another and an acceptance of that offer *by the person to whom it was made.*" *Salisbury v. Credit Service*, 199 A. 674, 681 (Del. Super. 1937)(emphasis added). *See also Fanean v. Rite Aid Corp.*, 984 A.2d 812, 822 (Del. Super. 2009)(same); *Loveman v. The Nusmile, Inc.*, Del. Super., C.A. No. 08C-08-223, Brady, J., 2009 WL 847655 at *3 (March 31, 2009)(same). What this means is that only the offeree can accept the offer. *See* Restatement (Second) of Contracts § 48, Comment c (1981).

While Claimant's Estate is authorized to wind up Claimant's affairs, it is not the same legal entity as Claimant. For example, Claimant's counsel did not automatically become counsel for the Estate upon Claimant's death. Rather, the Estate independently needed to retain counsel for itself. It follows from this that an offer extended by Employer to Claimant cannot be considered an offer extended to Claimant's Estate.³

Claimant's counsel lacked legal authority to take any action on behalf of his deceased client. There was no agreement. "Mutual mistake" would only be a consideration if an agreement had been formed and a party was trying to void it.

³ Of course, an employer/carrier could put language into an offer to extend the offer, if needed, to a claimant's surviving spouse, dependents or estate. The offer in this case, though, did not contain such language.

Although Delaware law is sparse on this subject with the current fact pattern, there is a case from New Jersey that dealt with highly similar facts. In *Smith v. Cynfax Corporation*, 618 A.2d 937 (N.J. Super. 1992), a plaintiff, Brenda Smith, retained counsel (Goldsman) to commence a tort suit against Cynfax, which was insured by Cumberland Mutual Fire Insurance Company (Cumberland). On February 4, 1992, Cumberland made a \$7,000.00 settlement offer. Goldsman contacted the Smith home to notify his client about the offer. He was then informed that Brenda Smith had died on February 2, 1991. *See Smith*, 618 A.2d at 938. Thus, as with Claimant in the present matter, the offer was extended after the offeree was dead with the offeror unaware of the death.

Brenda Smith's husband (Archie Bolden) was appointed administrator of the estate, and he then authorized Goldsman to accept the settlement offer on behalf of the decedent's estate. Cumberland denied that any settlement agreement was reached because it had been unaware of Brenda Smith's death. It argued that the alleged agreement was unenforceable due to mutual mistake. *See Smith*, 618 A.2d at 938.

The court declined to reach the issue of mutual mistake. "Mutual mistake' is not a reason for ruling in favor of defendant because no contract came into being to which that doctrine could apply." *See Smith*, 618 A.2d at 938-39. Rather, the court found that there was never an agreement.

It is undisputed in this case that defendant made a settlement offer of \$7,000. The dispositive issue is whether anyone was capable of accepting that offer. Neither Mr. Goldsman nor Mr. Bolden ever stood in the shoes of the deceased for the purpose of accepting Cumberland's offer since the offeree was dead when the offer was made.

The offer was made to Brenda Smith, not her estate.

Smith, 618 A.2d at 939.

Under the basic principles of contract law and offer/acceptance, the Board agrees with the analysis of the *Smith* court. When Employer extended a settlement offer to Claimant on January

4, Claimant was already dead. Claimant's counsel lacked authority to accept the offer on Claimant's behalf because the attorney-client relationship ended with Claimant's death. Claimant's Estate lack the ability to accept the offer because the offer was never made to the Estate.⁴ As such, there was no "meeting of minds" and no agreement for commutation was reached by the parties.

Claimant's motion is denied.

IT IS SO ORDERED this 13th day of December, 2021.

INDUSTRIAL ACCIDENT BOARD

Mark A. Murowany /s/
MARK A. MUROWANY

Bud Freel /s/
BUD FREEL

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: 12-14-2021

CR
OWC Staff

Gary S. Nitsche & Joel H. Fredericks, Attorneys for Claimant
Nathan V. Gin, Attorney for Employer

⁴ In light of the Board's ruling that an offer would have to be made directly to Claimant's Estate for the Estate to accept it, there is no need to reach the issue of whether Employer's counsel's May 14, 2021 letter impliedly rescinded the January 4th offer to Claimant.

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

KARI-ANN JONES,)	
)	
Employee,)	
)	
v.	)	Hearing No. 1412276
)	
UNIVERSAL HEALTH SERVICES, INC.,)	
)	
Employer.)	

ORDER

This matter came before the Board on August 20, 2020, on a motion to enforce a commutation agreement between Kari-Ann Jones (“Claimant”) and Universal Health Services, Inc. (“Employer”). Pursuant to the Industrial Accident Board’s COVID-19 Emergency Order dated May 11, 2020, this motion hearing was conducted by video conferencing using the WebEx video platform.

Background: Claimant was injured in a compensable work accident on April 6, 2014. The recognized injury was to the right hand and wrist. In November of 2014, she underwent surgery for a triangular fibrocartilage complex (“TFCC”) tear and debridement. *See Jones v. Universal Health Services*, Del. IAB, Hearing No. 1412276, at 3 (July 24, 2017), *aff’d*, Del. Super., C.A. No. K17A-08-002, Clark, J. (August 16, 2018). In 2015, she was found to have a large herniated disk at C5-6 in her cervical spine, as well as a C6-7 disk bulge. She underwent a cervical discectomy and fusion at C5-6 and C6-7. *Jones*, at 5. Claimant filed a petition to have the cervical condition considered as part of the compensable work injury, but her petition was denied. *Jones*, at 12.

In 2018, Claimant’s total disability status was terminated. *See Jones v. Universal Health Services*, Del. IAB, Hearing No. 1412276 (August 29, 2018)(ORDER). Claimant entered into an agreement for partial disability to be paid at the rate of \$150.00 per week. Claimant was also

compensated for a 20% permanent impairment to the right upper extremity and received compensation for disfigurement.

In 2020, the parties entered into negotiations for a full commutation of benefits. On May 22, 2020, Employer offered a full commutation for \$40,000.00. Claimant's counsel asked if Employer would agree to continue to pay partial disability benefits until the commutation was approved. On May 26, Employer agreed to pay partial disability until approval. Later that same day, Claimant confirmed her agreement to the proposed commutation, and Employer's counsel began to prepare the legal documents for the commutation.

Unfortunately, on June 1, 2020, before the documents were completed, Claimant and her husband died in a motor vehicle accident, leaving behind three minor children. Claimant's counsel notified Employer of this event on June 8.

Claimant's estate maintains that the commutation should be enforced because the parties reached a meeting of the minds on all material terms of the commutation. Employer argues that the commutation is unenforceable in light of the fact that the commutation documents were not signed, much less approved by the Board.

Analysis: It has long been established that, if parties reach a meeting of the minds on a settlement, the Board can enforce that settlement even if a party then has second thoughts. *See Anchor Motor Freight v. Ciabattini*, 716 A.2d 154, 156 (Del. 1998) (Board may approve and enforce an agreement if the Board finds that "the parties had reached a meeting of the minds as to all material terms and had entered into a binding agreement notwithstanding the absence of a formal contract."). *See also Johnson v. Food Lion*, C.A. No. N13A-08-010, Scott, J., 2014 Del. Super. LEXIS 3413, at *11 (April 14, 2014); *Soto v. Pettinaro Construction*, Del. IAB, Hearing No. 1256246, at 2 (October 2, 2009)(ORDER); *Woodall v. Diamond State Port Corp.*, Del. IAB,

Hearing No. 1191596, at 2-4 (August 8, 2002)(ORDER); *Curry v. Wendover, Inc.*, Del. IAB, Hearing No. 1119976, at 11 (March 22, 2001), *aff'd*, Del. Super., C.A. No. 01A-04-003, Del Pesco, J. (August 23, 2001)(ORDER).

In *Anchor Motor Freight*, it was found that the parties had reached a meeting of minds as to an agreement concerning future compensation, but the employee died before the agreement was formally approved by the Board. The Supreme Court found that the Board retained the authority “to approve an agreement on compensation or other benefits regardless of whether the claimant has died.” *Anchor Motor Freight*, 716 A.2d at 158. “The employer had made a bargain that, in hindsight, was not as beneficial as originally anticipated. We do not think it serves the purposes of the Workers’ Compensation Act to allow parties to avoid their commitments based on the fortuity of whether a claimant dies before the Board acts.” *Anchor Motor Freight*, 716 A.2d at 158-159. The Supreme Court did not consider the agreement in that case to be a “commutation,” even though both the Board and Superior Court had characterized it as such. *Anchor Motor Freight*, 716 A.2d at 157 & n. 7. Superior Court had recognized that, by statute, the Board could approve a commutation if it was in the best interest of the employee or of the dependents of a deceased employee. *Anchor Motor Freight*, 716 A.2d at 157 (citing DEL. CODE ANN. tit. 19, § 2358).

The Board does not find the difference between an agreement as to compensation (as was in issue in *Anchor Motor Freight*) and a commutation of benefits (as is in issue here) to be significant. Rather, the Board agrees with the approach taken in *Johnson v. Food Lion, supra*. The threshold issue is whether the parties reached a meeting of the minds on all material terms of the alleged settlement. If it is found that there was a meeting of the minds, then the next issue would be whether the Board would *approve* the proposed commutation as being in the best interest

of the employee or the dependents of a deceased employee. *See Johnson*, 2014 Del. Super. LEXIS 3413, at *14-*15 (after finding meeting of minds, the court considers whether there was substantial evidence that the commutation was in the claimant's best interest).

The first stage of the analysis is clear. There can be no doubt that the parties reached a meeting of the minds on a full commutation for \$40,000.00 with the added requirement that Employer would continue to pay Claimant her partial disability benefits until the commutation was signed. E-mails between counsel establish that these terms were agreed to by both parties on May 26.

The second stage is whether this commutation is in Claimant's best interest. Obviously, approving it would now be in the interest of Claimant's three minor children, but the proper question to ask is whether, at the time that the agreement was reached, it was in Claimant's best interest. A review of the file shows that it clearly was. As discussed above, Claimant failed to have her cervical condition included as part of her compensable injury. It follows that symptoms and limitations attributable to the cervical condition were not compensable, which could potentially complicate her receiving future treatment for right upper extremity complaints (which might be attributable to the cervical condition). Claimant's claim for total disability had ended. Permanent impairment has already been paid, as well as compensation for disfigurement from surgical repair to her right upper extremity. Thus, Claimant had no reasonable expectation of future benefits with respect to those items. With regard to partial disability, by the time the parties had reached agreement on the commutation, she had already received over 95 weeks of compensation (since roughly July 20, 2018) and was going to continue to receive partial disability compensation until the commutation documents were finalized. Partial disability benefits, of course, are capped at a maximum of 300 weeks. Therefore, even without reducing it to its present-

day value, at her established partial disability compensation rate that left only about \$30,000.00 of future partial disability compensation left. The commutation sum was for \$40,000.00.

Based on all of the above, the Board finds that the commutation that the parties had agreed to was in Claimant's best interest. It was adequate to compensate her for her likely future entitlement to workers' compensation benefits without her having to face the risk of further litigation that might reduce or eliminate those benefits.

Accordingly, the Board finds both that the parties did reach a meeting of the minds on the commutation and that the commutation was in Claimant's best interest at the time that the parties entered into their agreement. It does not serve "the purposes of the Workers' Compensation Act to allow parties to avoid their commitments based on the fortuity of whether a claimant dies before the Board acts." *Anchor Motor Freight*, 716 A.2d at 158-159. The Board therefore finds the agreement valid and enforceable. Employer shall complete the necessary documents to finalize the commutation for the benefit of Claimant's estate.

IT IS SO ORDERED this 24th day of August, 2020.

INDUSTRIAL ACCIDENT BOARD

Mark A. Murowany /cs
MARK A. MUROWANY

Robert J. Mitchell /cs
ROBERT J. MITCHELL

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: 8/31/20

OW
OWC Staff

Gary S. Nitsche, Attorney for Claimant
Paul V. Tatlow, Attorneys for Employer

Mr. Freibott explained that he and Claimant discussed a possible commutation of her claim. In June of 2020, Employer extended an offer of \$10,000.00. Claimant, through Mr. Freibott, countered with an offer of \$28,500.00 to commute the claim. Employer responded in August of 2020 with a counter-offer of \$15,000.00. At that point, settlement negotiations quieted down.

Mr. Freibott noted that, after Claimant ceased seeing Dr. Crain in May, Claimant next sought treatment in September of 2020, from Dr. Ginsberg (a gap of about four months). Dr. Ginsberg's medical records stated that Claimant had degenerative changes in her neck, according to an MRI. He thought that they were age-appropriate changes. Dr. Ginsberg's records stated that Claimant was extremely active and continued to be so. She was working full-time as of September 2020. Dr. Ginsberg stated that she was playing volleyball on a volleyball team three times per week.² She was exercising and still trying to do squats and dead-lifts. Claimant saw Dr. Ginsberg for the last time on October 28, 2020, and he gave her a full-duty release. Dr. Ginsberg's October 28th note stated that the MRI findings were age-appropriate and the only thing he could recommend in order to treat something systemic was with blood work or as a rheumatologic issue. He wrote that he did not believe Claimant's complaints emanated from the cervical or thoracic spine.

On November 4, 2020, Claimant filed a Petition to Determine Additional Compensation Due ("DACD") seeking a finding of compensability of a neck injury and payment of medical bills from First State Orthopaedics. The petition was scheduled to be heard on May 25, 2021, but a continuance was granted because of the unavailability of Employer's expert, Dr. William Murphy. *See Stansbury v. Randstad*, Del. IAB, Hearing No. 1506214 (April 19, 2021)(ORDER). The petition was rescheduled to be heard on August 18, 2021.

² Claimant, in her testimony, stated that Dr. Ginsberg was incorrect on this point. She had played volleyball back in 2019, prior to the work injury. That was the last time that she played.

Mr. Freibott stated that, in February of 2021, Claimant began seeing Dr. Glassman for low back complaints and Claimant wanted those low back complaints to be found compensable as well, even though references to the low back did not appear in the medical records until a year after the work accident. On April 7, 2021, Mr. Freibott sent Claimant to Dr. Jeffrey Meyers for an opinion concerning permanent impairment.

In May of 2021, Claimant went to see Dr. Grossinger about her neck.³ This was the first treatment she had sought for the neck since she had last seen Dr. Ginsberg in October of 2020. Dr. Grossinger's notes recorded a history that Claimant had had an "immediate onset" of sharp chest and neck pain from the February 2020 accident. There is no mention in Dr. Grossinger's records of the left shoulder problem. Mr. Freibott stated that that history of an immediate onset of chest and neck pain is not supported by the medical records from February of 2020.

On May 11, 2021, Claimant filed a second DACD petition. This second petition sought compensation for permanent impairment: 11% to the cervical spine; 9% to left upper extremity; and 7% to the lumbar spine. These impairment percentages were calculated by Dr. Meyers. This petition was scheduled to be heard on October 25, 2021. In June of 2021, the parties agreed that the two pending petitions involved substantially similar factual issues. As such, they requested that the August 18, 2021 hearing be continued and the two petitions were consolidated to be heard on October 25, 2021. *See Stansbury v. Randstad*, Del. IAB, Hearing No. 1506214 (June 23, 2021)(ORDER).

Mr. Freibott stated that, in July of 2021, Employer re-started settlement negotiations and offered \$7,000.00 for a full commutation. In August, Claimant stated that she was not interested

³ There was a discrepancy in the testimony on this point. At one point, Mr. Freibott stated that Claimant did not see Dr. Grossinger until "August" of 2021, but later, when directly asked when the visit happened, he stated that the appointment was in May of 2021. Because this was given in response to a direct question as to the date, the Board assumes that the May date is the correct one.

in a commutation at that time. Accordingly, Mr. Freibott proceeded to prepare for the October 25th hearing.

Mr. Freibott explained that Employer had scheduled the deposition of Dr. Andrew Gelman to occur on October 19, 2021. Because Mr. Freibott had concerns about the viability of Claimant's case in light of the medical records and the lapses in her treatment, he again discussed possible settlement with Claimant. Mr. Freibott states that, on October 12, 2021, Claimant authorized him to offer to settle for \$50,000.00, and he advised that he would try to get Employer as close to \$25,000.00 as he could. Employer countered with an offer of \$10,000.00.

Mr. Freibott stated that, on October 18, 2021, he warned Claimant that there were medical problems with the case and they should try to avoid the deposition with Dr. Gelman before those problems were documented in testimony.⁴ He warned Claimant that her initial injury was documented as just being to the left shoulder; that Dr. Crain recorded that the shoulder was better; and that Dr. Ginsburg recorded that she was doing well and was active. There had been a four or five month gap in treatment between Dr. Crain and Dr. Ginsberg, and another gap of several months between Dr. Ginsberg and Dr. Grossinger. According to Dr. Ginsberg, the cervical MRI only showed age-appropriate degenerative changes and he did not think the cervical or thoracic spine was contributing to her symptoms.

On October 18, Mr. Freibott told Claimant that he did not think, in his professional opinion, that she had a good case. He told her she needed to either get new counsel to pursue her claim or settle. According to Mr. Freibott, she told him that she did not want to pursue the route of new counsel and that he should try to settle with Employer for \$20,000.00 plus reimbursement of a \$2,000.00 deposition fee charged by Dr. Meyers. Employer responded that it would agree to

⁴ Because there was progress in the negotiations, the parties cancelled Dr. Gelman's October 19th deposition on the morning of October 19.

commute the claim for \$20,000.00 but would not pay the deposition fee. However, Mr. Freibott's office contacted Dr. Meyers' office and he agreed to reimburse the \$2,000.00 fee because the deposition had not gone forward. As such, Mr. Freibott felt that he had got Claimant to the spot she had agreed to: \$20,000.00 commutation and she got the \$2,000.00 deposition fee back. On October 21, 2021, Mr. Freibott's office sent an e-mail to Employer's counsel confirming that they were resolved for \$20,000.00 plus payment of related medical treatment through October 21, 2021.

Mr. Freibott confirmed that, after the settlement was accepted, Claimant, on November 2, 2021, contacted his office. She was upset and stated that she felt that Mr. Freibott was not really on her side and was "more for Ginsberg." She was very unhappy with the situation. Mr. Freibott's withdrawal from representation was officially processed in early December of 2021.

Claimant testified that, on October 24, 2021, she had had a medical appointment with Dr. Rastogi. After looking at the MRI, Dr. Rastogi informed her that she needed to have cervical surgery. He also told her that he thought she had "a really good case." She was upset about the settlement because she wanted to include the neck problem and everybody was acting like it didn't happen. She contacted Mr. Freibott's office after that doctor's appointment. She told Mr. Freibott that her case was more serious than he thought it was. In November, Claimant told Mr. Freibott that she did not trust him and wanted him to stop representing her. She underwent the proposed cervical surgery on December 2, 2021. The operative findings were of left-sided disk herniation at C5-6 with osteophyte formations at C3-4 and C4-5. She received a three-level cervical fusion.

Claimant agreed that, when she went to MedExpress in February of 2020, they only documented a left shoulder complaint. She had explained that when she first lifted the door it felt like a pull on both shoulders and then, when she lifted the second door, it felt like something pulled

in the left shoulder. At the time she was at Med Express, the left shoulder was bothering her the most, so that is the only thing that they wrote down. However, Claimant testified that, back near the end of March 2020 she told Dr. Crain that she had a complaint in her back between her shoulder blades. He referred her to see Dr. Ginsberg. She did not even know that her symptoms between the shoulder blades was a neck issue (as opposed to a back issue) until she saw Dr. Ginsburg in September of 2020. Claimant explained that she had tried to see Dr. Ginsberg on March 27, 2020, but that was when COVID restrictions were kicking in and the appointment was postponed until April 1, then to May 1, then to May 5, 2020. By the time May 5, 2020, came around, the doctor's office told her that Employer was denying the workers' comp claim so that visit was cancelled for insurance reasons. This is why she did not get to see Dr. Ginsberg until September of 2020.

Claimant explained that she had started working again with an employer as a temporary employee on August 5, 2020. She was then hired as a regular employee on January 4, 2021. After she started working again in August, she began to get all cramped up in her neck. That was then she was set up to see Dr. Ginsberg in September of 2020.

Claimant explained that she has been searching for other counsel to take her case. She has spoken with other attorneys, who indicated that there was too much risk and too little reward to merit their taking the case.

Analysis: It has long been established that, if parties reach a meeting of the minds on a settlement, the Board can enforce that settlement even if a party then has second thoughts. *See Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998) (Board may approve and enforce an agreement if the Board finds that “the parties had reached a meeting of the minds as to all material terms and had entered into a binding agreement notwithstanding the absence of a

formal contract.”). In *Anchor Motor Freight*, it was found that the parties had reached a meeting of minds as to an agreement concerning future compensation, but the employee died before the agreement was formally approved by the Board. The Supreme Court found that the Board retained the authority “to approve an agreement on compensation or other benefits regardless of whether the claimant has died.” *Anchor Motor Freight*, 716 A.2d at 158. “The employer had made a bargain that, in hindsight, was not as beneficial as originally anticipated. We do not think it serves the purposes of the Workers’ Compensation Act to allow parties to avoid their commitments based on the fortuity of whether a claimant dies before the Board acts.” *Anchor Motor Freight*, 716 A.2d at 158-159.⁵

In these types of situations, the Board follows the approach set forth in *Johnson v. Food Lion*, C.A. No. N13A-08-010, Scott, J., 2014 Del. Super. LEXIS 3413 (April 14, 2014). The threshold issue is whether the parties reached a meeting of the minds on all material terms of the alleged settlement. If it is found that there was a meeting of the minds, then the next issue would be whether the Board would *approve* the proposed commutation as being in the best interest of the employee or the dependents of a deceased employee. *See Johnson*, 2014 Del. Super. LEXIS 3413, at *14-*15 (after finding meeting of minds, the court considers whether there was substantial evidence that the commutation was in the claimant’s best interest).

The Board will first consider the issue of whether there was a meeting of minds between the parties. Certainly, counsel for Claimant and counsel for Employer reached agreement on October 21, 2021. The Board also finds that Mr. Freibott believed in good faith that he had

⁵ The Supreme Court did not consider the agreement in that case to be a “commutation,” even though both the Board and Superior Court had characterized it as such. *Anchor Motor Freight*, 716 A.2d at 157 & n. 7. Superior Court had recognized that, by statute, the Board could approve a commutation if it was deemed to be in the best interest of the employee or of the dependents of a deceased employee. *Anchor Motor Freight*, 716 A.2d at 157 (citing Del. Code Ann. tit. 19, § 2358).

Claimant's authority to accept. However, the evidence also indicates that Claimant had her doubts. In August of 2021, she absolutely rejected the thought of any commutation. On October 12, she authorized a settlement offer of \$50,000.00, but (per Mr. Freibott) would be satisfied if the offer got close to \$25,000.00. To get to the \$20,000.00 offer (with payment of the \$2,000.00 deposition fee), Mr. Freibott essentially offered Claimant an ultimatum: go with that settlement offer or find a new attorney. At the time, she was unwilling to pursue a new attorney, but that does not mean she was happy with the proposal.

However, while she may have been unhappy with it, the Board accepts that Claimant did authorize Mr. Freibott to extend the offer to Employer. Strictly speaking, the Employer did not accept the exact wording of the offer (of \$20,000.00 plus payment of \$2,000.00 for the deposition fee). It made a counter-offer of just \$20,000.00. However, Mr. Freibott's office was able to get Dr. Meyers to reimburse the deposition fee (because no deposition took place) and, understandably, the office concluded that, economically, they were at the spot that Claimant had authorized. As such, acceptance of Employer's counter-offer was made. While it was perhaps somewhat tenuous, there appears to have been a meeting of minds.

That, however, brings up the second half of the analysis: whether this commutation deal is in Claimant's best interest. The core issue on this concerns the neck claim. Claimant's originally recognized injury was to the left shoulder. However, the Board, in its experience, is very much aware that shoulder complaints can often mask a cervical complaint, and a cervical complaint can reflect the presence of a shoulder problem. It is difficult to separate the two. Mr. Freibott did explain why he had concerns about Claimant's ultimate success on a cervical claim based on the medical records, including the records of Dr. Ginsberg, which cast doubt on any connection

between the shoulder injury and the cervical complaints.⁶ On the other hand, even after Claimant saw Dr. Ginsberg, Mr. Freibott concluded that there was enough of a good faith basis to file two different DACD petitions (in November of 2020 and May of 2021) seeking compensation for a neck complaint. This just demonstrates how hard it is to clearly separate injuries to the shoulder and neck.

It appears that Claimant was having cervical complaints in 2021. Indeed, she (through her primary care doctor) arranged to see Dr. Rastogi because of her concern about her neck condition. This appointment was on October 24, just a few days after Mr. Freibott accepted the commutation offer on her behalf. As a result of this appointment, she was then scheduled for cervical fusion surgery.

If it should turn out that these cervical complaints were causally related to the work accident, then the present commutation is certainly not in Claimant's best interest. On the other hand, if it should turn out that the neck condition is not causally related to the work accident, then the commutation offer is fair and would be in her best interest.

This is the choice and the risk facing Claimant. If she turns down the commutation offer of \$20,000.00, she may end up with nothing if she cannot prove, more likely than not, that the cervical condition is related to her work accident. On the other hand, if she is able to establish the causal connection, then the commutation sum would be insufficient to fairly compensate her for the neck injury. Mr. Freibott clearly explained the basis for his concerns about the strength of the case and his fear, based on his experience, that Claimant will not be able to meet her burden of proof. Claimant, however, firmly believes there is a connection between her work accident and

⁶ It should be noted that, when he formed this opinion, Mr. Freibott was unaware of the opinion of Dr. Rastogi. Claimant had arranged the appointment with Dr. Rastogi through her primary care doctor, not through Mr. Freibott's office (who had arranged for her to see Dr. Ginsberg).

the neck condition. She has provided explanations for the delays in treatment (including recognizing that the COVID pandemic delayed treatment for many patients). According to her, Dr. Rastogi believes that there is a medical causal connection between her work accident and the neck condition. Frankly, without a full presentation of competent medical evidence on both sides, the Board cannot say which position is correct.

Claimant wants the Board to reject the commutation so that she can pursue her cervical claim. While there is great risk to her in this approach, the Board agrees that there is sufficient doubt or ambiguity on the matter of causation such that the Board cannot presently state that, more likely than not, the proposed commutation is in her best interest. For this reason, the Board declines to enforce the commutation.

Employer's motion is denied.

IT IS SO ORDERED this 25th day of February, 2022.

INDUSTRIAL ACCIDENT BOARD

Mark A. Murowany / 02
MARK A. MUROWANY

Vincent D'Anna / 03
VINCENT D'ANNA

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:

CMW 2/28/22
OWC Staff

Lamese Stansbury, Claimant *Pro Se*
Walter J. O'Brien, Attorney for Employer

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

LAMESE STANSBURY,)	
)	
Employee,)	
)	
v.	)	Hearing No. 1506214
)	
RANDSTAD STAFFING,)	
)	
Employer.)	

ORDER

Lamese Stansbury (“Claimant”) was injured in a compensable work accident on February 25, 2020, while she was working for Randstad Staffing (“Employer”). On January 20, 2022, the matter came before the Board on Employer’s motion to enforce a commutation agreement. Following a hearing on the merits of the motion, the Board concluded that, based on the presentation of evidence, it could not conclude that the proposed commutation was in her best interest. *See Stansbury v. Randstad Staffing*, Del. IAB, Hearing No. 1506214, at 10 (February 25, 2022) (“*February Order*”).

On March 11, 2022, Employer filed a motion for reargument asserting that the Board should have approved the commutation. Claimant, who is currently unrepresented by counsel, submitted an e-mail on March 28, 2022 with her response.

Employer’s first argument is that, in its ruling, the Board was improperly “indulging Claimant’s second thoughts in contravention of settled Delaware law.” Employer’s Motion, at ¶5. Employer references *Johnson v. Food Lion*, C.A. No. N13A-08-010, Scott, J., 2014 Del. Super. LEXIS 3413 (April 14, 2014), noting that the Court in *Johnson* stated that, if the parties reach a meeting of the minds, the Court would enforce the terms of that agreement despite a party’s later

second thoughts. *See Johnson*, 2014 Del. Super. LEXIS 3413, at *11 (quoting *Mell v. New Castle County*, Del. Super., C.A. No. 03M-06-030, Slights, J., 2004 WL 1790140, at *3 (August 4, 2004)).

Employer's argument on this basis is puzzling because the Board in fact found that there was a meeting of minds. *See February Order*, at 8. The Board did not deny this because Claimant later had second thoughts. The Board's reason for refusing to approve the commutation was the second part of the analysis, namely whether the commutation was in Claimant's best interest.

Employer seems to be laboring under the belief that all that is needed is a meeting of minds. When it comes to commutations of workers' compensation benefits, however, this is incorrect. As the Court in *Johnson* observed (and as the Board stated in the *February Order*) even when there is an agreement between the parties, the Board is still required, by law, to decide whether the proposed commutation is in the injured worker's best interest. *See Johnson*, 2014 Del. Super. LEXIS 3413, at *7.

This requirement is contained with the Workers' Compensation Act itself. Section 2358 permits the Board to commute benefits, but states that

[s]uch commutation may be allowed if it appears that it will be for the best interest of the employee or the dependents of the deceased employee, or that it will avoid undue expense or hardship to either party, or that such employee or dependent has removed or is about to remove from the United States or that the employer has sold or otherwise disposed of the whole or the greater part of the injured employee's or the dependents of a deceased employee's business or assets.

DEL. CODE ANN. tit. 19, §2358(a).¹ Thus, even in those situations when both parties are in agreement, the Board retains the statutory authority to reject a commutation if it does not meet the

¹ The Act also goes so far as to identify a specific situation when a commutation "shall not be allowed" (even if there is a meeting of minds and it might be deemed to be in the employee's best interest): if the purpose of the commutation is to enable an injured employee to "satisfy a debt created before the accident" except if the debt is a mortgage on the injured employee's home or household furniture. *See* DEL. CODE ANN. tit. 19, §2358(a).

standards set forth in section 2358(a). Case law has long stated that commutations are not favored, and should be granted only where the reasons are “sound and convincing.” *Molitor v. Wilder*, 195 A.2d 549, 552 (Del. Super.), *aff’d*, 196 A.2d 214 (Del. 1963). This recognizes that the intention of the Workers’ Compensation Act is to provide an injured employee with *periodical* payments, payable as wages are paid, “to preclude any possibility of an imprudent employee . . . wasting the means provided for his support and thereby becoming a charge on society.” *Molitor*, 195 A.2d at 552.

In the present case, as in most such cases, there is no question of the employer having sold the business or Claimant having left the country. There is no suggestion of any undue expense or hardship to either party. As such, per the statute, the critical question becomes whether “it appears that it will be for the best interest of the employee.” DEL. CODE ANN. tit.19, §2358(a). The Board, in the *February Order*, explained the Board’s reservations on this issue.

This leads to Employer’s second argument, namely that much of what the Board referenced was hearsay testimony and could not therefore be substantial evidence. Employer is correct that much of what was presented was a recitation from a Delaware attorney concerning Claimant’s medical records. There was no formal medical testimony provided. In that sense, it was hearsay.

What Employer overlooks in its argument, though, is that what was before the Board was Employer’s motion to enforce the commutation. As the petitioner, the burden of proof rested with Employer to demonstrate that the proposed commutation would be in Claimant’s best interest. *See* DEL. CODE ANN. tit. 29, § 10125(c) (“The burden of proof shall always be upon the applicant or proponent.”). Employer argues that Claimant presented no competent evidence concerning causation of the cervical complaint, but it is not Claimant’s burden of proof. She testified as to her cervical complaints and her subjective belief that they were part of her compensable injury.

The burden of proof rested with Employer to show that the proposed commutation was in Claimant's best interest. No competent medical evidence was presented by Employer and even consideration of the hearsay testimony of the existing medical records presented to the Board was, as the Board explained in the February Order, insufficient to permit the Board to state that, more likely than not, the commutation was in Claimant's best interest. *See February Order*, at 10.

For these reasons, Employer's motion for reargument is denied.

Having said that, the Board wishes to address Claimant's response to Employer's motion. She restated her position that her compensable work injuries were more extensive than Employer has acknowledged. She acknowledges that the offered \$20,000 would be fair if she only injured her left shoulder, but she believes there is more to her workplace injury than just the left shoulder. However, she then ended her submission stating that she would accept a "fair and just Commutation of benefits." The implication from the submission was that Claimant wanted the Board to set the commutation amount for her.

The Board wishes to make it quite clear to Claimant that that is beyond the Board's power as the matter has been presented to it. The only issue presented for decision by the Board was whether to enforce the \$20,000 commutation. That is all. For the reasons discussed earlier, the Board declined to enforce it. However, that does not mean that the Board can then impose a different commutation amount on the parties. The Board has had no proper presentation of evidence to allow it to make such a valuation. It would also be far beyond the scope of the motion for the Board to do anything like that.

Accordingly, Employer's motion for reargument is denied and the Board declines to enforce the submitted commutation.

IT IS SO ORDERED this 5th day of May, 2022.

INDUSTRIAL ACCIDENT BOARD

Mark A. Murowany / on
MARK A. MUROWANY

Vincent D'Anna / on
VINCENT D'ANNA

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: 5-9-2022

C.R.
OWC Staff

Lamese Stansbury, Claimant *Pro Se*
Walter J. O'Brien, Attorney for Employer

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

LACHINA INGRAM,)	
)	
Employee,)	
)	
v.	)	Hearing No. 1510716
)	
BANK OF AMERICA,)	
)	
Employer.)	

ORDER

This matter came before the Board on October 21, 2021, on a motion by Bank of America (“Employer”) to enforce a settlement resolution of a claim brought by Lachina Ingram (“Claimant”).

Background: On May 5, 2021, Claimant filed an initial Petition to Determine Compensation Due alleging that she was injured at work on March 17, 2020. She alleged that she experienced a pinched nerve in her back as a result of pushing, pulling and carrying heavy loads of mail. Employer denied compensability. The hearing on the merits was scheduled for October 27, 2021.

On August 26, 2021, Claimant’s counsel notified Employer’s counsel that he had authority to settle the matter for \$2,500.00. Employer’s counsel prepared a confirmation letter (dated September 15, 2021) reciting a full and final commutation for \$2,500.00, conditional on Claimant resigning her employment with Employer. By e-mail that same day, Claimant’s counsel confirmed that Claimant’s employment with Employer had ended some time ago. He requested that the commutation documents be prepared and sent to him.

On September 23, Claimant herself sent an e-mail directly to Employer's counsel stating that the offer of \$2,500.00 was unacceptable to her. Employer's counsel brought the note to Claimant's counsel's attention, which was the first that Claimant's counsel knew there was any issue. The parties have been unable to resolve the impasse, and Employer finally filed the present motion to enforce the settlement.

At this motion hearing, Claimant testified that she did discuss the \$2,500.00 number with her attorney and he explained to her that it would cost that much to hire a medical expert. Claimant denies that she ever agreed to that sum. She never felt that sum was sufficient. However, she agrees that she did authorize her attorney to negotiate with Employer. She did receive the draft commutation documents, but there were discrepancies in the documents. For example, the affidavit that was drafted for her to sign recited the sum of \$7,500.00. Her attorney told her that was incorrect and she should just scratch it out. Because of the inconsistencies, she refused to sign the documents.

Claimant agreed that the only treatment she has received for the March 2020 work injury was two visits of chiropractic care in May of 2021. She was not able to get more treatment because she was laid off and the Employer denied her unemployment benefits. She was out of work and had no income for three and a half months. She still has back pain. She is scheduled to get Medicaid starting November 1.

Analysis: It has long been established that, if parties reach a meeting of the minds on a settlement, the Board can enforce that settlement even if a party then has second thoughts. *See Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998) (Board may approve and enforce an agreement if the Board finds that "the parties had reached a meeting of the minds as to

all material terms and had entered into a binding agreement notwithstanding the absence of a formal contract.”). *See also Johnson v. Food Lion*, C.A. No. N13A-08-010, Scott, J., 2014 Del. Super. LEXIS 3413, at *11 (April 14, 2014).

The threshold issue is whether the parties reached a meeting of the minds on all material terms of the alleged settlement. If it is found that there was a meeting of the minds, then the next issue would be whether the Board would approve the proposed commutation as being in the best interest of the employee or the dependents of a deceased employee. *See Johnson*, 2014 Del. Super. LEXIS 3413, at *14-*15 (after finding meeting of minds, the court considers whether there was substantial evidence that the commutation was in the claimant’s best interest).

In this case, it is undisputed that Claimant did authorize her attorney to negotiate with employer and the documents are clear that Claimant’s counsel agreed to a settlement of the claim for \$2,500.00. This action is understandable when considering the second step: whether this settlement is in Claimant’s best interest.

“Whether commutation is in the best interest of the claimant or will avoid undue hardship and expense to either party depends on the totality of circumstances in each case.” *General Foods Corp. v. Meekins*, Del. Super., C.A. No. 86A-AU-1, Ridgely, J., 1988 WL 15335 at *2 (February 11, 1988). Reviewing the circumstances of Claimant’s case, the Board has no doubt at all that the offered settlement is in Claimant’s best interest.

Claimant alleges a work injury sustained back in March of 2020. There is, however, no contemporary medical documentation of any injury at that time. Claimant agrees her first medical care for the alleged injury occurred almost fourteen months later when she saw a chiropractor. Claimant’s petition is currently scheduled to be heard on October 27. Claimant has the burden of proof of establishing both that there was a workplace injury and the severity of that injury.

Claimant needs medical testimony in support of her claim. In workers' compensation cases, it has long been recognized that when an "injury is internal, thus concealed, then medical testimony becomes *essential* in order to properly determine that an injury in fact has occurred and the extent of such injury." *McCormick Transportation Co. v. Barone*, 89 A.2d 160, 163 (Del. Super. 1952)(emphasis added). Without expert medical testimony, the Board will have no substantial evidentiary basis to find in Claimant's favor. The Board cannot base a decision just on medical records absence such testimony. In this case, however, Claimant does not even have contemporaneous medical records to support her claim. Claimant clearly is not prepared to go to hearing on October 27 and it is doubtful that a doctor, who did not see Claimant until May of 2021, could possibly opine, to a reasonable degree of medical probability, that Claimant's medical condition in May of 2021 is connected to something that happened in March of 2020 (as opposed to anything else that may have happened to Claimant over the intervening year).

If this matter were to go to hearing, the risk is extremely high that Claimant's claim would be completely denied, receiving no compensation while accumulating more costs. As such, the \$2,500.00 is easily in her best interest. It allows her to receive some compensation instead of walking away with nothing.

For these reasons, the Board finds that the parties did enter into a binding settlement agreement to commute Claimant's workers' compensation claim for \$2,500.00 and that settlement is hereby enforced.

Pursuant to title 19, section 2349 of the Delaware Code, if Claimant disagrees with this decision, she may appeal this decision to the Superior Court. Such appeal must be filed with Superior Court within thirty days of the *mailing date* of this order. *See DEL. CODE ANN. tit. 19, § 2349.*

IT IS SO ORDERED this 25th day of October, 2021.

INDUSTRIAL ACCIDENT BOARD

Idel M. Wilson / 02
IDEL M. WILSON

Bud Freel / 03
BUD FREEL

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

Chris Baum

CMW 10/26/21

Mailed Date:

OWC Staff

Brian E. Lutness, Esquire, for Claimant
Scott A. Simpson, Esquire, for Employer

MARILYN PAGAN, Employee,
v.
HILTON WORLDWIDE, INC., Employer.

INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

Hearing No. 1380801

Mailed Date: July 10, 2013
July 8, 2013

DECISION ON PETITION FOR COMMUTATION OF BENEFITS

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause, by stipulation of the parties, came before a Workers' Compensation Hearing Officer on May 10, 2013, in a Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

CHRISTOPHER F. BAUM
Workers' Compensation Hearing Officer

APPEARANCES:

Matthew M. Bartkowski, Attorney for the Employee

Theodore J. Segletes, III, Attorney for the Employer

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NATURE AND STAGE OF THE PROCEEDINGS

Marilyn Pagan ("Claimant") was injured on January 24, 2011, while she was working for Hilton Worldwide, Inc. ("Employer"). Injuries to the left ankle, low back and left knee have been recognized as compensable. Claimant received compensation for a limited period of total disability, which was terminated by agreement of the parties. This stipulated termination order was signed on October 1, 2012, and was made effective the date of filing of Employer's termination petition (January 26, 2012). The parties represent that Claimant's weekly wage at the time of injury was \$469.72, with a corresponding compensation rate of \$313.15 per week.¹

On October 15, 2012, Employer filed a Petition for Commutation seeking to compel the commutation of Claimant's entitlement to all workers' compensation benefits related to the January 24, 2011 work accident. Claimant opposes this forced commutation.

A hearing was held on Employer's petition on May 10, 2013. The parties stipulated that this case could be heard and decided by a Workers' Compensation Hearing Officer, in accordance with title 19, section 2301B(a)(4) of the Delaware Code. When hearing a case by stipulation, the Hearing Officer stands in the position of the Industrial Accident Board. *See* DEL. CODE ANN. tit. 19, § 2301B(a)(6). This is the decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant testified that, in January of 2011, she was working for Employer at the Concord Pike Doubletree hotel. Her job title was "server" and she worked as a bartender and a waitress. She also performed supervisory tasks when no manager was present. On January 24, 2011, she slipped and fell on some black ice as she went out to the parking lot to try to return an item to a departing customer. She hurt her ankle, knee and low back, all on the left side. She was taken to

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the emergency room, where the initial focus was on her knee and ankle. She returned to work around April of 2011 and just handled the cash register and closed out. Claimant's memory is that she only worked a few hours and could not tolerate it so, after a day or two, she went back out of work. She thinks that, at some point, she made another attempted return to work, but she cannot recall when that was.

Claimant stated that she went to physical therapy, but it was not helpful. Eventually, she had an MRI done of her low back and, after that MRI, the physical therapy stopped. An EMG was tried, but the first attempt had to be stopped because of bruising caused during the administration of the test. A successful EMG was conducted in February of 2012. A functional capacity evaluation ("FCE") was also done in 2012. She had to do step-climbing, lifting and bending. She walked out of that test in tears and her back was "killing" her.

Claimant stated that she saw Dr. Bruce Katz for her low back.² In 2012, she saw him roughly every four weeks. Following the FCE, Dr. Katz sent her to a pain management doctor who prescribed Percocet. She took it up to four times per day. She filled the prescription two or three times, after which the prescription stopped. Claimant stated that she has had other MRIs done and received an epidural injection, which just aggravated her condition. Dr. Katz also wanted an MRI of the thoracic spine in connection with the work accident, but he was unable to get approval from the insurance carrier.

Claimant confirmed that during 2012 she moved from Wilmington to North Philadelphia. She does not see doctors in that area for this work accident and just commutes down to Wilmington to see her doctors here. Dr. Katz has released her to return to work in a light-duty capacity.

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Claimant agreed that she had been involved in another accident back in 2007 when she sustained a strain of some kind, although she cannot recall whether it was to the neck or the back. She received some right-sided injections and had no further problems from that.

Claimant acknowledged that she was also involved in a motor vehicle accident in June of 2012. Her vehicle was rear-ended in Philadelphia. She went to the emergency room with complaints to her low back, neck and arms. The low back complaints were more in the middle and right side of the back, although Claimant agrees that the 2012 accident also temporarily increased her left-sided low back pain. She received physical therapy for these injuries until September or October of 2012. It did not help. She was sent to an orthopedic doctor in Philadelphia.³ She has been taken back out of work because of that motor vehicle accident. MRI and EMG testing was done of her right shoulder and cervical and lumbar spine. She has been referred to a pain management doctor and she is currently looking for one in the Philadelphia area. The only medications she is currently taking are Motrin and Flexeril, prescribed by Claimant's Philadelphia doctor.

Claimant stated that she has not yet been compensated for permanent impairment in connection with her 2011 work accident. Dr. Katz has never released her without restrictions, nor has he suggested that she needs no further medical treatment.

Kevin K. Peak testified that he performed surveillance of Claimant in March of 2012. He performed surveillance of her on two days. The first day, he did not see her at all. On the other day, he witnessed her leaving a building, getting into a vehicle and driving to a Delaware

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residence. He did not see her using a cane. He believes that he saw her putting plastic shopping bags into the vehicle, opening a rear hatchback.

Mary Ann Shelli Palmer, a senior vocational case manager, prepared a labor market survey of jobs available to a person with Claimant's educational and vocational background and with physical restrictions on the back. Claimant is a high school graduate with light duty restrictions. She is

bilingual and has worked as a waitress and bartender. She also once did telemarketing and was a barber and manager of New Millennium Cuts. Ms. Palmer believes that, at the time of the survey, Claimant was still living in Wilmington.

The initial survey was done in August of 2012 and identified twenty sedentary/light-duty jobs that paid, on average, \$488.92 per week, assuming full-time work. This would be slightly in excess of what she was being paid by Employer. Ms. Palmer did not know that Claimant had moved to Philadelphia and she agreed that the unemployment rate in Delaware is less than the national average, but the labor market has improved since the survey was done in August of 2012 and, in any event, Claimant could commute from Philadelphia to northern Delaware for employment.

Dr. Andrew J. Gelman testified by deposition on behalf of Employer.⁴ He has evaluated Claimant on multiple occasions. Dr. Gelman first examined Claimant on December 8, 2011.⁵ He was aware that she had slipped on some ice. Dr. Gelman found Claimant evasive in providing him with a medical history. The doctor thought it clear that she had sustained a left knee contusion in January of 2011, which resolved. A left knee MRI ruled out any internal structural damage. The records reflect that she did receive treatment for low back and left leg

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symptoms as well. A December 2011 MRI showed disk protrusions at L1-2, L3-4 and L4-5. There had been two earlier MRIs that had shown the same findings.⁶ Dr. Gelman found it difficult to correlate Claimant's complaints with the medical records and MRI results. The MRI changes cannot be dated. At the time, Claimant had not been able to tolerate EMG testing, which might have been helpful. Dr. Gelman also thought that a CT myelogram should be done. Because of this, at the time (December 2011), Dr. Gelman found it difficult to speak regarding the low back complaints. Some things on examination did not line up with a specific localized area of pathology. Even accepting the low back complaints, he thought that Claimant could work in a sedentary or light-duty capacity.

Dr. Gelman saw Claimant a second time on June 29, 2012, which followed a motor vehicle accident Claimant was involved in on June 2, 2012. As a result of that motor vehicle accident, Claimant sought further treatment to her neck and low back. On June 29, she continued with low back and left leg complaints, but had no active problems with the left knee or ankle. Dr. Gelman viewed surveillance of Claimant and felt that Claimant moved better on that than in his presence.⁷ This made him question how much of her complaints were organic in nature and how much were generated by

secondary gain motives.⁸ He still thought that Claimant should have an EMG and a CT myelogram.⁹

Dr. Gelman examined Claimant again on April 17, 2013. Claimant continued with low back and left leg complaints. She separated out other musculoskeletal problems (neck, right arm,

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right leg) that she attributed to the 2012 motor vehicle accident. Dr. Gelman still had difficulty separating out true musculoskeletal pathology from non-organic exaggeration or magnification. There were inconsistencies on examination and Claimant engaged in facial grimacing that the doctor felt was exaggerated. He was asked to render an opinion as to a degree of permanent impairment for Claimant's lumbar spine based on the information that he had and he rated Claimant with a three percent impairment, although he could not say whether that was attributable to the work accident because she might have had a ratable impairment even prior to the work accident.¹⁰ He continued to believe that she was capable of working on a full-time basis in at least a light duty capacity.

Dr. Gelman opined that Claimant needed no further medical care for the left knee and ankle. With regard to the low back, more testing (including psychological testing) needs to be done to sort out whether there is really anything wrong with her.

Dr. Gelman observed that, in general, Delaware's Health Care Practice Guidelines encourage an injured worker's return to work as being therapeutic with appropriate accommodations or restrictions. In his mind, from a psychological perspective, Claimant also needs to resolve the legal ramifications of her work accident and the subsequent motor vehicle accident to resolve questions of secondary gain.

Dr. Bruce E. Katz, an orthopedic surgeon, testified by deposition on behalf of Claimant. He began to provide treatment to Claimant on February 24, 2011.

Dr. Katz explained that Claimant had been seeing Dr. Steele primarily for her left knee injury connected with a January 2011 work accident. Dr. Steele referred her to Dr. Katz for back and leg issues. Immediately following the work accident, Claimant had left knee, ankle and back

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pain. Claimant stated that she had previously had some back problems in 2007, but no symptoms prior to the 2011 fall at work. After examination, Dr.

Katz gave a diagnosis of lumbosacral sprain/strain. Physical therapy was prescribed and the doctor suggested an MRI. In March, Claimant reported that her pain was increasing.

Dr. Katz stated that an MRI was taken on April 5, 2011. There was a small right disk protrusion at L1-2 and small left bulges at L3-4 and L4-5. L5-S1 was normal. Epidural injections were recommended but those provided no relief. In June of 2011, Dr. Katz ordered an FCE because Claimant was anxious to return to work. The FCE indicated that Claimant could perform light duty work up to eight hours per day. However, in July, Dr. Katz noted that the FCE had significantly aggravated Claimant's symptoms, so another MRI scan was requested. A July 15, 2011 MRI showed subtle enlargement of the L1-2 protrusion, disk protrusions at L3-4 and L4-5, as well as an annular fissure at T12-L1. In August, Dr. Katz opined that Claimant could try to return to work within the limits suggested by the FCE. A third MRI was taken in December of 2011. According to the report, all the findings were stable or unchanged from the July MRI.

Dr. Katz stated that, in December of 2011, he wanted Claimant to see a neurologist because of weakness Claimant was having in her leg (specifically weakness in the left foot, knee and hip). This resulted in an EMG being done, which identified a chronic left L4-5 radiculopathy. This finding did not explain all of Claimant's complaints. The weakness and findings on the MRI did not quite match. In March of 2012, Dr. Katz recommended an MRI of the thoracic spine because there was not enough pathology in the low back for all the symptoms that Claimant was complaining about. However, they were unable to have that done.

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Dr. Katz stated that, on May 29, 2012, Claimant had pain in her left buttock. She rated her pain as a six on a ten-point scale. She had back pain as well. She reported that she could not stand or sit for any of period of time. Claimant was then involved in a motor vehicle accident in June of 2012. Claimant treated with physicians in Pennsylvania with regard to that accident, but Dr. Katz continued to treat her for the work-related injury. With regard to those complaints, Claimant's symptoms remained relatively unchanged with complaints of back pain and left leg weakness.¹¹ Dr. Katz stated that the reason for Claimant's symptoms remained unclear, which is why he believes that more diagnostic testing should be done, such as a thoracic MRI. She has had flare-ups of her condition, such as after the FCE and the physical therapy, and she likely will continue to have these.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Commutation

In this case, Employer seeks an order compelling Claimant to accept a full commutation of benefits. Certainly, the Board has the authority to commute workers' compensation benefits. This authority, however, is limited by statute.

Such commutation may be allowed if it appears that it will be for the best interest of the employee or the dependents of the deceased employee, or that it will avoid undue expense or hardship to either party, or that such employee or dependent has removed or is about to remove from the United States or that the employer has sold or otherwise disposed of the whole or the greater part of the injured employee's or the dependents of a deceased employee's business or assets.

DEL. CODE ANN. tit. 19, § 2358. Delaware case law has observed that the primary purpose of the Workers' Compensation Act ("the Act") is to provide an injured employee with periodical

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payments "to preclude any possibility of an imprudent employee . . . wasting the means provided for his support and thereby becoming a charge on society." *Molitor v. Wilder*, 195 A.2d 549, 552 (Del. Super.), *aff'd*, 196 A.2d 214 (Del. 1963). As such, commutations (particularly when one of the parties opposes it) are not favored and should only be granted after a showing of "unusual circumstances" where the reasons are "sound and convincing." *Molitor*, 195 A.2d at 552. As always, the burden of proof rests with the petitioner. *D&M Contractors, Inc. v. Forlano*, 283 A.2d 843, 846 (Del. Super. 1971); DEL. CODE ANN. tit. 29, § 10125(c). I am satisfied that Employer has not met its burden of proof.

While Section 2358 lists several bases for when a commutation might be deemed appropriate, only two of them are potentially applicable in the current case: (1) if the commutation is deemed to be in Claimant's best interest, or (2) if the commutation will avoid undue expense or hardship to either party. "Whether commutation is in the best interest of the claimant or will avoid undue hardship and expense to either party depends on the totality of circumstances in each case." *General Foods Corp. v. Meekins*, Del. Super., C.A. No. 86A-AU-1, Ridgely, J., 1988 WL 15335 at *2 (February 11, 1988).

While the totality of the circumstances is to be considered, there are certain common factors that should be reviewed. One factor is whether the

claimant's condition is expected to change significantly for the better or the worse. *See Kandravi v. Beebe Hospital*, Del. Super., C.A. No. 94A-10-005, Ridgely, J., 1995 WL 411736 at *4 (May 26, 1995). This can include consideration of the amount of psychological stress or agitation caused by litigation. However, general allegations of psychological benefit unsupported by psychological testing or evidence as to actual suffering of mental anguish due to the legal proceedings are not sufficient to support a commutation. *See Kandravi*, 1995 WL 411736 at * 4. "[D]eciding whether commutation is in a

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claimant's best interest based upon psychological benefit involves a very case specific judgment." *Boney-Nearhos v. Southland Corporation*, Del. Super., C.A. No. 001-07-005, Vaughn, J., 2001 WL 1482937 at * 3 (July 31, 2001).

Another common factor that should be considered in deciding whether to mandate a commutation is whether there would be financial hardship to the claimant if the commutation is not granted. "Where the claimant is not experiencing financial hardship which would warrant commutation on that grounds, the IAB is under no obligation to grant commutation based upon an economic analysis showing that she will receive more money overall through commutation than through periodic payments." *Boney-Nearhos*, 2001 WL 1482937 at *3. Related to this, the existence (or lack thereof) of a detailed investment plan for the commutation proceeds should be considered. *Meekins*, 1988 WL 15335 at *2. However, "in the absence of financial need, a possibility of increased income through an investment plan is not a legally sufficient reason for a lump sum payment." *Kandravi*, 1995 WL 411736 at *5.

This review of common considerations highlights the major problems with Employer's petition. First, Claimant opposes it. While not case dispositive, in any analysis of whether a commutation is in a claimant's best interest, whether the claimant *wants* it needs to be given some weight. Because commutations are not favored absent sound and convincing reasons, the fact that Claimant opposes it weighs against the granting of a commutation.

Second, I note that there is no evidence that Claimant is suffering any financial hardship that would support the need for a lump-sum commutation. *See Boney-Nearhos*, 2001 WL 1482937 at *3. This weighs against allowing the commutation.

Third, and perhaps most importantly, there is the issue of Claimant's medical condition. In this case, both medical experts testified that they needed further information to determine

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what is actually wrong with Claimant. Dr. Gelman mentioned a couple of times that he did not have records from Claimant's pre-2011 motor vehicle accident. Thus, he was uncertain what condition Claimant's lumbar spine was in prior to the work accident. In addition, he had not previously seen Dr. Robinson's report despite the fact that Dr. Robinson had examined Claimant at Employer's request. Dr. Gelman also did not see the EMG results showing a chronic radiculopathy until the deposition. He also did not have records from Claimant's Philadelphia doctor connected to the 2012 motor vehicle accident. Thus, Dr. Gelman's opinion concerning Claimant's condition was seriously restricted by not having pertinent medical records.

In addition, after both of his first two evaluations of Claimant, Dr. Gelman suggested that a CT myelogram be done of the low back to provide him with more information concerning the nature of Claimant's back condition. It appears that that testing has never been done. Similarly, Dr. Katz opined that Claimant's known low back pathology was not sufficient to explain all the symptoms that Claimant complained about. Accordingly, he wants an MRI of the thoracic spine. That testing has also not been done. Dr. Gelman further speculated that there may be a non-organic psychological factor in play and he suggested psychological testing to try to clarify the extent of actual pathology Claimant has (if any).¹² Thus, both medical experts want additional medical testing to help formulate their respective opinions concerning the nature of Claimant's condition.

This uncertainty as to Claimant's medical condition weighs heavily against a finding that a commutation is in her best interest. A commutation, if granted, would result in Claimant no

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longer having her related medical treatment covered under the Act. When the medical evidence is unanimous that Claimant needs further testing and that the source of Claimant's pain complaints remains obscure, it simply cannot be said that ending her right to reasonable and necessary medical treatment under the Act is in her best interest.

On a related point, because the amount of future treatment and testing is obscure, there is no rational basis upon which a commutation sum could be calculated. At the hearing, Claimant noted that, while Employer seeks an

order compelling a commutation of benefits, Employer has not proposed any definite lump sum for that commutation. Employer suggested that the Board (or, in this case, the Hearing Officer) could calculate that sum. Such a calculation, however, simply cannot reasonably be made when there is an admitted and undisputed ambiguity as to the amount of future benefits to which Claimant might be entitled.

It is true that there is no dispute that Claimant is not currently totally disabled and apparently she is not receiving partial disability benefits.¹³ Dr. Gelman opined that Claimant has a degree of permanent impairment. Dr. Katz had not considered that issue. Because he is still trying to uncover the source of Claimant's symptoms, it is not surprising that he has not done such a rating. Permanent impairment should not be calculated until the injured worker has reached maximum medical improvement. Knowing what is wrong with a patient is surely a prerequisite for deciding whether that patient has reached maximum improvement. In this case, the uncertainty concerning the amount of future benefits is connected to the uncertainty of Claimant's actual pathology. This is where both medical experts agree that further testing is needed. Until that testing is done, it is unclear what further treatment Claimant may need.

Taking all these factors into account, I find that the evidence submitted fails to establish that, more likely than not, a commutation would be in Claimant's best interest at this time.

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Employer argues that, even if the commutation is not shown to be in Claimant's best interest, a commutation should be imposed on her because it would allow Employer to avoid undue expense or hardship. Employer argues that it is burdensome to it to keep this claim open when the nature of the pathology is ambiguous and there is the complicating factor of other motor vehicle accidents (both prior to and after the work accident).

Certainly the ambiguity of Claimant's pathology and the evidence of other accidents complicate litigation in this case. That does not mean that the expense to Employer to litigate these issues constitutes an "undue" expense. This is not a situation where Claimant's claim for benefits is completely groundless. Claimant had a recognized work accident. If Employer disputes the causal link between that known accident and her current medical condition, then the cost and expense of investigating that medical condition are warranted, not "undue."

This is also not a case where Claimant has been overly litigious. If a claimant keeps filing baseless petitions that an employer needs to defend, it

might be said that a forced commutation was warranted to protect the employer from that undue expense. In this case, though, the Board's file reflects that the only formal petitions that have ever been filed in this case (a petition for termination of benefits and a petition for commutation of benefits) were both filed *by Employer*. Claimant has merely defended against these petitions, as is her legal right. There is no basis from this to conclude that Employer has sustained any "undue" expense in connection with Claimant's case.

Accordingly, I find that Employer has not met its burden of proof of establishing that a commutation of benefits is warranted in this case. The petition is denied.

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Overpayment: Employer also alleges that it has "overpaid" benefits for Claimant. Even if true, this would in no way mandate a commutation of all future benefits. At most, if established, there might be a claim for a credit against those future benefits. In any event, there is insufficient evidence in the record to establish the existence of a true "overpayment."

The claim of overpayment is because there is some evidence that, during her period of total disability, Claimant was paid full wages in lieu of the workers' compensation rate. The stipulation filed for this hearing alleges that Claimant's weekly wage at the time of injury was \$469.72, with a corresponding compensation rate of \$313.15 per week. However, there is no actual Agreement as to Compensation in the Board's file and I have no direct evidence (such as pay stubs) as to what Claimant was actually paid.¹⁴ The termination order that was entered back in 2012 recites that Claimant's "wage replacement benefits" were paid at the rate of \$469.72 per week. Thus, the wording in the termination order compared to the wording in the stipulation would suggest that Claimant was paid her full wages in lieu of workers' compensation.¹⁵ Contrary to this, however, there is also evidence in the Board's file (namely information received from the insurance carrier for purposes of setting payments from the Workers' Compensation Fund during the pendency of the termination petition) that states that Claimant was actually only being paid workers' compensation benefits at the rate of \$234.86 per week (*i.e.*, that \$469.72 was the amount of the *biweekly* checks, not a weekly amount).¹⁶ To add to this confusion, by letter dated May 30, 2012, Claimant's counsel alleged that Claimant's weekly wage was \$704.58 (with

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a compensation rate of \$469.72) but, on August 7, 2012, Employer's counsel submitted a pre-trial memorandum that alleged that Claimant's weekly wage was \$359.29 (with a compensation rate of \$234.86).

There is, therefore, conflicting evidence in the Board's file concerning both what Claimant's weekly wage was at the time of the accident and concerning what her compensation rate was. The parties failed to file a signed Agreement as to Compensation when benefits were being paid, which might have formally established these rates. The bottom line for the current petition, though, is that I do not have a sufficient basis to conclude that there actually was an overpayment, much less a basis to grant a commutation based on that alleged overpayment.

Attorney's Fee and Medical Witness Fees

A claimant who is awarded compensation is generally entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller." DEL. CODE ANN. tit. 19, § 2320. At the current time, the maximum based on Delaware's average weekly wage calculates to \$9,911.90. The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55 (Del. 1973). Less than the maximum fee may be awarded and consideration of the *Cox* factors does not prevent the granting of a nominal or minimal fee in an appropriate case, so long as some fee is awarded. *See Heil v. Nationwide Mutual Insurance Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96A-01-005, Cooch, J., 1996 WL 527213 at *6 (August 9, 1996). A "reasonable" fee does not generally mean a generous fee. *See Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966). Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information

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to make the requisite calculation. By operation of law, the amount of attorney's fees awarded by the Board applies as an offset to fees that would otherwise be charged to Claimant under the fee agreement between Claimant and Claimant's attorney. DEL. CODE ANN. tit. 19, § 2320(10)a.

In this case, Claimant has successfully defended against a commutation of benefits and, therefore, kept open her right to bring further claims connected to the work accident. Claimant's counsel submitted an affidavit stating that he spent fifteen hours in preparing for this hearing, which itself lasted slightly over three hours. Claimant's counsel was admitted to the

Delaware Bar in 1994 and he is experienced in workers' compensation law, a specialized area of litigation. His initial contact with Claimant was in February of 2011, so Claimant has been represented for over two years. This case was somewhat unusual. There are few examples of cases of an employer trying to force a commutation onto an unwilling claimant. Having said that, the matter was of only average complexity. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances. There is no evidence that accepting Claimant's case actually precluded counsel from accepting other clients, although naturally he could not work on other matters at the same time as he was devoting time to this case nor would he have been able to represent employer or its carrier if employment had been offered. Counsel's fee arrangement with Claimant is on a one-third contingency basis but he notes that his normal hourly rate for trial work is \$275.00. Counsel does not expect a fee from any other source. There is no evidence that the employer lacks the ability to pay a fee.

Taking into consideration the fees customarily charged in this locality for such services as were rendered by Claimant's counsel and the factors set forth above, I find that a fee in the amount of \$5,000.00 is reasonable in this case and does not exceed thirty percent of the value of the award once one takes into account the value of non-speculative future monetary and non-

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monetary benefits arising from this decision. *See Pugh v. Wal-Mart Stores, Inc.*, 945 A.2d 588, 591-92 (Del. 2008).

Medical witness fees for testimony on behalf of Claimant are also awarded to Claimant, in accordance with title 19, section 2322(e) of the Delaware Code.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Employer's petition is denied. Claimant is awarded the payment of a reasonable attorney's fee and payment of her medical witness fees.

IT IS SO ORDERED THIS 8th DAY OF JULY, 2013.

INDUSTRIAL ACCIDENT BOARD

/s/_____

CHRISTOPHER F.
Workers' Compensation Hearing Officer

BAUM

Mailed Date: 7-10-13

**Pagan v. Hilton Worldwide, Inc. (Delaware Workers
Compensation Decisions (2013))**

/s/ _____
OWC Staff

Notes:

^{1.} There is some question whether, in fact, Claimant continued to be paid her full wages in lieu of the workers' compensation rate. This will be discussed later in this decision.

^{2.} She also saw Dr. Robert Steele for her knee and ankle injuries. Claimant agrees that her ankle is fine now. The knee is "okay" although sometimes it feels "funny."

^{3.} There is some confusion over the name of this doctor. In his deposition, Dr. Gelman refers to him as "Dr. Spanick." At the hearing, I was unable to get a correct spelling from the parties. I have also been unable to locate a "Dr. Spanick" in the Philadelphia region. Not having a proper name for him, for purposes of this decision he shall simply be referred to as "Claimant's Philadelphia doctor."

^{4.} Employer provided both a written and video copy of the deposition. I viewed the video deposition.

^{5.} On cross-examination, there was discussion of the fact that Claimant had previously been examined on August 26, 2011, by Dr. Andrew Robinson on behalf of Employer. Dr. Gelman had not seen the report from that prior examination. Dr. Robinson had opined that, at least in August of 2011, Claimant could not return to even sedentary work.

^{6.} Although Dr. Gelman did not mention it during his deposition, from the deposition of Dr. Katz it is clear that all three of these MRIs post-date the January 2011 work accident.

^{7.} Although Dr. Gelman did not state this during his deposition, the testimony of Mr. Peak makes it clear that the surveillance was done before Claimant's June 2, 2012 motor vehicle accident.

^{8.} While referencing potential monetary gain as a secondary gain motive, Dr. Gelman clarified that, in June of 2012, he did not ask Claimant any questions about her legal situation or whether she had filed any claims for the motor vehicle accident. He focused only on the musculoskeletal evaluation.

**Pagan v. Hilton Worldwide, Inc. (Delaware Workers
Compensation Decisions (2013))**

9. Dr. Gelman had been unaware that a successful EMG was done on February 23, 2012. Reviewing the report at the deposition, the doctor agreed that it showed a chronic left L4-5 radiculopathy.

10. Having said this, on cross-examination Dr. Gelman admitted that, while he understood that there was a prior motor vehicle accident, he was not aware of Claimant having any low back symptomatology in the months leading up to January of 2011.

11. Dr. Katz agreed that Claimant did have a temporary exacerbation of her low back pain after the motor vehicle accident, but the level of the symptoms then returned to what they had been prior to that accident.

12. Employer argues that Dr. Gelman stated that a return to work would be psychologically beneficial to Claimant. The point of this argument in the current context is obscure. Claimant's total disability status was voluntarily terminated over a year ago. She has been returned to work status by her own doctor. A commutation would not affect this. Dr. Gelman suggested that, in general, not engaging in litigation would have a psychological benefit for Claimant. However, there is no evidence that Claimant is suffering any undue psychological agitation as a result of litigation. A general unsupported statement of alleged psychological benefit is not sufficient to support a commutation. *See Kandravi*, 1995 WL 411736 at * 4.

13. Certainly there is no Agreement as to Compensation for partial disability in the Board's file.

14. By failing to file a signed Agreement as to Compensation for benefits, the parties are in violation of title 19, section 2344 of the Delaware Code.

15. This would not be completely unusual. There are some employers that, because of union agreements or employer policy, agree to pay full wages instead of the workers' compensation benefits for a time following a work injury. Thus, even if Claimant were paid her full wages, that does not necessarily mean that that payment was in error.

16. By law, the Fund--and not the carrier--paid Claimant's total disability benefits from February 29, 2012, through September 7, 2012. *See* DEL. CODE ANN. tit. 19, § 2347. Because the parties agreed to the termination as of the date of the filing of the termination petition, Employer did not need to reimburse the Fund for the interim benefits that were paid on its behalf.

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

PHYLLIS SCARBOROUGH,)	
)	
Employee,)	
)	
v.	)	Hearing No. 1222466
)	
MEAD WESTVACO CORPORATION,)	
)	
Employer.)	

ORDER

This matter came before a Hearing Officer on a request by the parties for a commutation of benefits. Commutation of benefits may be granted provided that the Board is able to conclude that such commutation is in the best interest of the claimant or will avoid undue expense or hardship to either party. *See* DEL. CODE ANN. tit. 19, § 2358. The commutation in question relates to a work accident suffered by Phyllis Scarborough (“Claimant”) on September 24, 2002, while she was working for Mead Westvaco Corporation (“Mead”).

The Petition for Commutation that was filed indicates that the commutation is to be for Section 2325 partial disability benefits only. Paragraph 4 in the submitted “Stipulation & Order for Commutation” recites that “the parties have agreed to commute partial disability benefits for 100 weeks,” which would seem (at least potentially) a little more limited than what the petition recites but is not necessarily incorrect.¹ However, on the next page of the submitted form of

¹ Although it is stated in paragraph 4 that the commutation is for 100 weeks of partial disability at the rate of \$392.92, the very next paragraph in the form of order provides for Mead to have a credit if there is a recurrence of total disability for *300 weeks* (not 100) after the date of the Order, which credit is only in the amount of \$69.78 per week (a total potential credit of \$20,934.00). While it is not, strictly speaking, illegal to ask for a potential credit of \$20,934.00 against a commutation amount of \$39,292.00, nor is it necessarily wrong to ask for the credit to be assessed over 300 weeks when the parties are only commuting 100 weeks of partial disability benefits, it is undeniably an odd provision.

order, it is then recited in paragraph "a" that the parties request the Board or Hearing Officer to "approve the global commutation of all benefits, including medical." This provision goes against what was stated in the petition and what was stated in paragraph 4. Furthermore, paragraph 4 also contains a direction to "see attached Ex. A." That Exhibit adds to the confusion by stating that the commutation amount of \$39,292.00 "represents past, present and future worker's compensation benefits *for permanency* and wage claims." (Emphasis added.)

Accordingly, depending on what part of the submitted documents one reads, this commutation is either just for partial disability benefits alone (the petition), just for 100 weeks of partial disability benefits alone (paragraph 4), a global commutation of all benefits including medical (paragraph "a") or a commutation of permanency and wage claims (Exhibit A). Claimant's affidavit only supports the first option (partial disability benefits only).

Because of the multiple inconsistencies contained in the submitted documents, the commutation is denied. This denial is without prejudice to the parties re-filing corrected documents that clearly and unambiguously set forth the agreement of the parties as to what is being commuted and what the terms of that commutation may be.

IT IS SO ORDERED this 2d day of April, 2007.

INDUSTRIAL ACCIDENT BOARD

1/5/
CHRISTOPHER F. BAUM
Workers' Compensation Hearing Officer

Mailed Date:

OWC Staff

Jeffrey S. Friedman, Esquire, for Claimant
Christian G. McGarry, Esquire, for Mead

JAMES E. WILLIAMS, SR., Employee,
v.
TARGET, Employer.

INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

Hearing No. 1245696

Mailed Date: June 25, 2014
June 24, 2014

DECISION ON PETITION FOR COMMUTATION OF BENEFITS

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on June 12, 2014, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

LOWELL L. GROUNDLAND

MARILYN J. DOTO

Christopher F. Baum, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

James E. Williams, Sr., Claimant *Pro Se*

Christian G. McGarry, Attorney for the Employer

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NATURE AND STAGE OF THE PROCEEDINGS

James E. Williams, Sr. ("Claimant") was injured in a compensable work accident on December 7, 2003, while he was working for Target ("Employer"). The acknowledged injury was to the low back. In 2008, the parties entered into a commutation of benefits for \$30,000.00. Excluded from that commutation was medical expenses for treatment to the low back. *Williams v. Target*, Del. IAB, Hearing No. 1245696 (May 8, 2008)("Stipulation and Order of Commutation"). At the same time, an order was entered dismissing a pending Petition to Determine Additional Compensation Due stating that "Claimant now agrees to stipulate that the neck/cervical spine and shoulders are clearly unrelated to the December 7,

2003 work event." *Williams v. Target*, Del. IAB, Hearing No. 1245696 (May 8, 2008)("Order of Dismissal With Prejudice").

On January 6, 2014, Claimant filed a Petition for Commutation seeking to compel the commutation of his right to payment of medical expenses for treatment of the low back. Employer disputes that a commutation of medical benefits is appropriate at this time.

A hearing was held on Claimant's petition on June 12, 2014. This is the decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant testified that he has been having difficulty getting his medications since February of 2013. He has called the insurance carrier and left messages for the adjuster, but has not been able to get a response. Her voicemail was not working properly and he cannot reach her. His doctor has also failed to get through.

Claimant stated that he does not have a current doctor for the work injury. He previously saw Dr. David Mattingly, but that doctor left the practice in February of 2013. Claimant has

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been trying to find another doctor since then. He does have a family doctor who prescribed Norco but is unable to prescribe a heavier medication than that.¹ The family doctor wanted to send Claimant to a pain management doctor but, again, Claimant has been unable to reach the adjuster on his account to get approval for such a doctor. In addition, Claimant lives in Ambler, Pennsylvania and the doctors in Pennsylvania are not willing to handle a workers' compensation case. Claimant feels that it is too burdensome to come to Delaware for medical care.

Claimant stated that he does receive \$1,100 per month in Social Security disability payments.

Claimant mentioned that he is tired of dealing with the workers' compensation insurance carrier and wants them out of his life. He states that he is suffering physically, mentally and emotionally. He feels that Employer is not taking care of him and he is tired of the fight.²

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Commutation

In this case, Claimant seeks to force a commutation of his remaining workers' compensation benefits, namely his right to have medical treatment paid. The Board has the authority to commute workers' compensation benefits. This authority, however, is limited by statute.

Such commutation may be allowed if it appears that it will be for the best interest of the employee or the dependents of the deceased employee, or that it will avoid undue expense or hardship to either party, or that such employee or dependent has removed or is about to remove from the United States or that the employer has sold or otherwise disposed of the whole or the greater part of the injured

Page 4

employee's or the dependents of a deceased employee's business or assets.

DEL. CODE ANN. tit. 19, § 2358, Delaware case law has observed that the primary purpose of the Workers' Compensation Act ("the Act") is to provide an injured employee with periodical payments "to preclude any possibility of an imprudent employee . . . wasting the means provided for his support and thereby becoming a charge on society." *Molitor v. Wilder*, 195 A.2d 549, 552 (Del. Super.), *aff'd*, 196 A.2d 214 (Del. 1963). As such, commutations (particularly when one of the parties opposes it) are not favored and should only be granted after a showing of "unusual circumstances" where the reasons are "sound and convincing." *Molitor*, 195 A.2d at 552. As always, the burden of proof rests with the petitioner. *D&M Contractors, Inc. v. Forlano*, 283 A.2d 843, 846 (Del. Super. 1971); DEL. CODE ANN. tit. 29, § 10125(c).

While Section 2358 lists several bases for when a commutation might be deemed appropriate, only two of them are potentially applicable in the current case: (1) if the commutation is deemed to be in Claimant's best interest, or (2) if the commutation will avoid undue expense or hardship to either party. "Whether commutation is in the best interest of the claimant or will avoid undue hardship and expense to either party depends on the totality of circumstances in each case." *General Foods Corp. v. Meekins*, Del. Super., C.A. No. 86A-AU-1, Ridgely, J., 1988 WL 15335 at *2 (February 11, 1988).

While the totality of the circumstances is to be considered, there are certain common factors that should be reviewed. One factor is whether the claimant's condition is expected to change significantly for the better or the worse. *See Kandravi v. Beebe Hospital*, Del. Super., C.A. No. 94A-10-005, Ridgely, J., 1995 WL 411736 at *4 (May 26, 1995). This can include

consideration of the amount of psychological stress or agitation caused by litigation. However, general allegations of psychological benefit unsupported by psychological testing or evidence as

Page 5

to actual suffering of mental anguish due to the legal proceedings are not sufficient to support a commutation. *See Kandravi*, 1995 WL 411736 at * 4. "[D]eciding whether commutation is in a claimant's best interest based upon psychological benefit involves a very case specific judgment." *Boney-Nearhos v. Southland Corporation*, Del. Super., C.A. No. 001-07-005, Vaughn, J., 2001 WL 1482937 at * 3 (July 31, 2001).

Another common factor that should be considered in deciding whether to mandate a commutation is whether there would be financial hardship to the claimant if the commutation is not granted. "Where the claimant is not experiencing financial hardship which would warrant commutation on that grounds, the IAB is under no obligation to grant commutation based upon an economic analysis showing that she will receive more money overall through commutation than through periodic payments." *Boney-Nearhos*, 2001 WL 1482937 at *3. Related to this, the existence (or lack thereof) of a detailed investment plan for the commutation proceeds should be considered. *Meekins*, 1988 WL 15335 at *2. However, "in the absence of financial need, a possibility of increased income through an investment plan is not a legally sufficient reason for a lump sum payment." *Kandravi*, 1995 WL 411736 at *5.

From this review of common consideration, it is clear that Claimant's current petition lacks a sufficient evidentiary basis. As *Kandravi* indicates, having a clear understanding of Claimant's medical condition is necessary. This is particularly important in the current case. The only benefit to be commuted is medical expenses, yet the Board has been presented with no medical evidence as to what Claimant's expected future treatment will be or what his current condition is. The Board does not know what the expected annual costs of Claimant's related medical treatment is, nor what those costs would be over Claimant's life expectancy. The Board refuses to just take a guess as to what would be a sufficient sum to pay for Claimant's future

Page 6

medical treatment. The Board needs evidence to make that determination. No such evidence was presented. Because the amount of future treatment and testing is obscure, there is no rational basis upon which a commutation sum could be calculated.

Claimant did testify to a degree of psychological agitation caused by his dealings with the insurance carrier. However, Claimant only expressed his frustration. There was no formal psychological testing done. Absent such medical evidence, general allegations of receiving a psychological benefit from a commutation are insufficient to support a commutation. See *Kandravi*, 1995 WL 411736 at * 4.

Finally, there is the matter of Claimant's reason for wanting the commutation. Claimant states that he wants one because he has been unable to receive his medications and he is tired of dealing with the carrier. Employer's counsel, however, states that Employer is not opposed to Claimant seeking medical care and has not denied any request for ongoing medical care. The problem, according to Employer, is that no medical bills have been submitted. Claimant argues that that is because he no longer has a doctor for this injury and it is the doctors who submit the records. Claimant also denied that he has spoken to Employer's counsel although he has tried to reach the adjuster.³ It seems to the Board that this is not an undue hardship sufficient to justify a commutation. Rather, it is simply poor communication. If Claimant wants assistance from the carrier in locating another doctor or in having medical bills approved, and if he is unable to reach the adjuster, then the Board does not understand why he has not called or written to Employer's counsel. Nobody denies that Claimant was injured at work and that he likely needs ongoing medical treatment. The problem, it appears, is that Claimant is not making use of the means of communication available to him to have his bills paid. This is not a reason to commute all rights to having future medical treatment covered.

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All of these considerations weigh heavily against a finding that a commutation is in Claimant's best interest at this time.⁴

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Claimant's petition is denied.

IT IS SO ORDERED THIS 24th DAY OF JUNE, 2014.

INDUSTRIAL ACCIDENT BOARD

/s/ _____
LOWELL L. GROUNDLAND

/s/ _____
MARILYN J. DOTO

**Williams v. Target (Delaware Workers Compensation Decisions
(2014))**

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

/s/ _____

Mailed Date: 6-25-14

/s/ _____
OWC Staff

Notes:

^{1.} Norco is a pain medication combining acetaminophen and hydrocodone. Hydrocodone is an opioid pain medication.

^{2.} Claimant also mentioned his neck complaints but, as mentioned earlier, the Board's 2008 Order states that Claimant stipulated that the cervical complaints are unrelated to his 2003 work accident.

^{3.} Employer's counsel asserts that they have spoken on the phone.

^{4.} Employer's counsel observes that, because Claimant is receiving Social Security benefits, no commutation should be done without calculating a proper Medicare Set-Aside. The Board agrees that, if there is to be a commutation, a designated and properly administered Medicare Set-Aside account would be best if only to prevent Claimant from imprudently spending the funds set aside for his medical treatment. *See Molitor*, 195 A.2d at 552. However, because the factual basis is currently insufficient to justify any commutation, the issue of a Medicare Set-Aside account is moot at this time.

Quirky Permanent Impairments - IAB Consideration of Unscheduled Losses

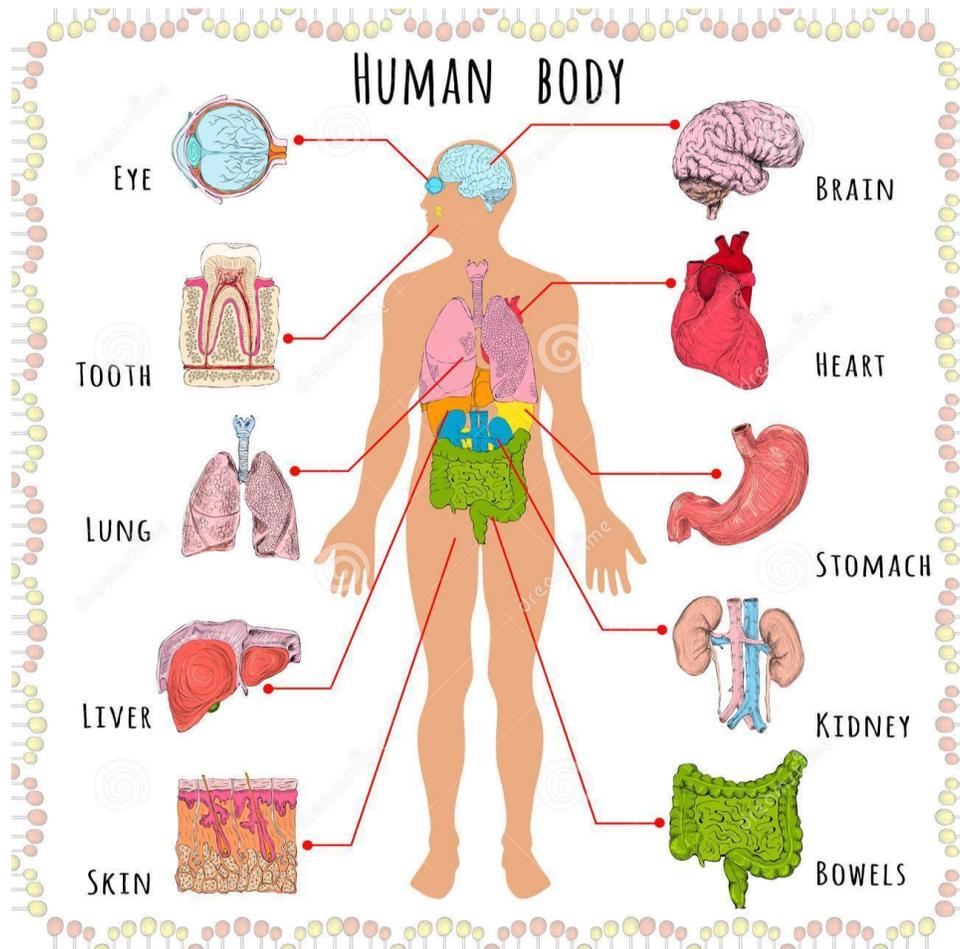
Maria Paris Newill, Esquire
Heckler & Frabizzio, P.A.

Cassandra F. Roberts, Esquire
Elzufon Austin & Mondell, P.A.

Walt F. Schmittinger, Esquire
Schmittinger & Rodriguez, P.A.

Quirky Permanent Impairments

IAB Consideration of Unscheduled Losses



Presented by:

Cassandra Faline Roberts, Esquire
Elzefon Austin & Mondell

Maria Paris Newill, Esquire
Heckler & Frabizzio

Walt F. Schmittinger, Esquire
Schmittinger & Rodriguez

I. Review of What Delaware Permanency Is Not

a. Not Whole Person

- i. 19 Del. C. section 2326 – attached**

b. No Pyramiding

- i. Nabb v. Haveg Industries, Inc., 265 A. 2d 320 (1969)– attached**

c. No “Just Pain” Alone

- i. Wilmington Fibre Specialty Company v. Rynders, 316 A. 2d 229 (1974) – attached**
- ii. Hibble v. Timko Brothers, IAB Hearing No. 954197, March 28, 1996 – attached**

d. No Formally Designated AMA Guidelines

- i. 6th Edition Exceptions – see attached**

e. No Compensation Rate “At Time Of The Accident”

- i. 19 Del. C. section 2326 – attached**

f. Not Apportioned

- i. Sewell v Delaware River & Bay Authority, Del. Super., No. 99A-07-003, Stokes, J., (Feb. 29, 2000) – attached**

g. Not Based on Future Events or Potential Outcomes

- i. Yvonne Short v. Blue Cross Blue Shield, IAB# 1141957 (11/3/04)**
- ii. Kim Williams v. United Distributors, IAB# 1320716 (5/14/10)**

h. Not About Work Capability

- i. Except RTW Heavy Duty as Relates to Basic Premise of “Loss of Use”**
 - a. Andrew Higgins. v. State of Delaware, IAB# 1351643 (9/25/14)**
 - b. Bernadette Johns v. State of Delaware, IAB# 1414414 (3/17/16)**

i. Not Usually Fixed Until 1-year post-accident or 1-year post-surgery

- i. Leonard Thomas v. City of Wilmington, IAB # 1477371 (5/18/22)**

II. Name That Unscheduled Permanent Impairment

a. Case Law Says...

b. Case Law Conflicted?

**The Knee Bone's
Connected
to the
Thigh Bone...**





2022 Delaware Code

Title 19 - Labor

Chapter 23. Workers' Compensation

Subchapter II. Payments for Injuries or Death and Incidental Benefits

§ 2326. Compensation for certain permanent injuries.

Universal Citation: 19 DE Code § 2326 (2022)

§ 2326. Compensation for certain permanent injuries.

(a) For all permanent injuries of the following classes, the compensation to be paid regardless of the earning power of the injured employee after the injury shall be as follows:

For the loss of a hand, $\frac{662}{3}$ percent of wages during 220 weeks;

For the loss of an arm, $\frac{662}{3}$ percent of wages during 250 weeks;

For the loss of a foot, $\frac{662}{3}$ percent of wages during 160 weeks;

For the loss of a leg, $\frac{662}{3}$ percent of wages during 250 weeks;

For the loss of 2 or more of such members, not constituting total disability, $\frac{662}{3}$ percent of wages during the aggregate of the period specified for each;

For the loss of a thumb, $\frac{662}{3}$ percent of wages during 75 weeks;

For the loss of a first finger, commonly called index finger, $\frac{662}{3}$ percent of wages during 50 weeks;

For the loss of a second finger, $\frac{662}{3}$ percent of wages during 40 weeks;

For the loss of a third finger, $\frac{662}{3}$ percent of wages during 30 weeks;

For the loss of a fourth finger, commonly called little finger, $\frac{662}{3}$ percent of wages during 20 weeks;

The loss of the first phalange of the thumb or any finger shall be considered to be equal to the loss of one half of such thumb or finger and compensation shall be for one half of the period, and compensation for the loss of one half of the first phalange shall be for one fourth of the period;

The loss of more phalanges than 1 shall be considered as the loss of the entire finger or thumb, provided, however, that in no case shall the amount received for more than 1 finger exceed the amount provided in this schedule for the loss of a hand;

The loss of 3 fingers or 2 fingers and a thumb of the same hand shall be considered as the loss of one half of the hand, and compensation shall be paid for such loss for a period of 110 weeks, or compensation shall be paid for the loss of 3 fingers or 2 fingers and a thumb of the same hand for the number of weeks stated in the above schedule for such a loss, whichever is greater;

For the loss of a great toe, $\frac{662}{3}$ percent of wages during 40 weeks;

For the loss of 1 of the toes, other than the great toe, $\frac{662}{3}$ percent of wages during 15 weeks;

The loss of the first phalange of any toe shall be considered to be equal to the loss of one half of such toe, and compensation shall be for one half of such period;

The loss of more phalanges than 1 shall be considered as the loss of the entire toe;

For the loss of an eye, $\frac{662}{3}$ percent of wages during 200 weeks;

For the loss of a fractional part of the vision of an eye, the compensation shall be for such percentage of the total number of weeks allowed for the total loss of the use of an eye under this section as the loss suffered bears to the total loss of an eye.

(b) Amputation to the ankle or any part of the foot, not including the toes, shall be considered as the equivalent of the loss of a foot. Amputation above the ankle shall be considered as the loss of a leg.

(c) Total loss of the use of a hand, arm, foot, leg or eye shall be considered as the equivalent of the loss of such hand, arm, foot, leg or eye.

(d) In all other cases of permanent injury of the classes specified in subsection (a) of this section, or when the usefulness of a member or any physical function is permanently impaired, the compensation shall bear such relation to the number of weeks stated in the schedule set forth in subsection (a) of this section as the disabilities bear to those produced by the injury named in the schedule.

(e) Unless the Board otherwise determines from the facts, the loss of both hands, or both arms, or both feet, or both legs, or both eyes, or an injury to the spine resulting in permanent and complete paralysis of both legs, or both arms, or 1 leg and 1 arm, or an injury to the skull resulting in incurable imbecility or insanity, shall constitute total disability for work, to be compensated according to § 2324 of this title.

Amputation between the palmar surface of the hand and the shoulder shall be considered as the loss of an arm, and compensation shall be paid for such injury for a period of 250 weeks. Amputation for 50 percent of the palmar surface of the hand shall be considered as the loss of the hand and compensation shall be paid for a period of 220 weeks.

(f) The Board shall award proper and equitable compensation for serious and permanent disfigurement to any part of the human body up to 150 weeks, provided that such disfigurement is visible and offensive when the body is clothed normally, which shall be paid to the employee at the rate of $\frac{662}{3}$ percent of wages. In the event that the nature of the injury causes both disfigurement to and loss or loss of use of the same part of the human body, the maximum compensation payable under this subsection for that part of the body shall be the higher of either:

(1) The amount of compensation found to be due for disfigurement without regard to compensation for loss of or loss of use; or

(2) The amount of compensation due for loss of or loss of use plus 20 percent thereof for disfigurement.

For the complete loss of hearing of 1 ear, the employee shall receive compensation at the rate of $\frac{662}{3}$ percent of wages for a period of 75 weeks.

For the complete loss of hearing in both ears, the employee shall receive $\frac{662}{3}$ percent of wages for a period of 175 weeks.

For the loss of a fractional part of hearing, the compensation shall be for such percentage of the total loss of weeks allowed for the total loss of hearing under this section as the loss suffered bears to the total loss of hearing.

(g) The Board shall award proper and equitable compensation for the loss of any member or part of the body or loss of use of any member or part of the body up to 300 weeks which shall be paid at the rate of $\frac{662}{3}$ percent of wages, but no compensation shall be awarded when such loss was caused by the loss of or the loss of use of a member of the body for which compensation payments are already provided by the terms of this section.

(h) The compensation provided for in subsections (a)-(g) of this section shall not be more than $\frac{662}{3}$ percent of the average weekly wage per week as announced by the Secretary of Labor for the last calendar year for which a determination of the average weekly wage has been made, nor less than $\frac{222}{9}$ percent of the average weekly wage per week. If at the time of the injury the employee receives wages less than $\frac{222}{9}$ percent of the average weekly wage per week, then the employee shall receive the full amount of such wages per week as compensation.

(i) Subject to subsection (e) of this section, the compensation provided for in subsections (a)-(h) of this section shall be paid in addition to the compensation provided for in §§ 2324 and 2325 of this title.

Code 1915, § 3193j; 29 Del. Laws, c. 233; 30 Del. Laws, c. 203, § 3; 32 Del. Laws, c. 186, § 2; Code 1935, § 6080; 43 Del. Laws, c. 269, § 8; 44 Del. Laws, c. 202, §§ 2, 4; 45 Del. Laws, c. 298; 48 Del. Laws, c. 190, § 3; 19 Del. C. 1953, § 2326; 50 Del. Laws, c. 339, § 8; 50 Del. Laws, c. 465, § 1; 52 Del. Laws, c. 45, § 2; 54 Del. Laws, c. 280, § 2; 57 Del. Laws, c. 520, § 3; 58 Del. Laws, c. 251, § 1; 61 Del. Laws, c. 515, § 2; 70 Del. Laws, c. 172, §§ 4, 7; 70 Del. Laws, c. 186, § 1;

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Nabb v. Haveg Industries, Inc.

265 A.2d 320 (1969)

Evelyn June NABB v. HAVEG INDUSTRIES, INC.

Superior Court of Delaware, New Castle.

December 23, 1969.

Gerald Z. Berkowitz, of Knecht, Greenstein & Berkowitz, Wilmington, for claimant.

B. Wilson Redfearn, of Tybout & Redfearn, Wilmington, for employer.

OPINION

CHRISTIE, Judge.

These are cross appeals from an order of the Industrial Accident Board. During the course of her employment as an extruding machine operator, claimant suffered what the Board found to be a 100% disability to her right hand and in addition she was found to have suffered a 50% loss of the use of her right arm.

Following the period during which claimant received total disability compensation, the Board awarded her the statutory compensation for 100% loss of the use of the right hand (220 weekly payments) and fifteen additional weekly payments for partial loss of the use of her right arm. Additional awards were made for injury to the back (thirty weekly payments) and for disfigurement (forty-four weekly payments) but these awards do not require consideration on this appeal.

The computation for the partial loss of the use of her arm was arrived at by taking the maximum scheduled allowance for a 100% loss of the hand (220 weeks), and awarding an

additional 50% of the remaining 30 weeks which would have been awarded under the statute had claimant suffered a complete loss of both arm and hand. This award was then translated into a percentage figure and inaccurately described as compensation for a 6% loss of the use of the right arm (6% x 250 weeks=15 weeks).

Both the claimant and the employer have appealed the award.

It is the position of the employer that the Board cannot make separate awards for an arm and a hand on the same side but must make a decision as to the member disabled and then make an appropriate percentage award. Thus, it is *321 the employer's position that if an arm is lost through amputation, a claimant cannot also collect a separate sum for the inevitable loss of the hand which accompanies it. I am of the opinion that the employer's position on the statute is essentially correct but I also find the award to be proper under the statute when it is viewed as an award for a 94% loss of the extremity, (235 weeks out of a possible award of 250 weeks).

It is the position of the claimant that she is entitled to a scheduled award for 100% loss of the use of her right hand (220 weekly payments) and in addition, an award for a percentage loss of the use of her right arm, (up to 250 weeks additional). I find this position to be based on an erroneous interpretation of the statute. I rule that the statutory reference to the loss of an arm (250 weeks compensation) is a reference to the loss of that entire extremity, and thus, no loss of a hand and arm from the same extremity can lead to an award under this section of the statute of more than 250 weekly payments. The pertinent parts of the statute read as follows:

"(a) For all permanent injuries of the following classes, the compensation to be paid regardless of the earning power of the injured employee after the injury shall be as follows: For loss of a hand, 662/3 percent of wages during 220 weeks; For loss of an arm, 662/3 percent of wages during 250 weeks; For the loss of a foot, 662/3 percent of wages during 160 weeks; For the loss of a leg, 662/3 percent of wages during 250 weeks; For the loss of two or more of such members, not constituting total disability, 662/3 percent of wages during the aggregate of the period specified for each." (19 Del.C. § 2326)

The statute appears to provide that where a person loses two of the specified members he may recover awards for each loss. However, because the term "arm" may apply to the arm alone or to the entire extremity, it is necessary to study the other parts of the section to determine what is meant by the word "arm" as used in this statute.

The other subsections of § 2326 involving specific members assist the Court to ascertain the legislative intent. They read as follows:

"(b) Amputation to the ankle or any part of the foot, not including the toes, shall be considered as the equivalent of the loss of a foot. Amputation above the ankle shall be considered as the loss of a leg. (c) Total loss of the use of a hand, arm, foot, leg, or eye, shall be considered as the equivalent of the loss of such hand, arm, foot, leg or eye. (d) In all other cases of permanent injury of the classes specified in subsection (2) of this section, or when the usefulness of a member or any physical function is permanently impaired the compensation shall bear such relation to the number of weeks stated in the schedule set forth in subsection (2) of this section as the disabilities bear to those produced by the injury named in the schedule. (e) Unless the Board otherwise determines from the facts, the loss of both hands, or both arms, or both feet, or both legs or both eyes, or an injury to the spine resulting in permanent and complete paralysis of both legs, or both arms, or one leg and one arm, or an injury to the skull resulting in incurable imbecility or insanity, shall constitute total disability for work, to be compensated according to the provisions of section 2324 of this title. Amputation between the palmar surface of the hand and the shoulder shall be *322 considered as the loss of an arm, and compensation shall be paid for such injury for a period of 250 weeks. Amputation for 50 percent of the palmar surface of the hand shall be considered as the loss of the hand and compensation shall be paid for a period of 220 weeks."

The language of the subsections indicates a legislative intent to avoid two separate scheduled compensation awards where one part of the body is necessarily lost because it is attached to another part, such as a foot lost with a leg to which it was attached, or a hand lost with an arm to which it is attached. The second paragraph of subsection (e) demonstrates that a loss shall be compensated for either as a loss of the hand or a loss of an arm, depending upon where amputation occurs. In subsection (b) there are corresponding provisions as to loss of a foot or ankle as related in a loss of a leg. Subsection (c) makes the total loss of use the equivalent of amputation of that member. These subsections show a legislative intent to prevent a pyramiding of compensation for losses from a single extremity by providing for a specified degree of loss which constitutes a loss of an arm and a specified degree of loss which constitutes a loss of a hand.

Thus, under this statutory scheme, the designated compensation for the loss of an arm includes compensation for the loss of that hand which is attached to the lost arm. A corresponding rule would apply to the loss of a "leg".

The statute would have been clearer if it had designated compensation "for the loss of an entire extremity (i. e., an arm and hand from the same extremity), 250 weeks". The statutory intent, however, is here clear enough to require that the statute be read as if so worded. The need for a redrafting and clarification of the language of many parts of this statute has often been noted by all those who must interpret it.

The holding in *Magreta v. Ambassador Steel Company*, 378 Mich. 689, 148 N.W.2d 767 (1967) is pertinent here. Under a statute defining when an amputation shall be considered that of a foot or a leg, the Court held that, where the claimant, as a result of a compensable injury, had his foot amputated by surgical procedure and subsequently required a second amputation to just below his knee, he was entitled to the scheduled benefits for the loss of a leg rather than to two awards, one for the loss of a foot and the other for a partial loss of the leg. The Court indicated that any other construction would be absurd.

Since the scheduled compensation for the total loss of the extremity is 250 weekly payments, loss of less than the total calls for compensation in a lesser amount, but under the facts such compensation must be greater than the 220 weekly payments available to claimant for what is here a lesser included injury.

Thus, under the factual findings in this case, claimant is not entitled to recover the amounts designated in § 2326(a) for the loss of a hand (220 weeks) and in addition compensation for a partial loss of an arm (up to 250 weeks) for injury to the same extremity. Rather, the award must have reasonable relationship to the 220 weekly payments available for the total loss of the hand and the 250 weekly payments available for total loss of the entire extremity.

Subsections (a) and (d) of § 2326, when read together, indicate that a claimant is entitled to benefits for the loss of a member and for the impairment, without loss, of a member. Compensation for the latter "shall bear such relation to the number of weeks stated in the schedule set forth in subsection (a) of this section as the disabilities bear to those produced by the injury named in the schedule". The injury to claimant's arm and hand is a permanent impairment of the usefulness and physical function of a member which falls into one of the classes specified in § 2326 (a), i. e. an "arm" meaning, as used in the *323 statute, the entire extremity. The Board has arrived at the degree of loss by finding the hand a total loss and then using the ratio between the number of weeks additional compensation specified for a 100% loss of the entire extremity and the actual degree of disability to the portion of the extremity not already compensated for. The determination of such an additional award is authorized under § 2326(d).

In arriving at this award the Board has included, and correctly so, the award specified for the loss of the hand. The statutory scheme makes it clear that the total loss of a hand entitles a claimant to 220 weeks compensation and this is true whether the loss is calculated solely as the loss of a hand or the loss of a hand as part of a less than total loss of the entire extremity. The Board then awarded 15 weeks additional compensation for impairment of the arm. Such award obviously took into account that if the arm and hand had both been lost the award available under the statute would be only 30 weeks more than an award for the loss of the hand alone. The award was proper but confusion may have stemmed from describing this part of the award in terms of 6% of 250 weeks. Actually claimant's award amounted to 235 weekly payments for partial loss of use of the extremity.

Under the circumstances the Board came to a fair and just decision depending, as it had to, upon a poorly worded and difficult to interpret statute. The amount awarded bears a reasonable relationship to what would have been awarded for the loss of the entire extremity as compared to what would have been awarded for the loss of the hand alone. It would have been clearer if the award were stated in terms of an award of 235 weeks compensation for 94% impairment of the entire extremity but in any event the amount of the award is proper and the record supports the results reached.

Any other construction placed upon subsections (a) and (d) would lead to the absurd conclusion that compensation for total loss of an arm, including the hand, would be less than the compensation awarded for the loss of the hand and a partial loss of the arm. I cannot construe the statute to mean that the less drastic injury entitles the injured party to more compensation than would be available in the event of total loss.

Other factual issues raised by the parties are resolved so as to be consistent with affirming the findings of the Board.

The decision of the Industrial Accident Board is affirmed. The appeal of each party is dismissed.

It is so ordered.

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Wilmington Fibre Specialty Company v. Rynders

316 A.2d 229 (1974)

WILMINGTON FIBRE SPECIALTY COMPANY, Employer-Appellant, v. Helene RYNDERS, Employee-Appellee.

Superior Court of Delaware, New Castle.

February 6, 1974.

*230 Stephen P. Casarino, of Tybout, Redfearn & Schnee, Wilmington, for employer-appellant.

Oliver V. Suddard, Wilmington, for employee-appellee.

TAYLOR, Judge.

This is an appeal by Wilmington Fibre Specialty Company [employer] from a decision of the Industrial Accident Board [Board] which held that Helene Rynders [employee] sustained a permanent functional impairment to her back caused in part by an accident on September 15, 1967 and in part by the anxiety neurosis and awarded permanent injury benefits to employee for a period of two hundred forty weeks, representing an eighty percent permanent functional impairment to employee's back.

Employee, while in the course of her employment for employer on September 15, 1967, while walking down a ramp, slipped and fell, injuring her coccyx. On October 2, 1967 employee commenced treatment with Dr. James Waddell, an orthopedic surgeon, for pain the coccygeal area. On March 1, 1968 he performed a coccygectomy. The pain persisted after the operation, and it was ascertained by X-ray examination that a segment of the

coccyx had not been removed. On September 16, 1968 the upper segment of the coccyx was removed. This too failed to produce improvement. Dr. Prerre LeRoy commenced treating employee in December, 1968. In January, 1969 he performed a radio frequency lesion to interrupt the nerve function, but this again failed to relieve employee. On April 24, 1969 he removed a painful nodule of nerve tissue, but this also failed to correct the condition.

According to employee, she has disabilities involving her low back, her left leg and her neck. She cannot sit down or lie on her back. She can bend her body only to a limited extent and is unable to lift even a small amount of weight. Her left leg is numb and she has difficulty moving it. She also has difficulty in turning her neck. All of the physicians who testified, with the exception of Dr. Joseph Arminio, concluded that employee's complaints of pain were real and sincere and that they related to the 1967 accident, and the operations which followed. They were also in agreement that in the absence of the pain, employee would have no significant degree of disability. All of the doctors agreed that many who have had the coccyx removed still experience substantial pain. Although the physicians failed to find a physical justification for the disability, no one found employee capable of performing normal functions. They agreed that pain can be disabling.

The issue before the Board was whether there was a permanent loss of use of a member or part of the body and whether such loss of use was caused by an accident within the meaning of the Workmen's Compensation Law, 19 Del.C. § *231 2326(g). Ernest DiSabatino & Sons, Inc. v. Apostolico, Del.Supr., 269 A.2d 552 (1970). Loss of use should be determined based upon the ability of the employee to use the member or part, and conversely, the loss of use represents that degree of normal use which is beyond the ability or capability of the employee.

Employer contends that a condition "caused by mental factors" is not compensable. The cases relied on are discussed below.

In Burton Transportation Center, Inc. v. Willoughby, Del.Supr., 265 A.2d 22 (1970), the Delaware Supreme Court stated:

"We think, on the other hand, that the term 'part of the body' is intended to refer to some specific identifiable member or organ of the body, and should not be stretched to include a general condition of psychosis or neurosis."

There, the Supreme Court refused to permit compensation for a "general condition of psychosis or neurosis" because it was not identifiable with a specific member or organ of the body. Further, the Court commented that traumatic neurosis "is not usually looked

upon as a kind of injury which is necessarily a presumably per se disabling ...". It is clear that in Willoughby the Supreme Court did not have before it evidence showing loss of use of an organ or member of the body resulting from psychosis or neurosis and the Court was not precluding compensation for disability of a member of the body which stemmed from psychosis or neurosis.

In *Guy Johnston Construction Co. v. Kennedy*, Del.Supr., 287 A.2d 658 (1972), the Delaware Supreme Court in discussing Willoughby distinguished a general condition of psychosis or neurosis which was not localized as to a member or organ of the body from a loss of use of a specific identifiable member or organ of the body. The latter is compensable under 19 Del.C. § 2326(g), *ibid.*, while the former is not compensable. In view of the facts of that case, the Court found it unnecessary to discuss the validity of an award based solely on psychological factors.

Rice's Bakery v. Adkins, Del.Supr., 269 A.2d 215 (1970), involved a claim for workmen's compensation for permanent total disability based upon psychosomatic back disability. Although the matter was remanded to the Board for findings upon the causal connection between the industrial accident and the psychosomatic back disability from which employee suffered, the Supreme Court stated:

"The law seems settled that, provided a sufficient causal connection is proved by competent evidence between an industrial accident and a resulting psychological or neurotic disorder resulting therefrom, such disability is compensable under Workmen's Compensation Law. See *Fiorucci v. C. F. Braun & Co.*, 4 Storey 79, 173 A.2d 635 (Del.Super. 1961). We so hold."

The philosophy of *Adkins* was reasserted and extended in *Sears, Roebuck and Company v. Farley*, Del.Supr., 290 A.2d 639 (1972) in the following language:

It is, of course, true that an award for a posttraumatic hysteria may be made when the hysteria occurs when a worker sustains a primary disabling physical injury and thereafter develops a secondary mental condition which causes him to believe that he still suffers from the disabling effects of the physical injury, even though he has in fact fully recovered physically."

In *Avon Products, Inc. v. Lamparski*, Del. Supr., 293 A.2d 559 (1972) the Delaware Supreme Court reaffirmed the principle.

The Delaware holdings are consistent with holdings in many states. 1A Larson, Workmen's Compensation Law, 7-359, § 42.22, recognizing that in view of the Delaware statute,

allowance based on permanency must relate to loss of use of a member or part of the body. Ibid, p. 7-369, § 42.22.

*232 One element which properly may be considered in determining disability is whether a function can be performed only by undergoing considerable pain. 2 Larson, Workmen's Compensation, 88.6, § 57.51; 11 Schneider, Workmen's Compensation Law, 496, § 2313. This standard is applicable regardless of whether the issue is inability to work or loss of use.

Pain which is not associated with loss of use is not compensable under Workmen's Compensation Law. 58 Am. Jur. 785, Workmen's Compensation § 292. However, pain of movement may constitute an inhibitory force which prevents movement or use.

Employer argues that since pain is a subjective matter, an impairment of use which derives wholly or in part from pain is not a lost use within the Workmen's Compensation Law. This is based on the premise that pain is subjective and cannot be established objectively.

Admittedly, in evaluating such loss, one must be on guard against deception. Deception may exist in some cases. However, in this case, no physician has questioned the reality of employee's experience of pain or her inability because of the pain to use her back and leg. Cf. Avon Products, Inc. v. Lamparski, Del.Supr., 293 A.2d 559 (1972). It is undisputed that it is not within the capability of this employee to use her back, leg or neck to some degree.

Dr. LeRoy found eighty percent or more permanent loss of use of the low back and ten to fifteen percent permanent loss of use of the leg. Dr. John Hogan and Dr. Arminio evaluated employee's disability from the removal of the coccyx as a ten percent loss. In each case this evaluation was not based on observed loss of use but on a statistical chart published by the American Medical Association.

Employer argues that Dr. LeRoy's evaluation is speculative because he is unable to establish the physical origin of the pain and because he cannot measure the amount of pain. It appears that the evaluation of loss indicated the extent to which employee was unable to use her back and leg based upon his observation of employee during examinations. This is a proper basis of evaluation.

In reviewing a decision of the Board, it is the function of this Court to determine whether there was substantial competent evidence in the record upon which to support the Board's findings and conclusions. Johnson v. Chrysler Corporation, Del.Supr., 213 A.2d 64 (1965). There is ample competent evidence of loss of use of the back. While employer takes issue with Dr. Leroy's findings, it is clear that Dr. LeRoy found an eighty percent or greater impairment of function of the low back area. This alone is sufficient to support the finding

of the Board. Moreover, it does not appear from the record that the other doctors who evaluated the loss of function considered that loss in terms of employee's actual capability. The permanency of employee's condition, based on the present record, has not been in dispute. It appears that in basing its award upon a finding of "permanent functional impairment", the Board was making its determination of loss of use as provided by 19 Del.C. § 2326(g).

The Court finds that the Board's findings and conclusions are supported by substantial competent evidence and are supported by law.

Accordingly, the decision of the Board is affirmed.

It is so ordered.

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Hibble v. Brothers (Delaware Workers Compensation Decisions (1996))

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MICHAEL HIBBLE, CLAIMANT,

v.

TIMKO BROTHERS, EMPLOYER.

**INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE
COUNTY**

HEARING NO. 954197

March 28, 1996

NATURE OF ACTION: DETERMINE ADDITIONAL COMPENSATION DUE

Pursuant to due notice of the time and place of the hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on Thursday, March 28, 1996, in the Hearing Room of the Board, First Federal Plaza, 710 North King Street, Suite 112, Wilmington, New Castle County, Delaware.

PRESENT:

Karen Wright

Jerome Donohue

Elizabeth Alice Saurman, Deputy Attorney General, for the Board.

APPEARANCE:

Martin C. Meltzer, Esquire, for the claimant.

Robert W. Ralston, Esquire, for the employer/carrier.

STATEMENT OF THE CASE

The Industrial Accident Board held a hearing on Thursday, March 28, 1996, pursuant to Claimant's Petition for Additional Compensation Due. Pursuant to the executed and filed Agreement as to Compensation and corresponding receipt for benefits, Claimant was involved in a compensable accident on December 20, 1991, and is receiving temporary total disability and has received additional compensation for a 25 percent back impairment, a 25 percent urological and sexual function impairment, and disfigurement. By this petition, Claimant seeks additional compensation for an alleged 15 percent impairment to his right leg.

SUMMARY OF EVIDENCE

The Board heard first from the Claimant, Michael **Hibble**, who was sworn and testified as follows:

He is 31 years old and is married with four children.

On December 20, 1991, he was driving a dump truck north on Route 13 at a high speed. The dumper part of the truck accidentally raised up and slammed into the I-95 overpass. When the dumper hit the overpass, the whole truck lifted up into the air until the dumper broke off. Then, the truck body bounced up and down several times, throwing him up and down in the cab.

After the accident he was taken to the Emergency Room ("ER") by ambulance. He had a spinal implosion and bones from his hips were eventually used to fuse his spine. He had metal rods in his back for 14 months.

As a result of the accident, he has gets pain in his right leg. The pain is intermittent, lasting 10 seconds on average. It is an electrical pain, which feels like some one hit his funny

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bone, shooting down the back of his leg. He stops the pain by smacking his foot against something to "distract the pain". The pain episodes happen throughout the day, but he notices them most when he tries to get comfortable sitting or laying down. It interferes with his sleeping and driving. He does not consciously think about the pain anymore. His response to it, smacking his foot, is becoming automatic. He is able to use his leg normally; the pain does not cause him to fall. He told all his doctors about this problem.

2. The Board heard next from Wai Wor Phoon, M.D., who was sworn and, after the parties stipulated to his qualifications, testified on Claimant's behalf as follows:

He reviewed Claimant's medical records and examined Claimant himself on January 20, 1994, and August 5, 1994. He never actually treated Claimant. The October 21, 1993, MRI showed that Claimant has some bone fragments from a compression fracture impinging on the sac enclosing the spinal cord, but not directly pressing onto the spinal cord.

On January 20, 1994, he examined Claimant briefly before performing an EMG test. Claimant related that he fractured his L1 and L2 spinal bodies in a 1991 car accident and that he had had Harrington Rods in his back, which were inserted in December, 1991, and removed in January, 1993. He continued to have pain in his low back and right lower extremity. The only positive finding during his brief physical examination of Claimant at that time was restricted straight leg raising on the right side. The EMG he performed that day showed that Claimant had a S1 radiculopathy on the right side with moderate involvement.

On August 5, 1994, his examination of Claimant revealed decreased range of motion in the lumbar spine with pain in the low back area, limited straight leg raising on the right side, and decreased sensation to pain and touch over the dorsal part of the right foot, which was his biggest problem. Claimant had normal range of motion and reflexes in his lower extremities. There was no lower extremity atrophy, evidence that Claimant had no motor problems. Claimant also had weakness in his lower extremities. He felt that the exam findings were consistent with the EMG finding of S1 radiculopathy.

In his opinion, Claimant's radiculopathy is related to the 1991, car accident and that because of it Claimant has a 15 percent permanent impairment to his right lower extremity. Claimant is able to use his right lower extremity like a normal person can, despite having some pain from the S1 radiculopathy.

His first report rated Claimant's impairment as 15 percent to the whole person based on the AMA Guide. However, he revised his opinion to rate Claimant's impairment as 15 percent to the right lower extremity because that was what was at issue. The AMA Guide Forth Edition, does not contain a chart of conversions for whole body impairments to body part impairments, so he was not able to wholly rely on the guide to make the conversion. He used his experience and background to do so.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On a petition to determine additional compensation due the Claimant bears the burden of proof. The Board finds that Claimant failed to meet that burden in this case. Claimant has pain his right leg as a result of a S1 radiculopathy that exists despite successful back surgery, but both he and Dr. Phoon testified that he is able to use his left leg normally. The record reflects that Claimant has already been compensated for his back injuries by agreement for 25 percent, which was exactly what he was sought in the October 20, 1993, petition based on the opinion of by Dr. Kalamcki. Based on the Board's experience, the compensation Claimant received for his post-surgical back impairment is consistent with intermittent radicular leg pain without loss of function such as Claimant's. There is no evidence of worsening since the approved agreement. The Board cannot award Claimant twice for the pain caused by his back injuries.

STATEMENT OF DETERMINATION

For the foregoing reasons, Claimant's Petition for

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Additional Compensation is DENIED. Accordingly, the Board does not grant Claimant's request for attorney's and expert witness fees.

IT IS SO ORDERED this 28th day of March, 1996.

INDUSTRIAL ACCIDENT BOARD

ss/Wright

Karen Wright, Board Member

ss/Donohue

Jerome Donohue, Board Member

##JR

**THE INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

WILLIAM JACKSON, Employee,)	
)	
v.	)	IAB No.: 1319732
)	
FLETCHER'S HEATING &)	
PLUMBING, Employer.)	

PETITION TO DETERMINE ADDITIONAL COMPENSATION DUE

Industrial Accident Board: Terrence Shannon, Otto Medinilla
Workers' Compensation Hearing Officer: Lydia C. F. Anderson, Esquire, for the Board
Counsel: Jeffrey M. Gentilotti, Esq., for Employee; Colin M. Shalk, Esq., for Employer
Hearing Date: October 18, 2011

PROCEDURAL SETTING AND HOLDING

William Jackson ("Claimant") sustained injury on October 1, 2007, while working for Fletcher's Heating & Plumbing, ("Employer" or "Fletcher's Heating"). Employer has paid compensation for benefits and Claimant indicates that his weekly compensate rate is \$533.36. On April 29, 2011, Claimant filed this Petition to Determine Compensation Due, seeking recognition of 29% permanent impairment of the lumbar spine. While Employer does not dispute that Claimant has sustained permanent injury, it maintains that a rating of 7% impairment is more appropriate.

The Board granted this petition based on Employer's medical expert's opinion. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. Stephen J. Rodgers is board certified in preventive medicine and occupational medicine. He has taken numerous courses on interpreting the *American Medical*

Association's Guides to Permanent Impairment ("AMA Guides"), 5th and 6th editions. He testified live on behalf of Claimant. In short, Dr. Rodgers opined that Claimant has suffered 29% permanent impairment to his lumbar spine as a result of the work accident. Dr. Rodgers based his conclusion on a single examination, April 14, 2011, a review of records, and the *AMA Guides*, 5th edition. Claimant is a plumber and he has also lifted weights for years. An MRI showed small central and right disc protrusions, one of which was pressing on the lower most nerve root, L5-S1, on the right side. Dr. Bruce Rudin performed surgery on March 16, 2010. His operative report identified an anterior discectomy with interbody and arthroplasty and reconstruction of longitudinal ligaments.

In Dr. Rodgers' examination, his findings included no tenderness to light palpation and he measured range of motion with an inclinometer. Claimant could flex to 40 degrees, extend to 15 degrees, and bend laterally 15 degrees on both sides. Dr. Rodgers described these findings as mild limitations, but in contrast with Dr. Barrish's finding of full range of motion in all areas. Dr. Rodgers also noted normal reflexes in the lower extremities. In sitting root position, Claimant had pain in the hamstring, but no sign of radiculopathy. His right calf was less than one centimeter girth than the left calf.

Reviewing recent records, Dr. Rodgers noted that a July 27, 2011 record indicated Claimant was doing well until one month earlier, when he aggravated his low back pain by lifting. He was prescribed 5 milligrams of Oxycodone. On August 24, 2011, Claimant underwent bilateral facet injections at L5-S1 without relief. He was seen by a physician's assistant, who noted that Claimant's condition had worsened over the last 90 days. His medication also was changed to Vicodin, three to four times a day. He was significantly impaired by pain at 8/10. Lumbar x-rays revealed degenerative disc disease.

Relying on the *AMA Guides*, 5th edition, page 384, Table 15-3, Dr. Rodgers treated Claimant's surgery as a problem with motion segment integrity. Dr. Rodgers noted the three requirements of that category: (1) unstable vertebrae, (2) complete loss of motion and (3) fusion. Further, Dr. Rodgers relied on the May-June 2006 edition of *The Guides Newsletter*, which included an "Impairment Tutorial," indicating that an artificial disc replacement ("ADR") is to be treated the same as a fusion.¹ Hence, Dr. Rodgers looked to DRE Category IV, which is assigned a range to 23% whole person impairment. Using a conversion factor of .75, he arrived at a lumbar impairment range of 27 to 31%, after rounding. Dr. Rodgers selected the mid-range of those ratings to get 29%.

Dr. Rodgers disagreed with Dr. Barrish's use of the *AMA Guides*, 6th edition, which factors in complex grade modifiers that make determinations complicated. Had Dr. Barrish used the 5th edition, he would have placed Claimant in DRE Category III, but Dr. Rodgers disagreed because of the 2006 tutorial publication. Notably, DRE Category IV does not require radiculopathy; but, if radiculopathy remained as a residual effect of the surgery, Dr. Rodgers would place Claimant in DRE Category V.

On cross-examination, Dr. Rodgers pointed out that Claimant met all the qualifications for ADR, including having a one-level problem, grade 1 spondylolithesis, failure of conservative care, and a mature skeleton. Dr. Rodgers has not treated patients who have had disc replacements. The natural history following surgery, he opined, is that the patient's range of motion is good and then it decreases. It takes approximately six weeks for the surgical scar to heal, but the healing process of laying down calcium and completely fusing is at least one year for maximum medical improvement. Claimant

¹ Parties' Joint Exhibit A, *The Guides Newsletter*, Impairment Tutorial: Rating Permanent impairment for Artificial Disc Replacements, May/June 2006.

had no problem with surgery and Dr. Rudin released him to full time work, based on a functional capacity evaluation ("FCE") performed three months after surgery.

Claimant, age 39, lives in Smyrna, Delaware with his wife and children, ages 19, 17, 3 and 3 months. He worked for five years at Fletcher's Heating before the work accident occurred. Claimant was taking a large vacuum down a set of steps and felt a pop. He went down and could not continue working. He initially had conservative care, physical therapy and then injections, but treatment progressed to surgery, an artificial disc replacement, in March 2010 by Dr. Rudin. Claimant responded well and, a month later, he was back at work in basements, crawl spaces and attics. He had nagging pain and took Naproxen as needed. By April 21, 2010, Claimant was 85 to 95% improved and able to manage pain. At some point, Claimant changed from being a service technician in residential settings to commercial and industrial settings where he can walk into areas and use cranes to handle heavy equipment. He also had a laborer to help him. The work is a lot less taxing. While he still stoops, he is not doing so for 6-8 hours at a time.

Still, Claimant started to miss days at work because of pain radiating into his buttock. He saw Dr. Rudin on July 20, 2011, a year and a half post-surgery. Claimant has not been pain-free since surgery. He had not done anything to re-injure his back, but he seemed to be getting worse. He was taking Vicodin, once a day, instead of Oxycodone, and he was taking Naproxen. Dr. Rudin took him out of work for two months. Injections relieved the radiating pain and Claimant returned to work. He saw Dr. Rudin again on September 14, 2011 and was better. His most recent injection by Dr. Witherall occurred on October 17, 2011. On a bad day, pain is at 8/10 and on a good day, it is at 2/10.

Dr. William Barrish is board certified in physical medicine and rehabilitation. He gave a deposition on behalf of Fletcher's Heating.² Dr. Barrish examined Claimant in March of 2011 to determine the degree of permanent impairment suffered. Claimant gave a history of walking down steps with a tool bag and a vacuum, slipping, and then having an onset of back pain. In March 2010, he underwent a disc replacement, which is a fairly new procedure. The prior surgical options included a lumbar fusion, where two bones are fused together, or a discectomy, where the disc is removed. A lumbar fusion is more involved procedurally and usually had a longer recovery period with generally less beneficial long-term results. Dr. Barrish opined that based on the *AMA Guides*, 6th edition, Claimant has sustained 7% permanent impairment of the lumbar spine.

Dr. Barrish summarized his findings: Claimant walked with no antalgia or pain; he could toe-heel walk without difficulty. Straight-leg-raising was negative on both sides. His motor exam was five over five in the lower extremities and sensation was intact to light touch. When there is a pinched nerve, sensation could have been altered. Dr. Barrish noted an anterior scar in Claimant's abdominal region. Range of motion of the lumbar spine was full in flexion, extension, and side bending without any significant pain. He had no tenderness in the lumbar spinal region. If Claimant had pain, this could indicate residual inflammation or an underlying irritation in the muscle or even the facet joints. In this instance, palpation did not cause pain or discomfort.

Dr. Barrish explained the basis of his permanency rating. He used Table 17-4, on Lumbar Spine Regional Grid: Spine Impairments, and placed Claimant in Class 1, including intervertebral disc herniation at a single level where there is documented

² Employer's Exhibit No. 1, *Deposition of Dr. William Barrish*, October 7, 2011.

resolved radiculopathy at a clinically appropriate level.³ Mistakenly, Dr. Barrish arrived at 4% impairment of the whole person, which he converted regionally to 6% of the lumbar spine. He had inadvertently looked at the wrong table, for cervical impairment rather than the lumbar table, but discovered the mistake while preparing for this deposition. Thus, Dr. Barrish repeated the rating process and arrived at 5% whole person, which he then converted to 7% impairment of the lumbar spine.

Dr. Barrish followed the *AMA Guides*, 6th edition, because it is a more updated edition and it gives more flexibility by providing more classes in which you can assign patients to give a more appropriate overall picture in most cases. A grid in the 6th edition is used to place patients in classes where they fall perfectly. In addition, within each class, the rates can be modified to a certain degree. The 5th edition has a lesser number of categories and it is not easy to fit people into the categories and it also sets forth options for range of motion findings. Dr. Rodgers used the 5th edition, and his rating figure is not appropriate given the (good) results of surgery that Claimant achieved. He had a single level disc problem and surgery resulted in no sign of radiculopathy. With Claimant's functional capabilities and his physical examination, Dr. Barrish modified him to the lower end of the scale rather than the higher end.

Dr. Barrish reviewed medical records of examinations occurring since he examined Claimant. July and August 2011 notes from First State Orthopedics indicate pain in the buttock, but that is not indicative of radiculopathy. In September, the records indicated Claimant had posterior low back pain without radiation. Again, this is not documented radiculopathy. Dr. Barrish concluded that Claimant has not developed radiculopathy after his evaluation. Dr. Barrish looked at Dr. Rodgers' report and noted

³ See *AMA Guides*, 6th ed. at 570.

the only significant difference in their findings is with forward flexion, which Dr. Rodgers noted as 40 degrees while Dr. Barrish noted 90 degrees. He could not find anything from surgery alone that would cause such a difference; but, patients certainly have good and bad days.

FINDINGS AND CONCLUSIONS

Permanent Impairment: Compensation is paid for loss of use of a body part in accordance with §2326, title 19 of the Delaware Code. Claimant seeks compensation for 29% permanent impairment to his lumbar spine. Fletcher's Heating, however, argues that Claimant has had a good result from surgery and is permanently impaired to the extent of 7% of the lumbar spine.

The parties rely on conflicting medical testimony and the Board is free to rely on either medical expert as long as substantial evidence can be found. *DiSabatino Brothers, Inc. v. Wortman*, 453 A. 2d 102, 106 (Del. 1982). The Board agrees with Fletcher's Heating and its medical expert that, with a good result from surgery and physical findings, Claimant's permanent impairment rating is less than 29% of the lumbar spine. A month after surgery, Claimant was 85 to 90% better. Later, Dr. Rudin released Claimant to full-time work, based on an FCE. Although Claimant testified that he has been working with some pain, he has continued full-time work, albeit in a commercial and industrial setting that permits him to walk into places rather than crawl, as in a residential setting. The Board finds Claimant to be very credible, but a determination of permanent impairment must be based on his actual disability (loss of use).

The Board reviewed the clinical findings: In Dr. Barrish's office examination, Claimant walked with no antalgia or pain and he could toe-heel walk without difficulty.

Straight-leg-raising tests were negative on both sides; a motor examination demonstrated normalcy, 5/5 in the lower extremities. Also, sensation was intact to light touch. This is important because when there is a pinched nerve, sensation may be altered. Furthermore, Claimant had no tenderness and full range of motion of the lumbar spine in all planes without significant pain. Dr. Rodgers' findings were quite similar, with no tenderness to light palpation, mild limitations in range of motion, normal reflexes in the lower extremities, and no sign of radiculopathy in the sitting root position. The major difference between the experts is that Dr. Rodgers made a finding of flexion to 40 degrees while Dr. Barrish noted flexion to 90 degrees. That may be due to a bad day versus a good day.

Consideration was given to Claimant's testimony that, in July 2011, he returned to Dr. Rudin because of increasing lower back pain. By September 2011, Claimant was improved. In any event, the recent issues are not settled enough for the Board to consider in rendering a permanent impairment determination. Dr. Rodgers appears to suggest, that since he knows that eventually Claimant's condition will go downhill, the higher rating of 29%, under the *AMA Guides*, 5th edition, is appropriate. That opinion is speculative and unreliable and does not take into consideration the results of an ADR. Dr. Barrish examined Claimant a year after the surgery, a long enough wait to evaluate permanent impairment; hence the Board adopts his lumbar rating of 7% permanent impairment.

For several reasons, including Claimant's functional capabilities and physical examinations, the Board is satisfied that Dr. Barrish's reliance on the more recent and updated 6th edition of *AMA Guides* is appropriate. In this instance, its flexibility in providing more classes so that patients are more perfectly or appropriately assigned, based on actual relevant findings, is applicable. The Board considered the "stop gap"

measure taken by the Impairment Tutorial of *The Guides Newsletter* in 2006 to treat a new procedure, the ADR, like a fusion; however, the AMA Guides, 5th edition, was not written with the disc replacement in mind; whereas, the 6th edition addresses it.

Lastly, the Board considered the abundant testimony regarding the doctors' certification or lack thereof in interpreting the *AMA Guides*. It should not be forgotten that the *AMA Guides* are guidelines and that the Board is free to rely on either medical expert, where there is substantial evidence and regardless of certification.

Compensation for permanent impairment of any part of the body is paid at the rate of 66 2/3% of wages.⁴ For loss of use of the lumbar spine, the Board has assigned 300 weeks because of important to the body's structure. With 7% permanent impairment, Claimant would be entitled to receive 21 weeks of compensation. With a compensation rate of \$533.36, Claimant is entitled to receive \$11, 200.56 (21 x \$533.36) for 7% permanent impairment of his lumbar spine.

Medical Witness and Attorney's Fees: This successful Claimant is entitled to receive medical witness fees taxed against Employer, pursuant to 19 *Del. C.* § 2322(e). Claimant is also entitled to payment of reasonable attorney's fees in an amount not to exceed 30% of the award or ten times the current weekly wage, \$9, 330.80, as announced by the Secretary of Labor.⁵ The statute also provides that when a written offer is timely communicated (at least 30 days prior to trial) and it is more than what the Board ultimately awards, then the provision for attorney's fee is not applicable.⁶ Here, Employer made a timely offer that was more than what the Board awarded. Hence, there is no provision for awarding an attorney's fee.

⁴ 19 *Del. C.* § 2326.

⁵ 19 *Del. C.* § 2320 (10) a.

⁶ 19 *Del. C.* § 2320 (10) b.

DETERMINATION

Accordingly, the Board grants Employer's Petition to Determine Additional Compensation Due, awarding compensation for permanent of the lumbar spine, as set forth hereinabove. The Board also awards compensation for a medical witness fee, but denies an award of attorney's fee, based on the statute.

IT IS SO ORDERED THIS 1 day of November, 2011.

THE INDUSTRIAL ACCIDENT BOARD

Terrence Shannon
TERRENCE SHANNON

Otto Medinilla
OTTO MEDINILLA

The undersigned Workers' Compensation Hearing Officer hereby certifies that the foregoing is a true and correct decision of the Industrial Accident Board.

Lydia C.F. Anderson
LYDIA C.F. ANDERSON, ESQUIRE

Mailed Date: 11-2-11

OWC Staff *L*

CHRISTOPHER TAYLOR, Employee,
v.
RGS ELECTRICAL, INC., Employer.

INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

Hearing No. 1322587

Mailed Date: August 16, 2011
August 12, 2011

DECISION ON PETITION TO DETERMINE ADDITIONAL COMPENSATION DUE

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on June 17, 2011, in the Hearing Room of the Board, in Wilmington, Delaware.

PRESENT:

TERRENCE SHANNON

OTTO MEDINILLA

Susan D. Mack, Workers' Compensation Board, for the Board

APPEARANCES:

David Arndt, Esquire, Attorney for the Employee

Kristopher Starr, Esquire, Attorney for the Employer

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NATURE AND STAGE OF THE PROCEEDINGS

On January 5, 2011, Christopher Taylor ("Claimant") filed a Petition to Determine Additional Compensation Due alleging an eleven percent permanent impairment to his thoracic spine as a result of a compensable work accident on May 7, 2007. RGS Electrical, Inc. ("Employer") disputes the degree of permanent impairment. The parties agreed that Claimant is entitled to a compensation rate of \$486.67 based on a weekly wage of \$730.00.

A hearing was held on Claimant's petition on June 17, 2011. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. Stephen J. Rodgers, a specialist in occupational medicine with specialized training in the use of the *AMA Guides*, testified for Claimant Christopher Taylor. Dr. Rodgers examined Claimant on December 17, 2010 and reviewed Claimant's relevant medical records. According to the history provided, Claimant suffered an injury to his thoracic spine while lifting a heavy spool of wire. An MRI of the thoracic spine performed on November 9, 2007 showed small disc herniations at multiple levels of the thoracic spine from T3-4 to T8-9. X-rays revealed no compression fractures. Dr. Rush Fisher evaluated Claimant on April 21, 2008 and concluded that Claimant's thoracic pain may be associated with a traumatic disc disruption at T8-9. Dr. Slipman consulted on the case in August 2008. He diagnosed Claimant with thoracic spine symptoms secondary to internal disc disruption syndrome. A neurological evaluation by Dr. Koefman revealed no neurological impairment associated with the injury.

Dr. Rodgers examined Claimant and found his back to be stiff with mild limitation in forward flexion and tenderness in the upper mid-back area. Claimant reported a pain level of four out of ten. Claimant was taking Percocet for his pain. Dr. Rodgers rated permanent impairment to

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the thoracic spine using the *AMA Guides to the Evaluation of Permanent Impairment*, Fifth Edition ("AMA Guides"). He placed Claimant in DRE Category II of Table 15-4 on page 389 based on a diagnosis of thoracic sprain and strain complicated by disc problems. Dr. Rodgers believed that the mechanism of injury described by Claimant was consistent with Claimant's sprain and strain injury. DRE Category II allows for five to eight percent whole person permanent impairment. According to Dr. Rodgers, Claimant belongs in the category because he had evidence of herniated discs without radicular signs. Dr. Rodgers placed Claimant at the high end of the DRE range, or eight percent whole person impairment, because of the multiple levels of abnormalities in Claimant's thoracic spine. The Fifth Edition provides conversion factors to convert whole person impairment to regional impairment for different levels of the spine; however, the thoracic spine conversion factor results in an unreasonably high regional impairment. Dr. Rodgers therefore applied the lumbar spine conversion factor to obtain an eleven percent regional impairment rating for Claimant's thoracic spine injury.

Dr. Rodgers confirmed that Dr. MacEwen applied the Sixth Edition of the *AMA Guides* to rate permanency. Dr. Rodgers believes that Dr. MacEwen rated Claimant by placing him at the high end of the sprain/strain category to obtain a six percent *whole person* impairment rating. He confirmed that Dr. MacEwen used correct methodology in applying the Sixth Edition. However, Dr. Rodgers asserted that the six percent whole person impairment rating from the Sixth Edition would be converted to a nine to ten percent regional impairment rating, if the lumbar conversion factor were applied.

Dr. Rodgers chooses to use the Fifth Edition in Delaware because the Sixth Edition unintentionally results in significantly lower ratings for many musculoskeletal conditions, a

problem that he expects to be corrected in the Seventh Edition of the *AMA Guides*. He also commented that

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the Sixth Edition is very complicated to apply, so even many DME doctors do not use it. He contended that the vast majority of permanent evaluators in Delaware still use the Fifth Edition. Dr. Rodgers further pointed out that the Sixth Edition was published with many editing errors, including the omission of the conversion factors from whole person impairment to regional impairment for the spine. These problems were corrected with a supplement and then later in a re-printing.

Claimant Christopher Taylor testified that he was lifting 200 to 300 pound spools of wire in May 2007 when he injured his back. He was working for RGS Electrical, Inc. Claimant currently takes pain medications but is not under any other treatment. On a typical day, he does a little around the house but is unable to do very much. Sometimes he tries to do construction projects for friends, but after an hour of work, he is "done" for two days. He can no longer go deep sea fishing, play sports, or engage in sex as he did prior to his injury. The pain is located in the middle of his back between the shoulder blades. The pain gets worse when he moves his arms apart. Claimant estimated a 4.5 level of pain at the hearing without taking any medications in the morning. He typically takes hydrocodone three to four times a day. If he did not take medications, he would be laying on the couch unable to move, with a pain level of 8.5 to nine out of ten. His pain level with medications is usually a three out of ten. Claimant tries to walk as much as possible and is able to walk about a block before his back starts to ache. After his injury, Claimant underwent some physical therapy, but this ended because it caused him more pain. Claimant had some injections to his back after that.

Dr. George D. MacEwen, an orthopedic surgeon, testified on behalf of the employer, RGS Electrical, Inc. Dr. MacEwen testified that he has performed thousands of spine surgeries over the course of his career. He has also published articles in the area of spine surgery. He examined Claimant on three occasions, in September 2008, June 2009, and February 2011. He also reviewed

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the relevant medical records related to Claimant's injury. Dr. MacEwen noted tenderness in the middle of Claimant's thoracic spine when he first examined Claimant in September 2008. An MRI showed protruded discs at T6-7 and T-8-9, which he agreed could be the source of Claimant's symptoms. Dr. MacEwen recommended Claimant reduce the amount of narcotics he was taking. He released Claimant to return to work at a sedentary level. At the second evaluation in June 2009, Dr. MacEwen found essentially no change on exam, though Claimant could move a little better. Injections had not improved Claimant's condition. Dr. Koyfman had evaluated Claimant and found no neurological problems. Dr. MacKwen again recommended that Claimant reduce his intake of narcotics and return to work gradually in a sedentary position. The most recent evaluation by Dr. MacKwen took place in February 2011.

Claimant reported pain when he held his hands out in front of himself and exhibited fifty percent reduction in flexion of the thoracic spine. Lumbar spine movement was normal. Dr. MacKwen's clinical diagnosis was disc herniation of the thoracic spine with no neurological involvement.

Dr. MacKwen rated permanency in Claimant's thoracic spine using the Sixth Edition of the *AMA Guides*. He placed Claimant at the upper end of DRE Class 1, the category for no neurological involvement, for a permanency rating of six percent. Dr. MacKwen asserted that the rating he obtained from the table on page 567 was already regionalized, so he did not need to apply a conversion factor. Dr. MacKwen is not sure which printing of the Sixth Edition he used, but he assumes it was the second printing that incorporated the corrections, since he did not have an errata sheet. Dr. MacKwen agreed that Claimant had small herniations at multiple levels of the thoracic spine with some evidence of mild indentation at T8, according to the MRI.

Dr. MacKwen prefers to use the Sixth Edition because he likes to use the most updated information. He believes the room for interpretation available in the Fifth Edition was incorporated

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into more specific guidelines in the Sixth Edition. Dr. MacEwen took a course in the use of the Fifth Edition but not the Sixth Edition. He is not certified in the use of the *AMA Guides* and is not a certified workers' compensation provider in Delaware.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Permanent Impairment

A claimant injured in a compensable work accident is entitled to proper and equitable compensation for the loss or loss of use of any member or part of the body. *See* DEL. CODE ANN. tit. 19, § 2326. It is the function of the Board, and not the physician, to determine the degree of a claimant's impairment, so long as the Board's findings are based on substantial competent evidence. *See Turbitt v. Blue Hen Lines, Inc.*, 711 A.2d 1214, 1215 (Del. 1998); *Poor Richard Inn v. Lister*, 420 A.2d 178, 180 (Del. 1980).

Here, Claimant Christopher Taylor alleges that he suffered an eleven percent permanent impairment to the thoracic spine as a result of a compensable work injury on May 7, 2007. The Employer disputes the degree of impairment, asserting that Claimant suffered only a six percent permanent impairment to his thoracic spine. After considering the evidence presented, the Board chooses to accept the testimony of Dr. MacEwen that Claimant should be placed at the upper end of DRE Class 1 using the Sixth Edition of the *AMA Guides*. Dr. Rodgers acknowledged that Dr. MacEwen correctly applied the Sixth Edition in placing Claimant in this category. The Board also accepts Dr. MacEwen's explanation for why the Sixth Edition is better to use in this case, since it is more specific to a case such as Claimant's

where there are disc herniations at multiple levels of the thoracic spine. The Board also believes the rating obtained by Dr. Rodgers using the Fifth Edition was too high given the lack of radicular symptoms and the relatively mild work-related injury suffered by Claimant.

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Nonetheless, the Board does not accept the six percent rating asserted by Dr. MacEwen without modification. Dr. MacEwen asserted incorrectly that the six percent rating he obtained from Table 17-3 on page 567 was a regional impairment. The Board reviewed the page in question, and while the table itself is titled "Thoracic Spine Regional Grid," the column heading is labeled "Impairment Rating (WPI %)." The Board believes it is clear that the percentages obtained using the table are whole person impairment ratings, not regional impairment ratings. The Board also recognizes that the errata section provided for the first printing of the Sixth Edition added the spine conversion factors from the Fifth Edition so that WPI ratings could be converted to regional impairment ratings. (*See Clarifications and Corrections to the Sixth Edition of the AMA Guides*, p. 47) The Board therefore follows the testimony of Dr. Rodgers and applies the lumbar spine conversion factor (0.75) to the six percent whole person rating obtained by Dr. MacEwen; this results in a regional impairment rating of eight percent (6 divided by 0.75).

To summarize, the Board accepts Dr. McEwen's opinion placing Claimant at the high end of DRE Class 1 in the Sixth Edition of the *AMA Guides*, and converts this six percent whole person rating using the lumbar spine conversion factor to obtain an eight percent regional impairment rating. A complete loss of use for the thoracic spine has been assigned 300 weeks by the Board. Claimant is therefore awarded 24 weeks of permanency benefits (300 multiplied by 0.08) at the compensation rate of \$486.67 per week, for total compensation of \$11,680.08.

Attorney's Fee and Medical Witness Fee

A claimant who receives an award is entitled to a reasonable attorney's fee in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is less. 19 *Del. C.* § 2320. At the current time, the maximum based on the average weekly wage calculates to \$9,330.80.

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In setting an attorney's fee, the Board considers the factors set forth in *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973). Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation. As a result of the Petition to Determine Additional Compensation Due, Claimant has been awarded \$ 11,680.08 in compensation for an eight percent permanent impairment of the thoracic spine; however, the Employer already offered to pay compensation of

\$12,410.09 for an 8.5 percent permanent impairment. Claimant is therefore not entitled to an attorney's fee award.¹

A medical witness fee for testimony on behalf of Claimant is awarded to Claimant, in accordance with title 19, section 2322(e) of the *Delaware Code*.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Claimant's Petition for Additional Compensation Due is GRANTED and Claimant is awarded 24 weeks of compensation for an eight percent permanent impairment to his thoracic spine at the compensation rate of \$486.67 per week, for total compensation of \$11,680.08. Claimant is also awarded a medical witness fee.

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IT IS SO ORDERED THIS 12th DAY OF AUGUST, 2011.

INDUSTRIAL ACCIDENT BOARD

/s/ _____
TERRENCE SHANNON

/s/ _____
OTTO MEDINILLA

I, Susan D. Mack, Board, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

/s/ _____

Mailed Date: 8-16-11

/s/ _____
OWC Staff

Notes:

¹ An employer can avoid liability for the attorney's fee if, thirty days prior to the hearing date, the employer makes a written settlement offer to claimant or claimant's attorney which is "equal to or greater than the amount ultimately awarded by the Board." DEL. CODE ANN. tit. 19, § 2320(10)b. In this case, the Employer submitted a sealed copy of an offer letter to the Board at the end of the hearing. The letter dated May 10, 2011 offered to pay \$12,410.09 for a compromise rating of 8.5 percent in order to settle the claim. Because this offer is equal to or greater than the amount awarded by the Board, Claimant is not entitled to an attorney's fee award based on the disability award.

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BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

MELVIN FORACRE,)	
)	
Employee,)	
)	
v.	)	Hearing No. 740726
)	
SHADYBROOK FARMS,)	
)	
Employer.)	

DECISION ON PETITION TO DETERMINE ADDITIONAL COMPENSATION DUE

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board, on September 8, 2020, via video conference pursuant to the Industrial Accident Board COVID-19 Emergency Order, dated May 11, 2020.

PRESENT:

WILLIAM HARE

GREGORY FULLER

Heather Williams, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Walt Schmittinger, Esq., Attorney for the Claimant

John Ellis, Esq., Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Melvin Foracre (“Claimant”) injured his left lower extremity in a compensable workplace accident on July 16, 1982, while he was working for Shadybrook Farms (“Employer”). On March 23, 2020, Claimant filed a Petition to Determine Additional Compensation Due, in which he is seeking additional compensation for a total of fifty percent (50%) left lower extremity permanent impairment. Employer disputes the degree of Claimant’s left lower extremity impairment.

The parties stipulate that Claimant’s compensation rate for the purposes of his left lower extremity permanency claim is \$208.45 per week.

A hearing on Claimant’s petition was held on September 8, 2020. This is the Board’s decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. Stephen Rodgers, board certified in occupational medicine, testified by deposition for Claimant. Dr. Rodgers evaluated Claimant in August 2008, April 2014, and January 2020 to calculate his left lower extremity permanent impairment. He confirmed that he had calculated Claimant’s lower left extremity permanent impairment to be thirty-seven percent (37%) in April 2014. Since the 2014 examination, Claimant had undergone a 2017 left, total knee replacement surgery, after experiencing years of progressively worsening symptoms stemming from a 1982 work accident. Dr. Rodgers testified that, prior to his knee replacement surgery, Claimant’s diagnoses were left knee tricompartmental degenerative joint disease and left knee severe valgus deformity, as well as a prior infection complication. Following the knee replacement surgery, Claimant recovered well, with some left knee swelling, effusion and quad atrophy. When Claimant followed up in December 2017 and January 2018, he was referred for physical therapy

and instructed to increase home exercises. At his January 25, 2018 follow up visit, Claimant was found to be "...overall, he is doing acceptably well." Dr. Rodgers Deposition 11:21-22 (September 2, 2020). Upon examination Claimant's provider found him to have: mild to moderate effusion, notable quadriceps atrophy, clunk with range of motion in the knee, pain at the end of flexion, strength testing of 5/5, mild varus/valgus laxity, and normal gait.

At his December 11, 2018 examination, Claimant was described as having "...some ongoing mechanical symptoms," but was doing well overall. *Id.* at 13:13-14. When Claimant was examined on June 27, 2019, he had no significant symptom changes and reported moderate, intermittent, sharp, left side pain, which interrupted his sleep. Claimant's examination results showed mild to moderate effusion, notable quad atrophy, diffuse tenderness, pain at end of flexion, and some valgus/varus laxity.

Dr. Rodgers testified that Claimant's knee replacement procedure results were less successful than most, as he continued to have pain following the procedure. When Dr. Rodgers examined Claimant, Claimant reported constant pain, for which he takes over the counter anti-inflammatories, and which he described as an 8 or 9 out of 10 at its worst. Dr. Rodgers provided Claimant with a Lower Extremity Functional Index, which indicated Claimant did not have a good result from his knee replacement procedure and rated himself as having moderately to severely decreased function. Upon physical examination, Dr. Rodgers found Claimant to have: full extension when seated; 130 degrees right and 110 degrees left reclining; force of flexion-extension with resistance decreased on left; strength deficits; left thigh atrophy; palpable knee warmth; swelling; and some effusion. Dr. Rodgers confirmed that Claimant's strength deficit correlates to his quadriceps atrophy.

Using the *American Medical Association Guides to the Evaluation of Permanent Impairment* (“*The Guides*”), 5th Edition, Dr. Rodgers calculated Claimant’s left lower extremity permanent impairment rating to be fifty percent (50%). Based on *The Guides*, Section 17.3 and Table 17-3, Dr. Rodgers considered Claimant’s pain (which he found moderate and continuous), range of motion, and stability to equal a fair level, or fifty percent regional impairment. The doctor confirmed that Claimant’s permanency rating is related to his work injury and subsequent surgeries.

Dr. Rodgers confirmed that Claimant’s prior permanency ratings have been calculated using *The Guides* 5th Edition, which he concluded was the appropriate edition to use for Claimant’s most recent evaluation because it would promote consistency and changing editions would cause a rating to be lower. Dr. Rodgers testified that he had reviewed Dr. Piccioni’s evaluation report and believed that Dr. Piccioni had “conflate[d] both systems” and had not performed “the grade modifier functional analysis.” Dr. Rodgers Deposition 31:19; 33:10 (September 2, 2020). Dr. Rodgers testified that the parameters Dr. Piccioni used, including pain, range of motion, and stability, were parameters used in *The Guides* 5th Edition and not the 6th Edition. He reported that the parameters used in *The Guides* 6th Edition are history, functional, examination and studies. The doctor testified that Claimant has continual, moderate pain, which equals ten points, placing him in the “fair” category. *Id.* at 35:13. He explained that rating Claimant with a pain score of 40 points would mean that Claimant only experiences pain when climbing stairs.

Dr. Rodgers disagreed with Dr. Piccioni’s placing Claimant in the “good” category, but according to *The Guides* 6th Edition, Claimant could be categorized as a “class III rather than class I, which would be an average of 37, going up to 43 or down to 31.” Dr. Rodgers Deposition

37:15-18 (September 2, 2020). The doctor explained that *The Guides* 5th edition considers function and *The Guides* 6th edition is based on diagnoses. He confirmed that medical techniques have improved in the last fifteen years, but there are still patients who lack a full recovery. Dr. Rodgers concluded that Claimant's appropriate left lower extremity impairment rating is fifty percent (50%), based on his function level and persisting symptoms. He concluded that Claimant is worse off after the total knee replacement than before he was before the procedure.

On cross examination, Dr. Rodgers confirmed that he is not an orthopedic surgeon and does not perform knee surgeries. He agreed that a knee replacement procedure normally improves a patient's function when done for the proper indications. The doctor testified that Claimant is now "...better than he was the weeks before his total knee replacement." *Id.* at 43:5-6. He confirmed that he had rated Claimant's left lower extremity permanent impairment at a thirty-seven percent (37%) in 2014 and now rated his impairment at fifty percent (50%). The doctor acknowledged that he had not referenced *The Guides* 6th edition in his permanency report.

Dr. Rodgers agreed that he found Claimant to have full range of seated motion in 2014 and in 2020. He agreed that Claimant's 2020 supine flexion range of motion findings were better in 2020 than in 2014. The doctor agreed that he used the same language in both reports to describe Claimant's force of flexion and that Claimant's muscle atrophy discrepancies were reduced in 2020 from 2014. Dr. Rodgers acknowledged that he found Claimant to have an antalgic gait in 2014, but Claimant's most recent records show a normal gait, and Claimant's knee laxity was normal in 2020 compared to significant laxity in 2014. He acknowledged that Claimant reported no problems performing his job duties in 2020 and that Claimant was working full-time then. The doctor agreed that Claimant reported taking prescription pain medications in

2014, but was only taking over the counter medication as needed in 2020. He denied reviewing any treatment records for Claimant's knee since June of 2019. The doctor confirmed his understanding that the parties had reached an agreement as to a thirty-seven percent permanency rating.

On redirect examination, Dr. Rodgers explained that Claimant's 2020 Lower Extremity Functional Index Form (specifically for lower extremities) showed Claimant reported great difficulty with sporting activities; no difficulty putting on shoes; little difficulty getting out of a tub, lifting objects, or performing light home activities; and, great difficulty with walking a mile or rolling over in bed. Based on the functional index, Dr. Rodgers concluded that Claimant's functioning is worse now than it was in 2014.

Claimant testified that he is 61 years old and currently lives in Tennessee. In 1982, Claimant was working in an attic for Employer and fell through the floor sixteen feet to the ground. As a result of the fall, Claimant sustained various injuries, including a left knee injury. Prior to his most recent surgery, Claimant had several other surgeries, with several resulting infections.

Currently, Claimant works as an account manager for a national company. He testified that "I can't go back and do what I did before." Claimant has been employed at his current job for nine years and he described his current duties as less physically demanding than his duties for Employer. Claimant testified that he is cautious when he is on job sites now and does not climb ladders or steps often, so that he protects his knee. He reported that he can evaluate jobs online or by talking to the customers, instead of being on job sites constantly. His knee begins to swell if he is on a job site for longer than twenty minutes or so. His current employer allows him to be flexible with how he handles his job duties.

Claimant denied that he is ever symptom free and described his pain as changing from a “dull toothache” like pain to a “10 or 11” rated pain. When Claimant continued to experience knee pain, he followed up with his surgeon and was told there was no further treatment available. He rated his normal pain as a 5 out of 10, unless it becomes irritated with activity. He has his atrophy in his left leg and his provider had expressed concern that his knee was “warm”, but there was no infection present. Claimant testified that knee pain wakes him from sleeping. He takes over the counter anti-inflammatories to reduce the pain and allow him to sleep. If his knee swells, he takes over the counter medication and puts ice on it. Claimant reported “I’m not into” prescription medications, but if the pain is severe (8 or 9 out of 10), he takes two anti-inflammatories.

Claimant testified that his activities of daily living are limited and he cannot perform any heavy duty activities. He tries to walk for exercise. When Dr. Rodgers evaluated him, he completed a functional index, which he believed covered his knee restrictions.

In February of 2020, Claimant was working and felt pressure in his chest. He stopped in Cincinnati, Ohio and ended up having bypass surgery. He returned to work four weeks after his surgery. While he was recovering from bypass surgery, he would walk in his driveway, and he has continued walking since then.

On cross examination, Claimant confirmed that he agreed to a thirty-two percent (32%) permanent impairment to his left knee, as part of a 2014 settlement agreement. Prior to his total knee replacement, his pain was “atrocious” and he could not walk stairs and used a cane. In 2017, his knee would “give out” while he was standing. On February 9, 2017, he told his doctor his knee cracks and he had fallen when his knee gives way. Since his 2017 surgery, he is able to

do more, but he still experiences left knee pain. On December 4, 2017, Claimant was released to full duty and he has worked full-time ever since.

On June 20, 2019, at his last follow up appointment, he reported experiencing “pain at nighttime when I go to sleep. It irritates me to sleep.” At the time of his last surgical visit, Claimant reported that he no longer has pain daily.

Claimant explained that his current job requires frequent standing, occasional walking, and frequent driving. He denied that he ever lifts anything at home. Claimant’s 2020 treatment records indicate he had been lifting heavy boxes upstairs, but Claimant testified that the box he carried weighed twenty pounds and he took it up a few steps. Claimant explained that he attended a hockey game and had to walk back to the shuttle. While he was walking to the shuttle, he felt chest pain. The next day, he walked up a flight of stairs and had no symptoms. Claimant drove from Tennessee to the hearing in Dover and had driven to both medical examinations from Tennessee.

On redirect examination, Claimant testified that driving does not cause him the same pain as other activities. He reported that “cold weather really affects the knee.”

When questioned by the Board, Claimant testified that he now drives everywhere in his company vehicle because of Covid restrictions. He confirmed that he injured his left knee in 1982, settled a permanent impairment for the left knee in 2014, and had a left total knee replacement surgery in 2017. Initially, Claimant reported that his is worse off now because he is “in pain” than he was before the knee replacement surgery. He then acknowledged that he is “better off after surgery for the mechanical part – with walking. I couldn’t walk before surgery.” Claimant reported that the knee problem he experiences now is “actually the pain.”

Dr. Lawrence Piccioni, board certified in orthopedic surgery, testified by deposition for Employer. After reviewing Claimant's pertinent medical records, Dr. Piccioni examined Claimant on May 26, 2020, when Claimant reported a work accident in which he had fallen approximately 12 to 16 feet, and sustained multiple injuries. Claimant underwent a 2017 left, total knee replacement procedure. After his 2017 surgery, Claimant returned to full-time work and had not sustained any subsequent injuries since his 2017 surgery.

Claimant reported treating with his surgeon on an as needed basis and was experiencing symptoms of pain, particularly at night, as well as swelling, for which he took over the counter anti-inflammatories. At the time of their examination, Claimant reported pain of a 2 out of 10, with no pain medication. Claimant's non-work-related medical issues included: diabetes, hypertension, and coronary artery disease, for which he had bypass surgery in February 2020.

Dr. Piccioni explained that the type of knee used in Claimant's surgery was an Oxinium product, which came on the market in 2005, after *The Guides* 5th Edition was published, which led him to conclude that *The Guides* 6th Edition was more appropriate to use in rating Claimant's impairment. The doctor confirmed that Claimant's last knee treatment was in June 2019, at which time he had normal strength, notable quad atrophy, diffuse tenderness, pain with flexion, normal strength, some valgus-varus laxity and normal gait. Dr. Piccioni explained that Claimant's replacement procedure involved removing some ligaments and *The Guides* allowed for some laxity on physical examination. The doctor noted that Dr. Rodgers' report indicates Claimant had 110 degrees of flexion (different than Dr. Piccioni's findings), and some quadriceps atrophy. The doctor reported that Claimant had explained that he completed the functional index form primarily pertaining to his lower extremity, but without separating the lower extremity restrictions from his other comorbidities.

When Dr. Piccioni examined Claimant, Claimant was not using any ambulatory assistive device. Upon physical examination, Dr. Piccioni found Claimant to have: normal gait, no limp, 5 degree valgus left knee, 9 degree valgus right knee, 5/5 strength in all muscle groups, intact sensory and reflexes, 0 to 124 degrees range of motion on left and 5 to 138 on right, 1 centimeter quad atrophy on the left, and no gross laxity or instability of the knee. Dr. Piccioni reported that Claimant's objective findings included some atrophy, which had improved, no instability and no extensor lag. The doctor noted that Claimant's other comorbidities, including his cardiac bypass procedure, could have impacted his total knee replacement recovery.

Using both the 5th and 6th Editions of *The Guides*, Dr. Piccioni determined Claimant's impairment rating. Using *The Guides* 5th Edition's point system, Dr. Piccioni rated Claimant's pain as 40 out of 50, based on Claimant's report of 2 out of 10 pain during his examination, his lack of need of prescription pain medication and his ability to work full-time. With the addition of range of motion and laxity points, Dr. Piccioni rated Claimant with 90 points, which he converted to a thirty-seven percent permanency with a good result, according to *The Guides*.

Dr. Piccioni concluded that *The Guides* 6th Edition is the more appropriate edition to use when rating Claimant's impairment because the knee replacement Claimant received was not available at the time *The Guides* 5th Edition was drafted and the knee replacement procedures and recovery have improved since *The Guides* 5th Edition was drafted. He testified that "...there's a significant amount of advancement since 2001 in knee replacement surgery than...there was at the last writing of the fifth edition." Dr. Piccioni Deposition 33: 11-15 (September 3, 2020). He testified that permanency ratings should be done using the most recent edition of *The Guides* and "...the individual is evaluated according to the latest information pertaining to the condition in the current edition of the Guides, which is the sixth edition." *Id.* at

41:4-8. Dr. Piccioni explained that, even using *The Guides* 5th Edition points scale, Claimant had 90 points, which qualified him with a good result. He testified that Claimant is functioning better since the knee replacement than he was before the knee replacements, which causes his impairment rating to decrease.

Using *The Guides* 6th Edition, the doctor explained that Claimant had good stability and function, which qualified him for a twenty-one to twenty-five percent impairment, which was less than the thirty-two percent impairment Claimant had been rated before. The doctor explained that for Claimant to qualify for a “fair” result, there would need to be findings of fair position of the knee and mild instability, which Claimant did not have. He reported that *The Guides* 6th Edition allows twenty different ratings choices for a knee replacement, which is far more options than *The Guides* 6th Edition allows. Dr. Piccioni concluded that Claimant did not qualify for any additional impairment beyond the thirty-two percent impairment he had already received.

Dr. Piccioni disagreed with Dr. Rodgers’ conclusion that knee replacement patients still have the same level of function and results from the surgery, and noted that Dr. Rodgers is no longer in clinical practice. Dr. Piccioni agreed with Claimant’s treating surgeon that Claimant requires no further knee treatment. He concluded that Claimant could continue to work full-time without restrictions.

Dr. Piccioni confirmed that Claimant’s January 2, 2014 treatment records indicate Claimant reported left knee cracking, popping, buckling, giving way, and sharp pain, which caused him to have trouble with activities of daily living. Claimant’s November 6, 2014 treatment records indicate Claimant reported problems using his left knee. Claimant’s February 19, 2017 records indicate Claimant reported sharp, severe knee pain, with constant symptoms

made worse by walking, bending, and standing, and causing him to fall. Claimant was taking prescription pain medication for his knee symptoms.

Claimant's June 21, 2018 treatment records indicate Claimant reported improvement in his symptoms and that he "...is happy with the knee and it was not bothering him much." Dr. Piccioni Deposition 46:22-24 (September 3, 2020). On December 11, 2018, Claimant rated his knee pain as a 3 out of 10 and reported that his knee had improved over time. On May 30, 2019, Claimant reported no significant changes since his last visit and pain only when he slept. Claimant's June 20, 2019 records show Claimant denied any change in symptoms and reported knee pain at night, with no pain at work. Dr. Piccioni confirmed that Claimant's medical records before and after the knee replacement procedure supported his conclusion that Claimant's condition had not worsened since the replacement procedure, the purpose of which is to improve function.

Dr. Piccioni disagreed with Dr. Rodgers' conclusion that quad atrophy and 5/5 strength findings are inconsistent. The doctor noted that Claimant's treating provider's range of motion and strength findings were similar to his. Dr. Piccioni confirmed that "...zero to 120 degrees, five over five strength, is a good result in a knee replacement, in a knee surgeon world." *Id.* at 55:4-6. The doctor explained that pain should follow function and if Claimant had been experiencing significant pain, there should be decreased range of motion, instability findings and malposition of the components. Dr. Piccioni confirmed that Claimant qualifies for a good result finding, based on *The Guides* 6th Edition, based on his good implant position, knee stability and knee function. The doctor concluded that Claimant is doing better since his knee replacement surgery than he was before the surgery, and has shown functional improvement.

On cross examination, Dr. Piccioni acknowledged that he was unaware if Claimant had been evaluated for permanency by other providers in the past, but he was asked to determine whether Claimant's rating had increased from a thirty-two percent (32%) rating. He was unaware of which edition of *The Guides* was used to calculate the prior rating. The doctor confirmed that, in his practice, he does not use the exact brand of prosthesis (Oxinium) that was used in Claimant's surgery, but noted that he understands the basic technology involved in other brands. He reported that the same congruency, safety features, range of motion, and biomechanics are similar for all the products.

The doctor agreed that neither edition of *The Guides* makes any distinction for the brand of prosthesis used. He disagreed that Claimant continues to experience "significant" symptoms and noted that Claimant rated his pain as 2 out of 10 and only takes over the counter medications at night after a long day. Dr. Piccioni agreed that Claimant's June 2019 treatment records indicate he reported 5 out of 10 pain, which interrupted his sleep, along with numbness, swelling and some fluid. He confirmed that Claimant's provider had described Claimant's pain as "moderate" and had found Claimant to have significant quad atrophy.

Dr. Piccioni agreed that Claimant's condition could have worsened following his cardiac surgery, but noted that the worsening would likely be bilateral. He explained that if Claimant had significant bilateral atrophy, Claimant would not have been able to carry a heavy box upstairs. The doctor testified that atrophy can be visualized during examinations, but even a change in atrophy measurements from 1.4 to 2.4 centimeters would not have changed Claimant's permanency rating. He acknowledged that Claimant appeared to be a reliable historian and that the cutoff between a good result, where Dr. Piccioni placed him, and a fair result, where Dr. Rodgers placed him is 85 points, using *The Guides* 5th edition. The doctor denied that Claimant

reported pain with stairs, on level surfaces, or in and out of a car, during their visit. He denied that Claimant reported pain every time he walks, but only after several hours. Dr. Piccioni testified that Claimant reported pain when walking after a hockey game and while carrying a heavy box upstairs, but not generalized day to day walking. He confirmed Claimant's report of pain and some swelling, particularly at night, after being on his knee for several hours. The doctor agreed that if Claimant was rated at 30 points, instead of the 40 points Dr. Piccioni calculated, he would qualify in the fair category, instead of the good category, according to *The Guides* 5th Edition.

Dr. Piccioni confirmed that he would not use the functional index form for knee replacement patients because some of the activities listed on the form should not be done by or expected of patients who have knee replacements. He explained that Claimant would have received the same twenty-five percent (25%) permanency rating regardless of the use of a grade modifier because twenty-five percent is the maximum rating in that category. He concluded that Claimant did not have an antalgic gait, instability, or significant clinical studies to warrant the use of a modifier, and his minimal atrophy did not warrant anything other than a mild grade modifier, which did not change his twenty-five percent rating. The doctor admitted that he had only examined Claimant one time and had not made any personal observations of Claimant over time.

The doctor agreed that Claimant is now three years post-knee replacement and his knee condition should be stable, but he explained that Claimant had an intervening cardiac event that impacted his functional ability, as described on the functional index.

On redirect examination, Dr. Piccioni confirmed that Claimant's release from treatment with his surgeon, return to full-time work, and lack of prescription pain medication was better

evidence of Claimant's functional history than the Lower Extremity Functional Index form. He confirmed his opinion that Claimant currently has a twenty-five percent (25%) permanent impairment to his left knee.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Permanent Impairment

The Delaware Workers' Compensation Act provides for proper and equitable compensation for the loss or loss of use of any member or part of the body. *See* 19 Del. C. § 2326. It is the function of the trier of fact, and not the physician, to determine the degree of a claimant's impairment. *Turbitt v. Blue Hen Lines, Inc.*, 711 A.2d 1214, 1215 (Del. 1998); *Poor Richard Inn v. Lister*, 420 A.2d 178, 180 (Del. 1980). "Loss of use should be determined based upon the ability of the employee to use the member or part, and conversely, the loss of use represents that degree of normal use which is beyond the ability or capability of the employee." *Wilmington Fibre Specialty Co. v. Rynders*, 316 A.2d 229, 231 (Del. Super. 1974), *aff'd*, 336 A.2d 580 (Del. 1975). Pain that is not associated with a loss of use is not compensable. *Rynders*, 316 A.2d at 232. Pain that inhibits movement or use, however, may be the basis for a finding of permanent impairment. *Id.* The burden of proof rests with Claimant. The primary dispute between the experts is the degree of Claimant's left lower extremity permanency rating. In this case, the Board concludes that Claimant has no additional left lower extremity permanent impairment, causally related to his work accident.

The Board finds Dr. Piccioni's testimony to be more persuasive than Dr. Rodgers'. Specifically, regarding Claimant's alleged additional lower extremity impairment, Dr. Piccioni pointed out that, at the time of his examination, Claimant reported pain of a 2 out of 10, with no pain medication. In addition, the doctor explained that the type of knee used in Claimant's

surgery was an Oxinium product, which came on the market in 2005, after *The Guides* 5th Edition was published, making *The Guides* 6th Edition more appropriate to use in rating Claimant's impairment. He confirmed that Claimant's last knee treatment was in June 2019, at which time Claimant had normal strength, notable quad atrophy, diffuse tenderness, pain with flexion, normal strength, and gait, with some valgus-varus laxity, which he explained *The Guides* allow for on physical examination. When Dr. Piccioni examined Claimant, he found Claimant's objective findings to include some atrophy, which had improved, no instability and no extensor lag.

Dr. Piccioni calculated Claimant's lower extremity impairment, using both the 5th and 6th Editions of *The Guides*. Using *The Guides* 5th Edition's point system, Dr. Piccioni found Claimant to have a thirty-seven percent (37%) permanency with a good result. Dr. Piccioni concluded that *The Guides* 6th Edition is the more appropriate edition to use when rating Claimant's impairment because "...there's a significant amount of advancement since 2001 in knee replacement surgery than...there was at the last writing of the fifth edition." Dr. Piccioni Deposition 33: 11-15 (September 3, 2020). The doctor determined that Claimant is functioning better since the knee replacement than he was before the knee replacements, which causes his impairment rating to decrease. The Board agrees.

Dr. Piccioni explained that Claimant had good stability and function, which qualified him for a twenty-one to twenty-five percent impairment, which was less than the thirty-two percent impairment Claimant had been rated before. The doctor explained that for Claimant to qualify for a "fair" result, there would need to be findings of fair position of the knee and mild instability, which Claimant did not have. He concluded that Claimant did not qualify for any additional impairment beyond the thirty-two percent impairment he had already received.

Dr. Piccioni confirmed that Claimant's 2014 treatment records indicate Claimant reported left knee cracking, popping, buckling, giving way, and sharp pain, which caused him to have trouble with activities of daily living and his 2017 records indicate Claimant reported sharp, severe knee pain, with constant symptoms made worse by walking, bending and standing, and causing him to fall. In addition, Claimant was taking prescription pain medication for his knee symptoms at that time. The doctor pointed out that Claimant's 2018 treatment records indicate Claimant reported improvement in his symptoms and that he "...is happy with the knee and it was not bothering him much." Dr. Piccioni Deposition 46:22-24 (September 3, 2020). Claimant's 2019 records indicate Claimant reported no significant changes since his last visit and pain only when he slept, and he denied any change in symptoms and reported knee pain at night, but no pain at work. Thus, Dr. Piccioni verified that Claimant's medical records before and after the knee replacement procedure supported his conclusion that Claimant's condition had not worsened since the knee replacement procedure, but had improved, which is the purpose of a knee replacement procedure.

Additionally, Dr. Piccioni explained that pain should follow function and if Claimant had been experiencing significant pain, there should be decreased range of motion, instability findings and malposition of the components during his examination. Dr. Piccioni confirmed that Claimant qualifies for a good result finding, based on *The Guides* 6th Edition, due to Claimant's good implant position, knee stability and knee function. Dr. Piccioni concluded that Claimant is doing better since his knee replacement surgery than he was before the surgery, and has shown functional improvement, which is documented in his treatment records.

Even Dr. Rodgers agreed that a knee replacement procedure normally improves a patient's function when done for the proper indications and he acknowledged that Claimant is

now "...better than he was the weeks before his total knee replacement." Dr. Rodgers Deposition 43:5-6 (September 2, 2020). Furthermore, Dr. Rodgers admitted that Claimant's 2014 examination findings had improved in many areas, including laxity, range of motion, and gait, at the time of his 2020 examination and he confirmed that Claimant had been taking prescription medication prior to the knee replacement, but no longer required prescription pain relief.

Finally, addition to Dr. Piccioni's testimony, the Board finds Claimant's own testimony supports a finding that he has not experienced any additional impairment to his left knee since his last rating in 2014. In fact, Claimant testified that, prior to his total knee replacement surgery, his left knee pain was "atrocious" and his knee would give way, causing him to fall. Furthermore, in 2019 Claimant reported to his surgeon that he no longer has daily pain and he has been working full-time, without restrictions. When questioned by the Board, Claimant admitted that he was barely able to walk before the knee replacement procedure, but since the knee replacement he is able to walk much better. Claimant reported that his only remaining issue is pain, which Claimant acknowledged is not severe enough to require anything more than occasional over the counter anti-inflammatories. Thus, by Claimant's own admission, his left knee function has improved since his replacement procedure.

Based on all the above, the Board accepts Dr. Piccioni's conclusion that Claimant does not have an additional left lower extremity impairment. The Board finds that Claimant has no additional left lower extremity permanent impairment. Therefore, Claimant's Petition is denied.

Attorney's Fee and Medical Witness Fee

A claimant who is awarded compensation is entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award,

whichever is smaller.” 19 *Del. C.* § 2320. At the current time, the maximum based on Delaware’s average weekly wage calculates to \$11,214.90. The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55 (Del. 1973). The Board is permitted to award less than the maximum fee and consideration of the *Cox* factors does not prevent the Board from granting a nominal or minimal fee in an appropriate case, so long as some fee is awarded. See *Heil v. Nationwide Mutual Insurance Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96A-01-005, Cooch, J., 1996 WL 527213 at *6 (August 9, 1996). A “reasonable” fee does not generally mean a generous fee. See *Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966). Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation. By operation of law, the amount of attorney’s fees awarded applies as an offset to fees that would otherwise be charged to Claimant under the fee agreement between Claimant and Claimant’s attorney. 19 *Del. C.* § 2320(10)a.

Claimant has not proven that he is entitled to an additional award of permanent impairment; therefore, Claimant is not entitled to an attorney’s fee.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board finds that Claimant has no additional permanent impairment to his left lower extremity causally related to his work accident. Therefore, Claimant's Petition is denied.

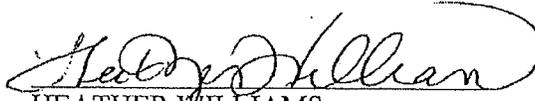
IT IS SO ORDERED THIS 22nd DAY OF SEPTEMBER, 2020.

INDUSTRIAL ACCIDENT BOARD

/s/William Hare
WILLIAM HARE

/s/Gregory Fuller
GREGORY FULLER

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


HEATHER WILLIAMS

Mailed Date:

CL. 9-24-2020 CL
OWC Staff

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

KATHY THOMAS,)	
)	
Employee,)	
)	
v.	)	Hearing No. 1417741
)	
CITY OF WILMINGTON,)	
)	
Employer.)	

DECISION ON PETITION TO DETERMINE ADDITIONAL COMPENSATION DUE

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on Tuesday July 16, 2019, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

PETER HARTRANFT

IDEL WILSON

Eric D. Boyle, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Heather A. Long, Attorney for the Employee

Gregory P. Skolnik, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Kathy Thomas (“Claimant”) injured her left knee in a compensable work accident on August 24, 2014, while in the course and scope of her employment with the City of Wilmington (“Employer”). She received medical benefits, total disability benefits and permanent partial disability benefits of 7% to the left lower extremity. On November 27, 2017, Claimant underwent a left sided total knee replacement. Claimant’s agreed upon average weekly wage (AWW) was \$1,251.24 resulting in a weekly compensation rate of \$713.65, the maximum for the purposes of permanent impairment. On February 4, 2019, Claimant filed a Petition seeking an increase in her permanent impairment of 30%. Employer disputes the amount of the increase and argues that it should only be a 16% increase in impairment. A hearing was held on Claimant’s Petition on July 16, 2019. This is the Board’s decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. Stephen Rodgers, a physician board certified in occupational medicine, testified by deposition on behalf of Claimant. Dr. Rodgers summarized his experience with the AMA Guides to the Evaluation of Permanent Impairment.¹ (“AMA Guides” or “Guides”). His experience includes acting as a reviewer and/or consultant on several editions of the Guides. Dr. Rodgers also detailed his extensive experience rating permanent impairment and testifying about same before the Board. Dr. Rodgers examined Claimant on two occasions, first in 2017 and then again in 2019. At his initial evaluation in 2017 he obtained a history of the accident from Claimant. This was also part of Dr. Johnson’s records. In 2014 Claimant twisted her knee and fell while at work. Shortly

¹ Linda Cocchiarella, MD, Ed., *AMA Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001); Robert D. Rondinelli, MD, Ed., *AMA Guides to the Evaluation of Permanent Impairment*, (6th Ed. 2008).

after the accident an MRI was taken which was interpreted as showing complex degenerative tearing of the lateral meniscus. Claimant also had severe joint osteoarthritis in several compartments of the knee joint. Dr. Rodgers described the location and purpose of the menisci. After some conservative treatment Claimant underwent arthroscopic surgery with Dr. Johnson to repair the meniscus tears. This was done on May 20, 2016. Dr. Rodgers agreed that this surgery as well as the subsequent total knee replacement surgery in 2017 were accepted as compensable. During the procedure Dr. Johnson found additional damage that was not visualized on the MRI scan. She had both a medial and a lateral meniscus tear. After the procedure Claimant underwent a course of physical therapy.

Claimant had difficulty with certain motions including kneeling and standing up. Dr. Rodgers testified that Claimant had an agreed-upon 7% impairment to the left lower extremity in July 2017. Ultimately in November 2017 Claimant had a left total knee replacement for the osteoarthritis of the left knee. Dr. Rodgers described this procedure and noted that it is very extensive and left a 20 cm incision on her knee. Following this surgery Claimant again had physical therapy but was having difficulties so she returned to Dr. Johnson in January 2018 for a procedure called a manipulation under anesthesia. This is a procedure done when someone is having trouble with range of motion after a procedure on their knee. The procedure helps to break up scar tissues around the joint. It is an attempt to restore range of motion. Dr. Rodgers reviewed the operative report and noted that it listed a left knee contracture status post left total knee replacement. This is a potential complication of a knee replacement procedure. After this procedure she again underwent physical therapy. At physical therapy they continued to measure her ranges of motion.

Dr. Rodgers examined Claimant in January 2019 and performed a physical examination. He noted there was fullness at the knee as well as the 20 cm scar. There was palpable warmth in

the left knee when compared to the right knee. This is a typical finding following this type of surgery. He did not find any atrophy and there was no laxity with stability maneuvers. This meant that the knee was medically stable. The alignment was clinically good. There was a subtle difference in gait when Claimant walked. She had less strength on the left than the right. She had 100 degrees of flexion on the left as compared to 135 degrees on the right. Dr. Rodgers agreed that this was consistent with the physical therapy records. He did not believe that the difference in gait would affect the permanency rating. By history Claimant was currently working with continuing symptoms. She had initially returned to work in March 2018 but the knee swelled up significantly and she returned to physical therapy. Claimant takes arthritis strength Tylenol for aching symptoms in the knee. She has trouble kneeling and cannot take steps serially. She has difficulty getting up from a low chair. Claimant told Dr. Rodgers about an episode at work when she was doing an inspection and lost stability in the knee coming out of a bathroom. She now always braces herself when transiting stairs. Dr. Rodgers reviewed a physical therapy note from March 2018 indicating that Claimant's knee was swollen after her initial attempt at returning to work. Dr. Rodgers described what he meant by taking steps serially versus in a reciprocating fashion left, right, left, right. He felt that this was a significant functional limitation. Dr. Rodgers felt that Claimant had a complicated recovery from the total knee replacement surgery.

Dr. Rodgers evaluated Claimant's permanent impairment in January using the AMA Guides fifth edition. Dr. Rodgers explained that he used the fifth edition instead of the sixth edition because most physicians use the fifth edition in Delaware. In general, the fifth edition provides values that are about double what they are in the sixth edition. Dr. Rodgers feels that the sixth edition numbers do not adequately reflect the loss of function. Pages 547 and 549 of the AMA Guide fifth edition were attached as exhibits to Dr. Rodgers deposition. Dr. Rodgers utilized table

17-33 on pages 546 and 547. There are specific ratings for the total knee replacement procedure. For a good result it is 37% impairment to the lower extremity, for a fair result it is 20% whole person or 50% lower extremity and for a poor result it is 30% whole person or 75% lower extremity impairment. To get the specific result; good, fair or poor there are certain points assigned in the form. These are listed on table 17-35 on page 549 and include parameters such as pain, range of motion and stability. Dr. Rodgers summarized the amount of points he assigned based on these conditions and other sub parameters. He came up with a total of 90 points, which is a good result. Dr. Rodgers agreed that this would be the total impairment and the previously awarded 7% would be deducted leaving an increase of 30% impairment.

Dr. Rodgers agreed that Dr. Piccioni came up with the same rating under the fifth edition of the Guide. Dr. Rodgers felt that Dr. Piccioni did not correctly utilize the sixth edition. In Dr. Rodgers' opinion if the sixth edition ratings were utilized correctly, Claimant would get a fair result with a 37% impairment like the fifth edition. Dr. Piccioni did not explain how he adjusted for the modifiers in the sixth edition. Dr. Rodgers opinion was that fifth edition more accurately reflects Claimant's loss of function, that is one third of the loss of the limb as opposed to one quarter per Dr. Piccioni's sixth edition rating. Dr. Rodgers then was asked to review some of some other jurisdictions and their use of the fifth or sixth editions of the Guide. Dr. Rodgers noted that the sixth edition generally gives less money. He referenced a court case in Pennsylvania rejecting the sixth edition. Dr. Rodgers summarized some of the function that Claimant has lost which he believes justifies the higher rating. He noted she has continuing pain, difficulty with ranges of motion, ambulating on stairs, squatting and kneeling as well as arising from a seated position. She has a 35-degree deficit in range of motion.

On cross examination Dr. Rodgers confirmed that he only saw Claimant for the purposes of a permanent impairment evaluation on two occasions. He agreed that he rated impairment based on the fifth edition in both of his reports. Dr. Rodgers does not use the sixth edition because he has felt no need to use it. The fifth edition is used by all the Claimant's bar and about 95% of the defense bar. Only Drs. Piccioni, Schwartz and Gelman use the sixth edition. Dr. Rodgers acknowledged that he often does provide ratings with both at the request of clients. Dr. Rodgers noted that other than preparation of the report it would not take very long to provide an evaluation under the sixth edition had he been asked to do so.

Claimant testified on her own behalf. Claimant is a code enforcement inspector for the city of Wilmington. Essentially, she is a housing inspector and does this for residential housing as well as businesses. She responds to complaints from homeowners and tenants. She is often in the field responding to calls and not at a desk. She is also on call to work with the fire department and the police department after hours. If there is a fire she helps to secure the property. She has worked for 20 years in this position. Claimant was responding to a complaint in a home and was descending some uneven steps when she attempted to grab a handrail that was not properly attached. Claimant twisted her knee and fell. She first had surgery to repair a torn meniscus. Her pain persisted after that surgery despite undergoing physical therapy. Dr. Johnson then recommended that she get a total knee replacement on her left knee and ultimately she had the procedure.

Afterwards she had very intense physical therapy. They work very hard to try to get the knee to bend so she could maintain a certain range of motion. She always went to her physical therapy appointments despite it being very intense and painful. Claimant testified that they could not get all the motion needed in the knee, so they had to do a manipulation procedure. This was done in January 2018. Claimant testified this was a difficult procedure and very painful. A nurse

told her that she was screaming even under anesthesia. She began physical therapy immediately after this procedure and that continued until they saw some progress. Claimant explained that pain drugs didn't work on her. She ended up going with Tylenol to control the pain. She also has an ice machine to keep the swelling down. Also, before she stretches and exercises, she applies heat.

Claimant attempted to return to work, but her knee swelled up and she was in considerable pain. This was a return to work that was to be at desk duty. Dr. Johnson took her back out of work and she went back to physical therapy. A month later in April 2018 she was able to return to work. Claimant explains that she still has some pain and swelling. Claimant feels that she has stability issues with her knee as well. Claimant described a fall in a home on February 2019. She felt unstable and fell coming out of the bathroom hitting her face on the wall. She changed the way she takes steps and continued with her treatment. She must be very careful especially in historic homes with irregular sized steps. She now must take time to maneuver on uneven surfaces. She no longer takes the on-call work because that means long hours of standing and her knee would start swelling up. She stopped taking the on-call hours in May. She does do home exercises which include stretching and other range of motion exercises. She takes Tylenol and applies ice and heat.

Claimant explained that she is originally from Maryland and now is unable to go on their boat because she just feels too unstable on her knee. She explained that her family likes to do outdoor activities but she is unable to do that because she has to be careful with her knee. She does not want to risk any setbacks. Claimant acknowledged that she had a 2011 knee injury but there were no lingering effects and had return to work full duty prior to this accident.

On cross examination Claimant acknowledged that she did not remember this prior incident when she was being examined by Dr. Rodgers and Dr. Piccioni. The records from Dr. Brady indicate that she fell down an escalator after her knee gave way. She does not recall that and does

not remember having an MRI after that incident. She does not remember a surgical recommendation made by Dr. Brady or having a meniscal tear at that time. Claimant testified that she returned to work and didn't have any problems after that incident. While she acknowledged that she was here for permanent impairment evaluation she did not understand all the different numbers that the doctors were talking about or that Dr. Rodgers assigned. Claimant agreed that her knee was better and had been improving after the total knee replacement and the manipulation procedure. She still has stability issues. She agreed that she returned to work full duty and the physical therapy notes indicate that she was able to do that without swelling. Claimant disputed a physical therapy record indicating that she was helping her son move when her knee swelled up in March 2018. Claimant disputed that account because they paid a mover to help. The record is incorrect that she was sore after moving.

Claimant did recall being evaluated by a Dr. Matz in Baltimore. In his evaluation she was able to flex the knee to 120°. She noted that the movement was not done on her own. Physical therapy records that indicated that she goes to the gym are incorrect. They wanted her to get a membership, but she has not done that yet. She can perform shopping and errand running activities. Her last visit with Dr. Johnson was on August 13, 2018. She is aware that his notes indicated that she only had intermittent swelling and mild symptoms and was trying to be active. Claimant testified that Dr. Johnson was aware of her instability problems. The last physical therapy visit was April 2018. Claimant testified that she was sure she said she saw someone at Dr. Johnson's office after her February 2019 fall. Although she agreed that the physical therapy at that time was for a neck injury. The records indicate that she tripped on a transition from tile to carpeting and there was nothing in the physical therapy records about her knee giving away. Claimant agreed that she

gave up the on-call duties on her own. Claimant is scheduled for a one-year follow-up visit in November 2019 with Dr. Johnson.

Dr. Lawrence Piccioni, a board-certified orthopedic surgeon, testified by deposition on behalf of Employer. Dr. Piccioni regularly performs knee replacement surgery. He agreed that he uses both the 5th Edition and the 6th Edition of the AMA Guides to rate impairment. Dr. Piccioni was aware that Claimant had been rated previously for permanent impairment by Dr. Rodgers and 7% left lower extremity permanency had been accepted. He agreed that in his opinion, following the total knee replacement surgery there has been a 16% increase in impairment for a total of 23%. He examined Claimant on May 1, 2019 and in conjunction with that examination he reviewed her medical records. He was also able to review Dr. Rodgers deposition testimony. He was aware that Claimant did have some pre-existing issues with her knee. He agreed that in 2011 Claimant saw Dr. Brady after a fall on an escalator that caused a medial meniscal tear. Claimant chose not to proceed with surgery at that time. Dr. Rodgers initially rated Claimant on June 1, 2017. At that time Claimant did not advise Dr. Rodgers that she had any prior knee injuries contrary to what the records indicated. Claimant subjectively noted difficulties with activities such as going up steps and standing up from a seated position. On physical examination Dr. Rodgers found crepitus in the left knee. Flexion on the right knee was to 130° degrees which Dr. Piccioni questioned because of Claimant's body habitus. On Dr. Rodgers examination the motion in the left knee was only to 95 degrees. There was an antalgic gait favoring the left. Dr. Piccioni agreed that Dr. Rodgers rated 15% at that time.

Following that examination on November 27, 2017 Claimant had a left total knee replacement and then subsequently a manipulation under anesthesia on January 5, 2018. Dr. Johnson's records indicate that Claimant was making good progress with intermittent symptoms

and improvement after that procedure. Claimant described the symptoms as mild with aching pain. She had significant improvement with physical therapy. X-rays showed good position and alignment of the knee replacement. Improvements in physical therapy included a range of motion of 110° of flexion. The physical therapy notes on April 16, 2018 revealed that Claimant did not have any swelling and her tolerance was increased throughout passive range of motion. She did not have to use any assistive devices. She had a flexion of between 110 and 120° from a sitting position. She was able to walk on a treadmill for 15 minutes and negotiate her basement steps. She wanted to increase function even more to resume full-time work. At that time Claimant noted to Dr. Johnson that she had less swelling with activities and only complained of stiffness and soreness occasionally. She was taking Tylenol. Her general level of mobility had increased. At that time, she was released to her preinjury position without restrictions. Claimant worked a full shift on April 18, 2018 and noted in physical therapy that she had some soreness and stiffness which she attributed to over exerting herself over the weekend trying to pack for a move. At that time Claimant was given a home exercise program. Dr. Piccioni agreed that the last physical therapy appointment on April 19 Claimant performed all the exercises including walking and using a bike but did not need any passive modalities. Dr. Piccioni felt that that would be indicative of continued improvement. Claimant saw Dr. Matz for a defense medical examination on April 25, 2018. Claimant indicated that she was able to get back to 120 degrees of flexion and work full duty as a housing inspector without any problems. She was able to go to the gym and run errands. She was not using any assistive devices. His examination revealed no redness heat or instability. Dr. Piccioni agreed that this was consistent with his subsequent examination. He noted that this was still only five months from the surgery and it would take a full year to completely recover from a knee replacement. He felt the ranges of motion would wax and wane, but it was significant that

Dr. Matz had her at 115 degrees at that time. Dr. Piccioni reviewed the last treatment record available from Dr. Johnson dated August 13, 2018. At that visit she had intermittent stiffness with mild symptoms. She had some discomfort and was taking Tylenol as needed. She had no significant pain or limitations. She was trying to remain active. There was no concern for stability noted. The next follow-up was to be in one year in November 2019. There was no indication that Claimant had difficulty with stairs.

Dr. Piccioni then reviewed Dr. Rodgers permanency evaluation dated January 3, 2019. He summarized the subjective issues that were noted by Dr. Rodgers. He also summarizes Dr. Rodgers physical examination findings. There were no findings of laxity on physical examination. Dr. Piccioni indicated that there was no indication of Dr. Rodgers examination of instability. Dr. Piccioni noted that instability is a very bad finding in either a knee replacement or a natural knee. It is an actual physical examination finding and there are grades of instability depending on the findings. This is a mechanical examination. This is the type of instability that you use when rating a knee injury pursuant to the AMA Guide. It does not matter which edition this is the type of physical exam finding that you look for when you use instability as a parameter. Dr. Piccioni noted that Dr. Rodgers did not use the standard convention for rating strength which would be in grades like five, five minus or 4 plus. He was not sure how Dr. Rodgers came up with 135 degrees motion on the uninjured side due to Claimant's body habitus. Dr. Piccioni noted that the findings on the injured side did improve and she did not really have antalgic gait. Dr. Rodgers merely suggested a subtle difference in gait. Dr. Piccioni agreed that she was no worse than when Dr. Rodgers gave her a 15% rating. Dr. Piccioni agreed that Dr. Rodgers examination findings of range of motion were inconsistent with the physical therapy records. His examination findings, those of Dr. Matz, Dr. Johnson and the physical therapy records are all consistent leaving Dr. Rodgers as the outlier.

Dr. Piccioni testified that the warmth felt in the left knee was not an uncommon finding following a knee replacement and could represent healing and increased blood flow. Dr. Piccioni agreed that the physical therapy notes referencing a fall that Claimant had on February 12, 2019 indicate that she tripped on the transition from tile floor to carpet because there was no transition plate. She hit the right side of her head on the wall. There was no history in those records of any knee instability causing the fall. He agreed that there were no knee complaints related to that fall and no mention of the knee in the records. Dr. Piccioni indicated that if he were treating Claimant and there was instability noted it may be because of quadriceps weakness. If that were the case, he might have her go back to using a cane until the instability could be addressed. Dr. Piccioni noted that this was a big issue with a knee replacement, so it would be noted in the records.

Dr. Piccioni addressed his own physical examination. Claimant indicated that she was taking Tylenol four times a day and noted knee stiffness. She was no longer in formal physical therapy and had no work restrictions. Claimant did indicate that she had problems of stiffness in the knee even before the injury in 2017. Claimant listed her pain at a two out of 10 after taking two Tylenols that morning. There was no antalgic gait and Claimant used no assistive devices. He noted the 20 cm anterior scar which was well-healed. There was some mild puffiness around the left knee compared to the right. There was no laxity or instability on physical examination. Claimant flexed to 115 degrees and came to full extension. He did not note any quad atrophy. He was able to get 120 degrees of flexion passively. He was unable to get beyond 129 degrees on the right side due to body habitus and the fact that the hamstring then contacted her calf area at that point. Claimant was treating for some hip arthritis at that time.

Dr. Piccioni testified regarding his permanent impairment ratings. He started with the fifth edition of the AMA guides noting that the ratings on page 547 reference good, fair and poor results

from the knee replacement. There are number of criteria which either give you points or take points away. You gain points for pain, range of motion and stability and get deductions for a flexion contracture extensor lag or alignment. Summing it up he came up with 93 points which represents a good result providing 37% impairment to the lower extremity. Dr. Piccioni agreed that the difference between his examination and Dr. Rodgers rating was really in the range of motion area where he gave her more points than Dr. Rodgers did. Dr. Piccioni agreed that in this case Claimant had a good outcome from the knee replacement. Dr. Piccioni also rated impairment using the sixth edition of the AMA Guide. The sixth edition uses the same six measurements as the fifth edition. Range of motion, pain, stability with the same deductions. The bottom line is a good result gets less percentage of permanency than in the fifth edition. It would be in between 21 and 25% impairment. Typically, you use the middle number which is 23% and then can modify that up or down based on grade modifiers. He did not think in this case there was a reason for grade modifiers, so he kept the 23% impairment. Grade modifiers would be for gait derangement or other findings such as crepitus. Dr. Piccioni felt that this was a straightforward knee replacement and did not assess any modifiers.

Dr. Piccioni responded to a criticism by Dr. Rodgers of his methodology under the sixth edition. He noted that he did not give Claimant the best category because he could have given her 21% impairment. He also noted that the range of motion of 115 degrees still gets her into the good category. To give her another modifier for range of motion would be double dipping as far as he was concerned. 120 degrees would get you the maximum points for range of motion for knee ratings using either edition. Dr. Piccioni noted that as far as the points ratings go he assessed 93 points and Dr. Rodgers assessed 90 points. What changed in the sixth edition is that the actual percentage you get for a good result is less. Even the 90 points that Dr. Rodgers assessed places

Claimant in the middle of the good result category. Dr. Piccioni noted that Claimant would not qualify for class III because she does not have instability. He noted further that if he placed her in a fair result category in the under the sixth edition he would have to have done the same thing under the fifth edition. Using the same parameters for deductions such as stability, extensor lag and alignment. Dr. Piccioni further responded to Dr. Rodgers criticisms of the sixth edition percentages. He noted that the fifth edition does not reflect the changes in knee replacement surgery since the edition came out in 2001. The prosthesis that was used here was not even available in 2001. Dr. Piccioni equated it to using a cell phone from 2001 comparing it to a 2019 phone. In 2001 his patients would stay several days in the hospital for a procedure which is now considered a non-inpatient procedure meaning that unless there's a problem you don't stay more than 23 hours in the hospital.

Dr. Piccioni then testified about several articles with reference to the sixth edition of the guides. He agreed that one of the reasons for the changes between the fifth and sixth edition was to more accurately reflect treatment outcomes. This includes total knee replacements. Dr. Piccioni agreed that this was consistent with treatment outcomes he has seen in his practice. There was also an agreement that the sixth edition was an improvement. Dr. Piccioni also indicated that one of the problems that needed to be addressed by the new edition was reliability between observers. He noted that we should not be arguing over a 14% difference, the rating should be much closer between different raters. So, they wanted to make it more reliable from rater to rater, show more about functional outcomes and reflect updated medical technology between the last edition of the guides.

On cross examination Dr. Piccioni agreed that there were no surgical recommendations prior to the August 2014 accident. He also agreed that there were no functional limitations that he

was aware of prior to the August 2014 accident. He agreed that all the permanent impairment that he rated is a direct result of the 2014 work accident. He agreed that Dr. Rodgers original report was issued following an arthroscopic surgery of the knee addressing partial medial and lateral meniscus tears. The second surgery in November 9, 2017 was the knee replacement. He agreed that these are two very different surgeries. He admitted that he only examined Claimant on one occasion. He confirmed that there was a 20 cm incision related to the total knee replacement and that he did observe puffiness in the left knee. Dr. Piccioni agreed that not every total knee replacement is followed by a manipulation under anesthesia procedure. Dr. Piccioni testified that someone would have to undergo this manipulation if they were not progressing appropriately with range of motion. Dr. Piccioni noted that due to Claimant having a gastric bypass procedure she was limited in the medications she could take following surgery to keep her pain under control. This led to stiffness and the requirement for the manipulation. This is a known complication of a total knee replacement. He agreed that utilizing the fifth edition of the AMA guides he achieved the same total percentage number that Dr. Rodgers did. He agreed that there was no give way or instability noted on his examination. He was aware that Claimant mentioned instability to Dr. Rodgers in February 2019. He did not ask her about this at his evaluation, but noted that stability assessment is based on the physical examination not subjective complaints. He admitted that he did not ask her about the fall on the evaluation. When observing Claimant's gait he watched her walk down a long hallway in the office. He is aware of Claimants activities from her job description. He did not ask her about her ability to drive or sit for long periods of time. He noted that kneeling is a problem for many knee replacement patients based on the way the procedure is done. He did not agree that the sixth edition consistently yields more conservative ratings. He

noted that with respect to the technology the previous ratings were inflated, too high and did not reflect technology. The sixth edition is more reflective of technological advancements.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Permanent Impairment

The Delaware Workers' Compensation Act provides for proper and equitable compensation for the loss or loss of use of any member or part of the body. *See* DEL. CODE ANN. tit. 19, § 2326. While it is important to have medical testimony, it is the function of the trier of fact, and not the physician, to determine the degree of a claimant's impairment. *Turbitt v. Blue Hen Lines, Inc.*, 711 A.2d 1214, 1215 (Del. 1998); *Poor Richard Inn v. Lister*, 420 A.2d 178, 180 (Del. 1980). Claimant is the petitioner and bears the burden of proof. The Claimant seeks a determination that she has an increased permanent impairment to her left lower extremity following a total knee replacement. Previously the parties agreed that Claimant had 7% impairment to the left lower extremity following her injury and arthroscopic surgery to repair meniscal tears. Dr. Rodgers evaluated Claimant following the total knee replacement and determined that she had a total of 37% impairment to the left lower extremity or an increase of 30%. On the request of the Employer Dr. Piccioni evaluated Claimant and determined she had 23% total impairment to the left lower extremity or an increase of 16%. The discrepancy in this case boils down to one issue; which edition of the AMA Guides is appropriate for this case. Both experts believe Claimant had a good outcome from the surgery, which leads to the same rating except that Dr. Rodgers feels that the 5th Edition is more appropriate and Dr. Piccioni feels that the 6th Edition is more appropriate. Both parties cited extraneous evidence to advance their position and the Board noted each sides objection to the entering of this evidence. The Board did not consider any of it for this decision.

The Board finds that citations to cases from other jurisdictions regarding the use of the AMA Guides is not helpful and mostly irrelevant. Further Claimant's proffer of the *Protz* case for the proposition that Pennsylvania had rejected the 6th Edition is misleading and disingenuous. The decision in that case turned on a constitutional issue regarding related legislation rather than anything to do with the merits of the 6th Edition. *See, Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.)*, 161 A.3d 827 (Pa. Supr. 2017).

After reviewing the evidence presented the Board finds that Claimant has met her burden to prove that she sustained a 23% permanent impairment to the left lower extremity equating to a 16% increase in impairment. For this determination the Board will rely on the medical opinion of Dr. Piccioni. The Board accepts Dr. Piccioni's opinion as more credible and reliable than Dr. Rodger's opinion in this case. *DiSabatino Brothers, Inc. v. Wortman*, Del. Supr., 453 A.2d 102, 106 (1982) (the Board is free to choose between conflicting medical opinions). Dr. Piccioni explained why the 6th edition of the AMA Guide is more appropriate for this case and the Board is convinced by his assessment. The question for the Board really is what Claimant's functional limitations are and which rating more accurately reflects those limitations. Another aspect present in this case is the advance of medical technology, which is particularly important with joint replacements. Dr. Piccioni noted that the 5th Edition ratings reflect functional outcomes from older prosthetics, available when the guide was released in 2001. In his opinion the 6th Edition, being the newer version by eight years more accurately reflects the advances in joint replacement.

The Board finds that the 23% overall impairment more accurately represents Claimant's functional limitations. Claimant testified about her activities and the limitations on her activities following her knee replacement. She felt that she had a complicated recovery and difficulty with physical therapy as well. She further testified about the modifications she has done for her job

duties. Claimant feels that instability in the knee is a big problem and for that reason she can no longer go out on their boat. She also testified about a fall she had at work in February 2019 when her knee gave way. The trouble with this testimony is that it is inconsistent with the medical records. Both Dr. Rodgers and Claimant testified about her first attempt to return to work in March 2018 when her knee swelled up and Dr. Johnson put her back on disability. Dr. Piccioni observed this was only five months out from surgery. Claimant returned to work a month later and then had her last physical therapy appointment. None of the physical therapy records or doctor's notes reflect instability in the knee. Dr. Piccioni noted that of all the exams Claimant had there were no findings of instability. Even Dr. Rodger's did not find instability in the knee. Dr. Johnson's records reveal a good recovery with little functional loss. Range of motion findings from the physical therapy records support those of Dr. Piccioni rather than Dr. Rodgers. The last physical therapy note, and Dr. Johnson's August 2018 note reveal that Claimant had minimal and intermittent symptoms such as stiffness and achiness. These are normal residual symptoms. Dr. Rodger's testimony that the lower number did not accurately measure her loss of functions is simply not credible. The bottom line is that Claimant has good function in her knee with minimal limitations despite her attempts to embellish her symptoms and Dr. Rodgers attempt to maximize her recovery. The Board is well aware that the Claimant's Bar does not favor the 6th Edition solely for the reason that impairment ratings are lower which in turn translates to a lower financial recovery for claimants. The Board finds that in cases such as this one involving a specific surgical procedure the 6th Edition provides more accurate and equitable ratings that account for favorable surgical outcomes than the 5th Edition. In those cases and cases involving prosthetics use of the 6th Edition would be preferred.

For these reasons the Board finds Claimant has 23% impairment to the left lower extremity. The prior agreed upon impairment of 7% is subtracted for a total award of 16% additional impairment. This equates to forty weeks (40) of benefits paid at the stipulated rate of \$713.65 per week. Claimant's Petition is hereby **GRANTED**.

Medical Witness and Attorney's Fees

Having received an award, Claimant is entitled to have her medical witness fees taxed as a cost against Employer pursuant to title 19, section 2322 of the Delaware Code.

A claimant who is awarded compensation is entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller." 19 *Del.C.*, § 2320(10)(a). However, attorney's fees are not awarded if, thirty days prior to the hearing date, the employer gives a written settlement offer to the claimant that is "equal to or greater than the amount ultimately awarded by the Board." 19 *Del.C.*, § 2320(10)(b). A settlement offer for permanent partial disability benefits was tendered by Employer that was equal to what has been awarded. Accordingly, an award of attorney's fees is not appropriate in this case.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Claimant's Petitions are **GRANTED**. The Board awards Claimant 16% impairment to the left lower extremity. Claimant's total impairment for the left lower extremity is now 23%. Employer will pay the award at the agreed upon compensation rate. Claimant is awarded her medical witness expenses.

IT IS SO ORDERED THIS 29th DAY OF JULY 2019.

INDUSTRIAL ACCIDENT BOARD

Idel M. Wilson / For ID wdc:

IDEL M. WILSON

Peter W. Hartranft

PETER W. HARTRANFT

I, Eric D. Boyle, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

Eric D. Boyle

TP

OVC Staff

Mailed Date: 7/30/19

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 SEWELL V. DELAWARE RIVER AND BAY AUTHORITY

SEWELL v. DELAWARE RIVER AND BAY AUTHORITY (2000)

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Superior Court of Delaware, Sussex County.

Charles SEWELL, Claimant Below-Appellant v. DELAWARE RIVER AND BAY AUTHORITY, Employer Below-Appellee.

Civil Action No. 99A-07-003.

Decided: February 29, 2000

Henry C. Davis, Esquire, Henry C. Davis III, P.A., Georgetown, Delaware, Attorney for the Claimant Below-Appellant. R. Stokes Nolte, Esquire, Wilmington, Delaware, Attorney for the Employer Below-Appellee.

MEMORANDUM OPINION

Presently before this Court is Charles Sewell's ("Claimant" or "the Claimant") appeal from a decision of the Industrial Accident Board ("Board") awarding him partial compensation for the partial permanent impairment to his right leg resulting from an accident that occurred while Claimant was working for the Delaware River and Bay Authority ("Employer"). This appeal places before this Court the following question of law:

Under current Delaware law, is a claimant, under the Worker's Compensation laws, entitled to complete and non-apportioned compensation for the resulting impairment where an identifiable industrial accident has triggered a pre-existing, asymptomatic, and non-impairing condition?

As discussed fully below, neither the General Assembly nor the Delaware courts have clearly addressed this issue. However, the great weight of authority in other jurisdictions finds the injury fully compensable and would not attempt to apportion the award between the accident and the pre-existing condition or infirmity. I find that Delaware law supports this majority view and thus reverse the decision of the Board.

STATEMENT OF FACTS

At the time of the accident, the Claimant was employed by the Delaware River and Bay Authority to work at the Lewes, Delaware, terminal for the Cape May-Lewes Ferry. Claimant's precise position with the Employer was never identified but his duties were quite varied. Upon his arrival at work each morning, Claimant would unlock over forty doors and gates to prepare for the day's ferry traffic. He also raised the flags that flew on the terminal grounds. Prior to the first ferry's arrival, he would check the fire escapes and prepare the ropes that moor the ferry while at the terminal. When a ferry arrived, the Claimant would secure the ferry to the dock and run up a fire escape to let foot passengers in the terminal embark. He would collect the foot passengers' tickets and would count the tickets after the ferry left the terminal. A ferry is scheduled to arrive approximately every forty-five minutes. In between ferry arrivals, he might help clean the grounds or wash police cars. At other times, he might help prepare the ferry between trips by removing trash from the ferry and disposing of it at the terminal. This would entail running up and down several flights of stairs. Overall, his duties involved a substantial amount of walking and climbing steps.

On January 15, 1996, while completing his duties for the Employer, the Claimant fell when a step on a fire escape he was descending failed. He injured his right ankle and knee in the fall. Claimant testified that he completed his shift that day, but that evening, the right knee and ankle began to swell "like a cantaloupe." The Claimant went to the Bebee Medical Center where he received an injection and a prescription to combat the pain.

Two days after the accident, the Claimant was examined by a board certified orthopedic surgeon, Dr. John Spieker, concerning his injury. Upon examination, Spieker observed a moderate amount of swelling in the knee and tenderness around the ankle. Dr. Spieker also reviewed x-rays of the Claimant's leg. Based on his examination and the diagnostic study, Dr. Spieker concluded that the Claimant suffered from an acute soft-tissue sprain and a pre-existing severe degenerative condition in his right knee consistent with osteoarthritis.

Dr. Spieker recommended rest and physical therapy and prescribed anti-inflammatory and pain-killing medications. He also placed the Claimant on a "no-work" status. Claimant made some progress but still had difficulties with his knee when Dr. Spieker saw him in early February of 1996. In March, 1996, Dr. Spieker released the Claimant to return to work with restrictions on his activity. The Employer modified Claimant's duties but after several weeks, it became apparent the Claimant's injury would prevent him from fulfilling even the restricted duties. The Claimant was unable to return to work.

Dr. Spieker continued to treat the Claimant and as recently as June, 1999, observed that the Claimant continues to be "clinically symptomatic" and that he has never returned to his pre-injury capabilities. While recent x-rays show no significant change in his degenerative condition, his knee is still moderately swollen. It is this swelling that causes pain and decreases his functional capabilities.

Based on this history of treatment, Dr. Spieker opined that the Claimant suffered a 22% permanent impairment to his right leg. In reaching this conclusion, he weighed the objective findings on loss of motion, loss of strength, and the diagnostic studies, which included the x-rays. When asked in his deposition to relate this permanent impairment to Claimant's accident at work, the following exchange occurred:

Q: Since there's no way to differentiate between the effects of the accident and his preexisting condition, can you relate his current condition, that is his current functional condition, to the accident or to the preexisting arthritis?

A: Well, I'd have to say that the accident is a result or cause of his present functional status. Since there's a constant here, which is arthritic changes on x-ray, they were present before and after. The only reason he is not able to work it appears at this time is because of the injury that he sustained to his knee that he did not recover fully from.

Q: Would it be fair to say that the limiting symptoms that he experienced are a direct result of the accident and not the preexisting arthritis?

A: Well, the preexisting arthritis, I mean, it plays a major role here because if a person had a normal knee and they had the same injury, they wouldn't have the same functional impairment at this time. Without giving an absolute with medical certainty assessment at which percent is which, I mean, I would have to say that they are both equally responsible.

Dr. Spieker Deposition at 17.

At the Employer's request, the Claimant was also examined by Dr. Andrew Gelman, a board certified orthopedic surgeon. Gelman saw the Claimant on January 17, 1997, and March 12, 1999. Dr. Gelman also reviewed Claimant's medical records. After examining the Claimant and his medical records, including x-rays, Dr. Gelman concluded that while the Claimant may have suffered a right ankle sprain and a sprain and contusion of the right knee as a result of the accident at work, those problems have resolved themselves. He also concludes that while the accident may have exacerbated his condition to some extent, the Claimant's current difficulties are attributed solely to his pre-existing degenerative condition, osteoarthritis. Moreover, he opined that it "is inevitable or would have been inevitable that right knee difficulties might have come to some sort of musculoskeletal attention irregardless of the January 15, 1996 accident." Dr. Gelman Transcript at 10.

Dr. Gelman concluded that Claimant suffered from a 25% permanent impairment to his right leg. In reaching this conclusion, Dr. Gelman relied on Table 62 of the AMA Guides, which provide guidance in establishing permanency ratings for injuries to the leg. Because the x-rays showed significant degenerative changes, and that Claimant's knee has only one millimeter of joint distance, the table assigns a 25% permanency rating to this condition. It accords no weight for a decrease in a person's range of motion. Finally, Dr. Gelman stated that the Claimant, because his x-rays showed the same degree of degeneration both prior to and after the accident, would have qualified for a 25% permanent impairment rating prior to the accident at work even though there was no evidence that the Claimant had any prior functional difficulties with his right leg.

The Claimant testified before the Board that he has been diagnosed with bilateral degenerative arthritis. However, while the degeneration is present in both knees, he apparently only experiences difficulty with the right knee. The Claimant testified that prior to the accident at work, both legs were fully functional and he had no problems completing the duties assigned to him at work. Moreover, he was active outside work and enjoyed bowling, hunting, fishing, and

serving as a Little League umpire. Since the accident, Claimant has been forced to curtail his participation in these activities and cannot climb more than three steps without difficulty. Most important to the present action, however, is the fact that Claimant has not been able to return to work.

On December 23, 1998, the Claimant filed a Petition to Determine Additional Compensation Due. The parties appeared before the Board on June 24, 1999, to address this petition. Following the hearing, the Board issued its decision on July 2, 1999, awarding the Claimant 11% permanent impairment.

In reaching their decision, the Board initially found that the Claimant had met the burden of proving that his impairment was work-related. The Board then found that “[i]n order to calculate the compensable portion of Claimant’s impairment under the “but for” standard, the Board must determine Claimant’s current level of impairment and then reduce that figure by the amount of impairment Claimant would suffer if the work accident had not occurred.” Board Decision at 5. The Board was presented with two physician’s opinions on the Claimant’s current level of impairment. One doctor opined that based on Table 62 of the AMA Guides, Claimant suffered a 25% level of impairment. This table assigns impairment ratings for arthritis based on the space between the cartilage in the knee. The other doctor found a 22% level of impairment based on Claimant’s loss of range of motion, loss of strength, and diagnostic studies.

The Board adopted the 22% figure because it took into account both the functional loss and the diagnostic studies. After adopting the 22% figure, the Board went on to find that the Claimant would suffer some level of impairment despite the accident and that “the amount of impairment attributable to the work accident is greater than zero but less than 22%.” Board Decision at 6. Ultimately, the Board found that the work accident and the pre-existing condition were equally responsible and awarded the Claimant compensation based on an impairment level of 11%.

On July 20, 1999, the Employer moved to reargue because, among other things, the original decision calculated the maximum number of weeks the Claimant was to receive benefits based on an injury to the spine. The Board issued a corrected decision on August 5, 1999, that reflected the maximum number of weeks Claimant could qualify for compensation based on an injury to his leg rather than spine.

The Claimant appeals the decision of the Board arguing that the Board’s decision was not supported by substantial evidence and that the apportioning of the injury’s effects between the asymptomatic pre-existing condition and the work-related injury was contrary to Delaware’s Worker’s Compensation laws. The Employer, however, argues that the Board’s decision is a correct application of the law and seeks affirmation of the Board’s decision.

STANDARD OF REVIEW

The duty of this Court when acting on an appeal from the Board is to determine whether the board’s decision is supported by substantial evidence and is free from legal error. *Johnson v. Chrysler Corp.*, Del.Super., 213 A.2d 64, 66 (1965); *Devine v. Advanced Power Control, Inc.*, Del.Super., 663 A.2d 1205, 1209 (1995)(citing *General Motors v. Freeman*, Del.Super., 164 A.2d 686, 688 (1960)); *General Motors v. Jarrell*, Del.Super., 493 A.2d 978, 980 (1985). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, Del.Super., 636 A.2d 892, 899 (1994); *Battista v. Chrysler Corp.*, Del.Super., 517 A.2d 295, 297 (1986). The Superior Court, when sitting as an appellate court, does not weigh the evidence, determine questions of credibility, or make its own factual findings. *Johnson v. Chrysler Corp.*, 213 A.2d at 66. It merely determines if the evidence is legally adequate to support the agency’s factual findings. 29 Del. C. § 10142(d). In reviewing the record for substantial evidence, the Court will consider the record in the light most favorable to the party prevailing below. *General Motors Corp. v. Guy*, Del.Super., C.A. No. 90A-JL-5, *Gebelein, J.*, 1991 WL 190491 (August 16, 1991). As to errors of law, the Court’s review is plenary. *Brooks v. Johnson*, Del.Super., 560 A.2d 1001, 1002 (1989).

ANALYSIS

Causation and Compensability. The Worker’s Compensation laws reflect a public policy to compensate employees for injuries “arising out of and in the course of employment.” See, 19 Del. C. § 2301(12). Moreover, this relief is an injured employee’s sole remedy for personal injury or death by accident that occurs within the employment relationship. 19 Del. C. § 2304. “While the law is not a general health insurance statute, it should be interpreted liberally to fulfill its intended compensation goal under § 2304.” *Duvall v. Charles Connell Roofing*, Del.Super., 564 A.2d 1132, 1134 (1989). Thus, before a claimant is entitled to compensation, he or she must show that the injury for which compensation is sought is work related.

Showing this causal connection between the work-related accident or activities and the resulting injury is challenging where the accident exacerbates a previously latent or dormant pre-existing condition that leaves the employee more susceptible to injury. The Delaware courts, in addressing this problem, have established two tests for causation and

hence compensability. One test addresses the situation where normal work activities aggravate a pre-existing condition and the other applies where a specific and identifiable work-related accident aggravates the pre-existing condition.

"In cases where a claimant is injured by the aggravation of a pre-existing condition and there is no identifiable industrial accident, causation is governed by the usual exertion rule." *State v. Steen*, Del.Supr., 719 A.2d 930, 932 (1998) (emphasis original) (citing *Duvall v. Charles Connell Roofing*, Del.Supr., 564 A.2d 1132 (1989)). The "usual exertion" rule "provides that the injury is compensable, notwithstanding the previous condition, if the ordinary stress and strain of employment is a 'substantial factor' in causing the injury." *Id.* In *Steen*, a Deputy Chief of a volunteer fire company was permanently disabled by a ruptured aneurysm he suffered while under the stress of responding to a horrible automobile accident. *Steen's* injury was found compensable, despite the fact that the ruptured aneurysm was a result of a pre-existing condition, because the normal stress of his work was found to be a substantial factor in causing his condition to become impaired at that time.

Where, however, there is an identifiable work-related accident, the "compensability of any resultant injury must be determined exclusively by an application of the 'but for' standard of proximate cause." *Steen* at 932 (citing *Reese v. Home Budget Ctr.*, Del.Supr., 619 A.2d 907 (1992)). In *Reese*, the Supreme Court stated:

The "but for" definition of proximate cause in the substantive law of torts finds equal application in fixing the relationship between an acknowledged industrial accident and its aftermath. If the worker had a preexisting disposition to a certain physical or emotional injury which had not manifested itself prior to the time of the accident, an injury attributable to the accident is compensable if the injury would not have occurred but for the accident. The accident need not be the sole cause or even a substantial cause of the injury. If the accident provides the "setting" or "trigger," causation is satisfied for the purposes of compensability.

Reese at 910.

Thus, under the "but for" test, "a preexisting disease or infirmity, whether overt or latent, does not disqualify a claim for worker's compensation if the employment aggravated, accelerated, or in combination with the infirmity produced the disability." *Id.*

In the present case, the Board found the Claimant's injury was caused by a work-related accident and was thus compensable under the Worker's Compensation program. The Board's finding as to causation is supported by substantial evidence in the record and is not an error as a matter of law. There was evidence before the Board, both through the testimony of the Claimant and the depositions of the treating and examining physicians, that the Claimant had no physical or overt manifestations of his arthritic condition prior to his accident while on the job with the Employer. There is evidence that he was fully functional before the accident and that his current level of impairment arose out of and occurred as a direct result of his accident at work. This is sufficient evidence upon which the Board could find that the accident caused the Claimant to suffer a compensable injury.

Apportionment. The more challenging issue facing this Court in this appeal is the question of whether the compensation awarded the Claimant should be apportioned between the pre-existing condition and the work-related accident. Ultimately, the Court concludes that this injury is fully compensable, apportionment was not appropriate, and a different result would require a legislative change to the Worker's Compensation laws.

As the Worker's Compensation program is designed by the General Assembly, in addressing issues arising under the program, Courts must look to the statute for guidance. By statute in a few states, "when a preexisting disease is aggravated by the employment, compensation is payable only for the percentage of disability attributable to the accident." 1 *Larson's Worker's Compensation Law* § 9.02(6) at p. 9-22 (1999). Professor Larson identifies five states that have this minority rule: California, Florida, Mississippi, North Dakota, and South Carolina. *Id.*, Digest Ch. 9 at D9-102.

In Delaware, the only Code provision that seems at first blush to apply to the situation at bar is 19 Del. C. § 2327. This section provides:

Whenever a subsequent permanent injury occurs to an employee who has previously sustained a permanent injury, from any cause, whether in line of employment or otherwise, the employer for whom such injured employee was working at the time of such subsequent injury shall be required to pay only that amount of compensation as would be due for such subsequent injury without regard to the effect of the prior injury. Whenever such subsequent permanent injury in connection with a previous permanent injury results in total disability as defined in § 2326 of this title, the employee shall be paid compensation for such total disability, as provided in § 2324 of this title, during the continuance of total disability, such compensation to be paid out of a special fund known as "Worker's Compensation Fund." 11 Del. C. § 2327(a) (1998 Supp.).

Judges, however, in interpreting this section, have ruled that a "previously sustained permanent injury" does not include naturally occurring degenerative changes to the body as a result of the aging process. See *Nastasi-White, Inc. v. Futtly*, Del.Supr., 509 A.2d 1102 (1986); *H. & A. Electric v. Bickling*, Del.Super., C.A. No. 94A-09-005, Ridgely, P.J., 1995 WL 562166 (August 24, 1995) (ORDER). In *Nastasi-White*, the Claimant suffered from osteoporosis, which left his bones brittle. While at work, he lifted a heavy box and suffered a cracked vertebra. The employer sought reimbursement from what is now the Worker's Compensation Fund. The Supreme Court, in defining "injury" in the Worker's Compensation context, ruled that pre-existing conditions resulting from the natural aging process are not the types of work-related trauma covered by the statute. *Nastasi-White* at 1104. Similarly, in *H. & A. Electric*, the Court found the statute inapplicable to a claimant's pre-existing diabetes. *H. & A. Electric* at 5.

Here the Claimant suffers from a naturally occurring degenerative condition, osteoarthritis, that has progressed with age. This type of condition is not a "work-related trauma" and thus falls outside the scope of § 2327. Moreover, the Employer is not seeking reimbursement from the Worker's Compensation Fund.

No other statutory provision permits the apportionment of compensation between the Claimant's pre-existing condition and the work-related accident. Thus, the Court must look elsewhere for authority permitting the apportionment in this case.

Several cases in Delaware have addressed this issue of the relationship between a pre-existing condition and subsequent work-related accident. Most cases, however, have dealt with the issue of causation only and have not addressed whether apportionment is proper or required once there has been a finding of causation.

Professor Larson, in his oft-cited treatise *Larson's Worker's Compensation Law* states the following as the majority view on the issue of apportionment:

Nothing is better established in compensation law than the rule that, when industrial injury precipitates disability from a latent prior condition, such as heart disease, cancer, back weakness and the like, the entire disability is compensable, and except in states having special statutes on aggravation of disease, no attempt is made to weigh the relative contribution of the accident and the preexisting condition to the final disability or death. Apportionment does not apply in such cases, nor in any case in which the prior condition was not a disability in the compensation sense. The principle that degeneration and infirmities due to age which have not previously produced disability are not a proper basis for reduction of compensation is amply supported by authorities from other jurisdictions.

5 *Larson's Workers Compensation Law* § 90.04(1) (1999) (emphasis added).

American Jurisprudence echoes this widespread rule. 82 Am.Jur.2d *Worker's Compensation* § 319 (1992) ("In the absence of a provision for apportionment of the compensation between an injury and pre-existing disease, there is no requirement to determine the relative contribution of the accident and the prior disease to the final result.").

In 1995, in *H. & A. Electric*, President Judge Ridgely found that a work-related accident that aggravates "a prior nondisabling defect or disease .is not apportionable." *H. & A. Electric* at 5. In reaching this result, the Court was persuaded by the almost universal rule of unrestricted coverage reported by Larson. *Id.* This conclusion also follows from the General Assembly's intention to afford injured workers complete relief from employment-related accidents.

While our Supreme Court has not spoken directly on this point, this result is consistent with the language of the Reese Court that the exacerbation of a previously asymptomatic pre-existing condition by an identifiable work-related accident is compensable once causation is shown. *Reese*, 619 A.2d at 910. The Supreme Court, in finding the injury "compensable," did not limit the compensability in any way. The following passage from *Reese* also argues against limiting or apportioning the compensation:

In work-related claims, as in personal injury claims sounding in tort, the employer takes the employee as he finds him.

The liability of an employer is not limited to injuries which a physically able and mentally sound employee would sustain in similar accidents. *Id.*

Similarly, *Duvall*, in establishing the test for causation where usual job activities aggravate a pre-existing condition, states that a claimant may be entitled to "compensation" but does not restrict that relief. *Duvall*, 564 A.2d at 1133 ("[A]n injury is compensable if the ordinary stress and strain of employment is a substantial cause of the injury.").

Another point must be addressed. This concerns the concept that "it is the duty of the Board, not a physician, to fix a percentage to a claimant's disability." See *Turbitt v. Blue Hen Lines, Inc.*, Del.Supr., 711 A.2d 1214, 1215 (1998) (citing *Asplundh Tree Expert Co. v. Clark*, Del.Super., 369 A.2d 1084, 1089 (1975)). The Superior Court used this theory in a factually similar case to affirm the Board's decision disallowing part of a compensation award that was related to a pre-existing degenerative condition. *Mangle v. Grotto Pizza, Inc.*, C.A. No. 96A-09-004, Graves, J., 1997 WL 358671

(May 13, 1997) Let. Op. Upon further appeal, the decision was affirmed "on the basis of, and for the reasons set forth in, the decision of the Superior Court." *Mangle v. Grotto Pizza, Inc.*, Del.Supr., No. 215, 1997, 1997 WL 664688 (Oct. 22, 1997) (ORDER).

Turbitt may be reconciled with Reese and H. & A. Electric because, while the Board has the authority to set percentages, in setting those percentages, the Board may not apportion the compensation between the asymptomatic pre-existing condition and the work-related injury that aggravated the condition without legislative authority. In *Mangle*, the Court did not rule on, nor did it address, the legal question of the appropriateness of apportionment. Rather, the Court ruled that the Board's decision as to the level of impairment was supported by substantial evidence and that the Board adequately stated the basis upon which it arrived at the award. *Mangle* at 4.

The appropriate rule of law in this case is the one adopted by President Judge Ridgely. Moreover, this rule follows the rationale of Reese and the majority rule identified by Larson. An employer takes its workers as they are and may not escape liability because an injured employee with a pre-existing condition sustains injuries that are greater than or different from those that a physically sound individual would experience.

In the present case, the Board adopted Dr. Gelman's testimony that the Claimant would have suffered some degree of impairment even if the accident had not occurred because of the severe level of degeneration. However, if the Court allows the Board to discount the Claimant's compensation to account for the portion attributed to the pre-existing condition, the Court would be limiting the Employer's liability to those injuries that a physically sound employee would sustain in a similar accident. This is prohibited by Reese.

It would also be blinking at reality to ignore the fact that the Claimant suffered no functional impairment prior to the accident, even though his x-rays showed significant degeneration in the knees had occurred prior to the accident. Moreover, there is evidence that the Claimant has been diagnosed as having osteoarthritis in both knees yet it is only the knee injured at work that is currently impaired. The Claimant's present permanent impairment stems from an identifiable work-related accident. While there was some evidence before the Board that the Claimant would likely have eventually suffered some level of impairment from the degenerative condition, neither physician opined, with any level of confidence, when and to what degree such natural impairment would occur. In fact, such an opinion would likely be based upon speculation and possibilities, which the Board cannot accept. See *Canyon Constr. v. Williams*, Del.Super., C.A. No. 95A-08-006, Lee, J., 1996 WL 190027 (March 11, 1996) Mem. Op. at 2.

CONCLUSION

The Board should not have parsed the Claimant's award. Given the remedial nature of the Worker's Compensation law and the public policy of the General Assembly to provide complete relief, a change in the statute would be necessary to permit apportionment as allowed in the five states identified by Larson. This ruling follows President Judge Ridgely's holding in *H. & A. Electric*. This conclusion is consistent with the clear language of the Supreme Court in Reese and with the principle that the Board may set percentages in different circumstances. When an industrial injury triggers disability or impairment from a latent prior condition, the entire condition is compensable and no attempt should be made to weigh the relative contribution of the accident and the pre-existing condition to the final result. In the present case, substantial evidence supports the Board's finding that the industrial accident caused the Claimant's impairment. However, in light of the applicable rule of law, apportioning the compensation award in the context of this case was not legally correct.

Considering the foregoing, the Board's decision is REVERSED and REMANDED for further proceedings consistent with this opinion.

IT IS SO ORDERED.

STOKES, Judge.

Market Price – Issues Involving Vocational Rehabilitation, Labor Market Surveys and Return to Work Evidence

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H. Garrett Baker, Esquire

H. Garrett Baker is a Director with the law offices of Elzufon Austin and Mondell and a member of the Workers' Compensation Department. Gary was admitted to the Pennsylvania bar in 1990 followed by the Delaware bar in 1992. His next bar admissions were to the U.S. District Court, District of Delaware and the U.S. Court of Appeals, Third Circuit in 1993 and in 1994 to the U.S. Supreme Court. Gary graduated from Evangel College (B.S., summa cum laude, 1986), Southern Illinois University (J.D., cum laude, 1990) and the University of Delaware (M.A. 1998). He is a member of the Phi Kappa Phi fraternity. Gary also served as Judicial Intern for the Honorable Carol Los Mansmann, Circuit Judge, U.S. Court of Appeals, Third Circuit, in 1989 and the Honorable Joseph T. Walsh, Associate Justice, Supreme Court of Delaware in 1992. Gary was the Lead Articles Editor for the Southern Illinois University Law Journal where he co-authored: "Survey of Family Law," 14 So. Ill. U.L.J. 1007 (1990). Gary is a Founder and past President of the Randy J. Holland Delaware Workers' Compensation Inn of Court, a member of the Delaware State Bar Association, and the 2013-2014 Chair of its Workers' Compensation Section. He has been repeatedly selected as a "Top Lawyer" in the field of worker's compensation defense in a peer review survey conducted by Delaware Today and holds an "AV" rating from Martindale-Hubbell.

Heather A. Long- BIO

Heather is proud to be a founding and managing partner of the newly formed Law Office of Long & Greenberg, LLC. Long & Greenberg is a female owned, female operated personal injury and workers' compensation firm. In her previous firm, Heather advanced diversity by being the first female partner in the law firm's history.

Licensed since 2005, Ms. Long's practice is focused on assisting plaintiffs with workers' compensation, personal injury, and premises liability claims, with a proven track record of attaining favorable results for her clients. Additionally, Heather is a former paramedic, an experience that gives her an edge when handling your injury claims. Both Ms. Long and Ms. Greenberg have worked for insurance companies in the past. They bring their experience and unique perspectives from "behind enemy lines" to work for you.

Heather Long earned her J.D. from Widener School of Law in 2005 and has been practicing personal injury law for over 15 years. Ms. Long has earned the following recognitions: Delaware Today Top Lawyer for workers compensation 2019 – present; Workers Injury Law and Advocacy Group (WILG) rising star award 2022; Best Lawyers in America 2021 -2023.

Ellen Lock CDMS CCM

Vocational Case Manager

Coventry/Genex

- Ellen has over 29 years' experience in Vocational Case Management
- She is a Certified Disability Management Specialist, as well as a Certified Case Manager
- Ellen has been accepted as an expert witness by the Industrial Accident Board of the state of Delaware, Family Court, and Superior Court
- Born and raised in Delaware, Ellen is familiar with the Delaware labor market and regularly conducts Labor Market Surveys for Workers' Compensation litigation, as well as Earnings Capacity Assessments and Vocational Evaluations for Family Court matters, and Superior Court trials in Personal Injury and Liability cases
- She is trained in Ergonomics and conducts on-site Job Analyses to determine appropriateness for return-to work

BARBARA RILEY, EdD, CRC, NCC
SENIOR CASE MANAGER/VOCATIONAL CONSULTANT
Perry & Associates, Inc.

QUALIFICATIONS

Certified Rehabilitation Counselor (CRC) # 00006762
Initial Certification: April 1989

National Certified Counselor (NCC) # 26071
Initial Certification: May 1991

EDUCATION

Wilmington University, Ed.D
Doctor of Education
Concentration in Organizational Leadership and
Innovation Student Commencement Speaker

Villanova University, M.S.
Major: Education and Human Services
Concentration in Community Counseling

Kutztown University, B.A.
Major: Psychology

EMPLOYMENT

September, 2017 - Present
Perry and Associates, Inc.
Senior Vocational Consultant
Delaware

Duties involve interviewing and assessing an individual's abilities, projecting employability based upon skills transferability and physical capabilities, administering and monitoring testing procedures, conducting job development for Labor Market Surveys and Placement. Responsible for reviewing and analyzing relevant medical and vocational data. Provide expert vocational testimony; caseload includes Workers Compensation, Liability, Short and Long Term Disability and Medical Reviews. Accepted as an expert vocational witness in the Commonwealth of Pennsylvania and as an expert vocational witness before the Industrial Accident Board in Delaware.

March, 2013 - 2017
State of Delaware
Department of Services for Children, Youth and Their Families
Division of Management Support Services
Career Development & Education Liaison
Wilmington, DE

Duties similar to position as Program Administrator at Department of Labor specializing in work with Delaware's adjudicated youth, their families and those that support them. Many of the job duties were focused on program development, monitoring and evaluation within the education unit ensuring that programs were consistent with career pathways and other requirements. Position also involved direct supervision of others that were working with the youth

as they prepared to return to their community, school and/or employment. Member of the Education Unit Leadership Team.

2004-2019

Wilmington University

*Department of Behavioral Sciences & Department of Education
Mental Health Counseling & Education- Organizational Leadership & Innovation
New Castle and Dover, DE*

Taught courses to graduate and doctoral students. Prepared syllabus, rubrics, lectures, tests, graded exams and papers; advised and worked with students individually. Attended faculty staff meetings and professional development convenings.

October, 2006-March, 2013 Program Administrator

State of Delaware Department of Labor

*Division of Vocational Rehabilitation
Wilmington, DE*

Liaison between the Department of Education and the local school districts for planning and monitoring high school transition services in Delaware. Met with community groups, parent organizations and others to present DVR transition program. Gathered transition data for planning and monitoring purposes. Duties included management of special projects, program administration and support functions and other administration tasks as assigned. Supervision of counselors and service providers.

January, 2006-October, 2006 Acting District Administrator

State of Delaware Department of Labor

*Division of Vocational Rehabilitation
New Castle, DE*

Responsible for planning, developing and implementing, interpreting, and evaluating a broad area of the Vocational Rehabilitation programs for a specific district. A significant aspect of this work involved administration and management of the vocational rehabilitation service for delivery, policy development, staff management, management of district budget and quality assurance and performance monitoring of facilities. Served as a representative of the Division of Vocational Rehabilitation with community partners and agencies, hospitals, and the legislature.

1997-2006 - Sr. Rehabilitation Counselor III

State of Delaware Department of Labor

*Division of Vocational Rehabilitation
New Castle, DE*

Interviewed and assessed an individual's abilities and projected employability based upon skills transferability, mental and emotional status and medically determined physical capabilities. Administered and/or monitored testing procedures. Conducted job development and placement. Performed additional direct case management services to include: prepare reports; monitor client progress and outcome; provide specialized counseling; obtain, review, and analyze relevant medical, psychological, psychiatric, social, educational and vocational data; coordinate and arrange services with physicians, employers, agencies and other community resources. Established and maintain effective working relationships with referral sources, employers, facilities/agencies, clients and medical/psychiatric and legal professionals.

**1996-1997 - Sr. Rehabilitation Consultant
Consultative Review and Rehabilitation, Inc.**

Wilmington, DE

Duties same as Rehabilitation Counselor III position. Also provided expert vocational testimony, prepared invoices, and performed extensive marketing services.

1982-1996 - Vocational Counselor, Vocational Supervisor, Medical Case Manager, Rehabilitation Counselor and Director of Rehabilitation Services.

Hoover Rehabilitation, Inc.

King of Prussia & Exton, PA and Newark, DE

Duties same as at Consultative Review and Rehabilitation.
Also recruited, interviewed, supervised and trained staff.

Member or Past Member of:

National Rehabilitation Association

Delaware Division of Prevention and Behavioral Health Services Advisory and Advocacy Council

Delaware Youth Vision Team, A Shared Vision for Youth

Youth Council of Delaware Work Force Investment Board and committee member of the scholarship fund

Chairperson of the Employment Work Group of Delaware Youth Opportunities Initiative

Delaware Task Force to Review Needs for Adults on the Autism Spectrum

Division of Youth Rehabilitative Services (DYRS) Community Advisory Board

Governor's Advisory Council for Exceptional Citizens, Vice Chair of the Adult Transition Services Sub Committee

Leadership Team, State of Delaware, Department of Labor, Division of Vocational Rehabilitation

Leadership Team, State of Delaware, Department of Children, Youth and their Families, Division of Management Support Services

Board Member of Asperger's Alliance Group of Delaware

Board Member of Project New Start

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PRACTICE POINTERS FOR VOCATIONAL EXPERTS

1. Provide as much information as possible.

Important information to share with your vocational expert includes job descriptions, job applications, a resume, DME reports and treating provider records (especially as it pertains to work restrictions and functional capabilities).

Defense vocational consultants rarely get to meet with the claimant directly. As such, getting them as much information will make for a better and more accurate assessment of the claimant's earning capacity.

2. Make sure to request job applications and job descriptions as well for any position for which claimant has applied post injury.

This will be important to ascertain whether the job search is sincere or for posturing.

Also, the types of jobs and rate of pay will be useful in sorting out how claimant perceives his restrictions and earning capacity.

3. Submit the labor market survey to the physicians for review.

The jobs must be within the claimant's restrictions. The best way to prove that is by asking a physician if they are.

4. Make sure the vocational consultant has documentation of any employer contacts.

The vocational consultant is required to view each job to make sure the description matches the actual duties.

The vocational consultant also has to make contact with each employer to confirm that someone with claimant's vocational background and restrictions is qualified for each job.

Keeping documentation and to when and with whom these contacts were made will help fend off cross-examination and/or the potential of contradictory testimony by representatives of the employers in the labor market survey.

5. Make sure to identify which jobs are "available" at the time of the vocational expert's testimony.

This is required under the Watson v. WalMart case.

But it also helps to rebut a frequently made argument that an employer would not hire the injured claimant for the job in question because of the availability of applicants who are not saddled by your client's restrictions or other disadvantages.

If the job truly were that competitive and/or rare then it would not be still available months after advertised.

6. Know any language and/or citizenship issues that claimant might contend as affecting eligibility for employment.



MAY 2023

DSBA Seminar May 2023

Perry & Associates, LLC

Ellen Lock, BS, CDMS, CCM, Vocational Case Manager\
Barbara R. Riley, EdD., CRC, NCC



Initial Report and Meeting with Claimant

When permissible, it is ideal to meet with the injured worker in person to obtain as much information as possible in order to complete a solid and accurate job search, whether it be for placement or a Labor Market Survey.

Information needed includes:

- › Need claimant attorney permission
- › Bullet
- › Bullet

Items to copy from legal file for LMS (DE Voc)

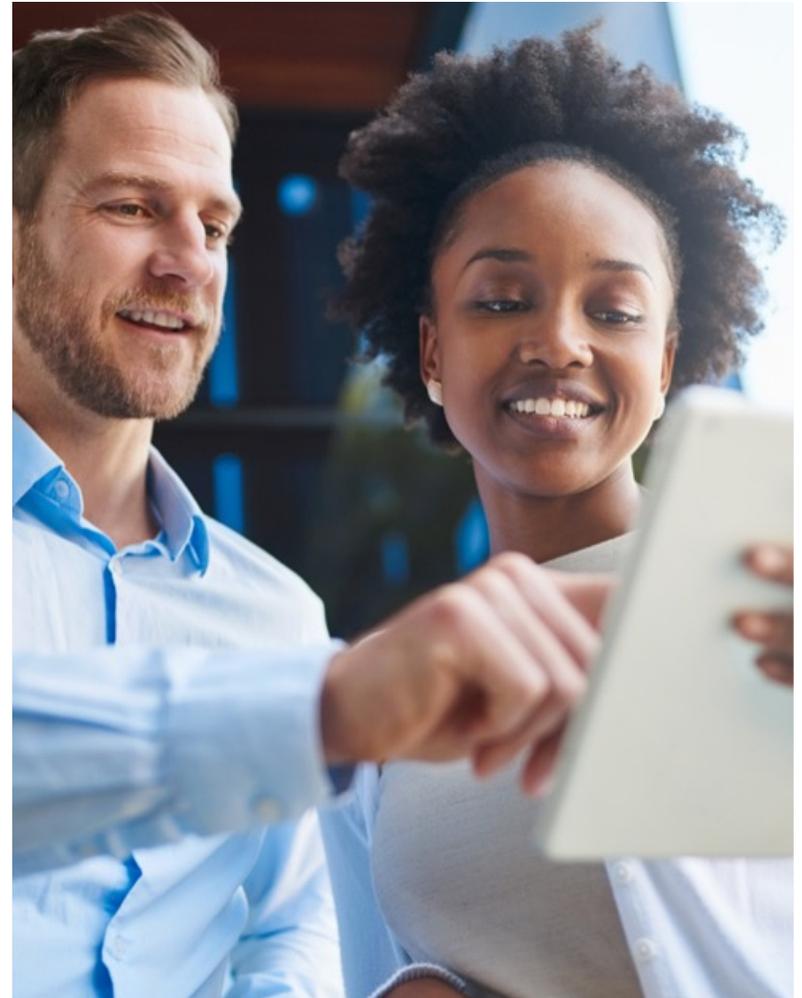
- › Adjuster contact info
- › Claim #
- › Claimant counsel name
- › Average weekly wage of claimant and job of injury
- › Claimant's address and Date of Birth
- › FROI (First Report of Injury)
- › Agreement for compensation (IAB forms)
- › Notice of hearing
- › Petition for review (clocked and copied, date stamped if possible)
- › Any prior board decisions
- › Treating provider notes – recent treating physician notes/reports for prior 6 months
- › DME (defense medical exam) report
- › FCE Report
- › ***Job description and any vocational or employment documents like employment application and/or resume if available
- › ***Criminal record and specific charges?
- › ***Non-English speaking?
- › ****provide updated medicals/procedures as LMS progresses to hearing

This should all be sent to the Voc CM assigned and copied to Account Rep for referral submission

The Job Development Process

This is an area where you can place any introductory copy or statements.

- Increase in at-home jobs as remote jobs or hybrid are and have been prevalent
- Low unemployment rate - 4.6% Delaware February 2023
- Other hiring trends
 - higher wages due to lack of workers
 - Less stringent requirements such as HS or GED-will now consider work history in lieu of



Claimants Seeking Work

- › Independent Search or Labor Market Survey
- › Appropriate time to discuss disability with prospective employers for the claimant
- › Reasonable Accommodations per ADA-most employers will accommodate, but some will say NOT FEASIBLE
- › Claimant's job search and documentation of: should be a "reasonable job search" i.e. within their physical, vocational abilities-not just "willynilly" and applying to anything and everything even if not appropriate for them (as for litigation purposes only)

Services at DVR via Department of Labor

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Thank You

Keynote Address

The Art of Bench and Bar Relations

The Honorable Gary F. Traynor
Supreme Court of Delaware



Justice Gary F. Traynor

Justice Traynor was sworn in for his first term as Justice of the Supreme Court of Delaware on July 5, 2017. Before his appointment, Justice Traynor was a practicing Delaware lawyer for 35 years.

A member of the Delaware Bar since 1982, Justice Traynor began his legal career with a small firm in Dover handling a diverse range of litigation matters. In 1990, he joined the firm of Prickett, Jones & Elliott, where he served as the firm's Managing Director from 2005 to 2007. For his first ten years with the Prickett firm, Justice Traynor continued to focus on general litigation matters, including criminal defense, personal injury litigation and domestic relations disputes. In 1999, he transitioned to the firm's corporate and commercial litigation practice where he remained until leaving the firm in 2014 to join the State of Delaware Office of Defense Services where he served as an Assistant Public Defender defending major felony cases until his appointment in 2017.

Justice Traynor received his undergraduate degree from Dartmouth College in 1978 and earned his law degree from Delaware Law School of Widener University in 1982.

Before joining the state's highest court, Justice Traynor served on the Delaware Supreme Court's Board on Professional Responsibility from 2011 to 2017, and was an appointed member of the U.S. 3rd Circuit Court of Appeals' Task Force on Management of Death Penalty Litigation from 1998 to 2001. Justice Traynor is a past-President of the Terry-Carey American Inn of Court.

In addition to his legal work, Justice Traynor was a commissioner of the Delaware River and Bay Authority from 2009 to 2014. He also served as an officer in the Delaware Army National Guard from 1990 to 1991. Justice Traynor and his wife, Kathleen Andrus, reside in Rehoboth Beach, Delaware.

Case Law Update

John J. Ellis, Esquire
Heckler & Frabizzio, P.A

Caroline A. Kaminski, Esquire
Doroshow, Pasquale, Krawitz & Bhaya

DELAWARE WORKERS' COMPENSATION
Industrial Accident Board
CASELAW Update
& Appellate Outcomes



By John J. Ellis, Esq.
Cassandra Faline Roberts, Esq.
Caroline A. Kaminski, Esq.

DSBA ANNUAL WORKERS' COMP SEMINAR

May 2, 2023

IAB DECISIONS

AVERAGE WEEKLY WAGE

Jessica White v. FGG Spa, LLC, DBA Hand & Stone Massage, IAB #1495656, (5/9/22). This case demonstrates how to calculate the average weekly wage for a massage therapist employed for only nine weeks whose income also includes both reported and unreported tips with the Board utilizing 19 Del. Code Section 2302 (B)(b)(2) and arriving at an average weekly wage of \$900.00. [Wasserman/Lukashunas]

Joel Welbon v. Baltimore Aircoil, IAB #1501185 & 1515620, (2/6/2023). In calculating the average weekly wage, vacation pay and holiday pay are *not* included. [Schmittinger/Wilson]

COLLATERAL ESTOPPEL

John Trincia v. Dick's Sporting Goods, IAB #1505228, (2/10/23). The carrier's payment of four bills and issuance of a letter accepting the claim as "medicals only" is *not* an implied Agreement under the facts of this case and based on the carrier's testimony, noting that there were mistakes by the carrier in processing the claim and that payment of the medical bills was careless or negligent but not done under a feeling of compulsion. [Laursen/Newill]

COMMUTATIONS/SETTLEMENTS

Eric Starling v. Formosa Plastics, IAB #1471909, (2/15/23). The Claimant's Petition for Commutation seeking to force a lump-sum commutation of partial disability benefit entitlement is denied and with the Board observing that much of the financial distress to which the Claimant testified could have been avoided had he been motivated to seek sedentary gainful employment. Moreover, the statutory system for workers' compensation intentionally mandates that compensation is to be made in periodic installments replicating the injured worker's wages before the accident. [O'Neill/Gin]

COURSE AND SCOPE

Mary Jo Testa-Carr v. Sallie Mae, IAB #1522185, (3/24/23). An employee injured during a PTO volunteer activity is not eligible for workers' comp and said injury did not occur in the course and scope of employment. Claimant was volunteering for "Meals on Wheels" as part of a PTO program allowing a certain number of hours for volunteer work, noting said program is offered on a non-mandatory basis. Claimant was injured in a fall suffered at a meal recipient's apartment building while delivering dinner. In reviewing existing Delaware case law and the "Larson factors", the Board finds this to be a non-sponsored recreational activity, commenting that the place where the injury occurred was off premises at a location not affiliated with or under the control of Sallie Mae in any way. As for the "time" aspect of this consideration, Claimant was volunteering during regular work hours and was being paid by Sallie Mae at the time. However, even in Sallie Mae's policy manual, this volunteer activity is referred to as "paid leave time". The Board notes that this volunteer time was consistently referred to "time off" or "leave" time within the Sallie Mae policy manual and on the Sallie Mae website. The Board further notes that this policy manual reflects that Sallie Mae employees are also provided with PTO for jury duty, to vote, and to take professional examinations. However, although all of these represent time off with pay, no one would expect accidents and injuries sustained while performing jury service, voting, or taking a professional exam to be considered work-related in nature. [Morrow/Baker]

CREDITS

Jessica Duncan v. New Castle County, IAB #1510553, (9/20/22). Where Claimant has already received her full salary during various periods of total disability in accordance with the terms of a union collective bargaining agreement with the County, the County is not entitled to a credit for "salary in lieu of" payments during periods of time in which it is argued the claimant was capable of full duty work and the Board finds that *Gilliard-Belfast v. Wendy's* is applicable. While the Board notes that it was an issue of total disability versus return to work in the case of *Wendy's*, here, it is an issue of work restrictions versus a non-restricted work, against a treating doctor's orders, as Claimant would plainly have had to disobey the treating physician's orders to begin performing non-restricted work for the County prior to 10/31/21. As already noted, Claimant had long since returned to work for the County per Dr. Mesa in a modified duty capacity but at no lost pay, pursuant to the language of her collective bargaining agreement. [Long/Norris]

William Everett v. Pepsi Bottling Ventures, IAB #1455826, (7/20/22) (ORDER).

There is no retroactive overpayment credit where the TPA pays the wrong compensation rate on three different occasions and as such, the Board in its discretion holds that the only way to resolve these repeated inaccuracies and ensure prompt payments timely and correctly made, is to “make the TPA bear the burden of its blunders. The request for retroactive credit is denied.” [Silverman/Hunt]

Joel Welbon v. Baltimore Aircoil, IAB #1501185 & 1515620, (2/6/23). A retroactive overpayment credit of \$16,000 is denied to the carrier based on its culpability in erroneously calculating the average weekly wage although the carrier is entitled to a reformation of the average weekly wage going forward. [Schmittinger/Wilson]

DISCOVERY ISSUES

Annette Davis v. Christiana Care Health System, IAB #1521009, (11/3/22) (ORDER). The Board refuses to limit the Claimant’s obligation with regard to social media disclosure. The Board stated the Employer’s surveillance provided evidence that “Claimant is not as physically disabled as she has asserted” and that Claimant’s active 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 rejected Claimant’s argument that any social media disclosure should be limited to the period of total disability. [Long/Newill]

Michelle Ramsdell v. Ward & Taylor, IAB #1511811, (9/13/22) (ORDER). The Claimant’s personal journal entries regarding her contact with the carrier for the employer are not protected by privilege. Employer acknowledged that summaries and impressions of Claimant’s conversation with her own attorneys are likely privileged and no disclosure of that is sought. However, Employer argued that summaries of conversations with employer representatives and representatives of the insurance company are not protected and that some of these entries might reflect animosity toward the employer. Employer’s medical expert had been deposed and rendered an opinion that Claimant may have a “secondary gain” motive in the form of animosity toward the employer. As such, evidence in Claimant’s journal of such feelings is important to employer’s position and the Board agreed. The Board also rejected the argument that these mental impressions were protected under either the theory of “work product” or “any anticipation of litigation.” [Stewart/Greenberg]

Kimberly Scarboro v. Dover Downs, IAB #1340465, (3/22/23) (ORDER). The Board threatens to revoke Dr. Cagampan's status as a workers' compensation certified provider due to his failure to cooperate with discovery and record production allegations. [Carmine/Skolnik]

DISFIGUREMENT

Joseph Corbett v. PVF Holding Co., IAB #1496990, (5/25/22). The Board awards 50 weeks of disfigurement benefits to the face for acne-like scars as the result of burn injuries. There was a separate award of 10 weeks of benefits for neck/throat disfigurement and an award of 2 weeks of benefits for each arm. [Mason/Wilson]

Arthur Washington v. XPO Logistics, IAB #1507875, (10/12/22). The Claimant is awarded 10 weeks for altered gait and 6 weeks for a neck scar on the left side of the throat running to a slight diagonal but generally perpendicular to the normal crease of the neck, two inches long and an eighth of an inch wide. The gait derangement was described as a slight stagger or otherwise a limp "somewhere between mild and moderate." [Gambogi/Starr]

Dwayne Jacobs v. YRC Freight, IAB #1516608, (6/10/22). A surgical seven-inch scar down the center of the leg which is ¼ inch wide is awarded four weeks of benefits. [O'Neill/Davis]

John Boyden v. Aquaflow Pump & Supply Co., IAB #1471019, (6/3/22). The Claimant is awarded 10 weeks of benefits for a lumbar surgical scar which is a two-inch-long white vertical scar in the center of his back extending below the pant line and a ¼ inch wide with the entire top half indented and readily visible. The claimant's children tease him and call "double butt crack". The Claimant is also awarded four weeks of benefits for collective disfigurement on his stomach which include two bumps on either end of a scar on the claimant's underbelly. [Fredricks/McGarry]

Constance Devine v. Christiana Care Health System, IAB #1516418, (3/27/23). The Board awards eight weeks of benefits for a five inch by quarter inch leg scar and zero weeks for an alleged limp where the employer introduces a brief video of the claimant walking at work with no discernible "hitch" in her stride. [Allen/Newill]

JURISDICTION

Norman Davis v. GT USA Wilmington LLC, IAB #not given (11/7/22) (ORDER).

There is no concurrent jurisdiction between the Delaware Workers' Compensation Act and the Federal LHWCA where Claimant has been found to be a dock worker/longshoreman and not an employee covered by the Delaware policy. [Tice/Lockyer]

LABOR MARKET SURVEY

James Smith v. Cut 'Em Up Tree Care of Delaware, IAB #1496320, (1/27/23).

The carrier's Petition for Review fails in light of a labor market survey for which the overwhelming majority of jobs require a high school diploma in a situation where the claimant has only a 9th grade education. [Warren/Logullo]

MEDICAL TREATMENT ISSUES

Elizabeth Delfi v. State, IAB #1481481, (2/27/23).

The Claimant's DACD Petition seeking payment for orthobiologic treatment (stem cell treatment) referable to the lumbar spine is denied. The Board accepts that FDA approval is not required by the Delaware Practice Guidelines for treatment to be deemed as presumptively reasonable. The Board further accepts that off-label uses are a routinely accepted part of medical practice and often compensable in the context of medical treatment. "A thorough review of this Board's body of decisions relating to treatments approved as compensable that might otherwise exceed or deviate from the Practice Guidelines reflect the Board's appreciation for a case-by-case assessment. The Board is not persuaded that Claimant has demonstrated by the standard of more likely than not that it was reasonable to undertake the use of orthobiologics given the lack of authority and acceptance for the treatment in the field of spinal care. Dr. Rudin's experience and the close nature of his relationship, financially and otherwise, to accept this methodology cannot be ignored, particularly given the debate it has spawned among providers in our state involved with creation and amendment of our Practice Guidelines. Accordingly, the Board does not find the use of this treatment to have been reasonable in the context of Claimant's injuries."

[Malkin/Baker]

Kevin Kurych v. Idexx-US Virtual, IAB #1504289, (9/23/22). The Claimant's DACD Petition seeking a finding of compensability for his lumbar spine condition as well as payment for stem cell/orthobiologic treatment is denied based on the defense testimony of Dr. Scott Rushton and with FDA concerns referenced. [Stanley/Adams]

Alfredo Ramirez-Rodriguez v. National Paper Recycling of DE, IAB #1397324, (9/29/22). Medical treatment expense benefits are awarded for treatment in Indiana, where Claimant resides, pursuant to 19 *Del. C.* § 2322(B)(1) without precertification. The ongoing conservative medical treatment in Indiana is awarded pursuant to 19 *Del Code* Section 2322 (B)(7). [Pruitt/Gin]

Richard Mahan v. Stroberg Organization, IAB #1208746, (11/3/22) (ORDER). The Board denies Claimant's Motion to Dismiss a Petition filed by the employer/carrier seeking review of Claimant's opioid medication usage and recommendation for detoxification. The Board did not agree that just because DIGA is not legally responsible for paying Claimant's medical care, it has no standing to challenge the medical care, noting that it is liable for ongoing total disability and has an opinion from a medical provider that detoxification from opioids will reduce Claimant's level of disability. Employer is offering detoxification services to the Claimant under the belief that such treatment will reduce Claimant's incapacity and potentially allow a termination of his total disability. [Bhaya/Wilson]

Teresa Bollinger v. Genesis Health Care Group, IAB #1483393, (2/17/22). On a DACD Petition seeking authority for a trial of a spinal cord stimulator and potential permanent placement of a SCS, the Board rules in favor of the employer based on the testimony of Dr. Brokaw that spinal cord stimulators are most effective for treating neuropathic pain in a distal limb, which is not a symptom that is a significant portion of Claimant's current complaints. Spinal cord stimulators have a very poor track record in controlling musculoskeletal pain and Claimant's symptoms are clearly musculoskeletal in nature, not neuropathic. Unknown pain genesis is a very poor prognosticator for spinal cord stimulator success and even the treating physician agreed that the source of Claimant's pain has not been determined. [Schmittinger/Lockyer]

Jeffrey Curtis v. Intertek, IAB #1467367, (2/7/23). The Board awards a lumbar spine surgery on the basis of adjacent segment disease with Dr. Zaslavsky testifying for the claimant and Dr. Schwartz testifying for the employer. [Silverman/Gin]

George Calder v. State, IAB #1255753, (2/14/23). The IAB awards a cervical spine surgery on the basis of adjacent segment disease with Dr. Eskander testifying on behalf of the claimant and Dr. Rushton testifying on behalf of the employer. [Morrow/O'Connor]

Patrick Kalix v. Giles & Ransom Inc., IAB #1280555, (1/6/23). This was Employer's Petition to Review seeking to have the Board reduce Claimant's monthly entitlement to medical marijuana from 90 grams to the original 50 grams he was initially awarded. Claimant, who maintains that he requires the dose he is presently receiving, objects to any reduction in his monthly allotment of medication. There was also a Petition filed by Claimant to compel the Board to order the carrier to contract with a third-party online marijuana provider so that pre-payment for medical marijuana could be made for the Claimant. That Petition was denied. The Petition to reduce the marijuana entitlement, however, was also denied. This case provides a very interesting testimony for the basic proposition that "not all marijuana grams are created equal" with the Board commenting that it "feels no more informed as to an appropriate dose than it did at the outset of these proceedings. "Therefore, while the Board is satisfied 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, the Board is satisfied that Dr. Townsend's generalized concerns fall short of meeting the burden necessary to bring about a reduction in the ordered amount." [Marston/Baker]

OCCUPATIONAL DISEASE

Barry Mullins (deceased) v. City of Wilmington, IAB #1523018, (12/30/22). The payment of a "line of duty disability pension" under City of Wilmington Code does not preclude the employer/carrier from challenging an occupational disease claim for causal relationship, which in this case involved Claimant's death as a result of ocular melanoma, which had metastasized to the liver. In this case, the benefits are denied and with Dr. John Parkerson the only medical expert testimony offered, who testified on behalf of the employer. Following the decision in ***Armstead v. City of Wilmington, IAB #1485578 (5/6/21)***, the Board agrees that the City pension code is not relevant to a causation decision in a workers' compensation case, which is

governed by State statute. The city official who oversees workers' compensation claims against the City testified that decisions on workers' compensation claims are made entirely separate from decisions on disability pensions. [Schmittinger/Bittner]

Robert Stant, Jr. v. Evraz, Inc., IAB #1474639, (9/28/22) A DCD Petition seeking death benefits from metastatic invasive adenocarcinoma of the appendix allegedly due to asbestos exposure was denied based on the defense testimony of Dr. Roggli. The pathology records reviewed by Dr. Roggli reveal that the carcinoma was in situ, which means that the cancer most likely started in the appendix. Dr. Roggli knew of no studies linking appendiceal cancer, which is a very rare cancer, to asbestos exposure. It was further his opinion that the studies do not show a strong enough association for one to be able to conclude to a level of medical probability that asbestos exposure was a causative factor for the colon cancer. Dr. Roggli testified there is no good indicator of a causative agent for most colon cancers aside from diet. Moreover, even the Claimant's expert, Dr. Cohen, would split causation evenly between Claimant's history of smoking and asbestos exposure. [Crumplar/Chrissinger-Cobb] **Note: this is on appeal**

PERMANENT IMPAIRMENT

Rita Mobley v. City of Wilmington, IAB #1476680, (7/7/22). On a claim for 20% impairment to the cervical spine and 10% to the lumbar spine, the Board embraces the methodology of the defense medical expert, Dr. Lawrence Piccioni, with regard to reliance on the AMA Guide Sixth Edition and awards 9% cervical and 3% lumbar and rejecting the ratings of Dr. Rodgers as inflated. The fusion surgery performed by Dr. Eppley was deemed highly successful although the claimant was not able to return to work as a police officer. [Stoner/Skolnik]

Leonard Thomas v. City of Wilmington, IAB #1477371, (5/18/22). On a claim for 45% impairment to the left lower extremity, the Board awards a 20% to the left lower extremity, with the Board embracing the methodology of the defense medical expert, Dr. Townsend, that the AMA Guides, Sixth Edition incorporates the medical community's better understanding of CRPS that has developed since the Fifth Edition was published. The Sixth Edition has a rating system specifically designed for CRPS without merging it with other disorders. [Long/Bittner]

PRACTICE AND PROCEDURE

Rudolph Hawkins v. United Parcel Service, IAB #1478596, (6/2/22). The “Two-Dismissal Rule” of Superior Court does not exist in workers’ compensation and the Board rejects the employer’s challenge to a Petition which the Claimant had voluntarily dismissed on two prior occasions. Superior Court Civil Rule 41(A)(1) does not apply. [Stewart/Herling]

Tyrone Girvin v. Baltimore Aircoil, IAB #1525669, (1/20/23). Where the employer presents a premises video reportedly showing the work accident not happening, the Board finds that the numerous “skips” in employer’s video feed are a convenient coincidence at best and rules that the video footage lacks any real evidentiary value and most certainly is not evidence that no work accident occurred. Benefits are awarded. [Kimmel/O’Brien]

TOTAL DISABILITY

Daphne Davis v. Johnson Controls, IAB #1287814, (8/11/22). This case includes a lovely tutorial on Hoey and its distinctions with specific discussion of the interplay between Hoey and union membership/collective bargaining agreements. [Freebery/Hunt]

Jose Marcano v. RCS Car Care Newark, Inc., IAB #1495531, (3/22/23). In granting the Employer’s Petition to Review, the Board is highly critical of Dr. Lingenfelter’s TTD testimony commenting as follows: “It is troubling Dr. Lingenfelter rendered this opinion without ever examining Claimant or communicating with Claimant after the hardware removal surgery. He did not have first-hand knowledge of how Claimant had been doing. The Board acknowledges that the Claimant did see Ms. Hughes on January 23, 2023. However, there was no evidence that Ms. Hughes examined Claimant for purposes of determining work capability. There was no evidence Ms. Hughes documented any exam findings that would suggest Claimant remained totally disabled. Claimant’s next visit was scheduled for February 23, 2023. Dr. Lingenfelter acknowledged there was no attempt by he or Ms. Hughes to order a Functional Capacity Evaluation at any point leading up to his testimony or otherwise explore Claimant’s work capability.” Dr. Gelman as the defense medical expert and having examined the Claimant on 1/5/23 was deemed more credible on the issue of work ability. “The Board disapproves of the lackadaisical approach of Dr. Lingenfelter took in rendering a medical expert opinion on Claimant’s total disability status without ever seeing or examining Claimant post-surgery and in not exerting more effort to try to release Claimant to return to work. The Board accepts Dr. Gelman’s opinion that Claimant is no longer

totally disabled and can return to full time sedentary work with the stated restrictions as of the date of Dr. Gelman's defense medical exam, January 5, 2023."
[Minuti/Bittner]

UTILIZATION REVIEW APPEALS

Tracy Wall v. State, IAB #1351676, (1/19/23). The IAB affirms a UR non-certification of physical therapy occurring 10 years post-accident with Dr. Eric Schwartz deemed persuasive as the defense medical expert.
[Componovo/Greenberg]

VOLUNTARY REMOVAL FROM LABOR MARKET

John Wesesky v. Amazon.com, IAB #1420247, (3/7/23). An application for Social Security Disability income prior to the work accident in question for an unrelated condition equals a voluntary withdrawal from the labor market and as such, Claimant is deemed ineligible for total disability benefits related to the left shoulder or injury.
[Gambogi/Starr]

Diana Dickerson v. Lowe's Companies, Inc., IAB #1481942, (1/19/23). On a Utilization Review Appeal by the claimant with regard to non-certification of treatment rendered by Dr. Mavrakakis, the Board holds that Dr. Mavrakakis' oversight of care rendered by others is superfluous and not compensable. "To the extent that claimant requires services that can be provided by her longtime physician Dr. Irene Mavrakakis, that provider is appropriate, however to the extent that Dr. Mavrakakis sees Claimant simply for the benefit of keeping up with care provided by others or under circumstances where it is evident she cannot provide the care herself, such visits are not reasonable or necessary and will not be found compensable". Treatment with Dr. Mavrakakis is only approved to the extent that Dr. Mavrakakis *actually provides services* the Claimant requires as opposed to the role of facilitator that she seemingly has filled in the Claimant's most recent care.
[Schmittinger/Davis]

APPELLATE OUTCOMES

Buchanan v. Waste Mgmt., N22A-04-001 CLS (Del. Super. Ct. Nov. 9, 2022).

Claimant sustained a compensable work injury to his back which required a fusion from S1 to L2, then L5-S1, then L4-L5, then L3-L4, and eventually L2-L3 over the course of seventeen years. Claimant asserted that he developed left hip following the last fusion and sought compensation for his treatment relating to his left hip, arguing the fusion aggravated his left hip and caused it to become symptomatic. Employer's physician agreed that a fusion of the lumbar spine can place more strain on an individual's hips and increase the risk of hip degeneration, however, Claimant's MRI showed evidence of a labrum tear, which presents an acute injury, rather than a slow progression of symptoms overtime. According to Claimant's medical records, he did not complain of hip pain until fifteen months after his last fusion in September 2019. The Board found Employer's physician more persuasive, finding that Claimant's hip injury was unrelated to the work accident. Claimant appealed the Board's decision, arguing there was not substantial evidence to support the Board's acceptance of the opinion of Employer's physician over Claimant's physician. The Superior Court affirmed the Board's decision, holding there was substantial evidence for the Board to choose Employer's physician's testimony over Claimant's because the opinions of Claimant's physician were inconsistent with Claimant's medical history and the presentation of Claimant's complaints and MRI imaging was more consistent with an acute injury rather than a correlation between the spinal fusions and Claimant's hip pain. [Gamboji/Davis].

Quality Assured Inc., T/A ServiceMaster of Brandywine v. David, N22A-05-012 SKR (Del. Super. Ct. Dec. 6, 2022).

Claimant sustained a neck and low back injury as a result of a 2009 compensable work accident. Since then, Claimant had been engaged in active treatment for his low back, which included consistent epidural injections. In November 2021, Claimant sought payment of medical expenses for his treatment from September 2020 and ongoing, which consisted entirely of injections directed to his low back. Claimant's physician, who began treating Claimant a couple months after the work accident and continues to treat him, testified that Claimant's treatment of his lumbar spine has not changed since 2009 which consists of typically one to three epidural injections per year. Claimant had one injection in 2019, three in 2020, and three in 2021. Claimant's physician opined that the injections were causally related to the 2008 work accident because Claimant has not had any lumbar injections before then and has been consistently receiving them at relatively the same frequency since the accident. Conversely, Employer's

physician testified that the injections are not causally related but rather attributed to Claimant's pre-existing degenerative conditions. The Board found that the injections were causally related to the work accident, relying upon Claimant's physician's opinion who had been overseeing his care and administering the injections since 2009. The Board also cited that Employer had paid for injections administered prior to those at issue. On appeal, Employer argued that the Board applied a less stringent legal standard to Claimant's burden of proof; the Board should not have considered past payments of medical expenses; and the Board's decision to accept the testimony of Claimant's treating physician over Employer's physician was not supported by substantial evidence. While the Superior Court agreed that the Board's consideration of payments for previous injections in determining causation or compensability of present, disputed medical expenses improper, the Court did not find that, standing alone, rendered the Board's whole decision reversible and affirmed it. [Bittner/Crumplar].

Hooten v. Blue Hen Disposal, K22A-05-001 JJC (Del. Super. Ct. Feb. 1, 2023).

This claimant sustained acknowledged work injuries and the employer filed a termination petition. Prior to hearing, the claimant sustained further injuries in a non-work-related car accident. The Board granted the petition, awarded partial disability benefits, and an appeal followed. The claimant contended that the Board erred as a matter of law by accepting the testimony of the defense expert when that expert had not examined the claimant after the second accident. The Court affirmed the decision. The Board was entitled to accept the opinion of the defense expert even though he did not examine the claimant after the non-work-related accident. Delaware law does not require an expert to physically examine a claimant to offer a medical opinion. Further, the defense expert's opinion was also based on his review of records following the second accident. The Court concluded by faulting the claimant with failing to notify the employer about the second accident. Notice was required under Board Rule 9(c). This prevented the employer from being able to timely schedule a new DME prior to the hearing. [Schmittinger/Bittner].

***Copes v. Delaware Transit Authority*, N22A-05-001 FWW (Del. Super. Ct. Feb. 2, 2023).** The issue before the Court was whether the Board’s denial of a second request for continuance was an abuse of discretion. The claimant filed a DCD petition alleging various injuries. After withdrawing and refileing her petition once, the claimant requested and the employer consented to a continuance due to a recommendation for surgery. The claimant then sought a second continuance so her expert could testify on her condition post-surgery. The Board denied the request, noting that the claimant could withdraw the petition and refile if she chose. She chose to proceed to the hearing, and appealed after the petition was denied. The Court affirmed the Board decision. The claimant had adequate time and opportunity to prepare for the hearing. A claimant’s failure to secure their own treating physician’s opinions on causation does not good cause under Board Rule 12. [Haley/Klusman].

***Del. Dept. Labor v. Drew’s Tree Serv., LLC*, 2022-0081-SG (Del. Ch. Mar. 2, 2023).** The Court of Chancery ordered that the Department of Labor was entitled to an assessment of \$52,250.00 and an injunction prohibiting Employer from operating its business in Delaware pursuant to 19 *Del. C.* § 2374(f) while it was out of compliance. The assessment amounted to \$250 per day for 209 days of non-compliance between the Department’s notification of Employer’s obligation to comply with Order and the filing of the Department’s motion for default judgment. The Board found that the Employer was in violation of 19 *Del. C.* § 2374(a), which requires compliance with 19 *Del. C.* §§ 2372–73, and ordered the Employer to immediately obtain workers’ compensation insurance and submit proof of such insurance by September 4, 2021. The Order provided that non-compliance would result in referral “back to the Industrial Accident Board for civil penalties per § 2374(e).” The Employer did not provide proof of insurance, so the matter was referred to the Department of Justice to file this Petition. [Kelly/?].

***Jason v. State*, N22A-06-004 VLM (Del. Super. Ct. Mar. 13, 2023).** The claimant challenged part of a Board decision that denied claims for bilateral wrist and right shoulder injuries and found that a neck injury had resolved. The primary contention on appeal was that the defense expert’s opinion was based in part on the lack of medical treatment. The claimant argued that any lack of medical treatment was the employer’s fault due to failing to report the accident to the carrier which prevented access. After considering the argument, the Court affirmed the decision. While the claimant focused attention on the delay in reporting the injuries by the employer, the Court found this was really a battle of the medical experts. The Board was entitled to find the defense expert most credible concerning these body parts. Further, the Board rejected the claimant’s contention that he did not treat due to insurance issues

as the PCP records over the course of years indicated he did not complain of symptoms to the body parts in question. [A.Carmine/Morris].

Cantoni v. Del. Park Racetrack & Slots, N22A-06-002 FJJ (Del. Super. Ct. Mar. 16, 2023). The Court reversed a Board decision that in part ordered weaning entirely from prescribed narcotic medication within a six month timeframe. This followed a prior Board decision which ordered a reduction which the claimant did not comply with. Following the filing of a new petition, the treating physician apparently did reduce the dosage. The court did not find evidence in the record to support weaning entirely from the narcotic medication. The only testifying witness was the defense expert. The expert at time of deposition testified that maintaining the current dosage would be reasonable if further weaning caused increased pain. Further weaning would be at the discretion of the treating physician. As there was no medical testimony to support weaning the claimant entirely off the medication, the decision could not be upheld. [Ippoliti/Morgan].

Mendoza v. Talarico Bldg. Sevs., Inc., N22A-05-003 VLM (Del. Super. Ct. Mar. 30, 2023). Claimant sought compensability of his cervical surgery which he argued was the result of a slip and fall at work in July 2018. However, due to the claimant's failure to disclose his significant medical history and his denial of prior/subsequent incidents to his treating surgeon, the employer's doctor, and the Board, the Board found the claimant not credible and his surgeon's opinion unreliable. Accordingly, the Board denied Claimant's Petition for Additional Compensation Due. Further, the Board granted Employer's Termination Petition to set aside the parties' original agreement for workers' compensation benefits upon a finding that Claimant engaged in fraud in pursuit of benefits. Claimant appealed the Board's Decision to the Superior Court, arguing (1) the Board erred in finding Employer's expert more credible; and (2) the Board failed to properly consider the elements of reliance and damages in finding fraud. First, the Superior Court found that there was substantial evidence to support the Board's finding that Employer's doctor was more credible than Claimant's doctor. Second, with respect to the Board's finding of fraud, the Superior Court found there was justifiable reliance on Claimant's misrepresentation. Then, the Superior Court found that the Board did consider that Employer suffered damages as a result of its reliance on the misrepresentation because the Board credits Employer for all monies expended on benefits to Claimant based on the prior agreement. [Stewart/Newill].

***Spera v. Mid-Atlantic Dental Servs. Holdings*, N22A-08-001 FWW (Del. Super. Ct. Apr. 20, 2023).** The claimant appealed a Board decision that found that his post-accident wage loss was not the result of the work injury. In the decision, the Board accepted the opinions of the defense expert on the proper diagnosis for the neck injury and ability to work without restrictions. Any wage loss to that date was due to non-work factors such as the claimant's planned career-shift, staffing issues, administrative complaints, post-COVID reduction surgeries, and failure to employ accommodations to continue his normal work. On appeal, the claimant contended the Board disregarded objective findings on the diagnostic studies and challenged the defense expert's qualifications to render opinions in this case. The Court disagreed and affirmed the decision. The defense expert's opinions following review of the diagnostic studies constituted substantial evidence on appeal. The fact that the defense expert was not a neck surgeon did not change the standard for review on appeal. The Board was also entitled to find the claimant incredible as to why he was unable to continue his normal job without wage loss. [Peltz/Andrews].

Whoops I Did It Again – The Legal Implications of Successive Injuries

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Whoops I Did It Again The Legal Implications of Successive Injuries

May 2, 2023

DSBA Workers' Compensation Seminar

CASE LAW

Standard Distributing Company v. Nally, 630 A.2d 640 (Del. 1963)

- ▶ Two Prong Test:
 - ▶ Did the Claimant sustain an aggravation or new injury?
 - ▶ Was there an untoward event?

Standard Distributing Company v. Nally, 630 A.2d 640 (Del. 1963)

- ▶ Did the Claimant sustain an aggravation or new injury?
 - ▶ If recurrence, the 1st carrier is responsible
 - ▶ Must show more than increase in symptomatology

Standard Distributing Company v. Nally, 630 A.2d 640 (Del. 1963)

- ▶ Was there an untoward event?
 - ▶ If yes, the 2nd carrier is responsible
 - ▶ If no, the 1st carrier is responsible
 - ▶ Must have both aggravation or new injury and an untoward event to shift responsibility to second carrier

Untoward Event

- ▶ What is an untoward event?
 - ▶ Kentucky Fried Chicken v. Iman 1998 WL 437140 (Del. Super. Ct.): an event or activity which is beyond the scope of the Claimant's normal duties. Second event of moving 150 lb. pieces of concrete was part of his job and not an "untoward event"
 - ▶ Giant Foods v. Fowler, 2001 Del. Super. LEXIS 372: Superior Court affirmed the Board's decision finding the second injury was a "recurrence" because the second event was not an untoward event. Claimant had a shoulder and neck injury from an accident while working at Giant. While working for Raytheon, he hurt his neck and shoulder when he grabbed a piece of lumbar while breaking down scaffolding. Breaking down scaffolding was part of his work duties.

Untoward Event

- ▶ Bayhealth Medical Center v. Coverdale, 2009 WL 1141642 (Del. Super. Ct.): Slip and fall is outside the normal job duties and thus, with increased symptoms, constituted an untoward event. Board focus on prior surgical eligibility misplaced.
- ▶ Taylor v. Greggo & Ferrara, Inc., IAB # 1520266 (October 31, 2022): The Board must consider whether an "untoward event" occurred. According to the Superior Court, "[a]n untoward event is an event beyond the normal duties of employment." Kirkwood Animal Hospital VCA v. Foster, No. 03A-090-04, 2004 WL 2187621 (Del. Super. Ct. Sept. 28, 2004) (affirming Board decision finding an untoward event where a sudden, unexpected, discrete, and identifiable movement precipitated the claimant's back problems rather than claimant's regular job duties as a dog groomer).

First accident barred by SOL

- ▶ *Janice Willis v. Beebe Medical Center, et al*, C.A. 08A-03-003 (RBY), Del. Super. Nov. 18, 2008 and No.: K10A-01-008 (THG) Del. Super. Jan. 7, 2011
 - ▶ 1st accident barred by statute of limitations, second accident barred because no untoward event - handling patient was part of Claimant's duties

First accident barred by Commutation

- ▶ Karen Jack v. Home for Aged Women, IAB #1466815, Jan. 23, 2020
 - ▶ Claimant had 3 prior work related low back injuries. She commuted all three prior claims. Board conducted *Nally* analysis and found there was only a temporary flare-up and no new injury. Petition granted in part and denied in part.
- ▶ Taylor v. Greggo & Ferrara, Inc., IAB # 1520266 (October 31, 2022)
 - ▶ The burden is on the initial carrier to prove the causative effect of the second event such that liability should be shifted to a subsequent carrier. *Standard Distributing Co. v. Nally*. The earlier case here was commuted, so Claimant takes the place of the previous insurance carrier to assert a shift of liability from the previous work-related accident to the alleged accident. Claimant thus needs to prove (1) an untoward event occurred and (2) the untoward event caused a new injury or worsening of a previous injury to the cervical and lumbar spine.

Second Carrier Acknowledges Treatment and Pays Benefits

- ▶ Can subsequent treatment be related to first carrier?
 - ▶ Whitney v. Bearing Construction, Inc., 2014 WL 2526484 (Del. 2014)
 - ▶ Greenville Country Club v. Greenville Country Club, 2016 WL 6471898 (Del. 2016)

Failure to File Against the Second Carrier

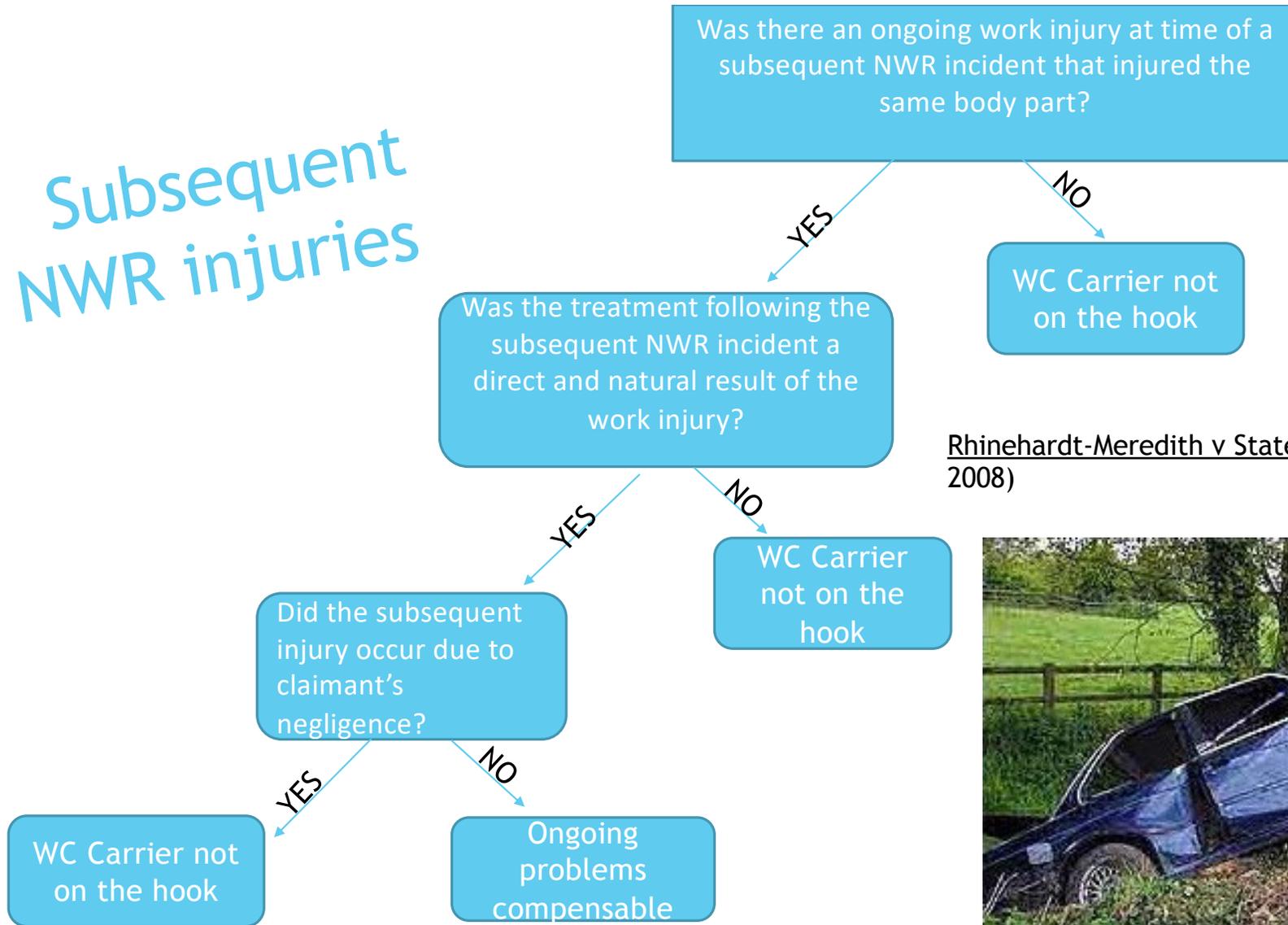
- ▶ Claimant considerations as to proceeding against one as to both carriers
- ▶ Defense considerations for impleading the second carrier if the Claimant fails to file against that carrier

2nd Injury Fund Consideration

§ 2327 Compensation for subsequent permanent injury; special fund for payment.

- ▶ (a) Whenever a subsequent permanent injury occurs to an employee who has previously sustained a permanent injury, from any cause, whether in line of employment or otherwise, the employer for whom such injured employee was working at the time of such subsequent injury shall be required to pay only that amount of compensation as would be due for such subsequent injury without regard to the effect of the prior injury. Whenever such subsequent permanent injury in connection with a previous permanent injury results in total disability as defined in § 2326 of this title, the employee shall be paid compensation for such total disability, as provided in § 2324 of this title, during the continuance of total disability, such compensation to be paid out of a special fund known as “Workers’ Compensation Fund”; any insurance carrier desiring reimbursement from the Fund shall file a petition for payment, provided all claim for reimbursement shall be forever barred unless the insurance carrier files a petition with the Department for reimbursement for payments under this section within 2 years after the date on which the employee was first paid total disability benefits following the subsequent permanent injury.
- ▶ (b) This section shall apply only to employers insured by insurance carriers. It shall not apply to self-insured employers who shall be responsible for payment of their own claims under this section and who shall not be eligible for further reimbursement for payments made under this section after the effective date of the Workers’ Compensation Improvement Act of 1997. Awards to self-insureds for reimbursements under this section are revoked as of the effective date of the Workers’ Compensation Improvement Act of 1997.

Subsequent NWR injuries



Rhinehardt-Meredith v State, 963 A.2d 139 (Del. 2008)



Rhinehardt-Meredith v. State, 963 A.2d 139.

- ▶ The direct and natural result test dictates that when an employee suffers a compensable industrial injury and later suffers a non-industrial injury, the later injury is compensable by the employer if it follows as a direct and natural result of the primary compensable injury. The direct and natural result test also has a superseding causation component: i.e., if the later injury is a result of the claimant's own negligence or fault, the chain of causation is broken and the later injury is not compensable.

Questions?



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by Parson v. City of Wilmington, Del.Super.,
December 24, 2012

630 A.2d 640

Supreme Court of Delaware.

STANDARD DISTRIBUTING COMPANY,
Through its Workers' Compensation Carrier,
PENNSYLVANIA MANUFACTURER'S
ASSOCIATION INSURANCE COMPANY,
Employer—Appellee Below, Appellant,

v.

Robert NALLY, Claimant—Appellee Below, Appellee,
and

Standard Distributing Company, Through
its Workers' Compensation Carrier,
Northbrook Property & Casualty Company,
Employer—Appellant Below, Appellee.

Submitted: April 27, 1993.

|

Decided: Sept. 17, 1993.

Synopsis

Worker, who experienced increased back pain while unloading beer keg from truck in 1989, petitioned Industrial Accident Board for workers' compensation benefits. The Board determined that carrier responsible for payment of benefits for worker's 1988 back injury, rather than successor carrier, was responsible for payment of benefits attributable to 1989 episode, and first carrier appealed. The Superior Court, New Castle County, reversed, and second carrier appealed. The Supreme Court, Walsh, J., held that: (1) 1989 episode was "recurrence," rather than "aggravation," of 1988 injury and, thus, first carrier was responsible, and (2) Board did not abuse its discretion in questioning worker.

Reversed and remanded with direction.

Procedural Posture(s): On Appeal.

West Headnotes (7)

[1] **Workers' Compensation** ⚡ Successive employers or insurers

Appropriate methodology for determining responsibility of successive workers' compensation carriers in recurrence/aggravation disputes requires determination of whether a new episode is producing cause of industrial accident resulting in changed physical condition before second carrier may be held liable; question is not whether worker's pain or other symptoms have returned or increased, but whether there has been new injury or worsening of previous injury attributable to untoward event.

27 Cases that cite this headnote

[2] **Workers' Compensation** ⚡ Necessity of accident and causal connection

Workers' Compensation ⚡ Successive employers or insurers

Use of "substantial causation" standard, rather than unusual exertion rule, in workers' compensation cases is limited to claims where very issue of compensability is at stake; standard should not be applied in successive carrier disputes where there is need to fix untoward event as basis for allocating responsibility between carriers.

18 Cases that cite this headnote

[3] **Workers' Compensation** ⚡ Presumptions and Burden of Proof

Burden of proving causative effect of a second event in recurrence/aggravation disputes as to liability of successive workers' compensation carriers is upon initial carrier seeking to shift responsibility for consequences of original injury.

16 Cases that cite this headnote

[4] **Workers' Compensation** ⚡ Successive employers or insurers

Finding that worker's increased symptoms of back injury were "recurrence," rather than "aggravation," of earlier injury, so that employer's workers' compensation carrier at time of first injury, rather than subsequent carrier, was responsible for payment of benefits, was

supported by testimony of three medical experts that second episode did not worsen back injury, by evidence that, when worker returned to full duties one week before second episode, he was not symptom free and continued under medication, and by evidence that, at time of second episode, worker was engaged in normal activity of unloading beer keg from truck and did so no differently than he had in past.

21 Cases that cite this headnote

- [5] **Administrative Law and Procedure** ⇄ Rules of evidence
 Rules of evidence do not apply strictly to adjudication by administrative agencies.

5 Cases that cite this headnote

- [6] **Workers' Compensation** ⇄ Summoning and examining witnesses
 While it is desirable that primary responsibility for examination and cross-examination of witnesses at workers' compensation hearing be that of counsel, Industrial Accident Board may, in its discretion, examine witnesses. 19 Del.C. § 2122(a).

1 Cases that cite this headnote

- [7] **Workers' Compensation** ⇄ Summoning and examining witnesses
 In absence of abuse of process allowing Industrial Accident Board to question witnesses at workers' compensation hearing, reviewing court will not fault Board for doing so. 19 Del.C. § 2122(a).

5 Cases that cite this headnote

*641 Appeal from Superior Court. Reversed and Remanded.

Attorneys and Law Firms

J.R. Julian (argued), J.R. Julian, P.A., Wilmington, for employer-appellee below, appellant Standard Distributing Co. through Pennsylvania Manufacturer's Ass'n Ins. Co.

Sidney Balick (argued), Wilmington, for claimant-appellee below, appellee Robert Nally.

George B. Heckler, Jr. (argued), and John J. Klusman, Jr., Heckler & Cattie, Wilmington, for employer-appellant below, appellee Standard Distributing Co. through Northbrook Property & Cas. Co.

Before VEASEY, C.J., WALSH and HOLLAND, JJ.

Opinion

WALSH, Justice:

[1] In this appeal from the Superior Court, we address the vexing question of successive carrier responsibility for alleged recurrence of a previous injury resulting in a claim for workers' compensation. The Superior Court, in reversing the Industrial Accident Board, ruled that, as a matter of law, a recurring injury resulting from the performance of normal employment duties constitutes a new injury for which the compensation carrier at the time of the new injury is responsible. In our view, the appropriate methodology for determining successive carrier responsibility requires the determination of whether the new episode is the producing cause of an industrial accident resulting in changed physical condition before the second carrier may be held liable. Accordingly, we reverse.

I

The facts which underlie the successive claims are essentially undisputed. On March 1, 1988, claimant-appellant, Robert Nally ("Nally"), injured his lower back in a work-related accident that occurred while he was employed by Standard Distributing Company ("Standard") as a delivery person. At the time of the accident, Northbrook Property and Casualty Company ("Northbrook") was the workers' compensation insurance carrier for Standard.

On the day of the accident, Nally was driving a delivery truck with five bays on each side, each with its own door. Nally was injured when he attempted to open a bay door that was stuck. As the door opened, six cases of beer fell out and pushed Nally to the ground. Some of the cases landed on Nally and he immediately felt pain in his lower back, right buttock and right leg. Nally was initially treated by Dr. Brent Noyes. Thereafter, he was treated by Dr. Ross Ufberg for pain in his lower back and his right leg.

As a result of the accident, Nally, under an agreement with Northbrook, collected total disability benefits from March 2, 1988 through June 28, 1988 and partial disability benefits thereafter until May 14, 1989. In January 1989, Nally returned to work on a restricted basis as a night packer, a lesser paying job which required him to place bottles in boxes. On March 10, 1989, Dr. Ufberg released Nally to return to work without restriction, although Nally continued to experience some back pain for which he took medication.

On March 20, 1989, while making a delivery, Nally once again injured his lower back in a work-related event. The second episode occurred as Nally was unloading several full kegs of beer, weighing 160–165 pounds each, from his delivery truck. Delivering beer kegs was one of Nally's regular duties. One of the kegs to be unloaded was toward the rear of the truck and had to be pulled to the door. Nally's normal method of getting a full keg from the back of the truck to the door was not to lift the keg, but to roll the keg to the front and to *642 flip it out the door, allowing it to fall approximately 20 inches to the ground. As Nally prepared to flip the keg out the door, he put his foot on the truck to gain leverage. He immediately felt pain across his lower back, right buttock and right thigh. At the time of the second accident, Pennsylvania Manufacturer's Association Insurance Company ("PMA") was the workers' compensation insurance carrier for Standard.

In a petition filed with the Industrial Accident Board ("Board"), Nally alleged that the March 20, 1989 injury was a "recurrence" of the March 1, 1988 accident for which Northbrook was responsible. Subsequently, Nally added PMA as a party, alleging that the March 20, 1989 disability was a new accident for which PMA was responsible. Northbrook filed a Petition to Terminate with the Industrial Accident Board ("Board"), alleging that Nally suffered a new accident/injury on March 20, 1989 for which PMA was on the risk. The carriers did not contest Nally's entitlement to compensation for the medical expenses attributable to the second episode. The dispute is over which carrier, Northbrook or PMA, is responsible for paying Nally's benefits.

The Board conducted an evidentiary hearing at which several physicians testified. Nally's treating physician for both incidents was Dr. Ufberg. Dr. Ufberg testified that when he saw Nally shortly after the first accident, he complained of lower back pain with sharp aching across his right lumbosacral region that was worse while standing straight

or while sitting for prolonged periods of time. Dr. Ufberg stated that his initial impression was that Nally suffered a lumbosacral strain and fibromyalgia. Dr. Ufberg continued to see Nally through May 1988, but Nally exhibited little improvement. Based upon Nally's symptoms as well as the type of work that he did, Dr. Ufberg considered the implications of a disc injury and ordered a CAT scan. In Dr. Ufberg's opinion, the CAT scan, dated May 9, 1988, revealed findings suspicious of herniation of the nucleus pulposus at L3–4. The doctor testified that an injury at L3–4 disc is not common in industrial accidents involving bending and lifting but is consistent with a fall backwards.

Thereafter, Dr. Ufberg ordered an MRI that, in his opinion, revealed a degeneration of the L3–4 disc as well as posterior bulging at L3–4 causing encroachment on the thecal sac. Dr. Ufberg continued to treat Nally through June and July of 1988 and his office notes reveal that Nally was still complaining of pain, sometimes severe, and reflect that Nally was having good and bad days. Dr. Ufberg noted Nally's general condition worsened with activity. At that time, Dr. Ufberg had the same three impressions as before: herniated disc; lumbosacral strain; and fibromyalgia.

Dr. Ufberg's report of September 1, 1988, recited that Nally continued to note significant lower back pain that worsened with certain activities such as lifting or carrying heavy items. He further noted occasional tingling sensations radiating to the right buttock. Dr. Ufberg ordered an EMG nerve conduction study that showed no nerve root irritation. Dr. Ufberg stated that this test was performed to determine if there was active pressure from the disc on the nerve roots. In Dr. Ufberg's opinion, however, the test results did not rule out herniation since the EMG merely tests nerve function. Dr. Ufberg continued to see Nally through March 10, 1989, when, at Nally's urging, Dr. Ufberg released him to work without restriction but to continue on prescribed medication.

As previously noted, Nally sustained his second injury one week after returning to full duty, and was seen by Dr. Ufberg on March 21 with complaints of sharp pain across his lumbosacral region radiating into his right posterior thigh. Dr. Ufberg testified that these findings were similar to, and consistent with, the prior findings. In Dr. Ufberg's opinion, Nally suffered a "flare-up" of his old injury, not a new injury, as a result of the incident with the keg. Dr. Ufberg related all of Nally's disability to his March 1, 1988 injury and viewed the 1989 event as a recurrence of the 1988 injury.

*643 Dr. Joseph M. Barsky, Jr. performed an independent medical examination in February 1990 at the request of PMA after reviewing all the medical records of the treating physicians since the 1988 accident. Dr. Barsky testified that Nally had a herniated disc at L3–4 as a result of the first accident. This diagnosis was based on Dr. Ufberg's history and records as well as the CAT scan and MRI that were performed. Dr. Barsky ordered a second MRI that was performed on April 26, 1989, which, in his opinion, revealed no significant change from the MRI performed in May 1988. Dr. Barsky testified that the March 20, 1989 incident was a recurrence of the prior disc problem. Finally, Dr. Barsky testified that he would not have released Nally to work without restrictions in March 1989 because he had a herniated disc at the L3–4 level which would require restrictions. Dr. Barsky testified that the purpose for not releasing a patient of this type to full duty is to limit exposure to any type of recurrence.

Dr. Bikash Bose, a neurosurgeon who performed a lumbar discectomy on Nally in 1989, testified that the lumbar myelogram and CAT scan performed on August 8, 1989 revealed a herniated disc at L3–4. Dr. Bose testified that the surgery confirmed the results of the myelogram. Dr. Bose testified that there was no new injury as a result of the March 20, 1989 incident. He stated that the type of accident that Nally experienced on March 1, 1988 was competent to cause the disc injury described in the CAT scan and MRI.

Dr. Jerry L. Case performed a series of independent medical examinations of Nally at the request of Northbrook. Dr. Case stated that when he first saw Nally on June 14, 1988, he obtained a detailed history from him. Dr. Case testified that there was no clinical evidence of disc herniation at his June 14, 1988 examination of Nally. Dr. Case further testified that there was no evidence of a herniation when Nally returned to work in March 1989. Dr. Case testified that this was not a recurrence without an intervening event but, rather, that the second incident was the precipitating cause of the herniation.

In its award of compensation, the Board noted that it was “persuaded by the testimony of Dr. Ufberg that the claimant suffered a recurrence of symptoms related to his original injury March 1, 1988.” The Board concluded that the 1989 incident did not involve sufficient untoward activity to cause a new injury and could not be deemed an intervening event. The Board was also of the view that Nally had been released for work prematurely at a time when he was not free of the effects of the 1988 injury. Accordingly, Northbrook was held

responsible for payment of benefits effective March 21, 1989. The Board also granted Northbrook's Petition to Terminate partial disability benefits effective March 13, 1989, the date that Nally returned to full duty.

On appeal, the Superior Court reversed the Board's determination that Northbrook was responsible for payment of benefits attributable to the 1989 episode. The court ruled that, despite application of the correct legal standard by the Board, the record did not contain substantial evidence to support the Board's decision that Nally had sustained a recurrence and not an aggravation of his prior disc problem. The Court noted that there was competent medical evidence to show that Nally had a disc herniation at L3–4 as a result of the first accident and his condition remained unchanged after the second accident. However, the court ruled, as a matter of law, that, under *DiSabatino & Sons, Inc. v. Facciolo*, Del.Supr., 306 A.2d 716 (1973), the second accident constituted an “intervening event” that “aggravated” Nally's prior disc condition.

In a supplemental decision denying reargument, the Superior Court ruled that the standard of causation for the second event, as established in *Facciolo*, had been modified by this Court's subsequent decision in *Duvall v. Charles Connell Roofing*, Del.Supr., 564 A.2d 1132 (1989) and, therefore, any work-related event or episode that results in disability constitutes an aggravation or new injury.

*644 II

On appeal, PMA, joined by Nally, seeks reinstatement of the Board's determination that Northbrook, as the carrier on the risk at the time of the 1988 injury, should respond to Nally's entitlement to benefits attributable to the 1989 episode. To the contrary, Northbrook contends that the Superior Court correctly determined that the 1989 episode brought about or aggravated the 1988 injury, and is thus compensable by PMA, the carrier on the risk at the time of the new event.

The first case in which this Court squarely addressed the successive carrier problem in the case of accidental injury was *DiSabatino & Sons, Inc. v. Facciolo*, Del.Supr., 306 A.2d 716 (1973).¹ In *Facciolo*, the claimant suffered a compensable injury to his back, returned to work and, after the employer changed insurers, was again disabled with back problems after escaping from a manhole cave-in. *Id.* at 718.

The Court adopted the recurrence/aggravation standard for determining which insurer is liable.

If an injured work[er] suffers a recurrence, he [or she] may apply for further compensation under [19 *Del.C.* § 2347] and if there has in the meantime been a change of insurers, the liability therefor falls upon the insurer which was liable for the original benefits. On the other hand, if [the worker's] condition is not a true recurrence, but is brought about or aggravated by a new work-connected accident, the liability falls upon that insurer whose policy is in effect at the date of the new accident.

Id. at 719.

“Recurrence” was defined as “the return of an impairment without the intervention of a new or independent accident.” *Id.* Thus, in the absence of an intervening accident, the first insurer must respond. If, however, there was “a new work-connected accident or episode, whether or not due to unusual exertion” the liability would be placed upon the new insurer. *Id.* The Court further held that a finding of unusual exertion necessarily implies the existence of an aggravation. *Id.* at 270. Finally, both insurance carriers would escape liability if the second injury was an aggravation which was *not* caused by unusual exertion.

We again considered the successive carrier problem in *Mr. Pizza, Inc. v. Schwartz*, Del.Supr., 489 A.2d 427 (1985). As in *Facciolo*, the claimant in *Schwartz* also suffered successive injuries to his back with an intervening change in insurers by the employer. After finding that the claimant's injury was the result of unusual exertion, the Court applied *Facciolo* and held that the second injury was an aggravation. This Court, however, also expressed unease with the bright line rule set forth in *Facciolo*, noting that “[t]he difficulty is that back conditions are often caused in part by a prior condition or injury, and in part by a new incident and consequently a primary cause is difficult to find.” *Id.* at 431–32.

In *Duvall v. Charles Connell Roofing*, Del.Supr., 564 A.2d 1132 (1989), this Court abandoned the unusual exertion rule. In its place the Court adopted the usual exertion rule, in which the claimant may recover, regardless of any preexisting weakness or disease, if it is shown that “the ordinary stress and strain of employment is a substantial cause of the injury.” *Id.* at 1136. *Duvall* did not purport to overrule *Facciolo* or *Schwartz* to the extent those decisions employed the unusual exertion concept in the recurrence/aggravation context. Given the reliance placed upon the unusual exertion

rule as a determinant of whether an injury is a recurrence or an aggravation, the *Facciolo* standard appears tenuous. As a result, the Superior Court has wrestled *645 with its application.²

The difficulty in successive accidental injury cases is distinguishing between recurrence and aggravation in the legal sense. As the record in this case suggests, from a medical standpoint, opining physicians are more concerned with symptomatology than causation, and may use the term interchangeably in diagnosis. In fixing liability, however, the Board, and a reviewing court, must focus equally on the causation factor since compensability for the new condition depends on its relationship to “a new work-connected accident.” *Facciolo*, 306 A.2d at 719.

The use of the word “aggravation” by this Court in *Facciolo* indicates that the injury must be worsened by the second event before the second carrier will be liable. In a literal sense “aggravation” means that a condition is “made worse, more serious, or more severe.” *Webster's Ninth New Collegiate Dictionary*, 64 (1990). The employee's physical condition after the second event may appear worse, or more serious, because of the appearance, or reappearance, of symptoms which, from a medical standpoint, suggests an aggravation. In order to fix carrier responsibility, however, the analysis must proceed to the causation stage to determine if the changed condition is attributable to a new industrial accident. In short, the question is not whether the employee's pain or other symptoms have returned but whether there has been a new injury or worsening of a previous injury attributable to an untoward event.

In ruling that Nally had suffered an aggravation attributable to a new incident, the Superior Court focused primarily on Nally's increased symptomatology and not on the causative effect of the second event. The court was apparently influenced, in part, by what it viewed as the lesser standard of causation announced in *Duvall*. In our view, the court extended the *Duvall* holding to an area not intended.

[2] We believe the focus of the inquiry in aggravation/recurrence disputes must be returned to the nature of the second event. *Duvall's* use of a “substantial causation” standard as the basis for rejection of the unusual exertion rule should be limited to claims where the very issue of compensability is at stake. *Cf.* *Reese v. Home Budget Center*, Del.Supr., 619 A.2d 907 (1992). The concept should

not be applied in successive carrier disputes where there is a need to fix an untoward event as the basis for allocating responsibility between carriers. In *Duvall* the issue was whether the injured employee would receive any compensation. In successive carrier disputes where compensability is conceded, as here, the determination is one of liability between carriers. That determination, posing different policy concerns, should not turn on whether unusual exertion is present but whether a genuine intervening event has occurred which brings out a new injury. Carrier liability should be fixed on primary responsibility for risks as they arise and, as a matter of policy to avoid delay and confusion, should continue as long as the consequences of that injury are present. *Pennsylvania Manufacturer's Assn. Ins. Co. v. Home Insurance Co.*, Del.Supr., 584 A.2d 1209 (1990).

In the same vein, the statement in *Facciolo* that the second carrier is liable if the second condition “is caused by a new work-connected accident or episode, whether or not due to accident or episode, whether or not due to unusual exertion,”

Facciolo, 306 A.2d at 719, should not be read expansively to eliminate the need to establish an untoward *646 event as the producing cause of the second condition. The need to establish a second accident or event, beyond the normal duties of employment, is a continuing requirement in order to shift liability from the first carrier who bears responsibility for the effect of the original injury. As Professor Larson notes:

This group also includes the kind of case in which a worker has suffered a back strain, followed by a period of work with continuing symptoms indicating that the original condition persists, and culminating in a second period of disability precipitated by some lift or exertion.

4 *Larson on Workmen's Compensation* § 95.23 p. 17–152.

[3] The rule we endorse for determining successive carrier responsibility in recurrence/aggravation disputes places responsibility on the carrier on the risk at the time of the initial injury when the claimant, with continuing symptoms and disability, sustains a further injury unaccompanied by any intervening or untoward event which could be deemed the proximate cause of the new condition. On

the other hand, where an employee with a previous compensable injury has sustained a subsequent industrial accident resulting in an aggravation of his physical condition, the second carrier must respond to the claim for additional compensation. *Pennsylvania Manufacturer's Assn. Ins. Co. v. Home Insurance Co.*, *supra*. The burden of proving the causative effect of the second event is upon the initial carrier seeking to shift responsibility for the consequences of the original injury. See *Aguiar v. Control Power Industries, Inc.*, R.I.Supr., 496 A.2d 147, 149 (1985); *Poole v. Statler Tissue Corp.*, Me.Supr., 400 A.2d 1067, 1069 (1979).

We recognize that there is an element of arbitrariness in a rule which emphasizes proof of a second producing accident, but in the complex area of successive carrier responsibility for continuing injury, in the absence of specific statutory allocation of responsibility, this Court must provide a standard of general application. *Facciolo*, 306 A.2d at 719. The resolution of successive carrier disputes rests as well on “the policy choices of the jurisdiction” as on “the medical characterization of the second episode as aggravation or recurrence.” 4 *Larson on Worker's Compensation* § 95.11 p. 17–116.

[4] Under the test here announced, it is clear that there is substantial evidence in the record before the Board to support the conclusion that Nally suffered a recurrence. Indeed, three of the medical experts who opined on that question stated that the 1989 episode did not worsen Nally's back injury. Although Dr. Case's opinion was to the contrary, the Board was entitled to accept the testimony of one medical expert over the views of another. *DiSabatino v. Wortman*, Del.Supr., 453 A.2d 102, 105 (1982).

There was also evidence before the Board that when Nally returned to his regular duties a week before the 1989 episode he was not symptom free from his 1988 injury and continued under medication. As the Board noted, in hindsight, Nally was probably released to full duty prematurely. Nally's description of the 1989 event supports the Board's conclusion that he was engaged in normal activity in rolling a keg and performed that chore no differently on that occasion than in the past. Undoubtedly, the pain experienced by Nally following the 1989 incident was greater than that which he felt immediately before the injury but that is not the critical factor. If the 1989 incident was not an untoward event which caused a new injury or aggravated the 1988 injury, his subsequent claims for benefits must be viewed as a recurrence, as the

Board determined. As the carrier on the risk at the time of the 1988 injury, Northbrook must respond to the 1989 claim for additional compensation.

III

In the Superior Court, Northbrook asserted, as an additional ground for appeal, that the Board abused its discretion in questioning Nally during the course of his cross-examination. This questioning of the claimant, it was argued, demonstrated the *647 Board's pre-determination of the case. In view of its holding that the Board's decision required reversal on substantial evidence grounds, the Superior Court declined to address this issue. Notwithstanding the Superior Court's failure to rule on the matter, we may dispose of it, in the interests of judicial economy, since the issue was "fairly presented to the trial court." Supreme Court Rule 8.  *Cannelongo v. Fidelity America Small Business Investment Co.*, Del.Supr., 540 A.2d 435, 440 n. 5 (1988).

[5] [6] [7] Administrative agencies operate less formally than courts of law. For example, the rules of evidence

do not strictly apply. *Pany of Delaware, Inc. v. Carroll*, Del.Super., 316 A.2d 562, 564 (1972). While it is desirable that the primary responsibility for the examination and cross-examination of witnesses be that of counsel, the Board may, in its discretion, "examine persons as witnesses ... and do all other things conformable to law which are necessary to enable it effectively to discharge the duties of office." 19 Del.C. § 2122(a). In the absence of an abuse of that process, a reviewing court will not fault the administrative agency. Upon review of the record, we find no basis for concluding that the Board engaged in improper questioning or that its questions suggested a pre-disposition of the matter before it. Accordingly, we find no merit in Northbrook's contention.

* * * * *

The decision of the Superior Court is REVERSED and the matter REMANDED with direction to reinstate the decision of the Board.

All Citations

630 A.2d 640

Footnotes

- 1 In  *Alloy Surfaces Co. v. Cicamore*, Del.Supr., 221 A.2d 480 (1966), this Court adopted the "last injurious exposure" rule, which "puts the whole burden of compensation payments upon the last insurer" in the case of a compensable occupational disease which developed over a lengthy period of time.  *Id.* at 486. The *Cicamore* rule was expressly applied in cases of successive accidental injury in  *Forbes Steel and Wire Co. v. Graham*, Del.Supr., 518 A.2d 86 (1986), although earlier implicitly recognized in  *Facciolo. Facciolo*, 306 A.2d at 719.
- 2 In the wake of this Court's decision in *Duvall*, the Superior Court has attempted to reconcile *Facciolo* and *Schwartz* with the usual exertion rule. In *DiMaio v. Bell's Supply Co.*, Del.Super., C.A. No. 89A-OC-7, Bifferato, J., 1990 WL 47360 (April 30, 1990) (ORDER), the court held that "[i]n reading *Duvall* in conjunction with *Facciolo*, all that is required is that [the intervening event] ... be a substantial cause of the second injury." *Id.* at 2. Similarly, in *Sea Watch International v. Lynch*, Del.Super., C.A. No. 89A-04-14, Steele, J. (July 20, 1992), the court held that "the question is whether there was substantial evidence before the Board that the ordinary stress and strain of claimant's employment ... was a 'substantial cause' of her ensuing disability and impairment—*i.e.*, was her condition 'brought about or aggravated by a new work-connected accident.'" *Id.* at 16-17.

1998 WL 437140

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of Delaware.

KENTUCKY FRIED CHICKEN,
Co-Employer-Below/Appellant,

v.

Stanley IMAN, Employee-Below/Appellee,

and

Lawrence Legates, Co-Employer-Below/Appellee,

No. 97A-03-010-JEB.

|

April 16, 1998.

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OPINION AND ORDER

BABIARZ, J.

*1 This is the Court's decision on appeal from a decision of the Industrial Accident Board (the "Board"). Appellant Kentucky Fried Chicken ("KFC") claims that a workplace injury sustained by claimant Stanley Iman ("claimant") in April 1993 constituted a "new injury," and as such, his employer at the time of that injury, Appellee Lawrence Legates Masonry ("Legates"), should be held liable for payment of any disability benefits arising out of that injury. Upon consideration of the parties' briefs and the record in this case, the Board's decision is AFFIRMED for the reasons set forth below.

I. FACTS AND PROCEDURAL POSTURE

Since the 1980s, claimant has sustained back injuries on four or more occasions. The first two occurred in the mid-1980s, and are not presently at issue. Claimant suffered his third back injury on April 14, 1991 while working for KFC. At that time, he slipped and fell on a wet floor, injuring his tailbone and left knee. Claimant's fourth injury occurred on April 23, 1993 while working for Legates. He was removing 150 pound concrete lintels from the back of a pick-up truck, and was in the process of lifting the fifth concrete lintel when he felt his lower back "pop out" and then become very painful.

On March 28, 1994, the Board conducted a hearing to determine whether the insurance carrier for KFC, Iman's employer at the time of the 1991 injury, versus the carrier for Legates, claimant's employer at the time of the 1993 injury, should be held responsible for claimant's condition following the 1993 injury. Bd. Op., Mar. 28, 1994 at 8. In order to determine that issue, the Board applied the standard set forth by the Delaware Supreme Court's in *Standard Distributing Co. v. Nally*, Del.Supr., 630 A.2d 640 (1993). *Id.* In *Nally*, the Court held that with a recurrence, which occurs when a claimant with continuing symptoms from an earlier injury "sustains a further injury unaccompanied by any intervening or untoward event which could be deemed the proximate cause of the new condition," the carrier at the time of the earlier injury will be held responsible for the claimant's current condition. *Nally*, 630 A.2d at 646. The Court distinguished the above situation from one in which an employee with a previous work-related injury has sustained a subsequent industrial accident resulting in aggravation of his condition, and in which case the carrier at the time of the second injury must respond to any claims for additional compensation. *Id.* The Board determined that the 1993 injury was a recurrence of the 1991 injury. Bd. Op., March 28, 1994 at 8-9. Accordingly, the Board held that KFC was liable for payment of claimant's disability benefits. *Id.*

KFC appealed the Board's decision claiming that the Board had misapplied the Supreme Court's decision in *Nally* because in reaching its conclusion, the Board had focused solely on claimant's symptomatology. Upon review of the Board's decision, this Court agreed with KFC's argument that the Board had misapplied the *Nally* standard. *See Kentucky Friend Chicken v. Stanley Iman and Lawrence Legates Masonry*, Del.Super., C.A. No. 94A-06-014, Babiarz, J. (July 11, 1995).¹

*2 This Court found that the Board erred as a matter of law by “basing its decision upon symptomatology without considering causation.” *Id.* at 9. The Court remanded the case to the Board with instructions for the Board to consider “whether claimant’s condition in 1993 was proximately caused by the April 1993 incident at Legates and, if so, whether that incident constituted an ‘intervening or untoward event.’” *Id.* at 9. The Court concluded that if both questions were answered affirmatively on remand, “Legates would be liable for payment of claimant’s benefits, regardless of whether claimant’s symptoms in 1993 were similar to those he experienced following the 1991 accident.” *Id.* at 10 (quoting *Nally*, 630 A.2d at 645).

Consequently, on April 10, 1996, the Board held a hearing on remand. At the hearing, claimant reiterated his position that the Board should have concluded that he had suffered a new injury as a result of the incident in 1993. Claimant indicated that prior to the 1993 injury, he had not been treated by a doctor for over a year and a half. Approximately six months after the April 1991 injury, he began to work for Mark Kimbel Masonry Company (“Kimbel”). In July or August 1992, claimant started working at Legates. His positions at Kimbel and Legates both required him to lift heavy items. Thus, claimant argued that the 1993 incident clearly resulted in a new injury because if he had recurring problems as a result of the 1991 injury, the problems would have become evident much sooner. Claimant further argued that he had suffered from a new injury because the pain he experienced in 1993, although similar to the pain he had experienced in 1991, was on a different side of his lower back than the former injury.

Likewise, at the hearing on remand, KFC reiterated its position that the April 1993 incident caused a new injury. It claimed that every medical expert who testified before the Board opined that the 1993 injury caused a recurrence of claimant’s pre-existing degenerative condition at L5-S1. In addition, it noted that the Board had originally concluded that the 1993 injury was a recurrence because “the claimant had an increase in the symptoms he had earlier, but there was no evidence of objective change of condition as a result of the incident at Legates.” Bd. Hr’g, March 28, 1994 at 8. However, KFC argued that in accordance with the standard set forth by the Supreme Court in *Nally* and the instructions of this Court, the Board should have considered whether “claimant’s condition in 1993 was proximately caused by the April 1993 incident at Legates, and, if so, whether that incident constituted an ‘intervening or untoward event.’”

Iman at 9. Under that standard, KFC reasoned, the Board should have found that the 1993 incident resulted in a “new injury” because claimant had been asymptomatic for over one and a half years prior to the 1993 incident.

At the second hearing before the Board, Legates contended that the 1993 injury was a recurrence. It stated that pursuant to the standard set forth in *Nally*, the first carrier not only needs to prove an untoward event, but also that the untoward event was the proximate cause of a claimant’s condition. Legates argued that the first carrier had not satisfied that standard because the injury was not an untoward or unusual one. Claimant previously testified that he had been performing his routine job duties at the time of the 1993 incident, and that his job included the lifting of 150 pound lintels. Legates concluded that because claimant’s injury was not attributable to an untoward event, liability could not shift to its carrier, regardless of whether there was a new injury or worsening of a previous injury.

*3 Finally, Legates stated that the Board had previously held that “claimant had an increase in the symptoms he had earlier.” Bd. Hr’g, Mar. 28, 1994 at 8. It asserted, however, that the Board has held that mere aggravation of a prior injury, without proof that the incident caused a change in the claimant’s condition, is inadequate to transfer liability to the second carrier. *Id.* Legates concluded that even if the Board determined that both prongs of the *Nally* test had been satisfied, liability could still not be transferred to its own insurer because the 1993 injury merely aggravated the earlier one.

In a decision dated March 6, 1997, the Board upon remand concluded that the 1993 injury was a recurrence. Bd. Op., Mar. 6, 1997 at 6. After acknowledging that it could have found that the 1993 incident was an “untoward event” or that the 1993 incident was sufficient to cause a change in claimant’s condition, the Board stated that it refused to do so because there was “insufficient objective evidence on the record of a change in the claimant’s condition.” *Id.* Rather, it determined that the evidence before it merely showed that “claimant had an exacerbation of his pre-existing condition as a result of the 1993 lifting incident.” *Id.* The Board noted, as it had in its prior decision, that “a mere exacerbation or increase in symptoms, even if the proximate result of an ‘untoward event,’ is not enough [to shift responsibility to the second carrier] absent a demonstrated worsening of the condition” under *Nally*. *Id.* Because it found no change in claimant’s condition as a result of the 1993 injury, the Board refused to

address the second prong of the *Nally* standard (i.e., whether the injury was attributable to an “untoward event”). *Id.*

KFC has appealed the March 6, 1997 decision of the Board, contending that the Board misapplied the standard set forth by the Supreme Court in *Nally* and restated by this Court on appeal. This Court previously directed the Board to consider both whether “claimant's condition in 1993 was proximately caused by the April 1993 incident at Legates and, if so, whether that incident constituted an ‘intervening or untoward event.’” *Iman* at 9. The Court concluded that “if, on remand, both of th[e] questions are answered affirmatively, Legates would be liable for payment of claimant's benefits, regardless of whether claimant's symptoms in 1993 were similar to those he experienced following the 1991 accident.” *Id.* at 10 (quoting *Nally*, 630 A.2d at 645) (emphasis added). In its brief, KFC argues that in reaching its decision upon remand, the Board did not follow the above standard.

Specifically, KFC contends that according to the Court's instructions on remand, once the Board determined that it “could have found the 1993 accident to be an ‘untoward event’” and that the incident “could have been sufficient to have caused a change in claimant's condition,” it was required to conclude that responsibility for the 1993 injury had shifted to Legates' carrier. Bd. Op., Mar. 6, 1997 at 6. Also, KFC argues that after recognizing that “something occurred on April 23, 1993,” the Board's determination that the April 1993 incident was an untoward event should have been inevitable. *Id.* Accordingly, KFC requests that the Court reverse the decision of the Board on remand.

*4 Conversely, in its brief, Legates raises several arguments in support of the Board's decision. First, Legates points out that the Board determined on remand that the 1993 incident merely caused a temporary exacerbation of his preexisting condition. It argues that the Board correctly acknowledged, however, that “a mere exacerbation or increase in symptoms, even if the proximate result of an ‘untoward event,’ is not enough [to transfer the responsibility for claimant's condition under *Nally*] absent a demonstrated worsening of the condition.” *Id.*

In addition, Legates asserts that this Court instructed the Board to determine both whether “claimant's condition in 1993 was proximately caused by the April 1993 incident at Legates and, if so, whether that incident constituted an ‘intervening or untoward event.’” *Iman* at 9 (emphasis added). The Court also stated that Legates would be liable

only “if, on remand, both of th[e] questions are answered affirmatively.” *Id.* (emphasis added). Thus, because the Board determined that there was no new injury or worsening of a previous injury, Legates maintains that the existence of an “untoward event” is irrelevant and that the Board acted in accordance with the Court's instructions in deciding not to address that issue.

II. STANDARD OF REVIEW

On appeal from the decision of the Board, the function of a reviewing court is to determine whether the Board's decision is supported by substantial evidence. 29 Del. C. § 10142(d); *General Motors Corp. v. Freeman*, Del.Supr., 164 A.2d 686, 688 (1960); *Johnson v. Chrysler Corp.*, Del.Supr., 213 A.2d 64, 66 (1965). “Substantial evidence” is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, Del. Supr., 636 A.2d 892, 899 (1994) (quoting *Olney v. Cooch*, Del.Supr., 425 A.2d 610, 614 (1981)). The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings. *Johnson*, 213 A.2d at 66. In reviewing alleged errors of law, however, this Court's review is plenary. *Brooks v. Johnson*, Del.Supr., 560 A.2d 1001, 1002 (1989) (citing *Nardo v. Nardo*, Del.Supr., 209 A.2d 905 (1965)).

III. DISCUSSION

This Court has recognized that the standard pronounced by the Delaware Supreme Court in *Nally* is applicable in the case *sub judice*. See *Iman* at 6. In *Nally*, the Supreme Court held that in recurrence/aggravation disputes in which successive carrier responsibility is at issue, the carrier at the time of the claimant's initial injury bears responsibility for the claimant's subsequent injury when the later injury is unaccompanied by an intervening or untoward event that is also the proximate cause of the new condition. *Nally*, 630 A.2d at 646. In such disputes, “the question is not whether the employee's pain or other symptoms have returned but whether there has been a new injury or worsening of a previous injury attributable to an untoward event.” *Id.* at 645.

*5 In its July 11, 1995 opinion, this Court found that *Nally* was applicable in the case *sub judice* and remanded the case

to the Board with instructions to apply the *Nally* standard. *Iman* at 9. The Court found that the Board had misapplied the *Nally* standard in its original decision by basing its decision solely upon symptomatology without considering causation. *Id.* Thus, the Court directed the Board to determine whether “claimant's condition in 1993 was proximately caused by the April 1993 incident at Legates and, if so, whether that incident constituted an ‘intervening or untoward event.’” *Id.* It concluded that Legates would be liable only “if, on remand, both of th[e] questions are answered affirmatively.” *Id.* at 10.

The Court finds that upon remand, the Board correctly applied the *Nally* standard for determining successive carrier responsibility in recurrence/aggravation disputes. The Board applied the standard in order to determine whether the carrier for KFC, as opposed to the carrier for Legates, should bear responsibility for claimant's condition following his 1993 injury. On remand, the Board opined that consideration of claimant's symptoms, although it could not be the Board's sole focus in determining whether claimant's injury was a recurrence, was still essential in determining whether there had been a change in claimant's condition, which is one prong of the *Nally* standard. Bd. Op., Mar. 6, 1997 at 4. At the original hearing, upon examining claimant's symptoms both before and after the 1993 injury, the Board concluded that the medical evidence before it was insufficient to show such a change. *Id.* at 5 (citing to Bd. Op., March 28, 1994 at 8). On appeal, the Board affirmed its original decision, stating that it agreed with Dr. Case's testimony that “there was no evidence of a new disk injury or any progression of abnormality following the 1993 incident.” *Id.*

Because the Board determined that the first prong of the *Nally* standard was not satisfied in the instant matter, the Court finds that the Board was correct in refusing to address the second prong of the *Nally* test. The Board concluded that there was no new injury or worsening of a previous injury, which constitute the first prong of the *Nally* standard. As with any two-pronged test, if the Board had determined that the first prong was satisfied, it would have been required to proceed to the second prong of the test. Thus, as previously noted by this Court, if the Board had found that there was evidence of a change in claimant's condition following the 1993 injury, it would have been required, under *Nally*, to address whether the change in claimant's condition was attributable to the 1993 incident. *See Iman* at 9.

As KFC has indicated in its brief, the Board recognized on remand that it “could have found” that the 1993 incident

constituted an untoward event and that “something” happened on April 23, 1993, or it could have assumed that the 1993 incident “could have been sufficient to have caused a change in the claimant's condition.” Bd. Op., Mar. 6, 1997 at 6. Although the Board could have made the above findings, it chose not to. Rather, after weighing the evidence before it, the Board opined that there was simply not enough objective evidence on the record of a change in claimant's condition. *Id.* It is the duty of the Board, and not the duty of this Court, to determine the weight to be given to the evidence presented. *Wohlsen Construction Co. v. Hodel*, Del.Super., C.A. No. 94A-04-017, 1994 WL 762657, Del Pesco, J. (Dec. 15, 1994) at * 2 (quoting *Mooney v. Benson Management Co.*, Del.Super., 451 A.2d 839, 841 (1982)).

*6 The Court further finds that there is substantial evidence to support the Board's decision. There were three medical experts who testified before the Board at the March 28, 1994 hearing. Dr. Mattern testified that he believed claimant's condition to be related to the 1993 injury and not to the 1991 injury at KFC. Dr. Varipapa opined that claimant's condition following the 1993 incident was not related to the 1991 injury. Rather, he believed that it was related to a drag racing accident that had occurred in 1986. Dr. Case testified, and Drs. Mattern and Varipapa also agreed, that claimant's disability in 1993 was the result of an aggravation of claimant's pre-existing degenerative disk condition at L5-S1. Dr. Case testified that the aggravation had been caused by the 1993 lifting incident. Dr. Case further opined that claimant's degenerative disk condition pre-existed his April 1991 incident, which had similarly caused an aggravation of claimant's degenerative disk condition.

The Board is entitled to accept the testimony of one medical expert over the views of another when such testimony is conflicting. *DiSabatino v. Wortman*, Del.Supr., 453 A.2d 102, 105-6 (1982). Thus, the Board was entitled to find Dr. Case's opinion to be more persuasive than the opinions of Drs. Mattern or Varipapa. Bd. Op., Mar. 6, 1997 at 6. Moreover, the opinion of any expert witness constitutes substantial evidence for appeal purposes. *DiSabatino*, 453 A.2d at 105-6; *Wohlsen* at *2. The Court is therefore satisfied with the Board's reliance on Dr. Case's opinion.

Furthermore, the Board determined on remand that at best, the evidence before it merely indicated that claimant had an exacerbation of his pre-existing degenerative condition at L5-S1 as a result of the 1993 incident. The Board correctly

held that under *Nally*, a mere exacerbation is not sufficient to transfer responsibility for claimant's condition from the first carrier to the second one absent any evidence of a worsening of claimant's condition. See *Nally*, 630 A.2d at 646. Rather, in order to shift responsibility for claimant's condition to the second carrier, the first carrier must establish "a second accident or event, beyond the normal duties of employment." *Id.* Based on the evidence before it, the Board correctly concluded that the first carrier had failed to satisfy its burden of proof with regard to the above requirement. Bd. Op., Mar. 6, 1997 at 6.

IV. CONCLUSION

For the foregoing reasons, the Board's decision is hereby AFFIRMED.

IT IS SO ORDERED.

All Citations

Not Reported in A.2d, 1998 WL 437140

Footnotes

- 1 The facts underlying this appeal and the evidence presented to the Board at the first hearing are set forth in detail therein.

2001 WL 1198945

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of Delaware.

GIANT FOODS, Employer-Below/Appellant,

v.

Gary FOWLER, and Raytheon

Constructors, Claimant-Below/Appellee.

No. Civ.A. 00A-07-014FSS.

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Submitted June 15, 2001.

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Decided Sept. 28, 2001.

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OPINION AND ORDER

SILVERMAN, J.

Upon Employer's Appeal from the
Industrial Accident Board-*AFFIRMED*

*1 Former employer, Giant Foods appeals the Industrial Accident Board's July 24, 2000 decision granting Gary Fowler's Petition to Determine Additional Compensation Due. Preliminarily, the Court must determine the proper parties to this appeal. Fowler filed two, separate petitions, which the Board heard at the same hearing. The Board denied his petition against Raytheon and granted his petition against Giant. Raytheon did not appeal the decision in its favor. Fowler did not appeal either decision. In its appeal, Giant also disputes the Board's substantive finding that Fowler's

second injury was a "recurrence" of a previous injury, already compensated by Giant.

I.

On December 4, 1998, Gary Fowler was injured while working as a carpenter for Giant. He fell and hurt his left shoulder and neck. Fowler won compensation from Giant for the injury. On September 21, 1999, while working for Raytheon, Fowler was hurt again. As he was breaking down a scaffold, Fowler "grabbed a piece of lumber weighing 80-100 pounds" and "felt something pull down his neck and into his right shoulder."

On September 24, 1999, Fowler filed a Petition to Determine Additional Compensation Due against Giant. On February 2, 2000, he re-filed that petition. He also filed a separate Petition to Determine Compensation Due against Raytheon, Inc., and requested that both matters be heard at one hearing. The petitions, however, were never consolidated. On July 13, 2000, the Board held a single hearing on the two petitions, Nos. 1137560 (Giant) and 1152495 (Raytheon).

At the hearing, Dr. Rowe testified, by deposition, for Fowler. He stated that Fowler "had left rotator cuff tendonitis and a possible rotator cuff tear." Dr. Rowe stated that Fowler's injury resulted from the 1998 and 1999 incidents, and that Fowler required surgery on his left shoulder. Dr. Rowe, however, could not specifically attribute the tear to one or the other work injuries.

Dr. David Sopa testified, by deposition, for Giant. He examined Fowler and reviewed Fowler's records. He testified that Fowler "has an exacerbated chronic neck strain or a herniated disk in the neck." He did not diagnose any shoulder problem. Meanwhile, Dr. Mohammad Kamali testified for Raytheon. He opined that Fowler had a "right shoulder sprain, neck sprain, and a left shoulder sprain with impingement." He further testified that Fowler's rotator cuff tear was "of uncertain origin" and could be "from ordinary wear and tear." Dr. Kamali did not believe the tear caused Fowler's current symptoms.

The Board concluded initially that Fowler's "shoulder problems are causally related to a work injury and are compensable." It then decided that Fowler's shoulder problems were "properly classified as a recurrence of a prior injury," since the 1999 incident occurred "in the normal

duty of his employment” and “cannot be considered a ‘genuine intervening event.’” The Board found that Giant was responsible for treatment.

*2 On July 24, 2000, the Board granted Fowler's petition against Giant and denied his petition against Raytheon. The Board also granted Fowler's attorney's fees. On July 28, 2000, Giant filed a notice of appeal with this Court. To date, neither Fowler nor has Raytheon challenged the Board's decisions.

II.

As mentioned, Giant claims that Raytheon should be a party to this appeal. Giant asserts that the two petitions were “handled as one consolidated matter by the Board.” And, Giant claims that its failure to include Raytheon in the Notice of Appeal's caption was “purely typographical error.”

Raytheon maintains that it is not a proper party because Giant limited its appeal to No. 1137560 and did not include No. 1152495 in the caption. Thus, Raytheon argues that Giant's appeal does not concern No. 1152495. Raytheon disputes Giant's claim that the caption is “purely typographical error.” Rather, Raytheon asserts, it is a jurisdictional defect.

As also mentioned, Giant further claims that the Board incorrectly determined that Fowler's “current left shoulder problems are a recurrence” of his 1998 injury. Rather, Giant argues that Fowler's 1999 injury was an aggravation of the 1998 injury. Giant maintains that the 1999 injury could not be a “recurrence” since the 1999 injury started on the right and radiated to the left, (the 1998 injury started on the left and radiated to the right), the 1999 injury's pain was “a lot more severe,” and the treatment for the 1999 injury was related to the left shoulder.

III.

The Court's authority on appeal is limited by 29 *Del. C.* §§ 10142 and 10161(a)(8). It does not reexamine evidence, much less make its own factual findings. The Board's decision stands so long as there are no legal errors and substantial evidence supports its factual findings.¹ Substantial evidence, to a reasonable mind, is adequate to support a conclusion.² A medical expert's opinion “constitutes substantial evidence to support the Board's finding.”³ When the Board relies on

an expert's opinion, which is backed by substantive evidence, the Court will not disturb the Board's decision.

IV.

a. Raytheon

The Board found Giant responsible for treatment and granted Fowler's petition seeking compensation from Giant. It denied Fowler's petition seeking compensation from Raytheon. As mentioned, Giant appeals the Board's ruling in No. 1137650. In its notice of appeal, Giant did not reference No. 1152495. It did not notice Raytheon's counsel, nor include Raytheon on the praecipe.

In Giant's subsequent motion to Amend the Case Caption, it states that the two petitions were filed in the alternative, and that because Petitions No. 1137560 and No. 1152495 were both disposed of at a single hearing, they were “handled as one consolidated matter by the Board.” Giant further states that because the Board identified both defendants in the same caption in its decisions, the Board “treat[ed] both petitions as being consolidated as one matter before the Board.” Finally, Giant asserts that Raytheon was “omitted from the Notice of Appeal ... [as] ... purely typographical error.”

*3 Despite Giant's assertions, the two petitions remain separate matters. None of the parties requested the petitions be consolidated. Therefore, the proper parties to Giant's appeal are only Giant and Fowler. Raytheon won and Fowler lost. Neither has chosen to appeal the Board's ruling on Fowler's petition against Raytheon.

Giant claims that the only reason Raytheon is not in this appeal is because Giant made a typographical error in the caption. As discussed above, however, this is not simply a matter of how the appeal was captioned. If Giant had attempted to drag Raytheon into the appeal by adding Raytheon to the caption, presumably Raytheon would have moved for its dismissal. The Court would conclude as it does here, that Raytheon, and most importantly, Fowler, agree with the Board's decision that Raytheon was not to blame. Besides, considering the Court's substantive decision discussed below, Giant's attempt to bring Raytheon into the appeal is moot.

b. The Merits

As mentioned, the Board found that Fowler had a compensable work injury. Next, the Board determined that Fowler's 1999 injury was a "recurrence" of the 1998 injury. This Court must determine whether the Board's ruling on Fowler's petition against Giant, No. 1137560, is correct.

The standard for determining whether a second injury is an "aggravation," for which the second employer pays, or a "recurrence," for which the original employer remains liable, is set out by the Delaware Supreme Court in *Standard Distrib. Co. v. Nally*.⁴ The Supreme Court held that the question turns on a question of fact, "whether there has been a new injury or worsening of a previous injury attributable to an untoward event."⁵ As a matter of law, an "untoward event" is "a genuine intervening event ... which brings out a new injury."⁶ Shifting responsibility from one employer to another requires "a second accident or event, beyond the normal duties of employment."⁷

As presented above, Dr. Rowe testified that if the original injury "quieted down ... but was still somewhat inflamed, it's going to be more prone to injury with the second injury." He agreed that Fowler's condition "was created by the first incident." Meanwhile, the Board concluded that, "Dr. Sopa's suggestion that [Fowler had] a herniated disk" was disproven by an MRI. Dr. Kamali testified that Fowler's shoulder problems, in his opinion, were biologically based. And, he did not think that the 1999 incident was responsible for Fowler's present left shoulder condition. In its decision, the Board stated that it "accepted Dr. Rowe's testimony that the current left shoulder problems are the result of a combination of the two incidents."

As mentioned, Giant contends that the 1999 injury is wholly new and separate from the 1998 injury, reasoning that the 1999 accident involved much more severe pain, that it began on "the right and radiated to the left," and that "his left shoulder was worse following his 1999 incident." Giant further asserts that "there was no suggestion that [Fowler] sustained a rotator cuff tear to his left shoulder as a result of the 1998 accident, until after the 1999 accident." Finally, Giant claims that the 1999 injury was an "aggravation" rather than a "recurrence," since "[i]t was only after his 1999 accident, with a new employer, performing new job duties" that Fowler's left shoulder condition appeared.

*4 The Board disagreed with Giant. Based on medical expert testimony, Fowler's testimony and a safety supervisor's testimony, the Board determined that "the [1999] incident was not a traumatic accident or event." The Board stated that the incident was part of the "normal duty of his employment" and not an "untoward event." The Board concluded that Fowler's "current left shoulder problems are properly classified as a recurrence of a prior injury" and that Giant was responsible for treatment. The Board's finding may be debatable, but it is supported by substantial evidence. Based on the record, the Court sees no reason that justifies disturbing the Board's decision.

V.

For the foregoing reasons, the Industrial Accident Board's decision is AFFIRMED.

IT IS SO ORDERED.

All Citations

Not Reported in A.2d, 2001 WL 1198945

Footnotes

¹ *General Motors Corp. v. Jarrell*, Del.Super., 493 A.2d 978 (1985).

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

³ *Lohr v. ACME Mkts.*, Del.Super., C.A. No. 98A-05-020, Cooch, J. (Feb. 24, 1999) Order at *2 (citing *DiSabatino v. Wortman*, Del.Super., 453 A.2d 102, 106 (1982)), *aff'd*, *?* Del.Super., 734 A.2d 641 (1999).

⁴ *?* Del.Super., 630 A.2d 640 (1993).

5  Id. at 645.

6 Id.

7 Id. at 646.

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2009 WL 1141642

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of Delaware,
Kent County.

BAYHEALTH MEDICAL
CENTER, Employer/Appellant,

v.

Walter COVERDALE, Employee/Appellee,

v.

Modern Maturity Center, Employer/Appellee.

C.A. No. o8A-o8-003WLW.

|

Submitted: Feb. 18, 2009.

|

Decided: April 20, 2009.

Upon Employer's Appeal of a Decision of the Industrial
Accident Board and Employee's Cross-Appeal. *Reversed.*

Attorneys and Law Firms

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Appellee.

ORDER

WITHAM, R.J.

FACTS

*1 Walter Coverdale, Employee-below (“Claimant”) sustained an acknowledged and compensable injury to his low back on November 9, 2000, while lifting boxes in the course and scope of his employment for Employer-below/Appellant

Bayhealth Medical Center (“Bayhealth”) (“the November 2000 injury”). On July 28, 2005, Claimant sustained a second injury to his low back, this time while employed by Employer-below/Appellee Modern Maturity Center (“the July 2005 injury”).

After the November 2000 injury, Claimant's treatment included epidural injections, physical therapy and medication. Claimant's treating physician, Dr. Ganesh Balu (“Dr.Balu”) referred Claimant to Dr. Ali Kalamachi (“Dr.Kalamachi”), who discussed with Claimant the option of having surgery, which at the time had a fifty percent chance of success. Claimant, however, was not interested in having the surgery. Claimant testified before the Industrial Accident Board (“IAB” or “Board”) that by July 2005, his chronic back pain had been slowly worsening, and that he was starting to consider having the surgery.

On July 28, 2005, Claimant slipped on a wet floor while working for Modern Maturity Center, and his back “popped.” Claimant testified that while the pain remains in the same location, it is more severe, and the pain running down his leg is more frequent. After this second injury, Claimant's treating physician referred him to Dr. Richard DuShuttle (“Dr.DuShuttle”), who discussed the same surgery with Claimant, but explained that now there would be a seventy percent chance of success. Claimant testified that due to his increased pain and the increased odds of the surgery's success, he now wants the surgery.

Dr. DuShuttle opined that Claimant's first injury is predominately responsible for Claimant's current condition, adding that the second injury exacerbated the first injury. He explained that although Claimant's condition worsened since the second injury, Claimant's current condition remains relatively the same as it was since the first injury.

Dr. Jerry Case (“Dr.Case”) testified on behalf of Modern Maturity Center. After examining Claimant and reviewing his medical records, Dr. Case opined that Claimant's current condition is related to the November 2000 injury, and that there is no evidence that Claimant's condition worsened as a result of the July 2005 injury.

Dr. Donald Saltzman (“Dr.Saltzman”) testified on behalf of Bayhealth. Dr. Saltzman opined that Claimant's current condition is causally related to the second injury and not to the first injury. He testified that a medical note categorized the second injury as an exacerbation of the first injury,

and noted that Claimant's treatment was increased after the second injury. Furthermore, Dr. Saltzman examined Claimant before and after the July 2005 injury, and noticed worsening symptoms and reduced range of motion.

On December 21, 2007, the Board held a hearing on Claimant's petition for additional compensation, to include payment for the back surgery, and issued its decision on June 11, 2008. The Board found that Claimant's current condition is a recurrence of the November 2000 injury, and not an aggravation of that injury resulting from the July 2005 slip and fall. Bayhealth filed its opening brief in opposition of the Board's decision on October 30, 2008. Claimant filed an answering brief and cross-appeal on December 1, 2008. Modern Maturity Center filed its answering brief in support of the Board's decision on December 22, 2008.

STANDARD OF REVIEW

*2 The review of an Industrial Accident Board's decision is limited to an examination of the record for errors of law and a determination of whether substantial evidence exists to support the Board's finding of fact and conclusions of law.¹ Substantial evidence equates to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."² This Court will not weigh the evidence, determine questions of credibility, or make its own factual findings.³ Errors of law are reviewed *de novo*. Absent error of law, the standard of review for a Board's decision is abuse of discretion.⁴ The Board has abused its discretion only when its decision has "exceeded the bounds of reason in view of the circumstances."⁵

DISCUSSION

The issues before the Board were whether Claimant's present back condition results from a recurrence of the November 2000 injury, or an aggravation of the injury caused by an untoward event which occurred on July 28, 2005, and whether the contemplated surgery is reasonable, necessary, and causally related to either work injury. In order to answer the first question, the Board relied on  *Standard Distributing Co. v. Nally*,⁶ and found that the second injury to Claimant's back was a recurrence, and not an aggravation, of the first injury.⁷

When the Board is faced with a recurrence/aggravation dispute where the parties have conceded that one of them is liable for the claimant's injuries, the Board must make two determinations before shifting liability to the new employer: (1) whether there was an intervening or untoward event giving rise to the claim; and (2) if there was an untoward event, whether it caused an aggravation of the claimant's physical condition.⁸

The standard for determining whether a second injury is an "aggravation," for which the second employer pays, or a "recurrence," for which the original employer remains liable, is set out by the Delaware Supreme Court in *Standard Distrib. Co. v. Nally*. The Supreme Court held that the question turns on a question of fact, whether there has been a new injury or worsening of a previous injury attributable to an untoward event. As a matter of law, an untoward event is a genuine intervening event which brings out a new injury. Shifting responsibility from one employer to another requires a second accident or event, beyond the normal duties of employment.⁹

The Board's inquiry must focus on the nature of the second event, to determine whether the event went beyond the normal duties of employment¹⁰ and resulted in an aggravation of the claimant's injuries.¹¹ The focus should not be on symptomatology, but on the causative effect of the second event. "Aggravation" of an injury means that the condition has been "made worse, more serious, or more severe."¹² However, the symptomatic worsening of claimant's physical condition does not automatically equal aggravation; the Board must find that the worsening of the previous injury is attributable to an untoward event.¹³

*3 In the case *sub judice*, the Board erred as a matter of law when it based its decision on symptomatology without properly considering causation. The Board found, as follows:

The Board finds that Claimant's condition is the result of the first injury; the second injury was merely a recurrence of the first injury.... Although Claimant's symptoms have worsened after the second injury, ... Claimant's overall

condition has remained relatively the same since the first injury. [S]urgery was contemplated prior to the second injury and that is the same surgery being contemplated currently. Therefore, it is not the second injury that caused Claimant's current condition and need for surgery but rather the first injury. The Board finds that the second injury constitutes a recurrence as opposed to an untoward event and therefore, Bayhealth is responsible for Claimant's workers' compensation benefits.¹⁴

The Board acknowledged that Claimant suffered a worsening of symptoms after the second injury. However, the Board focused on Claimant's prior eligibility for surgery in its determination that the second injury was not an untoward event. The Court finds that this focus on surgical eligibility

was legal error. Instead, the Board should have focused on the facts surrounding the second event to determine whether a slip and fall on a wet floor at work is beyond the normal duties of employment. In examining Delaware case law on this subject, the Court finds that a traumatic accident like a slip and fall is, in fact, an untoward event. Therefore, because Claimant experienced a worsening of symptoms after the slip and fall, the Court reverses the decision of the Board. Liability, therefore, shifts to Modern Maturity Center for Claimant's additional compensation, which includes the proposed surgery.

CONCLUSION

For the foregoing reasons, the decision of the Industrial Accident Board is REVERSED. IT IS SO ORDERED.

All Citations

Not Reported in A.2d, 2009 WL 1141642

Footnotes

- 1  *Histed v. E.I. Dupont de Nemours & Co.*, 621 A.2d 340, 342 (Del.1993).
- 2 *Olney v. Cooch*, 425 A.2d 610, 614 (Del.1981) (quoting  *Consolo v. Federal Mar. Comm'n*, 383 U.S. 607, 620 (1966)).
- 3 *Collins v. Giant Food, Inc.*, 1999 WL 1442024, at *3 (Del.Super.1999) (quoting  *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del.1965)).
- 4  *Digiacommo v. Bd. of Pub. Educ.*, 507 A.2d 542, 546 (Del.1986).
- 5 *Willis v. Plastic Materials*, 2003 WL 164292, at *3 (Del.Super.2003).
- 6  630 A.2d 640 (Del.1993).
- 7 The Court will not address the Board's finding that the contemplated surgery is reasonable and necessary.
- 8 *Mountaire Farms, Inc. v. Pitts*, 2000 WL 710094, at *5 (Del.Super. May 1, 2000).
- 9 *Giant Foods v. Fowler*, 2001 WL 1198945, at *3 (Del.Super.Sep.28, 2001) (internal citations omitted).
- 10 A traumatic accident or event is considered outside the normal duties of employment. *Turulski Custom Woodworking v. Sun Dog Cabinetry*, 2004 WL 1172884, at *9 (Del.Super. May 11, 2004); *Giant Foods*, 2001 WL 1198945, at *4; *Mountaire Farms*, 2000 WL 710094, at *5 (finding that a slip and fall at work is not a normal work duty and is instead an untoward event).
- 11  *Nally*, 630 A.2d at 645.
- 12 *Mountaire Farms*, 2000 WL 710094, at *5 (quoting *Webster's Ninth New Collegiate Dictionary*, 64 (1990)).
- 13  *Nally*, 630 A.2d at 645.

14 IAB decision at 8, 9.

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MARQUAN TAYLOR, Employee,
v.
GREGGO & FERRARA, INC., Employer.
Hearing No. 1520266
Before The Industrial Accident Board Of The State Of Delaware
October 31, 2022

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on September 28, 2022, in a Hearing Room of the Board, in Wilmington, Delaware.

Donald E. Marston, Esquire, Attorney for the Employee

Gregory P. Skolnik, Esquire, Attorney for Employer

PRESENT: MARK MUROWANY, ROBERT MITCHELL

DECISION ON PETITION TO DETERMINE COMPENSATION DUE

Susan D. Mack, Workers' Compensation Hearing Officer

NATURE AND STAGE OF THE PROCEEDINGS

On March 11, 2022, Marquan Taylor ("Claimant") filed a Petition to Determine Compensation Due against Greggo & Ferrara, Inc. ("Employer"). The petition alleges that Claimant suffered compensable injury to his neck, concussion, right arm, right leg, and back as a result of a work-related incident on November 24, 2021. Claimant seeks acknowledgement of the accident and injury, payment of related medical expenses, and compensation for ongoing total disability from the date of accident. The Employer disputes that Claimant sustained a work-related injury on November 24, 2021 and alleges that any injuries are related to an earlier workers' compensation accident on June 24, 2013 involving the same employer but a different insurance carrier.

A hearing was held on Claimant's petition on September 28, 2022. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

The joint stipulation of facts sets forth the following: On March 11, 2022, Claimant Marquan Taylor filed a Petition to Determine Compensation Due seeking acknowledgement of a November 24, 2021 work accident and injuries to the neck, concussion, right arm, right leg, and back. Claimant also

seeks ongoing total disability from the date of the accident and payment of all reasonable, necessary, and causally related medical bills and expenses. The issues for the Board to decide are (a) whether Claimant was involved in a work accident as alleged and sustained compensable injuries to the various body parts alleged; (b) whether Claimant is entitled to total disability benefits thereafter; and (c) whether Claimant's medical treatment has been reasonable, necessary, and casually related to the alleged accident. Claimant also was involved in a June 24, 2013 work accident involving the same employer but a different insurance carrier, with acknowledged cervical and lumbar strain injuries. The file was resolved by global commutation approved by Board Order dated August 14, 2015. The Employer therefore contends that *Nally* is applicable to this case.

James Zaslavsky, P.O., an orthopedic spine surgeon, testified by deposition for Claimant Marquan Taylor. (Claimant's Exhibit 1) Dr. Zaslavsky began treating Claimant on March 15, 2022 and reviewed numerous medical records related to the case. Dr. Zaslavsky is aware that Claimant had had multiple accidents and injuries over the years. Records show Claimant complained of neck and back pain after a motor vehicle accident on September 11, 2009. He was diagnosed with a neck sprain, a back sprain, and a rib injury at the ER. Claimant followed up with Delaware Pain Management and MRI and was prescribed a cervical MRI. Ultimately he was released to return to work and come back for followup as necessary. Claimant was out of work after the accident from September 16, 2009 to November 11, 2009. On June 24, 2013, Claimant was involved in another MVA. He treated with Dr. Cary. Records document a history of Claimant's dump truck being rear-ended by a car. He was diagnosed with strains and sprains of the cervical, thoracic, and lumbar spines. Claimant attended about twenty followup visits at Dr. Cary's office and was discharged on April 10, 2014 to a home exercise program. Dr. Cary kept Claimant on total disability from June 27, 2013 to September 12, 2013. Claimant's next MVA occurred on October 19, 2014. Claimant saw Dr. Krasner with complaints in his neck and right shoulder. He was diagnosed with cervicgia (neck pain) and right shoulder pain. The doctor prescribed non-steroidal anti-inflammatory medication and muscle relaxers. He anticipated a short recovery period. Claimant next saw Dr. Krasner on July 16, 2015 for a general medical examination. On November 10, 2015, Claimant was involved in another MVA. A record from Dr. Conrad King dated January 21, 2016 documented that Claimant was the restrained driver of a minivan when another car made an improper lane change and collided with him. Claimant sustained flexion/extension-type injuries to his neck and back after being jostled about in the accident. Dr. King provided a diagnosis of strain of muscle fascia or tendon in the cervical, thoracic, and lumbar areas. Claimant followed up with Dr. Cary through December 5, 2016, when

Claimant was discharged from treatment. Medications recommended were Flexeril and medical marijuana. Dr. Zaslavsky has not seen any medical records related to another possible MVA on September 20, 2021 in New Jersey. The records Dr. Zaslavsky had reviewed that predated the November 24, 2021 accident reflected diagnoses with strains and sprains of Claimant's cervical, thoracic, and lumbar spines after the previous accidents. Claimant's treatment consisted of nonsurgical approaches such as chiropractic, therapy, and medication. No injections had been performed and Claimant had always been released to go back to work after any period of total disability. As of November 24, 2021, Claimant was not undergoing any active treatment for any injuries from the previous accidents.

Dr. Zaslavsky was then asked to review records related to the alleged work accident on November 24, 2021. The ER record indicated Claimant presented four days after a motor vehicle collision at work. Claimant was driving a dump truck and another construction vehicle rear-ended the truck. Claimant was wearing a seat belt. The accident caused whiplash-type motion of his body. He did not suffer immediate pain or injuries and was able to walk immediately afterwards. The next morning, Claimant awoke with symptoms that gradually worsened over time. At the ER, Claimant reported neck pain in the middle and down his shoulder blades and intermittent burning into his left forearm. He denied motor weakness or shooting pain in the upper extremities. Claimant also described low back pain and thoracic pain left of the midline that was constant and achy. He denied shooting pain into his legs. Claimant had been taking Advil without any significant relief. His wife convinced him to seek medical care. The diagnoses from the ER were back pain, paresthesia of left arm, neck pain, headache, motor vehicle collision. He was discharged with a note to remain out of work. The note indicated he could return to full physical activity as of December 6, 2021. Dr. Zaslavsky testified that it is typical for the ER to place a patient on disability for a week to give them time to seek outpatient treatment.

Claimant first presented to Dr. Cary after the accident on December 7, 2021. Claimant reported a MVA in which the dump truck he was driving was hit by another vehicle on the passenger side. The back of the vehicle fishtailed and he was reportedly jostled, sustaining multiple injuries. Claimant indicated he fought through the pain over the next several days but went to the ER at Christiana Care on November 27, 2021. He thereafter saw his primary care physician, who provided him with pain medication. Claimant complained to Dr. Cary of neck pain, mid-back pain, and low back pain. His pain level was severe at ten out of ten and was aching in quality. Claimant reported pain at rest and had difficulty sleeping, lifting, bending, and with prolonged sitting and standing. Dr. Cary diagnosed Claimant with cervical spine strain, thoracic spine strain, and lumbar spine strain. He

recommended chiropractic care with Dr. Kevin Murray and placed Claimant on total disability. A chiropractor in Dr. Cary's office provided an initial evaluation on December 15, 2021 and made the same diagnoses. Claimant returned to see Dr. Cary on January 4, 2022. He reported a pain level of nine out of ten at the time, and he indicated the pain sometimes is more and sometimes less. Medication helped him to sleep. On physical examination, Dr. Cary noted full range of motion of the cervical and thoracic spine, restricted range of motion in the lumbar spine, and tightness over the bilateral trapezial and thoracic paraspinal muscles. The diagnoses remained cervical, thoracic, and lumbar spine strains. Dr. Cary recommended MRIs of the cervical, thoracic, and lumbar spines. He kept Claimant on total disability from work.

Claimant received chiropractic care in Dr. Cary's office and then saw Dr. Cary again on February 1, 2022, after he had undergone the MRIs. Claimant reported pain in the neck and back area, pain radiating from the low back into the right thigh, and numbness going down the right leg. This had happened more than once. Claimant rated his pain level at nine. Claimant noted that a few times after therapy he experienced increased pain. Dr. Cary reviewed the results of the MRIs and kept Claimant on total disability. He also recommended an EMG and continued rehabilitation treatment and chiropractic care. Claimant returned to Dr. Cary on March 1, 2022. He reported feeling a little better but was still having difficulty with prolonged sitting and standing. His pain level was a ten out often. An EMG of the lower extremities showed a right L5 and SI radiculopathy. Dr. Cary kept Claimant on total disability status and indicated Claimant would likely be referred for work conditioning. Two handwritten notes from Dr. Cary reflected some therapy he received that ended on March 10, 2022.

Claimant first came to see Dr. Zaslavsky on March 15, 2022. Claimant completed intake forms for Dr. Zaslavsky. On the cervical spine intake form, he referenced an accident date of November 24, 2021 and checked off that it was a work accident. He also checked off neck pain and bilateral, which means down both arms. On the lumbar spine intake form, Claimant checked off back pain and bilateral, with the addition of "depends." Dr. Zaslavsky interpreted this to mean sometimes the pain was bilateral and sometimes it was to the right side. Dr. Zaslavsky reviewed his office note from March 15, 2022. Claimant provided a history of the motor vehicle accident at work on November 24, 2021. Claimant stated that he was wearing a seat belt and was driving a dump truck when he was rear-ended by a front loader in an off-road incident. Claimant told Dr. Zaslavsky he had both neck and back problems since the accident. His neck pain radiates into both shoulders and down the back of both arms to his fingers and his hands. He reported weakness in his arms and trouble opening water bottles and jars. He could

not sleep through the night and had difficulty lifting a case of water. Claimant also reported pain across his back that radiating into his lower lumbar spine and right buttock and right posterior thigh. In addition, he had numbness and tingling into his right foot and weakness in his right leg. Just about all activities reportedly aggravated his symptoms. Sitting was reportedly the worst activity for him, in that sitting produced significantly worsened pain into his right leg. Claimant was not working at the time of the examination. Claimant's pain level was a ten out often. Sometimes changing positions, lying down, standing, heat, and rest would improve his symptoms. Symptoms failed to improve with medications. Claimant was unable to play games with his young children or exercise.

Dr. Zaslavsky conducted a physical examination. He found trigger point nodules in the bilateral trapezial and parascapular muscle regions, a positive Hoffman's sign bilaterally indicating spinal cord irritation, weakness in the right grip and wrist compared to the left, and decreased cervical range of motion. Sensation was good distally except for decreased light touch in the ulnar aspect of both hands. Claimant sat with a left truncal shift to unload his right painful buttock. He walked with an antalgic gait pattern. A right straight leg raise was positive. The right dorsiflexors and plantar flexors had weakness. Dr. Zaslavsky testified that muscle spasms and trigger point nodules are objective findings in areas where the patient was guarding due to an underlying injury in the spine. The weakness in Claimant's right grip strength and the positive Hoffman's sign indicated Claimant had some spinal cord irritation. This can be from a herniated disc or an annular tear. The positive straight leg raise was a nerve tension sign of irritation or pressure on a nerve in the lumbar spine. Dr. Zaslavsky also obtained X-rays of the cervical spine on March 15, 2022. The X-rays showed decreased disc space height at C4-5/C5-6 and reversal of the normal cervical lordosis, most likely secondary to severe spasm. Based on the pain complaints and subjective and objective exam findings, Dr. Zaslavsky assessed Claimant with cervical and lumbar radiculopathy. Dr. Zaslavsky also reviewed the results of the MRIs with Claimant. The lumbar MRI showed an interspinous ligament tear and inflammation in the facet joints at L4-5. The cervical MRI showed disc bulges. Dr. Zaslavsky recommended physical therapy that was more active than the chiropractic treatment and possible follow up with an injection if Claimant did not improve. Dr. Zaslavsky also issued a disability note keeping Claimant out of work. He indicated the work-related diagnoses were cervical radiculopathy and lumbar radiculopathy.

Dr. Zaslavsky next saw Claimant on May 3, 2022. Claimant had been undergoing physical therapy and medical massage. Claimant received some good temporary relief from the therapy and massage combinations. His neck pain level continued to be nine out often. The low back pain was more

occasional with a pain level of six to seven out of ten. Claimant continued to report radicular symptoms into both arms and his right flank and buttock. Dr. Zaslavsky performed a physical examination. He noted a positive Spurling's sign bilaterally, good strength in the bilateral upper extremity, continued difficulty with standing straight and extending past the neutral position, and overall limitations with standing and walking. The positive Spurling's sign indicated the nerves in the cervical spine were still irritated. Dr. Zaslavsky again diagnosed Claimant with cervical and lumbar radiculopathy. He provided Claimant with a Medrol Dosepak, which is an anti-inflammatory medication. He also discussed an injection, but Claimant wanted to think about it. Dr. Zaslavsky continued to keep Claimant out of work.

Claimant next visited Dr. Zaslavsky on June 21, 2022. Claimant reported continued neck and back pain with some improvement. The therapy and the steroid pack had been somewhat helpful. Dr. Zaslavsky did an exam and found some muscle spasm and trigger point nodules. Spasms worsened when Claimant tried to extend his lumbar spine. Backward bending was limited to five degrees. The straight leg raise was positive bilaterally. Dr. Zaslavsky continued the diagnoses of cervical and lumbar radiculopathy. Dr. Zaslavsky again discussed injections with Claimant. They decided to start with a lumbar spine injection administered by Dr. Ginsberg, with the possibility of following up with a cervical spine injection two weeks later. Dr. Ginsberg performed a lumbar causal epidural injection on July 18, 2022. The hope was to settle down the irritated facet joint and interspinous ligament pain and to reduce the radicular symptoms into the legs. Dr. Zaslavsky commented that there was also a high probability of an annular tear, given the interspinous ligament tear and facet joint inflammation. Dr. Zaslavsky agreed that Claimant was supposed to see Dr. Ginsberg two weeks after the injection, but he does not have any record of such a visit. Claimant has not been back to see him, either. Dr. Zaslavsky confirmed that Claimant underwent a course of physical therapy from March 28, 2022 to June 13, 2022. A discharge note from the therapist on July 8, 2022 indicates that Claimant was self-discharged. Dr. Zaslavsky explained that this means Claimant took himself out of physical therapy to do exercises at home. Claimant had attended therapy inconsistently and overall complained that his symptoms had not changed significantly. The therapist recommended an FCE. Dr. Zaslavsky testified that an FCE has not been scheduled yet, because he has not seen Claimant since the lumbar injection. His goal was to start Claimant on four hours of light duty work and begin some work conditioning, followed by an FCE. Dr. Zaslavsky felt it was important for Claimant to undergo the injections to both the cervical spine and lumbar spine before returning to work.

Dr. Zaslavsky has reviewed the films from the 2022 MRIs but only reviewed reports from the MRIs performed in the past. A cervical spine MRI in November 2004 showed disc herniations at C2-3, C3-4, and C4-5. The C3-4 herniation impinged on the cord. The cervical MRI in September 2009 showed a minor bulge at C7-T1 but not the disc herniations seen on the previous MRI. Dr. Zaslavsky explained that sometimes disc herniations can resolve, especially in a young person. An MRI of thoracic spine in October 2009 was negative. MRIs of the lumbar spine and cervical spine were performed in August 2013. The lumbar MRI did not show any herniations, stenosis, or nerve compression. The cervical MRI showed mild straightening of the lordotic curve but no herniation or compression of the spinal cord or nerves. MRIs were done again of the lumbar and cervical spines in March 2016. The lumbar MRI indicated facet effusions at several levels but no disc herniations. The cervical MRI showed a small central disc bulge at C4-5 and an annular tear with disc herniation at C5-6.

Dr. Zaslavsky reviewed the films from the January 6, 2022 MRIs and compared those to the radiologist reports. He saw a disc herniation at C5-6 causing mild stenosis and spinal cord deformity and a small disc bulge at C4-5. He would target injections at C4-5 and C5-6 based on these findings. Dr. Zaslavsky did not see the disc bulge at C3-4 noted by the radiologist. Dr. Zaslavsky commented that the disc herniation at C5-6 was large enough to compress the spinal cord, irritate the nerves, and cause symptoms into Claimant's upper extremities. It was also elevating the posterior longitudinal ligament, which makes it highly susceptible to an annular tear. Dr. Zaslavsky believed the MRI showed the pain generator to be at C5-6 and supported the diagnosis of cervical radiculopathy. He also opined that the elevation of the posterior longitudinal ligament and inflammation in that area were indicative of an acute injury. This acute injury on top of chronic changes led to the symptoms in Claimant's cervical spine and upper extremities. Dr. Zaslavsky attributed the acute-on-chronic injury at C5-6 to the MVA on November 24, 2021. He also opined that the MVA caused an aggravation of the pre-existing degenerative changes at C5-6, since the disc bulge was now touching the spinal cord and compressing it. Dr. Zaslavsky testified that the thoracic MRI from January 6, 2022 was normal. The lumbar MRI showed normal disc spaces from L5 to S1. The ligament at L4-5 appeared to be disrupted and there was some facet joint inflammation at L4-5. Dr. Zaslavsky commented that an interspinous ligament injury and facet joint inflammation almost always go together with a disc injury or an annular tear. It would have to be diagnosed with a discogram, but Claimant is not a candidate for this because he is not a surgical candidate at this time. Dr. Zaslavsky believed the MRI identified the pain generator to be the L4-5 disc space and supported his diagnosis of lumbar radiculopathy. He described the MRI findings at L4-5 as acute and believed they occurred within six

months of the MRI. The ligament would likely heal in a six month period. He insisted that the ligament tear at L4-5 has to be an acute injury. It would not occur without a substantial amount of force that gets transmitted through the spine in a flexion injury. The injury also caused the synovitis in the facet joints at this level. Dr. Zaslavsky opined with a very high degree of medical probability that the lumbar injury occurred as a direct result of the MVA in November 2021. Dr. Zaslavsky was asked to comment on the EMG findings of a right L5 and right S1 radiculopathy. He believed these findings were consistent with Claimant's complaints. He explained that the inflammation in the L4-5 disc space could irritate the L5 and S1 nerves on the right side of the lumbar spine, causing shooting pain into the right buttock and posterior thigh. Dr. Zaslavsky found no evidence of a pre-existing degenerative process at L4-5.

Dr. Zaslavsky agreed that Claimant is still physical totally disabled from work. His treatment recommendations would depend on how Claimant is doing and his response to the injection. Dr. Zaslavsky confirmed that the treatment that had been provided, including chiropractic, therapy, and medication, had been reasonable to address the symptoms Claimant had after the work accident. He also believed the total disability from work after November 24, 2021 had been reasonable.

Claimant Marquan Taylor testified that he is 37 years old and has worked ten years for Greggo & Ferrara as a driver. He transports construction materials throughout the work day. He drives a three-axel dump truck. Claimant confirmed that between 2009 and 2015 he was involved in four motor vehicle accidents. Claimant was a driver or passenger in each accident and was hit by another vehicle. In the 2013 accident, Claimant's vehicle was rear-ended by a car while he was working for Greggo & Ferrara. He made a workers' compensation claim. He suffered a neck sprain and a low back strain in the accident and was out of work for a period of time. He eventually settled the claim for \$5000. He returned to work in 2013 and continued to work for the Employer afterwards. Claimant testified that he did not seek medical treatment after all of the MVAs. When he did receive treatment, he was ultimately discharged from treatment and instructed to return as needed. The last treatment record prior to the November 2021 accident was with Dr. Cary on December 5, 2016. Claimant testified that he did not see any physician about his neck or low back between December 5, 2016 and November 24, 2021. He did not take medications, have problems with his neck or back, or have work restrictions during this period of time.

On November 24, 2021, Claimant reported to company headquarters in New Castle and then transported a load of broken concrete from Boulden Boulevard to South Heald Street. As he drove through the yard at South

Heald Street, a front loader hit him. He saw the front loader on his right as he drove through the yard, but it was not moving. As he passed the front loader, he felt a huge push on the rear passenger side of the truck and saw in a mirror that the front loader had backed into him. A front loader looks similar to a backhoe but only has a bucket on the front to load trucks. Claimant estimated he was going 8 mph at the time of the accident. The speed limit in the yard was 15 mph. Claimant insisted the front loader hit his truck on the rear right side. He felt a boom and the back of the truck moved. His body moved with the truck as the truck fishtailed and was jerked around. He stopped the truck and gestured at the driver of the front loader. They did not exchange any words. Claimant looked at the damage to the truck. He then drove about 50 yards and tried to dump his load, but the tailgate latch would not open. He got help to open the latch, which had been damaged in the collision. The yard foreman, Roger Petty, looked at the damage to the truck. Petty called a mechanic, Brian Driscoll, to look at the damage. Driscoll freed the latch mechanism so that Claimant could dump his load. Afterwards, Claimant drove to New Castle Avenue to park the truck. He was then escorted to Pivot Occupational Health by Mike Mayew for a drug and alcohol test. Mayew asked Claimant if he was doing okay, and Claimant told him yes. Claimant did not think anything was wrong with him at that time. He was administered a urine test by Pivot. He was not examined by a physician. Mayew drove Claimant back to the shop. Claimant confirmed that he filled out an Employee Injury Report. (Claimant's Exhibit 2) Claimant recalled reporting the accident to his direct supervisor on November 24, 2021 and then notifying the safety director on November 30, 2021. He was asked to review the driver's statement attached to Claimant's Exhibit 2. The statement was dated November 30, 2021. Claimant stated that he returned home after the accident.

On November 27, 2021, Claimant went to the emergency room at Christiana Care. His wife suggested he go due to back pain and a headache. Claimant's younger brother delivered the driver's statement to the Employer on November 30, 2021. In December 2021, Claimant sought treatment from Dr. Cary, who he had treated with in the past. Claimant is not from Delaware so he does not know other physicians in the state. On March 15, 2022, Claimant saw Dr. Zaslavsky for a second opinion. He did not know that Dr. Zaslavsky was a spine surgeon at the time. Claimant also recalled seeing Dr. Ginsberg, who injected him in the back. Last week, Dr. Ginsberg recommended Claimant return to physical therapy. Claimant plans to make an appointment for a return visit to Dr. Zaslavsky. Claimant attended physical therapy at RISE and did stretching and light exercises. He felt a little better after therapy. His attendance was sporadic because of babysitting issues or when his condition was aggravated by the physical therapy and he could not get out of bed. Claimant testified that he has not

worked since the accident on November 24, 2021. Claimant could not recall why he saw Dr. Krasner on March 16, 2022. It may have been for an annual physical. The record indicated Claimant was seeing a specialist for neck and back pain.

On cross-examination, Claimant testified that he was asked to complete an incident report when he returned to New Castle from Pivot, but he did not complete the report until he returned home. His brother hand delivered the report to the Employer. Karen Reynolds is the staff member who gave him the forms to fill out on the date of the accident. The following day was Thanksgiving. Claimant laid in bed that day. He was scheduled to work on Friday, but he called the shop steward to tell him he was not coming to work. He told the shop steward he was not feeling well. This was his usual process for calling out sick. Claimant then went to the ER on Saturday, November 27, 2021. At the ER, he denied having an issue with prior neck or back pain. Claimant called the shop steward again on Monday November 29, 2021. He recalled speaking with Karen Reynolds on November 30, and he told her that he had hurt his back. His brother dropped off the driver's statement on the same day. The purpose of the driver's statement was to describe the accident, not his injuries. He acknowledged that he left the description of injury blank on the Employee Injury Report. Claimant could not recall speaking to Karen Reynolds on December 1, 2021. Claimant testified that he first saw Dr. Zaslavsky in March 2022. His uncle suggested he see Dr. Zaslavsky. When Claimant saw Dr. Zaslavsky on March 15, 2022, he reported neck and low back pain. He also denied a neck or back problem prior to November 24, 2021 (Employer's Exhibit 1) Dr. Matz examined Claimant on April 26, 2022 at the request of the Employer. Claimant admitted to prior motor vehicle accidents and injuries, but he stated that his neck and back were 100 percent before the November 24, 2021 accident.

In 2009, Claimant's vehicle was struck by a car that ran a red light. He injured his neck and back. A neck MRI showed a bulging disc. He attended 24 chiropractic sessions. Claimant had legal representation and received an insurance payment. He could not recall if treatment extended into early 2011. In 2013, Claimant was involved in a work-related accident. The records show Claimant had neck and back complaints after the accident. MRIs were performed of the neck and back. Claimant treated with Dr. Cary, and Dr. Cary concluded that he had suffered permanent injury to his neck and back. A global settlement was reached in the case. Claimant could not remember the specific injuries from motor vehicle accidents in October 2014 and November 2015. Dr. Matz' record indicated there were neck and back injuries in November 2015. Claimant had legal counsel after the 2014 and 2015 accidents. He sought help from the same attorney after the November 24, 2021 accident. Claimant did not recall recommendations for injections

from Dr. Cary's assistant in 2016. Records showed Dr. Cary provided prescriptions for Tramadol, Percocet, and medical marijuana. Claimant got a medical marijuana card. He voluntarily surrendered the card at some point because Greggo and Ferrara would not let him continue working for them without doing so.

Claimant was not aware that the physical therapist questioned his effort three times during treatment after the November 2021 accident. He denied missing or being late for thirteen appointments. He missed some appointments because he was in so much pain from the previous day's therapy. Claimant saw Dr. Ginsberg last week. Claimant thinks he remains totally disabled from work until the doctor sees how he responds to physical therapy. Claimant's job does not require lifting. Claimant did not take medications the day of the hearing. His back pain level at the hearing was about a seven out of ten. The lowest level of back pain since the accident was a six out of ten. His neck pain is a three to four out of ten. He described it as more of a cramp in the neck. Right after the accident, the pain level in his neck was a ten out of ten. Treatment with Dr. Cary reduced the pain level to a six or seven. The neck does not bother him all the time. An injection to the low back provided some relief. The pain no longer goes down his leg.

On re-direct, Claimant testified that when he was asked whether he had prior injuries he thought that meant immediately before the accident and not old injuries that occurred in the past. His neck and back felt "one hundred percent" before the November 24, 2021 accident. Claimant confirmed that he received settlement money after the 2013 workers' compensation injury. He was out of work for several months. Dr. Cary provided medications after previous motor vehicle accidents, but Claimant never asked for refills on the prescriptions. Claimant bought CBD, not marijuana.

Under questioning by the Board, Claimant estimated he was going about 8 mph and the front loader was going about 5 mph when they collided. He admitted that he did not actually see the front loader in motion. The impact was sufficient enough so that the top half of Claimant's body almost went all the way over to the passenger seat. The seat belt held his lower half in place. Claimant believes he braced himself a little bit during the collision. Claimant clarified that the medical marijuana card was provided in 2016 not 2021. Dr. Cary provided a medical marijuana card again in January 2022 as an alternative to taking Percocet. Claimant insisted that he called the physical therapist when he needed to cancel an appointment. He last saw Dr. Cary in January 2022. He currently sees only Dr. Ginsberg and Dr. Zaslavsky. The only medication he currently takes is 800-mg Motrin. He uses medical marijuana because he has been out of work. Dr. Ginsberg provided an injection to his low back in July 2022. Claimant was supposed

to see Dr. Ginsberg two weeks later, but an appointment was not available then and the office was supposed to reschedule it. The office made a scheduling error. Claimant is supposed to go see Dr. Ginsberg before returning to see Dr. Zaslavsky. Claimant insisted he wants to return to work. Claimant denied ending physical therapy on his own. He stated that Dr. Zaslavsky recommended he see Dr. Ginsberg.

Under additional cross-examination, Claimant testified that he used medical marijuana beginning in 2022 as an alternative to Percocet. Dr. Cary did not tell Claimant that he is unable to prescribe Percocet.

Samuel Matz, M.D., an orthopedic surgeon, testified by deposition for the Employer, Greggo & Ferrara. (Employer's Exhibit 2) Dr. Matz examined Claimant on April 26, 2022 and reviewed a number of medical records related to the work-related injuries. This includes films of the cervical and lumbar MRIs done in 2016 and 2022. Dr. Matz reviewed a September 11, 2009 record from Christiana Care ER. The record documented neck and back complaints attributed to a motor vehicle accident. Claimant began seeing a chiropractor, Rachelle Stidd, on September 16, 2009 and attended about 24 visits for treatment of neck and back pain complaints. A cervical MRI on September 18, 2009 showed a C7-T1 disc bulge. The chiropractor wrote a letter in March 2010 to an attorney stating that Claimant's injuries may predispose these areas to future problems such as periodic exacerbation of his symptoms and complaints as well as degenerative changes that may take years to develop independent of another accident or injury. Also, the patient might find activities performed over a prolonged period may aggravate his condition. His lifetime expenses could exceed \$15,000. The injuries had caused a substantial impairment of bodily function. Another note from the same chiropractor dated January 3, 2011 released Claimant to full duty work.

Dr. Matz then reviewed Dr. Cary's records related to a work-related accident on June 24, 2013. Claimant saw Dr. Cary on June 27, 2013 and reported he was in a dump truck when it was rear-ended by a car. Claimant was jostled about and he sustained neck and back injuries. He described radiating pain into his left upper extremity. His pain level was an eight out of ten. He was diagnosed with cervical, thoracic, and lumbar sprain/strain injuries. Dr. Cary took Claimant out of work and prescribed Percocet for pain and cyclobenzaprine as a muscle relaxer. An MRI of the lumbar spine in August 2013 was interpreted as normal and an MRI of the cervical spine on the same date showed a straightening of the lordotic curve. A clinical history of pain radiating into the left shoulder was documented. Dr. Matz testified that a straightening of the lordotic curve could be indicative of spasm or positional. Claimant regularly attended physical therapy at Dr. Cary's office until the visits were discontinued on December 12, 2013. Percocet was

prescribed at monthly visits through February 27, 2014. Dr. Cary's record dated April 10, 2014 indicated the thoracic spine pain had resolved, but Claimant had continuing diagnoses of chronic cervical and lumbar sprain and strain. Dr. Cary specified that the neck and low back injuries were permanent. Claimant reported a pain level of five out of ten. He was discharged from active treatment and told he could be seen on an as-needed basis. Dr. Matz agreed that a pain level of five out of ten one year post-accident was indicative of a permanent or chronic problem.

Claimant reported another motor vehicle accident to Dr. Krasner on October 24, 2014. Claimant stated that he was rear-ended by another car, resulting in a back strain, neck strain, and right shoulder pain. The pain level of the neck was a four to five out of ten and the pain level for the right shoulder was a five to eight out of ten. On December 10, 2015, Claimant's primary care doctor documented another motor vehicle accident that occurred on November 10, 2015. Another vehicle swiped the front driver's side of Claimant's vehicle. The accident caused Claimant to jerk to the right and hit the curb, sending the car back to the left. Claimant suffered back, neck, and shoulder strain injuries. Claimant returned to Dr. Cary's practice on January 21, 2016 and saw Dr. King. Claimant complained of pain along both sides of the neck, extending into both shoulder tops, and low back pain. Dr. King diagnosed cervical and lumbar sprain injuries. He prescribed 10-mg Percocet and referred Claimant to physical therapy with Dr. Cary. MRIs of the lumbar and cervical spine were performed on March 8, 2016. Dr. Matz reviewed the reports and films of the MRIs. Dr. Matz did not see any definitive disc herniations or fracture on the lumbar MRI. He noted effusion, or inflammation, around several facets at L3-4, L4-5, and L5-S1. The radiologist had compared the study to the MRI from August 2013, and the radiologist felt that some small facet effusions were present in 2013. Dr. Matz confirmed that facet effusions can be a chronic issue for patients with multiple injuries, slowly progressive changes, or both. Dr. Matz testified that the cervical MRI showed a disc herniation at C5-6 towards the right associated with an annular tear. A bulging disc was also present at C4-5. Dr. Matz described the annular tear as a new finding as compared to the prior study in 2013. Dr. Cary reviewed the results of the 2016 MRIs on March 22, 2016. He then updated his diagnosis from the accident to cervical spine strain with C5-6 disc herniation and annular tear and lumbar strain. On exam, Dr. Cary found spasm about the cervical and lumbar spines. Claimant's level of pain was between seven and eight. Dr. Cary refilled the Percocet and continued the rehabilitation treatment. The Percocet was refilled again at visits to Dr. Cary's P.A. in May 2016 and September 2016. Claimant discussed having more physical therapy visits per week at the May 2016 visit. The P.A. referred Claimant to an orthopedist to consider injections when he saw Claimant on September 12, 2016. Claimant appeared

again at Dr. Cary's office on October 10, 2016. He reportedly lost his prescription for the orthopedist and asked for another Percocet script. Claimant was told he was coming up on the one-year mark for discharge and should look at other treatment avenues like injections. On November 7, 2016, the P.A. provided Claimant with the contact number for Dr. Patel, the physician he was supposed to see for an injection. Claimant was to be discharged the following month. Claimant asked about medical marijuana and was given a referral number for that. Claimant reported pain levels of six to seven in the neck and low back. Dr. Cary's P.A. saw Claimant again on December 5, 2016. Claimant's reported pain level was five. The P.A. refilled the Percocet with a tapering dose and provided tramadol to start after Claimant had weaned off the Percocet. The P.A. also provided the number for medical marijuana. Dr. Matz confirmed that the treatment of Claimant with polypharmacy through 2016 showed that Claimant complaints were significant and had not resolved. Nonetheless, Dr. Matz confirmed that he had not seen any medical records between December 5, 2016 and the November 24, 2021 accident that documented complaints or treatment for Claimant's neck or back. Dr. Matz commented that he would not expect these chronic problems to have resolved, based on the number of Claimant's accidents in the past, the prescription of four types of medication as of December 5, 2016, and the findings on the 2016 MRIs.

Dr. Matz next reviewed medical records that post-dated the November 24, 2021 accident. Claimant was seen that day at Pivot for a urine screen at the request of the Employer. Claimant first received treatment on November 27, 2021 at the Christiana Care ER. He reported headaches and posterior neck and midback pain for the past three days after a rear-end motor vehicle accident. The impact caused a whiplash motion. Claimant stated he awoke the next morning with symptoms. He described moderate/severe global headache, midline neck pain, intermittent paresthesias in the left forearm, and low back pain in the upper lumbar/lower thoracic region, more on the left side. He denied radicular pain into the upper extremities and legs. He also denied weakness in the arms. Claimant reported that he did not have prior neck or back pain. Dr. Matz felt it was significant that Claimant identified pain in the upper lumbar/lower thoracic region rather than pain lower in the lumbar spine, because he would expect immediate pain if an acute disruption of a ligament or an acute disc herniation occurred in the accident. The examiner at the ER was unable to reproduce the left-sided lower thoracic/upper lumbar pain with palpation and found no midline tenderness in the back. Dr. Matz asserted that this weighs against a significant structural injury to the low back in the accident. The ER exam also showed full range of motion and normal neurologic examination of both legs and both arms. The ER assessment was headache, neck pain, back pain, and left arm paresthesia. Claimant was provided with Tylenol, Motrin, and

cyclobenzaprine and taken out of work for one week. No imaging was done of the head, neck, or back. Dr. Matz believed there was discussion that the clinical situation did not warrant a CT scan. Dr. Matz also insisted that ER doctors do not want to miss a substantial spinal injury, so if there was reasonable suspicion of a neck or back injury, the doctors would get X-rays. The lack of X-rays at the ER suggested the doctors did not believe there was substantial acute injury that warranted imaging.

The next medical treatment was on December 7, 2021 with Dr. Cary. Claimant told Dr. Cary that he was driving a dump truck when a large yellow loader backed into the passenger side of his vehicle and the back of his vehicle fishtailed. The medication provided at the ER failed to help. Claimant complained to Dr. Cary of neck, midback, and low back pain. He also noted numbness and tingling with pain into both arms and both legs at times. His pain level was a ten out of ten. Dr. Cary found spasm in the cervical and lumbar regions upon examination. Limb strength was normal and a straight leg raise was negative. Dr. Cary diagnosed cervical and lumbar strain. He ordered X-rays, physical therapy, and chiropractic treatment and kept Claimant out of work. Medications documented on December 9, 2021 were Medrol Dosepak for acute inflammation, tizanidine as a muscle relaxer, and the nonsteroidal anti-inflammatory Naproxen. Dr. Cary's chiropractor began treating Claimant on December 9, 2021 for aching pain in the lower back and neck with upper shoulders. On January 4, 2022, Dr. Cary saw Claimant again and Claimant reported pain levels of nine to ten with no help from prescribed medications. An exam showed full cervical range of motion and restricted lumbar range of motion. No spasm was recorded. Dr. Cary referred Claimant for MRIs of the cervical, thoracic, and lumbar spine. Dr. Cary recommended continued rehabilitation and chiropractic treatment. He also discussed medical marijuana with Claimant and agreed to fill out the application for it.

The cervical, thoracic, and lumbar MRIs were done on January 6, 2022. Dr. Matz reviewed the reports and the films from the MRIs. Dr. Matz testified that the cervical MRI showed slight reversal of the lordosis, a very small bulge at C3-4, and a small bulge and mild stenosis at C5-6. He did not see the herniation or annular tear at C5-6 that had been noted in the March 2016 MRI. Dr. Matz did not believe there was evidence of an acute injury to the cervical spine when the January 6, 2022 MRI was compared to the 2016 MRI. Therefore, he saw nothing that would be reasonably related to the alleged November 24, 2021 work accident. In evaluating the 2022 lumbar MRI, Dr. Matz noted some minimal edema or swelling around the interspinous ligament at L4-5. He saw no complete disruption or anything acute in nature. He explained that the edema could be caused by slowly progressive degenerative changes superimposed on the past back injuries.

He found nothing acute when comparing the 2022 MRI to the 2016 MRI and after considering the history and physical examination. He would have expected more significant findings at the ER or complaints on the date of accident if there had been an acute injury in the November 24, 2021 incident. Dr. Matz is aware that Dr. Cary conducted an EMG of the lower extremities to rule out lumbar radiculopathy after Claimant complained of right leg radiation on February 1, 2022. The February 2, 2022 EMG was positive for right L5 and SI radiculopathies. Dr. Matz did not believe the EMG findings correlated to the lumbar MRI, because he did not see evidence of a disc herniation that would lead to a radiculopathy. He noted that Dr. Cary had not made any positive neurologic findings on examination to that point in time. Claimant saw Dr. Cary again on March 1, 2022 and reported problems with prolonged sitting, standing, and other activities of daily living. Dr. Matz agreed that these complaints were consistent with complaints Claimant had made after earlier accidents. Dr. Cary noted reduced lumbar range of motion and cervical and lumbar area spasm on examination. Dr. Cary continued Claimant on chiropractic treatment and kept Claimant on total disability, with the assertion that he would likely refer Claimant for work conditioning at the next visit. Claimant attended four more chiropractic visits through March 10, 2022. Claimant then saw Dr. Zaslavsky on March 15, 2022. Dr. Matz had not seen anything in the records of other medical providers to that point that would suggest Claimant needed to see an orthopedic surgeon for the alleged November 2021 accident. Dr. Zaslavsky did not list a referral source in his records. Dr. Zaslavsky documented complaints of neck and back pain, neck pain radiating down to the arms and all the fingers with weakness. Dr. Zaslavsky examined Claimant and found a positive Hoffman's sign and weakness in the grip bilaterally and in the right wrist flexors and extensors. Sensation was good except for the ulnar aspect of both hands. Claimant sat with a left truncal shift to unload the right lower extremity. He walked with an antalgic gait. A right straight leg raise was positive and there was weakness in the dorsi and plantar flexors. Dr. Martz agreed that it was unusual for these type of findings to appear for the first time four months into the injury. Dr. Zaslavsky read the lumbar MRI and noted the ligament tear at L4-5, disc bulges at L4-5 and C5-6, and a questionable annular tear at L4-5. He planned physical therapy and a follow up for a possible injection. Dr. Zaslavsky also wrote a total disability note. The next day, Claimant saw Dr. Krasner, his PCP, and indicated he felt well with minor complaints. Claimant denied weakness, nerve pain, and numbness. The doctor was aware Claimant was seeing another doctor about his neck and back. Claimant attended RISE physical therapy between March 28, 2022 and April 25, 2022. The therapist noted limited effort on March 30, 2022. Claimant was a no-show on April 1, 2022 and cancelled his appointment on April 6, 2022.

Dr. Matz performed a medical examination on April 26, 2022. Claimant reported that he was injured on November 24, 2022 while working for Greggo & Ferrara. He was driving a dump truck through the yard when a loader backed into the truck. He reported that the truck twisted around. He had difficulty unloading the truck after the accident because the tailgate was stuck. At first, Claimant was not aware of any injury but he developed a headache. The next day, he developed neck and back pain. Claimant stated that he went home early the day of the accident. Claimant reported going to the hospital on November 27, 2021 where he was evaluated, treated, and released. He sought additional treatment with Dr. Cary. Dr. Cary provided medications and therapy. Claimant was then referred to Dr. Zaslavsky. MRIs of the spine were done in January 2022. Claimant indicated he attended physical therapy three times a week. He was given a prescription for a nonsteroidal anti-inflammatory but had not filled the prescription. At the DME, Claimant complained of neck pain and pain occasionally radiating into his arms. He did not report numbness or tingling. Claimant also complained of low back pain that would occasionally radiate to his right thigh. The pain did not radiate below the knee. Claimant had been out of work since the accident. Claimant told Dr. Matz his back and neck were one hundred percent before the accident. He could not recall his specific injuries after the accidents in 2009, 2013, 2014, 2015, and 2017. He was clipped in a September 20, 2021 accident but did not recall any specific injuries from that accident.

Dr. Matz performed a physical examination. Claimant ambulated normally. He had full cervical range of motion, no spinous process tenderness, and vague discomfort to palpation of the paraspinals in the neck area. Reflexes into the upper extremities were normal. Grip strength was normal. Dr. Matz found full thoracic and lumbar mobility with no spinous tenderness. Claimant complained of vague discomfort to palpation in the paraspinals on either side of midline. Lower extremity reflexes were normal and straight leg raise testing was negative. Claimant said he had no sensation to touch about the right ankle medially or laterally from the mid-calf to just above the foot. Dr. Matz testified this did not correspond to any dermatological profile and did not indicate any specific anatomically correlated neurologic finding. Dr. Matz' impressions were that Claimant had an alleged work accident and cervical lumbar strain on November 24, 2021. He also had chronic pre-existing neck and back pain with multiple preexisting accidents requiring diagnostic studies. Dr. Matz did not believe the accident of November 2021 objectively exacerbated Claimant pre-existing condition or shifted liability for his chronic, pre-existing condition. He reached this causation opinion based on the absence of immediate neck and back pain when the accident occurred and a normal examination at the ER three days later. Dr. Matz opined that as of the DME Claimant had

sufficiently recovered and was able to work full duty status. He admitted that the treatment before the DME was not unreasonable. He did not think any ongoing treatment would be reasonable, necessary, or related to a November 2021 accident.

Dr. Matz reviewed some physical therapy notes that post-dated the April 24, 2022 DME. The therapist indicated on April 27, 2022 that Claimant needed to demonstrate increased effort with work conditioning to make progress. Claimant arrived 30 minutes late for his appointment on April 29. He was late again on May 10, cancelled his appointment on May 12, and was a no-show on May 17. The therapist noted on May 19 that the patient's effort appeared limited. Claimant either cancelled the appointment or was a no-show on May 20, 25, and 27 and June 1, 16, and 17. The physical therapist wrote on a discharge sheet dated July 8, 2022 that indicated Claimant had attended inconsistently and effort was inconsistent. Claimant had not returned to therapy for three weeks and it was appropriate to discharge him. Claimant saw Dr. Zaslavsky again on May 3, 2022 and June 21, 2022. He reported temporary relief from therapy and massage at the May exam, but the pain returned. His pain levels in May 2022 were nine out of ten in the neck and six to seven in the back. Claimant got radicular symptoms into both arms and occasionally into the right flank. On exam, Dr. Zaslavsky noted normal strength, sensation, and neurologic examination. He recommended a Medrol Dosepak and a discussion of injection to the cervical and lumbar spine. Claimant told Dr. Zaslavsky at the June 2022 exam that therapy had been somewhat helpful. The doctor noted a mildly positive bilateral straight leg raise. He sent Claimant to Dr. Ginsberg for a lumbar spine injection and evaluation for a cervical spine injection. The lumbar caudal epidural injection was done on July 18, 2022.

Dr. Matz disagreed with Dr. Zaslavsky's opinion that the 2022 MRI showed acute injury at C5-6 of the cervical spine; Dr. Matz pointed out that the 2016 MRI showed an annular tear and a disc herniation at that level already. Dr. Matz also disagreed that the 2022 lumbar MRI showed disruption of the interspinous ligament at L4-5. Dr. Matz agreed there was some minor edema present, but he believed this stemmed from a chronic condition in Claimant's case. He insisted the lack of immediate back pain and a normal exam of the back three days after the work accident, along with multiple prior accidents, weighed against seeing this finding as representative of an acute injury. Dr. Matz believed Claimant had ongoing problems from the prior accidents due to wear and tear subsequent to those injuries. He confirmed that facet arthropathy had been present on MRIs of the back in 2013 and 2016. Dr. Matz reconfirmed his opinion that there had not been an untoward event and new injury to shift liability in this case.

David Zavala testified that he has worked for Greggo & Ferrara for about three years. He works at the South Heald Street job site. He was present on November 24, 2021 and witnessed the motor vehicle accident. Zavala was in the operations tower with a clear line of sight to the vehicles involved. He was operating a machine that recycles stone at the time. Zavala saw Felix Batista driving a front loader into a dirt pile to fill a scoop. Bautista then backed up the front loader as Claimant drove by in a truck. Zavala estimated Bautista was going about 5 mph as he backed up and Claimant was going between 7 and 10 mph. The speed limit in the yard is 15 mph. Zavala testified that Batista had the right-of-way as he backed up. The front loader hit the back passenger side of the dump truck. Zavala described it as nicking the back edge of the truck. He did not consider it to be a big impact. After the incident, Claimant made a U-turn and drove back to the point of collision. Bautista got out of the loader and looked at the damage on the truck with Claimant. Zavala believes they "exchanged words" but he could not hear what was said. Both appeared to be walking normally. Zavala observed Batista on the telephone and assumed he was talking to their boss, Roger Petty. Zavala saw Petty arrive at the scene and Zavala then returned his attention elsewhere. Zavala was asked to write a statement about the accident. (Employer's Exhibit 3)

On cross-examination, Zavala estimated he was 50 to 75 feet away from the accident and operating a loud machine at the time. He saw Bautista backing up and Claimant failed to stop. He agreed there was a collision. He understood there were scratches and dents on the back of the loader but no major damage. He did not personally inspect the vehicles after the accident.

Michael Mayew testified that he works for Greggo & Ferrara as truck supervisor. He has worked there for 24 years. Claimant reports to him. Mayew did not witness the accident on November 24, 2021. He received a call about the accident at the South Heald Street yard but did not go to the scene of the collision. Claimant drove the truck back to the shop, and Mayew took Claimant to get a drug test. Mayew thought Claimant looked fine, and Claimant told him he felt good. They drove together about 25 minutes to the Omega Medical Center and talked a little about what had happened. They waited about 15 minutes to get the drug test done. Mayew told Claimant to get checked by a doctor if he was hurt, but Claimant kept stating that he "was good." Mayew thought Claimant looked fine getting in and out of the truck. Mayew confirmed that the incident occurred on the day before Thanksgiving. Mayew sent Claimant home for the day after the drug test. Claimant never mentioned an injury that day. Mayew prepared a written statement about the incident. (Employer's Exhibit 4)

Under questioning by the Board, Mayew testified that Felix Bautista also took a drug test. Mayew stated that an accident report is supposed to be

filled out the same day or the day after the event. He estimated Greggo & Ferrara has about 250 employees.

Karen Reynolds testified that she is the safety director for Greggo & Ferrara and has worked for the company for about 25 years. She did not witness the November 24, 2021 accident. She received a phone call about the incident from Roger Petty, the supervisor at the South Heald Street yard. Reynolds recalled seeing Claimant after he had undergone the drug test when he came into the office to punch out. Reynolds was sitting at a desk. Claimant told her he was fine. Reynolds told him he needed to fill out a driver's report about the accident, and he asked to take it home with him to fill out. Reynolds asked Claimant if he was feeling okay, and he said yes. Greggo & Ferrara was closed the next day for Thanksgiving. Reynolds believes Claimant was scheduled to work on Friday but did not report to work. Claimant would not have been scheduled for Saturday or Sunday. Reynolds was told that Claimant was a "no call/no show" on the following Monday. Claimant called her on Tuesday and asked for a claim number. Claimant also stated that his brother would bring in the driver's report of the accident. After Reynolds asked Claimant if he was injured, the phone went dead and she thought he hung up on her. She tried to call back. Reynolds confirmed that Claimant's brother brought in the driver's statement dated November 30, 2021, but the statement did not describe any injury. Claimant called Reynolds again on December 1, 2021 and asked for the claim number again. Reynolds asked if he was receiving medical treatment and the phone went dead again. Reynolds believes Claimant's brother brought in the Employee Injury Report after that call, but the report did not list any injury or treatment. Reynolds testified that the company did not believe it could make a workers' compensation claim without an injury or treatment listed on the report.

Reynolds provided information about the accident to the company's insurance coordinator. She does not know anything about a claim for properly damage related to the accident. Reynolds was then shown a document from their property carrier, Zurich. The document lists Karen Hogan as the insurance coordinator for Greggo & Ferrara. The document includes the accident date and location and indicates the front loader backed into a 2017 Mack dump truck. The vehicle tailgate was damaged. The document also indicates that the driver was not injured. No witnesses were listed. Reynolds was then shown the Loss Report she completed about the accident. (Claimant's Exhibit 3) Reynolds gathered information from Roger Petty to complete the report. The report indicates Claimant was driving in the yard and passing behind the loader when there was a collision with damage. The mechanic Brian Driscoll responded because the truck tailgate could not be opened. Reynolds does not know if any photographs were taken

of the truck. Reynolds was next shown the Employee Injury Report she filled out. (Claimant's Exhibit 4) The first time Reynolds learned of an injury was when Claimant informed his shop steward that he needed an insurance claim number. Reynolds filled out the injury report and indicated the loader backed up into the right rear of the dump truck. Brian Driscoll and David Zavala were listed as witnesses. No backup camera was present on either vehicle.

Under questioning by the Board, Reynolds testified that whoever is answering phones for the Employer takes "call outs" from employees. The shop steward usually sits at the desk and answers the phone.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Compensability

Claimant Marquan Taylor seeks a finding of compensability for multiple alleged injuries to his neck, head/concussion, right arm, right leg, and back as a result of an alleged work accident on November 24, 2021 while working for Greggo & Ferrara, Inc. Claimant seeks acknowledgement of work-related injuries and payment of medical expenses and an open period of total disability associated with the accident. The Employer denies that Claimant was injured as a result of a work accident on November 24, 2001. The Employer further asserts that any work-related injuries to the neck and back should be attributed to an earlier workers' compensation accident on June 24, 2013 while working for the same employer but a different insurance carrier (IAB Case No. 1404434). The workers' compensation benefits from this earlier work-related injury were commuted by agreement approved on August 14, 2015. The commutation agreement and 2013 Agreement as to Compensation identify the injuries as sprain/strain injuries to the cervical spine and lumbar spine. Because this is Claimant's petition, he has the ultimate burden of proof on his current claim for benefits. DEL. Code Ann. tit. 29, § 10125(c). "The claimant has the burden of proving causation not to a certainty but only by a preponderance of the evidence." *Goicuria v. Kauffman's Furniture*, Del. Super., C.A. No. 97A-03-005, Terry, J., 1997 WL 817889 at *2 (October 30, 1997), *aff'd*, 706 A.2d 26 (Del. 1998).

Claimant asserts that this is a successive carrier liability case in which "a genuine intervening event has occurred which brings out a new injury." *Standard Distributing Co. v. Nally*, 630 A.2d 640, 645 (Del. 1993). The question the Board must consider in a successive carrier liability case "is not whether the employee's pain or other symptoms have returned but whether there has been a new injury or worsening of a previous injury attributable to an untoward event." *Id.* The burden is on the initial carrier to prove the causative effect of the second event such that liability should be shifted to a

subsequent carrier. *Id.* The earlier case here was commuted, so Claimant takes the place of the previous insurance carrier to assert a shift of liability from the previous work-related accident to the alleged accident on November 24, 2021. Claimant thus needs to prove (1) an untoward event occurred on November 24, 2021 and (2) the untoward event caused a new injury or worsening of a previous injury to the cervical and lumbar spine. Claimant did not offer any medical testimony with regard to concussion, right arm, or right leg injuries separate from the spinal diagnoses. Claimant thus did not pursue those injury claims at the hearing.

The Board first considers whether an "untoward event" occurred on November 24, 2021. According to the Superior Court, "[a]n untoward event is an event beyond the normal duties of employment." *Kirkwood Animal Hospital VCA v. Foster*, No. 03A-090-04, 2004 WL 2187621 (Del. Super. Ct. Sept. 28, 2004) (affirming Board decision finding an untoward event where a sudden, unexpected, discrete, and identifiable movement precipitated the claimant's back problems rather than claimant's regular job duties as a dog groomer). Claimant presented uncontroverted evidence that a motor vehicle accident occurred on November 24, 2021. He testified that he was driving a loaded dump truck for Greggo & Ferrara when a front loader backed up into the passenger side of the truck as he drove past it in the yard at South Heald Street. He was driving about 8 mph and the front loader was going about 5 mph at the time of the accident. The incident was witnessed by a co-worker, David Zavala. The accident was reported immediately to the yard manager and Claimant's supervisor. The descriptions of the accident were similar between Claimant, Zavala, and the injury reports on file with the Employer as well as in the initial medical record after the accident from the Christiana Care emergency room. The evidence also supports damage occurred to the dump truck in the accident; a mechanic had to be called in to repair the tailgate latch and allow Claimant to dump his load immediately after the accident. The Board concludes that such a motor vehicle accident is clearly an event beyond the normal duties of employment, and thus an "untoward event" capable of shifting liability to a successive carrier.

Proving that an untoward event occurred is not enough to prove compensability, however. Claimant must also prove by a preponderance of the evidence that the untoward event caused a new injury or a worsening of a previous injury in order for the Board to find a compensable injury occurred. After weighing the evidence presented on the issue of causation, the Board finds Claimant has failed to meet his burden and therefore denies compensability of the alleged cervical spine and lumbar spine injuries. The Board accepts the opinion of Dr. Matz over that of Dr. Zaslavsky in reaching its conclusion. *See, e.g., Peden v. Dentsply International*, C.A. No. 03A-11-003, 2004 WL 2735461, at *5 (Del. Super. Ct. Nov. 1, 2004) (finding the

Board is free to choose between differing medical opinions that are supported by substantial evidence).

The Board finds Dr. Matz' opinion that Claimant did not injure his cervical spine or lumbar spine in the November 24, 2021 event to be persuasive for several reasons. As detailed throughout the evidence presented at the hearing, Claimant had an extensive history of accident and injury to both his neck and low back prior to the November 2021 accident. This included the 2013 work-related motor vehicle accident while Claimant was driving for Greggo & Ferrara as well as multiple other motor vehicle accidents between 2009 and 2015. Claimant also acknowledged another motor vehicle accident just a few months before the November 24, 2021 dump truck accident. The medical evidence reviewed by the medical experts and the testimony from Claimant established recurring symptoms and treatment to the neck and low back after the multiple accidents preceding 2021. The injuries and symptoms were significant enough for treating physicians to order MRIs of the neck in 2009, 2013, and 2016 and MRIs of the low back in 2013 and 2016. An earlier MRI of the cervical spine was also performed in 2004. The diagnoses after the accidents included cervical and lumbar strain/sprain injuries. Dr. Zaslavsky acknowledged that these injuries were treated non-surgically with chiropractic treatment, physical therapy, and medication, including narcotic pain medication, muscle relaxers, and medical marijuana. Although Claimant did not undergo injections prior to 2021, Dr. Matz confirmed that records from late 2016 indicate Claimant was referred to Dr. Patel to consider spinal injections. At the same time, Claimant was being weaned off Percocet and placed on tramadol and was referred for medical marijuana. In addition to the diagnostic testing and treatment, Claimant was kept out of work for periods of time after the 2009, 2013, and 2015 accidents. After the 2013 work-related accident, the treating physician, Dr. Cary, concluded that Claimant suffered chronic and permanent injuries to his cervical spine and lumbar spine. Dr. Matz reviewed the records from 2016 that he believed to show unresolved, significant neck and low back complaints, including the four medications prescribed in December 2016 and Claimant's report of a pain level of five at the same exam. MRIs in 2016 showed facet effusions around several levels of the lumbar spine and, in the cervical spine, a disc herniation and annular tear at C5-6 and a bulging disc at C4-5. Dr. Matz confirmed that facet effusions can be a chronic issue for patients with multiple injuries or slowly progressive changes in their spine. He pointed out that the radiologist found some small facet effusions in the lumbar spine as early as 2013. Dr. Matz further testified that the annular tear at C5-6 was a new finding in 2016 when compared to the MRI findings in 2013 and pre-dated the 2022 MRI. Dr. Matz reviewed the actual films of the 2016 MRIs, so he had a better

view of the studies than Dr. Zaslavsky who only reviewed the radiologist reports.

Dr. Matz insisted that Claimant's chronic spine problems would not be expected to resolve given the number of Claimant's past accidents, the multiple medications for his condition prescribed in December 2016, and the findings on the 2016 MRIs. The Board agrees with Dr. Matz's assessment and does not find Claimant credible when he states that his neck and low back were feeling "one hundred percent" prior to the November 24, 2021 motor vehicle accident. Even if it were true that Claimant had no symptoms before the November 2021 MVA, the Board does not find Claimant's explanation for failing to disclose his previous neck and low back injuries after the accident to be believable. Claimant denied any prior injuries to several medical providers, including at the emergency room three days after the accident. A patient might reasonably discount the importance of a minor injury in the remote past, but this was not the case for Claimant. He was involved in four motor vehicle accidents over the previous twelve years in which he injured his neck and low back and underwent evaluation and treatment for those injuries. The Board would expect a patient to recall such pertinent history to treating medical personnel, unless the patient had reason not to disclose his prior neck and low back injuries.

The Board also agrees with Dr. Matz that the records closest in time to the November 24, 2021 accident do not support any injury in the accident. Claimant did not disclose any injury in the report he filled out for the Employer. Claimant also denied any injury to the supervisors and managers he interacted with on the date of the accident. He did not ask to be examined when he was taken to Pivot for the urine screen. The Employer did not learn of a potential injury until Claimant asked for an insurance claim number on or around November 30, 2021. The Board recognizes that some injuries do not reveal themselves immediately after an accident and symptoms may take a few days to develop. However, the examination at the emergency room on November 27, 2021 was normal. The examiner found full range of motion and a normal neurologic examination of the legs and arms. The examiner was unable to reproduce Claimant left-sided lower thoracic/upper lumbar pain with palpation and found no midline tenderness in the back. Dr. Matz pointed out that no imaging was ordered for the head, neck, or back at the ER. He emphasized that ER doctors do not want to miss a substantial spinal injury, so they would at least order X-rays if there was a reasonable suspicion of a neck or back injury. It is also notable that Claimant denied radicular pain into the upper extremities and legs when he presented to the ER. In contrast, by the time Claimant saw his own physician on December 7, 2021, he was complaining of severe pain levels of ten out of ten and pain, numbness, and tingling into both arms and legs. The severe

complaints of pain continued at subsequent examinations with Dr. Cary. The Board does not find the severity of these complaints to be credible in light of the lack of pain immediately after the accident and the normal examination at the ER three days later.

Dr. Matz also cast doubt about the supposed acute findings on the 2021 MRIs noted by Dr. Zaslavsky. As discussed earlier, Dr. Matz attributed the MRI findings to chronic conditions that pre-existed the accident. He explained that the 2016 MRI of the cervical spine already showed an annular tear and a disc herniation at C5-6. He believed the minor edema on the 2022 lumbar MRI stemmed from a chronic condition in Claimant's case rather than an acute ligamentous tear, noting prior edema and facet arthropathy found on lumbar MRIs in 2013 and 2016. Dr. Matz also insisted that an acute tear would have resulted in immediate pain after the accident. He further opined that there was no correlation between the 2022 lumbar MRI and the right L5 and SI radiculopathy EMG findings in February 2022, since the MRI did not show any abnormalities at that level of the lumbar spine and there were no disc herniations seen on the MRI. In addition, Dr. Cary's examinations to that point had not shown any clinical evidence of radiculopathy. It is true that Dr. Zaslavsky made a number of objective findings indicative of radiculopathy when he saw Claimant in March 2022, but this was several months after the accident. No physician had made similar findings before that, so the Board does not find a temporal link between Dr. Zaslavsky's radiculopathy findings and diagnoses and the work accident.

Claimant's behavior with regard to his treatment after the accident raises general concerns about his credibility. After Dr. Cary saw Claimant several times post-accident, the doctor noted in February 2022 that he would likely refer Claimant to work conditioning at the next visit. Claimant never returned to see Dr. Cary. Instead, Claimant sought out treatment from an orthopedic spine surgeon, Dr. Zaslavsky, without any suggestion by a medical professional that he needed to be evaluated by a spine surgeon. Dr. Zaslavsky referred Claimant for physical therapy, but the physical therapy records reveal multiple instances where Claimant cancelled or was a no show for his appointments. The therapist noted lack of effort by Claimant during several of the therapy sessions he did attend. The discharge sheet from July 8, 2022 indicated Claimant had attended inconsistently and made inconsistent efforts. According to the discharge record, Claimant had not returned to therapy for three weeks and the therapist therefore stated it was appropriate to discharge him. The therapy notes thus present a situation quite different from the "self-discharge" to home exercise described by Dr. Zaslavsky. The lack of effort and attendance at therapy is inconsistent with Claimant's continued reports of severe pain to Dr. Zaslavsky during the

same time period and generally inconsistent with Claimant's claims of injury from the November 2021 accident.

Based on the evidence discussed above, the Board finds that Claimant has failed to prove he suffered a new injury or a worsening of pre-existing injuries to his lumbar spine or cervical spine as a result of the motor vehicle accident at work on November 24, 2021. The Board therefore denies Claimant's petition for workers' compensation benefits.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board DENIES Claimant's Petition to Determine Compensation Due.

IT IS SO ORDERED.

I, Susan D. Mack, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

Mailed Date: 11/1/2022.

KAREN JACK, Employee,
v.
HOME FOR AGED WOMEN, Employer.

INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

Hearing No. 1466815

Mailed Date: January 24, 2020
January 23, 2020

**DECISION ON PETITION TO DETERMINE ADDITIONAL
COMPENSATION DUE (DCD)**

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board ("IAB") on September 18, 2019, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

MARK MUROWANY

ROBERT J. MITCHELL

Kimberly A. Wilson, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Michael P. Minuti, Attorney for the Employee

Gregory P. Skolnick, Attorney for the Employer/Carrier

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NATURE AND STAGE OF THE PROCEEDINGS

On August 14, 2019, Karen Jack (also "Claimant") filed a Petition to Determine Compensation Due ("DCD"), seeking a finding that she sustained a low back injury in a December 12, 2017 work accident suffered while she was working for Home For Aged Women (also "Employer"). She seeks partial disability benefits from the date of the accident until February 25, 2019 and total disability benefits from February 26, 2019 and ongoing.¹ Claimant further seeks payment of all of her related medical treatment expenses, as well as preauthorization for a lumbar fusion surgery proposed by Dr. James Zaslavsky.

Employer denies that Claimant suffered a "new" injury in relation to the December 12, 2017 event. Instead, Employer points to the fact that Claimant suffered prior low back injuries while working for different employers on November 11, 2015, November 23, 2015 and September 28, 2016, for which Claimant commuted her right to receive any future benefits, including medical treatment expenses, in exchange for lump sum payments. The Stipulations and Orders for Full Commutation were approved by the Board on December 21, 2018 for IAB Hearing number 1448540 and on March 14, 2019 for IAB Hearing numbers 1435609 and 1435146.

A hearing was held before the Industrial Accident Board ("Board") on Claimant's petition on September 18, 2019. This is the decision on the merits of the petition.

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SUMMARY OF THE EVIDENCE

Claimant testified on her own behalf. She had worked as an activities director for Employer for about two years at the time of her December 2017 accident. Her job entailed planning activities for participants, some with disabilities. She planned crafts, music, exercises and other activities.

Claimant had a work accident on December 12, 2017. At the time, she was at the front of the kitchen table area. She was assisting a participant into a wheelchair to take her to the next activity. The participant said that she was about to fall, and in trying to keep her from falling, Claimant twisted her back. She immediately told Gina [Dunham], because Gina had witnessed it happen, along with the director, Crystal Hunter. Claimant recalled Gina asking if she was hurt. She told both Gina and Crystal that she had pain, but it was not that much pain at the time. Claimant thought that maybe she could just take Advil and that she would be fine. Her pain was probably rated at one on a scale from one to ten at the time of the incident.

Claimant saw her primary care physician ("PCP") the day after this incident. This appointment was scheduled far in advance because she was to become a new patient of the PCP. When she saw the doctor, she told his nurse practitioner that she had been involved in a work injury the day before, though it apparently was not noted in the records. She also mentioned other ailments that were documented. The focus was on becoming a new patient of the doctor.

A First Report of Injury ("FRI") was not filled out until two days after the accident, on December 14th. At that time, the human resources ("HR")

director instructed Claimant to get medical treatment. She was told to go to the nearest MedExpress. She was in pain and it felt

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like someone had hit her in the low back. Her pain was about two out of ten when she presented to MedExpress.

Claimant also treated with Dr. Michael Francis after this work accident. There was about a month's delay because when she called Dr. Francis's office, it was closed for the holidays. The appointment for January 10, 2018 was the first available. Dr. Francis's treatment has helped alleviate some of Claimant's pain, but she still has significant pain. She has had diagnostic studies after the work accident. Dr. Francis told her that she has some nerve damage in the left leg, and her pain is still there two years later. Dr. Zaslavsky has recommended a lumbar fusion surgery. Claimant is still weighing the pros and cons of surgery, and has not yet decided whether to proceed.

Claimant had other work accidents prior to this accident. The work accidents were on November 11, 2015, November 23, 2015 and September 26, 2016. In those incidents, she injured her right shoulder, right ankle and her knees. Claimant was also involved in a subsequent motor vehicle accident ("MVA") after the work incident; however, she injured her neck in that incident. She has only had additional chiropractic treatment for her neck in relation to that MVA.

Claimant did have a prior low back condition before this work accident. However, she was just seeing a chiropractor for general maintenance adjustments. She saw him once or twice per month.

Claimant no longer works for Employer. She did everything she could to return to work there, but she could not. She was on light duty at first working her activities director position, and then went out on total disability. She has not applied for work. She has looked for work

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but due to her limitations she could not find a job she can physically perform.² Sitting and standing are an issue for Claimant.

The accident has made it very difficult for Claimant to perform her activities of daily living ("ADLs") such as doing laundry and cooking. Her husband does the vacuuming and cleans the bathrooms. She can only stand or walk for a limited period of time. She used to ride a bike, but can no longer do so. Her exercise is limited. Claimant cannot even go on a car trip

or to a restaurant without her back hurting; she could take a car trip for more than two hours prior to this incident. She used to sit and play the piano for hours, stand to make a meal, garden, go to the movies, meet with friends or entertain friends at her home. She can no longer do any of this. Claimant also loved her work for Employer but cannot function daily in that role. Her life has been altered due to significant pain suffered in this work accident.

On cross-examination, Claimant testified that she would characterize her accident as "sudden and violent." She felt that it had involved torquing and jerking.

Claimant admitted she had finished her work shift on the day of the accident. She had not sought treatment that day. She saw her new PCP the next day and told him about her back injury, though admittedly this was not documented. Claimant was not aware that, following a physical exam, her PCP mentioned nothing about an abnormality to her back. She was not given work restrictions or medications the day after the work accident. A FRI was not filed until the next day, December 14th.

Claimant first sought treatment for this accident at MedExpress on December 14, 2017. She agreed that the record indicates that her back pain was 1 to 2 out of 10, though she felt that it was actually 5 out of 10. Claimant admitted that after her MedExpress treatment, she did not

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seek treatment again for this injury until January 10, 2018 when she saw Dr. Francis. She did not seek out urgent care or her PCP between her visit at MedExpress and the January 10th Dr. Francis appointment. She explained that she did not seek other treatment because the Dr. Francis appointment was pending. Claimant worked for Employer during this timeframe.

Claimant worked light duty for over a year with Employer after this incident. Light duty was not simply her pre-injury position with a lifting restriction; instead, she was restricted from bending, squatting, lifting overhead and lifting greater than 10 pounds. She also had to move around every twenty minutes. Employer accommodated Claimant, to a point. She was supposed to be assisted by certified nursing assistants ("CNAs") while on light duty, but CNAs were not always available. She performed certain tasks she was restricted from performing, such as bending down to plug in cords.

Claimant could not recall denying to Dr. Zaslavsky in January 2019 that she had any back problems prior to December 12, 2017 other than normal

aches and pains. She also did not recall telling him that she had never before treated for the back. She also could not recall telling this to other treatment providers. She clarified that she believes that she told them that she did not have any significant back pain comparable to what she currently had, which was at a pain level between 7 or 8 out of 10 and felt like a hammer to her back.

Claimant admitted that, prior to this work accident, she had a 2011 MVA with a back injury that required treatment. Her chiropractor had noted that she needed an evaluation for permanent impairment as well as an MRI and an EMG in that regard.

Claimant also had two accidents in November 2015. She could not recall seeing Dr. Sachi Patel to be rated for a lumbar spine permanent impairment regarding the 2015 accidents. Claimant agreed that paperwork approved by the Board indicates that "Claimant sustained

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injuries to the right knee, left knee and low back." Claimant clarified that she had a low back injury but not an annular tear. Claimant admitted that she commuted her right to future benefits regarding the 2015 accidents and received a lump sum settlement.

Her settlement paperwork regarding her September 2016 injury also references a low back injury. Claimant explained that she landed on her right shoulder and right knee in terms of the settlement; the settlement was not regarding the back. Claimant also did not recall having separate settlements between the 2015 incidents and the 2016 accident; she thought that while the settlement was \$20,000, she had received one lump sum of \$16,000 total, after fees, for all three of these accidents. However, she acknowledged that the Board approved her settlement for her 2015 claims in March 2019, at which time she had already seen Dr. Zaslavsky about this work accident. Claimant further admitted that the Board approved the commutation and settlement of her 2016 claim separately in December 2018, about a year after this work accident.³ She admitted that this was after extensive treatment involving this work accident, including MRI, EMG and discogram studies.

Claimant denied that Dr. Francis was treating her for a MVA, though his records indicate this on seven or eight occasions. He was aware that she was going to another chiropractor to have her neck treated for the MVA.

On redirect examination, Claimant testified that her pain gradually got worse after the work accident. She was far worse by June 2018. This led her to have a discogram and

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injections around the end of 2018. Dr. Francis's treatment was not adequately abating her pain level.

On recross examination, Claimant testified that she was unaware that medical records from multiple providers state that Claimant reported 9 out of 10 pain going from the back into the leg immediately after the work accident. There is no mention of a delay in onset or a gradual onset in these records. Claimant explained that she does not believe this to be true because she first sought treatment in January 2018 and was having injections by June 2018.

The Board next questioned Claimant. Claimant was assisting a patient with a walker, not a wheelchair, at the time of her injury.

In terms of clarification, Claimant's 2011 accident was a MVA. Her 2015 incidents were not MVAs. She then had the December 2017 work accident. She had a subsequent December 2018 MVA, which injured her neck.

Claimant no longer works for Employer. She worked light duty for Employer for a year after the work accident. During that time, she was taking an anti-depressant, but it did not work; none of the medications that she took helped. She was terminated because her back pain prevented her from performing her work duties. It was the sitting, standing and moving around with patient activities that were problematic.

Claimant has come before the Board three times for workers' compensation cases.

Claimant is no longer taking pain medications. She was given Celebrex at one point but that did not work. She is currently receiving medical massage. She finished physical therapy in July 2019, and now does home exercises. Claimant also walks up to thirty minutes without a problem.

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Claimant admitted that there was a gap of about a month between the time of her work accident and her appointment with Dr. Francis. She could not recall who had recommended Dr. Francis to her. Prior to the work accident, she had treated with a different chiropractor once or twice per month. She did not want to go to the same chiropractor for this injury. She

saw that chiropractor for less than a year prior to this work accident. Claimant's pain was real after the work accident but she felt that she could take Advil for it.

Michael Francis, D.O., a board-certified chiropractor, testified by deposition on behalf of Claimant.⁴ Dr. Francis has treated Claimant since January 10, 2018. At the time Claimant first presented in January 2018, she complained of 9 out of 10 pain.⁵ She related her condition to a December 12, 2017 work accident. She stated that she had been working as an activities director when a patient began falling down; Claimant turned and twisted to try to prevent the fall. Claimant twisted to the left and helped the patient to the floor. Dr. Francis's understanding is that Claimant had to act quickly and bore the weight of the patient while sharply compressing and torquing her body.

Claimant advised Dr. Francis that she had previously been a chiropractic patient of Dr. Jacob Ross's for many years. Dr. Ross's records reflect that he treated her for low back pain regarding a November 11, 2015 work accident. Claimant saw him about six times in the six months prior to the December 12, 2017 work accident. Dr. Ross's records indicate a low back pain diagnosis. Dr. Francis noted that that is a vague, nonspecific code that most chiropractors use for back maintenance regarding tension, stiffness or backache. Dr. Francis felt that the records reflected maintenance checkups for the back. Claimant's low back pain ratings were

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between 2 and 4 out of 10 in the six months prior to the December 2017 work accident. On the first date when Claimant's pain was rated at 4 out of 10, Dr. Ross noted that she had crashed a bicycle a couple of days prior and aggravated her neck, arm, shoulder and back in the incident. His records consistently reflected a pain rating of 4 out of 10 afterward. Claimant treated with Dr. Ross roughly once per month, though she did not treat between October 19th and December 12, 2017. Dr. Francis would not consider this active low back treatment; multiple treatments per month would be considered active.

Claimant denied to Dr. Francis that she ever had any significant low back injury prior to this incident. Her treatment was more or less maintenance as needed over the years. Claimant further reported having had two other work injuries in the past, to the elbow and knee.

On physical exam, Claimant had a positive straight leg raise in the lumbosacral, left pelvis and left leg. She had a positive Kemp's in the lumbosacral and left pelvis areas. Dr. Francis diagnosed Claimant with

having sustained injuries in relation to the December 2017 work accident. It was significant enough for her to need an MRI and x-rays.

Dr. Francis reviewed Claimant's MedExpress visit from two days after the work accident. Her complaints were low back pain with left leg radiculopathy. The record indicated that Claimant had received an injection and prescription medication, possibly Tylenol. This record comports with Dr. Francis's evaluation of Claimant on January 10th. He noted that due to a biochemical delay in inflammation, often days two, three and four are worse than day one; not everyone seeks treatment on the first day. It is possible that the injection and medication kept her pain levels and symptoms tolerable and manageable for the next few weeks until she saw Dr. Francis.

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Claimant's post-accident MRI showed a 3-millimeter bulge at L2-3, superimposed on a left paracentral herniated disc with a large annular tear. She also had some mild to moderate left and right foraminal stenosis at L2-3 as well as some degenerative findings. At L3-4, L4-5 and L5-S1, there are more 3-millimeter disc bulges as well as some degenerative findings. Dr. Francis noted that while the disc bulging and degenerative findings may have been preexisting, they were not significant enough to warrant any advanced diagnostics or treatment. He further pointed out that when a paracentral herniated disc is associated with an annular tear, this would be due to a trauma, something that would have required additional force. The timeframe would have to have been within the past six to twelve months; after twelve months, any herniated disc hardens and calcifies, becoming a disc osteophyte complex.

Claimant also had an abnormal discogram study at L3-4. The L3-4 disc space had a posterior Grade 5 annular tear, diffuse internal annular disruption with the production of concordant pain. L3-4 was noted as being a primary pain generator.

Claimant's first EMG was also abnormal, indicating a left L5 radiculopathy. Her second EMG was also abnormal regarding L4-5 in the innervated muscles on the left side, greater than the right. Every test came back positive or abnormal.

Dr. Francis confirmed that he and Dr. Zaslavsky have both identified the L2-3 level as reflecting an injury. Dr. Francis causally relates this injury to the December 12, 2017 work accident. In his opinion, a patient with this injury would not have sought chiropractic treatment on an as-needed basis only and complained of pain at 2 out of 10. Dr. Francis disagrees with Dr. Piccioni that Claimant was not asymptomatic leading up to the work

accident because it had been over two months since her last "as-needed" maintenance visit with a chiropractor at the time of the incident. Further, it is fairly common for a 51-year-old to have some

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degenerative conditions and/or even some underlying bulging. Underlying disc bulging leaves a person very vulnerable to further injury and aggravation with even less traumatic force needed. A compression and torsion can take a bulge and push it into a nerve root, causing a radiculopathy. He noted that this makes sense why some of the EMG studies came back normal, because those bulges could absolutely have caused the nerve injury lasting several months.

Dr. Francis testified that he believes that Claimant's back injury had resolved from the prior work accident. She was undergoing maintenance care as needed. She did not need any back treatment with Dr. Ross from October 19, 2017 through to the work injury, at which point she warranted advanced diagnostic imaging, something that was never needed in the past.

While there might not have been edema on the MRI taken about four weeks post injury, the edema may have resolved by then. Dr. Francis disagrees that the MRI only showed degenerative findings; there was a herniation at L2-3 with an annular tear. In Dr. Francis's opinion, the December 2017 work accident accelerated Claimant's preexisting condition. The work accident was sudden and traumatic. The mechanism of injury of trying to catch someone's body weight to prevent a fall will create a significant compression and torqueing that affects the discs in the back. If there are already disc bulges there, one is more vulnerable. Dr. Francis clarified that there was no preexisting injury to the spine, but there was preexisting bulging and degeneration. The work accident was the setting and trigger for Claimant's need for lumbar spine treatment. All of the treatment was reasonable, necessary and causally related to the December 2017 work accident.

Dr. Francis addressed Claimant's ability to work. As of the August 9, 2019 deposition, she had been out on short-term disability for the past few months. Her restrictions were

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unlikely to be removed within the next three months. Claimant is still dealing with low back flare-ups of the L2-3 disc. Dr. Francis agrees that Claimant should have been on light duty since the date of the accident in order to prevent a recurrence of the mechanism of injury.

On cross-examination, Dr. Francis agreed that Claimant worked up until she went out on short-term disability. He did not totally disable her prior to that time. He agreed that he restricted her only from her current job, not from any and all employment. His opinion is that she cannot perform her pre-injury job.

James Zaslavsky, D.O., an orthopaedic surgeon, testified by deposition on behalf of Claimant.⁶ Dr. Zaslavsky first evaluated Claimant in January 2019. At that time, Claimant provided her mechanism of injury. On physical exam, Claimant had tenderness across the lower lumbar spine, palpable muscle spasms and trigger point nodules. She had a positive right-sided straight leg raise, decreased sensation over the lateral aspect of the right anterior thigh and a positive right-sided femoral nerve stretch test. She had weakness in her right iliopsoas, right quadriceps and right anterior tibialis, all four over five. Dr. Zaslavsky's assessment was lumbar radiculopathy at L2-3.

Dr. Zaslavsky concluded that Claimant's injury related to the December 2017 work accident. Claimant never had any prior MRI imaging. Typically, an MRI is ordered if someone fails to improve with conservative care. The fact that she never had an MRI tells Dr. Zaslavsky that she never had any considerable, prolonged neurologic issues. Further, the prior records reflect that her symptoms have typically responded to conservative care. Claimant's post-accident imaging studies, including post-discography CT scan in August 2018 and January 2018 MRI, all tend to show the same injury pattern synonymous with both her

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physical limitations and exam findings. Importantly, the injection at L2-3, which was diagnostic as well as therapeutic, defines that that level is involved.

Claimant does have degenerative discs in her back, which makes sense at 51 years old. However, Claimant was living with that degeneration and maintaining with some exercise and occasional chiropractic visit. She was not seeking injections, discograms or surgery. This is the difference between degenerative discs with slow progressive changes versus a large annular tear with extrusion of disc material. Dr. Zaslavsky causally relates Claimant's need for surgery to the December 12, 2017 work accident. He confirmed that the mechanism of injury is consistent with the injury sustained at L2-3.

Dr. Zaslavsky disagrees with Dr. Piccioni that if Claimant's L2-3 disc were causing a radiculopathy, it would primarily involve the L3 nerve root and would not reach below the knee. This refers to a foraminal disc bulge,

which Claimant does not have. She has a very large annular tear with multiple disc extrusions. She is not just compressing the nerves coming out of that level; she is chemically irritating all of the nerves behind that annular tear (L3, L4, L5 and S1). This would also be the reason behind the discrepancies in the EMGs and why they show an L5 and S1 radiculopathy. This is also why Claimant might complain of pain in the front of the thigh one day and the back of the thigh the next day. It is expected and appropriate for a patient with this type of injury.

Dr. Zaslavsky also disagrees that L2-3 could not have suffered an acute tear because there was no edema found around the tear. Extravasation of disc material on a post-discogram CT scan shows that it is a fresh annular injury. She also had excellent relief with injections at that level, which is further telling that this is an annular injury. It is an active tear that is causing her symptoms.

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In terms of Claimant's ability to work, Dr. Zaslavsky agrees that Claimant could proceed with light duty at eight hours per day. There will be times where she is disabled completely because of flare-ups, however. Due to her lack of functionality at a fairly young age, it is likely she will proceed with something surgically at some point in order to improve the quality of her life. Following such a surgery, Claimant would be totally disabled for at least two months.

Dr. Zaslavsky summed up his medical opinion. It is his opinion that the industrial accident caused an annular tear at L2-3, which most likely had some degenerative findings prior to the tear, as all of her levels do. To a high degree of medical probability, however, Dr. Zaslavsky opined that Claimant did not have the tear prior to the December 2017 work accident. Claimant suffered an aggravation as a result of a sudden and violent injury at that time. She sustained the large annular tear with extrusion of disc material that is effacing the thecal sac. This is not something that is degenerative in nature; instead, it is acute. The annular tear led to the radiculopathy that ensued into her right leg and led her to become completely disabled for most of the functional activities that she enjoyed on a regular basis. In Dr. Zaslavsky's opinion, Claimant's need for surgery causally relates to the December 2017 work accident. Many patients with Claimant's previous lumbar spine changes and treatment plan never need to go down the path of surgery.

Claimant's treatment has been reasonable, necessary and causally related to the December 2017 work accident.

Gina Dunham, a nurse, testified on behalf of Employer. She worked with Claimant at the time of the work incident. Ms. Dunham observed Claimant at the time of the incident. A patient with Parkinson's disease that uses a walker to ambulate stood up to walk across the

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room. Ms. Dunham approached the patient because she needs to have help with transferring positions; the patient was having issues keeping her legs straight while standing up and holding onto her walker. Claimant came up and stood on the patient's right side, and Ms. Dunham was on her left. They tried to walk the patient across the room but she was having difficulty standing. Both Ms. Dunham and Claimant were supporting the patient when she said that she could not stand; together, they gently and equally lowered the patient to the floor. It was not violent.

Crystal Hunter came out and she and Ms. Dunham assessed the patient and checked her for injury. The patient was not injured and was helped back into a chair. The remaining participants moved onto the next activity. The program director then asked Ms. Dunham and Claimant if they were injured and Claimant said that she did not think that she was. Ms. Dunham told the program director that she was not injured. Ms. Dunham added that whenever a participant is lowered to the floor, an injury report must be filled out. Ms. Dunham filled one out although Claimant did not report an injury at that time. Ms. Dunham left for the day shortly after this incident.

On December 14, 2017, Ms. Dunham learned that Claimant was reporting that she was injured in relation to the December 12th incident. Ms. Dunham documented a nurse's note in that regard on December 14th.⁷ Ms. Dunham agreed that she mentioned that Claimant had been

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observed squatting and moving a table because, in her experience, this was inconsistent with a back injury.

On cross-examination, Ms. Dunham agreed that she has no reason to doubt Claimant's honesty. She worked with Claimant for about two years.

The Board questioned Ms. Dunham. The patient weighed no more than 120 pounds and was gently lowered to the floor.

Lawrence Piccioni, M.D., an orthopaedic surgeon, testified by deposition on behalf of Employer.⁸ He evaluated Claimant twice during defense medical examinations ("DMEs") in May 2018 and January 2019.

Dr. Piccioni addressed Claimant's preexisting medical records. A May 28, 2011 record indicates urgent care for a neck, right arm, left thigh and back injury in relation to a MVA. On physical exam, lumbar spine spasm (an objective finding) was documented. A follow up note from June 2011 indicated that Claimant complained of a lot of back pain. Her diagnosis was low back pain and spasm, and her exam was consistent with spasm. She was referred to chiropractic treatment, which also documented 8 out of 10 pain lumbar complaints as well as spasm at L3.

A February 5, 2012 chiropractic report was next reviewed. The report mentions lower back pain and that Claimant carried a diagnosis of lumbago or lumbalgia and multiple regions of hypertonicity (another word for spasm). The report further states: "It is my strong opinion that the severity of the accident and the method in which the accident occurred severely complicated her condition and her ability to recover from her symptoms." The chiropractor

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recommended that she see additional specialists "and consider permanent partial disability after further diagnostic studies determine continued severity of her multifaceted condition." In terms of diagnostic studies, an x-ray, MRI and nerve conduction/velocity studies and/or other studies were recommended. Thus, if Dr. Francis and Dr. Zaslavsky believe that these sorts of studies were never recommended prior to the work accident, this is incorrect.

Claimant continued with low back pain complaints after 2012, as there are complaints documented in the May 31, 2014 NovaCare Rehabilitation record. She was there for ankle therapy, but she also indicated that her back was hurting.

Claimant had a work accident with a different employer on November 10, 2015. Dr. Ross's (chiropractor) November 12, 2015 record indicates that Claimant had pain in the lumbar region that she rated at 4 out of 10, but reportedly could be as worse as 5 out of 10. She stated that she had the pain eighty percent of the time. The pain was reportedly causing her problems with driving, bending, exercising, lying, standing and working. Additionally, Claimant was compensating with standing to one side due to pain. On exam, she had reduced range of motion and lumbar spine spasm. There was also a positive Eli's test indicative of inflammation of nerve roots or presence of nerve lesions.

Claimant had another work accident on September 28, 2016, when she slipped and fell. The history section of the note states that Claimant had

"chronic low back pain since college."⁹ This would have been about thirty years of back pain, as Claimant is about fifty years old. The note further indicated that Claimant had chiropractic treatment on and off since the MVA in 2011. On physical exam, Claimant had tenderness to the left buttock and pain on range of motion. In terms of radiology, the note states "L2-3, degenerative disc disease and narrowing

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with anterior osteophytes, hyperlordosis." This is the same level that is currently being alleged; thus, there were positive imaging findings at L2-3 prior to the 2017 work accident.

An October 11, 2016 Concentra record was next addressed. It indicated low back pain complaints into the left hip and upper leg. There were also issues with squatting and weakness in the bilateral lower extremities on exam; this weakness can be indicative of a radicular problem. Dr. Ross's March 20, 2017 chiropractic record also indicates similar findings as well as weakness in both lower extremities and spasm.

A March 31, 2017 Concentra record showed that Claimant complained of back pain she rated at 7 out of 10. Tenderness to palpation at the left sacral base, problems with squatting and weakness in the bilateral lower extremities are again referenced. The L4-5 level is referenced.

A June 1, 2017 record is indicative of an incident in which Claimant tripped up the stairs and complained of low back and neck pain that she rated at 7 out of 10.

Dr. Ross's last chiropractic record is from October 18, 2017. The record notes that Claimant presented for treatment with pain complaints, particularly in the lumbar and sacral areas. She rated her pain at 4 out of 10, approximately fifty percent of the time. She stated that she experienced an increase in her overall spinal discomfort and believed it to be from standing at work. Her exam showed spasm, hypomobility, taut fibers, point tenderness and subluxation. The L3 level is referenced; this is the level that allegedly was injured in the work accident. Thus, Dr. Piccioni testified that the preexisting records indicate that Claimant was not asymptomatic prior to the December 2017 work accident. She complained of 4 out of 10 pain fifty percent of the time and reported that her symptoms were increasing in October 2017.

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Dr. Piccioni turned to Dr. Sachi Patel's January 24, 2018 report. At that time, Dr. Patel rated Claimant for lumbar spine permanent impairment regarding the November 11, 2015 and November 23, 2015 work accidents. Dr. Patel listed Claimant's condition as a low back strain, with a 5 percent permanent impairment to the region.

After the December 2017 work accident in question, the first record of medical treatment is December 13, 2017. That record reflected that Claimant was establishing care with a brand new PCP. Notably, this was the day after the work accident. Claimant told Dr. Piccioni that she had finished out her shift the day before. This PCP visit was prescheduled. The typical new patient visit would involve extensive history taking and an inclusive physical examination. This record reflects that Claimant advised about her gastroesophageal reflux disease, allergies, her immunization history, living status, work status and her history of surgeries. During such an extensive visit, Dr. Piccioni noted that he would expect that if Claimant had a work injury the day before, it would have been mentioned. Additionally, he would expect that chronic problems related to the lumbar spine would also be reported. This was not a "meet and greet." This is an in-depth evaluation reflected by a four-page typed note with multiple reviews of systems, past medical history, lab studies and other diagnoses. This record also indicated a full physical exam, including musculoskeletal. The physical exam noted a normal posture and gait.

Dr. Piccioni disagrees with Dr. Zaslavsky that any surgical intervention would causally relate to the December 2017 work event. Notably, Claimant finished her work shift on the day of the incident. Further, there is no scientific way with an acute injury that Claimant would walk into a PCP's appointment the next day and not mention having had this event or having pain complaints. Her physical exam also did not reveal anything.

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Dr. Piccioni turned to the next record, December 14, 2017, two days after the work accident. Importantly, in the "history of present illness" section, Claimant denied numbness, tingling and weakness of the extremities. Further, numbness was again denied in the "review of systems" section. This is significant because there are positive EMGs and MRIs that are considered positive for radiculopathy. Additionally, Claimant's physical exam was similar to that from the PCP visit the day before. She had normal gait and stance and full strength against resistance in the low back. The only abnormal findings were range of motion to the low back and low back SI joint tenderness, and these are subjective findings. Although there was no numbness or tingling on exam, the assessment was lumbago with left-sided sciatica. This was notable as there was neither true sciatica on physical exam

nor any true sciatic history reported in the pages preceding the assessment. Claimant was provided a Toradol injection (anti-inflammatory) and naproxen medication (an anti-inflammatory). The naproxen prescription was for thirty days with no refills. There were no work restrictions provided on this date.

Claimant's next date of treatment was not until January 10, 2018, with Dr. Francis. Despite Claimant's explanation, the gap in treatment does not relate to success from an injection unless this was a very mild situation. However, this has been coined as a significant injury, for which even surgery is being contemplated and, thus, this would not comport with a history of a significant disc herniation and annular tear. Further, a Toradol injection would be expected to last about twenty-four to forty-eight hours at most. Notably, Claimant had a physical exam on December 19, 2017 in preparation for eye surgery and it was also documented that she had normal posture, gait, joints and muscles.

On January 10, 2018, Dr. Francis documented that Claimant had very severe, aching, sharp pain that she rated 9 out of 10. She had lumbar pain radiating to the sacral, left pelvic

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area and left leg. It was noted that her pain came on right away and that she went to a medical clinic the same day, despite the fact that there is no evidence she sought treatment the same day. Her assessments were lumbago with sciatica, left leg. A radiculopathy of the lumbosacral region and sacroiliitis were noted. An MRI from the next day indicated degenerative changes at the L2-3 level as had been shown in x-rays in the past, as well as a diffuse, 3-millimeter disc bulge. This was not a significant disc bulge, it is small at one-eighth of an inch. Because of where L2-3 is located, with much more room in the spinal canal, that disc bulge would not be able to compress anything.

Dr. Sugarman's report regarding the January 2018 MRI is also notable. He mentions disc space narrowing at L1-2 and a disc bulge present at L1-2 causing neuroforaminal stenosis. He also documented mild disc protrusions at L3-4 and L4-5. He noted that there was no evidence of nerve root encroachment. He also did not mention any problem at L2-3. Dr. Sugarman actually wrote that he did not believe that Claimant's symptoms were related to the lumbar spine and were instead related to sacroiliitis. He referred her for SI joint injections instead of lumbar injections.

Dr. Piccioni further noted that the MRI report reflected that there was superimposed a left-sided paracentral disc herniation associated with an

annular tear measuring 10 millimeters by 3 millimeters. Ten millimeters is the length of the herniation, but that really has nothing to do with this; the 3 millimeters is the amount bulged out, which is still minimal. While the annular tear is mentioned, there cannot be a disc herniation without an annular tear, so this is a little redundant. Mild to moderate left and mild right foraminal stenosis were also noted. The spinal canal was noted to be a little bit tight; much of that is due to hypertrophy of the facet joints in the back of the spine; as they become arthritic, they become spurred and thickened.

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This is also the case with the ligamentum flavum, which is a ligament between L1, L2, L3 and L4 in the back of the spine. They have become thickened and that is really what is causing the moderate canal stenosis. This comports with a history of many years of chronic low back problems and recurrent injuries. This is certainly not an acute finding.

Dr. Piccioni disagrees with Dr. Francis that the L2-3 findings are acute because a herniated disc older than six or twelve months would have already become a disk osteophyte complex. Dr. Piccioni does not believe that there are any scientific studies that have ever come out and said that disk osteophyte complexes ossify at 9 to 12 months. It may take years for them to ossify. Again, this is not a big disk lesion. It is causing a herniation because some of the material comes out of the annulus so it is more than a bulge and there is a tear but, in reality, it is still a relatively small disc bulge. Notably, Dr. Zaslavsky's opinion appears to be opposite to that of Dr. Francis. Dr. Zaslavsky stated at about 13 months post injury that Claimant could have multiple levels of radicular complaints due to leakage from this disk. Dr. Francis, however, says they become disk osteophyte complexes at 9 to 12 months. Thus, these opinions do not coincide.

Dr. Piccioni further disagrees with Dr. Francis that because Claimant has a longitudinal tear he knows that it is an acute injury. First, there is no such thing as a longitudinal tear, acute or not. Dr. Piccioni wrote in his report that the fact that there was really no significant edema around the disc injury supports the fact that it is not an acute injury. He disagrees with Claimant's medical experts that it is normal for no edema to be present weeks after this injury. If it was an acute injury and there was very minimal edema such that it was already cleared up by four weeks post injury (which is why the MRI did not pick it up), there would be no reason to consider surgical management 13 months later or for Claimant to begin reporting nine out of

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10 pain this far out from the injury. Edema can last for up to 12 weeks but there was absolutely no evidence of any edema, even on MRI. Therefore, there are two possibilities: (1) Claimant only had a very minimal change where there might have been a tiny bit of edema which disappeared, in which case there is no reason for any treatment now; or (2) there should have been an edema if there was an acute injury but it was not an acute injury because there was no edema present.

Dr. Piccioni further testified that the natural degenerative process causes most annular tears. Because many of them are asymptomatic, one has to comport them with the patient's symptomatology. In Claimant's case there was disc degeneration noted specifically at L2 -3 on x-rays prior to the work accident. In 2011, degenerative changes were already being reported at L2-3; thus, this had to come on even long before then.

Dr. Patel's January 2018 report was also notable. Claimant denied weakness or paresthesia into her legs and thus, this does not comport with radiculopathy. Claimant's flexion and extension were without pain in the lumbar spine. There was tenderness in the bilateral paralumbar areas, though there was a negative straight leg raise bilaterally. Again, there was no clinical sign indicative of radiculopathy. Her neurologic exam was completely normal. Dr. Patel's physical examination findings were similar to what Dr. Piccioni found in May 2018 and January 2019; he also saw no objective findings comporting with a radiculopathy.

Additionally, Dr. Patel documented that Claimant complained of nine out of 10 pain at the April 2018 visit. Claimant also had complaints that have not significantly improved in the low back and left leg. Dr. Piccioni noted that with nine out of 10 pain one would be going to the hospital, needing narcotic pain medication and urgent care. The patient would be expected to have difficulty getting into the office. There would also be spasm and grimacing and the

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patient would have to list to the side and would be unable to get from a sitting to a standing position. Typically, the patient might need a cane, crutch or walker to get into the office. The physical examination recorded by Dr. Patel on that date, however, showed that the gait was normal and Claimant had full range of motion of the bilateral lower extremities. She showed normal strength, sensation and reflexes. While straight leg raising produced pain in the back it did not produce any sciatic tension; thus, that is not a true positive straight leg raise. If one believes that Claimant had nine out of 10 pain related to a radicular problem or a disc problem, there would be other physical findings during the neurologic examination.

The April 2018 EMG was also notable. At the EMG, Claimant told Dr. Grossinger that she had immediate pain on the day of the work accident. She stated that she developed pain in the low back that spread to her left leg, involving the thigh and calf. The EMG was listed as an abnormal study indicative of L5 radiculopathy. While Dr. Grossinger stated that this corresponded with her complaints, in Dr. Piccioni's opinion, what she describes is not an L5 radiculopathy. He explained that L5 goes to the top of the foot so there would be pain, numbness and weakness in the L5 dermatome, which would be the top of the foot. In any case, in order to have a true radiculopathy, and not just radicular complaints or radiculitis, one would have to have a lesion at L4-5 pushing onto the left L5 nerve root, which was not noted on Claimant's MRI.

Additionally, in Dr. Piccioni's opinion, there is no scientific basis for Dr. Zaslavsky's testimony that the tear at L2-3 could cause chemical radiculopathy all the way down, jumping a couple of levels to L5. First, if there is a chemical irritation from an annular tear, it is chemical radiculitis, not radiculopathy. Second, it would never jump multiple levels. Dr.

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Piccioni does not understand how leakage of material from L2-3 can skip the L3 and skip the L4 to get to the L5 nerve. There is just no scientific or logical sense for that to ever happen.

Dr. Piccioni turned to Dr. Witherell's July 2018 records. He recorded that Claimant's injection was concordant for lower back discomfort. There is nothing to indicate any concordance with pain down the leg, however. The left and right hips are the L1 and L2 areas; they have nothing to do with L3-4. There has been speculation that Dr. Witherell meant L2-3, but that is just speculation.

Dr. Piccioni next addressed the CT scan findings. Dr. Zaslavsky opines that this was an acute injury at L2-3 because there is an extravasation of disc material on the CT scan nine months after the accident. However, he contradicts himself by also stating that it was normal for edema to be gone three weeks post-injury (meaning that it was healed) yet states that at nine months this would be an acute tear based on that leakage. Again, that disc leakage and extravasation could have been there for years afterwards. There is nothing indicative of this being acute. Further, only an MRI can tell acuteness, not a CT discogram.

While Dr. Zaslavsky also characterized the injections at L2-3 as providing Claimant great relief, the records show a minimal at best response. For example, Dr. Witherell's July 2018 record documents

Claimant's pain rating at eight out of 10. The next record on September 18, 2018 documents her pain rating at only down to seven out of 10 yet notes "significant improvement" in her low back symptoms following the injection at L3-4 (which Dr. Zaslavsky has indicated is a typographical error) as well as "moderate sustained improvement." Dr. Piccioni would only characterize this improvement as mild.

Also inconsistent, Claimant's radicular complaints with all practitioners seemed to strongly focus on the left leg prior to January 2019; if anything, they were bilateral before that,

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with the right leg never having been more painful than the left. The records of Dr. Grossinger, Dr. Francis, MedExpress and others all focused on left-sided leg complaints. This was also the case during Dr. Piccioni's two DMEs. However, Dr. Zaslavsky's January 29, 2019 record is indicative of Claimant's radicular complaints radiating to the right anterior thigh, posterior calf, lateral calf and medial calf. All of Dr. Zaslavsky's findings on exam in January 2019 were right-sided with no significant left-sided findings at all. Notably, Claimant also rated her pain at nine out of 10 on this date yet she was reportedly working light duty. Pain rated at nine out of 10 is inconsistent with a person that could even work light duty. Additionally, the record further reads: "she denies any back problems prior to December 12, 2017. Normal aches and pains, but never treated."

There was no mention of any sign of radiculopathy at the L2-3 level on the March 2019 EMG. Again, in order to believe Dr. Zaslavsky's testimony that the finding at L4-L5 on the left was coming from a downstream chemical radiculopathy at L2-3, there would have to be a jumping of the levels. Further, both the right and left sides would also have to now be involved.

Dr. Piccioni turned to the May 2018 DME. At this DME, Claimant stated that she did not have any prior back problems. Dr. Piccioni pointed out to her that he had records of previous low back treatment and she stated that she had been treated in the past but was not having any ongoing complaints at the time of the accident. She also denied any new injuries since the December 2017 work accident. She was having chiropractic care, taking an anti-inflammatory and pain medication and had had injections. She had a 20-pound lifting restriction. She had not yet had a surgical consultation. She complained of pain at nine out of 10.

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On physical examination, she had a normal neurologic examination. She reported that 90 percent of her pain was in the back with ten percent in the leg. She noted that the pain radiated to the ankle but she had no foot symptoms. Again, that would not be consistent with an L5 radiculopathy. She walked with no limp or list and her gait was normal. There was no sign of spasm. In some ways, this examination was better than her earlier examination.

Dr. Piccioni addressed the January 2019 DME. Since the prior DME, Dr. Sugarman told Claimant (in June 2018) that she was not a surgical candidate. Her work restrictions were the same. Again, she denied any new injuries since December 2017. Her pain was rated at eight out of 10 in the lumbar area and she had no left leg pain, numbness or tingling at the time of the exam. Notably, Claimant stated that she had two injections subsequent to the discogram but they gave her very little relief, very short-term at best. She had had no further injections. This is regarding the injections Dr. Witherell refers to as L3-4 but Dr. Zaslavsky believes to have been located at L2-3.

Claimant's physical examination was completely normal neurologically in terms of strength, sensation and straight leg raising. Further, given the amount of pain and treatment she has had one would expect some atrophy due to disuse or relating to neurologic compromise, but there was no sign of atrophy.

Dr. Piccioni was questioned about Claimant's three prior workers' compensation back injuries as compared to whether there was a new injury due to an untoward event occurring on December 12, 2017. The L2-3 level was already known radiologically to be a problem in the lumbar spine. To a reasonable degree of medical probability, Dr. Piccioni opined that there was a possibility that a minor lumbar sprain was sustained in terms of the December 2017 work accident. However, the patient's symptomatology, which does not meet any objective criteria,

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far exceeds what would be expected. There is some concern about the patient's pre-existing, chronic lumbar spine problems, which are not significantly disposed to either the neurological group, Dr. Witherell's records or the December 13, 2017 PCP's notes, which fail to reconcile that there was any significant injury occurring the day before.

Additionally, Dr. Piccioni does not believe that the pain generator has been adequately identified. Claimant has had multiple diagnostic injections. Her subjective complaints are still markedly over her objective findings. Her

January 2019 examination comports with a normal neurologic examination. There is an EMG from a neurologist stating that she has an L5 radiculopathy. There is an MRI, which shows an L2-3 disc problem but is not competent to cause any significant foraminal or spinal stenosis, and certainly not an L5 radiculopathy. A June 2018 neurological evaluation states that her problem is not lumbar spine-related, but primarily SI joint related. However, two diagnostic injections did not show any evidence of an SI joint problem. She was recommended to the neurosurgeon for further surgical consultation. Claimant was then seen by a pain management specialist for which a five-level discogram found a pain concordant at the L3-4 level which, again, would not cause an L5 radiculopathy and is not associated with an L2-3 level problem. Neither of her DMEs, nor her records from Dr. Witherell and Dr. Sugarman, comport with any true objective radiculopathy down either leg. Instead, she has fleeting and differing symptomatology from history to physical examination.

In sum, despite all of the testing and all of the records from various practitioners, including examinations with her treating doctors, none comports with a specific lesion at one specific area. Thus, there is no sufficient proof of a new injury to the L2-3 level. To a degree of reasonable medical probability, Dr. Piccioni disagrees that the L2-3 disc herniation associated

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with the annular tear is a new lesion or that it associates with a December 12, 2017 work accident. In rendering such an opinion, he also considers the following prior to the December 2017 work accident: her documented 30 year history of back pain; a February 2012 report indicative of a permanent disability with recommendations for an MRI, EMG and pain management; her two accidents in 2015; and her accident in 2016 with radiology noting an L2-3 problem and issues with squatting, spasm, weakness on physical examination and pain complaints between four and seven out of 10. Dr. Piccioni opined that all of this strengthens his opinion that there was no acute injury at L2-3 related to the December 12, 2017 work accident.

On cross examination, Dr. Piccioni testified that he does not believe that his opinions would change in this case regardless of whether Claimant was forcibly pulled down to the floor or whether she gently assisted someone down to the floor. He agreed that either of these scenarios would provide the setting for a potential injury.

Dr. Piccioni was questioned about his second DME report. He agreed that the report states that it is his opinion that Claimant had sufficiently recovered from any alleged injury, if it even occurred, on December 12, 2017

in relation to this event. He explained that he focused largely on the PCP record of December 13, 2017 in which there was an extensive history and physical examination taken with absolutely no evidence of a work related injury from the day before nor any evidence of any chronic lumbar spine problems. His opinion is that even if Claimant was injured that day she possibly had it resolved that same day--or two days later--once she was provided with an injection and some medication at MedExpress. However, it is tough for him to reconcile coming in for a comprehensive physical examination the day after the injury with no lumbar spine complaints. He admitted that she was a brand-new patient

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being transitioned to care as opposed to seeing a spine specialist. However, Dr. Piccioni added that, if you look at her history to the PCP, she states that she had an injury to the ankle in 2009 yet she mentioned no problems related to her back. This is despite the fact that other practitioners have shown that she mentions back pain going as far back as her college days. Again, there was no evidence on the PCP's physical examination that she was in any kind of distress that would alert someone to a back injury.

Dr. Piccioni testified that inflammation could relate to either acute or chronic injuries. Typically, inflammation is acute, but it could be either. The use of Toradol as an anti-inflammatory for acute pain would be a proper medical procedure.

Dr. Piccioni confirmed that, to a reasonable degree of medical probability, he could not state that there was an injury on December 12, 2017.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Legal Causation Standard

The Delaware Workers' Compensation Act states that employees are entitled to compensation "for personal injury or death by accident arising out of and in the course of employment."¹⁰ Because Claimant has filed the current petition, she has the burden of proof.¹¹

Primarily, the Board notes that it is not uncommon for a worker to sustain a work injury resulting in a permanent condition but not so serious as to render the worker totally disabled from any and all employment. As such, the worker continues to work, potentially with a different employer. The question then arises as to where responsibility lies if that worker

becomes symptomatic while working for a new employer. The Supreme Court has held that

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liability will only shift to a second employer where there has, as a result of a second accident, either been a new injury or a "worsening of a previous injury attributable to an untoward event."¹² Stated another way, responsibility is placed "on the carrier on the risk at the time of the initial injury when the claimant, with continuing symptoms and disability, sustains a further injury unaccompanied by an intervening or untoward event which could be deemed the proximate cause of the new condition."¹³ It is not a question of whether an "unusual exertion is present but whether a genuine intervening event has occurred which brings out "a worsening of a previous injury."¹⁴ To shift responsibility from the first employer onto a subsequent employer, there must be "a second accident or event, beyond the normal duties of employment."¹⁵

While it has been suggested that the *Nally* rule complicates these situations, the Board, however, has recognized the wisdom behind the rule.¹⁶ The standard was deliberately designed by the Supreme Court to ensure that liability does *not* shift to a later employer or carrier unless there has been a true, substantial subsequent accident that can fairly be said to have broken the chain of causation from the original work accident.¹⁷ An obvious reason for the *Nally* standard is because any existing chronic injury is liable to wax and wane. If a subsequent employer will have to assume liability for the entire condition whenever some work activity causes a flare-up of the condition, it would be a strong disincentive for any employer to hire an employee who had been injured in a prior work accident. It would also complicate the process of getting medical care if the insurer on the risk for a physical condition could shift responsibility with

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each new flare-up. Thus, the *Nally* standard was carefully crafted to prevent such an undesirable result.¹⁸

With all of this in mind, the Board notes that this case presents a different posture from the typical case where employers faces off as to which entity has responsibility following a subsequent incident. It is perhaps even more unusual here that Claimant wishes to have the Board find that she suffered a "genuine intervening event" that shifts the burden to Employer because she previously commuted her right to future benefits in regard to her prior injuries/employers. Notably, the Board has previously addressed

the issue of how to analyze such a case. In *Pautler v. Pep Boys*, the Board determined that:

"When there is an acknowledged compensable work injury...future compensation for that injury "must be determined exclusively by an application of the 'but for' standard of proximate cause¹⁹...Further flare-ups or exacerbations of that injury are compensable using the "but for" standard. As the Supreme Court implied in *Nally*, when there is a subsequent work event, there is a legal presumption that compensability remains connected to and based on that first accident unless it is shown that there has been a "genuine intervening event" sufficient to shift compensability to the subsequent accident.

Pautler v. Pep Boys, Del. IAB, Hearing Nos. 1221791 & 1413268 (Sept. 23, 2015)(ORDER) citing *Nally*, 630A.2d 640.*Nally*, 630 A.2d at 645-46. In *Pautler*, the Board recognized that there are scenarios where a claimant might wish to link compensability to a subsequent accident, such as when the compensation rate would be higher in relation to the later event, where a claimant wants to start a new 300-week period of partial disability or, as here, where a

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claimant has already commuted the right to future benefits with respect to a first injury. In this regard, the Board Order in *Pautler* indicated that:

If a claimant, who has a compensable claim based on the first accident, wishes to shift compensability to a later accident, then that claimant must establish a "new" injury to break the "but for" chain of causation from the original injury using a *Nally*-like standard...[T]he Board believes that this rule ensures that all claimants are treated equally regardless of the insurance status of the employer and preserves the validity and scope of commutation settlements while, at the same time, preserving a basis for compensation to a claimant who may have a prior work injury that is not a viable Delaware claim for reasons other than the claimant's own voluntary actions (such as because of the expiration of the statute of limitations).

The Board notes that *Nally* requires more than just a subsequent event—there needs to be a new injury or worsening of a prior injury beyond a mere return of pain or symptoms.²⁰ As the *Pautler* Board recognized in its September 23, 2015 Order:

This is a reasonable standard: if a current condition is simply a flare-up or exacerbation of an existing condition, as a realistic matter it still remains the original injury. Liability should only shift if the subsequent event causes something new—a truly "new injury" or "new condition" that can reasonably be deemed the responsibility of whoever is on the risk of that new injury.

Pautler v. Pep Boys, Del. IAB, Hearing Nos. 1221791 & 1413268 at p. 8 (Sept. 23, 2015)(ORDER).

Compensability

The Board thoughtfully considered this case with the *Nally* standard in mind, along with the knowledge that the scenario presented here is very similar to that presented in *Pautler*. As the Supreme Court implied in *Nally*, when there is a subsequent work event, there is a legal presumption that compensability remains connected to and based on that first accident unless it

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is shown that there has been a "genuine intervening event" sufficient to shift compensability to a subsequent accident.²¹ Likewise, as stated in *Pautler*, if a current condition is simply a flare-up or exacerbation of an existing condition, realistically, it still remains the original injury. Liability should only shift if the subsequent event causes something new—a truly "new injury" or "new condition" that can reasonably be deemed the responsibility of whoever is on the risk of that new injury.²²

After a thorough review of the evidence, the Board concludes that the December 2017 incident, at most, resulted in a temporary flare-up or exacerbation of Claimant's existing low back condition that did not result in a new injury or worsening of such; thus, the Board finds that the December 2017 incident was not a genuine intervening event. In so finding, allowing that Claimant sustained a flare-up or exacerbation in relation to the December 12, 2017 incident, it was simply a flare up of Claimant's preexisting condition with no new injury. Thus, this flare up was not significant enough to break the chain of causation from Claimant's prior low back injuries. In reaching this conclusion, the Board did not find Dr. Francis's or Dr. Zaslavsky's opinions to be persuasive and, instead, found Dr. Piccioni to be most convincing. The Board also did not find Claimant entirely credible.

First, the Board did not find Dr. Francis's opinion persuasive that Claimant sustained an injury to L2-3 in relation to this incident. Dr.

Francis's impression of the mechanism of Claimant's injury does not appear to be completely accurate. He relied on a version of the mechanism of injury in which Claimant was alone with a patient. He testified that, to his knowledge, Claimant had borne the weight of a falling patient, with Claimant suffering a violent torqueing and jerking motion of the low back in the process. As will be discussed later,

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the Board did not find Claimant credible in this regard, particularly in that she failed to mention that Ms. Dunham was also helping her to hold the patient up. It also appears that Claimant did not mention Ms. Dunham's assistance to Dr. Francis. Thus, Dr. Francis seems to have relied on an inaccurate mechanism of injury where Claimant alone had borne the entire weight of a collapsing patient and violently torqued and jerked her back in the process. In this regard, the Board believed Ms. Dunham that, together, she and Claimant had instead gently lowered the patient to the floor.

The Board also notes that Dr. Francis additionally based his causation opinion on the notion that Claimant essentially had an asymptomatic low back prior to this work accident, which was also not convincing. He testified that Claimant's prior low back condition was one in which she received maintenance "more or less" on an "as-needed basis only." He testified that Claimant's low back was essentially asymptomatic prior to this incident because she was not actively treating. He based this conclusion on the fact that she had not seen her chiropractor since October 19, 2017, while she suffered this work accident on December 12, 2017. Dr. Francis indicated that he did not believe that Claimant was actively treating at the time of the work accident because she had not treated "in over two months." Dr. Francis opined that Claimant's L2-3 condition causally relates to the December 2017 incident because if the condition were preexisting, she would have required treatment more frequently than on an as-needed basis and her pain would be rated higher than 2 out of 10; in fact, he testified that he believed that Claimant's low back condition had "resolved" following her 2011, 2015 and 2016 injuries. The Board notes that Dr. Francis holds these opinions despite several prior low back injuries and incidents as well as preexisting diagnostic studies indicative of widespread degeneration, including at the L2-3 level.

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After reviewing the evidence, the Board was not convinced by Dr. Francis that Claimant's preexisting low back treatment records reflected a resolved condition. Notably, Claimant was rated for a 5 percent lumbar spine permanent impairment by Dr. Patel in January 2018 (in relation to her 2015 accidents), about a month after this incident. A preexisting

permanent low back impairment is inherently inconsistent with a "resolved" condition. Claimant herself testified that she was receiving low back chiropractic treatment about once or twice per month prior to this incident. While it does appear that no November 2017 appointment took place for whatever reason, the Board was not convinced that this small gap that Dr. Francis regarded as "over two months" meant that Claimant had a resolved low back condition or that she did not require active treatment. Instead, the Board found Dr. Piccioni very convincing that Claimant's medical records in the October 2017 timeframe, shortly prior to the work accident, reflect low back complaints of 4 out of 10 pain, fifty percent of the time, and reports of increasing low back symptoms. Thus, the Board did not find Dr. Francis convincing in this regard.

Dr. Francis's opinion that Claimant could not have had this condition at L2-3 prior to December 12, 2017 was also not convincing. If Claimant *had* sustained the L2-3 injury in relation to this incident, she still finished her entire work shift. She then saw her new PCP the following day for a prescheduled extensive intake interview and physical examination with no indication that she reported to her PCP either a low back injury or work accident having occurred the day before. Further, the medical notes from the extensive physical exam that took place that day were not reflective of a low back injury or abnormality. Claimant also helped Ms. Dunham lift an 8-foot table two days after this incident. She then sought treatment at MedExpress that same day complaining of 2 out of 10 pain. She delayed any further treatment

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until January 10, 2018, for Dr. Francis's prescheduled visit. Claimant testified that she did not seek any further treatment during the interim because she knew the prescheduled appointment was forthcoming; however, the Board felt that this pattern was also consistent with the frequency of low back treatment she normally would have received before this incident. In any case, she did not seek out her PCP or present for emergency treatment during this gap in time. The Board felt that Claimant's pattern of low back treatment directly following this incident did not significantly change from that which she had prior to the accident. Thus, Dr. Francis's testimony that Claimant could not have had this condition prior to December 12, 2017 was also not persuasive.

On Claimant's behalf, the Board also did not find Dr. Zaslavsky's opinion to be convincing. Dr. Zaslavsky opined that, as a result of a sudden and violent incident,²³ Claimant sustained a large annular tear with extrusion of disc material acutely at L2-3. He opined that this annular tear led to radiculopathy into her right leg, causing total disability. However, Dr.

Piccioni pointed out that there was no mention of any sign of radiculopathy at the L2-3 level on the March 2019 EMG; instead, an L5 radiculopathy was indicated. He further explained that there is no scientific basis for Dr. Zaslavsky's opinion that an annular tear at L2-3 would cause chemical radiculopathy to move all the way downward, even jumping a couple of levels to L5. He explained that if there is a chemical irritation from an annular tear, it would lead to radiculitis, not radiculopathy. Further, a chemical irritation would never jump levels; here, the leakage of material from L2-3 would have had to skip the L3 and the L4 levels to get to the L5

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nerve, and Dr. Piccioni opined that there is no scientific basis or logical sense to support this theory.

Dr. Piccioni was additionally persuasive that Dr. Zaslavsky's theory of causation further fails because both lower extremities would now also have to be involved, and this is not the case; instead, Claimant's radicular complaints appeared to have jumped from the left side to the right side by the January 2019 timeframe. Dr. Piccioni testified that his review of the records showed that Claimant's radicular complaints with all of the medical practitioners seemed strongly focused on the left leg prior to January 2019; before that, if anything, there were bilateral symptoms, never with a report that the right leg was more painful than the left. Dr. Grossinger's records, Dr. Francis's records, the MedExpress records and other records all focused on left-sided leg complaints. Notably, Claimant's complaints during Dr. Piccioni's two DMEs were also focused on the left side. However, Dr. Zaslavsky's January 29, 2019 record is indicative of Claimant's radicular complaints radiating to the right thigh and calf; there were no significant left-sided findings at all.

Dr. Piccioni was also persuasive that Dr. Zaslavsky's opinion was faulty that Claimant had suffered an acute injury at L2-3 during this incident evidenced by a CT scan nine months afterward showing leakage of disc material. Dr. Piccioni noted that this finding does not pinpoint timing because this disc leakage could have been there for years. He added that there is nothing indicative of an acute condition in the December 2017 timeframe, particularly as a CT discogram cannot tell the acuteness of an injury. Further, Dr. Piccioni also noted that it was contradictory for Dr. Zaslavsky to testify that it was normal for edema to be gone three weeks post-injury, an indication of healing, while also testifying that this was an acute tear based on

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leakage shown nine months after the alleged injury. For all of these reasons, the Board also did not find Dr. Zaslavsky's theory of causation persuasive.

Conversely, the Board found Dr. Piccioni's opinion in this case to be very convincing. In terms of causation of the L2-3 condition, he testified that Claimant had three prior back injuries and that the L2-3 level was already pinpointed radiologically as problematic prior to December 2017. Notably, while Dr. Francis and Dr. Zaslavsky have focused on L2-3 to a point where surgery has been recommended, Dr. Piccioni was further persuasive that Claimant's pain generator has not been adequately identified. Claimant has had multiple diagnostic injections, though her subjective complaints are still markedly above her objective findings. Her January 2019 examination was normal neurologically. An EMG indicated that she has an L5 radiculopathy, though an MRI shows an L2-3 disc problem that is not competent to cause any significant foraminal or spinal stenosis, or an L5 radiculopathy. A June 2018 neurological evaluation led to a suspicion that her problem was not lumbar spine related but primarily SI joint related, though two diagnostic injections did not show any evidence of an SI joint problem. A five-level discogram found pain concordant at the L3-4 level, which would not cause an L5 radiculopathy or be associated with an L2-3 level problem. Dr. Witherell's records were indicative of injections at L3-4 as opposed to L2-3, with no definitive clarification of typographical error.²⁴ Dr. Piccioni further noted that neither of Claimant's May 2018 or January 2019 DMEs, nor her records from Dr. Witherell nor Dr. Sugarman, comport with a true objective radiculopathy down either leg. He testified that Claimant instead has fleeting and differing symptomatology when her history is compared to her physical examinations. Dr.

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Piccioni concluded that none of the testing or the records from various practitioners, including examinations with Claimant's own treating doctors, comport with a specific lesion at one specific area. Thus, he opined that there is neither sufficient proof of a new injury to the L2-3 level in relation to the December 12, 2017 incident, nor clarity that L2-3 is even her pain generator.²⁵

For all of the aforementioned reasons, the Board concluded that Claimant has failed in her burden to show that the December 12, 2017 work incident was a genuine intervening event sufficient to break the chain of causation from Claimant's original and preexisting low back injuries/condition(s).

Extent of Low Back Injury Sustained

As already indicated, in this case the Board found Dr. Piccioni most persuasive. As to whether *any* injury was incurred on December 12, 2017, Dr. Piccioni opined that, at most, Claimant possibly sustained a minor lumbar sprain. However, he even found this concession problematic as, in his view, Claimant's symptomatology far exceeds what would be expected. Dr. Piccioni also found it inconceivable that Claimant had an extensive intake interview with a new PCP the day following the work accident with no mention in that record of her having sustained a back injury the day before. Further problematic, this record does not contain any indication of an injury or abnormality following a comprehensive physical examination. It was notable to the Board that Claimant's prior ankle surgery was mentioned in this record, yet there

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was no mention of a back injury occurring the day before. Like Dr. Piccioni, the Board also found this problematic.

Further, the Board notes that Claimant did not seek treatment until two days after the work accident, when she presented to MedExpress. Additionally, as already noted, her version of the incident itself before the Board made it sound much more traumatic than Ms. Dunham's version. Claimant's accounting indicated a violent torqueing and jerking motion, while Ms. Dunham testified that she and Claimant were on each side of the patient and had gently lowered her to the floor. Notably, Claimant's version of the event did not even include Ms. Dunham's assistance. It was also problematic that Ms. Dunham testified that two days after the work accident, the same day that Claimant sought medical treatment at MedExpress for this injury, she had also helped Ms. Dunham lift and move an 8-foot table.

The Board also must state that it was troubling that Claimant received an evaluation for permanent impairment in January 2018, about a month after this incident, for low back injuries sustained in unrelated 2015 accidents occurring with a different employer. Claimant commuted her right to future benefits via two agreements in three separate cases, all of which included low back injuries, with each agreement signed and approved after the accident in question. Thus, there is motivation here to prove that any such current low back condition causally relates to a "new" injury.

With all of this in mind, the question that remains is whether Claimant's low back was injured at all in relation to this incident. The Board again found Dr. Piccioni most persuasive in this regard. Dr. Piccioni testified that if Claimant was injured in the incident, at most, she suffered a lumbar strain that resolved back to Claimant's baseline low back condition the same day or

a few days after the work incident. He noted that any injury had likely resolved once

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Claimant was provided medication and an injection at MedExpress. This would explain why Claimant did not need to seek treatment with Dr. Francis, or any other medical provider, between the time of the MedExpress visit on December 14, 2017 and January 10, 2018, the prescheduled Dr. Francis appointment. The Board did have concerns with the extent of Claimant's injury; however, after a review of the evidence, to include the fact that Claimant did report an injury within two days and received medication and injection treatment at MedExpress, the Board concludes that she proved that she suffered a temporary low back strain in relation to the December 12, 2017 incident. Dr. Piccioni acknowledged that this was possible. The Board finds that only a temporary lumbar strain was proven. The Board was not convinced that anything more than a mild flare-up/temporary strain of Claimant's preexisting low back condition had occurred in relation to this incident.

Thus, in accordance with Dr. Piccioni's opinion, the Board concludes that Claimant's medical treatment at MedExpress on December 14, 2017 is compensable in relation to a lumbar strain that resolved back to her baseline condition on or about that same date.²⁶ Any treatment after December 14, 2017, including Dr. Zaslavsky's surgical recommendation, is not compensable as the Board was not convinced of an ongoing low back condition causally relating to the December 12, 2017 incident. As has already been stated, the Board was not convinced that any such injury sustained on December 12, 2017 was a genuine intervening event or significant enough to break the chain of causation regarding her preexisting low back condition.

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Attorney's Fee & Medical Witness Fee

A claimant who is awarded compensation is entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller." DEL. CODE ANN. tit. 19, § 2320. At the current time, the maximum based on Delaware's average weekly wage calculates to \$10,888.40. The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55 (Del. 1973). Less than the maximum fee may be awarded and consideration of the *Cox* factors does not prevent the granting of a nominal or minimal fee in an appropriate case, so long as some fee is

awarded.²⁷ A "reasonable" fee does not generally mean a generous fee.²⁸ Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation.

Claimant's counsel submitted an affidavit stating that at least 16 hours were spent preparing for this hearing. The hearing itself lasted about 2.75 hours. Claimant's counsel was admitted to the Delaware Bar in 2016, and is experienced in the area of workers' compensation litigation, a specialized area of the law. Claimant's first contact with counsel was in April 2017, so counsel has represented Claimant for over two years. This case was of average to above average complexity, involving no unusual question of fact or law. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances. There is no evidence that accepting Claimant's case precluded counsel from other employment. Counsel's fee arrangement with Claimant is on a contingency basis.

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Counsel does not expect a fee from any other source. There is no evidence that the employer lacks the ability to pay a fee.

Taking into consideration the fees customarily charged in this locality for such services as were rendered by Claimant's counsel and the factors set forth above, as well as the degree of Claimant's success in this case, the Board finds that an attorney's fee in the amount of \$500.00 is reasonable.²⁹

Having been partially successful in her petition, Claimant is also entitled to have her medical witness fees taxed as a cost against Employer pursuant to title 19, section 2322 of the Delaware Code.

STATEMENT OF THE DETERMINATION

Accordingly, for the reasons stated above, the Board **GRANTS IN PART** Claimant's petition and finds that Claimant suffered a lumbar sprain injury in relation to a work accident that occurred on December 12, 2017. However, the Board concluded that the injury was a temporary lumbar strain and that Claimant returned to baseline shortly thereafter; the petition is **DENIED IN PART** as the Board concluded that the December 12, 2017 incident was not a genuine intervening event that broke the chain of causation from Claimant's prior low back injuries. Accordingly, Claimant is granted payment of her medical expenses in relation to the December 14, 2017 MedExpress visit, but all medical treatment afterward, to include the recommendation for surgery, is not compensable.

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Having received an award, Claimant is awarded payment of a reasonable attorney's fee in the amount of \$500.00, as well as payment of her medical witness fees in accordance with 19 *Del. C.* § 2322(e).

IT IS SO ORDERED this 23RD day of January, 2020.

INDUSTRIAL ACCIDENT BOARD

/s/ _____
MARK MUROWANY

/s/ _____
ROBERT J. MITCHELL

I, Kimberly A. Wilson, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

/s/ _____

Mailed Date: 1-24-20

/s/ _____
OWC Staff

Notes:

¹ Claimant noted that this would be less any credit provided for short-term disability paid by an Employer-funded policy from March 5, 2019 through June 16, 2019 - total payment of \$5,774.25.

² Employer objected to any testimony regarding a failed job search as no such information was provided in advance of the hearing. Claimant agreed to withdraw any such claim of displacement.

³ The commutation of Claimant's November 11, 2015 and November 23, 2015 claims involving injuries to the right knee, left knee and low back," with a lump sum payment of \$20,000 before attorney's fees, was approved by the Board on March 14, 2019. This agreement was marked into evidence as Employer's Exhibit #1.

Likewise, the commutation of Claimant's September 28, 2016 claim involving an injury to the "right shoulder, neck, low back and right lower extremity," with a lump sum payment of \$20,000 before attorney's fees, was

approved by the Board on December 21, 2018. This agreement was marked into evidence as Employer's Exhibit #2.

⁴. Dr. Francis's deposition was marked into evidence as Claimant's Exhibit #1.

⁵. Dr. Francis testified that his office closes between Christmas and New Year's every year. There is only one other part-time doctor in Dr. Francis's office. Therefore, it can be difficult to bring in new patients at that time of year.

⁶. Dr. Zaslavsky's deposition was marked into evidence as Claimant's Exhibit #2.

⁷. Claimant objected to testimony regarding the nurse's note as it was not produced to Claimant outside of thirty days of the hearing. Employer agreed that it had been provided approximately two weeks prior to the hearing. The Board overruled the objection, concluding that while not outside of thirty days, Claimant had ample time (about two weeks) to review the short note. The statement was marked into evidence as Employer's Exhibit #3. The statement entitled "Nurse's Notes" was dated December 14, 2017 and states:

"This morning Karen Jack, Activities Director, informed this nurse that she was having to go see a chiropractor for her back and that she has been taking Advil for back pain. This nurse ask[ed] her if she had seen a doctor since [the] incident on Tue[sday] 12/12/17 and she stated "No, I haven't and it's probably too late to file for workman's comp." I instructed Karen to speak with Crystal Hunter, ADP Director. Karen then stated, "I don't want to be taking Advil forever." This nurse witnessed Karen squatting down looking into [a] kitchen cabinet. This nurse also assisted Karen [in] picking up and moving [an] 8-foot table in the Program Room per Karen's request to assist her with moving the table. Gina Dunham, LPN"

⁸. Dr. Piccioni's deposition was marked into evidence as Employer's Exhibit #4.

⁹. Dr. Piccioni also pointed out that Dr. Gordon's March 23, 2017 record also notes a "history of chronic low back pain since her college years." This was the same history provided to Concentra a couple of months earlier.

¹⁰. DEL. CODE ANN. tit. 19, § 2304.

¹¹. DEL. CODE ANN. tit. 29, § 10125(c).

^{12.} *Nally*, 630 A.2d at 645.

^{13.} *Id.* at 646.

^{14.} *Nally, id.* at 645.

^{15.} *Nally, id.* at 646.

^{16.} *See Delaware Supermarkets v. Same*, No. N12A-09-003, 2013 WL 3412055 at *7 (Del. Super. Ct., June 28, 2013).

^{17.} *Same v. Delaware Supermarkets*, Del. IAB, Hearing Nos. 1379438 & 1380625 at 8 n.3 (Apr. 21, 2014)(ORDER).

^{18.} The *Same* case was an example of a case with such an undesirable result. The claimant in *Same* was earning more for her first employer than she was earning at the time she was again injured in a "new intervening event" and a shift in liability to the second employer negatively impacted her compensation rate. *Same v. Delaware Supermarkets*, Del. IAB, Hearing Nos. 1379438 & 1380625 at 8 n.3 (Apr. 21, 2014)(ORDER). To prevent such an unfair result, *Nally* established a rule that intentionally makes it difficult to shift responsibility from the first employer to a subsequent employer.

^{19.} *State v. Steen*, 719 A.2d 930, 932 (emphasis in original).

^{20.} *See Nally*, 630 A.2d at 645 ("the question is not whether the employee's pain or other symptoms have returned but whether there has been a new injury or worsening of a previous injury attributable to an untoward event.")

^{21.} *Nally, id.*

^{22.} *Pautler, id.*

^{23.} The Board reiterates that it was not convinced that this incident was sudden and violent. Instead, the Board believed Ms. Dunham's testimony that she and Claimant, flanking the patient while supporting her, gently lowered her to the floor together. Ms. Dunham's testimony was not indicative of a mechanism of torqueing or jerking of the low back that Claimant claims, and the Board did not find Claimant credible in this regard. This was particularly the case as Claimant failed to mention Ms. Dunham's assistance during this event.

^{24.} Dr. Piccioni testified that even presuming that there were typographical errors and Dr. Witherell had provided the injections at L2-3, Dr. Zaslavsky's characterization of Claimant's injections as diagnostic in that they provided Claimant "great relief" is inaccurate. Dr. Piccioni noted that

the records show a minimal at best response, as Claimant's subjective pain rating went from 8 out of 10 to 7 out of ten.

²⁵ Dr. Piccioni summarized that the following bolstered his opinion that Claimant did not suffer an injury to L2-3 in relation to this work event: (1) Claimant had a thirty-year history of back pain as evidenced by two medical records in which Claimant reported back pain since her "college days;" (2) a February 2012 report was indicative of a permanent disability with recommendations for an MRI, EMG and pain management; (3) two accidents were sustained with low back injuries in 2015; (4) she had a subsequent accident in 2016 followed by a radiological notation of an L2-3 problem and issues with squatting, spasm and weakness on physical examination; (5) Claimant was not asymptomatic prior to the December 2017 work accident as she complained in October 2017 of pain fifty percent of the time, with increasing low back symptoms, which she rated at 4 out of 10. Dr. Piccioni opined that all of this strengthened his opinion that there was no new injury and/or worsening of Claimant's condition at L2-3 relating to the December 12, 2017 work incident, and the Board found his opinion convincing.

²⁶ Therefore, the MedExpress expenses shall be paid by Employer according to the fee schedule under title 19 of the *Delaware Code*, section 2322B.

²⁷ See *Heil v. Nationwide Mutual Insurance Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrst v. Kentmere Home*, No. 96A-01-005, 1996 WL 527213 at *6 (Del. Super. Ct., August 9, 1996).

²⁸ See *Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966).

²⁹ In this case, the attorney's fee reflects Claimant's success in regard to her petition. If the \$500.00 award exceeds thirty percent of the MedExpress bill, the attorney's fee shall instead equal thirty percent of the amount of that bill.

93 A.3d 655 (Table)
Unpublished Disposition
(The decision of the Court is referenced
in the Atlantic Reporter in a ‘Table of
Decisions Without Published Opinions.’)
Supreme Court of Delaware.

Joseph WHITNEY,
Claimant Below–Appellant,
v.
BEARING CONSTRUCTION,
INC., Employer Below–Appellee.

No. 496, 2013.

|
Submitted: April 23, 2014.

|
Decided: May 30, 2014.

Synopsis

Background: Workers' compensation claimant filed a petition to determine additional compensation due, seeking disability benefits and medical expenses. The Industrial Accident Board determined that claimant's disability was the result of his prior work injury, and employer appealed. The Superior Court, Sussex County, reversed, and claimant appealed.

The Supreme Court held that substantial evidence supported Board's finding that claimant's current condition was the result of his original work injury.

Reversed and remanded.

Court Below: Superior Court of the State of Delaware, in and for Sussex County, C.A. No. S13A–01–004.

Before BERGER, JACOBS, and RIDGELY, Justices.

ORDER

HENRY duPONT RIDGELY, Justice.

*1 On this 30th day of May 2014, it appears to the Court that:

(1) Claimant/Appellee–Below/Appellant Joseph Whitney appeals from a Superior Court decision in favor of Employer/Appellant–Below/Appellee Bearing Construction, Inc. (“Bearing”), reversing the decision of the Industrial Accident Board (the “Board” or “IAB”). Whitney raises one claim on appeal. He contends that the Superior Court erred when it found that there was insufficient evidence to support the Board's determination that his 2005 injury caused his current condition. We agree. Accordingly, we reverse the decision of the Superior Court and remand with instruction to reinstate the decision of the Board.

(2) In 2005, Whitney suffered an injury to his back while working for Bearing as a pipe layer/laborer. He had surgery on his back and was out of work through February 2006. Upon his return, Whitney was able to work without any restrictions. Thereafter, Whitney left Bearing and worked in several other construction jobs laying pipe. He had some residual pain but was able to continue working.

(3) In 2010, Whitney experienced three minor injuries to his back for which he sought treatment (the “2010 Incidents”). In June, Whitney was riding in a dump truck on uneven ground while working for another employer. Due to the bumpy ride, Whitney had an aggravation and sought medical treatment. Whitney returned to work after a one-day leave but was restricted from driving a dump truck. In August, Whitney was in an automobile accident, for which Whitney sought treatment on his back. His doctor described the incident as an aggravation. Finally in September, Whitney went to the Emergency Room complaining of back pain after lifting a child and some camping equipment.

(4) Beginning in 2011, Whitney started working as a pipe layer for Dixie Construction. Whitney continued treatment with Dr. Uday Uthaman, a board-certified pain management physician. Whitney told Dr. Uthaman that he was experiencing increasing lower back pain and leg pain. Even though Whitney told Dr. Uthaman about the 2005 injury and the surgeries, there is nothing in the record indicating that he told Dr. Uthaman about the 2010 Incidents. Dr. Uthaman provided some treatment, but by May 2012 Whitney left Dixie Construction because he could no longer take the pain from the demanding physical labor. Thereafter, Dr. Uthaman advised Whitney to seek out a job that was less demanding physically. Whitney then obtained a temporary position at Playtex operating a forklift.

(5) In 2012, Whitney filed a Petition to Determine Additional Compensation Due with the Board, seeking disability benefits and medical expenses. Dr. Uthaman provided

expert testimony in support of Whitney's petition. Bearing retained Dr. Lawrence Piccioni, a board-certified orthopedic surgeon, who took Whitney's medical records and initially concluded that Whitney's 2012 disability was the result of the 2005 injury. But after further review of Whitney's medical history, Dr. Piccioni changed his conclusion and found that the 2010 Incidents, which aggravated Whitney's back, actually caused the 2012 disability. After hearing from both experts, the Board determined that Whitney's disability was the result of his 2005 injury. The Board further found that the 2010 Incidents were insignificant and could not account for Whitney's current condition.

*2 (6) Bearing appealed the Board's decision to the Superior Court. The Superior Court reversed, finding that there was insufficient evidence to support Dr. Uthaman's testimony. The court's decision was based on the fact that Dr. Uthaman did not address or appear to know about the 2010 Incidents, and thus no reasonable mind could rely upon his opinion to conclude that the injuries were related to Whitney's initial injury in 2005. This appeal followed.

(7) On appeal, Whitney argues that the decision of the IAB was free of legal error, supported by substantial evidence, and should not have been reversed by the Superior Court. Industrial Accident Board decisions are reviewed using the same standard at both the Superior Court and the Supreme Court.¹ We review legal issues decided by the Board *de novo* and “factual findings to determine whether they are supported by substantial evidence.”² “Substantial evidence equates to ‘such relevant

evidence as a reasonable mind might accept as adequate to support a conclusion.’³ But a reviewing court “does not weigh evidence, resolve questions of credibility, or make its own factual findings.”⁴ Further, both this Court and the Superior Court “must view the record in the light most favorable to the prevailing party below.”⁵

(8) The Board's finding of fact is given a high level of deference at both the Superior Court and Supreme Court. Overturning a factual finding of the Board may only be done “when there is no satisfactory proof in favor of such a determination.”⁶ “[A]n award cannot stand on medical testimony alone, if the medical testimony shows nothing more than a mere possibility that the injury is related to the accident.”⁷ But expert medical testimony supplemented by “other credible evidence tending to show that the injury occurred directly after the trauma and without interruption” is sufficient evidence to uphold the Board's decision.⁸ This supplemental evidence can include knowledgeable lay witness testimony.⁹

(9) In *Steppi v. Conti Electric, Inc.*, we stated that the absence of evidence, as long as it is considered by the Board, is not necessarily dispositive of a particular issue.¹⁰ The Board is free to make its own inferences, weigh evidence, determine questions of credibility, and make its own factual findings and conclusions.¹¹ “Furthermore, the IAB may adopt the opinion testimony of one expert over another; and that opinion, if adopted, will constitute substantial evidence for purposes

of appellate review. Similarly, the IAB may accept or reject an expert's testimony in whole or in part.”¹² When medical testimony is supplemented by other creditable evidence, such evidence is sufficient to sustain an award under the substantial evidence standard.¹³

(10) In *Standard Distributing Co. v. Nally*, this Court reiterated the “last injurious exposure” rule, which considered the appropriate methodology for determining successive carrier responsibility where an employer alleges that a new episode of an industrial accident resulted in a changed physical condition for which the second carrier should be liable.¹⁴ As we explained, the burden of proving a causative effect of a second event in a recurrence/aggravation dispute is upon the initial employer or insurer seeking to shift responsibility for the consequences of an original injury.¹⁵ Thus, where an entity is found to be liable for an earlier injury, that same entity will be liable for a recurrence/aggravation where the claimant “with continuing symptoms and disability” carries his or her burden that the original injury caused the complained-of condition.¹⁶ But where the employer or carrier proves that the claimant suffered “a subsequent industrial accident resulting in an aggravation of his physical condition” that could be the proximate cause of the claimant's condition, then liability shifts to the successor entity.¹⁷

*3 (11) Whitney argues that the record contains sufficient evidence to support the Board's conclusion that his 2005 injury led to his lost earning capacity in 2012 and that the 2010 Incidents did not cause his back problems. Dr. Uthaman, Whitney's expert, explained that

Whitney's complaints were consistent with his 2005 injury. This opinion was based on electromyography, MRI testing, and Whitney's patient history. The 2012 report by Dr. Piccioni, Bearing's expert, also stated that Whitney's 2012 disability was related to his 2005 injury. According to Whitney, these two pieces of evidence are sufficient to support the Board's factual determination that his 2012 disability was the result of his 2005 injury.

(12) Bearing contends that this evidence is insufficient for a number of reasons. First, Bearing explains that there is no information in the record to indicate that Dr. Uthaman was aware of the 2010 Incidents that aggravated Whitney's back condition. In his deposition, Dr. Uthaman detailed the medical history provided by Whitney, which did not include any discussion of the 2010 Incidents. Second, Bearing notes that Dr. Piccioni changed his conclusion after a further review of Whitney's medical history, finding that the 2010 Incidents worsened Whitney's condition. Third, Bearing disputes the Board's factual findings that 2010 Incidents were only temporary aggravations because the only medical testimony related to the 2010 Incidents came from Dr. Piccioni. And Dr. Piccioni explained that the incidents were significant enough to cause an aggravation of Whitney's condition. Because this testimony was un rebutted, Bearing believes the Board's decision to the contrary cannot stand.

(13) The IAB considered the testimony of both Dr. Piccioni and Dr. Uthaman. The Board concluded that there was "insufficient evidence to find that Claimant's condition was worsened beyond a temporary aggravation by any of the three events."¹⁸ There is substantial evidence

to support the Board's factual finding that Whitney's post-2010 injuries were the result of his 2005 injury and that the 2010 Incidents did not contribute to his condition. Dr. Uthaman testified that Whitney's current condition is related to his original injury in 2005. Although Dr. Uthaman did not have knowledge of the 2010 Incidents, his testimony is supplemented by additional credible evidence. Whitney's MRI, which was taken after the 2010 Incidents, showed no structural changes in his physiology. Whitney also testified that he continued to experience symptoms after his surgery and before the 2010 Incidents. This is sufficient evidence to support the Board's finding that Whitney's condition was the result of his 2005 injury.

(14) Moreover, the record shows that Bearing failed to carry its burden of proving that the 2010 Incidents were subsequent events proximately causing Whitney's condition. Once Whitney carried his burden of proving that his condition in 2012 was the result of his 2005 injury, it was Bearing's burden under *Nally* to prove to the Board, as the trier of fact, that the 2010 Incidents proximately caused Whitney's condition in 2012. Because Bearing failed to carry its burden, we must uphold the Board's finding that the 2010 Incidents did not cause Whitney's injuries.

*4 (15) In making our determination to reverse, we are mindful of the limited review of an appellate court. The court must only determine if the Board's decision is supported by substantial evidence when viewed in the light most favorable to the prevailing party.¹⁹ A reviewing court does not weigh evidence or make credibility determinations.²⁰ The Board

chose to rely on the testimony of Dr. Uthaman, the results of the MRI, and Whitney's own testimony over the testimony of Dr. Piccioni. Although we do not condone the fact that Whitney kept information about the 2010 Incidents from Doctors Uthaman and Piccioni, the record indicates that the Board fully considered the 2010 Incidents and relied on substantial evidence to conclude that they were nothing more than temporary aggravations. “[T]he Board is entrusted to find the facts in any given case, and its findings of fact ‘must be affirmed if supported by any evidence,

even if the reviewing court thinks the evidence points the other way.’”²¹ For these reasons, we reverse and reinstate the IAB decision.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **REVERSED** and this matter is **REMANDED** with instruction to reinstate the decision of the Industrial Accident Board.

All Citations

93 A.3d 655 (Table), 2014 WL 2526484

Footnotes

- 1 *Wyatt v. Rescare Home Care*, 81 A.3d 1253, 1258 (Del.2013).
- 2 *Scheers v. Indep. Newspapers*, 832 A.2d 1244, 1246 (Del.2003) (citing *Keeler v. Metal Masters Foodservice Equip. Co.*, 712 A.2d 1004, 1005 (Del.1998) (per curiam)).
- 3 *Person–Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del.2009) (quoting *Olney v. Cooch*, 425 A.2d 610, 614 (Del.1981)).
- 4 *Scheers*, 832 A.2d at 1247 (citing *Alcoholic Beverage Control Comm’n v. Newsome*, 690 A.2d 906, 910 (Del.1996)).
- 5 *Wyatt*, 81 A.3d at 1258–59 (citing *Steppi v. Conti Elec., Inc.*, 991 A.2d 19, 2010 WL 718012, at *2 (Del.2010)).
- 6 *Id.* at 1259 (citing *Steppi*, 2010 WL 718012, at *2).
- 7 *Id.* (quoting *Gen. Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del.1960)).
- 8 *Id.* (quoting *Gen. Motors Corp.*, 164 A.2d at 688).
- 9 *Id.* (citing *Gen. Motors Corp.*, 164 A.2d at 689).
- 10 See *Steppi*, 2010 WL 718012, at *3. (“The absence of evidence ... was considered by the Board and found to not be dispositive. While the Board could have drawn an inference as the Superior Court did ... the testimony as a whole, including Claimant’s testimony, also allowed the inference [that was adopted by the Board].”).
- 11 *Id.*
- 12 *Person–Gaines*, 981 A.2d at 1161. (footnote omitted) (citing *Bolden v. Kraft Foods*, 889 A.2d 283, 2005 WL 3526324, at *4 (Del.2005); *Lewis v. Formosa Plastics Corp.*, 1999 WL 743322, at *3 (Del.Super.Ct. July 8, 1999)).
- 13 *Wyatt*, 81 A.3d at 1259 (quoting *Gen. Motors Corp.*, 164 A.2d at 688).
- 14 *Standard Distrib. Co. v. Nally*, 630 A.2d 640, 644 n. 1 (Del.1993).
- 15 *Id.* at 646.
- 16 *Id.*; see, e.g., *Rhodes v. Diamond State Port Corp.*, 2 A.3d 75, 2010 WL 2977331, at *2 (Del.2010) (“It is the petitioner’s burden to establish by a preponderance of the evidence that the injury sustained was caused by occupational exposure to asbestos.” (citing 29 Del. C. § 10125(c))).
- 17 *Nally*, 630 A.2d at 646 (citing *Pa. Mfrs. Ass’n Ins. Co. v. Home Ins. Co.*, 584 A.2d 1209, 1212 (Del.1990)).
- 18 *Whitney v. Bearing Construction, Inc.*, No. 1289541, at 21 (Del. Indust. Accident Bd. Dec. 27, 2012).
- 19 See *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del.1965) (“[T]he sole function of the Superior Court, as is the function of this Court on appeal, is to determine whether or not there was substantial competent evidence to support the finding of the Board, and, if it finds such in the record, to affirm the findings of the Board.”).

- 20 See *id.* (“On appeal from the Board, however, the Superior Court does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions.”).
- 21 *Wyatt*, 81 A.3d at 1259–60 (quoting *Steppi*, 2010 WL 718012, at *2).

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150 A.3d 1194
Supreme Court of Delaware.

GREENVILLE COUNTRY
CLUB, Through its workers'
compensation carrier, Guard
Insurance, Appellant Below-Appellant,

v.

GREENVILLE COUNTRY CLUB,
Through its workers' compensation
carrier, Technology Insurance,
Appellee Below-Appellee.

No. 101, 2016

|

Submitted: September 14, 2016

|

Decided: November 2, 2016

Synopsis

Background: Initial workers' compensation carrier, which provided coverage for employer at time of claimant's first work-related accident, sought judicial review of Industrial Accident Board's determination that claimant's renewed need for treatment for his lumbar spine injury following second work-related injury was result of first accident, so that initial carrier was liable for further payment, rather than successive carrier that provided coverage at time of second injury. The Superior Court affirmed. Carrier appealed.

Holdings: The Supreme Court, Vaughn, J., held that:

Board applied correct analysis for determining whether initial or successive carrier was liable, and

substantial evidence supported Board determination that initial carrier was liable.

Affirmed.

*1195 Court Below: Superior Court of the State of Delaware, C.A. No. N15A-05-002

Upon appeal from the Superior Court.
AFFIRMED.

Attorneys and Law Firms

Amy M. Taylor, Esquire, Heckler & Frabizzio, Wilmington, Delaware, for Appellant.

Elissa A Greenberg, Esquire, Elzufon Austin Tarlov & Mondell, PA, Wilmington, Delaware, for Appellee.

Before HOLLAND, VALIHURA, and VAUGHN, Justices.

Opinion

*1196 VAUGHN, Justice:

**1 Appellant, Greenville Country Club, through its workers' compensation carrier, Guard Insurance ("Guard"), appeals from a Superior Court Order affirming a decision of the Industrial Accident Board (the "Board"). While working for Greenville Country Club, Jordan Rash suffered injuries to his lumbar spine in two separate compensable work accidents. The first accident occurred in 2009 while the country club was insured by Guard

Insurance Group. The second accident occurred in 2012 while the country club was insured by Technology Insurance (“Technology”).

In 2014, Rash filed two Petitions to Determine Additional Compensation, one against Guard and one against Technology. He sought payment of outstanding medical bills, including lumbar spine surgery, and compensation for a recurrence of ongoing temporary total disability benefits. After a hearing, the Board determined that the condition in issue was a recurrence of the 2009 work injury and not an aggravation of the 2012 work injury, and concluded that Guard was therefore wholly liable for the additional compensation to Rash. In reaching its conclusion, the Board relied upon the case of *Standard Distributing Co., v. Nally*,¹ which addresses successive carrier liability.

Guard asserts two claims on appeal. First it contends that the Board failed to properly apply the rule for determining successive carrier liability. Second, it contends that there is no substantial evidence to support the Board's finding that Rash fully recovered from the 2012 accident or that his ongoing condition was solely caused by the 2009 work accident. We have concluded that the Board's decision is free of legal error and supported by substantial evidence. The judgment of the Superior Court from which this appeal is taken will be affirmed.

I. FACTS AND PROCEDURAL HISTORY

On June 20, 2009, Rash injured his back when he fell onto the floor while at work

at the Greenville Country Club (“2009 work injury”). At the time of this accident, Guard was the country club's workers' compensation insurance carrier, and the company accepted compensability for Rash's claim. Guard last paid benefits stemming from the 2009 work injury on September 4, 2009.

On June 29, 2012, also while working at the Greenville Country Club, Rash fell on his back while mowing a wet lawn. Technology was the workers' compensation carrier for the country club at that time and determined the claim was compensable. Technology last paid benefits to Rash on July 10, 2013.

Both of the work-related accidents resulted in injuries to Rash's lumbar spine. On August 13, 2012, Dr. Peter Witherell commenced treating Rash's lumbar spine. On June 16, 2014, Dr. Kennedy Yalamanchili commenced treating Rash's lumbar spine and ultimately performed lumbar spine surgery on Rash on August 21, 2014.

On July 7, 2014, Rash filed his petitions against Guard and Technology seeking compensation for a recurrence of his condition which he alleged occurred in July 2013. The compensation sought was for medical expenses of Dr. Witherell and Dr. Yalamanchili and additional total disability benefits. Rash alleged that the proximate cause of his medical condition was either the 2009 work injury, or the 2012 work injury, or both.

****2 *1197** Five medical experts and Mr. Rash testified at the Board hearing. After hearing the testimony of the six witnesses, the Board concluded that the condition in issue was

a reoccurrence of the 2009 work injury and not an aggravation of the 2012 work injury. In reaching its conclusion that Guard was wholly liable for Rash's additional compensation, the Board relied, as mentioned, on the rule for determining successive carrier liability set forth in *Standard Distributing Co. v. Nally*.² Guard appealed to the Superior Court, which affirmed the Board's decision. This appeal followed.

II. DISCUSSION

“The review of an Industrial Accident Board's decision is limited to an examination of the record for errors of law and a determination of whether substantial evidence exists to support the Board's finding of fact and conclusions of law.”³ Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁴ “On appeal, this Court will not weigh the evidence, determine questions of credibility, or make its own factual findings.”⁵ Absent errors of law, which are reviewed *de novo*, we review a Board's decision for abuse of discretion.⁶ An abuse of discretion occurs when the decision has “exceeded the bounds of reason in view of the circumstances, [or] so ignored recognized rules of law or practice so as to produce injustice.”⁷

Guard claims that the Board erred as a matter of law by improperly applying the rule for determining successive carrier liability. In support of this claim, Guard makes the following argument. When Technology accepted responsibility for the 2012 injury, the entire burden of liability for compensation

arising from the lumbar spine shifted to it. The Board should not have applied *Standard Distributing Co. v. Nally* because the analysis set forth in that case is used only when determining whether a second work accident causes a new, distinct work injury (or aggravation) as opposed to a continuation of an original work injury (a recurrence). Once Technology acknowledged that the 2012 injury was a new injury (or aggravation of the first injury), Guard argues, causation was severed away from the first accident, no further analysis under *Nally* was warranted, and Technology became liable for all compensation after the 2012 accident.

This Court first addressed successive carrier liability where an employee has suffered two work accidents in *DiSabatino & Sons, Inc. v. Facciolo*, in which the Court stated as follows:

If an injured workman suffers a recurrence, he may apply for further compensation under the quoted section and if there has in the meantime been a change of insurers, the liability therefor falls upon that insurer which was liable for the original benefits. On the other hand, if his condition is not a true recurrence, but is brought about or aggravated by a new work-connected accident, the liability falls upon that insurer *1198 whose policy is in effect at the date of the new accident If the later condition is a true recurrence, as defined herein, the original insurer is liable; if it is caused by a new work-connected accident or episode, the liability is upon the insurer at that time.⁸

**3 The last sentence demonstrates that the successive carrier is not strictly liable as a

matter of law for a later condition which manifests itself after the second accident. It is liable if the newer work-connected accident was the cause of the later condition.

This rule, known as the “last injurious exposure” rule, was repeated in *Standard Distributing Co. v. Nally*.⁹ As we explained there, the “burden of proving the causative effect of a second event is upon the initial carrier seeking to shift responsibility for the consequences of the original injury.”¹⁰ In *Nally*, the issue was whether an injury from a second work place accident was a recurrence of the injury caused by the first accident, or a new injury.¹¹ Here, the issue is whether liability for a later manifestation of injury, occurring after both accidents, falls upon the first carrier or the second carrier. This factual distinction does not alter the analysis. Liability for a later condition falls upon the carrier responsible for the injury which proximately causes the later condition, whether it be the first injury or the second injury.¹² The burden of proving that the second event caused the later condition is upon the initial carrier.¹³

This conclusion finds support in the case of *Whitney v. Bearing Construction, Inc.*¹⁴ There, the claimant suffered a work-related injury to his back in 2005.¹⁵ In 2010, he experienced three minor injuries to his back.¹⁶ He experienced a later manifestation of injury to his back in 2012.¹⁷ The Board concluded that the 2012 condition was caused by the 2005 injury and that the 2010 injuries could not account for the 2012 condition.¹⁸ The Superior Court reversed the Board's decision,

but this Court reversed the Superior Court's judgment and ordered that the Board's decision be reinstated.¹⁹

Guard relies, in part, upon the cases of *Forbes Steele and Wire Co. v. Graham*²⁰ and *Alloy Surfaces Co. v. Cicamore*.²¹ However, both of these cases are distinguishable. In *Forbes*, the Board found that both accidents contributed to the claimant's condition.²² Since the second accident was a cause of the condition, the last injurious exposure rule placed liability on the successive carrier.²³ Here, the Board found that the 2012 accident was not a cause of ***1199** Rash's condition at all. *Cicamore* involved an occupational disease which developed over time, the history of which could not be determined “with any satisfactory degree or certainty.”²⁴

The Board was correct in recognizing that causation in this case was still an issue that must be proven. Guard's contention that the occurrence of a second compensable injury in 2012 shifted liability to the second carrier for all subsequent compensation for Rash's lumbar back without proof of a causal relationship between the 2012 injury and the condition in issue is rejected.

Guard's second claim is that there is no substantial evidence to support the Board's finding that Rash fully recovered from the 2012 accident or that his ongoing condition was solely caused by the 2009 work accident. “The Board's finding[s] of fact [are] given a high level of deference at both the Superior Court and [this Court].”²⁵ In this case, the Board found that four of the five doctors

testified that Rash's condition at issue was caused by the 2009 accident, not the 2012 accident. Although Guard takes issue with these findings, we are satisfied that there is substantial evidence in the record to support them. It is well established that the Board may adopt one expert's testimony over that of another, and the Board acted well within its discretion in adopting the opinions of the four who attributed Rash's condition to the 2009 accident.²⁶

****4** Rash met his burden of proving that his condition at issue in this case was proximately caused by the 2009 accident. Guard failed to meet its burden of proving that it was proximately caused by the 2012 accident. For the foregoing reasons, the judgment of the Superior Court is affirmed.

All Citations

150 A.3d 1194, 2016 WL 6471898

Footnotes

1 630 A.2d 640 (Del. 1993).

2 *Id.*

3 *Stanley v. Kraft Foods, Inc.*, 2008 WL 2410212, at *2 (Del. Mar. 24, 2008).

4 *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966)).

5 *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009).

6 *Id.*

7 *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (quoting *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988)).

8 *DiSabatino & Sons, Inc. v. Facciolo*, Del.Supr., 306 A.2d 716, 719 (1973)

9 630 A.2d at 646.

10 *Id.*

11 *Id.* at 641.

12 *Id.*

13 *Id.* at 646.

14 2014 WL 2526484 (Del. May 30, 2014).

15 *Id.* at *1.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.* at *4.

20 518 A.2d 86 (Del. 1986).

21 221 A.2d 480 (Del. 1966).

22 518 A.2d at 87.

23 *Id.* at 89.

24 221 A.2d at 486.

2016 WL 6471898

25 *Whitney*, 2014 WL 2526484, at *2.

26 *Id.*

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JORDON RASH, Employee,
v.
GREENVILLE COUNTRY CLUB, Employer.

INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

Hearing No. 1404962

Hearing No. 1339195

Mail Date: April 10, 2015

April 8, 2015

**DECISION ON PETITIONS TO DETERMINE ADDITIONAL
COMPENSATION DUE**

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated causes came before the Industrial Accident Board ("Board") on November 12, 2014 in the hearing room of the Board in New Castle County, Delaware.

PRESENT:

JOHN DANIELLO

OTTO MEDINILLA, SR., M.D.

Julie Pezzner, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

William Peltz, Attorney for the Employee
Amy Taylor, Attorney for the Employer/Guard Insurance Co.
Elissa Greenberg, Attorney for Employer/Technology Insurance Co.

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NATURE AND STAGE OF THE PROCEEDINGS

Mr. Jordon Rash ("Claimant") was involved in two separate but compensable work accidents while working for the Greenville Country Club ("Employer"). Both accidents resulted in lumbar spine injuries. The first accident occurred on June 20, 2009 ("2009 accident") while Employer was insured by Guard Insurance Group ("Guard").¹ Based on Claimant's average weekly wage, his weekly compensation rate in effect was \$140.28. The second accident occurred on June 29, 2012 ("2012 accident")² while Employer was insured by Technology Insurance ("Technology").³ Based on Claimant's average weekly wage, his weekly compensation rate in effect was

\$213.60. On October 30, 2011, Claimant also sustained an intervening non-work-related injury to his lumbar spine when he fell directly onto his buttocks and slid down a flight of fourteen steps ("2011 fall").

Guard last paid workers' compensation benefits on September 4, 2009. ~~July 10, 2013.~~ Technology last paid benefits on July 10, 2013. Technology and Claimant subsequently reached a permanent impairment settlement that Technology paid without prejudice to its right to dispute compensability of the underlying permanency being claimed. Proper statutory notification was issued pursuant to 19 *Del. C.* § 2322(h).

On August 13, 2012, Dr. Peter Witherell commenced treating Claimant's lumbar spine. On June 16, 2014, Claimant commenced treating with Dr. Kennedy Yalamanchili who ultimately performed a lumbar spine surgery on August 21, 2014. On July 7, 2014, Claimant filed two Petitions to Determine Additional Compensation Due - one against Guard (IAB #1339195) and

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one against Technology (IAB #1404962) - in which Claimant seeks payment of outstanding medical bills for treatment with Dr. Witherell (\$11,369.28) and for treatment with Dr. Yalamanchili including the surgery (\$96,000.34) as well as payment for a recurrence of ongoing temporary total disability benefits as of June 16, 2014. The reasonableness and necessity of medical treatment are not in dispute. The issue before the Board is the causal relationship of the medical treatment relating to the outstanding bills.

A hearing was held on Claimant's petition on November 12, 2014. The Board requested that the parties submit briefs addressing the legal issue of successor carrier liability. The last submission was received on December 11, 2014. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant testified on his own behalf. He is thirty-two years old. He described the 2009 work accident from which he injured his low back. He was placed on temporary total disability. He treated with Dr. Stephen Kushner, Claimant's primary care physician, until August 2009. Dr. Kushner diagnosed Claimant as having spondylosis, a condition Dr. Kushner described as genetic. At the end of August/beginning of September Claimant returned to his regular duty job. Claimant acknowledged that his job was physically demanding.

The next time Claimant sought medical treatment for his low back was on May 6, 2011 when he treated at the emergency room. On the day after the

2011 fall, Claimant treated with Dr. Kushner who referred Claimant to Dr. Sternberg. Claimant acknowledged that his symptoms included numbness in his legs accompanied by a little bit of pain. After a month or two of medical treatment, he returned to baseline.

Claimant testified that he treated with Dr. Kushner on June 22, 2012 at which time he reported that his low back had never felt the same since the 2009 accident. Claimant had already

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had two injections from Dr. Ginger Chiang from which he experienced temporary relief. Claimant returned to Dr. Kushner with hopes of getting another injection. Claimant explained that he was under the impression after the first accident that he would always need injections. The injections provided temporary relief.

Claimant testified that the 2012 accident increased his low back pain. Claimant estimated that he was placed on temporary total disability for one to two weeks before he returned to his regular duty job. On July 17, 2012, Claimant rated his pain at a three on a ten-point pain scale.

Claimant testified that his symptoms returned and worsened. In August, 2012, Claimant commenced treating with Dr. Witherell. Dr. Witherell administered an injection in August 2012 and in September 2012. Claimant benefitted from the injections. Claimant represented that he returned to his pre-2012 accident baseline prior to 2013.

In June 2014, Dr. Yalamanchili informed Claimant that Claimant was a surgical candidate. Claimant testified that he had continued to work his regular duties until June 2014 at which time Dr. Yalamanchili directed Claimant to stop working for Employer. Claimant underwent surgery on August 22, 2014. Claimant benefitted from surgery. His pain has decreased and the nerve pain no longer extends all the way to his toes. He still has numbness and tingling. Claimant has not returned to work since the surgery.

Claimant acknowledged that he experienced a "stinger" in his back while in high school. He described the "stinger" as a "muscle thing" unlike the symptoms he has experienced since the 2009 accident. He did not have symptoms into his leg. Claimant testified that the symptoms related to the stinger resolved while in high school. He never experienced back problems again until the 2009 accident.

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Dr. Peter Witherell who is board certified in anesthesiology and in the subspecialty of pain management testified by deposition to a reasonable degree of medical probability on behalf of Claimant. He commenced treating Claimant on August 13, 2012 per referral by Dr. Kushner. Dr. Witherell initially opined that the medical treatment at issue is causally related to the 2012 accident. However, he formed such opinion before becoming aware of the content of medical treatment to Claimant's low back between May 6, 2011 and the day of the 2012 accident. Claimant had reported to Dr. Witherell at Claimant's first visit that Claimant had been managing well with conservative care after the 2009 accident and that the 2012 accident caused a severe exacerbation of his typical pain. Dr. Witherell understood that Dr. Kushner referred Claimant to Dr. Witherell because Claimant was not responding to conservative care of physical therapy, medications and rest. After being referred to the medical records that preceded the 2012 accident that documented a progression of symptoms leading up to the 2012 accident as well as being referred to the medical records of Dr. Evan Crain, both of which were consistent with Claimant's reported history to Dr. Crain, Dr. Witherell opined that the medical treatment at issue is causally related to the 2009 accident.

When Dr. Witherell first treated Claimant, the examination findings were the following. Claimant had severe restriction of range of motion because of pain elicited with flexion and extension as well as bend of the lumbar spine. His motor and sensory functions or neurologic exams were within normal limits. The main finding was of lower back discomfort.

A July 2012 MRI revealed a predominant finding of spondylosis (a defect in the back part of the vertebra) at L4-5 and spondylolisthesis (some slippage of the vertebra) at L4 and at L5. Dr. Witherell's examination findings were consistent with the MRI findings. The pain was emanating from L4-5 and L5-S1.

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Claimant had already been given work restrictions by Dr. Kushner. Dr. Witherell administered two injections in the lumbar facet region - one in August and one in September - from which Claimant benefitted for six months. Claimant had reported a ninety percent reduction in symptoms.

Claimant returned to Dr. Witherell on March 14, 2013 at which time he administered another facet joint nerve block. The examination was essentially the same as Dr. Witherell's first examination of Claimant. Claimant returned on April 25, 2013 at which time Claimant reported having only benefitted from the injection for a short time. Dr. Witherell performed a left-sided ablation (burning the sensory nerves that provide sensation to

the joints at issue) at the April 25 visit. On May 23, 2013, Dr. Witherell performed a right-sided ablation.

On July 1, 2013, Claimant reported experiencing substantial improvement in his left lower back symptoms and about fifty percent reduction in his right-sided symptoms. The left side was doing fairly well but the right side was gradually increasing in pain with extension into his right lower extremity.

On July 10, 2013 Dr. Witherell administered a transforaminal epidural injection on the right side to target Claimant's leg symptomatology originating at the L4-5 and L5-S1 regions. On July 25, 2013, Claimant reported eighty percent relief of his right lower extremity symptomatology. Dr. Witherell wanted to repeat the injection in close proximity to the July 10, 2013 injection but was unable to repeat it until December 2013.⁴ Dr. Witherell explained that Claimant had an unrelated surgery during the interim that caused the delay in administering the injection. Claimant had another injection in January 2014. Claimant reported experiencing less relief from these injections.

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Dr. Witherell saw Claimant again in February 2014 and in April 2014. Claimant underwent an MRI on March 27, 2014. Dr. Witherell represented that the findings from the 2014 MRI were essentially the same as the findings from the March 27, 2012 MRI although the 2014 MRI revealed an annular tear at the L4-5 level compared to the 2012 MRI. A May 7, 2014 EMG was normal. There was no overt injury to the spinal nerve.

Claimant underwent a discogram on May 28, 2014. Claimant had a symptomatic tear at L4-5 and a tear at L5-S1 level that was highly symptomatic and reproduced Claimant's characteristic low back symptomatology. The findings from the discogram had objective and subjective components that were consistent with the clinical findings.

In June 2014, Dr. Witherell referred Claimant to Dr. Yalamanchili because Claimant was not benefitting from the conservative treatment. Dr. Witherell last saw Claimant on July 1, 2014 at which time Dr. Witherell gave Claimant medication for Claimant's discomfort. Claimant was already on Neurontin for pain.

During direct examination, Dr. Witherell concluded based on Claimant's reported history to Dr. Witherell and on the progression of symptoms after the 2012 accident, that the medical treatment at issue is causally related to the 2012 accident. Dr. Witherell explained that Claimant

reported to Dr. Witherell that Claimant had been doing well after the conservative treatment following the 2009 accident. Claimant represented that he had been managing the pain and working without difficulty until the 2012 accident.

During cross examination, Dr. Witherell admitted that he was not familiar with the content of any medical records pertaining to treatment prior to the 2012 accident. He had not been provided with the 2011 MRI or any diagnostic studies that predated the 2012 accident. Excluding the 2009 accident, Claimant did not provide Dr. Witherell with any history, episodes,

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or issues relating to his low back that predated the 2012 accident. Hence, Dr. Witherell was unaware of any treatment or low back issues Claimant may have had between August 2009 and the 2012 accident.

On cross examination, Dr. Witherell was referred to the below-referenced medical records of which Dr. Witherell had been previously unaware. On May 6, 2011 Claimant treated at the Christiana Care emergency room at which time Claimant was diagnosed as having acute back pain. Claimant had reported that the onset of symptoms occurred two weeks prior. He completed a pain diagram and included an additional location of pain that was different than the location of pain that Dr. Witherell was treating. Claimant was prescribed Percocet, Flexeril, and Naprosyn.

On October 4, 2011, Claimant treated with Dr. Kushner at which time Claimant presented with persistent low back pain. Claimant requested pain medications because he was having difficulty falling asleep.

On October 31, 2011, Claimant treated with Dr. Kushner for low back pain after the 2011 fall. Claimant complained of pain in the lower back, the middle of the low back and bottom. The notation indicated that Claimant aggravated his already painful back. Dr. Witherell specifically acknowledged that he was not aware of the 2011 fall. The area of pain at this visit was consistent with the location of pain Dr. Witherell was treating.

On November 15, 2011, Claimant treated with Dr. Sternberg at Delaware Back Pain and Sports at which time Claimant presented with a long-standing history of low back pain initially caused by the 2009 accident. Claimant had complaints of numbness and tingling in both legs and of weakness in his right leg.

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On December 9, 2011, Claimant treated with Dr. Chiang per Dr. Sternberg's referral. Claimant complained that his back had not been the same since the 2009 accident. He noted that he was working part-time because of his low back symptoms. Claimant underwent a series of two lumbar spine injections by Dr. Chiang; the most recent injection was administered on January 6, 2012.

On June 22, 2012 (one week prior to the 2012 accident), Claimant treated with Dr. Kushner for recurrent low back pain. Claimant reported having benefitted from the previous Cortisone injections and requested more. Dr. Kushner referred Claimant back to Dr. Chiang. Claimant did not return to Dr. Chiang. Dr. Witherell acknowledged that he and Dr. Chiang provide the same services.

Dr. Witherell agreed that the records demonstrated a pattern of progressively worsening low back pain leading up to the 2012 accident. He agreed that based on the medical notes, Claimant was not managing his pain as Claimant had represented to Dr. Witherell. Instead, Claimant had remained symptomatic throughout treatment but began to experience more frequent and more pronounced aggravations and exacerbations as time progressed to the point that the injections were no longer helpful. There was also an indication that Claimant had not been working full-time during the entire interim between August 2009 and the 2012 accident because of low back symptoms.

Dr. Witherell was directed to Dr. Crain's defense medical examination records, the content of which Dr. Witherell also was unaware. According to Dr. Crain's October 1, 2014 medical notes, Claimant told Dr. Crain that prior to the 2012 accident, Claimant was not better and needed shots to control his symptoms. Claimant reported that he hurt is back from the 2012

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accident but within a short time the pain he experienced became similar to the pain he had prior to the 2012 accident. Claimant stated that he sought shots because of the same symptoms.

Dr. Witherell agreed that the timeline presented to Dr. Crain was consistent with the medical records prior to the 2012 accident. In light of the medical records preceding the 2012 accident and of Claimant's consistently reported history to Dr. Crain, Dr. Witherell changed his opinion and ultimately opined that the medical treatment at issue related to the 2009 accident and not to the 2012 accident.

Dr. Kennedy Yalamanchili who is board certified in neurosurgery testified by deposition to a reasonable degree of medical probability on behalf of Claimant. He first examined Claimant on June 16, 2014 at which time he placed Claimant on temporary total disability. He performed the surgery on August 21, 2014. At Claimant's September 22, 2014 follow-up visit, Claimant had already demonstrated significant improvement in symptoms. Dr. Yalamanchili represented that the outstanding medical bills relating to his treatment is \$99,097.94 but such amount also includes Dr. Yalamanchili's deposition fees and copying fees.

Dr. Yalamanchili opined that the medical treatment at issue is causally related to the 2009 accident. He explained that the 2009 accident made Claimant's spondylolisthesis and the spondylosis conditions symptomatic. He opined that the spondylolisthesis was either brought on or rendered symptomatic as a result of the 2009 accident. He explained that with spondylolisthesis, symptoms progress with some sort of stress whether it is a physical injury, body weight or other things that can cause stress unrelated to sustaining an injury. Once the 2009 accident caused the underlying condition to become symptomatic, the condition was going to progress to the point of requiring surgery at or around the time Claimant underwent the surgery. Dr. Yalamanchili testified, in other words, that Claimant would have required the

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surgery regardless of the 2011 fall and the 2012 accident; neither the 2011 fall nor the 2012 accident accelerated Claimant's need for surgery.

Dr. Yalamanchili acknowledged that the 2012 accident clinically worsened Claimant's condition at least temporarily but that Claimant had always been symptomatic since 2009. Claimant described to Dr. Yalamanchili a gradual progressive condition over a five-year span.

Dr. Yalamanchili acknowledged that Claimant did not mention anything about the 2011 fall nor did Claimant reveal having undergone injections by Dr. Sternberg after the 2011 fall. Dr. Yalamanchili admitted he had not reviewed the medical records that predated the 2012 accident. Without having reviewed such medical records, Dr. Yalamanchili stated that Claimant appeared to be managing his symptoms with conservative treatment until 2014. Dr. Yalamanchili recognized that Claimant had not been referred to a neurosurgeon prior to the 2012 accident but the lack of referral did not change his causation opinion.

During cross examination, Dr. Yalamanchili was presented with medical records that predated the 2012 accident and was asked to acknowledge the

below content contained within such records. On May 6, 2011, Claimant presented to the Christiana Care emergency room for acute back pain with no precipitating trauma noted. Five months later, on October 4, Claimant presented to Dr. Kushner with pain that Claimant rated at an eight on a ten-point pain scale. Claimant also complained of pain with paresthesias in the left leg. There was no precipitating trauma. Dr. Yalamanchili concluded that Claimant was having continuing symptoms during the gap in time that were just not documented.

On November 10, 2011 Dr. Kushner documented continued low back pain with pain down to the bilateral legs that was aggravated by standing all day. Dr. Kushner referred Claimant to a back specialist. Five days later, Claimant treated with Dr. Sternberg who referred

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Claimant to Dr. Chiang for injections. Dr. Chiang administered one injection in December 2011 and another injection in January 2012. Dr. Yalamanchili remarked that such treatment was for symptoms consistent with the symptoms for which Dr. Yalamanchili was treating Claimant.

On June 22, 2012 (one week prior to the 2012 accident), Claimant complained of back pain for the past one-and-a-half months. Claimant complained of pain shooting down to the right buttocks and down to the foot while driving. Claimant also complained of right leg numbness and weakness. According to the medical notes, Claimant did not benefit from physical therapy but he did benefit from Cortisone shots. Dr. Kushner referred Claimant back for another injection. Dr. Yalamanchili emphasized that Claimant was scheduled to get more injections prior to the 2012 accident.

Dr. Yalamanchili testified that the above history presented during cross examination demonstrated a progressive worsening of symptoms and demonstrated a progression of a course of treatment leading to the need for surgery regardless of the 2011 fall or the 2012 accident. Initially, conservative treatment was working but over the course of time, conservative treatment eventually failed - not unexpected.

Dr. Neil Kahanovitz who is board certified in orthopaedic surgery testified by deposition on behalf of Guard. He examined Claimant on October 7, 2014. He opined that the medical treatment at issue including the need for surgery is causally related to the 2012 accident based: on the history Claimant provided to Dr. Kahanovitz; on Claimant's failure to respond to the second course of epidural steroid injections after the 2012

accident; and on Claimant's inability to continue working without significant complaints after the 2012 accident.

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Dr. Kahanovitz testified that as a result of the 2009 accident, Claimant had an acute onset of pain into the low back with some radiation into the buttocks, thighs and lower extremities diffusely into both feet with occasional numbness and tingling.

X-rays from June 22, 2009 revealed evidence of spondylolisthesis and spondylolysis at L5. The spondylolisthesis at L4-5 probably related to the spondylolysis rather than a fracture and secondary to the spondylolysis. Dr. Kahanovitz explained that spondylolisthesis is a developmental deformity that often is not symptomatic but rather identified coincidentally on X-rays taken for an unrelated reason. The majority of these conditions becomes symptomatic intermittently in adulthood but do not progress. In other words, it is not something that has a stable progression over time. Dr. Kahanovitz represented that very few cases result in requiring an operation. However, periodic exacerbations or aggravations without having to be related to a traumatic event can be expected once spondylolisthesis becomes symptomatic but there would not be a direct downhill progression in most individuals with this condition.

Three months after the 2009 accident, Claimant returned to full duty work. Dr. Kahanovitz opined that the 2011 fall caused a brief aggravation necessitating epidural injections. Overall, Claimant continued to work at a fairly physical level of activity. He was mowing the lawn and working as a bartender on his feet until the 2012 accident.

Dr. Kahanovitz testified that the 2012 accident caused a significant increase in the low back pain, with continued radicular complaints at the lower extremities. At that time, the pain was associated with numbness and tingling in the buttocks, the posterior thighs, and the calves.

The July 22, 2012 MRI showed a progression of the degeneration indicated by fluid in the facet joints. Dr. Kahanovitz represented that the finding of fluid is a radiographic finding indicative of a degenerative change or of a traumatic event. In Claimant's case, Dr. Kahanovitz

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interpreted the finding of fluid in the facet joints to be indicative of a traumatic event as opposed to indicative of a progression of degenerative

disease. He explained, for example, that when a person twists a knee (a traumatic event), fluid collects in the joint.

Following the 2012 accident, Claimant had no relief with facet injections, with epidural injections, and with radiofrequency ablations. Prior to the surgery, Claimant continued to take Neurontin and Vicodin regularly and continued to work as a bartender until Memorial Day of 2014, the last day Claimant worked. Claimant underwent lumbar spine surgery on August 21, 2014 and has not returned to work since.

Dr. Kahanovitz recognized some inconsistencies between Claimant's reported history and the medical records. Claimant reported to Dr. Kahanovitz that the 2012 accident made Claimant's pain worse and that his symptoms continued to be worse. Claimant did not benefit from the subsequent epidural injections. However, according to the June 22, 2012 medical notes of Dr. Kushner taken one week prior to the 2012 accident, Claimant was complaining of back pain he had had for a month-and-a-half on either side of his back and of shooting pain to the right buttocks and down the foot while driving. Claimant complained of numbness with right leg weakness and numbness. According to the medical notes, Claimant reported on June 22, 2012 that he benefited from the previous Cortisone injections and wanted to return for more injections. Dr. Kahanovitz acknowledged that the extent of Claimant's complaints and desire for injections are not in sync with Claimant's account of the impact of the 2012 accident.

Dr. Kahanovitz also recognized that Claimant reported to Dr. Kahanovitz that Claimant had been working up until the 2012 accident. However, according to Dr. Kushner's December 8, 2011 medical record, Claimant was seen by Dr. Sternberg who noted that Claimant is probably

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not working because it is too painful. Claimant had been treating with Vicodin and possible injections.

At the time of Dr. Kahanovitz's defense medical examination, he opined that Claimant remained temporarily totally disabled as a result of the surgery. He anticipated that Claimant could be fully recovered one year after surgery. For nine to twelve months postop, Dr. Kahanovitz would want Claimant to avoid any significant bending, lifting and strenuous activities.

Dr. Ali Kalamchi who is board certified in orthopaedic surgery testified by deposition to a reasonable degree of medical probability on behalf of Technology. He examined Claimant on July 11, 2013 and on October 7, 2014.

He opined that the medical treatment at issue is causally related to the 2009 accident.

Dr. Kalamchi explained that spondylolisthesis is a defect in the pars that occurs in people in or around the late teens or early twenties. Although such condition does not necessarily have to be symptomatic, people with spondylolisthesis can become symptomatic in adulthood. Based on his experience and the literature, once the spondylolisthesis becomes symptomatic, it continues with variable levels in different individuals. The progression depends on the patient's activities, the patient's build, the patient's athleticism (whether the patient is an athlete and well-conditioned), the patient's physical job demands, and the patient's age. The heavier, the less athletic, and the less conditioned the patient is, the more susceptible the patient is to experiencing an increase in symptoms including an increase in backache. He added that the younger the patient is when the spondylolisthesis becomes symptomatic, the more likely the condition will at some point stop responding to conservative treatment thereby creating the need for surgery. The common factor among patients with symptomatic spondylolisthesis is that once the

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spondylolisthesis becomes symptomatic, it will not return to becoming asymptomatic. Such patients may have times of feeling better but they will continue to have aggravations.

In Claimant's case, the 2009 accident involved a soft tissue sprain type injury - an injury that stretched out that segment of the pars defect rendering it more unstable. Once it stretches, stability is lost. Claimant is young, overweight⁵ and not athletic. His job is physically demanding. Dr. Kalamchi stated generally in light of Claimant's physical condition, Claimant's physically demanding job, and Claimant's age, Claimant would be even more susceptible to progressing aggravations because his spondylolisthesis has become symptomatic. Hence, the cause of Claimant's medical treatment including the need for surgery is going to be whenever Claimant's spondylolisthesis became symptomatic. According to Claimant, Claimant has not had back problems prior to the 2009 accident. The 2009 accident caused Claimant's spondylolisthesis to become symptomatic; therefore, the 2009 accident proximately caused Claimant's need for the surgery.

Claimant was temporarily totally disabled for three months after the 2009 accident but then returned to work full duty. Claimant did not return for medical treatment for low back complaints until May 6, 2011 at which time Claimant treated at Christiana Care's emergency room. Claimant

complained of acute back pain with no associated trauma. Dr. Kalamchi testified that while there was an approximate two-year gap in treatment, Claimant's spondylolisthesis remained symptomatic. Dr. Kalamchi commented that Claimant's aggravated symptoms likely related to the various physical activities Claimant was doing at that time; now that Claimant's spondylolisthesis had become symptomatic, aggravations requiring medical treatment can be expected.

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Five months later on October 4, 2011, Claimant presented to Dr. Kushner with back pain that Claimant rated at and eight on a ten-point pain scale and with paresthesias in the left posterior leg, worse in the mornings. This is the first notation of radiating pain. Dr. Kalamchi stated that such radiation is consistent with spondylolisthesis because such condition tends to cause buttock and upper thigh to knee pain.

On October 31, 2011, Claimant returned to Dr. Kushner the day after the 2011 fall. Claimant commenced treating with Dr. Sternberg and with Dr. Chiang. Claimant was taken out of work and underwent a series of two injections by Dr. Chiang: one on December 9, 2011 and one on January 6, 2012.

On June 22, 2012, one week prior to the 2012 accident, Claimant returned to Dr. Kushner for complaints of bilateral back pain shooting into the right buttock and down the right leg to the foot while driving - symptoms consistent with symptomatic spondylolisthesis. Dr. Kushner noted that the back pain had been ongoing for one-and-a-half months on either side of back, shooting to the right buttock, down to the right foot. The source of the onset of symptoms was a fall three years ago, a timeframe consistent with the 2009 accident. Dr. Kushner noted that Claimant has never been the same since the 2009 accident. Dr. Kushner also noted that previous physical therapy failed but previous Cortisone injections provided benefit. Claimant requested more Cortisone injections.

Dr. Kalamchi concluded that by the June 22, 2012 visit, it would be reasonable to recommend to Claimant to see a spinal surgeon. Dr. Kalamchi explained as well as reiterated that Claimant's symptomatic spondylolisthesis is only going to continue and Claimant has undergone unsuccessful conservative treatment. A spinal surgeon at this point could see the

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patient for baseline, for evaluation, and for comparison regarding future aggravations. It would be time to see a specialist after failing conservative treatment and injections.

When Kalamchi saw Claimant on July 11, 2013, Claimant was working full duty although avoiding heavy lifting. Claimant was not taking pain medication although he occasionally was taking Aleve.

To summarize Dr. Kalamchi's opinion, Claimant is going to have episodes of exacerbations or aggravations because the 2009 accident caused Claimant's spondylolisthesis to become symptomatic. An episode can happen from lifting at work or from twisting after missing the soap in the shower and trying to retrieve it. While Claimant experienced the 2011 fall and the 2012 accident that required treatment, such treatment was short term. The ultimate and ongoing treatment is the result of the 2009 accident. Claimant would not have needed surgery when he did but for the 2009 accident.

Dr. Evan Crain who is board certified in orthopaedic surgery testified by deposition to a reasonable degree of medical probability on behalf of Technology. He examined Claimant on January 15, 2014 and on October 1, 2014. He opined that the medical treatment at issue is causally related to the 2009 accident. To summarize his opinions, the 2009 accident caused Claimant's spondylolisthesis to become symptomatic. Once symptomatic, spondylolisthesis will always be symptomatic and will require some kind of treatment. The treatment Claimant has received since the 2009 accident has been along an algorithm of treatment for symptomatic spondylolisthesis. After becoming symptomatic from the 2009 accident. Claimant's symptoms progressed and Claimant eventually exhausted conservative care necessitating surgery. Ultimately, Claimant would have required the course of treatment regardless of the 2011 fall and

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the 2012 accident based on the nature of the condition, on the medical history, on the progressing symptoms, on the course of medical treatment, and on Claimant's reported history to Dr. Crain.

Dr. Crain was aware that Claimant sustained a low back football injury while in high school. X-rays revealed the presence of spondylolysis and he was diagnosed accordingly. Claimant disclosed as such to Dr. Crain. The related symptoms, however, resolved. Claimant did not experience low back symptoms nor seek treatment for any low back symptoms since high school until the 2009 accident. During the interim, Claimant had been working physically demanding jobs.

Dr. Crain described the nature of the condition of spondylolisthesis. He represented that spondylolysis leads to spondylolisthesis but does not naturally lead to a significant condition as Grade 1 like Claimant had after the 2009 accident. Spondylolisthesis does not necessarily have to become symptomatic; it can remain asymptomatic. However, once it becomes symptomatic, the patient will never return to being asymptomatic. The patient is going to be prone to experiencing exacerbations. Any activity even a trivial activity unrelated to a specific trauma can cause heightened symptoms.

Dr. Crain opined that the 2009 accident caused Claimant's spondylolisthesis to become symptomatic. Claimant treated predominantly with Dr. Kushner for approximately two months. Claimant was removed from work. X-rays revealed old mild spondylolysis as opposed to a fracture. Claimant underwent physical therapy and took medications. Claimant was released to return to work full-duty in August 2009. Claimant reported to Dr. Crain that although he was released to return to work, Claimant's low back never got better; Claimant worked with ongoing symptomatology.

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Claimant did not seek additional medical treatment for his low back until May 6, 2011. Dr. Grain acknowledged that in one of his reports, he stated that at the end of August 2009, Claimant was released to full duty and did not have complaints of back pain until a recurrence in May 2011, almost two years later. Dr. Crain clarified that he did not intend for such statement to indicate that Claimant was asymptomatic during the interim but rather that Claimant did not seek medical treatment for low back complaints during the interim.

Dr. Crain testified that the medical history demonstrated a progression of symptoms that flowed from the 2009 accident requiring a course of treatment leading to surgery. On October 31, 2011, Claimant treated with Dr. Kushner after the 2011 fall. Repeat X-rays demonstrated the previous findings of degenerative changes with Grade 1 spondylolisthesis. Claimant also underwent an MRI that demonstrated spondylolysis without acute fracture. Dr. Kushner sent Claimant to Dr. Sternberg who referred Claimant for spinal injections. Dr. Chiang administered the injections in December 2011 and in January 2012. In February 2012 there was a history noted of ongoing low back symptoms with evidence of spasm.

On June 22, 2012 (one week before the 2012 accident) Claimant returned to Dr. Kushner for ongoing complaints. Claimant complained of low back pain shooting into the buttock, of numbness, and of weakness. Claimant rated his pain level at a four on a ten-point pain scale. Claimant

had benefitted from previous Cortisone shots and was requesting to have more. Dr. Kushner referred Claimant back for more spinal injections. Dr. Sternberg also treated Claimant on June 22, 2012. Dr. Sternberg's records reflected a longstanding history of low back pain caused by a 2009 accident. Claimant complained of pain, of numbness, and of tingling in both legs.

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Dr. Crain reiterated that prior to the 2012 accident Claimant was already on a course leading to surgery. Claimant had remained symptomatic since the 2009 accident and continued to have flare-ups - each one presenting with worsening symptoms. Claimant presented with radicular complaints prior to the 2011 fall. After the 2011 fall, Claimant treated with injections - a treatment that would have been prescribed anyway to treat the radicular complaints. It is documented that physical therapy failed - the beginning of failing conservative treatment.

Dr. Crain stated that the 2012 accident caused a temporary aggravation of symptoms. On July 2, 2012, Claimant rated his pain at a five on a ten-point pain scale. Claimant had a few days off from work with no lifting but shortly thereafter returned to work. On July 17, 2012, Claimant rated his pain at a three on a ten-point pain scale. Dr. Kushner noted that Claimant was doing well. Dr. Kushner also noted that Claimant experienced a recurrence of pain after returning to work. Claimant reported to Dr. Crain that the 2012 accident was a temporary setback but after a short course of treatment, Claimant stated that he returned to baseline.

Dr. Crain opined that Claimant sustained contusions from the 2011 fall and the 2012 accident. After short courses of treatment following the 2011 fall and following the 2012 accident, Claimant returned to his pre-2012 accident baseline that would relate to the 2009 accident.

Dr. Crain opined that the 2011 fall and the 2012 accident did not have any impact on Claimant's progression of symptoms or treatment timeline. The diagnostic tests after the 2011 fall or after the 2012 accident did not show a new fracture, a new problem, or anything that would indicate a new injury. Dr. Crain reviewed the MRI films and there was no difference in the findings. Claimant's spondylolisthesis remained stable.

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Dr. Crain disagreed with Dr. Kahanovitz about the significance of the presence of fluid in the facet joint that was revealed in the 2012 MRI. Dr. Crain testified that fluid is representative of inflammation; it is not indicative of a new injury as Dr. Kahanovitz testified. Dr. Crain explained

that an acute injury would produce edema in the bone, would produce a new structural change in the spine and perhaps with the disks, with the vertebral bodies. That is not what happened here. When there is spondylolisthesis, the vertebral body slips forward on the lower. When that shift occurs, it puts a lot of pressure on the facet joints and on the nerve and that tends to produce pain and inflammation. Depending on the day that the scan is performed, there can be fluid or no fluid very much like fluid that comes and goes in patients with arthritic knees.

In response to Dr. Kahanovitz's opinion, Dr. Crain reiterated that this is not a situation in which the 2012 accident set Claimant on a different course of treatment. If the 2012 accident never occurred, Claimant still would have needed the medical treatment at issue. The 2012 accident did not accelerate by one day the need for the surgery based: on the information Claimant provided about his condition; on the medical records review as to previous symptoms and complaints that were clearly documented by treating doctors even just prior to the accident; and on a review of the diagnostic tests that were taken before and after the 2012 accident.

Medical treatment relating to the 2009 accident would not terminate once Claimant returned to work in August 2009. The 2009 accident caused the spondylolisthesis to become symptomatic. Once symptomatic, Claimant was going to experience exacerbations requiring additional treatment. Claimant's physical condition of the spondylolisthesis as per diagnostic tests did not progress but his symptoms did. It could be expected as Claimant had more exacerbations caused by the spondylolisthesis becoming symptomatic that Claimant was going to

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require more conservative care. At some point conservative care can fail and that is when surgery can become an option. That is what happened in Claimant's case. Dr. Crain noted that Claimant returned to work for approximately two years after the 2012 accident contrary to Dr. Kahanovitz's suggestion that the 2012 accident caused Claimant to be unable to return to work.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is well established under Delaware law that when an employee sustains multiple injuries while working for the same employer and at least one of such injuries occurred while the employer has a different insurance carrier, that the Board must determine if the proximate cause of the condition at issue is the result of a recurrence or an aggravation of the preexisting condition. *See Standard Distributing Company v. Nally*, 630

A.2d 640 (Del. 1993) - the seminal case for determining successive carrier responsibility in recurrence/aggravation disputes. If the condition is considered to be a recurrence, the initial carrier is liable. A recurrence entails the situation when a "claimant with continuing symptoms and disability, sustains a further injury unaccompanied by any intervening or untoward event which could be deemed the proximate cause of the new condition." *Id.* at 646. "On the other hand, where an employee with a previous compensable injury has sustained a subsequent industrial accident resulting in an aggravation of his physical condition, the second carrier must respond to the claim for additional compensation." *Id.* An aggravation refers to when the second work accident worsens the condition from the first accident in a manner that changes such condition. *Id.* at 645. "The burden of proving the *causative effect* of the second event is upon the initial carrier seeking to shift responsibility for the consequences of the original injury. *Id.* at 646. (Emphasis added).

Guard contends that all it must do to shift the responsibility of compensability to Technology, the second carrier, is to prove the existence of a subsequent untoward event (the

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occurrence of the 2012 accident). According to Guard, it is not necessary to prove any causal relationship of the disputed medical treatment to the subsequent accident or untoward event so long as a subsequent accident or untoward event has been established.⁶ It reasoned that because it is undisputed that Claimant sustained an injury from the 2012 accident, Technology should be liable for the medical treatment at issue.⁷

Guard's interpretation of the law is misguided - causation is still an issue that must be proven. "[T]he focus in determining liability in aggravation/recurrence disputes must turn on

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whether the nature of the second event *proximately caused* the injuries now being complained of."⁸ Asked differently, is the change in the worker's medical condition at issue attributable to the second accident? The Superior Court in the *Sarne* Decision, after recognizing the existence of a second work accident and after acknowledging that the claimant's "condition, at a minimum, was worse after the second accident" specifically stated that the legal analysis does not end. The question becomes "whether the worsened condition was caused by the second accident or, rather, was simply a natural, expected consequence of the initial accident."

Guard alternatively presented the medical testimony of Dr. Kahanovitz who opined that the medical treatment at issue is causally related to the 2012 accident. Dr. Kahanovitz additionally opined that medical treatment relating to the 2009 accident ended in 2009 when Claimant returned to work and started a gap in treatment. Dr. Kahanovitz explained that in his opinion, the available clinical data and the history did not indicate that Claimant would appear to have a need for surgery prior to the 2012 accident. He stated that Claimant had been working and performing normal activities. The 2012 accident caused a heightened level of pain that pushed Claimant over the threshold of being able to manage without surgery to no longer responding to conservative treatment thereby requiring surgery. The Board rejects Dr. Kahanovitz's opinions for the reasons stated below.

Based on the evidence incorporated herein, the Board finds that the medical treatment at issue relates to a recurrence of the injury proximately caused by the 2009 accident. In other words, the medical treatment at issue addressed the natural, expected consequence of the 2009 accident. The 2012 accident is not the proximate cause of the symptoms of which Claimant complained that relate to the medical treatment at issue. The change in Claimant's medical

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condition relating to the medical treatment at issue is attributable to the 2009 accident and not to the 2012 accident.

The testimonies of Dr. Crain, Dr. Kalamchi, Dr. Yalamanchili and Dr. Witherell were highly convincing, particularly the testimony of Dr. Crain who, prior to testifying, was the only doctor familiar with the pertinent medical records from before and after the 2012 accident and the only doctor to whom Claimant provided a history consistent with the documented history⁹. Dr. Kahanovitz is the only medical expert out of five testifying medical experts to opine that the medical treatment at issue is causally related to the 2012 work accident. The Board accepts the collective opinions of Dr. Crain, of Dr. Kalamchi, of Dr. Yalamanchili and of Dr. Witherell.

It is undisputed that a patient can have asymptomatic spondylolisthesis. What is disputed is the impact spondylolisthesis has once it becomes symptomatic. Dr. Crain and Dr. Kalamchi in no uncertain terms testified that once spondylolisthesis becomes symptomatic, the patient will continue to have symptoms at varying degrees; the condition will never return to being asymptomatic. Dr. Yalamanchili similarly testified that once spondylolisthesis becomes symptomatic, symptoms progress without having to relate to an independent trauma.¹⁰ Dr. Crain, Dr. Kalamchi and Dr. Yalamanchili opined that regardless of the 2011 fall or the 2012 accident,

Claimant still would have required the medical treatment at issue at the time it was rendered. Dr. Crain, Dr. Kalamchi, Dr. Yalamanchili and Dr. Witherell opined that the 2009 accident set off a progression of symptoms and a course of progressing medical treatment that

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causally relate the medical treatment at issue to the 2009 accident. The Board accepts these opinions.

As Dr. Crain testified, the Board finds that the treatment Claimant has received since the 2009 accident has been along an algorithm of treatment for symptomatic spondylolisthesis. The 2009 accident caused Claimant's spondylolisthesis to become symptomatic.⁴¹ It is true that Claimant did not seek medical treatment for his symptoms after August 2009 until May 6, 2011 but such gap in treatment does not necessarily indicate that Claimant was asymptomatic. As stated above, once spondylolisthesis becomes symptomatic, it will always be symptomatic - such is the nature of the condition. Claimant testified that his low back remained symptomatic since the 2009 accident and that his low back had never been the same since the 2009 accident. Claimant reported as such to Dr. Crain.

The medical records overall also indicated that Claimant's back had not been the same since the 2009 accident; there are references in the medical notes prior to the 2012 accident that cite the 2009 accident as the origin of ongoing and progressing complaints. The medical records also demonstrated that Claimant returned to his pre-2012 accident baseline after the 2012 accident - the baseline being defined as a return to the natural progression of symptoms Claimant would have experienced and to the return to the course of requisite medical treatment that Claimant would have received regardless of the 2012 accident.

The following highlights the medical notes that support the above-stated progressions. On May 6, 2011, Claimant treated at the emergency room for low back pain that commenced two weeks prior with no precipitating trauma. By accepting the testimonies of Dr. Crain and of Dr. Kalamchi as well as of Dr. Yalamanchili, the latter can be considered an expected exacerbation of the symptomatic spondylolisthesis condition. On October 4, 2011 (twenty-six days before the

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2011 fall), Dr. Kushner documented Claimant's first radiating pain complaints relating to spondylolisthesis. Claimant rated his low back pain at an eight on a ten-point pain scale. Claimant had persistent back pain and

parethesias in the left leg. Radicular complaints are treated with injections; therefore, as Dr. Crain testified, Claimant would have required injections to treat his radicular complaints regardless of the 2011 fall.

On October 31, 2011, the day after the 2011 fall, Dr. Kushner noted that Claimant had continued pain - a notation consistent with Claimant having ongoing low back problems predating the 2011 fall.¹² On November 10, 2011 Dr. Kushner noted continued back pain with pain down the legs bilaterally that became aggravated by standing all day. On November 15, 2011, Claimant complained to Dr. Sternberg of numbness and of tingling in both legs and of weakness in his right leg. Dr. Sternberg noted a long-standing history of low back pain initially caused by the 2009 accident.

On December 8, 2011, Dr. Kushner noted that Claimant had problems with working because it was too painful. On December 9, 2011, Dr. Chiang noted that Claimant's low back was not the same since the 2009 accident and that Claimant was working part-time because of his low back symptoms. Such notations contradict Dr. Kahanovitz's contention that it was not until after the 2012 accident that Claimant was unable to work without significant complaints. Dr. Chiang administered an injection on December 9, 2011 and on January 6, 2012. Claimant benefitted from the injections.

Claimant did not seek additional medical treatment until June 22, 2012 - one week prior to the 2012 accident. This visit is significant because it evidences Claimant's pre-2012 accident

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baseline as the baseline relates to the 2009 accident.¹³ Claimant presented with complaints of bilateral pain with pain shooting down the right buttocks and down to the right foot while driving. He had right leg weakness and numbness. Claimant rated his pain level at a four on a ten-point pain scale. Dr. Kushner related the origin of pain from a fall three years prior - consistent with the 2009 accident. According to the medical notes, Claimant indicated that his back had not been the same since the 2009 accident.

Based on the June 22, 2012 medical notes, although Claimant initially benefitted from physical therapy in 2009, Claimant no longer benefitted from subsequent physical therapy. Hence, the Board recognizes (as Dr. Crain testified) that by this point, one type of conservative treatment had already failed prior to the 2012 accident. On the other hand, Claimant had benefited from injections and requested to have more injections. Dr. Kushner referred Claimant to have additional injections from Dr. Chiang.

By accepting the collective testimonies of Dr. Crain, of Dr. Witherell, of Dr. Kalamchi and of Dr. Yalamanchili, and to summarize the above, the Board finds that by June 22, 2012, Claimant had been demonstrating a pattern of progressively worsening low back symptomatology with a radicular component prior to the 2012 accident that is causally related to the 2009 accident. Claimant was experiencing more frequent and pronounced exacerbations. He was not managing his pain well despite conservative treatment. Conservative treatment was starting to fail as evidenced by failed physical therapy. Claimant requested injections and was referred back to Dr. Chiang for injections. Claimant did not return to Dr. Chiang but rather commenced treating with Dr. Witherell. Dr. Chiang and Dr. Witherell provide the same

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services. Dr. Witherell's injections would have been necessary regardless of the 2012 accident. By June 22, 2012, Claimant had already embarked on the path to eventually requiring surgery.

Claimant experienced the 2012 accident one week later. Dr. Crain reviewed the MRIs of 2011 and of 2012 and represented that there was no difference in the findings. Neither MRI revealed any indication of a new injury or a new problem. Claimant's spondylolisthesis remained stable. The Board accepts Dr. Crain's representation that the presence of fluid in the 2012 MRI was not indicative of a traumatic or new injury for the reasons he explained. The Board notes that although Dr. Kahanovitz acknowledged that the presence of fluid could be related to degeneration and unrelated to a new injury he opined in Claimant's case that the presence of fluid related to a trauma. The Board rejects Dr. Kahanovitz's conclusion.

Pursuant to the 2012 accident, Claimant reported experiencing a severe exacerbation of his *typical* pain. Claimant's pain rating increased to a five on a ten-point pain scale. Claimant was out of work briefly but then returned to work full duty. On July 17, 2012, Claimant's pain rating reduced to a three on a ten-point pain scale and Dr. Kushner at this visit noted that Claimant was doing well.

Claimant testified that the progression of symptoms returned. Claimant commenced treating with Dr. Witherell. The need for injection treatment was already documented on June 22, 2012, prior to the 2012 accident. In August 2012 and in September 2012, Dr. Witherell administered two injections in the lumbar facet region from which Claimant benefitted for six months. Claimant had reported a ninety percent reduction in symptoms.

It is undisputed that the 2012 accident is a separate and distinguishable accident from the 2009 accident. The issue before this Board is the cause of the need for medical treatment from July 10, 2013 and ongoing. It is clear to this Board that the 2012 accident caused a mere

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temporary aggravation and that Claimant returned to his pre-2012 accident condition baseline (at the latest) after the second injection in September 2012.¹⁴ Therefore, the medical treatment at issue would no longer be a proximate cause of the 2012 accident. Claimant represented to Dr. Crain and testified before this Board that after a short course of treatment, he returned to his pre-2012 accident baseline. Dr. Crain testified similarly. Furthermore, Dr. Witherell, Dr. Crain, Dr. Kalamchi and Dr. Yalamanchili each opined that Claimant had returned to his pre-2012 accident baseline prior to 2013 and that the 2009 accident is the proximate cause of the medical treatment for the progressing symptoms at issue. Claimant's spondylolisthesis will continue to cause problems because the 2009 accident caused it to become symptomatic. Hence, the Board concludes that the medical treatment at issue was consistent with the course of treatment Claimant would have undergone regardless of the 2012 accident. The medical treatment at issue was simply a natural expected consequence of the 2009 accident.¹⁵ The Board, therefore, finds that Guard is responsible for the compensability of the medical treatment at issue and the temporary total disability benefits.¹⁶

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Medical Witness Fees and Attorney's Fee

Under 19 *Del. C.* § 2322(e), the employer shall pay for Claimant's medical expert's fees in the event Claimant receives an award. Hence, the Board awards Claimant payment of his medical expert witnesses' testimonies.

A claimant who is awarded compensation generally is entitled to payment of "a reasonable attorney's fee in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller...." 19 *Del.C.* § 2320(10)(a). At the current time, based on Delaware's average weekly wage, the maximum calculates to \$9,983.50. The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55 (Del. 1973). The Board is permitted to award less than the maximum fee. So long as the Board awards some fee and considers the *Cox* factors, the Board may grant a nominal or minimal fee in an appropriate case. *See Heil v. Nationwide Mutual Insurance Co.*, 371 A.2d 1077, 1078

(Del. 1977); *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96A-01-005, Cooch, J., 1996 WL 527213 at *6 (August 9, 1996). A "reasonable" fee does not generally mean a generous fee. See *Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966). Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient evidence to make the necessary calculation.

Claimant's counsel submitted an Affidavit and a copy of the retention agreement to enable the Board to consider the necessary *Cox* factors. Claimant's counsel spent approximately

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twenty-five hours preparing for the hearing. The hearing lasted approximately three hours. After such consideration, the Board awards an attorney's fee to be paid by Guard that is equal to \$9,800 - an amount less than thirty percent of the value of the award.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Claimant's Petition for Additional Compensation Due against Guard is GRANTED. The Board awards Claimant payment of outstanding medical expenses, payment of total disability benefits as of June 16, 2014, payment of Claimant's medical expert witnesses' fees, and payment of an attorney's fee.

Claimant's Petition for Additional Compensation Due against Technology is DENIED.

IT IS SO ORDERED THIS 8th DAY OF APRIL, 2015.

INDUSTRIAL ACCIDENT BOARD

/s/ _____
JOHN DANIELLO

/s/ _____
OTTO MEDINILLA, SR., M.D.

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

/s/ _____

Mail Date: 4-10-15

**Rash v. Greenville Country Club (Industrial Accident Board of the
State of Delaware, 2015)**

/s/ _____
OWC Staff

Notes:

^{1.} The 2009 accident occurred while Claimant was working as a bar back. As went to get wine glasses, he slipped on a wet and greasy floor and landed hard, directly onto his buttocks.

^{2.} The 2012 accident occurred on July 2, 2012 while Claimant was pushing a mower and he slipped on grass and fell directly onto his buttocks.

^{3.} The parties referred to Technology Insurance as AmTrust or AmTrust North America in the Stipulation of Facts, at the Hearing, and in the depositions. However, after the Hearing, counsel for Technology clarified that the carrier should appropriately be referred to as "Technology Insurance" as opposed to "AmTrust North America".

^{4.} At one point in Dr. Witherell's testimony, questioning made it appear that such injection was administered on November 13, 2013.

^{5.} When Dr. Kalamchi saw Claimant, Claimant was five foot ten and weighed two hundred ninety pounds.

^{6.} Before the Hearing commenced, Guard filed a Motion for Summary Judgement based on such contention. The Industrial Accident Board Rules do not provide a means to entertain a Motion for Summary Judgement. Furthermore, by allowing the Hearing to proceed on the merits in its entirety, such motion would have become moot. However, substantively, the Board wanted the parties to brief the issue of successive carrier liability. The parties submitted the briefs under the guise of Guard's Motion for Summary Judgment. The briefs were considered with respect to the legal arguments pertaining to the substance of the case.

^{7.} The Board recognizes that the Superior Court in *Delaware Supermarkets v. Sarne*, Del. Super., C.A. No. N12A-09-003, Carpenter, J., 2013 Del. Super.278 (June 28, 2013) ("*Sarne* Decision") stated that the rule in *Nally* "unduly complicates the situation and makes it difficult for administrative boards to address complex, medical subtleties". *Id.* at *26. In dicta, the Superior Court suggested that "[a] fairer and simpler rule to both enforce and manage [such complex, medical subtleties as well as predictability for insurance carriers] would [be to] place responsibility on the insurance carrier at the time of the accident, regardless of the medical determination." *Id.* This Board emphasizes that the latter was a mere

suggestion by the Judge for the legislature to revisit the standard to be applied in successive carrier cases. It was not a statement of the law.

In response to such suggestion, the Board noted in a footnote of a Board Order that addressed ancillary issues flowing from the *Sarne* Decision the following:

The Board is the administrative agency that is charged with applying the Workers' Compensation Act on a daily basis. As such, the Board is fully aware of the subtleties of the Act and the consequences of its application. Based on that experience, the Board would respectfully suggest that the *Nally* rule, while admittedly complicated to apply, is not "unduly" so. It was deliberately designed to make sure that liability does *not* shift to a later employer or carrier when there has not been a true, substantial subsequent accident that can fairly be said to have broken the chain of causation from the original work accident. ... To avoid having their [injured workers'] benefits negatively affected (as is happening to Claimant in the current case) the *Nally* rule intentionally makes it difficult to switch liability to that later employment. The "simpler" rule advocated by the Court is not necessarily fairer to the injured worker.

Sarne v. Delaware Supermarkets, Del. IAB, Hearing Nos. 1379438 & 1380625 at 8, footnote 3 (April 21, 2014)(ORDER) ("*Sarne* ORDER).

In the *Sarne* ORDER, the Board cited one example of a possible negative impact that the suggested ruling could have on an injured worker. For example, (as in the *Sarne* case), the injured worker's earning capacity was decreased by the first work injury. Consequently, the injured worker's average weekly wage at the time of the second work accident was less than it was at the time of the first work accident. To hold the second carrier automatically liable without regard to causation would cause in this example, the injured worker's total disability benefits to be unjustly less than they would be had the first carrier been justly held liable.

^{8.} *Delaware Supermarkets v. Sarne*, Del. Super., C.A. No. N12A-09-003, Carpenter, J., 2013 Del. Super.278 at *11 (June 28, 2013). (Emphasis added).

^{9.} Of the testifying medical experts, Dr. Crain appeared to be the only doctor to whom Claimant was forthcoming about his medical history.

^{10.} Dr. Kahanovitz admitted that once spondylolisthesis becomes symptomatic, periodic exacerbations or aggravations can be expected without having to relate to a trauma. He opined, however, that there would

not be a direct downhill progression in *most* individuals and that *very few* cases would result in requiring surgery. The Board notes that Dr. Kahanovitz's opinion leaves open the possibility, even if he considers the possibility to be small, of symptomatic spondylolisthesis progressing to the degree of requiring surgery without a subsequent trauma.

^{11.} The Board recognizes that Claimant's high school injury is not causally related to the medical treatment at issue.

^{12.} The Board notes that the reference to "continued pain" is yet another indication of Claimant's pre-2012 accident baseline being inclusive of low back symptomatology.

^{13.} The Board notes that all five medical experts opined that the 2011 fall caused a temporary aggravation that did not influence the course of the medical treatment at issue. The latter suggests that Claimant's June 22, 2012 complaints are not causally related to the 2011 fall.

^{14.} One might argue that Claimant returned to baseline on July 17, 2012.

^{15.} The Board rejects Dr. Kahanovitz's opinions and additionally comments on the facts that Dr. Kahanovitz did not appear to have a full awareness of Claimant's history preceding the 2012 accident. He based his opinions: on the history Claimant provided to Dr. Kahanovitz that was incomplete and a misleading because it was void of important medical treatment and progressing symptoms preceding the 2012 accident; on Claimant's failure to respond to the second course of injections that post-dated the work accident - a set of injections the Board in this decision finds is unrelated to the 2012 accident; and on Claimant's inability to continue working without significant complaints only until after the 2012 accident - another inaccurate representation. The Board does not find Dr. Kahanovitz's opinions nearly as credible as the other four medical experts whose testimonies and opinions incorporated a much more accurate history of progressing symptoms and necessary course of treatment and were consistent with each other.

^{16.} The Board is aware that the Superior Court on appeal in the *Sarne* Decision reversed the Board's finding that the second work injury was a recurrence as opposed to an aggravation of the first work injury and instead held that the second accident was an aggravation requiring a new course of treatment for which the second carrier should be liable. The case before this Board is clearly distinguishable from the situation in the *Sarne* Decision. The *Sarne* Decision addressed a situation in which the second carrier also denied the occurrence of a second work accident. Hence, the medical treatment at issue included the treatment immediately after the second accident. The second carrier was arguing that it should not be responsible

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State of Delaware, 2015)**

for the compensability of any of the medical treatment. Therefore, the question was whether or not the second accident was a recurrence or an aggravation of the initial injury.

The case before this Board addresses a different question. It had previously been established that the second accident was an aggravation requiring a course of medical treatment for which the second carrier was responsible. The issue before this Board is whether the symptoms of which Claimant complains and the corresponding medical treatment as of July 10, 2013 and ongoing are the result of a recurrence of the 2009 accident or of a continuation of the 2012 accident. As described in the "Findings of Fact and Conclusion of Law" section of this decision, the Board determined that Claimant returned to his pre-2012 accident baseline prior to 2013 and that the medical treatment at issue is proximately caused by the 2009 work accident.

963 A.2d 139 (Table)
Unpublished Disposition
(The decision of the Court is referenced
in the Atlantic Reporter in a 'Table of
Decisions Without Published Opinions.')

Kathy **RHINEHARDT**–MEREDITH,
Claimant Below, Appellant,

v.

STATE of Delaware, Employer Below, Appellee.

No. 302, 2008.

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Submitted: Oct. 8, 2008.

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Decided: Dec. 22, 2008.

Synopsis

Background: Claimant sought review of decision of Industrial Accident Board, that back injuries were not the result of industrial accident. The Superior Court, Kent County, affirmed. Claimant appealed.

[Holding:] The Supreme Court, Myron T. Steele, C.J., held that evidence supported finding that subsequent traffic accident, rather than prior industrial accident, was the cause of claimant's back injury.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (3)

[1] **Workers' Compensation** ↔ Remote and Proximate Consequences

Direct and natural result test for determining causation when an employee suffers a compensable industrial injury and later suffers a non-industrial injury dictates that the later injury is compensable by the employer if it follows as a direct and natural result of the primary compensable injury; the direct and natural result test also has a superseding causation component,

i.e., if the later injury is a result of the workers' compensation claimant's own negligence or fault, the chain of causation is broken and the later injury is not compensable.

1 Case that cites this headnote

[2] **Workers' Compensation** ↔ Remote and Proximate Consequences

Trial court, applying direct and natural result test for determining causation where workers' compensation claimant suffered a compensable industrial injury and later suffered a non-industrial injury, was not required to engage in superseding causation analysis after determining that no relationship existed between the two accidents.

1 Case that cites this headnote

[3] **Workers' Compensation** ↔ Back injuries

Evidence supported finding that subsequent traffic accident, rather than prior industrial accident, was the cause of claimant's back injury, thus supporting decision by Industrial Accident Board to deny compensation; expert testified that traffic accident exacerbated weakened back condition brought on by age, rather than prior industrial accident.

Court Below: Superior Court of the State of Delaware, in and for Kent County, C.A. No. 07A–09–001.

Before STEELE, Chief Justice, BERGER and RIDGELY, Justices.

ORDER

MYRON T. STEELE, Chief Justice.

*1 This 22nd day of December 2008, it appears to the Court that:

(1) Kathy **Rhinehardt**–Meredith appeals from a Superior Court judgment affirming the decisions of the Industrial

Accident Board that injuries **Rhinehardt-Meredith** suffered as a result of a 2005 motor vehicle accident were not caused by injuries suffered in a 1980 industrial accident and, therefore, were not compensable. **Rhinehardt-Meredith** makes two arguments on appeal. First, she contends that the IAB and Superior Court erred as a matter of law by applying the wrong standard of causation. Specifically, she argues that rather than applying the “direct and natural result” test, the Board looked only to the proximity of the two injuries to determine whether one was “causally related” to the other. Second, she contends that the Board erred in relying on the State's medical expert, whose testimony, she contends, did not provide substantial evidence to support the Board's decision. Because we find no merit to either of her arguments, we affirm.

(2) On November 23, 1980, while working for the State of Delaware, **Rhinehardt-Meredith** injured her back. As a result, she had two fusion surgeries performed at the S4 to L1 vertebral level of the lower back. The first surgery occurred in the early 1980s and Dr. Kalamchi performed the second in 2002. Following the second surgery, **Rhinehardt-Meredith** missed two months of work but returned to work part time in January 2003. By October 10, 2003, she was working fulltime and had sufficiently returned to her normal activities for Dr. Kalamchi to release her from active care.

(3) In September 2005, **Rhinehardt-Meredith** was involved in a motor vehicle accident on Interstate 95 (“2005 accident”). **Rhinehardt-Meredith** was at a near standstill in traffic when a sports utility vehicle struck her vehicle, pushing the trunk of her vehicle into the back seat. Immediately following the accident, **Rhinehardt-Meredith** complained of neck pains and headaches and was treated with a neck brace and medication. The accident left her totally disabled for two or three days.

(4) About a month after the accident, **Rhinehardt-Meredith** started to develop lower back pains. She then visited Dr. Kalamchi on May 12, 2006 and underwent a third spinal fusion surgery on August 16, 2006. This surgery fused the L2–3 vertebrae, two levels above the site of the 1980 and 2002 surgeries. **Rhinehardt-Meredith** petitioned the IAB for additional compensation of \$103,124.51 for costs associated with this third surgery.

(5) At the IAB hearing, **Rhinehardt-Meredith** presented the deposition testimony of Dr. Kalamchi, who testified that a 2002 MRI indicated a nonunion from L4 through S1 as well

as narrowing and abnormal changes at the L2–3 level. At the time, Dr. Kalamchi questioned whether to treat the L2–3 level, ultimately electing not to operate because he did not want to place additional stress on the nonfused levels. He believed that, after three or four years, the L2–3 level eventually succumbed to the added stress caused by the L4 to S1 fusion. Dr. Kalamchi testified that he believes it is possible for the added stress of a fusion to affect mobile levels of the spine that are not adjacent to the fusion site, and claims to have seen this multiple times throughout his practice. Although he was unable to cite anything specific, he also believes there is medial literature to support this idea. Furthermore, although Dr. Kalamchi was unaware of the 2005 accident prior to the 2006 surgery, he does not believe that information would have changed his opinion that the injury precipitating the 2006 surgery was a result of the 1980 accident. He does not believe that the 2005 accident could have caused the damage to the L2–3 area because there was not enough time between it and the third surgery. Instead, he believes that the 2005 accident could have only made the existing problem more symptomatic.

*2 (6) Dr. Sabbagh testified by deposition for the State. He conceded that the procedures performed by Dr. Kalamchi were reasonable and necessary, but testified that they were unrelated to **Rhinehardt-Meredith's** 1980 accident. He reviewed the 2002 MRI and testified that it showed minimal narrowing of the spinal canal at the L2–3 level secondary to a disc bulge. He opined that natural degeneration brought on by age caused her condition, not the 1980 accident. He also reviewed the 2006 MRI, which he believed indicated that the bulging disc progressed into a hernia. This could be attributed to multiple possible causes, including significant trauma, insignificant trauma, and natural aging.

(7) Dr. Sabbagh opined that neither the 1980 accident nor **Rhinehardt-Meredith's** related treatment brought about the changes that weakened the L2–3 level. Dr. Sabbagh testified, instead, that the 2005 accident likely exacerbated a weakened back condition brought on by age, not the 1980 accident. He stated that the 2002 MRI showed age appropriate changes and no significant pathology to the L3–4 vertebral level. He believed that, if the L4 to S1 fusion contributed to a weakened state at L2–3, then L3–4 would also show damage. Dr. Sabbagh acknowledged that a fusion could bring about changes to adjacent vertebral levels, but not to more remote vertebral levels.

(8) The IAB credited Dr. Sabbagh's testimony over Dr. Kalamchi's and found that the injuries resulting from the two accidents were not causally related. The Board found that the 2005 accident exacerbated a condition brought on by **Rhinehardt-Meredith's** age and that the 2002 MRI showed age appropriate degeneration at L2-3 and no significant pathology at L3-4. It accepted Dr. Sabbagh's testimony that there would have been more pathology at L2-3 during the 2002 MRI, had the 1980 accident been the cause of the injuries leading to the 2006 surgery. The Board determined that **Rhinehardt-Meredith** did not meet her burden of proof because she failed to show that the 1980 accident and her condition in 2006 were causally related and denied additional compensation. **Rhinehardt-Meredith** then appealed to the Superior Court, which affirmed the Board's decision, finding it was supported by substantial evidence in the record. This appeal followed.

(9) In reviewing decisions from the Industrial Accident Board our role is limited. We review the record to determine whether the Board's decision is supported by substantial evidence and is free from legal error.¹ We review questions of law *de novo*.² We do not weigh the evidence, determine credibility or draw our own factual findings or conclusions; we merely determine if the evidence is legally adequate to support the Board's factual findings.³

[1] (10) **Rhinehardt-Meredith** argues that the IAB erred as a matter of law by failing to apply the “direct and natural result” test. *Hudson v. E.I. DuPont de Nemours & Co.* first adopted the direct and natural result test.⁴ That test dictates that when an employee suffers a compensable industrial injury and later suffers a non-industrial injury, the later injury is compensable by the employer if it “follows as a direct and natural result of the primary compensable injury.”⁵ The direct and natural result test also has a superseding causation component: *i.e.*, if the later injury is a result of the claimant's own negligence or fault, the chain of causation is broken and the later injury is not compensable.⁶

*3 (11) **Rhinehardt-Meredith** argues that the IAB only assessed the relation of the 2005 accident to the 1980 accident by reference to the proximity of the injuries sustained in both accidents. She argues that the Board misinterpreted the Superior Court's holdings in *Barkley v. Johnson Controls*⁷ and *Food Lion v. King*⁸ because it based its decision on the fact that the injuries stemming from the 2005 accident were at

the L2-3 vertebral junction, while the injuries from the 1980 accident were sustained at the L4-S1 junction. **Rhinehardt-Meredith** asserts that the correct standard is “whether the added stress caused by a fusion can cause problems at another abnormal level and if that is a ‘direct and natural consequence’ of the injury.”

(12) The Board did not limit its use of the proximity of the two spinal injuries to assess the causal relationship; rather, the Board accepted this evidence to support its decision to accept Dr. Sabbagh's opinion over Dr. Kalamchi's. The IAB's determination that the changes to the L2-3 area would have been greater, had they been related to the initial fusion, flows from an implicit direct and natural result inquiry.⁹ The Board determined that if the 2005 injury was causally related to the 1980 accident, then the damage to the L2-3 area would have been more noticeable in the 2002 MRI.¹⁰ Implicit in Dr. Sabbagh's opinion that the preexisting damage was a result of natural aging, which the Board accepted, is the conclusion that the preexisting damage could not have been the direct and natural result of the 1980 industrial accident. Thus, the Board applied the proper test to determine causation.

[2] (13) **Rhinehardt-Meredith** next argues that the Superior Court erred by applying a test that is ordinarily utilized in successive carrier liability cases, rather than the direct and natural result test.¹¹ The Superior Court, indeed, stated the law for successor carrier liability, which is different than the direct and natural result inquiry.

(14) The Superior Court, however, began its analysis by recognizing that the “direct and natural results” test was the applicable causation standard.¹² The court then affirmed the IAB's finding that there was no causal connection between the two accidents, without ever reaching the question of whether the 2005 accident was a “new or independent accident.”

(15) **Rhinehardt-Meredith** was first required to prove that her recent injury was compensable because it was a natural and direct result of the 1980 accident. Only then would the Board or the Superior Court continue with the superseding causation analysis. The superseding causation analysis functions to remove liability from what would otherwise be compensable claims because of the claimant's negligent or intentional acts. The Superior Court correctly affirmed the Board's decision that there was no relationship between the 1980 and 2005 accidents; after reaching that

conclusion, no superseding causation analysis needed to be done.

*4 [3] (16) **Rhinehardt–Meredith** also argues that the Board's and the Superior Court's findings are not based on substantial evidence and must be reversed. Specifically, she claims that Dr. Sabbagh's testimony did not establish that she failed to meet her burden and that Dr. Sabbagh's testimony that the treatment was reasonable indicates that the Board did not base its findings on substantial evidence. We conclude that the Board's findings are supported by substantial evidence.

(17) “Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”¹³ Substantial evidence has been quantified as “more than a scintilla but less than a preponderance of the evidence.”¹⁴ “This Court is not the trier of fact and does not have authority to weigh the evidence, determine the credibility of witnesses, or make independent factual findings. Determinations of credibility are reserved exclusively to the Board.”¹⁵ We give deference to the experience and specialized skill of the Board and will accept the Board's findings, even if, acting independently, we would have reached a contrary finding.¹⁶ “Only when there is no satisfactory proof in support of a factual finding of the Board may the Superior Court, or this Court for that matter, overturn it.”¹⁷

(18) **Rhinehardt–Meredith** challenges the decision by the Board to credit the testimony of Dr. Sabbagh over that of Dr. Kalamchi regarding the causal relation of the 1980 accident and the 2005 accident. It is within the Board's authority to accept the testimony of one expert over another as long as the testimony the Board finds more persuasive is supported by substantial evidence.¹⁸ Dr. Sabbagh's testimony provided sufficient relevant evidence to support the Board's findings.

(19) In accepting Dr. Sabbagh's conclusions that **Rhinehardt–Meredith** recovered from her 1980 accident and the resulting surgeries and that her recent injuries were not causally related to the 1980 accident, the Board stated that it found his opinion “reasonable.” It specifically found Dr. Sabbagh's opinion that the problem likely resulted from “chronic degenerative changes at L2–3 that were recently exacerbated by the motor vehicle accident” to be “a much more realistic scenario than to have the L2–3 problems as a result of her 1980 injury or 2002 surgery.” This decision was based on the lack of progressive damage to the L2–3

vertebral junction in the 2002 MRI that would have been present had the injury been related to the 1980 injury. The Board noted that the medical literature also supported Dr. Sabbagh's opinion, while Dr. Kalamchi could not point to any specific support for his opinion, other than personal experience. Moreover, the Board found it “significant” that Dr. Kalamchi did not initially know about the 2005 accident.

(20) **Rhinehardt–Meredith** next challenges the Board's decision on the basis of the Superior Court's decision in *McCracken v. Wilson Beverage Co.*¹⁹ In *McCracken*, the court held that, because the employer's expert did not refute the testimony of the claimant's expert concerning the reasonableness of medical treatment for which the claimant sought compensation under 19 *Del. C.* § 2322, there was not substantial evidence to find for the employer.²⁰ Because the employer's expert did not testify that the two injuries were unreasonable or that it was medically impossible to relate the two procedures, the Superior Court reversed the findings of the Board.²¹

*5 (21) Based on Dr. Sabbagh's admission that her medical treatment was reasonable, **Rhinehardt–Meredith** argues that *McCracken* should control. This position misapprehends *McCracken's* holding. Both causation and reasonable medical treatment are elements of a worker's compensation claim, and, in *McCracken*, the reasonableness of the treatment was at issue.²² No one here questions whether **Rhinehardt–Meredith's** third surgery was reasonable or medically necessary; rather, the Board based its decision on testimony indicating that the 2005 injuries were *not causally related* to the 1980 accident. Thus, *McCracken* is inapposite.²³

(22) Lastly, **Rhinehardt–Meredith** challenges the Board's findings on the basis of the Superior Court's decision in *Lindsay v. Chrysler Corp.*²⁴ She argues that, because both experts testified by deposition, the Board was not able to base its decision solely on the persuasiveness of one expert over another. In *Lindsay*, the court held that when both experts testify by deposition, the IAB is not permitted to accept one opinion over the other *solely on the persuasiveness* of that witness.²⁵ Here, the Board provided specific relevant reasons for discounting the opinion of Dr. Kalamchi and accepting the opinion of Dr. Sabbagh, consistent with our caselaw.²⁶ Thus, we conclude that **Rhinehardt–Meredith's** claims of error are without merit.

NOW, THEREFORE, IT IS ORDERED that the decision of the Board is AFFIRMED.

All Citations

963 A.2d 139 (Table), 2008 WL 5308388

Footnotes

1 E.g.,  *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66–67 (Del.1965); *GMC v. Freeman*, 164 A.2d 686, 688 (Del.1960); see also 29 Del. C. § 10142(d).

2  *Duvall v. Charles Connell Roofing*, 564 A.2d 1132 (Del.1989).

3  *Johnson*, 213 A.2d at 66–67; see also 29 Del. C. § 10142(d).

4  245 A.2d 805 (Del.Super.1968).

5  *Id.* at 810 (citing 1 LARSON, WORKMEN'S COMPENSATION LAW, § 13.12).

6 *Barkley v. Johnson Controls*, 2003 WL 187278, at *3 (Del.Super.).

7 *Id.* at *4 (holding that a weakened condition stemming from a prior industrial accident that leads to a non-industrial accident is compensable only if the chain of causation is not broken by claimant's negligence or intentional misconduct).

8 *Delhaize Am., Inc. a/k/a Food Lion v. King*, 2005 WL 1654367, at *3 (Del.Super.) (affirming a decision of the I.A.B. to discount the testimony of Claimant's expert because he applied a “but for” test to causality instead of the proper “direct and natural result” test).

9 Although the IAB did not use the precise language “direct and natural result (or consequence),” that is not controlling. The Superior Court determined the IAB utilized the standard when it found causation, even though it did not use the words “direct” or “natural.” In a similar case, the Superior Court found that the Board properly performed its causality test when it stated, “[The Board] accepts [Claimant's expert doctor's] opinion that while the fall could have made Hall's symptoms worse, the underlying cause of the L2/3 herniation and resultant surgery was the natural degeneration brought on by the previous fusions.” *Standard Dist., Inc. v. Hall*, 2006 WL 2714960, at *2 (Del.Super.2006) (quoting *Hall v. Standard Dist., Inc.*, No. 908223, at 13 (Del. I.A.B. June 28, 2005)); cf. *Neely v. State*, 2007 WL 4201131, at *2, 4 (Del.Super.2007) (holding the IAB did not determine causation properly and remanding to determine if claimant would still have been totally disabled in the absence of the subsequent injury).

10 In fact, the IAB made a direct and natural determination when it credited the testimony of Dr. Sabbagh: “The Board accepts Dr. Sabbagh's opinion that the L2–3 disc bulge was a normal degenerative finding for someone of Claimant's age in 2002 and that the degenerative changes would have been much greater if they were related to the L4 to S1 fusion that had been performed initially in 1981.”

11 The Superior Court stated:

If an impairment has returned or increased “without the intervention of a new or independent accident,” an employee may seek compensation. A two step test is applied to determine the distinction. First, the

Board determines whether the second injury was a result of an “intervening or untoward event.” Second, the Board determines whether there was a change in Claimant's condition as a result of the event. In this case, the Board found that the 2005 car accident caused an injury unrelated to the 1980 industrial injury and therefore correctly treated it as a new and unrelated injury. Appellant's argument that the Board applied the wrong rule is without merit.

Rhinehardt–Meredith, 2008 WL 2582981, at *3 (internal citations omitted).

12 *Id.*

13  *Breeding v. Contractors–One–Inc.*, 549 A.2d 1102, 1104 (Del.1988).

14 *Id.*

15 *Wenke v. GAICO*, 2006 WL 1476057, *2 (Del.2006).

16 *See Papa John's, Inc. v. Biddle*, 2006 WL 3844074 (Del.Super.2006).

17  *Johnson v. Chrysler Corp.*, 213 A.2d 64, 51 (Del.1965).

18 *Cottman v. Burris Fence Const.*, 2006 WL 3742580, *3 (Del.2006).

19  1992 WL 301985 (Del.Super.).

20 Section 2322(a) mandates that an employer pay for reasonable medical treatment relating from an industrial accident.

21  *McCracken*, 1992 WL 301985 at *5.

22 *Id.* at *3.

23 The Superior Court was presented with a similar argument in *Boucek v. J.C. Penny, Co.*, 1995 WL 108949 (Del.Super.1995), where the claimant sought to reverse on the same grounds **Rhinehardt–Meredith** now argues. Like the instant case, the Board based its findings on the lack of a causal relationship between the two injuries. In declining to extend *McCracken* into such cases, the court stated:

The Claimant reads *McCracken* to extend this rule to disputes as to causation as well as to appropriate treatment and says that if a Claimant's treating physician testifies that the injuries were caused by an industrial accident, the Board may not reject that testimony unless the employer's doctor says that the treating physician's opinion is unreasonable or incredible.

To the extent that *McCracken* can be read to impose such a standard when evaluating the existence of substantial evidence, it would result in a departure from the law as it has been generally applied on appeals from the Industrial Accident Board.

Id. at *4.

24  1994 WL 750345 (Del.Super.1994).

25  *Lindsay*, 1994 WL 750345, at *3.

26 See  *Diamond Fuel Oil v. O'Neal*, 734 A.2d 1060, 1065 (Del.1999) (“While the Board is entitled to discount the testimony of the medical witness on the basis of credibility, it must provide specific relevant reasons for doing so.”)

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Ethics and the Duty to the Tribunal and Opposing Counsel

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THE DELAWARE LAWYERS' RULES OF PROFESSIONAL CONDUCT

Preamble: A lawyer's responsibilities	Rule
Rule	4.1. Truthfulness in statements to others
1.0 Terminology	4.2. Communication with person represented by counsel
1.1. Competence	4.3. Dealing with unrepresented person
1.2. Scope of representation	4.4. Respect for rights of third persons
1.3. Diligence	5.1. Responsibilities of partners, managers, and supervisory lawyers
1.4. Communication	5.2. Responsibilities of a subordinate lawyer
1.5. Fees	5.3. Responsibilities regarding non-lawyer assistants
1.6. Confidentiality of information	5.4. Professional independence of a lawyer
1.7. Conflict of interest: Current clients	5.5. Unauthorized practice of law; multijurisdictional practice of law
1.8. Conflict of interest: Current clients: Specific rules	5.6. Restrictions on right to practice
1.9. Duties to former clients	5.7. Responsibilities regarding law-related services
1.10. Imputation of conflicts of interest: General rule	6.1. Voluntary pro bono publico service
1.11. Special conflicts of interest for former and current government officers and employees	6.2. Accepting appointments
1.12. Former judge, arbitrator, mediator or other third-party neutral	6.3. Membership in legal services organization
1.13. Organization as client	6.4. Law reform activities affecting client interests
1.14. Client with diminished capacity	6.5. Non-profit and court-annexed limited legal-service programs
1.15. Safekeeping property	7.1. Communications concerning a lawyer's services
1.15A. Trust account overdraft notification	7.2. Advertising
1.16. Declining or terminating representation	7.3. Direct contact with prospective clients
1.17. Sale of law practice	7.4. Communication of fields of practice and specialization
1.18. Duties to prospective client	7.5. Firm names and letterheads
2.1. Advisor	7.6. Political contributions to obtain government legal engagements or appointments by judges
2.2. Intermediary (Deleted)	8.1. Bar admission and disciplinary matters
2.3. Evaluation for use by third persons	8.2. Judicial and legal officials
2.4. Lawyer serving as third-party neutral	8.3. Reporting professional misconduct
3.1. Meritorious claims and contentions	8.4. Misconduct
3.2. Expediting litigation	8.5. Disciplinary authority; choice of law
3.3. Candor toward the tribunal	
3.4. Fairness to opposing party and counsel	
3.5. Impartiality and decorum of the tribunal	
3.6. Trial publicity	
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3.8. Special responsibilities of a prosecutor	
3.9. Advocate in nonadjudicative proceedings	
3.10. Communication with or investigation of jurors (Deleted)	

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

RULE 1.0: TERMINOLOGY

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably

adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute

a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is

independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

RULE 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate

preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

RULE 1.2 SCOPE OF REPRESENTATION

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law,

however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

RULE 1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's workload must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

RULE 1.4 COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations - depending on both the importance of the action under consideration and the feasibility of consulting with the client - this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the

lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may

provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

RULE 1.5 FEES

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the client is advised in writing of and does not object to the participation of all the lawyers involved; and

(2) the total fee is reasonable.

(f) A lawyer may require the client to pay some or all of the fee in advance of the lawyer undertaking the representation, provided that:

(1) The lawyer shall provide the client with a written statement that the fee is refundable if it is not earned,

(2) The written statement shall state the basis under which the fees shall be considered to have been earned, whether in whole or in part, and

(3) All unearned fees shall be retained in the lawyer's trust account, with statement of the fees earned provided to the client at the time such funds are withdrawn from the trust account.

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an

understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee without regard to whether the division is in proportion to the services each lawyer renders or whether each lawyer assumes responsibility for the representation as a whole, so long as the client is advised in writing and does not object, and the total fee is reasonable. It does not require disclosure to the client of the share that each lawyer is to receive. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Advance Fees

[9] A lawyer may require that a client pay a fee in advance of completing the work for the representation. All fees paid in advance are refundable until earned. Until such time as that fee is earned, that fee must be held in the attorney's trust account. An attorney who accepts an advance fee must provide the client with a written statement that the fee is refundable if not earned and how the fee will be considered earned. When the fee is earned and the money is withdrawn from the attorney's trust account, the client must be notified and a statement provided.

[10] Some smaller fees--such as those less than \$2500.00--may be considered earned in whole upon some identified event, such as upon commencement of the attorney's work on that matter or the attorney's appearance on the record. However, a fee considered to be "earned upon commencement of the attorney's work on the matter" is not the same as a fee "earned upon receipt." The former requires that the attorney actually begin work whereas the latter is dependent only upon payment by the client. In a criminal defense matter, for example, a smaller fee--such as a fee under \$2500.00-- may be considered earned upon entry of the attorney's appearance on the record or at the initial consultation at which substantive, confidential information has been communicated which would preclude the attorney from representation of another potential client (e.g. a co-defendant). Nevertheless, all fees must be reasonable such that even a smaller fee might be refundable, in whole or in part, if it is not reasonable under the circumstances.

[11] As a general rule, larger advance fees--such as those over \$2500.00--will not be considered earned upon one specific event. Therefore, the attorney must identify the manner in which the fee will be considered earned and make the appropriate disclosures to the client at the outset of the representation. The written statement must include a reasonable method of determining fees earned at a given time in the representation. One

method might be calculation of fees based upon an agreed upon hourly rate. If an hourly rate is not utilized, the attorney is required to identify certain events which will trigger earned fees. For example, in a criminal defense matter, an attorney might identify events such as entry of appearance, arraignment, certain motions, case review, and trial as the events which might trigger certain specified earned fees and deduction of those fees from the attorney trust account. Likewise, in a domestic matter, an attorney might identify such events as entry of appearance, drafting petition, attendance at mediation conference, commissioner's hearing, pre-trial conference, and judge's hearing as triggering events for purposes of earning fees. It might be reasonable for an attorney to provide that a certain percentage of this fee will be considered earned on a monthly basis, for any work performed in that month, or upon the completion of an identified portion of the work. Nevertheless, all fees must be reasonable such that even a fee considered earned in full per the written statement provided to the client might be refundable, in whole or in part, if it is not reasonable under the circumstances.

[12] In contrast to the general rule, a larger advance fee may, under certain circumstances, be earned upon one specific event. For example, this fee or a large portion thereof could become earned upon an attorney's initial consultation with a client in a bankruptcy matter at which substantive, confidential information has been communicated which would preclude the attorney from representation of another potential client (e.g. the client's creditors). In this context, the attorney must provide a clear written statement that the fee, or a portion thereof, is earned at time of consultation as compensation for this lost opportunity. Likewise, a criminal defense attorney might outline in the written agreement that the entire fee becomes earned upon conclusion of the matter--in the case of negotiation and acceptance of a plea agreement prior to trial. Both of these examples are tempered, however, by the reasonableness requirement set forth above.

[13] It is not acceptable for an attorney to hold earned fees in the attorney trust account. See Rule 1.15(a). This is commingling. Once fees are earned, those fees must be withdrawn from the attorney trust account. Typically, it is acceptable to draw down earned fees from an attorney trust account on a monthly or some other reasonable periodic basis. Similarly, monthly/periodic statements are considered an acceptable method of notifying one's clients that earned fees have been withdrawn from a trust account. For those attorneys earning fees on a percentage basis, wherein the fee would be considered earned upon the completion of an identified portion of the work, a statement to that effect upon completion of that work would satisfy this requirement.

Disputes over Fees

[14] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The

lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order.

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is

thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a

present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or a fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Disclosure is not permitted under paragraph (b)(3) when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense if that lawyer's services were not used in the initial crime or fraud; disclosure would be permitted, however, if the lawyer's services are used to commit a further crime or fraud, such as the crime of obstructing justice. While applicable law may provide that a completed act is regarded for some purposes as a continuing offense, if commission of the initial act has already occurred without the use of the lawyer's services, the lawyer does not have discretion under this paragraph to use or disclose the client's information.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(2) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law. *See, e.g.*, 29 DEL. CODE ANN. § 9007A(c) (which provides that an attorney acting as guardian ad litem for a child in child welfare proceedings shall have the “duty of confidentiality to the child unless the disclosure is necessary to protect the child’s best interests”).

[13] Paragraph (b)(6) also permits compliance with a court order requiring a lawyer to disclose information relating to a client’s representation. If a lawyer is called as a witness to give testimony concerning a client or is otherwise ordered to reveal information relating to the client’s representation, however, the lawyer must, absent informed consent of the client to do otherwise, assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the

purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in

paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will

be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal

interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b) some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot

reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be

assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

**RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC
RULES**

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Comment

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the

lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the

requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

RULE 1.9 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that

transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree

limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) Except as otherwise provided in this rule, while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a client in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the affected former client.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] - [4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Where the conditions of paragraph (c) are met, imputation is removed, and consent to the new representation is not required. Lawyers should be aware, however, that courts may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation.

[7] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(2) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[10] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11 (b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[11] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

RULE 1.11 SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental

employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Comment

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under

paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [6].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph ~~(b)~~ (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and ~~(e)~~ (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

RULE 1.12 FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those Rules correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(e) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

RULE 1.13 ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

[4] The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[5] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

Government Agency

[6] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[7] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[8] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[9] Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[10] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[11] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the disabled person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

RULE 1.15 SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Funds of the lawyer that are reasonably sufficient to pay bank charges may be deposited therein; however, such amount may not exceed \$500 and must be separately stated and accounted for in the same manner as clients' funds deposited therein. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after the completion of the events that they record.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) A lawyer engaged in the private practice of law must maintain financial books and records on a current basis, and shall preserve the books and records for at least five years following the completion of the year to which they relate, or, as to fiduciary books and records, five years following the completion of that fiduciary obligation. The maintenance of books and records must conform with the following provisions:

(1) All bank statements, cancelled checks, and duplicate deposit slips relating to fiduciary and non-fiduciary accounts must be preserved.

(2) Bank accounts and related statements, checks, deposit slips, and other documents maintained for fiduciary funds must be specifically designated as "Trust Account" or "Escrow Account," and must be used only for funds held in a fiduciary capacity.

(3) Bank accounts and related statements, checks, deposit slips, and other documents maintained for non-fiduciary funds must be specifically designated as "Attorney Business Account" or "Attorney Operating Account," and must be used only for funds held in a non-fiduciary capacity. A lawyer in the private practice of law shall maintain a non-fiduciary account for general operating purposes, and the account shall be separate from any of the lawyer's personal or other accounts.

(4) All records relating to property other than cash received by a lawyer in a fiduciary capacity shall be maintained and preserved. The records must describe with specificity the identity and location of such property.

(5) All billing records reflecting fees charged and other billings to clients or other parties must be maintained and preserved.

(6) Cash receipts and cash disbursement journals must be maintained and preserved for each bank account for the purpose of recording fiduciary and non-fiduciary transactions. A lawyer using a manual system for such purposes must total and balance the transaction columns on a monthly basis.

(7) A monthly reconciliation for each bank account, matching totals from the cash receipts and cash disbursement journals with the ending check register balance, must be performed. The reconciliation procedures, however, shall not be required for lawyers using a computer accounting system or a general ledger.

(8) The check register balance for each bank account must be reconciled monthly to the bank statement balance.

(9) With respect to all fiduciary accounts:

(A) A subsidiary ledger must be maintained and preserved with a separate account for each client or third party in which cash receipts and cash disbursement transactions and monthly balances are recorded.

(B) Monthly listings of client or third party balances must be prepared showing the name and balance of each client or third party, and the total of all balances.

(C) No funds disbursed for a client or third party must be in excess of funds received from that client or third party. If, however, through error funds disbursed for a client or third party exceed funds received from that client or third party, the lawyer shall transfer funds from the non-fiduciary account in a timely manner to cover the excess disbursement.

(D) The reconciled total cash balance must agree with the total of the client or third party balance listing. There shall be no unidentified client or third party funds. The bank reconciliation for a fiduciary account is not complete unless there is agreement with the total of client or third party accounts.

(E) No funds which should have been disbursed shall remain in the account, including, but not limited to, earned legal fees, which must be

transferred to the lawyer's non-fiduciary account on a prompt and timely basis when earned.

(F) No funds of the lawyer shall be placed in or left in the account except as provided in Rule 1.15(a).

(G) When a separate real estate bank account is maintained for settlement transactions, and when client or third party funds are received but not yet disbursed, a listing must be prepared on a monthly basis showing the name of the client or third party, the balance due to each client or third party, and the total of all such balances. The total must agree with the reconciled cash balance.

(10) If a lawyer maintains financial books and records using a computer system, the lawyer must cause to be printed each month a hard copy of all monthly journals, ledgers, reports, and reconciliations, and must review and preserve the documents in the same manner as other financial records described in this Rule.

(e) A lawyer's financial books and records must be subject to examination by the auditor for the Lawyers' Fund for Client Protection, for the purpose of verifying the accuracy of a certificate of compliance filed each year by the lawyer pursuant to Supreme Court Rule 69. The examination must be conducted so as to preserve, insofar as is consistent with these Rules, the confidential nature of the lawyer's books and records. If the lawyer's books and records are not located in Delaware, the lawyer may have the option either to produce the books and records at the lawyer's office in Delaware or to produce the books and records at the location outside of Delaware where they are ordinarily located. If the production occurs outside of Delaware, the lawyer shall pay any additional expenses incurred by the auditor for the purposes of an examination.

(f) A lawyer holding client funds must initially and reasonably determine whether the funds should or should not be placed in an interest-bearing depository account for the benefit of the client. In making such a determination, the lawyer must consider the financial interests of the client, the costs of establishing and maintaining the account, any tax reporting procedures or requirements, the nature of the transaction involved, the likelihood of delay in the relevant proceedings, whether the funds are of a nominal amount, and whether the funds are expected to be held by the lawyer for a short period of time. A lawyer must at reasonable intervals consider whether changed circumstances would warrant a different determination with respect to the deposit of client funds. Except as provided in these Rules, interest earned on client funds placed into an interest-bearing depository account for the benefit of the client (less any deductions for service charges or other fees of the depository institution) shall belong to the client whose funds are deposited, and the lawyer shall have no right or claim to such interest.

(g) A lawyer holding client funds who has reasonably determined, pursuant to subsection (f) of this Rule, that such funds need not be deposited into an interest-bearing

depository account for the benefit of the client must maintain a pooled interest-bearing depository account for the deposit of the funds; provided, however, that this requirement shall not apply to a lawyer who either has obtained inactive status pursuant to Supreme Court Rule 69(d), or has obtained a Certificate of Retirement pursuant to Supreme Court Rule 69(f), or has formally elected to opt out of this requirement in accordance with the procedure set forth below in subparagraph (k).

(h) A lawyer who maintains such a pooled account shall comply with the following:

(1) The account shall include only client's funds which are nominal amount or are expected to be held for a short period of time.

(2) No interest from such an account shall be made available to a lawyer or law firm.

(3) Lawyers or law firms depositing client funds in a pooled interest-bearing account under this paragraph (h) [(g)] shall direct the depository institution:

(a) To remit interest, net any service charges or fees, as computed in accordance with the institution's standard accounting practice, at least quarterly, to the Delaware Bar Foundation; and

(b) To transmit with each remittance to the Delaware Bar Foundation a statement showing the name of the lawyer or law firm on whose accounting remittance is sent and the rate of interest applied; with a copy of statement to be transmitted to the lawyer or law firm by the Delaware Bar Foundation.

(i) The funds transmitted to the Delaware Bar Foundation shall be available for distribution for the following purposes:

- (1) To improve the administration of justice;
- (2) To provide and to enhance the delivery of legal services to the poor;
- (3) To support law related education;
- (4) For such other purposes that serve the public interest.

The Delaware Bar Foundation shall recommend for the approval of the Supreme Court of the State of Delaware, such distributions as it may deem appropriate. Distributions shall be made only upon the Court's approval.

(j) Lawyers or law firms, depositing client funds in a pooled interest-bearing depository account under this paragraph shall not be required to advise the client of such deposit or of the purposes to which the interest accumulated by reason of such deposits is to be directed.

(k) The procedure available for opting out of the requirement to maintain pooled interest-bearing accounts are as follows:

(1) Prior to December 15, 1983, a lawyer wishing to decline to maintain a pooled interest-bearing account[s] described in this paragraph for any calendar year may do so by submitting a Notice of Declination in writing to the Clerk of the Supreme Court *ab initio* or before December 15 of the preceding calendar year. Any such submission shall remain effective, unless revoked and need not be renewed for any ensuing year.

(2) Any lawyer who has not filed a Notice of Declination on or before December 15, 1983, may elect not to maintain a pooled interest-bearing depository account for client funds as required and instead to maintain a pooled depository account for such funds that does not bear interest or that bears interest solely for the benefit of the clients who deposited the funds by certifying that the lawyer or law firm opts out of the obligation to comply with the requirements by timely submission of the Annual Registration Statement required by Supreme Court Rule 69(b)(i). Any such certification shall release the lawyer or law firm submitting it from participation effective as of the date that the certification is submitted and it shall remain effective until revoked as set forth below without need for renewal for any ensuing year.

(3) Notwithstanding the foregoing provisions of this subparagraph, any lawyer or law firm may petition the Court at any time and, for good cause shown, may be granted leave to opt out of the obligation to comply with the mandatory requirements of this paragraph.

(l) An election to opt out of the obligation to comply with paragraph (h) hereof may be revoked at any time upon the opening by a non-participating lawyer or law firm of a pooled interest-bearing account as previously described and due notification thereof to the Court Administrator of the Supreme Court pursuant to Supreme Court Rule 69(g).

(m) A lawyer should exercise good faith judgment in determining initially, whether funds of a client are of such nominal amount or are expected to be held by the lawyer for such a short period of time that the funds should not be placed in an interest-bearing depository account for the benefit of the client. The lawyer should also consider such other facts as:

(1) The cost of establishing and maintaining the account, service charges, accounting fees, and tax reporting procedures;

(2) The nature of the transaction(s) involved; and

(3) The likelihood of delay in the relevant proceedings.

A lawyer should review at reasonable intervals whether changed circumstances require further action respecting the deposit of client funds.

(n) A lawyer shall not disburse Fiduciary Funds from his or her attorney trust account(s) unless the funds deposited in the account to be disbursed are good funds as hereinafter defined. "Good funds" shall mean:

- (1) cash;
- (2) electronic fund ("wire") transfer;
- (3) certified check;
- (4) bank cashier's check or treasurer's check;
- (5) U.S. Treasury or State of Delaware Treasury check;
- (6) Check drawn on a separate trust or escrow account of an attorney engaged in the private practice of law in the State of Delaware held in a fiduciary capacity, including his or her client's funds;
- (7) Check of an insurance company that is authorized by the Insurance Commissioner of Delaware to transact insurance business in Delaware;
- (8) Check in an amount no greater than \$10,000.00;
- (9) Check greater than \$10,000.00, which has been actually and finally collected and may be drawn against under federal or state banking regulations then in effect;
- (10) Check drawn on an escrow account of a real estate broker licensed by the State of Delaware up to the limit of guarantee provided per transaction by statute.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[2] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[3] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

[4] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

[5] The extensive provisions contained in Rule 1.15(d) represent the financial recordkeeping requirements that Delaware lawyers must follow when engaged in the private practice of law. These provisions are also reflected in a certificate of compliance that is included in each lawyer's registration statement, filed annually pursuant to Delaware Supreme Court Rule 69.

[6] Compliance with these provisions provides the necessary level of control to safeguard client and third party funds, as well as the lawyer's operating funds. When these recordkeeping procedures are not performed on a prompt and timely basis, there will be a loss of control by the lawyer, resulting in insufficient safeguards over client and other property.

[7] Some of the essential financial recordkeeping issues for Delaware lawyers under this Rule include the following:

(a) Segregation of funds. Improper commingling occurs when the lawyer's funds are deposited in an account intended for the holding of client and third party funds, or when client funds are deposited in an account intended for the holding of the lawyer's funds. The only exception is found in Rule 1.15(a), which allows a lawyer to maintain \$500 of the lawyer's funds in the fiduciary account in order to cover possible bank service charges. Keeping an accurate account of each client's funds is more difficult if client funds are combined with the lawyer's own funds. The requirement of separate bank accounts for lawyer funds and non-lawyer funds, with separate bookkeeping procedures for each, is intended to avoid commingling.

(b) Deposits of legal fees. Unearned legal fees are the property of the client until earned, and therefore must be deposited into the lawyer's fiduciary account. Legal fees must be withdrawn from the fiduciary account and transferred to the operating or business account promptly upon being earned, to avoid improper commingling. The monthly listing of client and third party funds in the fiduciary account should therefore be carefully reviewed in order to determine whether any earned legal fees remain in the account.

(c) Identity of property. The identity and location of client funds and other property must be maintained at all times. Accordingly, every cash receipt and disbursement transaction in the fiduciary account must be specifically identified by the name of the client or third party. If financial books and records are maintained in this manner, the resultant control should ensure that there are no unidentified funds in the lawyer's possession.

(d) Disbursement of funds. Funds due to clients or third parties must be disbursed without unnecessary delay. The monthly listing of client funds in the fiduciary account should therefore be reviewed carefully in order to determine whether any balances due to clients or third parties remain in the account.

(e) Negative balances. The disbursement of client or third party funds in an amount greater than the amount being held for such client or third party results in a negative balance in the fiduciary account. This should never occur when the proper controls are in place. However, if a negative balance occurs by mistake or oversight, the lawyer must make a timely transfer of funds from the operating account to the fiduciary account in order to cover the excess disbursement and cure the negative balance. Such mistakes can be avoided by making certain that the client balance sufficiently covers a potential disbursement prior to making the actual disbursement.

(f) Reconciliations. Reconciled cash balances in the fiduciary accounts must agree with the totals of client balances held. Only by performing a reconciliation procedure will the lawyer be assured that the cash balance in the fiduciary account exactly covers the balance of client and third party funds that the lawyer is holding.

(g) Real estate accounts. Bank accounts used exclusively for real estate settlement transactions are fiduciary accounts, and are therefore subject to the same recordkeeping requirements as other such accounts, except that cash receipts and cash disbursements journals are not required.

[8] Illustrations of some of the accounting terms that Delaware lawyers need to be aware of, as used in this Rule, include the following:

(a) Financial books and records include all paper documents or computer files in which fiduciary and non-fiduciary transactions are individually recorded, balanced, reconciled, and totaled. Such records include cash receipts and cash disbursements journals, general and subsidiary journals, periodic reports, monthly reconciliations, listings, and so on.

(b) The cash receipts journal is a monthly listing of all deposits made during the month and identified by date, source name, and amount, and in distribution columns, the nature of the funds received, such as "fee income" or "advance from client," and so on. Such a journal is maintained for each bank account.

(c) The cash disbursements journal is a listing of all check payments made during the month and identified by date, payee name, check number, and amount, and in distribution columns, the nature of funds disbursed, such as "rent" or "payroll," and so on. Such a journal is maintained for each bank account. Cash

receipts and cash disbursement records may be maintained in one consolidated journal.

(d) Totals and balances refer to the procedures that the lawyer needs to perform when using a manual system for accounting purposes, in order to ensure that the totals in the monthly cash receipts and cash disbursements journals are correct. The cash and distribution columns must be added up for each month, then the total cash received or disbursed must be compared with the total of all of the distribution columns.

(e) The ending check register balance is the accumulated net cash balance of all deposits, check payments, and adjustments for each bank account. This balance will not normally agree with the bank balance appearing on the end-of-month bank statement because deposits and checks may not clear with the bank until the next statement period. This is why a reconciliation is necessary.

(f) The reconciled monthly cash balance is the bank balance conformed to the check register balance by taking into account the items recorded in the check register which have not cleared the bank. For example:

Account balance, per bank statement	
\$2,000.00	
Add -- deposits in transit (deposits in check register that do not appear on bank statement)	
\$1,500.00	
Less -- outstanding checks (checks entered in check register that do not appear on bank statement)	
(1,800.00)	

Reconciled cash balance	
\$1,700.00	-----

(g) The general ledger is a yearly record in which all of a lawyer's transactions are recorded and grouped by type, such as cash received, cash disbursed, fee income, funds due to clients, and so on. Each type of transaction recorded in the general ledger is also summarized as an aggregate balance. For example, the ledger shows cash balances for each bank account which represent the accumulation of the beginning balance, all of the deposits in the period, and all of the checks issued in the period.

(h) The subsidiary ledger is the list of transactions shown by each individual client or third party, with the individual balances of each (as contrasted to the general ledger, which lists the total balances in an aggregate amount "due to clients"). The total of all of the individual client and third party balances in the

subsidiary ledger should agree with the total account balance in the general ledger.

(i) A variance occurs in a reconciliation procedure when two figures which should agree do not in fact agree. For example, a variance occurs when the reconciled cash balance in a fiduciary account does not agree with the total of client and third party funds that the lawyer is actually holding.

[9] Accrued interest on client and other funds in a lawyer's possession is not the property of the lawyer, but is generally considered to be the property of the owner of the principal. An exception to this legal principle relates to nominal amounts of interest on principal. A lawyer must reasonably determine if the transactional or other costs of tracking and transferring such interest to the owners of the principal are greater than the amount of the interest itself. The lawyer's proper determination along these lines will result in the lawyer's depositing of fiduciary funds into an interest-bearing account for the benefit of the owners of the principal, or into a pooled interest-bearing account. If funds are deposited into a pooled account, the interest is to be transferred (with some exceptions) to the Delaware Bar Foundation pursuant to the Delaware Supreme Court's Interest On Lawyer Trust Accounts Program ("IOLTA").

[10] Implicit in the principles underlying Rule 1.15 is the strict prohibition against the misappropriation of client or third party funds. Misappropriation of fiduciary funds is clearly a violation of the lawyer's obligation to safeguard client and other funds. Moreover, intentional or knowing misappropriation may also be a violation of Rule 8.4(b) (criminal conduct in the form of theft) and Rule 8.4(c) (general dishonest or deceptive conduct). Intentional or knowing misappropriation is considered to be one of the most serious acts of professional misconduct in which a lawyer can engage, and typically results in severe disciplinary sanctions.

[11] Misappropriation includes any unauthorized taking by a lawyer of client or other property, even for benign reasons or where there is an intent to replenish such funds. Although misappropriation by mistake, neglect, or recklessness is not as serious as intentional or knowing misappropriation, it can nevertheless result in severe disciplinary sanctions. See, e.g., *Matter of Figliola*, Del. Supr., 652 A.2d 1071, 1076-78 (1995).

RULE 1.15A TRUST ACCOUNT OVERDRAFT NOTIFICATION

(a) Attorney accounts designated as “Trust Account” or “Escrow Account” pursuant to Rule 1.15(d)(2) shall be maintained only in financial institutions approved by the Lawyers’ Fund for Client Protection (the “Fund”). A financial institution may not be approved as a depository for attorney trust and escrow accounts unless it shall have filed with the Fund an agreement, in a form provided by the Fund, to report to the Office of Disciplinary Counsel (“ODC”) in the event any instrument in properly payable form is presented against an attorney trust or escrow account containing insufficient funds, irrespective of whether or not the instrument is honored.

(b) The Supreme Court may establish rules governing approval and termination of approved status for financial institutions and the Fund shall annually publish a list of approved financial institutions. No trust or escrow account shall be maintained in any financial institution that does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon thirty (30) days notice in writing to the Fund.

(c) The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and the financial institution shall provide a copy of the dishonored instrument to the ODC no later than seven (7) calendar days following a request for the copy by the ODC.

(2) In the case of instruments that are presented against insufficient funds, but which instruments are honored, the report shall identify the financial institution, the attorney or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby.

(d) Reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor. If an instrument presented against insufficient funds is honored, then the report shall be made within seven (7) calendar days of the date of presentation for payment against insufficient funds.

(e) Every attorney practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.

(f) Nothing herein shall preclude a financial institution from charging a particular attorney or law firm for the reasonable costs of producing the reports and records required by this rule.

(g) The terms used in this section are defined as follows:

(1) “Financial institution” includes banks, savings and loan associations, credit unions, savings banks, and any other business or persons who accept for deposit funds held in trust by attorneys.

(2) “Properly payable” refers to an instrument that, if presented in the normal course of business, is in a form requiring payment under the laws of Delaware.

(3) “Notice of dishonor” refers to the notice that a financial institution is required to give, under the laws of Delaware, upon presentation of an instrument that the institution dishonors.

(h) Every attorney practicing or admitted to practice in this jurisdiction shall designate every account into which attorney trust or escrow funds are deposited either as a “Rule 1.15A Attorney Trust Account” or a “Rule 1.15A Attorney Escrow Account.”

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's service to perpetrate a crime or fraud;

(4) a client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or

expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider

the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

INTERPRETIVE GUIDELINE. RE: RESIDENTIAL REAL ESTATE TRANSACTIONS

The following statements of principles are promulgated as interpretive guidelines in the application to residential real estate transactions in The Delaware Lawyers' Rules of Professional Conduct:

(a) Before accepting representation of a buyer or mortgagor of residential property (including condominiums under the Unit Property Act of the State of Delaware), upon referral by the seller, lender, real estate agent, or other person having an interest in the transaction, it is the ethical duty of a lawyer to inform the buyer or mortgagor in writing at the earliest practicable time:

(1) That the buyer or mortgagor has the absolute right (regardless of any preference that the seller, real estate agent, lender, or other person may have and regardless of who is to pay attorney's fees) to retain a lawyer of his own choice to represent him throughout the transaction, including the examination and certification of title, the preparation of documents, and the holding of settlement; and

(2) As to the identity of any other party having an interest in the transaction whom the lawyer may represent, including a statement that such other representation may be possibly conflicting and may adversely affect the exercise of the lawyer's professional

judgment on behalf of the buyer or mortgagor in case of a dispute between the parties. For the purpose of this Guideline, a lawyer shall be deemed to have a "possibly conflicting" representation if he represents the seller or has represented the seller on a continuing basis in the past; or if he represents the real estate agent or has represented the real estate agent on a continuing basis in the past; or if he represents the lender or has represented the lender on a continuing basis in the past.

(b) Unless a lawyer has been freely and voluntarily selected by the buyer or mortgagor after he has made to the buyer or mortgagor the statements and disclosures hereinabove required, the lawyer may not ethically:

(1) Certify, report, or represent for any purpose that the buyer or mortgagor is his client, or that the buyer or mortgagor is or was obligated for any legal service rendered by him in the transaction; or

(2) Participate in causing the buyer or mortgagor, directly or indirectly, to bear any charge for his legal service; except that the lawyer for a lender may receive from the buyer or mortgagor, directly or indirectly, payment of the lender's reasonable and necessary legal expenses for preparation of documents at the request of the buyer's or mortgagor's lawyer, for attendance at settlement, and for title insurance properly specified by the lender (within the provisions of 18 Del.C. § 2305(a)(1)) but unobtainable by the buyer's or mortgagor's lawyer, provided that the buyer's or mortgagor's obligation to pay each such legal expense is particularized as a term and condition of the loan;

or

(3) Participate as the buyer's or mortgagor's lawyer in any transaction in which his representation of the buyer or mortgagor has been made a term or condition of the transaction, directly or indirectly.

(c) The information supplied to the buyer or mortgagor in writing shall contain a description of the attorney's interest or interests sufficient to enable the buyer or mortgagor to determine whether he should obtain a different attorney.

RULE 1.17: SALE OF LAW PRACTICE

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold in the jurisdiction in which the practice has been conducted;

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) The seller gives written notice to each of the seller's clients regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and

(3) the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

In a matter of pending litigation, if a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file. If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale.

(d) The fees charged clients shall not be increased by reason of the sale.

Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by the Seller

[2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's

clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another state.

[5] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves the jurisdiction typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

Sale of Entire Practice or Entire Area of Practice

[6] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more

violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered *in camera*. (A procedure by which such an order can be obtained needs to be established in jurisdictions in which it presently does not exist.)

[9] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

[13] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the

possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

RULE 2.1 ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social and political factors, that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to

the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

RULE 2.2 INTERMEDIARY (Deleted)

RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Comment

Definition

[1] An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duties Owed to Third Person and Client

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer

must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1.

Obtaining Client's Informed Consent

[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(e).

Financial Auditors' Requests for Information

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

RULE 2.4: LAWYER SERVING AS THIRD-PARTY NEUTRAL

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege.

The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

RULE 3.2 EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Comment

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraph (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the

client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a

prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw

if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery requests or fail to make reasonably diligent efforts to comply with a legally proper discovery requests by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending

proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate or cause another to communicate ex parte with such a person or members of such person's family during the proceeding unless authorized to do so by law or court order; or

(c) communicate with a juror or prospective juror after discharge of the jury unless the communication is permitted by court rule; or

(d) engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate or cause another to communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, or with members of such person's family, unless authorized to do so by law or court order. Furthermore, a lawyer shall not conduct or cause another to conduct a vexatious or harassing investigation of such persons or their family members.

[3] A lawyer may not communicate with a juror or prospective juror after the jury has been discharged unless permitted by court rule. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive, undignified or discourteous conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

RULE 3.6 TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

- (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

RULE 3.7 LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Comment

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the

opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the

ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments that have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5(a) and (c).

Comment

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

RULE 3.10 COMMUNICATION WITH OR INVESTIGATION OF JURORS
(Deleted)

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information,

then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

RULE 4.3 DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that a such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

RULE 5.1 RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in

practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;

(3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

**RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL
PRACTICE OF LAW**

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under

paragraph (c). Services may be “temporary” even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word “admitted” in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission *pro hac vice* or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission *pro hac vice* before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted *pro hac vice*. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services

are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission *pro hac vice* in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to

the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Comment

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

RULE 5.7 RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Comment

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and

legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent

required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

RULE 6.1 VOLUNTARY PRO BONO PUBLICO SERVICE

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

Comment

[1] The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice. This Rule expresses that policy but is not intended to be enforced through the disciplinary process.

[2] The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.

[3] The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.

RULE 6.2 ACCEPTING APPOINTMENTS

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Comment

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

RULE 6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comment

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

RULE 6.4 LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Comment

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefited.

RULE 6.5 NON-PROFIT AND COURT-ANNEXED LIMITED LEGAL-SERVICE PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Comment

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services — such as advice or the completion of legal forms - that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

RULE 7.2 ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) Except as permitted by Rule 1.5(e), a lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; and

(3) pay for a law practice in accordance with Rule 1.17.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Comment

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of

information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of prospective clients; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service.)

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

- 1) is a lawyer; or
- (2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, ~~or~~ recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

- (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
- (2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group

or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[7] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

Comment

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and

proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

RULE 7.5 FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Comment

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

RULE 7.6 POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

Comment

[1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.

[2] The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term "political contribution" does not include uncompensated services.

[3] Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.

[4] The term "lawyer or law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.

[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence

award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.

[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.

RULE 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Comment

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

RULE 8.2 JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Comment

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

(d) Notwithstanding anything in this or other of the rules to the contrary, the relationship between members of either (i) the Lawyers Assistance Committee of the Delaware State Bar Association and counselors retained by the Bar Association, or (ii) the Professional Ethics Committee of the Delaware State Bar Association, or (iii) the Fee Dispute Conciliation and Mediation Committee of the Delaware State Bar Association, or (iv) the Professional Guidance Committee of the Delaware State Bar Association, and a lawyer or a judge shall be the same as that of attorney and client.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, which have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy

respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

INTERPRETIVE GUIDELINE. LAWYER'S INCOME TAXES

The following statements of principles are promulgated as Interpretive Guidelines in the application of the Delaware Lawyers' Rules of Professional Conduct:

Criminal acts that reflect adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, as construed under these Rules, shall be deemed to include, but not limited to, the following:

- (1) Willful failure to make and file federal, state, or city income tax returns or estimated income tax returns, or to pay such estimated tax or taxes, or to supply information in connection therewith at the time or times required by law or regulation;
- (2) Willful attempt in any manner to evade any federal, state, or city income tax.

RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA *Model Rules for Lawyer Disciplinary Enforcement*. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice

before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, ~~and~~ (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

ETHICS & PROFESSIONALISM

I. Professionalism :

A recent e-mail from Morgan & Moran in response to the change in Florida's Tort Law:

Good morning PI lawyers across the country!

As we enter this new era, I want to make it unequivocally clear that we will not be giving an inch to carriers ever again.

Not one inch.

Specifically, as a matter of policy we will not be granting any extension of any sort moving forward for any reason.

They can figure it out or file a motion.

Under no circumstances will we be agreeing to any continuances, discovery extensions, or request to extend deadline to answer complaints.

Redline rules.

It will be a serious internal offense if we find any courtesies being extended to the insurance industry.

Including cases filed prior to March.

No discovery extensions.

No matter the circumstances.

We may want to help the human being defense attorney because we know them and maybe like them, but we will not because they work for an enemy who is heartless and ruthless.

The enemy who just tried to kill us in FL.

They work for the enemy who would like nothing more but for you to be unemployed.

We work for the people.

Exclusively.

They tried to take from the most vulnerable people and consequently, from your families.

No extensions for responses to our complaints.

If there are extenuating circumstances that would benefit our client only please reach out to Matt or John Smith for prior approval.

As a blanket rule we will be giving not one single inch.

LFG.

1. Are there ethical implications from this e-mail?

2. What are the professional implications from this e-mail?

Preamble : A Lawyer's Responsibilities:

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. **These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.**

RULE 3.2 EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.

(c) ***knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;***

(d) in pretrial procedure, make a frivolous discovery requests or

fail to make reasonably diligent efforts to comply with a legally proper discovery requests by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

RULE 5.1 RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial

authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

3. What were the changes to Florida's law?
 - a. Statute of limitations changed from 2 years to 4.
 - b. Comparative negligence statute changed to a modified comparative negligence standard ...
 - c. Medical expenses limited to health care amounts paid

PRINCIPLES OF PROFESSIONALISM FOR DELAWARE

LAWYERS PREAMBLE

The Delaware State Bar Association and the Delaware Supreme Court have jointly adopted the Principles of Professionalism for Delaware Lawyers for the guidance of Delaware lawyers, effective November 1, 2003. These Principles replace and supercede the Statement of Principles of Lawyer Conduct adopted by the Delaware State Bar Association on November 15, 1991. They are not intended, nor should they be construed, as establishing any minimum standards of professional care or competence, or as altering a lawyer's responsibilities under the Delaware Lawyers' Rules of Professional Conduct. These Principles shall not be used as a basis for litigation, lawyer discipline or sanctions. The purpose of adopting the Principles is to promote and foster the ideals of professional courtesy, conduct and cooperation. These Principles are fundamental to the functioning of our system of justice and public confidence in that system.

PRINCIPLES

A. *In general.* A lawyer should develop and maintain the qualities of integrity, compassion, learning, civility, diligence and public service that mark the most admired members of our profession. A lawyer should provide an example to the community in these qualities and should not be satisfied with minimal compliance with the mandatory rules governing professional conduct. These qualities apply both to office practice and to litigation. A lawyer should be mindful of the need to protect the standing of the legal profession in the view of the public and should bring these Principles to the attention of other lawyers when appropriate.

1. **Integrity.** Personal integrity is the most important quality in a lawyer. A lawyer's integrity requires personal conduct that does not impair the rendering of professional service of the highest skill and ability; acting with candor; preserving confidences; treating others with respect; and acting with conviction and courage in advocating a lawful cause. Candor requires both the expression of the truth and the refusal to mislead others in speech and demeanor.

2. **Compassion.** Compassion requires respect for the personal dignity of all persons. In that connection, a lawyer should treat all persons, including adverse lawyers and parties, fairly and equitably and refrain from

acting upon or manifesting racial, gender or other bias or prejudice toward any participant in the legal process.

3. **Learning.** A lawyer's commitment to learning involves academic study in the law followed by continual individual research and investigation in those fields in which the lawyer offers legal services to the public.

4. **Civility.** Professional civility is conduct that shows respect not only for the courts and colleagues, but also for all people encountered in practice. Respect requires promptness in meeting appointments, consideration of the schedules and commitments of others, adherence to commitments whether made orally or in writing, promptness in returning telephone calls and responding to communications, and avoidance of verbal intemperance and personal attacks. A lawyer should not communicate with a Court* concerning pending or prospective litigation without reasonable notice whenever possible to all affected parties. Respect for the Court requires careful preparation of matters to be presented; clear, succinct, and candid oral and written communications; acceptance of rulings of the Court, subject to appropriate review; emotional self-control; the absence of scorn and superiority in words or demeanor; observance of local practice and custom as to the manner of addressing the Court; and appropriate dress in all Court proceedings. A lawyer should represent a client with vigor, dedication and commitment. Such representation, however, does not justify conduct that unnecessarily delays matters, or is abusive, rude or disrespectful. A lawyer should recognize that such conduct may be detrimental to a client's interests and contrary to the administration of justice.

5. **Diligence.** A lawyer should expend the time, effort, and energy required to master the facts and law presented by each professional task.

6. **Public service.** A lawyer should assist and substantially participate in civic, educational and charitable organizations. A lawyer should render substantial professional services on a charitable, or pro bono publico, basis on behalf of those persons who cannot afford adequate legal assistance.

B. ***Conduct of Litigation.*** In dealing with opposing counsel, adverse parties, judges, court personnel and other participants in the legal process, a lawyer should strive to make our system of justice work fairly and efficiently. A lawyer should avoid conduct that undermines the judicial

system or the public's confidence in it, as a truth seeking process for resolving disputes in a rational, amicable and efficient way.

1. **Responsible choice of forum.** Before choosing a forum, a lawyer should review with the client all alternatives, including alternate methods of dispute resolution. A lawyer should not file or defend a suit or an administrative proceeding without as thorough a review of the facts and the law as is required to form a conviction that the complaint or response has merit.

2. **Pre-trial proceedings.** A lawyer should use pre-trial procedures, including discovery, solely to develop a case for settlement or trial and not to harass an opponent or delay a case. Whenever possible, stipulations and agreements should be made between counsel to reduce both the cost and the use of judicial time. Interrogatories and requests for documents should be carefully crafted to demand only relevant matter, and responses should be timely, candid and not evasive. Good faith efforts should be

* As used in these Principles, "Court" includes not only state and federal courts, but also other tribunals performing an adjudicatory function including administrative hearing panels and boards as well as arbitration tribunals.

made to resolve by agreement objections to matters contained in pleadings, discovery requests and objections.

A lawyer should endeavor to schedule pre-trial procedures so as to accommodate the schedules of all parties and attorneys involved. Agreements for reasonable extensions of time should not be withheld arbitrarily.

Only those depositions necessary to develop or preserve the facts should be taken. Questions and objections at deposition should be restricted to conduct appropriate in the presence of a judge.

3. **Communications with the Court or Tribunal.** A lawyer should speak and write respectfully in all communications with the Court. All papers filed in a proceeding should be as succinct as the complexity of the matter will allow. A lawyer should avoid ex parte communications with the Court on pending matters, except when permitted by law. Unless specifically authorized by law, a lawyer should not submit papers to the Court without serving copies of all papers upon opposing counsel in such a manner that opposing counsel will receive them before or contemporaneously with the submission to the Court.

4. **Settlement.** A lawyer should constantly evaluate the strength of a client's legal position and keep the client advised. A lawyer should seek to settle any matter at any time that such course of action is determined to be consistent with the client's best interest after considering the anticipated cost of continuing the proceeding and the lawyer's good faith evaluation of the likely result.

5. **Appeal.** A lawyer should take an appeal only if the lawyer believes in good faith that the Court has committed error, or an appeal is otherwise required.

C. ***Out of state associate counsel.*** Before moving the admission of a lawyer from another jurisdiction, a Delaware lawyer should make such inquiry as required to determine that the lawyer to be admitted is reputable and competent and should furnish the candidate for admission with a copy these Principles.

II. CANDOR TOWARDS THE TRIBUNAL:

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraph (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

III. What do you do when ...

a. You have a witness that becomes uncooperative during the litigation?

See *Christina Zayas v. State of Delaware*, C.A. No.: N20Z-03-006, Del. Supr., March 7, 2022.

During the trial deposition of Dr. Tadunni, Employer's expert, he "refused to discuss anything related to Dr. Cary because at the time of the Hearing, disciplinary charges were pending against Dr. Cary alleging that he had, "fraudulently submitted bills to insurance carriers for physical examinations, medical discussions, and diagnoses of medical complaints that never occurred."

None of the allegations against Dr. Cary involved his treatment of the Ms. Zayas, the claimant.

At the Board hearing, Claimant's counsel moved to exclude Dr. Tadunni's testimony based on his behavior at his trial deposition. The Board denied the request, finding that the prejudice of the exclusion to the Employer outweighed the prejudice to Claimant.

At the hearing, Claimant attempted to move into evidence the medical records of Dr. Cary's treatment. Employer objected on the grounds of authentication and the pending disciplinary charges against Dr. Cary. The objection was sustained.

The Board found in favor of Employer, finding that

Claimant did not meet her burden of proving the surgery was causally related to the work accident. The Board noted that, “the evidence [did] not support that [Zayas] presented with pain upon rotator cuff testing within close proximity to the assault *or in Dr. Cary’s records*”.

The Board then noted in its decision that Dr. Cary’s records were admissible, even though it previously ruled that they were not. The Supreme Court noted the inconsistency in the ruling and the Board’s trial procedure.

On appeal, the Supreme Court ruled that Dr. Tadunni’s refusal to answer relevant questions deprived Claimant of the opportunity to elicit relevant information. It noted that Dr. Tadunni unilaterally determined that he would not answer questions concerning Dr. Cary’s treatment of Claimant. By admitting Tadunni’s testimony and excluding Cary’s medical records, Claimant was prevented from adequately presenting her case and that violated the fundamental notions of fairness, and thereby abused its discretion.

In the Supreme Court’s decision, it makes reference to *In re Shorestein Hays-Nederlander Theatres LLC Appeals*, and noted that **Employer’s counsel should have directed Dr. Tadunni to cooperate with cross-examination.**

The Supreme Court noted that:

1. Employer's counsel should not have tolerated Dr. Tadunni's deposition misconduct.
2. The Court cited to Shorenstein and noted that it made clear that such deposition misconduct is not acceptable Delaware practice.
3. "Depositions are court proceedings and counsel defending the deposition have an obligation to prevent their deponent from impeding or frustrating a fair examination".
4. "Lawyers have an obligation to ensure that their clients do not undermine the integrity of the deposition proceedings by engaging in bad faith litigation tactics; they cannot simply sit and passively observe as their clients persist in such conduct".

b. Employer receives a medical expert opinion that exceeds the permanency rating of Claimant's expert?

1. Are you obligated to produce the opinions noted in the report?
2. Can Employer's expert then become an expert for Claimant?

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(g) *unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;*

(h) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.

(i) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(j) in pretrial procedure, make a frivolous discovery requests or fail to make reasonably diligent efforts to comply with a legally proper discovery requests by an opposing party;

(k) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue

except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(l) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

c. Are there ethical implications in using the same witnesses (experts) all the time in your cases?

d. When your opponent shows up with surprise case law?

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

e. When your opponent lists witnesses on the pre-trial memorandum that they never intend on using at trial or when your opponent checks every box on the pre-trial memorandum?

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(d) in pretrial procedure, make a frivolous discovery requests or fail to make reasonably diligent efforts to comply with a legally proper discovery requests by an opposing party;

f. When you know your witness is lying on the witness stand?

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

- g. When you know the claims adjuster wants to acknowledge the claim but counsel denies it?**
- h. When you suspect your opponent is having ex-parte communications with members of the Board or hearing officers?**
- i. When you have a violent client?**
- j. When you have a zoom motion/hearing?**
- k. When you have a witness that refuses to testify unless he's paid – fact witnesses?**
- l. Your opponent calls someone not identified appropriately on the pre-trial memorandum?**
- m. Dealing with Undocumented Immigrants.**

IN THE SUPREME COURT OF THE STATE OF DELAWARE

In the Matter of	§	
LEONARD B. EDELSTEIN	§	No. 262, 2014
	§	
Respondent.	§	Board Case No. 2012-0258-B
	§	
	§	

Submitted: June 6, 2014

Decided: June 18, 2014

Before **STRINE**, Chief Justice, **BERGER** and **RIDGELY**, Justices.

O R D E R

This 18th day of June 2014, it appears to the Court that the Board on Professional Responsibility has filed a Report on this matter pursuant to Rule 9(d) of the Delaware Lawyers' Rules of Disciplinary Procedure. Neither the Office of Disciplinary Counsel nor the Respondent filed objections to the Board's Report. The Court has reviewed the matter pursuant to Rule 9(e) of the Delaware Lawyers' Rules of Disciplinary Procedure and approves the Board's Report.

NOW, THEREFORE, IT IS ORDERED that the Report filed by the Board on Professional Responsibility on May 19, 2014 (copy attached) is hereby APPROVED and ADOPTED.

IT IS FURTHER ORDERED that:

1. Respondent is hereby suspended from the practice of law in the State of Delaware for a period of one year effective as of the date of this Order.

2. Respondent is prohibited from providing advice to any Delaware clients on matters of Delaware law for a period of one year.
3. Respondent is prohibited from acting *pro hac vice* on any matter in Delaware for a period of three years.
4. The contents of the Board's report shall be made public.
5. The ODC is directed to file within ten days of the date of this Order the costs of the disciplinary proceedings. Thereafter, Respondent is directed to pay all costs within thirty days.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice



DARBY | BROWN-EDWARDS LLC
ATTORNEYS

EFiled: May 20 2014 09:58AM EDT
Filing ID 55471687
Case Number 262,2014



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May 19, 2014

Stephen D. Taylor, Court Administrator
Supreme Court of Delaware
Elbert N. Carvel State Office Building
820 North French Street
Wilmington, DE 19899

DELAWARE SUPREME COURT
2014 MAY 20 A 9 47
DEPARTMENT CLERK
WILMINGTON

VIA HAND DELIVERY

Re: Board on Professional Responsibility – Case No. 2012-0258-B- Board Report and Recommendation of Sanctions

Dear Mr. Taylor:

Enclosed herewith, please find the *Board Report and Recommendation of Sanctions* in connection with the above-referenced matter. Please do not hesitate to let me know if you require anything further.

Very truly yours,

DARBY | BROWN-EDWARDS LLC

By: _____

Theresa V. Brown-Edwards

**BOARD ON PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF THE STATE OF DELAWARE**

In the Matter of:) **CONFIDENTIAL**
)
LEONARD B. EDELSTEIN,) Board Case No.2012-0258-B
)
Respondent.)
)
)

Before Theresa V. Brown-Edwards, Esquire (Chair), Susan H. Kirk-Ryan, Esquire and Louise Roselle

Patricia Bartley Schwartz, Esquire for Petitioner, Office of Disciplinary Counsel

Charles Slanina, Esquire for Respondent

Dated: May 19, 2014

**BOARD ON PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF THE STATE OF DELAWARE**

In the Matter of:) **CONFIDENTIAL**
)
LEONARD B. EDELSTEIN,) Board Case No.2012-0258-B
)
Respondent.)
)
)
)

BOARD REPORT AND RECOMMENDATION OF SANCTIONS

On January 30, 2014, a panel of the Board on Professional Responsibility (the "Board") consisting of Theresa V. Brown-Edwards, Esquire, Chair, Susan H. Kirk-Ryan, Esquire and Louise Roselle (the "Panel"), conducted a hearing (the "Hearing")¹ on the allegations of misconduct brought by the Office of Disciplinary Counsel ("ODC") against Leonard B. Edelstein ("Respondent"). Patricia Bartley Schwartz, Esquire appeared on behalf of the ODC and Charles Slanina, Esquire appeared on behalf of the Respondent. Pursuant to Rule 9(d) of the Delaware Lawyers' Rules of Disciplinary Procedure, this is the Report, Findings and Recommendation of the Board (the "Report"), by the assigned Panel regarding the matter. The date for filing of the Report has been extended, by order of the Court, until May 19, 2014.

I. Procedural Background

On December 5, 2013, the ODC filed a Petition (the "Petition") for Discipline against Respondent alleging Respondent engaged in the unauthorized practice of law in violation of **Rule 5.5(b)(1) and Rule 5.5(b)(2)** of the Delaware Lawyers' Rules of Professional Conduct (the "Rules").

On December 23, 2013, Respondent filed a Response (the "Response") to the Petition in which Respondent admitted the allegations contained in Count I of the Petition, the Rule

¹ The transcript of the January 30, 2014 hearing is cited as "Tr. at ___."

5.5(b)(1) violations, but admitted in part and denied in part the allegations contained in Count II of the Petition, the 5.5(b)(2) allegations.

On January 28, 2014, the Panel Chair conducted a pre-trial conference with counsel to the ODC and Respondent.

No pre-trial motions were filed nor were any pre-trial stipulations submitted by the parties.

At the Hearing, during the portion pertaining to the allegations of misconduct, the Panel heard testimony from the single witness offered by the ODC, namely, the Respondent himself. The Respondent did not present any witnesses during its case in chief.

During the sanctions phase of the Hearing, the Panel received into evidence, a singular stapled packet of documents, marked "Respondent's Exhibit 1 for Mitigation Purposes."² (Tr. at 44-45) The Panel also heard testimony from three witness offered by Respondent, namely, William L. McLaughlin, Jr., Esquire, Michael I. Silverman, Esquire and the Respondent who took the stand on his own behalf. The ODC did not present any witnesses during the sanctions phase of the hearing.

II. Factual Background

1. Respondent is not a member of the Bar of the Supreme Court of Delaware. (Petition and Answer, ¶ 1 and Tr. at 14)
2. Respondent is an active member of the Bar of the Commonwealth of Pennsylvania. (Petition and Answer, ¶ 2 and Tr. at 14)
3. Respondent was admitted to the Pennsylvania bar in 1965, began the practice of law in 1968, and has practiced ever since then. (Tr. at 14-15)
4. At all times relevant to the Petition, Respondent was associated with the law firm of Edelstein, Martin & Nelson in its Philadelphia office. (Petition and Answer, ¶ 3 and Tr. at 15)
5. Edelstein, Martin & Nelson also has an office in Wilmington, Delaware. (Petition and Answer, ¶ 4 and Tr. at 15)
6. Respondent has never worked out of the Delaware office of his firm. (Tr. at 15)

² The ODC did not oppose the receipt into evidence of Respondent's Exhibit 1 for Mitigation Purposes.

7. From February 2006 until March 2013, Respondent represented Delaware residents in over 100 matters arising out of motor vehicle accidents which occurred in Delaware and involved a policy of insurance issued for a vehicle registered in the State of Delaware.³ (Petition and Answer, ¶ 6 and Tr. at 16-18)

8. Many of Respondent's Delaware clients came to him as a result of a referral from Morris Peterzell, D.O., Wilmington, Delaware. (Petition and Answer, ¶ 8 and Tr. at 17)

9. Respondent met with some of his Delaware clients to discuss his representation at Dr. Peterzell's office. (Petition and Answer, ¶ 9 and Tr. at 17)

10. Some of Respondent's Delaware clients came to him as a result of television advertisements which targeted Delaware residents. (Petition and Answer, ¶ 10 and Tr. at 18-19)

11. Respondent's firm has been running television ads for twenty years. (Tr. at 18)

12. Respondent met with some of his Delaware clients at Edelstein, Martin & Nelson's Wilmington, Delaware office. (Petition and Answer, ¶ 11 and Tr. at 20)

III. Allegations of Misconduct

In light of the pleadings, in which all of the allegations of misconduct in Count I were admitted and the allegations related to Count II were admitted in part and denied in part, ODC and Respondent requested that the Panel address both the allegations of misconduct and sanctions at the Hearing. The Panel consented to this approach. Mindful of the Court's guidance suggesting that the Panel should make its own independent determination, the Panel will first address the allegations of misconduct before turning to sanctions.

a. Count I of the Petition alleges:

COUNT ONE: RESPONDENT HAS ENGAGED IN THE UNAUTHORIZED PRACTICE OF LAW IN VIOLATION OF RULE 5.5(b)(1)

12. **Rule 5.5(b)(1)** states, "[a] lawyer who is not admitted to practice in this jurisdiction shall not: (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence this jurisdiction for the practice of law."

³ See Petition pp 2-8, attached as *Exhibit 1*, hereto for table detailing Delaware matters handled by Respondent.

13. By representing eighty-one Delaware residents, on a continuing basis since February 24, 2006, in over 100 claims arising out of accidents that occurred in Delaware involving an insurance policy issued to a vehicle registered in Delaware, Respondent established a systematic and continuous legal presence in Delaware, in violation of **Rule 5.5 (b)(1)**.

14. By airing television advertisements which targeted Delaware residents, Respondent established a systematic and continuous legal presence in Delaware, in violation of **Rule 5.5 (b)(1)**.

Petition at 9.

Discussion

Respondent admitted in his Response each of the allegations contained in Count I of the Petition and testified at the Hearing that he is a lawyer licensed to practice in the state of Pennsylvania and is not admitted to practice law in Delaware. Respondent further admitted and testified that he provided legal services to eighty-one Delaware residents from February 24, 2006 through March 2013 in over 100 claims arising out of automobile accidents that occurred in Delaware involving an insurance policy issued to a vehicle registered in Delaware. (Tr. at 14-17)

Respondent further admitted and testified that for nearly the past 20 years his law firm has run television ads and some of the clients that he represented in Delaware came to him because of the television ads. (Tr. at 18-19) In speaking of the advertisements, Respondent testified, “. . . they’re aired on television. And I’m assuming, since television goes over state lines, some of the ads would be seen in Delaware.” (Tr. at 18)

Respondent also testified that he advocated on behalf of his clients in an attempt to resolve their disputes during the pre-litigation phase. If the matter did not resolve via settlement, Respondent testified that he would transfer the matter to a Delaware lawyer. Respondent, “[i]f a matter didn’t settle – I had thought that what I had done was very preliminary in getting information from the insurance company, getting information from the doctor and then sending out a letter trying to resolve these matters preliminarily -- they would [then] be referred to Delaware counsel.” (Tr. at 22)

The Panel takes note that while Respondent’s firm had a Delaware office which was managed by a Delaware licensed attorney, Respondent never consulted his Delaware law partner

or any other Delaware lawyer about whether his actions in representing clients in Delaware was permissible. (Tr. at 22)

The recent Supreme Court decision in In re Nadel, 2013 WL 6252499 (Del.Supr.), fits squarely with the facts and circumstances presented in the within matter. Both the ODC and Respondent assert that the Court's holdings in that case are precedential. The Panel agrees. In Nadel, on substantially identical facts,⁴ the Court found that respondent's conduct constituted the unauthorized practice of law in violation of Rule 5.5(b)(1). Id. The Court opined that "Nadel knew that he could not actively represent Delaware clients in court, but he failed to determine any limits on the pre-litigation assistance he thought he could provide." (Nadel at 7.)

Conclusion and Findings

The Panel finds that Nadel is controlling and, thus, concludes that the allegations of misconduct contained in Count 1 are supported by clear and convincing evidence and Respondent's conduct constitutes the unauthorized practice of law in derogation of Rule 5.5(b)(1).

b. Count II of the Petition alleges:

COUNT TWO: RESPONDENT HAS ENGAGED IN THE UNATHORIZED PRACTICE OF LAW IN VIOLATION OF RULE 5.5(b)(2)

15. **Rule 5.5(b)(2)** states, "[a] lawyer who is not admitted to practice in this jurisdiction shall not: . . . (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction."

16. By meeting Delaware clients in Dr. Peterzell's Wilmington office to discuss his representation, Respondent held out to the public he was admitted to practice law in Delaware, in violation of **Rule 5.5 (b)(2)**.

⁴ In Nadel, respondent was a non-Delaware lawyer admitted to practice in the States of New Jersey and Pennsylvania. For a period of nearly 3.5 years, respondent represented more than 75 Delaware residents who were involved in automobile accidents which occurred in Delaware and involved Delaware insurance policies. The respondent, in Nadel, also took referrals from Dr. Morris Peterzell and met with approximately half of his Delaware clients at Dr. Peterzell's Delaware office. Similar to Edelstein, Nadel would endeavor to settle the insurance claims on behalf of his Delaware clients and, if unsuccessful at doing so, he would then refer the matter to local Delaware counsel to pursue the litigation. Neither, Nadel, nor his firm, had an office in Delaware and Nadel did not use advertising.

17. By airing television advertisements which targeted Delaware residents, Respondent held out to the public he was admitted to practice law in Delaware, in violation of **Rule 5.5 (b)(2)**.

Petition at 9-10.

Discussion

With respect to paragraph 16 of the Petition, Respondent admitted in his Response and testified at the Hearing that he met and conducted meetings with some of his clients in the Delaware offices of Dr. Morris Peterzell. (Tr. at 17) The meetings would result in Respondent representing the client to final settlement or if settlement was not to occur, only at that point, was the matter referred to a Delaware lawyer for litigation. (Tr. at 40-41) Respondent further admitted in his Response that “meeting clients at Dr. Peterzell’s office and subsequently the handling of their legal matters may have resulted in a misunderstanding on the part of his clients.” (Response at 10)

With respect to paragraph 17 of the Petition, and as discussed, *supra*, Respondent’s law firm ran ads which aired in Delaware markets and netted some of his Delaware clients. (Tr. at 18-19) However, Respondent denies that the airing of the television ads resulted in him holding himself out as a Delaware lawyer in violation of the ethical rules.

The uncontroverted evidence introduced at the Hearing, was Respondent’s testimony that, “[i]t was generic advertising. I was never in the advertising. Nobody in my firm was ever in the advertising. It just said if you need a lawyer, if you are in an accident, call. Some of those cases I got calls.” (Tr. at 41) Neither the ODC nor the Respondent offered the actual ad or its precise content into evidence.

Conclusion and Findings

With respect to paragraph 16 of the Petition, the Panel finds that absent an affirmative disclosure by Respondent that he was not admitted to practice law in Delaware, his meetings with clients in Dr. Peterzell’s Delaware office coupled with his agreement to represent Delaware residents and, in fact, representing those clients about legal matters arising under Delaware law and factual circumstances arising in Delaware would bolster a reasonable assumption that he was

licensed to practice law in Delaware and, as such, he held himself out to be a Delaware lawyer in violation of Rule 5.5(b)(2).

With respect to paragraph 17 of the Petition, the Panel finds that the “airing” of the television ads without the inclusion of Respondent by name, photo or likeness or any representative of his firm is insufficient to create a violation of Rule 5.5(b)(2) on the part of the Respondent. Given that there exists no all-encompassing ban on attorney advertising, a violation of Rule 5.5(b)(2), in this Panel’s view, would require more than mere “airing” of an add which did not include or reference Respondent. While the overall fact pattern of this matter illustrates that Respondent agreed to and in fact represented his Delaware clients up to and including settlement, Paragraph 17 of the Petition is narrowly drafted and simply refers to the “airing” of the ads as the sole basis for the violation. Given the precise language contained in paragraph 17, it is the Panel’s belief that the mere “airing” of the ads ---which did not include or reference Respondent or any lawyer in his firm---, does not establish a violation.

Nevertheless, since the Panel finds that the allegations of misconduct contained in paragraph 16 of Count II are supported by clear and convincing evidence, Respondent’s conduct constituted the unauthorized practice of law in derogation of Rule 5.5(b)(2).

IV. Sanctions Recommendation

Having found that Respondent violated Rules 5.5(b)(1) and 5.5(b)(2), the Panel must now address a recommendation for sanctions. The Panel is guided and bound by the precedents of the Delaware Supreme Court and the ABA Standards for Imposing Lawyer Sanctions.⁵ In determining an appropriate recommendation for sanctions, the Panel has utilized the four-part framework set forth in the ABA Standards for Imposing Lawyer Discipline, (1991 & Supp. 1992) (hereinafter “the ABA Standards”), as required in In re Steiner, 817 A.2d 793, 796 (Del. 2003).

A preliminary determination of appropriate sanctions is made by assessing the first three (3) prongs of the test: (1) the ethical duty violated; (2) the lawyer’s state of mind; and (3) the actual or potential injury caused by the lawyer’s misconduct. Once the preliminary

⁵ *In re Agostini*, 632 A.2d 80 (Del. 1993).

determination is made, the fourth prong addresses whether an increase or decrease in the presumptive sanction is justified because of the presence of mitigating or aggravating factors.

The Panel has also been mindful that the overarching objective of the lawyer disciplinary system in Delaware is to protect the public, protect the administration of justice, preserve confidence in our legal profession and to deter other lawyers from similar misconduct. We now turn to the rationale of the Panel's recommendation. The Panel finds:

Ethical Duties Violated

The Panel has found that Respondent engaged in the unauthorized practice of law in violation of Rule 5.5(b)(1) and 5.5(b)(2). Further, Rule 5.5 is generally viewed as embodying duties to the profession. As such, Respondent violated his duties to the Profession.

State of Mind

While Rule 5.5 does not have a mental state requirement, the Panel finds that Respondent knew or should have known that his actions on behalf of Delaware residents who were involved in automobile accidents which occurred in Delaware in vehicles that were both insured and registered in Delaware, was tantamount to the practice of law. Certainly, the Panel believes that Respondent knew or should have known enough to inquire about limitations on his practice. Respondent has been admitted to the bar of Pennsylvania since 1965 and practicing law since 1968. (Tr. at 14) He was quite aware that he could not represent clients in Delaware lawsuits pending before the Delaware courts. (Tr. at 22, 24-25)

Similarly, in Nadel, the Supreme Court held that:

Nadel knew that he could not actively represent Delaware clients in the court, but he failed to determine any limits on the pre-litigation assistance he thought he could provide. Further, he had every opportunity to learn this information. Nadel regularly worked with licensed Delaware attorneys when a client needed to file a claim in court. Moreover, the Delaware Lawyers' Rules and the case law interpreting those rules are also publicly available-something an experienced attorney from any state would know.

Nadel at 4.

Accordingly, the Panel finds Respondent's knowledge as a lawyer admitted to the bar of Pennsylvania and the length of time in which he has been practicing law suggest a knowing mental state.

Actual or Potential Injury Caused by Respondent's Misconduct

While the record reflects that there was no actual harm or injury to any client or any claim of any such injury, the Panel finds that potential harm existed by Respondent's unauthorized practice of law. In Nadel, the Supreme Court held:

But there was the potential for injury. Nadel could have been confronted with a unique issue of Delaware law or a right of his client that he failed to notice. Further, he could have created a situation where one of his Delaware clients came to rely on his legal assistance in this or a related matter, only to be stranded later when she realized that Nadel could not provide proper legal assistance. This amounts to a potential injury to Nadel's clients.

Nadel at 4.

Akin to the Supreme Court in Nadel, so, too, this Panel finds that Respondent's unauthorized practice of law presented the potential for injury.

Presumptive Sanctions

The ABA Standards set out criteria for determining presumptive sanctions based upon the findings for the first three criteria. Section 7 addresses violations of duties to the profession. The ODC and Respondent both advance that the appropriate sanction for Respondent is a suspension of one-year from the practice of law. Section 7.2 of the ABA Standards provides that "[s]uspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public or the legal system." (ABA Standards at 45)

Based on (a) the record before the Panel, (b) the Panel's independent analysis of prongs one through three of the four-part test for imposing lawyer discipline and (c) the Supreme Court's decision in Nadel, the panel agrees that a one-year suspension is appropriate.

Aggravating and Mitigating Factors

Section 9.22 of the ABA Standards provides the following factors which may be considered in aggravation:

(a) Prior Disciplinary Offenses: Respondent has no prior record of discipline in any jurisdiction (Tr. at 39); therefore, the Panel finds that this is not an aggravating factor;

(b) Dishonest or Selfish Motive: The ODC did not present evidence in support of an argument, nor did it argue, that Respondent acted out of dishonesty or selfish motive. The Panel does not find sufficient evidence of dishonesty or selfish motive to find this an aggravating factor;

(c) A Pattern of Misconduct: The evidence before the Panel reflects that Respondent represented over 80 Delaware clients in an excess of 100 matters over a period spanning 7 years and 1 month. (Petition and Answer, ¶ 6 and Tr. at 16-18) The Panel finds that Respondent persisted in his manner of obtaining clients in Delaware and undertaking the attendant representations for a period in excess of 7 years. Additionally, the Panel finds that with respect to certain of his 80 plus Delaware clients, Respondent represented them in multiple matters. As such, the Panel considers this to be an aggravating factor;

(d) Multiple Offenses: The evidence before the Panel reflects that Respondent represented over 80 Delaware clients in an excess of 100 matters over a period spanning 7 years and 1 month. (Petition and Answer, ¶ 6 and Tr. at 16-18) The Panel finds each individual matter to represent a separate offense and separate violations by Respondent of the Rules. As such, the Panel considers this to be an aggravating factor;

(e) Bad Faith Obstruction of the Disciplinary Proceeding by Intentionally Failing to Comply with Rules or Orders of the Disciplinary Agency: There is no evidence in the record that this factor exists;

(f) Submission of False Evidence, False Statements, or Other Deceptive Practices During the Disciplinary Process: There is no evidence in the record that this factor exists;

(g) Refusal to Acknowledge Wrongful Nature of Conduct: Respondent admitted in his Response all of the allegations in Count I of the Petition and at the Hearing. While admitting in part and denying in part the allegations in Count II of the Petition, Respondent did acknowledge his actions in his Answer and while testifying at the Hearing. Panel finds that this is not an aggravating factor;

(h) Vulnerability of Victim: There is no evidence in the record that this factor exists;

(i) Substantial Experience in the Practice of Law: Respondent was admitted to practice law in 1965 and has been continuously practicing law since 1968, a period of 46 years. The Panel finds that Respondent has substantial experience in the Practice of law and that this is an aggravating factor;

(j) Indifference to Making Restitution: There is no evidence in the record that this factor exists; and

(k) Illegal Conduct, Including that Involving the Use of Controlled Substances: There is no evidence in the record that this factor exists.

Section 9.32 of the ABA Standards provides the following factors which may be considered in mitigation:

(a) Absence of a Prior Disciplinary Record: Respondent has no prior record of discipline in any jurisdiction. (Tr. at 39) The Panel finds this to be a mitigating factor;

(b) Absence of a Dishonest or Selfish Motive: As discussed, *supra*, no evidence was introduced into evidence regarding Respondent's motive, thus, the Panel finds insufficient evidence exists to establish this as a mitigating factor;

(c) Personal or Emotional Problems: There is no evidence in the record that this factor exists;

(d) Timely Good Faith Effort to Make Restitution or to Rectify Consequences of Misconduct: There is no evidence in the record that this mitigating factor has any application as it relates to restitution, since none is necessary. Upon his realization that his representation of

clients in Delaware was actionable by the ODC, as the unauthorized practice of law in violation of Rule 5.5(b)(1) and Rule 5.5(b)(2), Respondent immediately ceased representing clients in Delaware and transitioned them to a Delaware lawyer. (Tr. at 45) Respondent also placed a firewall in his records at his law firm between him and each of his former Delaware clients. (Tr. at 45) The Panel views Respondent's immediate efforts to rectify consequences of his misconduct as a mitigating factor;

(e) Full and Free Disclosure to Disciplinary Board or Cooperative Attitude toward Proceedings: The record reflects that Respondent was immediately cooperative and responsive to the ODC once it became involved in this matter and proceeded in a cooperative fashion throughout the Hearing. The Panel finds that this is a mitigating factor;

(f) Inexperience in the Practice of Law: As discussed, *supra*, the Panel finds that Respondent has substantial experience in the Practice of law such that it is an aggravating factor and not a mitigating factor;

(g) Character or Reputation: Pennsylvania attorney, William L. McLaughlin, Jr. and Delaware attorney, Michael I. Silverman, both testified on Respondent's behalf to offer mitigating testimony. They each testified to Respondent's good character and his good reputation as a lawyer. (Tr. at 50-53 and 54-56) In addition, the Panel takes note of Respondent's Exhibit 1 for Mitigating Purposes which contains a sizeable compilation of "thank you" notes and various expressions of gratitude offered by some of Respondent's former clients. The Panel accepts that Respondent is a long standing, successful attorney practicing in the area of accident litigation with a good reputation with both the bench and bar in the state of Pennsylvania. The panel views this as a mitigating factor;

(h) Physical Disability: There is no evidence in the record that this factor exists;

(i) Mental Disability or Chemical Dependency Including Alcoholism or Drug Abuse
When:

- (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;
- (2) the chemical dependency or mental disability caused the misconduct;

- (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
- (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

There is no evidence in the record that this factor exists;

(j) Delay in Disciplinary Proceedings: There is no evidence in the record that this factor exists;

(k) Imposition of other Penalties or Sanctions: This factor is inapplicable to this proceeding;

(l) Remorse: Respondent expressed sincere remorse and regret for his actions and apologized to the Panel, the ODC, the Delaware Supreme Court and the Delaware Bar for his actions. (Tr. at 42) The Panel finds this to be a mitigating factor; and

(m) Remoteness of Prior Offenses. This is inapplicable to this proceeding as Respondent had no record of prior discipline.

V. Panel Conclusions and Recommendations

Upon weighing the applicable aggravating and mitigating circumstances, the Panel believes that the presumptive sanction of suspension remains appropriate. The circumstances of this case are substantially similar to those presented in Nadel. The Nadel court adopted a panel's recommendation of a one-year suspension with several conditions: (a) a prohibition on advising Delaware clients on matters of Delaware law for a period of one year; (b) a prohibition from acting *pro hac vice* on any matter in Delaware for a period of three years; (c) that the content of its report be made public; and (d) that Nadel pay the costs of these proceedings. The Court held:

We hold that the Panel properly concluded, a one year-suspension, along with the additional limitations that it recommended, would adequately protect the public and the administration of justice, preserve confidence in the legal profession, and deter other lawyers from engaging in similar conduct.

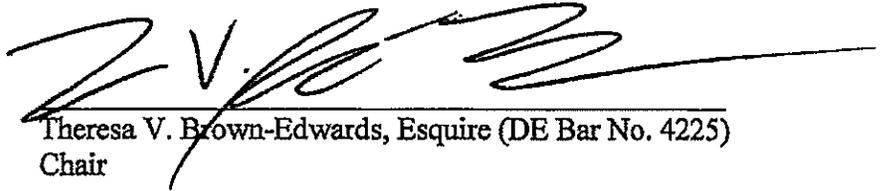
Nadel at 5.

This Panel believes that Respondent's sanctions should parallel those held up by the Supreme Court in Nadel. Accordingly, the Panel recommends that the Court impose the following sanctions and conditions, to wit, that:

- 1) Respondent be suspended from the practice of law in the State of Delaware for a period of one year;
- 2) Respondent be prohibited from providing advice to any Delaware clients on matters of Delaware law for a period of one year;
- 3) Respondent be prohibited from acting *pro hac vice* on any matter in Delaware for a period of three years;
- 4) The contents of this report be made public; and
- 5) Respondent pay the costs of these proceedings.

Respectfully submitted,

Date: May 19, 2014



Theresa V. Brown-Edwards, Esquire (DE Bar No. 4225)
Chair

Date: May 19, 2014

Susan H. Kirk-Ryan, Esquire (DE Bar No.1070)

Date: May 19, 2014

Louise Roselle

This Panel believes that Respondent's sanctions should parallel those held up by the Supreme Court in Nadel. Accordingly, the Panel recommends that the Court impose the following sanctions and conditions, to wit, that:

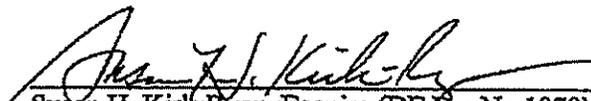
- 1) Respondent be suspended from the practice of law in the State of Delaware for a period of one year;
- 2) Respondent be prohibited from providing advice to any Delaware clients on matters of Delaware law for a period of one year;
- 3) Respondent be prohibited from acting *pro hac vice* on any matter in Delaware for a period of three years;
- 4) The contents of this report be made public; and
- 5) Respondent pay the costs of these proceedings.

Respectfully submitted,

Date: May 19, 2014

Theresa V Brown-Edwards, Esquire (DE Bar No. 4225)
Chair

Date: May 17, 2014



Susan H. Kirk-Ryan, Esquire (DE Bar No. 1070)

Date: May 19, 2014

Louise Roselle

CERTIFICATE OF SERVICE

I, Theresa V. Brown-Edwards, certify that I am not less than 18 years of age and that on this 19th day of May, 2014, I caused a true and correct copy of the foregoing *Report and Recommendation of Sanctions* to be served, as indicated, upon the following parties:

Under penalty of perjury, I declare that the foregoing is true and correct.

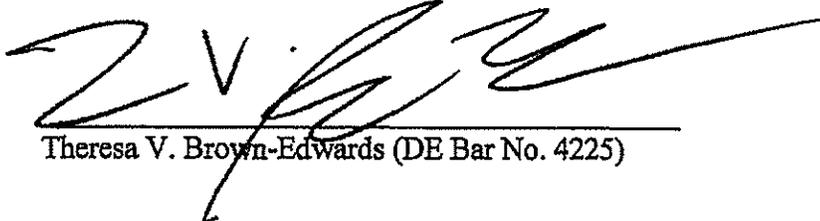
**VIA HAND DELIVERY AND
ELECTRONIC MAIL**

Patricia Bartley Schwartz, Esquire
Office of Disciplinary Counsel
Carvel State Office Building
820 N. French Street
11th Floor
Wilmington, DE 19801

**VIA FIRST CLASS AND ELECTRONIC
MAIL**

Charles Slanina, Esquire
Finger & Slanina, LLC
724 Yorklyn Road
Suite 210
Hockessin, DE 19707-1449

Date: May 19, 2014



Theresa V. Brown-Edwards (DE Bar No. 4225)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

In the Matter of
RAYMOND S. NADEL,
Respondent.

§
§ No. 559, 2013
§
§ Board Case Nos. 2012-0139-B
§ and 2012-0253-B

Submitted: December 4, 2013

Decided: December 4, 2013

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

Disciplinary Proceeding Upon Final Report of the Board on Professional Responsibility of the Supreme Court. **SUSPENSION IMPOSED.**

Patricia Bartley Schwarz, Esquire, Office of Disciplinary Counsel, Wilmington, Delaware.

Charles Slanina, Esquire, Finger & Slanina, LLC, Hockessin, Delaware, for Respondent.

Per Curiam:

This is a disciplinary proceeding filed by the Office of Disciplinary Counsel (“ODC”) against the Respondent, Raymond S. Nadel (“Nadel”). On June 10, 2013, a Panel of the Board on Professional Responsibility (the “Panel”) filed a Report (the “Panel’s Report”) finding that Nadel engaged in the unauthorized practice of law. The Panel recommended that: Nadel be suspended from practicing law for one year; prohibited from providing advice to any Delaware clients for a period of one year; prohibited from any admission *pro hac vice* for a period of three years; be publicly sanctioned; and pay the costs of the disciplinary proceedings.

Nadel raises three objections to the Panel’s Report. Nadel first argues that he was prejudiced by the ODC’s decision to prosecute Nadel by the Board on Professional Responsibility instead of the Board on the Unauthorized Practice of Law (“BUPL”). Nadel also contends that the Panel’s recommended sanctions violate Equal Protection and exceed the goals of attorney discipline.

We have concluded that Nadel’s objections are without merit. We have determined that the factual findings set forth in the Panel’s Report are supported by the record. We have independently concluded that the sanctions recommended in the Panel’s Report are appropriate.

*Facts and Procedural History*¹

Nadel is not a member of the Bar of the Supreme Court of Delaware. He was admitted to the Bars of the State of New Jersey and the Commonwealth of Pennsylvania in 1982. Nadel currently practices in a private firm located in Cherry Hill and Pennsauken, New Jersey.

From April 2009 through September 21, 2012, Nadel engaged in the unauthorized practice of law in Delaware. After he was initially asked to help a patient by a Delaware doctor, Dr. Morris Peterzell, Nadel met with more than seventy-five Delaware residents who were involved in auto accidents. These accidents occurred in Delaware and involved Delaware insurance policies governed by Delaware law. Nadel met with roughly half of his Delaware clients at Dr. Peterzell's medical office in Wilmington. But in each instance, Nadel would attempt to settle the insurance claims on behalf of his Delaware clients. If settlement proved unsuccessful, Nadel would turn the case over to local Delaware counsel to pursue the litigation.

Nadel never filed a lawsuit in Delaware or made any representations to a Delaware court. Further, Nadel never advertised or actively solicited clients. Nor did he ever represent to a Delaware citizen that he was a

¹ The facts are taken from the Panel's June 10, 2013 Report of the Board on Petition for Discipline unless otherwise noted. *See In re Nadel*, No. 2012-0139-B and 2012-0253-B (Del. Bd. Prof. Resp. June. 10, 2013) [hereinafter "Panel's Report"].

member of the Delaware bar. But Nadel does admit that by meeting with his Delaware clients in Delaware, he could have unintentionally created the impression that he was licensed to practice law in Delaware. No actual harm resulted from Nadel's representation. But these Delaware clients accounted for ten to fifteen percent of Nadel's legal practice.

In 2012, the ODC filed a disciplinary claim with the Board on Professional Responsibility against Nadel alleging two counts of the unlicensed practice of law in violation of Rules 5.5(b)(1) and 5.5(b)(2) of the Delaware Lawyers' Rules of Professional Conduct.² Nadel admitted both violations. Although not a defense, Nadel argued that he was not aware of Rule 5.5 and was under the belief that he was not required to be a licensed Delaware lawyer to represent clients in pre-litigation matters.

After a hearing on the matter, the Panel found by clear and convincing evidence that Nadel had knowingly violated the Delaware Lawyers' Rules. To determine the appropriate sanction, the Board considered four aggravating factors and four mitigating factors. Nadel's aggravating factors included "(1) dishonest or selfish motive, (2) pattern of misconduct, (3)

² Rule 5.5(b)(1) provides that "[a] lawyer who is not admitted to practice in this jurisdiction shall not . . . establish an office or other systematic and continuous presence in this jurisdiction for the practice of law." And Rule 5.5(b)(2) explains that an out-of-state lawyer shall not "hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction."

multiple offenses, and (4) substantial experience in the practice of law.”³ His mitigating factors included “(1) absence of a prior disciplinary record, (2) timely good faith effort to make restitution or to rectify misconduct, (3) full and free disclosure to disciplinary board . . . , and (4) remorse.”⁴

The ODC urged the Panel to recommend a three-year suspension. Nadel argued that a public reprimand would be more appropriate, primarily because the State of New Jersey will likely impose a reciprocal suspension. Despite the parties’ contentions, the Panel recommended a one-year suspension in addition to other limitations.

Standard of Review

We have the “inherent and exclusive authority to discipline members of the Delaware Bar.”⁵ “We also have the authority to discipline non-Delaware attorneys who provide legal services in this State in violation of our Professional Code of Conduct.”⁶ Although the recommendations of the Panel are helpful, we are not bound by those recommendations.⁷ Our role is to review the record independently and determine whether there is

³ Panel’s Report at 9.

⁴ *Id.* at 10.

⁵ *In re Abbott*, 925 A.2d 482, 484 (Del. 2007) (quoting *In re Froelich*, 838 A.2d 1117, 1120 (Del. 2003)).

⁶ *In re Kingsley*, 950 A.2d 659, 2008 WL 2310289, at *3 (Del. 2008) (TABLE) (footnote omitted) (citing *In re Tonwe*, 929 A.2d 774, 778 (Del. 2007); Delaware Lawyers’ Rules of Professional Conduct Rule 8.5).

⁷ *Id.*

substantial evidence to support the Panel’s factual findings.⁸ We review the Board’s conclusions of law *de novo*.⁹

Rule 5.5 of the Delaware Lawyers’ Rules of Professional Conduct prohibits a lawyer from practicing in a jurisdiction “in violation of the regulation of the legal profession in that jurisdiction.”¹⁰ A lawyer not admitted to practice in Delaware must refrain from establishing a “continuous presence in this jurisdiction for the practice of law.”¹¹ Further, an out-of-state lawyer cannot “hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.”¹²

Forum Selection Proper

Nadel first argues that the ODC should not have proceeded against Nadel before the Board on Professional Responsibility, resulting in a harsher penalty than would have been given by the BUPL. As we explained in *In re Tonwe*, the ODC has the authority to prosecute a disciplinary proceeding against a lawyer who engages in professional misconduct with either the BUPL or the Board on Professional Responsibility.¹³ That decision to

⁸ *Id.*

⁹ *Id.*

¹⁰ Delaware Lawyers’ Rules of Professional Conduct Rule 5.5.

¹¹ Rule 5.5(b)(1).

¹² Rule 5.5(b)(2).

¹³ *Tonwe*, 929 A.2d at 778; *see also* Sup. Ct. R. 64(e)(4) (providing that the ODC has the power to “[p]rosecute cases for disciplinary or other action before the Court, the Board on Professional Responsibility, and the Board on the Unauthorized Practice of Law”).

proceed with one entity or another is a discretionary decision to be made by the ODC.¹⁴ Further, the Board on Professional Responsibility has the power, *without limitation*, to make findings of fact and recommendations for sanctions with respect to disciplinary matters.¹⁵

Because this is his first disciplinary offense, Nadel argues that if the ODC had pursued his case with the BUPL, he would have received an Order prohibiting him from practicing law in Delaware and other sanctions including limits on *pro hac vice* admissions. Nadel further contends that the ODC's choice to present his case to the Board on Professional Responsibility rather than that BUPL should not result in a more severe sanction. Nadel's arguments, however, lack merit.

The Rules of Professional Conduct and the Rules of Disciplinary Procedure provide that the ODC has full discretion to choose the appropriate forum to enforce the Delaware Lawyers' Rules of Professional Conduct. Once a claim is before the Board on Professional Responsibility, the Panel is free to determine an appropriate sanction, subject to the independent review and final determination by this Court. Therefore, Nadel's claim that either the ODC or the Panel somehow exceeded their authority is without merit.

¹⁴ See *Tonwe*, 929 A.2d at 778 (“The ODC, in a proper exercise of its discretion, elected to proceed under the lawyer disciplinary rules.”).

¹⁵ Lawyers' Rules of Disciplinary Procedure Rule 2(c).

No Equal Protection Violation

Nadel next contends that the Panel's recommendation of a one-year suspension following his first offense in some way violates Equal Protection. Nadel does not cite any authority in support of this claim or even specify that the Panel's sanction violates either the Delaware or United States Constitution. Rather, Nadel suggests that a Delaware attorney would not receive a one-year suspension as a first-time offender. First, this argument is only speculation. Nadel does not cite to any similar instances of a Delaware attorney with thirty years of legal experience receiving a lesser penalty for similar violations. Second, Nadel admitted to seventy five violations of the Delaware Lawyers' Rules of Professional Conduct. Such conduct cannot be reasonably described as a first-time offense. As a result, Nadel's second objection is without merit.

Disciplinary Objectives Achieved

Nadel's final objection contends that the Panel's recommendation exceeds the goals of attorney discipline. As we have explained, "[t]he objectives of the lawyer disciplinary system are to protect the public, to protect the administration of justice, to preserve confidence in the legal

profession, and to deter other lawyers from similar misconduct.”¹⁶ Nadel argues that our stated goals can still be achieved through the use of an indefinite period of public probation. In support of this argument, Nadel compares his conduct to our prior decisions in *In re Kingsley* and *In re Tonwe*, where we disbarred out-of-state attorneys who knowingly violated a prior cease and desist order.¹⁷ Nadel explains that his conduct is less grievous because he did not openly disregard a court order.

Although Nadel’s conduct is less serious than the attorneys in *Kingsley* and *Tonwe*, we disagree with his premise that a public probation would adequately fulfill the objective of the lawyer disciplinary systems. A suspension falls within the American Bar Association (ABA) Standards for Imposing Lawyer Sanctions for the unlicensed practice of law. Moreover, a suspension provides a stiff deterrent to other out-of-state lawyers, alerting them that the rules governing the representation of Delaware clients are strictly enforced. We recognize that a suspension in Delaware could affect Nadel’s ability to practice law in the State of New Jersey. However, our concerns must be focused on the practice of law within the State of

¹⁶ *In re Bailey*, 821 A.2d 851, 866 (Del. 2003) (citing *In re Figliola*, 652 A.2d 1071, 1076 (Del. 1995)), *reinstatement granted*, 842 A.2d 1244 (Del. 2004).

¹⁷ *Kingsley*, 2008 WL 2310289, at *4; *Tonwe*, 929 A.2d at 781.

Delaware and the protection of Delaware's citizens from the unauthorized practice of law.

Factual Findings Approved

Having determined that Nadel's objections are without merit, we now turn to our independent examination of whether there is substantial evidence to support the Panel's factual findings and to then decide on an appropriate sanction. In determining the appropriate sanctions for lawyer misconduct, we traditionally follow the American Bar Association (ABA) Standards for Imposing Lawyer Sanctions (the "ABA Standards").¹⁸ This ABA framework requires that we determine "(1) the ethical duty violated; (2) the lawyer's state of mind; and (3) the actual or potential injury caused by the lawyer's misconduct."¹⁹

In this case, Nadel does not dispute any of the Panel's factual findings. The record shows that Nadel provided legal services to at least 75 Delaware residents involved in automobile accidents, representing about ten to fifteen percent of his law practice. Further, Nadel advocated on behalf of these clients when he attempted to settle their claims. He turned over the cases to a Delaware attorney only if litigation was required. Even though Nadel did not represent that he was licensed in Delaware and did not

¹⁸ *Tonwe*, 929 A.2d at 780.

¹⁹ *Id.*

actively solicit Delaware clients, he would often meet with many of these clients in Delaware, likely giving the impression that he was a Delaware lawyer. The record supports the Panel's findings that this conduct constituted the unauthorized practice of law that is prohibited by the Delaware Lawyers' Rules of Professional Conduct, specifically Rules 5.5(b)(1) and 5.5(b)(2).

The record also supports the Panel's finding that Nadel knew that Delaware insurance policies and Delaware law applied in the cases he worked on. Although he claims he was unaware of Rule 5.5 and believed he was allowed to represent Delaware clients in prelitigation matters, Nadel was fully aware that he was not allowed to represent these clients in court or file legal claims on their behalf. Nadel's actions demonstrate an awareness of a violation or at the very least willful ignorance of the rules.

Nadel knew that he could not actively represent Delaware clients in court, but he failed to determine any limits on the pre-litigation assistance he thought he could provide. Further, he had every opportunity to learn this information. Nadel regularly worked with licensed Delaware attorneys when a client needed to file a claim in court. Moreover, the Delaware Lawyers' Rules and the case law interpreting those rules are also publicly available—something an experienced attorney from any state would know.

Sanctions Imposed

The ODC and Nadel agree that there was no actual injury resulting from Nadel's unlicensed practice of law. But there was the potential for injury. Nadel could have been confronted with a unique issue of Delaware law or a right of his client that he failed to notice. Further, he could have created a situation where one of his Delaware clients came to rely on his legal assistance in this or a related matter, only to be stranded later when she realized that Nadel could not provide proper legal assistance. This amounts to a potential injury to Nadel's clients.

Having determined Nadel's violation, state of mind, and potential for injury, we now turn to the appropriate sanction. The ABA Standards on the unauthorized practice of law provide four options for sanctioning an attorney and the basis for imposing each sanction.²⁰ The four options provide for the following sanctions and bases:

7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

²⁰ ABA Standards for Imposing Lawyer Sanctions 7.0.

7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

7.4 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence that is a violation of a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.²¹

In this case, Nadel knowingly engaged in conduct that violated the Delaware Lawyer's Rules and caused a potential injury to his clients. Nadel received a substantial financial benefit during this unauthorized practice of law in the State of Delaware. Based on his conduct, the ABA Standards call for a suspension.

The Panel recommended a series of sanctions in addition to a suspension. The recommended sanctions included:

- 1) [Nadel] be suspended from the practice of law in the State of Delaware for a period of one year;
- 2) [Nadel] be prohibited from providing advice to any Delaware clients on matters of Delaware law for a period of one year;
- 3) [Nadel] be prohibited from acting *pro hac vice* on any matter in Delaware for a period of three years;
- 4) The contents of [its] report be made public; and
- 5) [Nadel] pay the costs of these proceedings.²²

²¹ *Id.* at 7.1–7.4.

²² Panel's Report at 12.

The ODC urges this Court to impose a three year suspension. Nadel suggests that a public reprimand along with the Panel's recommendation prohibiting any *pro hac vice* activity is appropriate. We hold that the Panel properly concluded, a one year-suspension, along with the additional limitations that it recommended, would adequately protect the public and the administration of justice, preserve confidence in the legal profession, and deter other lawyers from engaging in similar conduct.

Conclusion

We adopt the Panel's Report and sanction Raymond S. Nadel in accordance with the Panel's recommendations.

PRINCIPLES OF PROFESSIONALISM FOR DELAWARE LAWYERS

PREAMBLE

The Delaware State Bar Association and the Delaware Supreme Court have jointly adopted the Principles of Professionalism for Delaware Lawyers for the guidance of Delaware lawyers, effective November 1, 2003. These Principles replace and supercede the Statement of Principles of Lawyer Conduct adopted by the Delaware State Bar Association on November 15, 1991. They are not intended, nor should they be construed, as establishing any minimum standards of professional care or competence, or as altering a lawyer's responsibilities under the Delaware Lawyers' Rules of Professional Conduct. These Principles shall not be used as a basis for litigation, lawyer discipline or sanctions. The purpose of adopting the Principles is to promote and foster the ideals of professional courtesy, conduct and cooperation. These Principles are fundamental to the functioning of our system of justice and public confidence in that system.

PRINCIPLES

A. ***In general.*** A lawyer should develop and maintain the qualities of integrity, compassion, learning, civility, diligence and public service that mark the most admired members of our profession. A lawyer should provide an example to the community in these qualities and should not be satisfied with minimal compliance with the mandatory rules governing professional conduct. These qualities apply both to office practice and to litigation. A lawyer should be mindful of the need to protect the standing of the legal profession in the view of the public and should bring these Principles to the attention of other lawyers when appropriate.

1. **Integrity.** Personal integrity is the most important quality in a lawyer. A lawyer's integrity requires personal conduct that does not impair the rendering of professional service of the highest skill and ability; acting with candor; preserving confidences; treating others with respect; and acting with conviction and courage in advocating a lawful cause. Candor requires both the expression of the truth and the refusal to mislead others in speech and demeanor.

2. **Compassion.** Compassion requires respect for the personal dignity of all persons. In that connection, a lawyer should treat all persons, including adverse lawyers and parties, fairly and equitably and refrain from acting upon or manifesting racial, gender or other bias or prejudice toward any participant in the legal process.

3. **Learning.** A lawyer's commitment to learning involves academic study in the law followed by continual individual research and investigation in those fields in which the lawyer offers legal services to the public.

4. **Civility.** Professional civility is conduct that shows respect not only for the courts and colleagues, but also for all people encountered in practice. Respect requires promptness in meeting appointments, consideration of the schedules and

commitments of others, adherence to commitments whether made orally or in writing, promptness in returning telephone calls and responding to communications, and avoidance of verbal intemperance and personal attacks. A lawyer should not communicate with a Court* concerning pending or prospective litigation without reasonable notice whenever possible to all affected parties. Respect for the Court requires careful preparation of matters to be presented; clear, succinct, and candid oral and written communications; acceptance of rulings of the Court, subject to appropriate review; emotional self-control; the absence of scorn and superiority in words or demeanor; observance of local practice and custom as to the manner of addressing the Court; and appropriate dress in all Court proceedings. A lawyer should represent a client with vigor, dedication and commitment. Such representation, however, does not justify conduct that unnecessarily delays matters, or is abusive, rude or disrespectful. A lawyer should recognize that such conduct may be detrimental to a client's interests and contrary to the administration of justice.

5. **Diligence.** A lawyer should expend the time, effort, and energy required to master the facts and law presented by each professional task.

6. **Public service.** A lawyer should assist and substantially participate in civic, educational and charitable organizations. A lawyer should render substantial professional services on a charitable, or pro bono publico, basis on behalf of those persons who cannot afford adequate legal assistance.

B. ***Conduct of Litigation.*** In dealing with opposing counsel, adverse parties, judges, court personnel and other participants in the legal process, a lawyer should strive to make our system of justice work fairly and efficiently. A lawyer should avoid conduct that undermines the judicial system or the public's confidence in it, as a truth seeking process for resolving disputes in a rational, amicable and efficient way.

1. **Responsible choice of forum.** Before choosing a forum, a lawyer should review with the client all alternatives, including alternate methods of dispute resolution. A lawyer should not file or defend a suit or an administrative proceeding without as thorough a review of the facts and the law as is required to form a conviction that the complaint or response has merit.

2. **Pre-trial proceedings.** A lawyer should use pre-trial procedures, including discovery, solely to develop a case for settlement or trial and not to harass an opponent or delay a case. Whenever possible, stipulations and agreements should be made between counsel to reduce both the cost and the use of judicial time. Interrogatories and requests for documents should be carefully crafted to demand only relevant matter, and responses should be timely, candid and not evasive. Good faith efforts should be

* As used in these Principles, "Court" includes not only state and federal courts, but also other tribunals performing an adjudicatory function including administrative hearing panels and boards as well as arbitration tribunals.

made to resolve by agreement objections to matters contained in pleadings, discovery requests and objections.

A lawyer should endeavor to schedule pre-trial procedures so as to accommodate the schedules of all parties and attorneys involved. Agreements for reasonable extensions of time should not be withheld arbitrarily.

Only those depositions necessary to develop or preserve the facts should be taken. Questions and objections at deposition should be restricted to conduct appropriate in the presence of a judge.

3. **Communications with the Court or Tribunal.** A lawyer should speak and write respectfully in all communications with the Court. All papers filed in a proceeding should be as succinct as the complexity of the matter will allow. A lawyer should avoid ex parte communications with the Court on pending matters, except when permitted by law. Unless specifically authorized by law, a lawyer should not submit papers to the Court without serving copies of all papers upon opposing counsel in such a manner that opposing counsel will receive them before or contemporaneously with the submission to the Court.

4. **Settlement.** A lawyer should constantly evaluate the strength of a client's legal position and keep the client advised. A lawyer should seek to settle any matter at any time that such course of action is determined to be consistent with the client's best interest after considering the anticipated cost of continuing the proceeding and the lawyer's good faith evaluation of the likely result.

5. **Appeal.** A lawyer should take an appeal only if the lawyer believes in good faith that the Court has committed error, or an appeal is otherwise required.

C. ***Out of state associate counsel.*** Before moving the admission of a lawyer from another jurisdiction, a Delaware lawyer should make such inquiry as required to determine that the lawyer to be admitted is reputable and competent and should furnish the candidate for admission with a copy these Principles.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHRISTINA ZAYAS,	§	
	§	No. 232, 2021
Claimant Below/Appellant,	§	
	§	
v.	§	Court Below: Superior Court
	§	of the State of Delaware
STATE OF DELAWARE,	§	
	§	
Employer Below/Appellee.	§	C.A. No. N20A-03-006

Submitted: January 26, 2022
Decided: March 7, 2022

Before **VALIHURA, VAUGHN, and MONTGOMERY-REEVES**, Justices.

Upon appeal from the Superior Court. **REVERSED** and **REMANDED**.

Gary S. Nitsche, Esquire, Joel H. Fredericks, Esquire, Weik, Nitsche & Dougherty, LLC,
Wilmington, Delaware for Appellant.

John J. Klusman, Esquire, Megan E. Traynor, Esquire, Tybout, Redfearn & Pell,
Wilmington, Delaware for Appellee.

VALIHURA, Justice:

Claimant Christina Zayas (“Zayas”), a paratransit bus driver, sued her employer, DART/State of Delaware (“Employer”), for injuries she sustained in a 2016 work incident where a passenger physically assaulted her (the “Incident”).¹ Zayas sustained multiple injuries during the Incident. On May 2, 2019, Zayas underwent left shoulder arthroscopic surgery performed by Dr. Evan Crain (“Dr. Crain”).² After the surgery, Zayas was placed on total disability from May 2019 through October 2019.

Zayas filed Petitions to Determine Additional Compensation Due (the “Petitions”) relating to the Incident. Specifically, Zayas’ Petitions sought payment of medical expenses, total disability benefits, and acknowledgement of the compensability of the surgery Dr. Crain performed in 2019. Zayas’ hearing was scheduled for November 14, 2019 (the “Hearing”). Prior to the Hearing, the parties stipulated that the limited issue in dispute was whether the May 2, 2019 surgery was causally related to the Incident.

On October 1, 2019, Zayas deposed Employer’s medical expert, Dr. Gregory Tadduni (“Dr. Tadduni”). At the deposition, Dr. Tadduni refused to answer questions concerning the treatment Zayas received from Dr. Damon Cary (“Dr. Cary”). Dr. Tadduni refused to discuss anything related to Dr. Cary because at the time of the Hearing, disciplinary charges were pending against Dr. Cary alleging that he had “fraudulently submitted bills to insurance carriers for physical examinations, medical discussions, and

¹ A006 (IAB Decision at 6 dated March 20, 2020, hereinafter, “IAB Decision”).

² A002 (IAB Decision at 2). Dr. Crain’s preoperative diagnosis was of a traumatic rotator cuff tear with post traumatic impingement syndrome. A011 (IAB Decision at 11).

diagnoses of medical complaints that never occurred.”³ However, none of those allegations involved his treatment of Zayas. Dr. Tadduni’s repeated refusal to testify concerning Dr. Cary’s treatment of Zayas prompted Zayas’ petition on October 7, 2019, requesting that the Board exclude Dr. Tadduni’s testimony at the Hearing.

On the day of the Hearing, the Board denied Zayas’ request to exclude Dr. Tadduni’s testimony. The Board explained that the prejudice to the Employer in excluding Dr. Tadduni’s testimony outweighed any prejudice to Zayas.

At the Hearing during Zayas’ direct examination, Zayas’ counsel sought to admit Dr. Cary’s medical records (“Medical Records”) because the records contained evidence of Zayas’ left shoulder pain between September 15, 2016 and July 26, 2018.⁴ Employer objected, arguing that Zayas was not in a position to authenticate the Medical Records and that the information contained in the Medical Records was not credible due to Dr. Cary’s pending disciplinary matter. After a short discussion off the record, the Board returned and sustained the Employer’s objection to the admission of the Medical Records.⁵

After the Hearing, the Board issued its written decision (the “IAB Decision”). The Board held that Zayas had failed to meet her burden of proof that the surgery in 2019 was causally related to the Incident. Specifically, the Board stated, “the evidence [did] not support that [Zayas] presented with pain upon rotator cuff testing within close proximity

³ A003 (IAB Decision at 3).

⁴ A061 (IAB Hr’g Tr. at 38).

⁵ A064 (IAB Hr’g Tr. at 41).

to the assault *or in Dr. Cary's records.*"⁶ Notably, although the Board had excluded them, the Board stated in its Decision that the Medical Records were *admissible*. It stated:

The charges against Dr. Cary are pending. Dr. Cary has not been found guilty. There was no evidence that the allegations against Dr. Cary involved [Zayas'] case. The treatment Dr. Cary provided to [Zayas] was not at issue or disputed but rather accepted as reasonable and necessary. *The content of Dr. Cary's records in this case is admissible evidence. During cross-examination, Dr. Tadduni repeatedly testified that he would not accept the validity of or acknowledge anything Dr. Cary documented because of the reasons Dr. Cary's medical license was suspended.* The latter is the basis for [Zayas'] motion.⁷

However, a review of the record indicates that the Medical Records were never admitted into evidence. The Superior Court did not consider this apparent inconsistency, or the issues Zayas had raised regarding the medical testimony and records. Nevertheless, the Superior Court affirmed the Board's decision and found that substantial evidence existed to support the Board's legal conclusions.

On appeal, Zayas again argues that the Board committed legal error by not admitting her Medical Records and that it abused its discretion by admitting Dr. Tadduni's deposition testimony during the Hearing.

We conclude that Dr. Tadduni's refusal to answer relevant questions deprived Zayas of the opportunity to elicit relevant information. In essence, Dr. Tadduni unilaterally determined that he would not answer questions concerning Dr. Cary's treatment of Zayas. In admitting Dr. Tadduni's testimony, and simultaneously excluding the Medical Records,

⁶ A020 (IAB Decision at 20) (emphasis added).

⁷ A003 (IAB Decision at 3) (emphasis added).

the Board's actions prevented Zayas from adequately presenting her case, violated fundamental notions of fairness, and thereby abused its discretion.

Although the Board's ultimate conclusion was based, in part, on credibility findings of other witnesses, we are of the view that the process was so flawed that it is difficult for us to have confidence in the outcome. As a result, we **REVERSE** and **REMAND** for proceedings consistent with this decision.

I. Factual and Procedural Background

On September 2, 2016, Zayas sustained injuries while she was working as a paratransit bus driver for DART. At a scheduled stop, a male passenger assaulted a passenger sitting in front of him. The assailant was a large adult male with a mental disability. After the male (assailant) passenger got off the bus, Zayas exited the bus to escort him as required by her employment.⁸ While Zayas stood in front of the bus, he assaulted her. Zayas attempted to get back into the bus, but the assailant punched her repeatedly in her face, neck, and head. Zayas fought back and eventually fell to the ground. After she fell to the ground, the assailant continued to beat her. As a result of her injuries, Zayas received medical treatment.

⁸ A review of what has been described as footage of the Incident, described in the IAB record as Exhibit 7, reveals that incorrect video footage has been included in the record provided to this Court. The video footage included in the Appendix filed with this Court instead shows events that, according to the timestamp affixed to the video footage, transpired on October 23, 2020 at 5:01 p.m. This video does not show footage of the Incident as described by the IAB/Board and Superior Court below.

After the Incident, Zayas was treated by three different doctors: Dr. Cary, Dr. Adam Ginsberg (“Dr. Ginsberg”), and Dr. Crain.⁹

Zayas began having problems with both shoulders following the Incident and began treating with Dr. Cary. Zayas estimated that between September 15, 2016 and July 26, 2018, she treated with Dr. Cary forty-three times. During each of these visits, according to the Medical Records, Zayas presented with left shoulder complaints.¹⁰ Dr. Cary attributed Zayas’s upper extremity complaints to her neck.¹¹ However, Zayas continued to experience left shoulder symptoms throughout the course of treatment with Dr. Cary. In August 2018, Dr. Cary referred Zayas to Dr. Ginsberg.

Zayas complained to Dr. Ginsberg that she could not move her arm. She “described the pain as being like crushed glass.”¹² Dr. Ginsberg confirmed that some of Zayas’s issues stemmed from her neck. Despite this, Dr. Ginsberg suspected shoulder involvement and gave Zayas an injection in her shoulder. Within five minutes of receiving the injection, Zayas was able to move her left arm freely, lift things without pain, and otherwise had complete relief. Zayas rated her pain at a zero on a ten-point scale. Thereafter, Dr. Ginsberg referred Zayas to Dr. Crain to treat her left shoulder.

⁹ A006–07 (IAB Decision at 6–7). Zayas was involved in two prior work accidents -- one in 2011 and one in 2014. For those two prior incidents, Zayas was treated by Dr. Cary and Dr. Ginsberg. A006.

¹⁰ A006 (IAB Decision at 6). Zayas confirmed that she raised left shoulder complaints at these visits when she testified after reviewing the Medical Records.

¹¹ *Id.*

¹² A007 (IAB Decision at 7).

On September 27, 2018, Zayas met with Dr. Crain for the first time. After an examination, Dr. Crain “summarized that [Zayas] had shoulder pain, pain with rotator cuff maneuvers and impingement maneuvers, but [Zayas] had much less pain than she had prior to receiving the injection.”¹³ On February 14, 2019, Zayas underwent an MRI of the left shoulder. Upon review, “Dr. Crain thought there was a high-grade bursal surface rotator cuff tear, almost full thickness but no major retraction.”¹⁴ Dr. Crain’s main findings were abnormalities of the rotator cuff suggestive of a rotator cuff injury and a tear. He reviewed the MRI results with Zayas on April 15, 2019. After an examination, Dr. Crain recommended surgery as he believed that Zayas suffered from a traumatic rotator cuff tear with posttraumatic impingement syndrome.

On May 2, 2019, Dr. Crain performed the surgery. Intraoperatively, he noted a complete tear of the supraspinatus, a loose flap of labrum consistent with a Type I tear, and a partial tear of the biceps. “Dr. Crain debrided the structures, repaired the rotator cuff and did an arthroscopic decompression.”¹⁵ According to Zayas, the surgery was successful in curing her shoulder issues.

On September 24, 2019, Dr. Crain was deposed by Zayas’s attorney and the Employer’s attorney. During his deposition, Dr. Crain confirmed the following: (i) he had examined Dr. Cary’s records and Dr. Cary mentioned in the Medical Records that on every

¹³ A010 (IAB Decision at 10).

¹⁴ A011 (IAB Decision at 11).

¹⁵ *Id.*

visit, Zayas had “a diagnosis related to her left shoulder” from the Incident;¹⁶ (ii) Zayas had “complaints of pain and some findings on physical exam[s] documented by Dr. Cary;”¹⁷ and (iii) Dr. Cary’s report, dated December 16, 2017, stated that Zayas’s left shoulder problem, among other injuries, was one hundred percent related to the Incident. Dr. Crain testified that he agreed with Dr. Cary’s conclusion regarding the causal connection between Zayas’ left shoulder problem and the Incident.¹⁸

On October 1, 2019, Dr. Tadduni was deposed by the parties’ respective attorneys. Generally, Dr. Tadduni did not take issue with the “reasonableness and necessity of the treatment performed by Dr. Crain or . . . the surgery that he performed.”¹⁹ Although Dr. Tadduni answered questions about Dr. Ginsberg and Dr. Crain’s medical findings regarding Zayas’ injury and treatment, Dr. Tadduni refused to answer questions on cross-examination about Dr. Cary’s medical findings due to Dr. Cary’s pending disciplinary charges.²⁰ Dr. Tadduni “repeatedly testified that he would not accept the validity of or acknowledge anything Dr. Cary documented” because Dr. Cary’s medical license was suspended on an emergency basis as a result of the pending charges.²¹

On November 14, 2019, the IAB conducted the Hearing. At the start of it, Zayas’

¹⁶ A206 (Dr. Crain Dep. at 6).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ A282 (Dr. Tadduni Dep. at 24).

²⁰ A295–99, A302–08 (Dr. Tadduni Dep. at 37–41, 44–50). *See also* Appendix A to this opinion.

²¹ A003 (IAB Decision at 3).

counsel presented a motion to exclude Dr. Tadduni's deposition testimony due to Dr. Tadduni's refusal to answer questions concerning Dr. Cary's treatment and records.²² Zayas' counsel argued that the Medical Records directly contradicted Dr. Tadduni's opinion. Further, Dr. Tadduni's refusal to testify concerning the Medical Records significantly prejudiced Zayas by precluding relevant impeachment questions related to his opinions.²³ For example, Dr. Tadduni had testified on direct examination that: "I think what you have to look at is the period after the injury where she's examined multiple times, twice by me, and she's not sent for an MRI of her shoulder at any point *because she doesn't really have symptoms or findings that point to a left shoulder problem.*"²⁴ The Board denied Zayas's motion and stated that such conduct would affect the weight of the evidence being presented.²⁵

During Zayas' direct testimony, Zayas' counsel sought to admit Zayas' Medical Records into evidence.²⁶ Counsel for Employer objected and argued that Zayas was not in

²² A028–32 (IAB Hr'g Tr. at 5–9); *see also* A333–40 (Zayas's October 7, 2019 Letter Requesting to Exclude Dr. Tadduni Testimony.).

²³ A032 (IAB Hr'g Tr. at 9). Zayas's counsel raised a prior instance where Dr. Tadduni behaved similarly. In 2018, Dr. Tadduni "refused to answer any questions [in another matter] about medical records of [a different doctor] that contradicted statements that Dr. Tadduni was making with regard to what was in the record." A031 (IAB Hr'g Tr. at 8). Zayas's counsel asserted that there is a pattern of inappropriate and unprofessional conduct by a doctor who is not "comp certified," who does not treat patients in Delaware, whose sole involvement in Delaware is doing defense medical examinations and testifying before the Board. A032 (IAB Hr'g Tr. at 9).

²⁴ A274 (Tadduni Dep. at 16) (emphasis added).

²⁵ A038 (IAB Hr'g Tr. at 38). The Board was "sympathetic" to the objections of the Employer's counsel and instructed Zayas's counsel to "move on" after reading from Dr. Tadduni's deposition. A149 (IAB Hr'g Tr. at 126).

²⁶ A061 (IAB Hr'g Tr. at 38).

a position to authenticate the Medical Records and that those records were unreliable due to Dr. Cary's pending disciplinary action. Zayas's counsel argued that if the Board did not admit the Medical Records, Zayas would have no way of getting this evidence in front of the Board due to Dr. Tadduni's prior refusal to answer questions.²⁷ Additionally, Zayas's counsel argued that the emergency suspension of Dr. Cary was inadmissible for any consideration by the Board because, according to a Superior Court case, a suspension is not a finding.

After a short discussion off the record, "[t]he Board sustained [Employer's] objections to allowing [Zayas] to testify about the content of Dr. Cary's medical records and to admitting Dr. Cary's medical records into evidence."²⁸ Further, the Hearing Officer stated, with regard to Zayas's counsel's argument that there would be no way of getting the Medical Records evidence in front of the Board, that Zayas had her "own doctor to be able to talk about what was in those records."²⁹ But the testimony provided by Dr. Crain was pre-recorded, as was Dr. Tadduni's testimony, and Dr. Crain's deposition preceded Dr. Tadduni's. Dr. Crain was deposed on September 24, 2019.³⁰ Dr. Tadduni was deposed

²⁷ A063 (IAB Hr'g Tr. at 40). Employer's counsel responded that Zayas's counsel could have subpoenaed Dr. Cary or could have gone through the records with Dr. Crain. Zayas's counsel then countered that Dr. Crain testified before Dr. Tadduni and that "Dr. Cary will not testify." A064 (IAB Hr'g Tr. at 41).

²⁸ A006 (IAB Decision at 6 n.4).

²⁹ A065 (IAB Hr'g Tr. at 42).

³⁰ A201-58 (Dr. Crain Dep.). Dr. Crain is a board-certified provider under the Workers' Compensation Guidelines who has testified on behalf of both claimants and employers. A204-05 (Dr. Crain Dep.).

on October 1, 2019.³¹ Zayas argued that she should not be expected to have anticipated Dr. Tadduni's improper deposition conduct.

On March 20, 2020, the Board issued the IAB Decision.³² As a preliminary matter, the Board addressed Dr. Tadduni's conduct during his deposition. Specifically, during his deposition, Dr. Tadduni was obstructive and disrespectful to Zayas's counsel.³³ The Board noted that this was not the first time Dr. Tadduni had refused to respond to questioning. Further, the Board noted that Dr. Tadduni is not licensed to practice medicine in Delaware.³⁴ Nor is he a certified provider under the Delaware Workers' Compensation Healthcare Payment System. Rather, according to the IAB Decision, "[h]is only

³¹ A259–332 (Dr. Tadduni Dep.).

³² A001–22 (IAB Decision).

³³ A003–04 (IAB Decision at 3–4). The IAB Decision states that:

In Dr. Tadduni's repeated refusals to respond to questioning, he continually obstructed deposition proceedings, insulted [Zayas'] counsel, inappropriately challenged [Zayas'] counsel's ethics, wasted much time, and increased the fees associated with his deposition. Furthermore, Dr. Tadduni unilaterally made a legal decision (a decision to be made by the Board) that such evidence was not relevant, credible or admissible.

A004 (IAB Decision at 4) (citations to Dr. Tadduni Dep. omitted).

³⁴ In his deposition, Dr. Tadduni testified as follows:

Q. Doctor, do you practice in Delaware?

A. No.

Q. Do you treat any patients in Delaware or have any privileges to perform surgery in Delaware?

A. No.

Q. Your interactions with Delaware, is that solely for the purpose of performing defense medical examinations?

A. Correct.

A313 (Dr. Tadduni Dep. at 55).

involvement in Delaware pertaining to workers' compensation cases related to profiting from performing defense medical examinations and from providing medical expert testimony."³⁵ The Board stated that it was referring Dr. Tadduni to the Division of Professional Regulation. It also warned that if he repeated this conduct, "the Board will consider referring Dr. Tadduni to the Delaware Attorney General's office to pursue before the Delaware Superior Court a finding of contempt."³⁶ Separately, citing this Court's decision in *In re Shorestein Hays-Nederlander Theatres LLC Appeals*,³⁷ the Board stated that, "Employer's counsel should have directed Dr. Tadduni to cooperate with cross-examination."³⁸

After addressing Dr. Tadduni's misconduct, the Board explained that Zayas failed to meet her burden of proof that the surgery on her left shoulder was causally related to the Incident. The Board specified three reasons underlying its decision: (1) it found Dr. Tadduni to be more credible than Dr. Crain because Dr. Crain did not explain how the injury could have caused the tears; (2) the video captured Zayas falling onto her right side, rather than her left side; and (3) "the evidence [did] not support that [Zayas] presented with pain upon rotator cuff testing within close proximity to the assault *or in Dr. Cary's records*."³⁹

³⁵ A005 (IAB Decision at 5).

³⁶ *Id.* (citing 19 *Del. C.* § 2320(6)).

³⁷ 213 A.3d 39, 78 (Del. 2019).

³⁸ A005 (IAB Decision at 5).

³⁹ A020 (IAB Decision at 20) (emphasis added). We note that in her briefing on appeal, Zayas contends that she also fell on her left side. She states that that part of her fall was captured on the

Zayas timely appealed to the Superior Court. On appeal, Zayas argued that: (1) the Board erred in admitting the testimony of Dr. Tadduni and that his refusal to respond to questions on cross-examination regarding Dr. Cary's records rendered his opinion unreliable under Delaware Rule of Evidence 702; and (2) the Board erred in excluding Zayas's Medical Records that it later acknowledged were relevant and admissible.⁴⁰ Zayas argued that the substance of these records directly contradicted the basis of Dr. Tadduni's opinion and related to the heart of the issue in controversy. The Superior Court, in affirming the IAB Decision, determined that "the Board had sufficient evidence to conclude that Zayas had failed to meet her burden of proof that her left shoulder injury was causally related to the September 2016 assault,"⁴¹ and that the IAB Decision was "free from legal error."⁴²

The Superior Court did not address the Board's decision to exclude the Medical Records.⁴³ Nor did it address the Board's refusal to strike Dr. Tadduni's testimony.

video also, and that the video did not capture the entire Incident. Opening Br. at 1. *See also* A158 (IAB Hr'g Tr. at 135). Her counsel stated that the video depicted her being hit "close to 30 times." A159 (IAB Hr'g Tr. at 136).

⁴⁰ A432–33 (Superior Ct. Op. at 20–21).

⁴¹ A440–41 (Superior Ct. Op. at 28–29).

⁴² *Id.*

⁴³ *See, e.g.,* A411–412 (Notice of Appeal to Delaware Superior Court) (The Notice provides the following: "4. The Board erred as a matter of law in permitting the testimony of Employer's expert, Dr. Gregory Tadduni. 5. The board erred as a matter of law in precluding the Claimant from admitting her medical records, including records of Dr. Damon Cary, into evidence at the hearing."). The Medical Records are included in Appellant's Appendix filed with this Court. A341–94 (Zayas' Medical Records from Dr. Cary). However, the Medical Records do not appear in the record below based upon our review of that record.

The Superior Court relied largely on the Board’s credibility determinations that Zayas was not credible and that Zayas had failed to show that the Board acted unreasonably or capriciously in crediting the Employer’s medical expert over Dr. Crain. The Superior Court concluded that:

It is solely the Board’s function to weigh the evidence and to make credibility determinations. The Board is free to rely on either expert; thus, the Board was entitled to accept Dr. Tadduni’s opinion as more persuasive regarding the causal relationship between [Zayas’] left shoulder injury and the incident. Therefore, the Board did not commit legal error by accepting Dr. Tadduni’s opinion over Dr. Crain’s.⁴⁴

Thereafter, Zayas timely appealed to this Court.

II. Standard of Review

“The review of an Industrial Accident Board's decision is limited to an examination of the record for errors of law and a determination of whether substantial evidence exists to support the Board's findings of fact and conclusions of law.”⁴⁵ “Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’”⁴⁶

“On appeal, this Court will not weigh the evidence, determine questions of credibility, or make its own factual findings.”⁴⁷ “Weighing the evidence, determining the credibility of witnesses, and resolving any conflicts in the testimony are functions reserved

⁴⁴ A440 (Superior Ct. Op. at 28).

⁴⁵ *Roos Foods v. Guardado*, 152 A.3d 114, 118 (Del. 2016) (citing *Stanley v. Kraft Foods, Inc.*, 2008 WL 2410212, at *2 (Del. Mar. 24, 2008)).

⁴⁶ *Id.* (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

⁴⁷ *Id.* (citing *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009)).

exclusively for the Board.”⁴⁸ “When determining the reliability of an expert’s opinion, the Board must make a determination of the reliability of the sources on which the expert relied.”⁴⁹ Further, “[t]he Board is not required to accept medical evidence that it deems unreliable[.]”⁵⁰ Moreover, where factual determinations are at issue, this Court takes due account of the Board’s experience and specialized competence and of the purposes of Delaware’s worker’s compensation statute.⁵¹

If the Board decided legal issues, this Court reviews them *de novo*.⁵² If there is no error of law and substantial evidence supports the Board’s findings, “the Board’s decision must be affirmed.”⁵³

III. Analysis

In considering the evidentiary issues presented here, we note at the outset that “[a]dministrative agencies operate less formally than courts of law.”⁵⁴ For example, how the rules of evidence apply to IAB hearings is set forth under Section 1331 of the Industrial

⁴⁸ *Powell v. OTAC, Inc.*, 223 A.3d 864, 870 (Del. 2019) (citing *Noel-Liszkiewicz v La-Z-Boy*, 68 A.3d 188, 191 (Del. 2013)).

⁴⁹ *Adams v. F. Schumacher & Co., Inc.*, 886 A.2d 1277, 2005 WL 2895105, at *2 (Del. Nov. 1, 2005) (TABLE) (citing *Fensterer v. State*, 509 A.2d 1106, 1110 (Del. 1986)).

⁵⁰ *White v. Volt Services*, 35 A.3d 420, 2011 WL 6826438, at *1 (Del. Dec. 22, 2011) (TABLE).

⁵¹ *Spellman v. Christiana Care Health Servs.*, 74 A.3d 619, 623 (Del. 2013).

⁵² *Oceanport Indus., Inc. v. Wilm. Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994) (internal quotation marks omitted).

⁵³ *Stevens v. State*, 802 A.2d 939, 944 (Del. Super. 2002) (citing *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988)).

⁵⁴ *Standard Distrib. Co. v. Nally*, 630 A.2d 640, 647 (Del. 1993).

Accident Board Regulations (the “Regulations”). Specifically, Section 1331.14.3 of the Regulations provides:

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.*⁵⁵

An abuse of discretion occurs when the Board’s decision has “exceeded the bounds of reason in view of the circumstances, [or] so ignored recognized rules of law or practice as to produce injustice.”⁵⁶

Further, Section 1331.10.6 of the Regulations sets forth the scope of administrative depositions, which provides that “[t]he deponent may be examined regarding any matter,

⁵⁵ 19 Del. Admin. C. § 1331-14.3. See *Standard Distributing, Inc. v. Hall*, 897 A.2d 155, 157 (Del. 2006) (noting that “[w]hile the Board operates ‘less formally than courts of law,’ and ‘the rules of evidence do not strictly apply,’ it is nonetheless an adversarial proceeding where the rules of evidence apply insofar as practicable.”) (citing *Standard Distributing Co. v. Nally*, 630 A.2d 640, 647 (Del. 1993)). See also *Paulley v. Second String, LLC d/b/a Hammerheads Dockside*, No. 1478726 (I.A.B. Oct. 9, 2019) (“[T]he Board will only consider evidence which in its opinion, possesses any probative value commonly accepted by reasonably prudent persons in the conduct of their affairs.”). See also *Carey v. Bryan and Rollins*, 105 A.2d 201, 203–05 (Del. Super. 1954) (holding that, where a question regarding claimant’s intoxication during the time of the accident was material, it was an error for Unemployment Industrial Accident Board (“UIAB”) to permit the claimant to refuse to answer the question). The Superior Court further held, if the claimant continued to refuse answering material questions regarding the issue of intoxication, that the UIAB may strike all of the claimant’s testimony regarding the accident. *Id.*

⁵⁶ *Roos Foods*, 152 A.3d at 118 (alteration in original) (quoting *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994)); see e.g., *Abrahams v. Chrysler Grp., LLC*, 44 A.3d 921, 2012 WL 1744270 (Del. May 11, 2012) (TABLE). In *Abrahams*, the Court ruled that the “IAB improperly permitted Chrysler’s attorney to offer what amounted to expert testimony during her closing argument. This maneuver, defended before this Court as a tactical decision, violated fundamental notions of fairness by depriving Abrahams of the opportunity to dispute the facts material to the outcome of his case.” *Id.* As a result, the Court determined that this case represented an abuse of discretion. *Id.*

not privileged, which is relevant to the subject matter involved in the pending action.”⁵⁷ In refusing to strike Dr. Tadduni’s testimony, the Board reasoned that Dr. Tadduni’s testimony should be admitted because: (1) the Employer would have no medical expert to testify on its behalf; (2) Zayas had the opportunity to elicit the information contained in Dr. Cary’s records during the deposition of Dr. Crain; and (3) the prejudice to the Employer outweighed the prejudice to Zayas by allowing the testimony. The Board attempted to ameliorate any such prejudice by stating it would factor Dr. Tadduni’s refusal to cooperate into its deliberations when weighing the evidence.

But we hold that it was improper for Dr. Tadduni to unilaterally determine that he did not have to testify about the Medical Records. Dr. Tadduni’s refusal to answer relevant questions, and the Employer’s counsel’s failure to address this conduct, deprived Zayas of the opportunity to elicit relevant information material to the outcome of her case, and to effectively cross-examine Dr. Tadduni about his medical opinion.⁵⁸ Accordingly, the Board abused its discretion by admitting Dr. Tadduni’s testimony. Furthermore, the Board’s exclusion of the Medical Records, which it stated constituted relevant and “admissible evidence,” also reflects an internal inconsistency and illogical process.⁵⁹

⁵⁷ 19 Del. Admin. C. § 1331-10.6.

⁵⁸ Appendix A (attached hereto) contains illustrative excerpts of Dr. Tadduni’s deposition.

⁵⁹ We also acknowledge Zayas’s explanation that she did not attempt to elicit such information during Dr. Crain’s deposition because Dr. Crain had appeared via an earlier pre-recorded deposition and Zayas had not anticipated that Dr. Tadduni would improperly refuse to answer questions about Dr. Cary’s treatment of Zayas.

Moreover, given the Board’s statement that the Medical Records were relevant and admissible, and given Dr. Tadduni’s testimony that he would not acknowledge anything Dr. Cary documented, Zayas’s argument that Dr. Tadduni’s testimony lacked a factual foundation and was based on an incomplete medical history has significant force. As we explained in *Perry v. Berkley*, “[t]his Court has adopted the United States Supreme Court holding in *Daubert*, which requires that an expert’s opinion be based upon a *proper factual foundation* and sound methodology to be admissible.”⁶⁰ Pursuant to that rule, any expert who testifies must satisfy Delaware Rule of Evidence (“D.R.E.”) 702 in order for his or her testimony to be admissible as evidence. If an expert’s opinion lacks a factual foundation, then the opinion is not valid.⁶¹

In *Perry*, this Court affirmed the decision of the trial court’s exclusion of the testimony of plaintiff’s medical expert and its dismissal of the case due to lack of evidence of causation. The plaintiff in *Perry* alleged that she sustained back injuries as the result of a motor vehicle accident. Plaintiff’s only medical expert opined that the accident caused plaintiff’s back injury because she had not experienced any back pain prior to the accident. However, plaintiff’s expert had not personally treated her after the accident and based his opinion on medical records and the plaintiff’s self-reports. Although Perry’s counsel had advised plaintiff’s expert that the plaintiff had been treated for back pain prior to the accident in question, the expert “apparently did not read those communications . . . because

⁶⁰ *Perry v. Berkley*, 996 A.2d 1262, 1267 (Del. 2010) (emphasis added).

⁶¹ *Id.* at 1265.

at his 2009 deposition [the expert] testified that he had no knowledge of Perry’s pre-existing back condition and prior treatments for pain.”⁶² Because the expert’s opinion was premised on the incorrect assumption that the plaintiff had not previously experienced back pain, the trial judge excluded the expert’s testimony on the grounds that it lacked the proper factual foundation.⁶³

Zayas compares Dr. Tadduni’s lack of a factual foundation to that of the medical expert’s in *Perry*. Zayas argues that Dr. Tadduni opined that she failed to “demonstrate left shoulder symptoms for nearly two years before she was referred to Dr. Crain,”⁶⁴ but that Dr. Cary’s records confirm that Zayas had continued complaints of left shoulder symptoms during that period.

⁶² 996 A.2d at 1266.

⁶³ Specifically, the trial judge expressed concern about the factual basis for the medical expert’s opinion, stating that:

[Y]our doctor, [] predicates his opinion as to causation on the lack of any complaints by your client [] as to her low back prior to the accident, . . . and that the trauma was causally related to the herniation . . . how can that opinion be valid when [the expert] didn’t know—when you[r] client didn’t tell him about the previous low-back complaints and it was never disclosed to him that she had been diagnosed with herniation before the accident.

Id. at 1266. The Superior Court continued to express its concern by stating that “it’s really a *Daubert* problem. This motion, as I see it, doesn’t focus on qualifications or competence or methodology or science involved, it focuses on factual foundation. And if the factual foundation isn’t there, the opinion is not valid.” *Id.*

⁶⁴ Opening Br. at 27. Dr. Tadduni testified that Zayas did not have any left shoulder symptoms for two years following the Incident. A274 (Dr. Tadduni Dep. at 16). Zayas argues that his testimony disregards her forty-three visits to Dr. Cary which the Employer paid for where she specifically complained of left shoulder problems. *See also Durmmond Fuel Oil v. O’Neal*, 734 A.2d 1060, 1065 (Del. 1999) (stating that treating physicians have great familiarity with a patient’s condition and their opinions should be given substantial weight).

Employer contends that Zayas misapplies *Perry* because in *Perry*, the medical expert “rendered an expert opinion based on a completely incorrect case specific factual predicate.”⁶⁵ Employer attempts to distinguish this case from the *Perry* case by arguing that Dr. Tadduni “had knowledge of the facts of the case, and the injuries sustained by [Zayas]” and that Dr. Tadduni “based his opinion that [Zayas’] surgery was not casually related to the [I]ncident on the fact that he found no left shoulder complaints until [Zayas] saw Dr. Ginsburg in August of 2018, almost two years after the [I]ncident.”⁶⁶

But according to the testimony of Dr. Crain and Zayas, Dr. Tadduni’s factual foundation contradicts the Medical Records that documented Zayas’ complaints of left shoulder injury. The Board said the Medical Records were “relevant” and “admissible” but excluded them. According to Zayas, given Dr. Tadduni’s refusal to respond to questions during cross examination, it was unclear whether Dr. Tadduni had even reviewed the Medical Records prior to arriving at his opinion.⁶⁷

This situation resembles the situation in *Perry*. Dr. Tadduni predicated his opinion, at least in part, on the lack of any complaints by Zayas as to her left shoulder. However, Zayas’ Medical Records documented numerous complaints regarding her left shoulder. Notwithstanding the professional issues in which Dr. Cary was involved, Dr. Tadduni’s

⁶⁵ Answering Br. at 20 (quoting *Perry*, 996 A.2d at 1271).

⁶⁶ *Id.* (citing A288 (Dr. Tadduni Dep. at 30)).

⁶⁷ *See* Opening Br. at 27–28 (“Dr. Tadduni’s outright refusal to answer any questions regarding those records let the Board, and the Superior Court, unable to conclude whether those records [from Dr. Cary] were even considered in [Dr. Tadduni’s] opinion at all. In fact, at one point, [Dr. Tadduni] indicated the records may have never been provided to him.”).

refusal to acknowledge, consider and to respond to cross-examination as to critical facts that go to the heart of the factual basis for his opinion, lead us to conclude that his opinion was based upon an incomplete factual predicate. The Board's process violated fundamental notions of fairness, and it therefore, abused its discretion. Accordingly, we hold that the Board should have stricken Dr. Tadduni's testimony. The Board's errors were not harmless as the dueling experts were central to Zayas's case.⁶⁸

Finally, the Employer's counsel should not have tolerated Dr. Tadduni's deposition misconduct. We made clear in *Shorenstein* that such deposition misconduct is not acceptable Delaware practice. As we said there, that "[d]epositions are court proceedings, and counsel defending the deposition have an obligation to prevent their deponent from impeding or frustrating a fair examination."⁶⁹ We also said that, "[l]awyers have an obligation to ensure that their clients do not undermine the integrity of the deposition proceedings by engaging in bad faith litigation tactics; they cannot simply sit and passively observe as their client persists in such conduct."⁷⁰ In any proceedings on remand, Dr. Tadduni's deposition taken in this case shall not be admitted for any purpose.

⁶⁸ See, e.g., *Abrahams v. Chrysler Group LLC*, 44 A.3d 921, 2012 WL 1744270, at *4 (reversing and stating that, "[t]his case, at its heart, was about dueling experts, and an attempted impeachment of an expert without notice and an opportunity for the parties offering the expert to respond might well have determined the outcome."). As Zayas's counsel aptly noted at the close of the Hearing, Dr. Tadduni's credibility was at issue -- "[t]he credibility of the person who while he profits from our workers' compensation system, fails to fairly participate in it and engage in discussion through way of deposition." (IAB Hr'g Tr. at 159).

⁶⁹ 213 A.3d at 78.

⁷⁰ *Id.* at 79.

IV. Conclusion

For the reasons set forth above, we **REVERSE** the Superior Court's order, and **REMAND** for proceedings consistent with this opinion.

Appendix A

The following are selected excerpts from Dr. Tadduni's deposition:

[Mr. Fredericks]: You reviewed the medical records of Dr. Cary; correct?⁷¹

[Dr. Tadduni]: I'm not even gonna talk about medical records of Dr. Cary. That would have absolutely no relevance to me at all and I think you know why.

[Mr. Fredericks]: Doctor, I'm gonna just ask you to answer my questions.

[Dr. Tadduni]: I'm gonna tell you that anything in the medical records of Dr. Cary would have absolutely no relevance to me –

[Mr. Fredericks]: Okay.

[Dr. Tadduni]: -- and you know why.

[Mr. Fredericks]: Okay. And, again, just do me a favor and just answer the questions unless Mr. Klusman --

[Dr. Tadduni]: I answered the question. Nothing in Dr. Cary's records would have any relevance to me, so even if I mention them in my report, that would have been by mistake --

[Mr. Fredericks]: Okay.

[Dr. Tadduni]: -- in retrospect.

[Mr. Fredericks]: I'm just trying to understand what you reviewed. Did you review --

[Dr. Tadduni]: No, that's not what you're trying to do. I'm not going to tell you what Dr. Cary said because it's obviously not relevant to any of us. It's not relevant to you. It's not relevant to the Board. It's not relevant to Mr. Klusman.

⁷¹ Mr. Fredericks is Zayas's counsel. The telephone deposition was taken on October 1, 2019. (A259–A332).

[Mr. Fredericks]: I understand that it may not be relevant to the Employer or to you. I understand that. It is relevant to me as --

[Dr. Tadduni]: Well, it shouldn't be. It shouldn't be and you know it shouldn't be.

[Mr. Fredericks]: Doctor --

[Dr. Tadduni]: You know it shouldn't be.

[Mr. Fredericks]: Doctor, I'm trying to be incredibly polite and respectful.

[Dr. Tadduni]: And I'm being polite too. I'm being polite too. You're bringing up something that is absurd.

[Mr. Fredericks]: Doctor, can you tell me whether you reviewed the treatment records of Dr. Cary.

[Dr. Tadduni]: I'm not even discussing Dr. Cary.

[Mr. Fredericks]: All right.

[Mr. Fredericks]: Mr. Klusman, if the Doctor refuses to answer questions, and if you think my question is inappropriate, certainly let me know, but if the Doctor refuses to answer questions from me that are reasonable and relevant, I'm gonna have to strike his testimony. I don't want to have to do that.

[Mr. Klusman]: Well, Joel, you'll do whatever you think is appropriate. You have the opportunity to ask him whatever you want and he's got the opportunity to answer in the way he sees fit.

We all know that Dr. Cary's been suspended for fraudulently preparing medical records which document diagnoses that are not accurate, not offered by the patient, complaints that were not offered by the patient and then submitting those records to insurance for payment based on those fraudulent records, so that's I think the basis of Dr. Tadduni's opinions. I can't help you any more than that.

[Mr. Fredericks]: But he also hasn't been found guilty of any of those things. It's a complaint and it's still pending and he's entitled to a hearing at this point and, again, these are treating doctor's records, treating doctor's records that are in his own report. Perhaps if you let him know that this information

is relevant and admissible, maybe that would change some of his testimony. I'm just trying to think of the path of least resistance, Mr. Klusman. I'm trying to get through this as expeditiously as possible.

[Mr. Klusman]: I guess, Joel -- I can't tell -- I'm not gonna tell the Doctor to answer questions that he doesn't feel comfortable answering.

[Dr. Tadduni]: You're asking me to perpetrate a fraud on the Board? Is that what it is?

[Mr. Fredericks]: Doctor, I'm asking you to answer clear and relevant questions.

[Dr. Tadduni]: No. You're asking me to perpetrate a fraud on the Board. His license was emergently revoked. Emergently revoked; okay? And you're gonna ask me to talk about what Dr. Cary found?

[Mr. Klusman]: Joel, you're gonna have to move on. Doctor clearly is not comfortable answering these questions relying on Dr. Cary's records.⁷²

...

[Mr. Fredericks]: So let me be clear. Is there anything specifically that says left shoulder in any of those records?

[Dr. Tadduni]: No.

[Mr. Fredericks]: Is there any diagnosis as to the left shoulder in any of those records?

[Dr. Tadduni]: No, and that's consistent with the fact that when I see her in 2016 she also doesn't complain specifically about the shoulder. She has complaints everywhere and her exam is negative with regard to the shoulder, so that would be consistent with that.

[Mr. Fredericks]: All right. But when she goes to see Dr. Cary after the assault the first visit on September 15, 2018 she's complaining of left shoulder complaints specifically and she's diagnosed with a left shoulder condition; correct?

⁷² A295–298 (Tadduni Deposition at 37–40).

[Dr. Tadduni]: How could we possibly know that? It's Dr. Cary. We can't possibly know what she actually complained of on that day.⁷³

...

[Mr. Fredericks]: On the physical examination it shows tenderness and restricted range of motion as to the left shoulder. Do you agree?

[Dr. Tadduni]: Again, I'm not – I am not gonna substantiate the physical exam of somebody whose license has been emergently revoked. I'm not doing that.

[Mr. Fredericks]: Doctor, all you have to say is *I'm not answering* and I can move on. You just have to say *I'm not answering* and I can move on.

[Dr. Tadduni]: So why do you keep pressing this? I would think that you'd be embarrassed to ask that question. You should be embarrassed to ask that question.

[Mr. Fredericks]: Doctor, I can appreciate your opinion but I have a job that I have to do.

[Dr. Tadduni]: Right. And it doesn't matter how you do it. Throw whatever you want on the wall and maybe some of it'll stick.⁷⁴

...

[Mr. Fredericks]: All right. I want to jump back to the questions again. If you're not gonna answer it, just say you're not gonna answer. I'm actually going to instead go through them individually just lump them all together -- okay? – for the purposes of time. I took a look at Dr. Cary's records after this injury, this assault, included evaluations and therapy, and there was a reference to a shoulder problem in almost all the records, and I pulled out a few dates. I'm just gonna go through them: September 20th, 2016; October 6th, 2016; October 18th, 2016; October 25th, 2016; December 8th, 2016; January 5th, 2017; February 7th, 2017; March 16th, 2017; April 18th, 2017; May 23rd, 2017; July 6th, 2017; and August 17, 2017. I stopped at about a year. Do you have any reason to dispute that there are references to problems with the left shoulder in those records?

⁷³ A301–302 (Tadduni Deposition at 43–44).

⁷⁴ A303 (Tadduni Deposition at 45).

[Dr. Tadduni]: I'm not gonna substantiate records of Dr. Cary, so you can testify if you're allowed to testify, but I'm not gonna testify to that. I'm also looking at Dr. Gelman's report. It seems like the diagnoses he makes do not mention the left shoulder. Cervical spine. Lumbosacral spine. I don't see that he makes a left shoulder diagnosis.⁷⁵

...

[Mr. Fredericks]: So if you were in that position of a pain management doctor, not an orthopedic surgeon, not a specialist, when that problem is going on for a year, wouldn't it be reasonable at that point to send a person to a specialist or for an MRI?

[Dr. Tadduni]: It would be, yes.

[Mr. Fredericks]: Dr. Cary didn't do that though; right?

[Dr. Tadduni]: You really just want to prolong this unnecessarily.

[Mr. Fredericks]: Well, not really. But Dr. Cary didn't do that; right?

[Dr. Tadduni]: I told you I'm not gonna testify to what Dr. Cary did or said or didn't do.⁷⁶

...

[Mr. Fredericks]: Again, I'm gonna keep going with Dr. Cary. We stopped in August 2017. She continued to treat with Dr. Cary up until the time he referred her to Dr. Ginsberg in August of 2018 with continued consistent references to the left shoulder. Do you have any reason to dispute that?

[Dr. Tadduni]: Yes, I have reason to dispute it.

[Mr. Fredericks]: Do you have any reason to dispute that that is what is noted in the records, Doctor?

⁷⁵ A305–306 (Tadduni Deposition at 47–48).

⁷⁶ A307 (Tadduni Deposition at 49).

[Dr. Tadduni]: I'm not gonna testify to his records. I told you that. If you can testify, then testify. Why don't you bring him in, let him testify.⁷⁷

...

[Mr. Fredericks]: This opinion that you hold of Dr. Cary, is it an opinion that you formed before any issues with his medical license? Is this an opinion that you've held before then or since then?

[Dr. Tadduni]: I'd say it's a combination.

[Mr. Fredericks]: Okay. He's not a doctor that you're particularly fond of; is that fair?

[Dr. Tadduni]: I'm sure he's a doctor you're particularly fond of.⁷⁸

⁷⁷ A308 (Tadduni Deposition at 50).

⁷⁸ A317–318 (Tadduni Deposition at 59–60).