WILLIAM D. RIMMER WORKERS' COMPENSATION SEMINAR 2022

LIVE CLE Seminar at Riverfront Events/Hyatt

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

TUESDAY, MAY 3, 2022 | 8:30 A.M. – 4:30 P.M.

6.8 hours of CLE Credit including 1.8 hours of Enhanced Ethics for DE Attorneys
6.5 hours of CLE Credit including 1.5 hours of Enhanced Ethics for PA Attorneys
7.0 DE Insurance Continuing Education licensee credits including 1.8 credit in Ethics

ABOUT THE PROGRAM

This seminar on Workers' Compensation issues will focus on the following issues/presentations: Address from the Industrial Accident Board; Self-limited injuries; Workers' Compensation Fund Reimbursement Issues; Do's and Don'ts in the Practice of Workers' Compensation; Keynote Address: The Art of Professionalism and Civility; Case Law Update; Surgical Issues; Head Cases: The Role of Psychological and Psychiatric Experts in Workers' Compensation Claims; Ethics and the Practice of Workers' Compensation.

Visit https://www.dsba.org/event/william-d-rimmer-workers-compensation-seminar-2022/ 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.

WILLIAM D. RIMMER WORKERS' COMPENSATION SEMINAR 2022

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CLE SCHEDULE

8:30 a.m. – 8:45 a.m.

Opening Remarks

John J. Ellis, Esquire
Section Chair of the Workers' Compensation Section
Heckler & Frabizzio, P.A.

8:45 a.m. – 9:15 a.m.

Address from the Industrial Accident Board

The Honorable Mark Murowany
Chairman, Industrial Accident Board

Christopher F. Baum, Esquire
Delaware Department of Labor

9:15 a.m. – 9:45 a.m.

Self-Limited Injuries

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

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

Michael I. Silverman, Esquire
Silverman McDonald & Friedman

9:45 a.m. –10:15 a.m.

Workers' Compensation Fund Reimbursement Issues

Lynn A. Kelly, Esquire
Delaware Department of Justice

Nicholas M. Krayer, Esquire
Pratcher Krayer LLC

Scott A. Simpson, Esquire
Elzufon Austin & Mondell, P. A.

10:15 a.m. – 10:30 a.m. | Break

10:30 a.m. – 11:15 a.m.

Do's and Don'ts in the Practice of Workers' Compensation

Benjamin K. Durstein, Esquire
Marshall Dennehey Warner Coleman & Goggin

Matthew R. Fogg, Esquire
Morris James LLP

Meghan Butters Houser, Esquire
Weiss, Saville & Houser, P.A.

Danielle K. Yearick, Esquire
Tybout, Redfearn & Pell

11:15 a.m. – 12:00 p.m.

Keynote Address – A Roundtable

The Art of Professionalism and Civility

The Honorable. Collins J. Seitz, Jr.
Chief Justice
Supreme Court of Delaware

H. Garrett Baker, Esquire
Elzufon Austin & Mondell, P.A.

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.

Surgical Issues

Nancy Chrissinger Cobb, Esquire
Chrissinger & Baumberger

Jessica L. Julian, Esquire
Marshall Dennehey Warner Coleman & Goggin

Stephen T. Morrow, Esquire
Rhoades & Morrow LLC

Jessica L. Welch, Esquire
Doroshow Pasquale Krawitz & Bhaya

2:15 p.m. – 2:30 p.m. | Break

2:30 p.m. – 3:30 p.m.

Head Cases: The Role of Psychological and Psychiatric Experts in Workers' Compensation Claims

John W. Dettwyler, Ph.D.
Neil S. Kaye, MD
Board Certified Forensic Psychiatrist

James S. Langan, Psy. D.

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

3:30 p.m. – 4:30 p.m.

Ethics and the Practice of Workers' Compensation

Wade A. Adams, III, Esquire
The Law Offices Of Wade A. Adams, III

Donald E. Marston, Esquire
Doroshow Pasquale Krawitz & Bhaya

Keri L. Morris-Johnston, Esquire
Marshall Dennehey Warner Coleman & Goggin

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

4:30 p.m. Adjournment

Visit www.dsba.org/event/27th-annual-rubenstein-walsh-seminar-on-ethics-and-professionalism-2022-2/ for all the DSBA CLE seminar policies.

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Opening Remarks

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Section Chair of the
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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

24th Annual Report

on the

Status of Workers' Compensation

Case Management

January, 2022

2021 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 2021, three 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 215 Workers Compensation policies that covered previously uninsured employees working in the State of Delaware.
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. The Office is in the process of exploring the acceptance of Pre-Trial Memos

electronically from stakeholders as well as the file exchange of First Report of Injury with the State of Delaware's third-party administrator, PMA.

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. The processing of agreement and receipt documents was transferred from the fiscal unit to the Workers' Compensation unit in the Fall of 2021.

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. Within the last year, the Office of Workers' Compensation has obtained dedicated legal resources for the Workers' Compensation Fund. From June 2021 to December 2021, the Workers' Compensation Fund has been able to recoup more wage payments than ever in its history and has been able to reduce the bi-monthly wage payments in half the amount as compared to a year ago.

OWC is continuing to look at additional ways of streamlining processes for the benefit of members of the public as well as staff.

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/

Health Care Payment System - Year in Review 2021

The Delaware Workers' Compensation Health Care Payment System (HCPS) marked its twelfth anniversary on May 23, 2021. 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

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 one Insurance Carrier vacancy and one Medical Society – At Large vacancy.

In 2021, the WCOP did not meet. Its subcommittees met 3 times.

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.

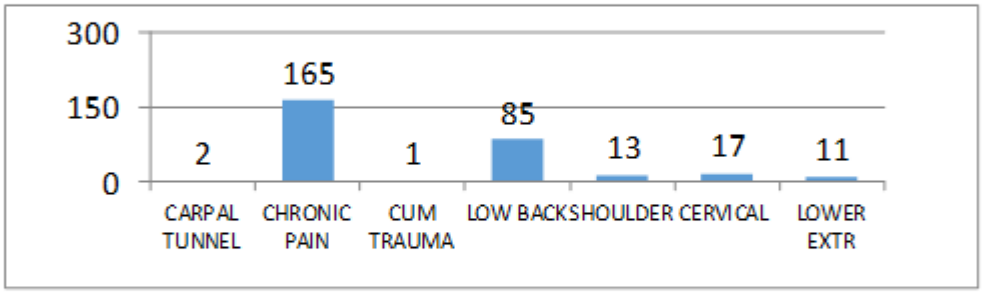
Utilization review (UR) provides prompt resolution of compliance issues related to proposed or provided health care services within the practice guidelines for those claims acknowledged as compensable. Parties may appeal UR determinations to challenge the assumption that treatment specified within a 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 2020, OWC received 225 requests for utilization review. In 2021 YTD, OWC received 249 requests for utilization review, which constituted an 9.64% increase. In 2020, OWC received 140 Petitions to Appeal a Utilization Review. These appeals were filed in approximately 62% 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 2021, OWC received 158 Petitions to Appeal a Utilization Review. The percentage rate of appeal for 2021 was approximately 63.45%. Also 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 2021 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.

OWC Health Care Payment System (HCPS)
2021 UR Practice Guidelines
through 12/31/21

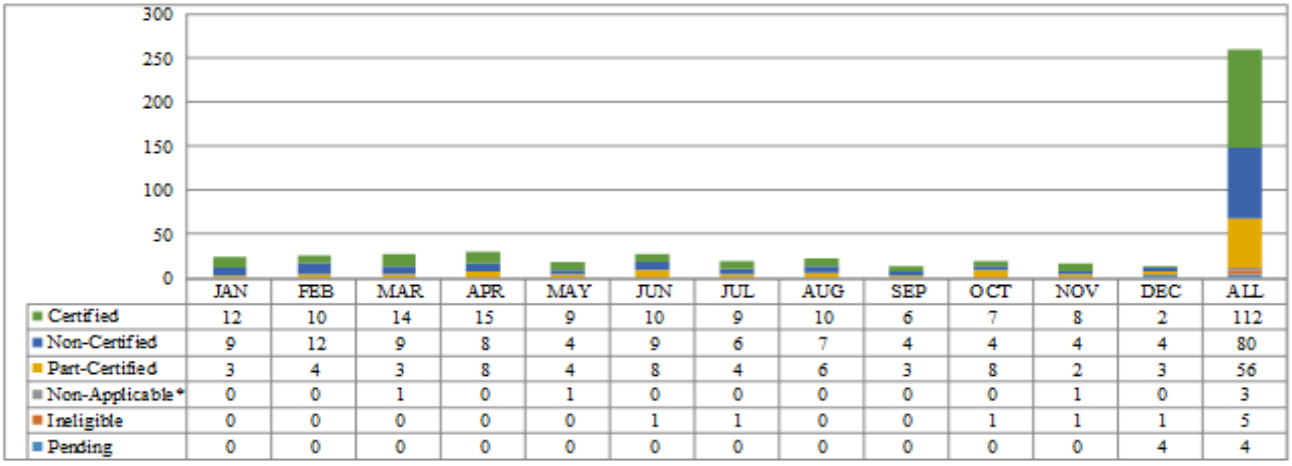
UR statistics are compiled on a one-month lag based on date of receipt.



•Individual UR requests may involve multiple Practice Guidelines.

OWC Health Care Payment System (HCPS)
2021 Utilization Review Program*

UR statistics are compiled on a one-month lag based on date of receipt.



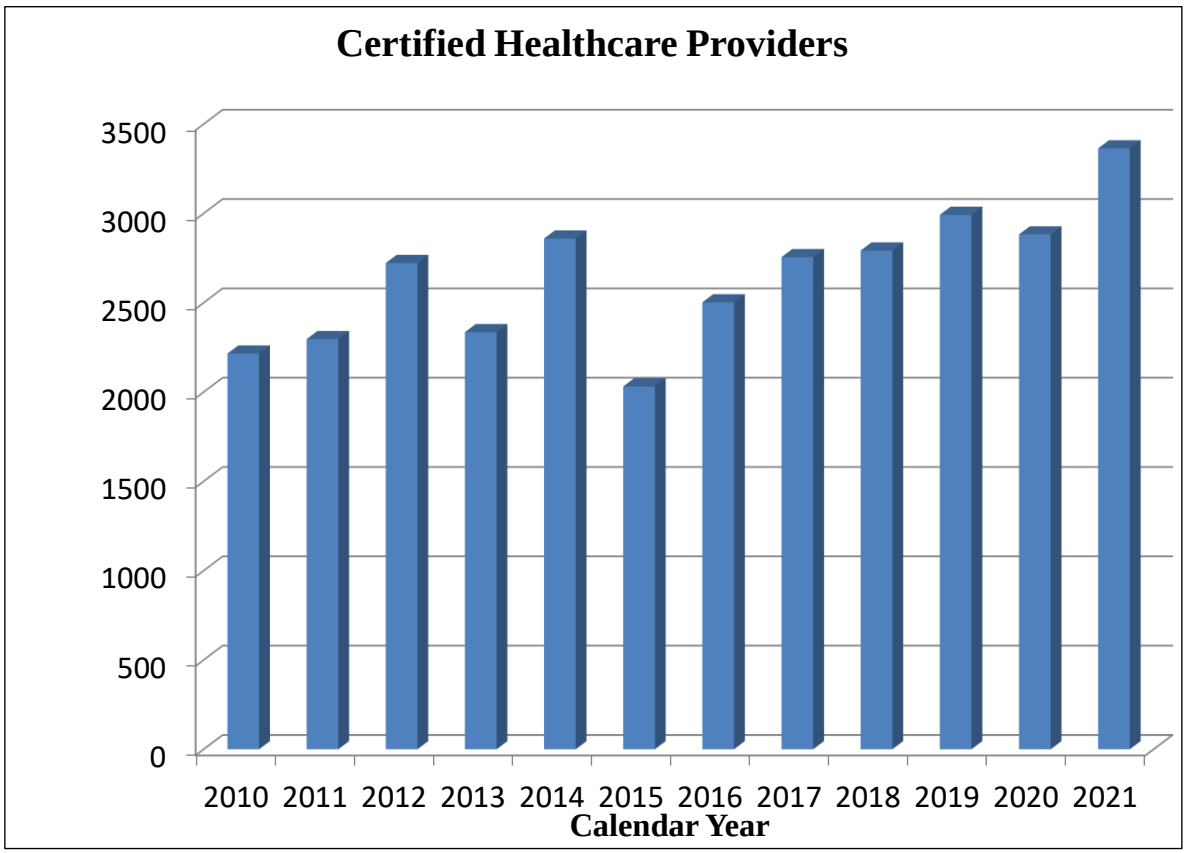
	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	ALL
Certified	12	10	14	15	9	10	9	10	6	7	8	2	112
Non-Certified	9	12	9	8	4	9	6	7	4	4	4	4	80
Part-Certified	3	4	3	8	4	8	4	6	3	8	2	3	56
Non-Applicable*	0	0	1	0	1	0	0	0	0	0	1	0	3
Ineligible	0	0	0	0	0	1	1	0	0	1	1	1	5
Pending	0	0	0	0	0	0	0	0	0	0	0	4	4

*The "Notice of Non-Applicability for Utilization Review" went into effect on 8/1/12, for instances when the injury **does** fall under one of the 7 Practice Guidelines, but the treatment to be reviewed is not addressed within those Guidelines. This determination is made by the UR contractor.

UR Requests	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
Total - month	21	24	26	31	17	28	20	23	13	19	14	13
Total - YTD	21	45	71	102	119	147	167	190	203	222	236	249
Total – Since 5/23/08	4263	4287	4313	4344	4361	4389	4409	4432	4445	4464	4478	4491

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 of our UR contractors via secure email instead of certified mail. All of these processes allow the contractor to receive the UR request in a shorter period of time 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 increased within the last year. In 2020 there were 2,822 certified providers and that number has increased by 19% to 3,364 in 2021. 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. 2021 marked the eighth 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.



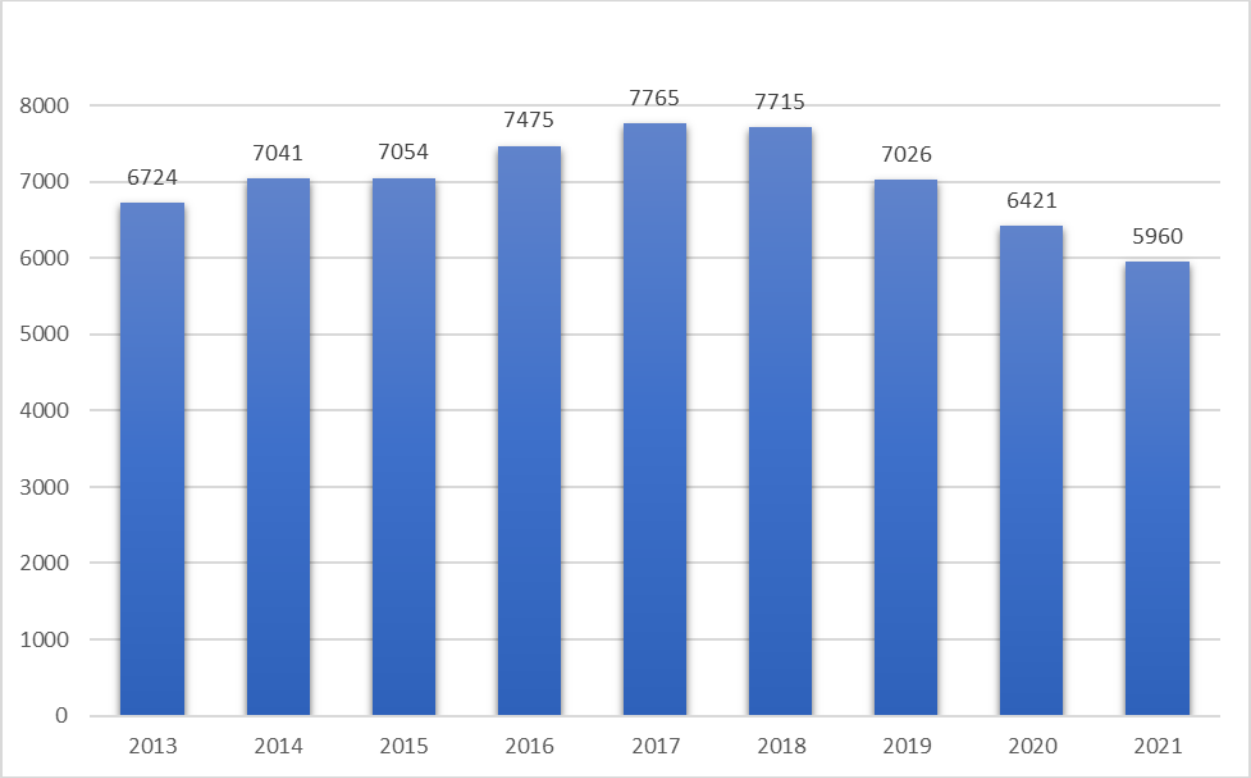
In 2021, approximately 3,576 stakeholders participated in OWC's ListServ, which represents a increase over the 3,142 subscribers at the end of 2020, partly due to the COVID -19 pandemic. The OWC ListServ provides a no-cost, quick, and effective tool to broadcast important changes and information via email.

Office of Workers' Compensation

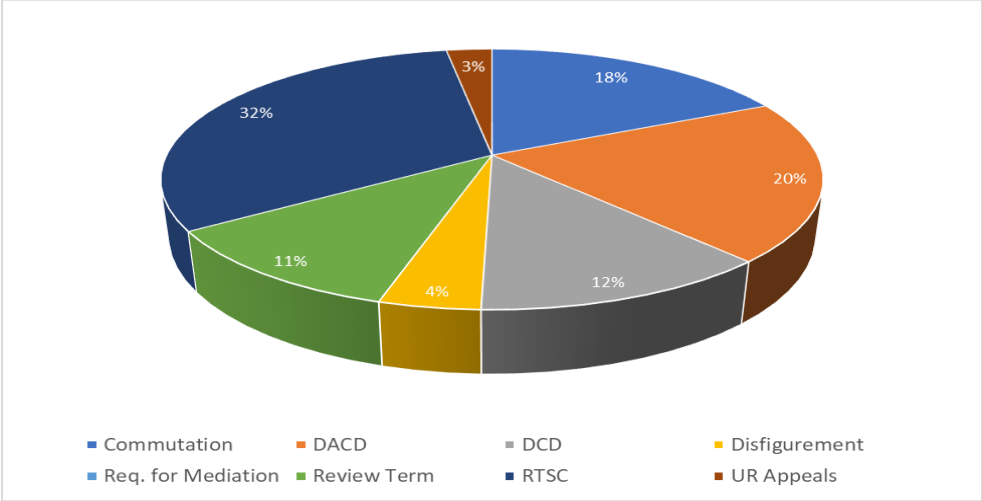
The Workers' Compensation Specialists continued to assist callers, even if the Specialist was working remotely. Other than injured workers, the additional contacts included attorneys, insurance carriers and employers. The Office of Workers' Compensation processed 2452 requests for copies of public documents. OWC processed 12,988 First Report of Injury. Only 3% were filed elctronically. OWC is exploring ways to allow the interfacing of the FRI to our current system.

Petitions Filed Annually

During 2021, a total of 5960 petitions were filed. This is a very slight decrease compared to 2020 (8%) but is an anomaly statistically due to the unusual circumstances that continued in 2021.

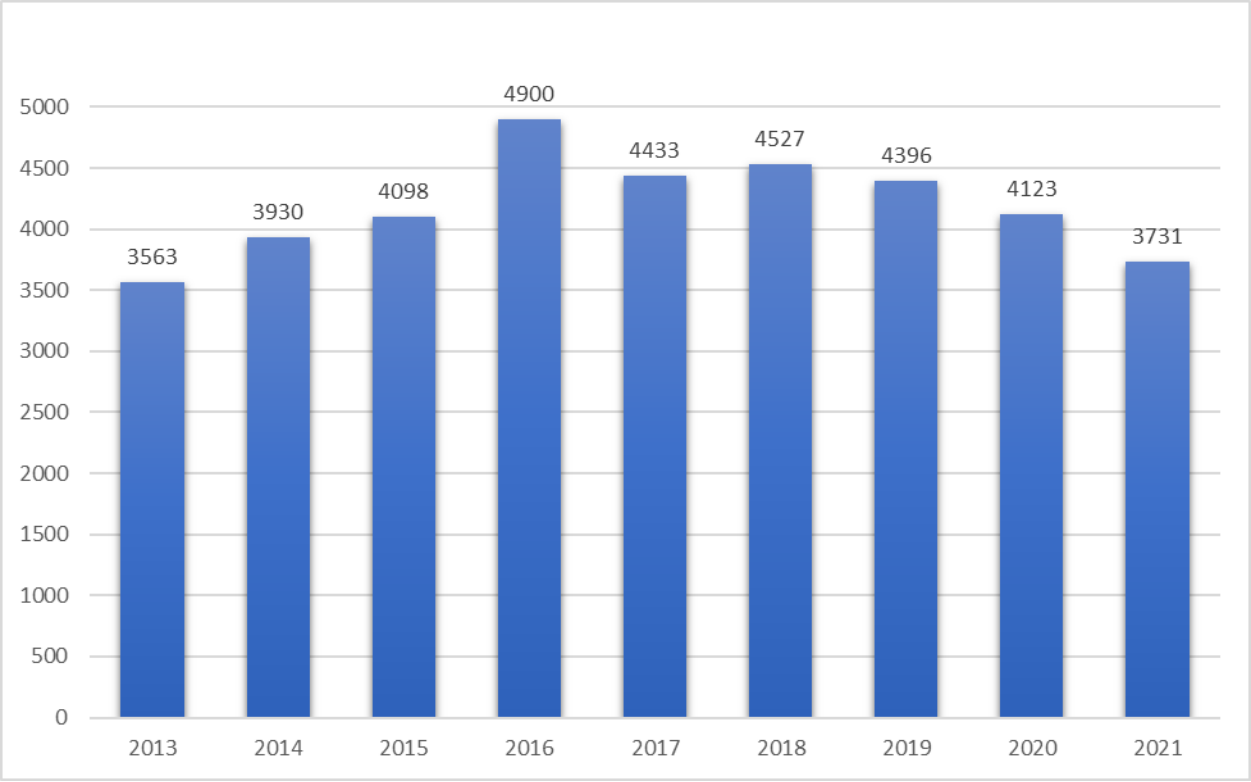


Types of Petitions

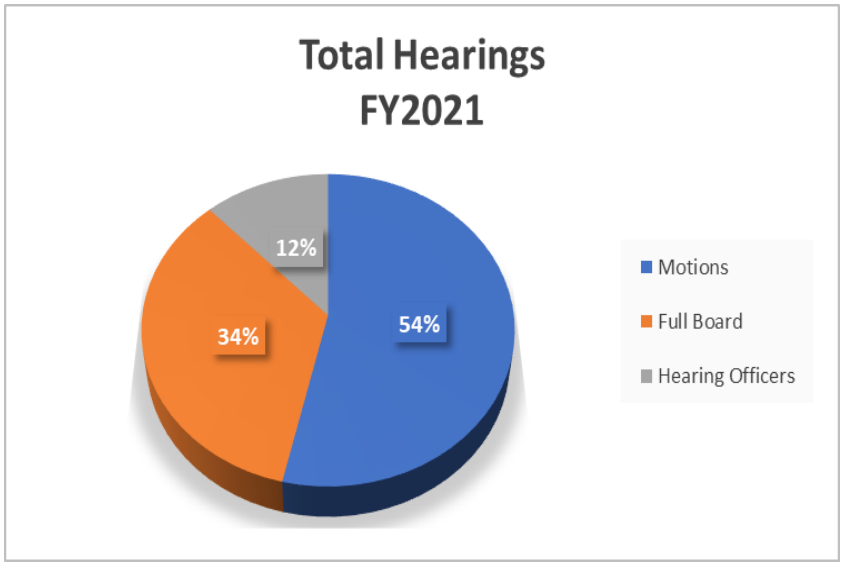


Petitions Heard by the Board/Hearing Officers

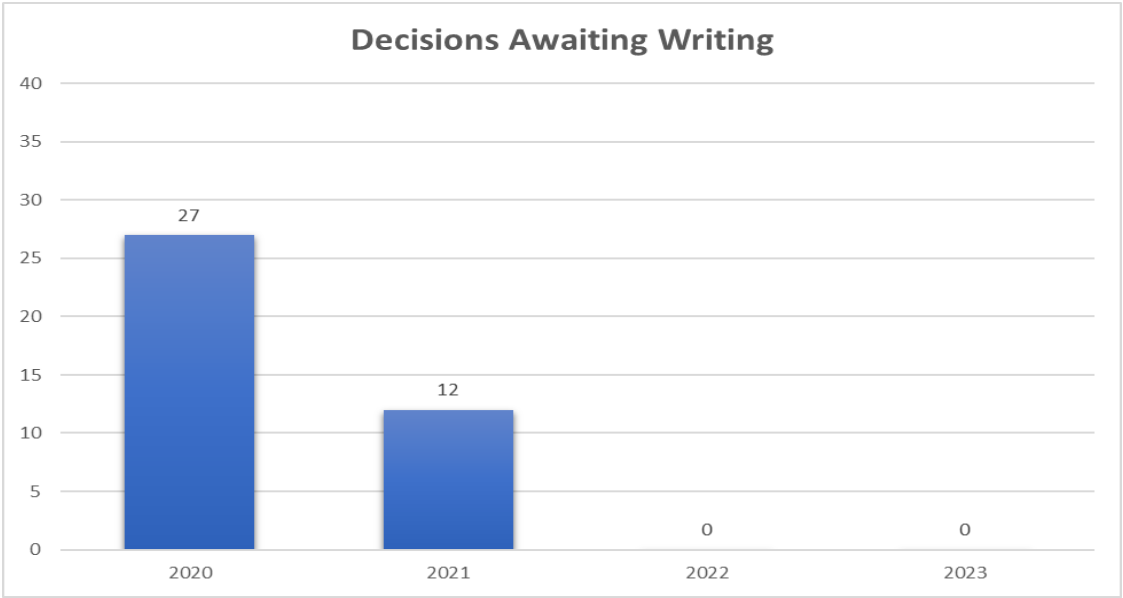
As seen in the chart on page 9, the number of petitions filed annually decreased 8% in calendar year 2021, as compared to 2020; while there was a decrease of 9% in Petitions heard in FY21. This statistic is for all petitions regardless of hearing type.



252 Merit hearings were conducted in 2021, at which 65 were conducted by solo Hearing Officers. There were 795 commutations reviewed by a solo Hearing Officer in 2021.

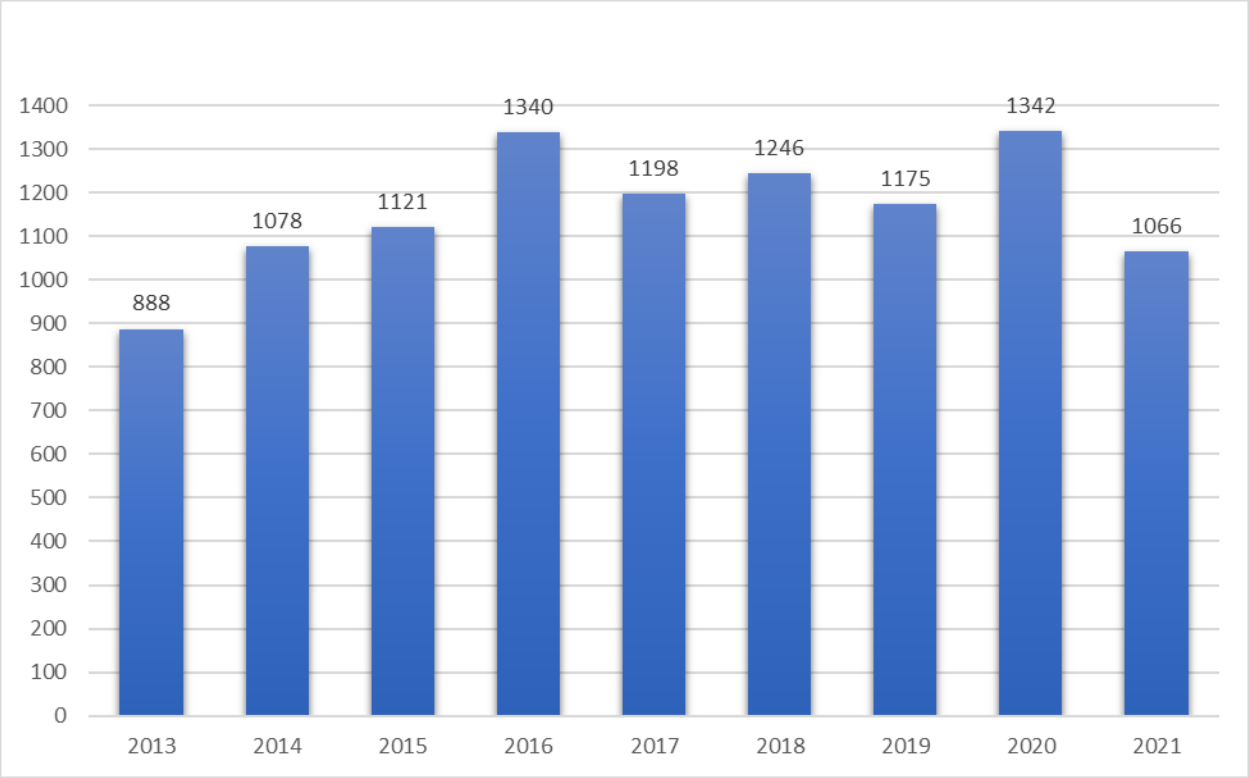


Currently, there are 12 decisions in the queue awaiting writing. During the year of 2021 and continuing into 2022, the OWC is "cleaning up" the entries of consolidated hearings to reflect a more accurate chart in our SCARS system.

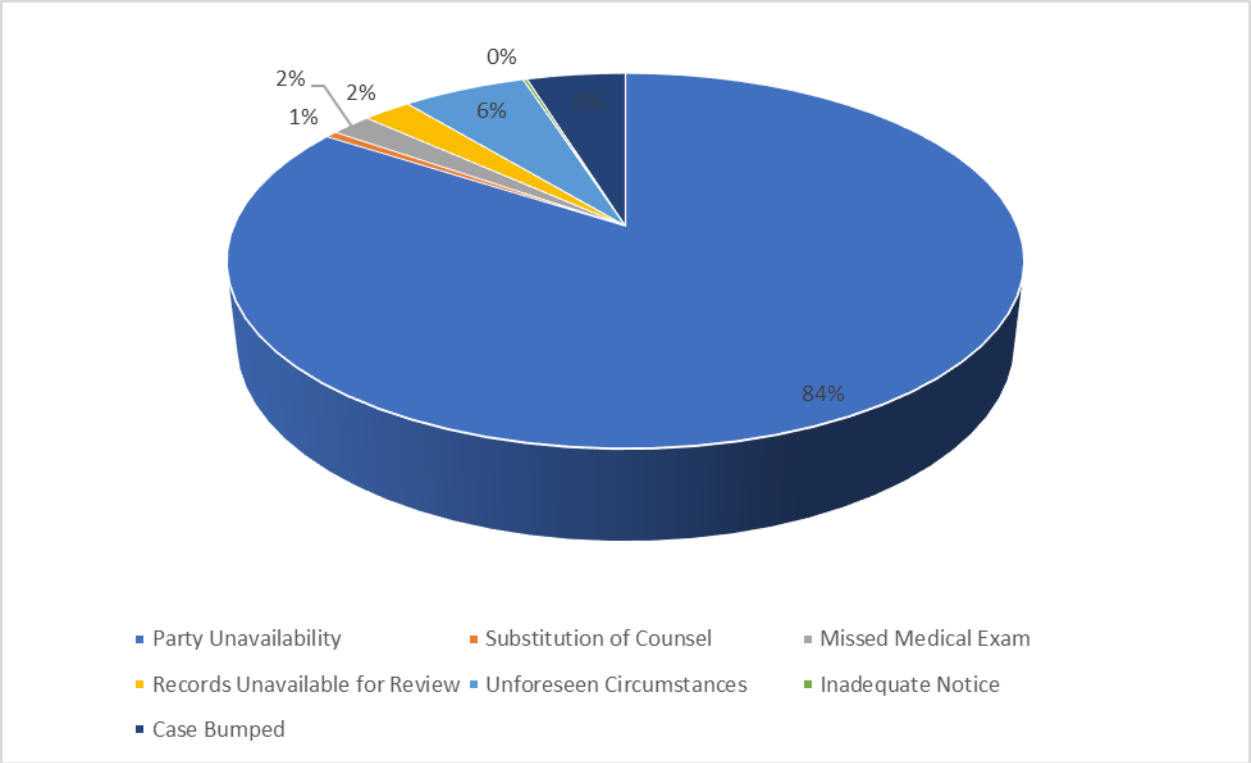


Continuances

In 2021, a total of 1,066 continuances were granted, which represents a 20% decrease from the 1,342 continuances granted in 2020. The mass 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)	897
A justifiable substitution of counsel for a party	6
Any unforeseen circumstance beyond the control of the parties:	
• Employee missed employer-scheduled medical exam	21
• Records unavailable for review by parties prior to hearing	25
• Unforeseen circumstances	64
• Inadequate notice	2
• Case bumped	51



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 2021. Scheduled days versus actual days differ due to case settlements and continuances. The Board Members sat 40% of the scheduled time; a 2% increase over last year.

Board Member	Number of Days Scheduled to Conduct Hearings	Number of Days Actually Conducted Hearings
Dantzler	128	66
D'Anna	154	48
Freel	59	22
Fuller, Sr.*	96	50
Hare	129	56
Hartranft	160	60
Maull	130	50
Mitchell	177	62
Murowany	165	61
Rodriguez*	77	33
Wilson	167	56
Total:	**1442**	**564**

- A. Rodriguez resigned effective June 30, 2021
- G. Fuller resigned effective October 8, 2021
- B. Freel was hired effective July 1, 2021

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
Dantzler	32
D'Anna	29
Freel	14
Fuller	20
Hare	30
Hartranft	43
Maull	32
Mitchell	43
Murowany	41
Rodriguez	18
Wilson	34
Total	**336**

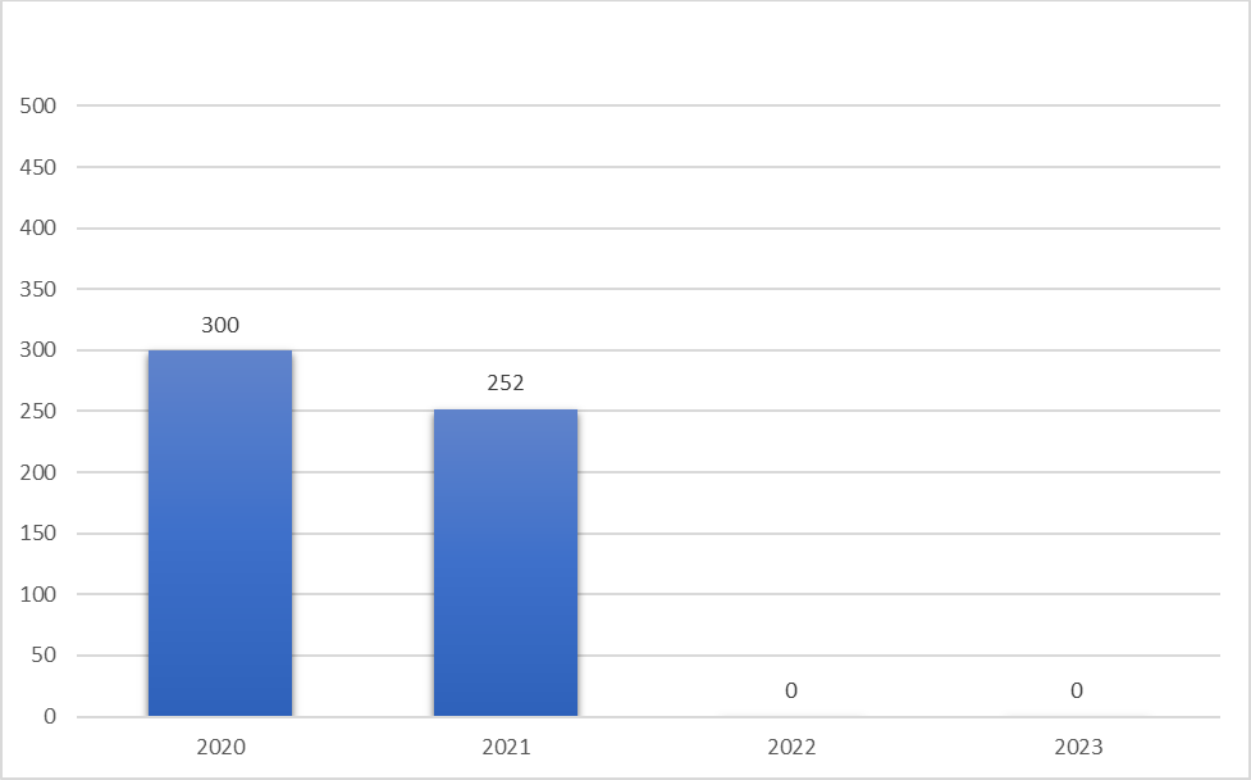
Completed Caseload of Individual Hearing Officers

Hearing Officer	Number of Decisions, Orders and Reargruments Written
E. Boyle	30
J. Bucklin	42
A. Fowler	44
S. Mack	32
J. Pezzner	30
J. Schneikart	31
H. Williams	59
K. Wilson	39
C. Baum, Chief	48
Total	355

In 2021, hearing officers conducted no workers' compensation mediations pursuant to DEL. CODE ANN. tit. 19, § 2348A.

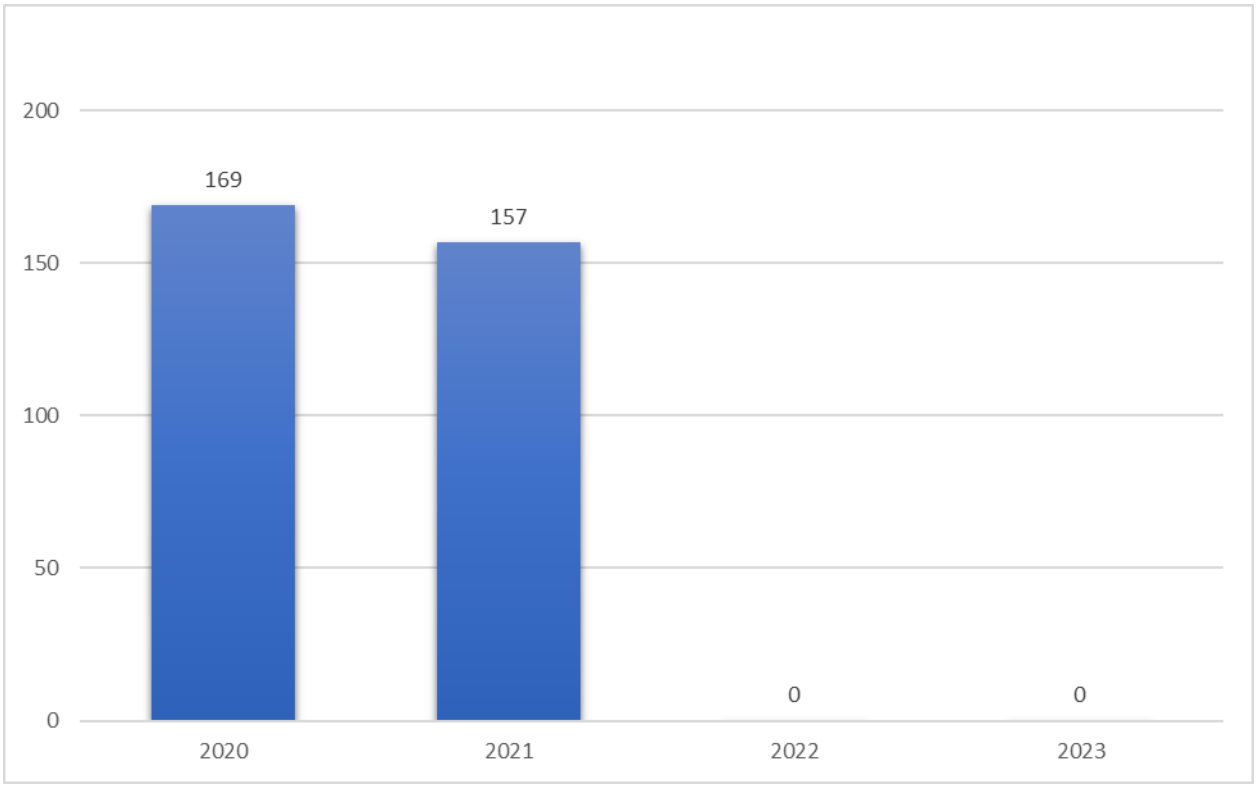
Compliance with Hearing & Decisional Deadlines

In 2021, 252 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 2021.



Analysis of Dispositional Speed

In 2021, the average dispositional speed for processing all petitions (from the filing of the petition to the issuance of the decision) was 151 days, compared to 170 in 2020. An 11% improvement. 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, 2021)

In the last five years, the Board (or Hearing Officers) have rendered 1,594 decisions on the merits. Of those decisions, 202 (approximately 12.67%) were appealed (an average of 40.4 per year). 177 of those appeals have been resolved. Only 26 decisions have been reversed and/or remanded, in whole or in part. This represents a "reversal rate" of only about **1.63%** of all decisions rendered in those five years.

Year Appeal Taken In:	2017	2018	2019	2020	2021
Total Number of Decisions:	375	338	358	254	269
Total Number of Appeals:	29	46	47	45	35
Affirmed:	7	15	14	22	6
Reversed and/or Remanded:	4	10	9	3	0
Dismissed/Withdrawn:	18	21	23	16	9
Pending:[1]	0	0	1	4	20

Five-Year Cumulative	
Total Number of Decisions:	1594
Total Number of Appeals:	202
Affirmed:	64
Reversed and/or Remanded	26
Dismissed/Withdrawn	87
Pending:	25

[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.

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 pamplets and videos are planned for 2022 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 manner in which 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 Oversight Panel (WCOP)

On November 29, 2021, the Insurance Commissioner announced that workers' compensation rates for 2022 would decrease on average 20.01% for the residual market and 21.02 % for the voluntary market. This is the fifth 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.

Self-Limited Injuries

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Heckler & Frabizzio, P.A.

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

Michael I. Silverman, Esquire
Silverman McDonald & Friedman

HECKLER & FRABIZZIO

INSURANCE DEFENSE LITIGATION

MENU

MARIA PARIS NEWILL

PARTNER

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MARIA PARIS NEWILL (Firm Tenure 1990; Position: Workers' Compensation Team Leader; Co-Managing Partner), born Philadelphia, Pennsylvania, September 26, 1965; admitted to bar, 1991, Delaware. *Education:* University of Delaware (B.S.A.S., 1986); Oklahoma City University School of Law (J.D., 1990). *Member:* Delaware State Bar Association (Past Nomination Committee Member; Past Chair and Executive Committee Member, Section on Workers' Compensation; & Past Chair and Executive Committee Member, Section on Women and the Law) and American Bar Association; Defense Counsel of Delaware; & Defense Research Institute. PRACTICE AREAS: Workers' Compensation Litigation. Practice.

Maria Paris Newill is one of two Managing Directors for the Firm of Heckler & Frabizzio where she has worked since 1990 representing Employers and Insurance Companies in Workers' Compensation matters before the Delaware's Industrial Accident Board, Superior Court and/or Supreme Court.

Ms. Newill attended the University of Delaware, Newark, Delaware (December 1986, B.S.A.S.) graduating from University of Delaware with a major in Criminal Justice and minor in Psychology (degrees completed in 3 ½ years). Ms. Newill then attended Oklahoma City University School of Law, Oklahoma City, OK (May 1990, J.D.) while her husband was stationed in Oklahoma, serving in the military. Ms. Newill graduated from Law School in the top 25 % of the class in May 1990.

Ms. Newill successfully passed the Delaware Bar on her first attempt and was admitted to the Delaware Bar, January 7, 1991. She is also admitted to U.S. District Court for the District of Delaware.

Ms. Newill's professional activities include: Associate at the Law Firm of Heckler & Frabizzio — 8/1/1990 to 1997 and then Director at the Law Firm of Heckler & Frabizzio 1997 to present practicing in Workers' Compensation Litigation – Insurance Defense where she has handled over 3000 claims within Delaware's Industrial Accident Board, Superior Court, and Supreme Courts on behalf of self-insured employers, employers, and/or insurance companies.

Ms. Newill's professional memberships include, or have included: American Bar Association;
Delaware State Bar Association; Workers' Compensation Section of the Delaware State Bar Association; Women and the Law Section of the Delaware State Bar Association, National Association of Professional Women VIP Member, Defense Counsel of Delaware; Defense Research Institute; and Council for Litigation Management. Additionally, Ms. Newill was voted by her peers as one of Delaware's Top Lawyer for Workers Compensation by *Delaware Today Magazine* for 2015-2020.

Ms. Newill has held many positions within the Workers Compensation Section and Women and the Law Section of the Delaware State Bar Association including Chairpersons of each of these Sections. Ms. Newill also served on The Delaware State Bar Association Nomination Committee (3-year term). Ms. Newill has been a voluntary judge for the Delaware's High School Moot Court Competitions and has worked pro bono as a Guardian ad Litem in Delaware's Family Court representing children in foster care

Personally, Ms. Newill has been married to her husband, James F. Newill, since 4/28/1987. She is a mother to two boys, Nicholas and Charles Newill. Ms. Newill's civic participation had included: Smyrna Downtown Renaissance Association – Former Board Member, and Chairperson; Organization Subcommittee of SDRA – Former Member; PEO (Philanthropic Education Organization raising money for Women's Education) – Former Member; Development Subcommittee of Duck Creek Library Guild – Former Member; and Cotillion Subcommittee of the Smyrna Opera House in Delaware – Former Member.

For fun, Ms. Newill enjoys being on or near the water, antiques/auctions, historic preservation, movies, music (especially blues and country), reading, and spending time with family and friends.

NEXT: PATRICK G. ROCK ›

WALT F SCHMITTINGER

Born and raised in Delaware, Mr. Schmittinger received his Bachelor of Arts in English from Dickinson College in Carlisle, PA. He obtained his law degree from Widener University in Wilmington (now known as Delaware Law School) in 1995, where he was a member of the Phi Delta Phi honor society and the Harrington Inn. Mr. Schmittinger was also a member of the law school's law review, the Delaware Journal of Corporate Law.

Following law school, Mr. Schmittinger was admitted to practice in Delaware in 1995 and in Federal District Court for the District of Delaware in 1998. Mr. Schmittinger is also a member of the Kent County, Delaware State and American Bar Associations, as well as the Justice Randy Holland Workers' Compensation Inn of Court.

Mr. Schmittinger has been practicing in Dover, Delaware with Schmittinger and Rodriguez since 1995. His practice is focused on workers' compensation matters exclusively on behalf of injured workers.

Michael I. Silverman

Partner

Mr. Michael I. Silverman is the co-founder of Silverman, McDonald & Friedman. He maintains a general civil litigation practice with a focus on personal injury, workmen's compensation and commercial litigation. He is a frequent lecturer for the Delaware State Bar Association. Mr. Silverman has also previously been appointed by the Insurance Commissioner's office to serve on the Insurance Commissioner Panel hearing motor vehicle accident related litigation.

As a seasoned litigator, Mr. Silverman has gained a reputation for fighting for his clients to attain results. He has worked as lead trial counsel culminating in million dollar verdicts. He has successfully litigated many cases in all Courts in the State of Delaware and before the Industrial Accident Board at the Department of Labor.

Locally, Mr. Silverman has been active participating in a volunteer capacity with the Naaman's Little League. He serves on the Board for Jewish Family Services. He recently became a member of IAABO Board 11 where he became certified as a basketball referee.

Mr. Silverman enjoys the outdoors and sports. He continues to play basketball and golf believing that upon retirement, he will, one day, make the NBA or the PGA Tour. Mr. Silverman is also the proud father of two girls.

Self-Limiting Injuries

Presented BY:

Maria Paris Newill

Walt F. Schmittinger

Michael I. Silverman

Self-Limiting Injuries:

I When 'resolved' is in the Resolution

Christiana Care Health System Services v. Davis discussed by Maria Paris Newill

II When 'resolved' is not in the Decision

Washington v Delaware Transit Corp. discussed by Michael I. Silverman

III Resolved or Not Resolved – Current State of the Matter

Best Practices discussed by Walt Schmittinger

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Case Number 138,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHRISTIANA CARE HEALTH SERVICES,	§	
	§	
	§	No. 138, 2015
Appellee Below-Appellant,	§	
	§	Court Below: Superior Court
v.	§	of the State of Delaware, in and for
	§	New Castle County
KENNETH S. DAVIS,	§	
	§	C.A. No. N14-A-05-012 VLM
Appellant Below-Appellee.	§	
	§	

Submitted: October 21, 2015
Decided: November 3, 2015

Before **STRINE**, Chief Justice; **HOLLAND** and **VALIHURA**, Justices.

Upon appeal from the Superior Court. **REVERSED**.

Maria Paris Newill, Esquire, Gregory P. Skolnik, Esquire, Heckler & Frabizzio, Wilmington, Delaware, for Appellant.

Michael B. Galbraith, Esquire, Weik, Nitsche, Dougherty, & Galbraith, Wilmington, Delaware, for Appellee.

STRINE, Chief Justice:

I. INTRODUCTION

This appeal addresses the Superior Court's decision to overrule a determination by the Industrial Accident Board (the "IAB") that the parties before it had reached a settlement agreement, which barred a later claim for benefits due to permanent impairment. Because it lacked a complete release that would have avoided any question about its effect, the settlement agreement was less than ideally clear. But the IAB's factual determination that the parties' settlement, which involved an express agreement that the injury in question was resolved as an ongoing medical matter, precluded a future claim for permanent impairment based on the same "resolved" injury was supported by substantial evidence. Because the Superior Court was required to defer to the IAB's factual determinations to the extent they were supported by substantial evidence, the Superior Court erred by substituting its own factual findings for that of the IAB. Moreover, there is no question that the settlement agreement was, as a legal matter, a binding contract supported by adequate consideration. Therefore, we reverse the Superior Court's decision and reinstate the IAB's determination.

II. BACKGROUND[1]

Kenneth Davis was employed by Christiana Care Health Services as a dishwasher in its Nutrition Services department. On August 21, 2012, Davis was working when he slipped and fell backwards, landing on his back. Davis filed a Petition to Determine

[1] Unless otherwise noted, all facts are taken from the IAB's order dated May 15, 2014. *Davis v. Christiana Care Health Servs.*, Hearing No. 1387075 (Industrial Accident Board, May 15, 2014) [hereinafter IAB Order].

Compensation Due with the IAB on December 11, 2012, alleging total disability since the date of his fall.

Dr. Crain[2] saw Davis for a defense medical examination on February 27, 2013.[3] Dr. Crain, wrote a report indicating "that any low back injury causally related to the work accident was '*resolved*' and any ongoing symptoms were non-work related."[4]

On March 18, 2013, Christiana Care's counsel sent a settlement offer to Davis's attorney.[5] The letter provided that Christiana Care would "acknowledge the 8/21/12 work accident and a lumbar spine contusion – resolved" and specified certain discrete medical bills that it would cover.[6] In other words, Christiana Care's extremely modest settlement offer was an attempt to agree that any work-related injury Davis suffered was "resolved" and to prevent Davis from seeking benefits for an ongoing injury and treatment. Although it extended this settlement offer, Christiana Care's position was that Davis's back injury was due to a pre-existing gunshot injury that was unrelated to Davis's employment. To the extent that any injury during his work contributed to Davis's back troubles, Christiana Care maintained that this was resolved as of February 27, 2013 when Dr. Crain examined him.

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[2] There is no indication in the record of Dr. Crain's first name.
[3] The record does not include a copy of Dr. Crain's report.
[4] IAB Order at 2 (emphasis in original).
[5] App. to Opening Br. at 21–22 (Letter from Maria Paris Newill, Esquire to Gary S. Nitsche, Esquire, Mar. 18, 2013).
[6] *Id.* at 21.

On May 13, 2013, Davis's attorney accepted Christiana Care's settlement offer in an email, noting that he had "authority to accept the employer's settlement offer."[7] Davis's counsel explained that "[m]y understanding is that this will resolve *all* issues presently pending before the board" and asked Christiana Care's attorney to "forward the appropriate agreements & receipts to my office along with confirmations that the aforementioned bills have been paid."[8] As noted, Davis had put before the IAB the argument that he was rendered totally disabled by his fall and that Christiana Care had to pay him a further stream of benefits as compensation for that loss.[9]

Christiana Care's attorney replied to Davis by letter on May 16, 2013, confirming the settlement and that Christiana Care agreed to "acknowledge the 8/21/12 work accident and a lumbar spine contusion – *resolved.*"[10] This letter further provided that it "constitute[d] the complete settlement."[11] The parties jointly submitted the Department of Labor's "Agreement as to Compensation" form on May 21, 2013, which was approved on July 6, 2013.[12]

On May 23, 2013, Christiana Care's attorney sent Davis's attorney the "'Medical Only' Agreements and Final Receipts" and requested that Davis's attorney have Davis

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[7] *Id.* at 23 (Email from Michael B. Galbraith, Esquire to Maria Paris Newill, Esquire, May 13, 2013).
[8] *Id.* (emphasis added).
[9] Industrial Accident Board Pre-Trial Memorandum, No. 1387075, at 2 (Feb. 19, 2013) (clarifying that Davis sought "total disability benefits").
[10] *Id.* at 25 (Letter from Maria Paris Newill, Esquire to Gary S. Nitsche, Esquire, May 16, 2013) (emphasis added).
[11] *Id.* at 26.
[12] *Id.* at 32 (Office of Workers' Compensation Agreement as to Compensation, May 21, 2013).

sign these settlement documents so that they could be filed with the IAB.[13] The documents were returned to Christiana Care's attorney on June 20, 2013 and soon thereafter filed with the IAB.

Eight months later, on February 17, 2014, Davis filed another petition with the IAB, alleging that he was 8% permanently impaired as a result of his August 2012 fall.[14] Christiana Care responded by filing a motion to dismiss the petition because it was inconsistent with the parties' settlement agreement. Christiana Care's counsel also sent the IAB a request for a hearing on this issue on April 16, 2014.

After briefing by the parties, the IAB granted Christiana Care's motion and dismissed Davis's petition with prejudice. It concluded that "the objective evidence presented clearly indicates that the Employer has met its burden of proof to establish that the parties agreed that the injury that was acknowledged was 'lumbar spine contusion – *resolved*', and that only a limited period of treatment would be paid."[15] The IAB noted that the attorneys' exchange of correspondence created a valid settlement agreement and that "[n]o objection was raised to the language of the settlement agreement until close to one year post-settlement when the instant Petition alleging permanent impairment was filed."[16]

Davis appealed the IAB's determination to the Superior Court. The Superior Court overturned the IAB's decision, concluding that it was "unsupported by the

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[13] *Id.* at 28 (Letter from Maria Paris Newill, Esquire to Gary S. Nitsche, Esquire, May 23, 2013).
[14] App. to Answering Br. at 27 (Petition to Determine Additional Compensation Due to Injured Employee, Feb. 12, 2014). This petition was filed pursuant to 19 *Del. C.* § 2326.
[15] IAB Order at 4.
[16] *Id.*

evidence."[17] The Superior Court reasoned that Christiana Care agreed in the settlement to pay medical expenses through the date of Dr. Crain's examination but that the purpose of the settlement agreement "was not to resolve claims related to permanent impairment."[18] Rather, the Superior Court concluded that "the 'resolve' language in the settlement discussions did not free [Christiana Care] of responsibility for the injury indefinitely" but only indicated the parties' agreement that Davis "suffered a compensable, work-related injury" and that "his medical bills were reasonable and causally related to the work accident."[19] This appeal followed.

III. ANALYSIS

On an appeal from the IAB, "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."[20] Thus, "the sole function of the Superior Court, as is the function of this Court on appeal, is to determine whether or not there was substantial evidence to support the finding of the [IAB]."[21] "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[22] It is "more than a scintilla but less than a preponderance of the

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[17] *Davis v. Christiana Care Health Servs.*, 2015 WL 899599, at *3 (Del. Super. Feb. 27, 2015).
[18] *Id.*
[19] *Id.* at *5; *see also id.* at *3 ("[M]erely because an injury is described as resolved does not mean that a claimant's case is fully 'resolved' to the extent it precludes him from raising additional claims that he might be entitled to receive for his work-related injury.").
[20] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).
[21] *Id.* at 64.
[22] *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993) (internal quotation marks omitted).

evidence."[23] Thus, we give considerable deference to the IAB's decision and uphold the Superior Court's reversal of it "[o]nly when there is *no* satisfactory proof in support of a factual finding of the Board."[24] Although our review of the IAB's legal determinations is *de novo*,[25] we give heavy weight to the IAB's application of legal principles in the specialized context of our state's workers' compensation scheme, because the IAB has the occasion to give life to that scheme on a weekly basis in the many cases that come before it.[26]

We find that the IAB's decision was supported by substantial evidence and thus that the Superior Court was required to defer to it. The ability of parties to settle a workers' compensation claim is undisputed, and Delaware law favors such agreements.[27] The Superior Court, however, found that the exchange of correspondence between the parties' attorneys did not amount to a settlement agreement as to all future claims arising

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[23] *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988).
[24] *Johnson*, 213 A.2d at 67 (emphasis added).
[25] *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009); *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998); *Chavez v. David's Bridal*, 979 A.2d 1129, 1133 (Del. Super. 2008).
[26] *See Histed*, 621 A.2d at 342 ("When factual determinations are at issue, we must take due account of the experience and specialized competence of the Board and of the purposes of our workers' compensation law."); *Spring Constr. Co. v. Mendez*, 1992 WL 302072, at *2 (Del. Super. Sept. 15, 1992) ("Since one of the most compelling reasons for creating administrative agencies is to allow the judicial system to make use of the knowledge and experience of specialists, this Court would be wasting this resource if it lightly dismissed the fruits of such expertise. It may not do so when the decision is based on substantial evidence and the product of an orderly deductive process.").
[27] *See Crescent/Mach I Partners, L.P. v. Dr Pepper Bottling Co. of Tex.*, 962 A.2d 205, 208 (Del. 2008) ("Delaware law favors settlements and treats them as binding contracts."); *Chavez*, 979 A.2d at 1134 ("[I]n a settlement agreement, a party may effectively waive his or her right to petition the [IAB] for additional compensation by agreeing to free an employer for responsibility of the injury.").

out of Davis's fall.[28] Admittedly, the parties here could have been more clear about creating such an agreement, simply by using a general release and adding an exception for the one category of claims that could still be made, which was for any unpaid bills for treatment during the period before Dr. Crain's evaluation. But, in contrast to the Superior Court, we cannot conclude that the IAB was without substantial evidence to rule as it did when the course of the uncontradicted negotiating process, and particularly the final settlement agreement, so clearly manifested that the parties were agreeing that the injury was "resolved."[29] That agreement is inconsistent with Davis's later contention that the injury was not in fact resolved and that he suffered a permanent impairment for which Christiana Care would be responsible in further payments.[30]

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[28] *See Davis*, 2015 WL 899599, at *3 ("This Court finds that the Board's interpretation of the parties' agreement was evidenced by its May 15, 2014 Order is unsupported by the evidence presented at the Legal Hearing.").

[29] App. to Opening Br. at 32 (Office of Workers' Compensation Agreement as to Compensation, May 21, 2013).

[30] Under Davis's understanding of this agreement, he got payments for medical expenses from Christiana Care and an acknowledgement by Christiana Care that Davis had suffered an injury in the fall that caused him harm. In exchange, though, Davis contends that Christiana Care got nothing, other than a de facto continuance of the case to a later date at which Davis could revive his claim that the fall caused him serious injury, against a backdrop where Christiana Care would have acknowledged that the fall caused him injury. The "resolved" nature of the injury and the dispute would therefore have been no resolution at all. The IAB was well within its discretion to conclude that Davis's written acceptance broadly indicating that the settlement would resolve all claims pending before the Board, and the signed agreement clearly noting that Davis's contusion was "resolved," meant that Davis could not bring future claims contending that any injury from the fall was causing him further compensable costs of any kind.

At oral argument, counsel for Davis could not remember exactly what claims Davis was making as of the time of settlement. The record reveals that they were broad and included both "total disability benefits" and "partial disability benefits." Industrial Accident Board Pre-Trial Memorandum, No. 1387075, at 2 (Feb. 19, 2013). This context supports the IAB's conclusion that Christiana Care was willing to provide Davis with limited relief it did not believe he deserved (payment of medical costs that Christiana Care actually contended were attributable to both pre-existing and subsequent non-work injuries to Davis's lower back) in order "to avoid the

Furthermore, Davis's argument that an acceptance email that did not match Christiana Care's settlement offer word-for-word was a counteroffer is without merit.[31] The IAB was within its discretion to reject that argument because the final settlement agreement signed by Davis contained the precise term he claims to have desired to exclude. Specifically, the compensation agreement provided, "Nature/Part of Body: lumbar spine contusion, resolved."[32] Thus, the parties created a valid and enforceable settlement agreement, which provided that Davis's back injuries were "resolved" as of February 27, 2013. That agreement was neither an admission of liability on Christiana Care's part nor a commutation of benefits.[33] Rather, the settlement agreement that Davis's counsel negotiated and he signed was an acknowledgement that any back injury Davis suffered as a result of his fall was resolved and that his claims against Christiana Care were limited to those for outstanding medical treatment incurred before February 27, 2013.

Therefore, the judgment of the Superior Court of February 27, 2015 is reversed, and the Industrial Accident Board's order of May 15, 2014 is reinstated.

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need for a Hearing on the Petition and incurring the associated litigation costs/expenses." IAB Order at 4.

[31] Davis argues "that the parties did not have a meeting of the minds on all material terms of the settlement agreement because the acceptance was not on identical terms to the offer" and thus that Davis's "settlement email constituted a counteroffer." Answering Br. at 16.

[32] App. to Opening Br. at 32 (Office of Workers' Compensation Agreement as to Compensation, May 21, 2013).

[33] The Superior Court noted that Delaware's workers' compensation statute permits an employer and employee to settle their case through commutation. *See* 19 *Del. C.* § 2358. This statute permits, with IAB approval, the employer to pay the employee "one large lump sum payment instead of many small monthly payments that may extend for years." *Ciabattoni*, 716 A.2d at 157. We agree with Christiana Care that the settlement did not involve a commutation of benefits because Christiana Care never agreed that the benefits were due and was not seeking to commute in the sense that the statute means.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LESHAWN WASHINGTON	§	
	§	No. 333, 2019
Appellant-Below,	§	
Appellant,	§	
	§	Court Below:
v.	§	Superior Court
	§	of the State of Delaware
DELAWARE TRANSIT CORP.,	§	
	§	
Appellee-Below,	§	C.A. No. N18A-12-007
Appellee.	§	

Submitted: January 15, 2020
Decided: March 2, 2020

Before **VALIHURA**, **VAUGHN**, and **TRAYNOR**, Justices.

Upon appeal from the Superior Court. **REVERSED** and **REMANDED**.

Michael I. Silverman, Esquire, Adrienne M. McDonald, Esquire, Silverman McDonald & Friedman, Wilmington, Delaware for Appellant.

John J. Klusman, Esquire, Kenneth L. Wan, Esquire, Tybout Redfearn & Pell, Wilmington, Delaware for Appellee.

VALIHURA, Justice:

This is an appeal of a July 22, 2019 decision by the Superior Court affirming the November 28, 2018 Order (the "Order") of the Industrial Accident Board (the "IAB" or "Board") granting Delaware Transit Corporation's ("DTC") motion to dismiss Claimant LeShawn Washington's ("Claimant") Petition seeking benefits for Permanent Impairment (the "PI Petition").

Claimant suffered an injury to his left shoulder in a work-related incident that occurred on August 4, 2016 and was placed on disability. Upon returning to work, he claimed that his shoulder symptoms had worsened. Claimant then filed a Petition seeking compensation for a recurrence of temporary total disability (the "TTD Petition"),[1] which the IAB denied (the "TTD Opinion"). Claimant then filed his PI Petition.

In preparing for the hearing on the PI Petition, both parties obtained medical expert opinions regarding the degree of Claimant's permanent impairment. Both parties' experts agreed that there was some degree of permanent impairment. Nevertheless, DTC moved to dismiss the PI Petition at the commencement of the hearing. DTC argued that the IAB had previously ruled on the matter during Claimant's TTD Petition hearing when it stated that Claimant had "fully recovered" from his work injury. The IAB agreed, and dismissed the PI Petition on that basis, before considering the permanent impairment testimony.[2]

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[1] *Washington v. Del. Transit Corp.*, No. 1445577 (Del. I.A.B. Aug. 7, 2017), App. to Opening Br. at A20 [hereinafter *Washington I*].

[2] *Washington v. Del. Transit Corp.*, No. 1445577 (Del. I.A.B. Nov. 28, 2018), App. to Opening Br. at A18 [hereinafter *Washington II*].

Claimant appealed the IAB's decision to the Superior Court, arguing that the IAB never concluded that the Claimant had "fully recovered." In affirming the IAB's Order,[3] the Superior Court recognized that the IAB's "Findings of Fact and Conclusions of Law" section did not contain the words "fully recovered."[4] However, the court acknowledged that the phrase "fully recovered" was in the "Summary of Evidence" section.[5] The court highlighted the IAB's references to Dr. Gregory Tadduni's testimony that Claimant's shoulder examination was "normal," and that Claimant had "returned to normal."[6] The Superior Court then held that the Board had reasonably interpreted the TTD Opinion, and that the Board's decision to dismiss was supported by substantial evidence.

Claimant raises two issues on appeal. First, he asserts that the Superior Court erred in concluding that the Board had reasonably interpreted the TTD Opinion. He argues that the Board never considered the testimony regarding his permanent impairment because the issue considered by the experts in the temporary total disability context, although related, is different from the issue addressed by the experts in the permanent impairment context. Therefore, it was error for both the Board, and the Superior Court, to dismiss the PI Petition based solely on the testimony given in the total temporary disability context. Second, Claimant asserts that the Superior Court erred as a matter of law in holding that the Board's

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[3] *Washington v. Del. Transit Corp.*, C.A. No. N18A-12-007 (Del. Super. July 22, 2019), App. to Opening Br. at A5 [hereinafter the "*Opinion*"].

[4] *Id.* at 10 n.24, App. to Opening Br. at A15 ("[T]he 'Findings of Fact and Conclusions of Law' section of the Board's TD Decision did not specifically state that the Board found that [Claimant] had 'fully recovered' . . . .").

[5] *Id.* ("[T]he fact section states that Dr. Tadduni concluded that [Claimant] had fully recovered.").

[6] *Id.* at 9–11, App. to Opening Br. at A14–A16.

dismissal of his PI Petition was supported by substantial evidence. Claimant argues that the Board did not have any evidence regarding his impairment because the Board dismissed the PI Petition without considering the testimony related to the PI Petition.

As explained below, we hold that the Superior Court erred in affirming the Board's decision to deny Claimant's PI Petition. Although the Board is permitted to interpret its own orders and rulings, the Board erred when it dismissed Claimant's PI Petition based solely on the expert testimony presented in connection with his TTD Petition. The TTD Petition addressed the question of whether Claimant had suffered a recurrence of a total disability, and whether Claimant could return to work. The TTD Petition did not address Claimant's degree of impairment. In this close case, we conclude that the Claimant should have the opportunity to present his evidence in a permanent impairment hearing. Accordingly, we **REVERSE** and **REMAND** this matter to the Superior Court.

I. Relevant Facts and Procedural Background

Claimant worked for DTC as a bus driver.[7] On August 4, 2016, Claimant injured his left shoulder while driving on the job.[8]

On September 8, 2016, Claimant underwent surgery on his shoulder, which required him to be out of work for a period of time.[9] DTC agreed that Claimant was injured in the

[7] *Washington I*, No. 1445577, at 2, App. to Opening Br. at A21.

[8] *Id.* The Superior Court incorrectly lists the date of injury as April 4, 2016. *See Opinion*, C.A. No. N18A-12-007, at 2, App. to Opening Br. at A7.

[9] *Washington I*, No. 1445577, at 2, App. to Opening Br. at A21.

course and scope of his employment and provided workers compensation disability benefits pursuant to 19 *Del. C.* § 2324 ("Section 2324").

On December 5, 2016, Dr. Shaun Rinow released Claimant to light duty as a bus checker.[10] Upon returning to work, Claimant alleged that his shoulder began to hurt from riding the bus. Due to the Claimant's alleged discomfort, Dr. Rinow placed Claimant back on disability on December 7, 2016. DTC refused to pay for a recurrence of total disability at this time, and as a result, Claimant filed his TTD Petition.

A. The Temporary Total Disability Proceedings

On January 17, 2017, Claimant filed his TTD Petition to determine Additional Compensation Due. On July 24, 2017, a hearing was held to decide whether he had suffered a recurrence of his shoulder disability from December 7, 2016 to June 23, 2017. During the hearing, the Board considered live testimony from the Claimant and deposition testimony from both parties' experts, Dr. Rinow and Dr. Tadduni.

Claimant testified that, on December 5, 2016, he was released by Dr. Rinow for light duty, which limited him to lifting no more than 10 pounds and working four hours per day. Upon returning to work as a bus checker, Claimant alleged that his shoulder began hurting from riding on the bus.[11] Claimant returned to Dr. Rinow for treatment, who, again, placed him on disability until June 23, 2017.[12]

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[10] *Id.*

[11] *Id.* Claimant described the difference in his shoulder as "more soreness and tenderness and less movement." *Id.*

[12] *Id.*

Dr. Rinow, a licensed and board certified chiropractor,[13] testified by deposition on Claimant's behalf. In August of 2016, Dr. Rinow began treating Claimant for shoulder symptoms related to his work incident.[14] Dr. Rinow referred Claimant to Dr. Palma for surgery in order to repair a broken screw in Claimant's left shoulder.[15] After surgery, Dr. Rinow testified that Claimant had an increase in symptoms upon returning to work in December of 2016, precluding him from returning to work before June 2017.[16] Dr. Rinow testified that Claimant was out of work for such a lengthy time because "[t]he shoulder is a complex joint. It takes a long time to rehab[ilitate]."[17]

Dr. Tadduni, a board certified orthopedic surgeon,[18] testified by deposition on DTC's behalf. Dr. Tadduni evaluated the Claimant on two occasions: first on October 13, 2016, approximately five weeks after his surgery; and again on June 22, 2017.[19] As part of these evaluations, Dr. Tadduni reviewed Claimant's medical records, diagnostic testing results, and a DART bus video depicting what had occurred on August 4, 2016.[20] Dr. Tadduni testified that at the time of the first evaluation, he was unsure of the exact

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[13] App. to Opening Br. at A41 (Rinow Dep. at 4:5–9).

[14] *Washington I*, No. 1445577, at 5, App. to Opening Br. at A24.

[15] *Washington I*, No. 1445577, at 2, App. to Opening Br. at A21; *see* App. to Opening Br. at A113 (Tadduni Dep. at 7:7–9). The record does not provide Dr. Palma's full name.

[16] App. to Opening Br. at A46–A47 (Rinow Dep. at 9:11–10:17).

[17] *Id.* at A45–A46 (Rinow Dep. at 8:24–9:1).

[18] *Id.* at A109–A110 (Tadduni Dep. at 3:21–4:1). Although Dr. Tadduni is a board certified orthopedic surgeon, he is not certified under the Delaware workers' compensation guidelines. *Id.* (Tadduni Dep. at 4:13–16).

[19] *Id.* at A111, A113 (Tadduni Dep. at 5:12, 7:12–13).

[20] *Id.* at A111–A112 (Tadduni Dep. at 5:12–6:18).

procedure Claimant had undergone.[21] However, Dr. Tadduni testified that, had he known that Claimant's surgery repaired a broken screw, he "would have said that [Claimant] was not going to need prolonged restriction and probably by the six-week point post surgery [Claimant would] be able to return to normal activity."[22] Thus, Dr. Tadduni concluded Claimant could return to work as he was "fully recovered and [did] not need ongoing treatment at this point."[23] Dr. Tadduni testified that Claimant was "capable of returning to work as early as December of 2016,"[24] and at the very latest, Dr. Tadduni opined that Claimant could fully return to work on June 22, 2017.[25]

The IAB denied Claimant's TTD Petition in its TTD Opinion dated August 7, 2017.[26] The Board held that Claimant had failed to prove by a preponderance of the evidence that he had suffered a recurrence of total disability effective December 7, 2016 through June 23, 2017.[27] In denying Claimant's TTD Petition, the Board explicitly

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[21] *Id.* at A119 (Tadduni Dep. at 13:8–18). *See also id.* (Tadduni Dep. at 13:1–18) ("[I]n retrospect probably if [Claimant] didn't have the broken screw he might not have had the procedure to begin with . . . . I didn't know that when I saw him, so I assumed that he needed ongoing restrictions regarding the shoulder because I didn't know exactly what had taken place and I saw him exactly five weeks I believe after the shoulder procedure.").

[22] *Id.* at A119 (Tadduni Dep. at 13:22–24).

[23] *Id.* at A129 (Tadduni Dep. at 23:3–4).

[24] *Washington I*, No. 1445577, at 10, App. to Opening Br. at A29; *see also* App. to Opening Br. at A129 (Tadduni Dep. at 23:5–23).

[25] *See Washington I*, No. 1445577, at 15, App. to Opening Br. at A34; App. to Opening Br. at A129–A130 (Tadduni Dep. at 23:24–24:3).

[26] *Washington I*, No. 1445577, at 17, App. to Opening Br. at A36.

[27] *Id.* at 12–13, App. to Opening Br. at A31–A32. The IAB found that, "[t]here is no evidence that Claimant's physical condition with respect to his work injury has changed for the worse at any time since December 7, 2016." *Id.*

accepted Dr. Tadduni's testimony over that of Dr. Rinow's, and concluded that "Claimant was no longer totally disabled after December 5, 2016."[28]

The ten-page "Summary of the Evidence" section of the TTD Opinion contained the testimony and opinion of both experts.[29] This included Dr. Rinow's opinion that Claimant initially had an increase in symptoms upon his return to work in December of 2016, and his belief that Claimant was "fully recovered" as of June 2017.[30] This also included Dr. Tadduni's review of Claimant's history,[31] his disagreement with Claimant's prolonged restriction, and his opinion that "Claimant had fully recovered from the August 2016 work accident . . . ."[32] The Board reiterated Dr. Tadduni's opinions in the "Findings of Fact and Conclusions of Law" portion that Claimant had returned to "normal," but not the statements that Claimant had fully recovered.[33]

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[28] *Id.* at 15, App. to Opening Br. at A34; *see id.* (stating that, "[t]he Board accepts the opinion of Dr. Tadduni over that of Dr. Rinow).

[29] *Id.* at 2–11, App. to Opening Br. at A21–A30.

[30] *Id.* at 5–6, App. to Opening Br. at A24–A25.

[31] *Id.* at 8–11, App. to Opening Br. at A27–A30.

[32] *Id.* at 11, App. to Opening Br. at A30.

[33] *Id.* at 13–15, App. to Opening Br. at A32–A34 ("The medical testimony further supports a finding that no recurrence occurred. . . . Dr. Tadduni testified that Claimant could have returned to work full-time after December 5, 2016 . . . . Dr. Tadduni [also] pointed out that Claimant's records from December 5, 2016 and December 7, 2016 . . . indicated Claimant was improving, . . . [and] [b]y the time of Claimant's June 2017 visit[] [with] Dr. Tadduni [he] concluded that Claimant's shoulder examination was normal.").

B. The Permanent Impairment Proceedings

On February 21, 2018, Claimant filed his PI Petition pursuant to 19 *Del .C.* § 2326 ("Section 2326").[34] Both parties retained experts in preparation for the hearing.[35] Claimant retained Dr. Peter Bandera, and DTC retained Dr. Andrew Gelman. Both experts offered deposition testimony for use at the permanency hearing.[36] Although Dr. Bandera and Dr. Gelman agreed that Claimant had some permanent impairment, they disagreed as to the extent of it.

Dr. Bandera evaluated Claimant on January 31, 2018, and found that "[h]e had pain on abduction and forward flexion at 110 degrees on the left side, which is restricted range of motion, the normal motion being approximately 180 degrees."[37] Using the Fifth Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment (the "AMA Guides"),[38] Dr. Bandera assigned Claimant a 16% partial permanent impairment rating.[39]

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[34] *Opinion*, C.A. No. N18A-12-007, at 4, App. to Opening Br. at A9.

[35] App. to Opening Br. at 3.

[36] *Id.* at A147 (Bandera Dep. at 3:9–13); *id.* at A197 (Gelman Dep. at 3:9–19).

[37] *Id.* at A147, A153 (Bandera Dep. at 3:22, 9:1–5).

[38] Dr. Bandera criticized Dr. Gelman's use of the Sixth Edition, as opposed to the Fifth Edition, which he referred to as "the more used edition." *Id.* at A177.

[39] *Id.* at A155 (Bandera Dep. at 11:20–23); *see also id.* at A156–A158 (Bandera Dep. at 12:10–14:4):

> Q. Did you arrive at a number for permanency? And how did you get to that number?
>
> A. I assigned him a 16 percent partial permanent impairment relative to the left upper extremity based on the surgical model as reviewed in Chapter 16, specifically citing, there is a page 506, Table 16-27 . . . . From the Table 16-27 he at least qualifies for, in the shoulder region, there is a breakdown of a wide total shoulder

Dr. Gelman evaluated Claimant on DTC's behalf on June 6, 2018.[40] As to Claimant's left shoulder motion, Dr. Gelman found that Claimant's "[f]orward flexion measured 90 degrees; abduction, 70 degrees; external rotation, 30 degrees; internal rotation, 35 degrees; extension, 30 degrees; and adduction, 30 degrees,"[41] and that, "[t]hese were all restricted relative to his right shoulder."[42] Using the Sixth Edition of the AMA Guides, Dr. Gelman assigned Claimant a 3% partial permanent impairment rating.[43]

> procedure versus isolated surgery to the clavicle region, so he clearly qualifies for a more comprehensive shoulder operation within a range of 24 to 30 percent. I gave him a lower level which is 24 percent. And I believe there is some discrepancy and actually has a typo in the Table 16-27. But I believe he qualifies for the lower end of that range, 24 percent. And then we add the restriction, range of motion, and he has pain and dysfunction on abduction, forward flexion at 110 degrees. The deficit in abduction would qualify him for 3 percent impairment, and the deficit in flexion, which is moving the arm forward, qualifies him for 5 degrees based on the pie charts of the upper extremity on page 476 and 477. So in summary, he received 24 percent impairment for this very extensive surgery to his left shoulder, and he received an 8 percent total impairment with restriction to range of motion. That combination would essentially be 32 percent. And I downgraded him to a 16 percent based on my clinical experience.

[40] *Id.* at A198 (Gelman Dep. at 4:6–18).

[41] *Id.* at A201 (Gelman Dep. at 7:11–14).

[42] *Id.* at A201 (Gelman Dep. at 7:15).

[43] *Id.* at A208–A209 (Gelman Dep. at 14:7–15:2).

> Q. Doctor, you evaluated the Claimant using the Fifth Edition and the Sixth Edition of the AMA Guidelines. Can you discuss your findings on permanent impairment with regard to the Claimant's left shoulder under the Fifth Edition?
>
> A. So to answer that question I did look at the Fifth Edition and I felt that that would be applicable with regards to the records that I had reviewed dating back to the summer of 2017 at which time Mr. Washington was released. I specifically outlined the methodology that I applied with regards to the Sixth Edition, feeling that a more precise diagnosis is referenced and applicable towards [Claimant] . . . . And with that said, and citing the Sixth Edition, that is specifically addressed in the Sixth Edition in Tables 15-5, Page 404. So I took that where [Claimant] falls into a Class I category which identifies, quote, "Residual symptoms consistent with objective findings and/or functional loss with normal motion," unquote. That's his residual. That's with what others recorded as the motion measurements back in the

On November 27, 2018, the Board held Claimant's PI hearing. At the beginning of the hearing, DTC moved for dismissal, arguing that the Board had already concluded in its TTD Opinion that Claimant's shoulder had returned to normal and that he had "fully recovered." Without considering the deposition testimony from either Dr. Bandera or Dr. Gelman, the Board granted DTC's motion to dismiss.[44] On November 28, 2018, the Board issued the Order dismissing Claimant's PI Petition.[45] The Order stated that the Board had previously accepted Dr. Tadduni's testimony over that of Dr. Rinow, and that it had found previously that Claimant had "fully recovered."[46]

C. The Superior Court Appeal

On December 19, 2018, Claimant appealed the Board's Order to the Superior Court, arguing that his PI Petition had been dismissed improperly. He argued that the Board lacked substantial evidence to dismiss his PI Petition because the Board failed to examine any evidence relating to his left shoulder permanency. DTC countered that the Board did not commit an error when it had determined Claimant's injury was fully resolved because the Board was free to reasonably interpret its prior ruling.

> summer of 2017, and that default equates to a 3 percent rating. Applying the Adjustment Grid Parameters as I appreciated them and as others recorded [for Claimant] back in the Summer of 2017, there would be no net adjustment and thus I concluded a 3 percent left shoulder rating attributable to that which occurred in 2016.

Id. at A207–A209 (Gelman Dep. at 13:14–15:2).

[44] The deposition testimony of Dr. Bandera and Dr. Gelman was not admitted into evidence; however, it was submitted as part of the record in this appeal.

[45] *Washington II*, No. 1445577, App. to Opening Br. at A18.

[46] *Id.*

The Superior Court affirmed the Board's decision, finding that the Board's interpretation of its previous decision was reasonable and supported by substantial evidence.[47] The court focused on Dr. Tadduni's "fully recovered" statement, as well as his testimony that Claimant's shoulder had "returned to normal." In addition, the court recognized that the "fully recovered" language was not in the "Findings of Fact and Conclusions of Law" section of the TTD Opinion. Nevertheless, it concluded that the Board had the authority to interpret the findings and conclusions in the TTD Opinion so long as the interpretation was reasonable.[48] The court then reasoned that substantial evidence supported affirming the Order because the Board could deduce from those statements that there was no loss of use in his shoulder, and, thus, there was no permanent impairment.[49] It also noted Claimant's expert's testimony that Claimant was "'100%' by June 23[,] 2017" supported its holding.[50]

This appeal followed. The question Claimant presents is whether the IAB properly relied upon the expert medical testimony, presented in the context of a TTD Petition, as a basis to dismiss Claimant's PI Petition. DTC argues that the Superior Court did not err in affirming the Order, and further contends that the decision should be affirmed based upon "law of the case" and *res judicata* grounds. Although this is a close case because of the deferential standard of review, we conclude that the Board erred in dismissing the PI

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[47] *Opinion*, C.A. No. N18A-12-007, at 11–12, App. to Opening Br. at A16–A17.

[48] *Id.* at 8, App. to Opening Br. at A13; *see also id.* at 10 n.24, App. to Opening Br. at A15.

[49] *Id.* at 10–11, App. to Opening Br. at A15–A16.

[50] *Id.* at 11, App. to Opening Br. at A16 (quoting App. to Opening Br. at A47 (Rinow Dep. at 10:1–3)).

Petition solely on the basis of the testimony provided for the TTD Petition. We believe that Claimant should have had an opportunity to present his evidence in the PI Petition hearing. Accordingly, we reverse and remand for further proceedings.

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."[51] "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"[52] "It is 'more than a scintilla but less than a preponderance of the evidence.'"[53] "On appeal, this Court will not weigh the evidence, determine questions of credibility, or make its own factual findings."[54]

III. Analysis

A. The Board Erred in Dismissing the Claimant's PI Petition.

We agree with Claimant that the Superior Court erred in affirming the Order because there was no permanent impairment evidence presented to the Board prior to the dismissal of his PI Petition, and thus, the Board's decision to deny that petition was unsupported. As

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[51] *Powell v. OTAC, Inc.*, 2019 WL 6521980, at *4 (Del. Dec. 4, 2019) (quoting *Roos Foods v. Guardado*, 152 A.3d 114, 118 (Del. 2016)).

[52] *Id.*

[53] *Id.* (quoting *Noel-Liszkiewicz v. La-Z-Boy*, 68 A.3d 188, 191 (Del. 2013)).

[54] *Id.* (quoting *Person-Gaines v. Pepco Hldgs., Inc.*, 981 A.2d 1159, 1161 (Del. 2009)) (internal quotation marks omitted).

the TTD Petition and PI Petition address different issues, the Board erred in relying on testimony from the TTD Petition as the sole basis for dismissing the PI Petition.

In its Order dismissing the PI Petition, the Board stated in the recitals:

> WHEREAS, after a prior Hearing in this case on July 24, 2017, the Board issued a decision dated August 7, 2017 in which it accepted Dr. Tadduni's testimony that the claimant had a normal left shoulder on examination and that the claimant had "fully recovered" from the August 4, 2016 work accident . . . .[55]

The Superior Court affirmed the Board's decision, finding that the Board had reasonably interpreted the TTD Opinion. The court found that substantial evidence supported affirming the Order, because the Board could deduce from those statements that there was no loss of use in his shoulder, and thus there was no permanent impairment. To support its conclusion, the court also referred to Dr. Rinow's statement that Claimant "was '100%' by June 23[,] 2017."[56]

As an initial matter, we are not troubled that Dr. Tadduni's testimony that Claimant "fully recovered" is not contained in the "Findings of Fact and Conclusions of Law" section of the TTD Opinion.[57] It is within the Board's discretion to interpret its own rules and orders so long as the interpretation is reasonable.[58] "[A]lthough the reasoning of the Board must be apparent, 'where the testimony has been explained as part of the preface to the

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[55] *Washington II*, No. 1445577, App. to Opening Br. at A18.

[56] *Opinion*, C.A. No. N18A-12-007, at 11, App. to Opening Br. at A16 (quoting App. to Opening Br. at A47 (Rinow Dep. 10:1–3)).

[57] The Board used similar terminology and found that Claimant's shoulder was "normal" and "returned to normal" based on Dr. Tadduni's testimony. *Washington I*, No. 1445577, at 15, App. to Opening Br. at A34.

[58] *Goldsborough v. New Castle Cnty.*, 2011 WL 51736, at *6 (Del. Super. Jan. 5, 2011).

findings of fact and law and where the Board's decision contains the appropriate details which led to its reasoning, this Court will not reverse simply because the Board did not repeat those facts in its "Findings."'"[59] Thus, the Board could look to the "fully recovered" language and any other language in the decision to support its reasoning that Claimant did not suffer from a permanent impairment.

However, we hold that it was error for the Board and the Superior Court to rule that Claimant did not suffer from a permanent impairment based on the "fully recovered" language in the TTD Opinion. Claims for compensation asserted in a TTD Petition and a PI Petition differ in an important way. We have previously observed that, "[w]hether an industrial accident caused temporary total disability or permanent partial disability are two totally distinct questions."[60] When a claimant petitions the Board for permanent impairment compensation under Section 2326, "he or she has the burden of proving the percentage of permanent impairment."[61] On the other hand, when a claimant petitions for

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[59] *Johnson v. E.I. Dupont de Nemours & Co.*, 2000 WL 33115805, at *3 (Del. Super. Oct. 4, 2000), *aff'd*, 768 A.2d 469 (Del. 2001) (quoting *Justison v. Home Health Corp.*, 1999 WL 463702, at *4 (Del. Super. May 19, 1999)).

[60] *Betts v. Townsends, Inc.*, 765 A.2d 531, 535 (Del. 2000). Compensation for permanent injuries under Section 2326 pertains to the compensation paid to a claimant for permanent physical impairment, "regardless of earning power after the injury." 19 *Del. C.* § 2326(a).

[61] *Griffith v. Wachovia Corp.*, 2006 WL 1149162, at *3 (Del. Super. Mar. 9, 2006), *aff'd*, 907 A.2d 145 (Del. 2006); *see also Jennings v. Avon Prods.*, 2013 WL 183738, at *2 (Del. Super. Jan. 4, 2013) ("When determining whether an employee has been permanently impaired, the IAB must decide whether the employee suffered a permanent loss of use of a member or part of his body and whether such loss of use was caused by a work accident."). Further, "[t]he IAB must determine loss of use based upon the employee's ability to use that body part; loss of use represents that degree of normal use which is beyond the employee's ability or capability." *Id.*

total disability compensation under Section 2324, the question is whether the claimant was disabled from working for a period of time.[62]

The question before the Board in the TTD Petition was whether Claimant had suffered a recurrence of a total disability, and the experts testified in terms of whether Claimant was able to return to work. Although there was some testimony that Claimant's shoulder injury was "fully recovered" and back to "normal" in the TTD hearing, that testimony related to whether there had been a recurrence of total disability and whether Claimant could return to work. The nature of the inquiry in the TTD hearing was not whether, and to what degree, Claimant may have suffered from a permanent impairment.

DTC argues that the IAB is free to choose between conflicting medical opinions, and it is the Board's function to resolve conflicts in medical testimony. The problem with DTC's argument is that the Board never considered the expert testimony regarding the degree of Claimant's permanent impairment from the experts. Instead, it dismissed the PI

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[62] *See Griffith*, 2006 WL 1149162, at *3 ("[W]here the employee claims she is entitled to benefits *for periods* of total disability via § 2324, she is charged with proving that claim to the Board's satisfaction." (emphasis added)); *McMillan v. General Motors Corp.*, 1972 WL 122760, at *2 (Del. Super. Nov. 8, 1972) (remanding the case to determine if total disability benefits should be awarded or denied over the period from 1966 to 1970). *See also Huda v. Continental Can Co.*, 265 A.2d 34, 36 (Del. 1970) ("It is now well established in this State that the degree of compensable disability in a workmen's compensation case depends upon the degree of impairment of earning capacity; that an employee may be totally disabled economically, and within the meaning of the Workmen's Compensation Law, although only partially disabled physically." (citing *Ham v. Chrysler Corp.*, 231 A.2d 258, 261 (Del. 1967))); *Bigelow v. Sears, Roebuck &* Co, 260 A.2d 906, 907 (Del. 1969) (holding that, total disability may be found "if the claimant's physical condition is such as to disqualify her from regular employment commensurate with her qualifications and training" (citing *M/A. Hartnett, Inc. v. Coleman*, 226 A.2d 910 (Del. 1967))); *Ernest DiSabatino & Sons, Inc. v. Apostolico*, 269 A.2d 552, 553 (*Del.* 1970) (explaining that, Section 2324 is "designed to reimburse an employee, at least in part, for loss of earnings," whereas under Section 2326, regardless of earning power, the employee is to be paid for bodily injury.).

Petition at the outset.[63] Thus, under these circumstances, we agree with the Claimant that there is a lack of substantial evidence in the record to support a finding that Claimant does not suffer from a permanent impairment.

B. Neither the Law of the Case Doctrine nor Res Judicata Bars Claimant's Petition for Permanent Impairment.

DTC argues both the law of the case doctrine and *res judicata* bar Claimant's PI Petition. We disagree. The law of the case "is established when a specific legal principle is applied to an issue presented by facts which remain constant throughout the subsequent course of the same litigation."[64] It is a "self-imposed restriction that prohibits courts from revisiting issues previously decided, with the intent to promote 'efficiency, finality, stability and respect for the judicial system.'"[65] The doctrine "presumes a hearing on the merits and only applies to issues the court actually decided."[66]

Similarly, *res judicata* applies if "1) the court making the prior adjudication had jurisdiction, 2) the parties in the present action are either the same parties or in privity with the parties from the prior adjudication, 3) the cause of action [is] the same in both cases or

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[63] DTC argues that following the IAB's dismissal of the PI Petition, the record was closed and that, "Washington cannot rely on their testimony as a basis for his appeal." Answering Br. at 18. Although we quote above some of the expert testimony taken in anticipation of the permanent impairment hearing, we give no specific weight to it as it was not considered in the proceedings below. We merely hold here that the PI Petition was dismissed prematurely, and that Claimant should be able to introduce his evidence of permanent impairment.

[64] *Kenton v. Kenton*, 571 A.2d 778, 784 (Del. 1990).

[65] *State v. Wright*, 131 A.3d 310, 321 (Del. 2016) (quoting *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 39 (Del. 2005)).

[66] *Id.* (citations and internal quotation marks omitted). *See id.* (noting also that "[c]ourts usually require the issue to have been 'fully briefed and squarely decided' in the prior proceedings" (quoting *Hanover Ins. Co. v. Am. Eng'g Co.*, 105 F.3d 306, 312 (6th Cir. 1997))).

the issues decided in the prior action [are] the same as those raised in the present case, 4) the issues in the prior action [were] decided adversely to the plaintiff's contentions in the instant case, and 5) the prior adjudication [was] final."[67]

In order for either to apply, the previously resolved issue must be the same. However, as explained above, Claimant's claim for temporary total disability and his claim for permanent impairment required examining different, albeit related, issues. Although both parties retained experts in connection with the permanent impairment hearing, both experts were deposed, and both testified that there was at least some measure of permanent impairment, the Board never heard any evidence on the issue of permanent impairment. Accordingly, the law of the case doctrine and *res judicata* do not apply here.

IV. Conclusion

For the foregoing reasons, we **REVERSE** the decision below and **REMAND** this matter to the Superior Court for further proceedings consistent with this opinion.

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[67] *Chavez v. David's Bridal*, 979 A.2d 1129, 1134 (Del. Super. 2008), *aff'd*, 950 A.2d 658 (Del. 2008); *see also Betts*, 765 A.2d at 535 (holding that *res judicata* was inapplicable to a claimant's permanent partial disability claim in connection with a knee injury where the IAB previously made a determination on his temporary total disability claim for the knee injury, "[b]ecause the Board was confronted with a different claim at each hearing.").

Nationwide Insurance Co. v. Wolos

Decided Aug 23, 2006

C.A. No. 04A-10-001 RRC.

Submitted: May 27, 2006.

Decided: August 23, 2006.

Upon Appeal from a Decision of the Industrial Accident Board. **AFFIRMED.**

H. Garrett Baker, Esquire, Elzufon, Austin, Reardon, Tarlov Mondell, P.A., Wilmington, Delaware, Attorney for Employer Below/Appellant.

Michael I. Silverman, Esquire, Silverman, McDonald Friedman, 1010 North Bancroft Parkway, Wilmington, Delaware, Attorney for Claimant Below/Appellee.

RICHARD R. COOCH, Resident Judge.

Dear Counsel:

Before this Court is an appeal filed by Employer Below/Appellant Nationwide Insurance Company ("Employer") from a decision rendered by the Industrial Accident Board ("Board") on September 8, 2004, in favor of Claimant Below/Appellee Linda Wolos ("Claimant"). That decision dismissed Employer's Petition for Termination of Benefits on the grounds that the petition was precluded under an Agreement as to Compensation, which defined Claimant's compensable injury and was previously executed by the parties. The issue is whether the Board erred as a matter of law in deciding that Employer's petition for termination was precluded by the prior agreement between the parties. For the reasons set forth below, the decision of the Board is **AFFIRMED.**

I. FACTS AND PROCEDURAL HISTORY

During Claimant's employment as an insurance adjuster for Employer, she developed a work-related injury to her shoulder that required surgery in September of 2001.[1] After the surgery, Claimant was found to be suffering from an unrelated connective tissue disorder, later determined to be scleroderma, apparently an ultimately fatal disease, which rendered Claimant totally disabled and from which Claimant continues to be totally disabled.[2] After the surgery on the shoulder, Employer filed a Petition for Review on February 28, 2002,[3] arguing that Claimant's shoulder injury had resolved and that Claimant was able to go back to work. However, before the Board ruled on the petition, the parties entered into an Agreement as to Compensation, which was then approved by the Board.[4] Essentially, the agreement was for total disability benefits and reflected that both parties found that, in addition to the shoulder injury, the connective tissue disorder was a compensable injury.

[1] *Wolos v. Nationwide Ins. Co.*, IAB No. 1206368, at 1 (Sept. 8, 2004), Ex. E to Appellant's Appendix.

[2] *Id.* at 1-2. There appears to be some dispute between the parties as to when Claimant was first diagnosed with scerloderma. While Employer alleges that Claimant was diagnosed with the disease before the shoulder surgery, Claimant maintains that the diagnosis occurred after the surgery. As the Board determined that " [s]ubsequent to the surgery, Claimant was

determined to be suffering from a connective tissue disorder," this Court holds that finding to be conclusive. *Id.* at 1. However, it does appear from the record that Claimant may have displayed symptoms of a connective tissue disorder prior to the shoulder surgery. *See Wolos v. Nationwide Ins. Co.*, IAB No. 1206368, at 2 (June 17, 2004), Ex. G to Appellee's Appendix ("Following [shoulder] surgery Claimant exhibited symptoms that were ultimately diagnosed as a connective tissue disorder, an underlying condition that had been present before the surgery."). This distinction, in the end, makes little difference as Employer expressly agreed that the connective tissue disorder was compensable in the compensation agreement.

[3] Ex. B to Appellee's Appendix.

[4] The Board specifically found that the "Agreement, signed by the parties, was received in the Office of Workers' Compensation on June 1, 2004, and was approved by mid-July 2004. The actual signatures of the parties do not bear a date, so it is unknown when they were signed." *Wolos*, IAB No. 1206368, at 2 n. 4 (Sept. 8, 2004).

On February 12, 2004, Employer filed a Petition to Review seeking to terminate Claimant's total disability benefits on the basis that "Claimant's pre-existing condition [i.e. the connective tissue disorder], having been first accelerated by the work-injury-related surgery, has now progressed to a level it would have achieved by this date in the natural course of the condition despite the acceleration."[5] Claimant then filed a motion to dismiss on the grounds that "the impetus for the Petition to Review is a change of the defense medical expert's opinion on causation . . . [which] is legally insufficient to sustain a petition to terminate."[6] However, the Board denied Claimant's motion to dismiss to allow Employer's medical experts to testify because the Board could not "say with certainty that there are no facts [Employer] could introduce to merit termination."[7]

[5] *Wolos v. Nationwide Ins. Co.*, IAB No. 1206368, at 2 (June 17, 2004) (denying claimant's motion to dismiss employer's petition to review to give time to allow employer's medical expert to be deposed), Ex. G to Appellee's Appendix.

[6] *Id.* at 1.

[7] *Id.* at 7.

Employer then filed a Petition to Terminate Benefits, which is the subject of this appeal, with the Board on the grounds that the Employer "did not accept responsibility for the connective tissue disorder, but only acknowledged that the [shoulder] surgery caused an 'acceleration' of the disorder."[8] Claimant moved to dismiss Employer's petition on the grounds that Employer "accepted the compensability of the entire connective disorder and not just a transient acceleration of that disorder."[9] Thus, the dispute, as the Board described it, "rest[ed] in the characterization of what [Employer] acknowledged as being the compensable injury.[10] Employer argued before the Board, in connection with Claimant's motion to dismiss Employer's petition to terminate benefits, that Claimant's then-condition was the same as it would have been had she not had the shoulder surgery; thus, "the effects of the compensable acceleration have 'terminated' even though Claimant's medical condition itself has not improved."[11] Claimant, on the other hand, and in support of her motion to dismiss the petition, relied upon the agreement previously executed by the parties, which showed that Employer had accepted the entire connective tissue disorder as a compensable injury, not merely an "acceleration" of the disease.[12]

[8] *Wolos v. Nationwide Ins. Co.*, IAB No. 1206368, at 2 (Sept. 8, 2004).

[9] *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

The Board, in rendering its decision on Claimant's Motion to Dismiss on September 8, 2004, framed the issue well:

> [W]hat is the "accepted disorder"[13] in this case? If the "accepted disorder" was only an aggravation of Claimant's connective tissue disorder, then [Employer] can legitimately proceed on its argument that the aggravation had ended. On the other hand, if the "accepted disorder" is the connective tissue disorder itself, then [Employer's] petition must fall because it has no evidence that that disorder has ended or that the disability from that disorder has ceased.[14]

13 The term "accepted disorder" was initially used by the Board in *Wolos v. Nationwide Ins. Co.*, IAB No. 1206368 (June 17, 2004), to describe the injuries that were recognized by both parties in the Agreement as to Compensation as causing Claimant's total disability.

14 *Wolos v. Nationwide Ins. Co.*, IAB No. 1206368, at 6 (Sept. 8, 2004).

Ultimately, the Board agreed with Claimant and found as a matter of law that "the Agreement is plain on its face . . . [and that] [Employer] accepted Claimant's entire connective tissue disorder as being compensable."[15] The Board found that "the `accepted disorder' must be that specifically listed on the Agreement as to Compensation . . . [which] lists the nature of the injury as `connective tissue disorder,' not just an aggravation thereof."[16] The Board also found that Employer "had the ability and opportunity on the Agreement to limit compensability to an aggravation of a pre-existing disorder and it did not."[17] The Board further recognized the "final and binding" nature of such an agreement once it is approved by the Board and that because "both parties are on notice as to the legal ramifications of the documents . . . the Board does not find it unreasonable to expect parties to complete such documents carefully . . . [and] to hold parties to the expressed [sic] terms of those agreements."[18] The Board also noted that although causation issues had been brought in previous, unrelated cases, in which the Board had expressed concerns as to causation, "those concerns were unavailing because the agreement of the parties was considered `final and binding.'"[19] Finally, as the Board found that Claimant remained totally disabled because of the connective tissue disorder (a compensable injury under the compensation agreement), and that Employer did not dispute that it could not prove that Claimant's entire disorder had terminated or diminished, the Board dismissed Employer's petition to terminate.[20]

15 *Id.* at 7.

16 *Id.* at 6.

17 *Id.* at 7.

18 *Id.*

19 *Id.*

20 *Id.*

II. CONTENTIONS OF THE PARTIES

Employer argues that the Board erred as a matter of law by focusing solely on the compensation agreement instead of considering whether Claimant's "present day disability is related to the pre-existing and progressive connective tissue disorder rather than the work related acceleration."[21] Essentially, Employer argues that because Claimant "had a pre-existing symptomatic connective tissue disorder that was not related to her work duties[,] . . . [which] was aggravated by the surgery performed to address her shoulder[,]" then Employer is responsible only for the

acceleration of the underlying condition.[22] Employer also argues that "[a]t the time the injured worker's disability is no longer due to the acceleration, but to the underlying condition[,]" the liability of the Employer must cease.[23]

21 Employer's Op. Br. 17.

22 *Id.* at 10.

23 *Id.*

Moreover, Employer contends that the compensation agreement, which indicates that the compensable injury includes "connective tissue disorder," should not have controlled the Board's decision because the doctrine of collateral estoppel does not apply in this situation.[24] Employer asserts that the "issues presented are not identical to those in existence at the time the Agreement for Compensation was executed[,]" thus precluding the application of collateral estoppel to bar Employer's petition.[25] Employer maintains that at the time the agreement was executed the issue was "whether [Claimant] was then disabled due to the effects of the work accident," whereas here, the issue is "whether the effects of the work-related acceleration of her condition continue to be a factor in [Claimant's] present-day disability."[26] Employer alleges that the Board abrogated its statutory duty to modify the compensation agreement "by forcing the Employer to accept . . . all liability for any condition ever deemed or found to [be] a part of the work accident."[27] From a policy standpoint, Employer contends that the "Board essentially held that it will never consider whether an injured worker's disability continues to be the product of the work accident as to any condition listed on the agreement."[28]

24 *Id.* at 13.

25 *Id.*

26 *Id.*

27 *Id.* at 16.

28 *Id.* at 11.

In response, Claimant argues that the Board did not err in dismissing Employer's petition as it was barred by the compensation agreement that was executed by both parties and determined an issue already "voluntarily acknowledged by [Employer] and judicially accepted by the Board."[29] Claimant contends that "where an agreement, approved by the Board, has accepted 'an injury as work-related, the Board may 'not revisit this causation issue on employer's petition to terminate.'"[30] Claimant also argues that because the parties entered into an agreement as to compensation that specifically identified "connective tissue disorder" as a compensable injury, which was then approved by the Board, "the Board is precluded from considering the issue of causation."[31]

29 Claimant's Ans. Br. 8.

30 *Id.* at 9 (citations omitted).

31 *Id.* at 11.

III. STANDARD OF REVIEW

The Delaware Supreme Court and this Court have repeatedly emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence.[32] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[33] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[34] The reviewing Court must view the facts in a light most favorable to the party prevailing below;[35] therefore, it merely determines if the evidence is legally adequate to support the agency's factual findings.[36] Findings of fact made by the Board will be upheld unless the record does not contain proof to support such factual findings.[37] Finally, as here, where the issue involves an alleged error of law on the part of the Board, this Court's review is *de novo.* [38]

32 *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del.Super.Ct. 1965).

33 *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del.Super.Ct. 1986), *appeal dismissed*, 515 A.2d 397 (1986).

34 *Johnson*, 213 A.2d at 66.

35 *Chudnofsky v. Edwards*, 208 A.2d 516, 518 (Del. 1965).

36 29 Del. C. § 10142(d).

37 *Johnson*, 213 A.2d at 67.

38 *Brooks v. Johnson*, 560 A.2d 1001, 1002 (Del. 1989) (citing *Nardo v. Nardo*, 209 A.2d 905 (Del. 1965)).

IV. DISCUSSION

The instant issue is whether the Board erred as a matter of law by dismissing Employer's petition to terminate as being precluded by the executed compensation agreement. The answer to that question will depend on whether the injury that was the subject of the compensation agreement has "subsequently terminated, increased, diminished or recurred . . ."[39] As this is a matter of law, the Board's application of the relevant law will be reviewed *de novo*.

39 19 Del. C. § 2347(a).

Delaware law provides a mechanism for parties engaged in workers' compensation litigation to reach an agreement as to compensation prior to and in lieu of an award given by the Board. 19 Del. C. § 2344(a) provides that "[i]f the employer and the injured employee . . . reach an agreement in regard to compensation . . . and if [it is] approved by [the Department of Labor], [it] shall be final and binding unless modified as provided in § 2347 of this title."[40] These agreements have been held to have preclusive effect by prohibiting a party from later asking the Board to review the correctness of the agreement as to causation.[41]

40 *See also* 8 Arthur Larson Lex K. Larson, Larson's Workers' Compensation Law § 132.06(2) (2004) ("If the settlement [as to compensation] is approved, it takes on the quality of an award, and the parties can no more back out of it than any other kind of award.").

41 *Whalen v. State*, 1994 WL 636915 (Del.Super.) (holding that the Board erred as a matter of law by reviewing " *de nova*" issues relating to an injury that had been addressed in a prior agreement as to compensation and approved by the board). *See also Elliot v. Salisbury Coca-Cola*, 1996 WL 453340, * 4 (Del.Super.) (holding that a prior agreement had *res judicata* effect on the issue of causation in a subsequent petition as the "causation issue . . . is separate [any] § 2347 issues").

As noted above, such an agreement as to compensation may be amended, in certain limited situations. The relevant statute for review and modification of an agreement is 19 Del. C. § 2347(a), which provides that "[o]n the application of any party in interest on the ground that the incapacity of the injured employee has subsequently terminated, increased, diminished or recurred . . . the Board may at any time . . . review any agreement or award."

However, a balance must be struck between the sanctity of the agreement entered into by the parties and the Board's potential statutory ability to modify such an agreement. The preclusive effect of an agreement to compensate does not apply "[w]here the Board is asked to reconsider the incapacity . . . of a claimant based on one of these specifically delineated changes in circumstances [found in § 2347(a).]"[42] Thus, where there is an alleged claim by an employer of a change in the incapacity of the claimant, the Board may revisit, among other potential issues,

the problem of causation. However, the preclusive effect of a compensation agreement bars a future attack on the correctness of the prior agreement as to compensation, unless the agreement is in some other way void.[43] Thus, causation may not be reconsidered in that situation. The sole footnote in *Betts* is helpful for analysis here:

> [S]uppose the Board found that a claimant was involved in an industrial accident that caused permanent partial disability. Subsequently, the employer seeks to terminate benefits on the basis that the claimant is no longer permanently disabled. In that case, *res judicata* would prevent the Board from revisiting the issue of causation. Under § 2347, however, the Board would be free to reconsider whether the claimant remained permanently partially disabled because it has statutory authority to determine if the incapacity of the employee has subsequently terminated.[44]

Such an example is closely on point with the case at bar. Here, the parties executed a compensation agreement that, as the Board found, specifically included "connective tissue disorder" in the nature of the accepted injury. Now, Employer seeks to modify the agreement and terminate benefits on the grounds that the "acceleration" of the disease attributable to the shoulder surgery has ended, even though the connective tissue disorder itself has not terminated.

However, to invoke the modification powers of the Board in § 2347, Employer must show, among other things, that the compensable injury recognized in the agreement has terminated, or otherwise changed. The Board found that Employer "accepted the compensability of Claimant's entire connective tissue disorder[,]" because that disease was expressly listed in the executed compensation agreement.[45] The Board also found that Employer "does not dispute that it currently has no evidence to prove" that Claimant's incapacity has either terminated or decreased.[46] There is no argument from either party that these findings are incorrect or not supported by substantial evidence. Thus, they are binding on this Court.

[42] *Betts v. Townsends, Inc.*, 765 A.2d 531, 534 (Del. 2000) (affirming Superior Court's refusal to hold that Board's prior decision prevented Board from revisiting issue of causation because the issues in the respective board hearings were distinct). *See also Harris v. Chrysler Corp.*, 1988 WL 44783, * 1 (Del.Supr.) (holding that the law is clear that "the doctrine of *res judicata* is not a bar to the Board's exercise of its authority conferred by 19 Del. C. § 2347 to review, modify or terminate previous awards [or agreements] upon proof of subsequent change of condition").

[43] *Betts*, at 534 (citing *Taylor v. Hatzel Buehler*, 258 A.2d 905, 908 (Del. 1969) ("[A]wards of compensation boards are generally held to be *res judicata* and, thus, immune from collateral attack, except where the award for some reason is void."). *See also* 82 Am.Jur.2d *Workers' Compensation* § 512 (2003) ("A settlement of a compensation claim which has been approved . . . operates as an adjudication of the facts agreed upon in the settlement, . . . has the same force and effect as an award made after a full hearing, and thus the matter may not be later reopened absent . . . a change in the employee's physical condition . . . and is res judicata as to the employer's obligation to pay compensation.").

[44] *Id.* at 534 n.*

45 *Wolos v. Nationwide Ins. Co.*, IAB No. 1206368, at 7 (Sept. 8, 2004).

46 *Id.*

Employer's reliance on two cases from this Court, *Atkinson v. Delaware Curative Workshop* [47] and *Floyd v. Atlantic Aviation*,[48] to demonstrate that the prior agreement does not preclude Employer's Petition to Terminate Benefits is misplaced. Employer relies on *Atkinson* for the proposition that "because the Board always has the statutory authority to review any agreement or award, 'the doctrine of collateral estoppel does not apply.'"[49] However, such an expansive reading of § 2347 and *Atkinson* is not warranted. The statute limits the Board's ability to review and modify an agreement to a set of "specifically delineated changes in circumstances" where the incapacity of the claimant has "subsequently terminated, increased, diminished or recurred . . ." Thus, to say that the Board "always" has the ability, under the statute, to review an agreement overstates the authority of the Board. Moreover, *Atkinson* recognized that the claimant's incapacity had "increased or recurred," thus, giving the Board the ability, under those specific facts, to review and modify the prior award given by the Board.[50] In this case, unlike in *Atkinson*, the Board found that there was no dispute that Claimant's condition, as it relates to the entire connective tissue disorder, had changed. Therefore, *Atkinson* is inapposite to the case at bar.

47 2001 WL 38787 (Del.Super.) (holding that collateral estoppel did not bar review of a prior award of the Board where the issues presented at each respective hearing were not identical as claimant's incapacity had increased since the time of the prior award).

48 1999 WL 33217938 (Del.Super.) (holding that the Board could review a prior award where certain "intervening factors" had caused a change in the circumstances of claimant's incapacity).

49 Employer's Op. Br. 12 (citing *Atkinson*, at * 3-4 (citing 19 Del. C. § 2347)).

50 2001 WL 38787, at * 3.

Likewise, *Floyd* is distinguishable from the instant case based on the facts. Employer relies on *Floyd* for the theory that the Board may review the causation issue if the employer could show the presence of intervening factors that were the source of the claimant's present condition.[51] However, the *Floyd* court only allowed such a modification to occur if the incapacity recognized in the prior award given by the Board had changed.[52] This is consistent with the plain language of § 2347, which requires a change in the claimant's incapacity to trigger the Board's power to modify. The *Floyd* court recognized such a change in incapacity and thus, allowed the Board's decision that modified the initial award to stand.[53] Therefore, as here, unlike *Floyd*, there is no evidence to indicate that Claimant's accepted incapacity has changed. *Floyd* is inapplicable to the facts before this Court.

51 Employer's Op. Br. 14-15.

52 1999 WL 33217938, at * 3.

53 *Id.*

Based on the findings of the Board, the issue is whether the Board erred in dismissing Employer's petition based on the preclusive effect of the compensation agreement. The holding of *Betts* and the plain language of § 2347, contrary to the suggestion of Employer, will only allow the Board to review a prior agreement if the incapacity is "subsequently terminated, increased, diminished or recurred . . ." There has been no such showing here. Although the Employer argued before the Board that the acceleration of the disorder that resulted from the surgery has terminated (and Employer may be correct), "aggravation" or the "accelerative effect"[54] of the connective tissue disorder is not recognized as the compensable injury in the compensation agreement; instead, as shown by the plain language of the agreement, the

compensable injury is the entire disorder. The agreement has the same integrity as a decision of the Board itself and the Employer cannot now "back out of it,"[55] especially in light of the fact that there is no dispute that the circumstances of Claimant's incapacity have not changed. As the Board noted, Employer had the ability and opportunity on the [Board-approved Compensation] Agreement to limit compensability to an aggravation of a pre-existing disorder and it did not."[56] Thus, the Board did not err in dismissing Employer's petition based on the preclusive effect of the agreement as to compensation.

[54] *See* Employer's Op. Br. at 10, 17.

[55] *See* Larson's, at § 132.06(2).

[56] *Wolos v. Nationwide Ins. Co.*, IAB No. 1206368, at 7 (Sept. 8, 2004).

V. CONCLUSION

Based on the foregoing, the decision of the Industrial Accident Board is **AFFIRMED.**

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

DAWN PEER,	:	
	:	C.A. No. K20A-02-001 WLW
Claimant Below-Appellant	:	
	:	
v.	:	
	:	
STATE OF DELAWARE,	:	
	:	
Employer Below-Appellee.	:	

Submitted: July 10, 2020
Decided: October 29, 2020

ORDER

Appeal of an Industrial Accident Board
Decision dated January 15, 2020.
Affirmed.

Walt F. Schmittinger, Esquire and Candace E. Holmes, Esquire of Schmittinger and Rodriguez, P.A., Dover, Delaware; attorneys for the Claimant Below-Appellant.

John J. Klusman, Esquire and Jocelyn N. Pugh, Esquire of Tybout Redfearn & Pell, Wilmington, Delaware; attorneys for Employer Below-Appellee.

WITHAM, R.J.

Before the Court is an appeal of a decision from the Industrial Accident Board (hereafter "IAB") dated January 15, 2020, brought by the Claimant Below, Dawn Peer (hereafter "Peer"). Peer seeks a reversal of the IAB's decision because the decision was an error as a matter of law. The State of Delaware (hereafter "the Employer") responded that the January 15, 2020, decision is simply upholding what the IAB has already determined. Both parties have filed their briefs, and, based on the record of the case, arguments presented, and the statutory and case law of the State of Delaware, this Court **AFFIRMS** the IAB decision of January 25, 2020.

Facts and Procedure of the Case

This appeal was triggered by two separate IAB decisions, one finding that Peer did suffer a work-related injury and the other requiring Peer to sign a Receipt of Compensation Received. On April 17, 2019, Peer suffered injuries to her head, shoulder, neck, and lower back as a result of a rear-end collision while she operated a bus as an employee of the State of Delaware. These injuries were found to be compensable by the IAB on October 9, 2019. The decision granted Peer temporary total disability benefits from April 17, 2019, to June 25, 2019, and further noted that the injuries had resolved by June 25, 2019.

Following the October hearing, the Employer sent to Peer an Agreement as to Compensation and a Receipt of Compensation Paid. The agreement was a reflection of the IAB's October decision, and the receipt was an acknowledgment of benefits paid by Employer to Peer as required by 19 Del. C. § 2344. The receipt included language that reflected the IAB's October decision, stating "per board order of

10/9/19 the claimant's injuries 'resolved' by June 25, 2019."[1] Peer signed the Agreement and the Receipt but crossed out the additional language on the receipt pertaining to the injuries being resolved. Employer requested another IAB hearing as a result of this action by Peer. That hearing commenced on January 15, 2020. During this hearing, counsel for the Employer presented to the IAB the prior decision that stated Peer's injuries resolved as of June 25, 2019.[2] As a result of that hearing, the IAB affirmed their initial decision's finding that Peer did suffer compensable injuries as a result of the work related accident and that those injuries were "resolved as of June 25, 2019."[3] Peer now seeks to appeal the January 15, 2020, IAB decision.

Standard of Review

Reviews of IAB decisions by the Superior Court involve determining whether the decisions are based on substantial evidence to support the findings and whether the decisions are based on legal error.[4] Substantial evidence is that which a "reasonable mind might accept as adequate."[5] Such evidence does not rise to the level of preponderance of the evidence, but it is more than a mere scintilla of evidence.[6] Conversely, the Superior Court has much more authority when measuring the decisions of the IAB based on legal determinations, and when such decisions are

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[1]Cl.'s Br. at 3.

[2]*Peer v. State of Delaware*, IAB Hearing No. 1485010, Tr. 3:11 - 25, (Jan. 15, 2020)

[3]*Peer v. State of Delaware*, IAB Hearing No. 1485010 (Jan. 15, 2020).

[4]*Christiana Care Health Services v. Davis*, 127 A. 3d 391 at 395 (Del. 2015).

[5]*Id.*

[6]*Id.*

made in error, the Superior Court reviews them *de novo*.[7]

Arguments of the Parties

Peer's argument that the IAB's January 15, 2020, decision was an error as a matter of law pointed to assertions that it served to nullify its own October 9, 2019, decision; the "resolved" language on the receipt was unnecessary to comport to the October 9, 2019, decision; it awarded the Employer a greater award than what was granted in the October 9, 2019, decision by granting a commutation of benefits; and that the January 15, 2020, decision was against public policy.

Peer stated that the IAB's January 15, 2020, decision ordering Peer to sign the receipt with the "resolved" language ultimately barred her from filing any future claims under 19 Del. C. § 2347. Relying on a string of case law, Peer claimed that the receipt with the "resolved" language acted to preclude future claims to benefits in the same manner as 1) a settlement agreement that stated the claimant has "fully recovered,"[8] 2) an agreement where the claimant agrees to free the employer of any future liability,[9] and 3) where a negotiated agreement set a date certain cutting off

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[7] *Id.*

[8] *Washington v. Delaware Transit Corp.*, 226 A. 3d 202 (Del. 2020). (A decision where the Claimant was precluded from filing a Petition for Permanent Impairment based on expert testimony given during a hearing about Claimant's total temporary disability.)

[9] *Chavez v. David's Bridal*, 979 A. 2d 1129 (Del. Super. Jan. 10, 2008). (A decision where the Claimant agreed to waive their right to petition for future claims to benefits under § 2347 when Claimant freed employer from future liability.)

future claims to benefits past that date.[10]

Peer then stated that inclusion of the "resolved" language on the receipt was unnecessary because the IAB's decision of October 9, 2019, was self-executing and not dependent on the receipt including the "resolved" language. Peer stated that the purpose of the receipt is merely to acknowledge that the Employer has paid benefits, that the disability has ceased, and does not release the employer from future liability.

Peer further stated that signing the receipt with the "resolved" language would effectively be a termination of her claim in the same manner as a commutation. Peer claimed that the "resolved" language could be interpreted as a waiver of her right to petition under § 2347 for future benefits and thus constitute an award to the Employer a commutation.

Finally, Peer pointed to the public policy behind the Workers' Compensation Act (hereafter "the WCA"), and asserted that affirming the January 15, 2020, IAB decision would undermine the WCA. The WCA's purpose is to provide protection to injured employees, and affirming the IAB's decision would effectively strip Peer of those protections.

The Employer's argument is 1) that this appeal of the January 25, 2020, IAB decision is really an attempt to appeal the October 9, 2019, decision and the time to do that has passed and 2) that the receipt with the "resolved" language simply reflects what the IAB stated in its October 9, 2019, decision. The Employer stated that this is not an attempt to garner more than what was already awarded by the IAB nor does

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[10]*Davis*, 127 A. 3d 391 (Del. 2015). (A decision where the parties negotiated without any involvement by the IAB to preclude future claims to benefits past February 27, 2013.)

the receipt with the "resolved" language act in any of the ways Peer cited from case law.

Discussion and Analysis

Peer's argument relied on three key cases pertaining to worker's compensation statutes and when claims to future compensation can be sought. However, Peer's interpretation of these cases is misplaced.

First, Peer relied on *Washington v. Delaware Transit Corp.* to draw a parallel between that case and the present case. In *Washington*, an IAB decision to dismiss a claimant's petition for permanent impairment was reversed by the Delaware Supreme Court. Peer asserted that this reversal was due to error on the part of the IAB "in dismissing the claimant's petition" on the basis that the prior decision by the IAB determined that the "claimant had 'fully recovered'."[11] However, this is not what prompted the reversal. The reversal was due to the IAB's reliance on expert testimony in the total temporary disability (TTD) hearing to dismiss the permanent impairment petition despite the fact that the expert testimony of the TTD hearing could not satisfy the substantial evidence rule in dismissing the permanent impairment petition.[12] The expert testimony in the TTD hearing used to dismiss the permanent impairment hearing was "in terms of whether Claimant was able to return to work" and not "testimony regarding the degree of Claimant's permanent

[11]Cl.'s Opening Br. at 11.

[12]*Washington v. Delaware Transit Corp.*, 226 A. 3d 202 at 211 - 12 (Del. 2020).

impairment."[13] In short, the reversal was not caused by basing the IAB's dismissal on the "fully recovered" language, but on the fact that the dismissal was based on expert testimony that was inapposite to the question of whether there was a permanent impairment.

Second, Peer looked to *Chavez v. David's Bridal* to conclude that resolution language of a settlement agreement in a worker's compensation case can serve as a waiver to any future claims to compensation. Again, Peer misconstrued this case by asserting that it stands for *res judicata* applying to petitions for future compensation when settlement agreements include "fully recovered" and "resolved" language. In *Chavez*, the determination that the settlement agreement served as a waiver was based on the fact that the settlement agreement contained language that freed the employer from any future claims to compensation. The right to petition for adjustments to compensation is statutorily enshrined in 19 Del. C. § 2347; however, "[w]here a settlement agreement frees an employer of responsibility for an injury...the Court holds that that provision of the settlement agreement operates as *res judicata*, and precludes the Board from reviewing whether additional compensation for that injury is necessary."[14] The determinative factor is that the language explicitly frees the employer from future liability, not that the language suggests that the injuries have resolved.

Finally, Peer's reliance on *Christiana Care Health Services v. Davis* also

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[13]*Id.* at 212.

[14]*Chavez v. David's Bridal*, 979 A. 2d 1129 at 1135 (Del. Super. Jan. 10, 2008).

misconstrued the holding in that case. The issue in *Davis* was not that the ruling precluded claims to any future compensation, but, rather, that any future claims to compensation would not go beyond the date determined to be the date of resolution of the injury. "That agreement was neither an admission of liability on Christiana Care's part nor a commutation of benefits. Rather, the settlement agreement that Davis's counsel negotiated and he signed was an acknowledgement that any back injury Davis suffered as a result of the fall was resolved and that his claims against Christiana Care were limited to those of outstanding medical treatment incurred before February 27, 2013."[15]

Peer also asserted that the "purpose of a Receipt (sic) is to acknowledge that benefits have been paid by the employer."[16] The receipt further serves as the "prima facie evidence that the disability of the employee has ceased for any given time period (not that the injury has completely 'resolved')."[17] Peer correctly argued that "the receipt is not a release of the liability of the employer or insurance carrier."[18] This is correct and is supported by *Kenol v. Johnny Janosik, Inc.*, where the Superior Court for New Castle County stated such orders to sign "simply require[] Employee to sign a receipt for payments received pursuant to a preexisting agreement for a closed period of disability. It does not address the merits of Employee's claim, much less

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[15]*Davis*, 127 A. 3d at 396.

[16]Cl.'s Opening Br. at 13.

[17]*Id.*

[18]*Id.*

'create rulings that fix the nature and scope of the [Employee's] injuries."[19]

The IAB decision of October 9, 2019, determined that the work-related injury suffered by Peer warranted an award of compensation from April 17, 2019, to June 25, 2019. It stated that the injuries incurred by Peer resolved on June 25, 2019, and the IAB based this conclusion on the testimony of expert witnesses as well as physical evidence in the form of surveillance video footage showing that Peer was not conducting herself in a manner consistent with someone continuing to suffer from the injuries she claimed beyond June 25, 2019. This Court finds that the IAB's October 9, 2019, decision was based on substantial evidence and supported by appropriate application of law. Further, this Court finds that the IAB was correct in requiring Peer sign the receipt as presented by the Employer with the included "resolved" language.

Conclusion

Wherefore, due to the reasons stated above, this Court **AFFIRMS** the January 15, 2020, decision of the Industrial Accident Board compelling Claimant-Appellant to sign the Receipt for Compensation Paid stating that the injuries caused by a work related accident on April 17, 2019, resolved on June 25, 2019, reiterating the October 9, 2019, decision of the Industrial Accident Board.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

[19]*Kenol v. Johnny Janosik, Inc.*, 2011 WL 900588 at *3 (Del. Super. Mar. 15, 2011).

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAWN PEER, Appellant Below, Appellant, v. STATE OF DELAWARE, Appellee Below, Appellee.	§ § § § § § § § § § § § §	No. 370, 2020 Court Below – Superior Court of the State of Delaware C.A. No. K20A-02-001

Submitted: April 21, 2021
Decided: May 3, 2021

Before **SEITZ**, Chief Justice; **TRAYNOR** and **MONTGOMERY-REEVES**, Justices.

ORDER

In this appeal, Dawn Peer challenges the Delaware Industrial Accident Board's (the "IAB") January 15, 2020 decision, which required that she sign a receipt of compensation that included language mirroring the IAB's finding in its October 9, 2019 decision that her injury had resolved. She contends that signing a receipt with the "resolved" language would preclude her from bringing future claims under 19 *Del. C.* § 2347 or impose a *de facto* commutation agreement. We disagree. As the Superior Court held, the receipt with the "resolved" language simply reflects what the IAB stated in its October 9, 2019 decision. The receipt is not a waiver of rights granted under Section 2347, and it does not hinder Peer's

ability to bring future Section 2347 claims. Similarly, nothing in the language of the receipt, the IAB's decisions, or the record triggers commutation under 19 *Del. C.* § 2358. Thus, the judgment of the Superior Court is affirmed on the basis of and for the reasons stated in its October 29, 2020 Order.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Tamika R. Montgomery-Reeves
Justice

Workers' Compensation Fund Reimbursement Issues

Lynn A. Kelly, Esquire
Delaware Department of Justice

Nicholas M. Krayer, Esquire
Pratcher Krayer LLC

Scott A. Simpson, Esquire
Elzufon Austin & Mondell, P. A.

Lynn A. Kelly

Lynn A. Kelly is a Deputy Attorney General in the State of Delaware Department of Justice. Lynn has been with the Department of Justice in various roles since 2013. Prior to serving with the Department of Justice, Lynn was an associate at a Wilmington, Delaware insurance defense firm where she provided representation to insurance carriers in personal injury matters. Lynn has also been an associate in a personal injury firm in Wilmington, Delaware where she represented injured clients.

Lynn is a member of the Delaware Bar, Maryland Bar and the Federal District Court for the District of Delaware. She is also a member of the Randy J. Holland Delaware Workers' Compensation American Inn of Court.

Nicholas M. Krayer

Nicholas M. Krayer is a founding partner of Pratcher Krayer LLC where he practices in the areas of personal injury and workers' compensation law. Nick is a Delawarean through and through. He was born in Wilmington, Delaware and attended St. Elizabeth High School. Subsequently Nick attended the University of Delaware then Widener University School of Law in Wilmington, Delaware. In law school, Nick served as a law clerk for the Delaware Department of Justice and received the pro bono distinction for his volunteer legal work.

When Nick graduated law school, he served as a Deputy Attorney General at the State of Delaware Department of Justice where he prosecuted criminal cases and also served as a Deputy Child Advocate for the State of Delaware Office of the Child Advocate where he provided representation for dependent, neglected and abused children.

Nick left his position at the State of Delaware to join a Wilmington, Delaware insurance defense firm where he provided representation to insurance carriers in personal injury and workers' compensation matters. During this time Nick learned how insurance companies defend against personal injury and workers' compensation cases. Prior to founding Pratcher Krayer LLC, Nick was a partner at another personal injury and workers' compensation firm in Wilmington, Delaware where he represented injured clients.

Nick is a member of the Delaware Bar and the Federal District Court for the District of Delaware. He is also a member of the Delaware State Bar Association Workers' Compensation Section and Torts Section, the Randy J. Holland Delaware Workers' Compensation American Inn of Court and the American Association for Justice. Nick is a part president of the Delaware Trial Lawyers' Association where he continues to serve on the board of directors.

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Scott A. Simpson is a Director in our firm and part of the Workers' Compensation Defense Department. He was admitted to practice in Delaware in 1997. He is a graduate of the University of Delaware (B. A., 1989) and Widener University School of Law (J. D., 1996). Scott is a member of the Delaware State Bar Association and the Randy J. Holland Delaware Workers' Compensation Inn of Court.

WORKERS' COMPENSATION FUND REIMBURSEMENT ISSUES

(By Lynn Kelly, Esq., Nicholas M. Krayer, Esq., and Scott A. Simpson, Esq.)

I. Relevant statutory provisions:

§ 2395. Workers' Compensation Fund; payments by insurance carriers.

(a) Every insurance carrier insuring employers who are or may be liable under this chapter to pay for compensation for personal injuries to or death of their employees under this chapter shall pay to the Department annually, on or before March 1 and October 1 of each year, a sum not to exceed 1 percent at each date on all workers' compensation or employer liability premiums received by the carrier during the calendar year next preceding the due date of such payment.

(b) Such sums shall be paid by the Department to the State Treasurer, to be deposited in a special account known as "Workers' Compensation Fund." Such sums shall not be a part of the General Fund of the State. Any balance remaining in such special account at the end of any fiscal year shall not revert to the General Fund.

(c) The amounts paid under this section shall constitute an element of loss for the purpose of establishing workers' compensation premium rates.

(d) Should the Department subsequently determine that the amounts assessed are insufficient to meet the Fund's obligations during a calendar year, it may assess insurance carriers to cover any anticipated deficiency, based upon the allocations for that calendar year as determined pursuant to subsection (a) of this section.

(e) Should the Department subsequently determine that the amounts assessed are sufficient to meet the Fund's obligations during a calendar year, it shall not assess insurance carriers until a deficiency is projected based upon the anticipated expenditures for the next calendar year as determined pursuant to subsection (a) of this section.

§ 2396. Workers' Compensation Fund; reimbursement of carriers.

(a) The Workers' Compensation Fund is created for the purpose of making payments under §2327, §2334, or §2347 of this title by any insurance carrier.

(b) The Department shall perform the administrative, ministerial, fiscal and clerical functions of the Workers' Compensation Fund. The Fund shall be a party to and shall be represented by a Deputy Attorney General in any proceeding involving possible reimbursement to or from the Fund, and if the decision is against the Fund, the Fund may secure judicial review thereof by commencing an action in Superior Court in the county in which the hearing was held. Any expenses incurred in defense of the Fund are payable from said Fund.

(c) With respect to payments made subject to reimbursement under subsection (a) of this section, insurance carriers, on or before December 15 and July 1 of each year, shall file with the Department a report setting forth the money expended for said payments during the previous 6 months. Reimbursement to such insurance carrier shall be made on January 15 and August 1 each year.

§ 2347. Review by Board of agreements or awards; grounds; modification of award.

On the application of any party in interest on the ground that the incapacity of the injured employee has subsequently terminated, increased, diminished or recurred or that the status of the dependent has changed, the Board may at any time, but not oftener than once in 6 months, review any agreement or award.

On such review, the Board may make an award ending, diminishing, increasing or renewing the compensation previously agreed upon or awarded, and designating the persons entitled thereto, subject to this chapter, and shall state its conclusions of facts and rulings of law. The Department shall immediately send to the parties a copy of the award by personal delivery, by secure email with electronic receipt, or by certified mail.

This section shall not apply to a commutation of payments under § 2358 of this title.

Compensation payable to an employee, under this chapter, shall not terminate until and unless the Board enters an award ending the payment of compensation after a hearing upon review of an agreement or award, provided that no petition for review, hearing or an order by the Board shall be necessary to terminate compensation where the parties to an award or an agreement consent to the termination. No petition for review shall be accepted by the Department unless it is accompanied by proof that a copy of the petition for review has been served by certified mail upon the other party to the agreement or award. Within 5 days after the filing of a petition for review, the Department shall notify each party concerned of the time, date and place scheduled for the hearing upon the petition.

Compensation shall be paid by the Department to the employee after the filing of the employer's petition to review from the Workers' Compensation Fund until the parties to an award or agreement consent to the termination or until the Board enters an order upon the employer's petition to review. After the parties to an award or agreement consent to the reinstatement of compensation or, after the employer withdraws its petition, or, if the Industrial Accident Board orders the employer's petition dismissed, the employer shall repay to the Workers' Compensation Fund the amount paid out by the Department. A petition to review must be withdrawn whenever the parties to an agreement settle the claim without a hearing before the Board or whenever an employee consents to a termination after a petition to review has been filed with the Board.

The first 2 sentences of the fifth paragraph of this section shall apply only to employers insured by insurance carriers. Nor shall they apply to self-insured employers who shall be responsible for payment of their own claims under this section.

Upon any order imposed by the Insurance Commissioner under § 2411(e) of Title 18 requiring payment of restitution following a finding of insurance fraud, and after all rights of appeal from said order have been waived or exhausted, the Board shall, upon motion of the party to whom restitution was ordered and after hearing and opportunity to be heard, allow a credit against benefits payable under §§ 2324, 2325 and/or 2326 of this title, for any restitution ordered by the Insurance Commissioner remaining unpaid. The Board shall also review orders establishing such credits upon motion based upon any change in circumstances that may warrant modification or rescission of a prior order.

II. Impact on Petitions for Review Pursuant to 19 Del. C. §2347:

Pursuant to §2396(b), the Fund "shall be a party to and shall be represented by a Deputy Attorney General in any proceeding involving possible reimbursement to or from the Fund". Prior to July 2021 the Fund's involvement in litigation before the Board on petitions for review (PFR's) was extremely limited. Since July 2021 the Fund has taken an extremely active role in protecting the Fund's interests. The Fund has counsel who has entered their appearance in every PFR that has been filed, actively seeking reimbursement in appropriate cases. This has had an impact on litigation of PFR's from the perspective of both employers and claimants.

A. Fund entitled to reimbursement upon settlement.

- The Fund must be reimbursed in full by Employer where the parties reach a settlement prior to the hearing.
    - *Robinson v. Delmarva*, Hearing No. 1492125 (Sept. 16, 2021)

B. Claimant Returning to Work Full-time.

- A return to work by a claimant creates an implied agreement to termination of an open agreement for total disability benefits.
    - *Fague v. Delaware Park Racing Association*, Del. Super., C.A. No. 99A-05-004, Barron, J., 2000 WL 303457 at *3 (February 24, 2000);
    - *Jones v. Spence Protective Agency*, Del. Super., C.A. No. 89A-MY-11, Gebelein, J., 1990 WL 177641 at *4 (October 26,1990).

C. Claimant Returning to Work Part-Time.

- When a Claimant returns to work while termination petition is pending, the Fund must pay partial disability commensurate with the evidence submitted by the Claimant concerning earnings earned at the new job
    - *Krebs v. David G. Horsey & Sons*, Hearing No. 1485457 (Sept. 7, 2021)/*Levis v. Harry Casell, Inc.*, Hearing No. 1473779 (Sept. 7, 2021)

    - See Also *Small v. Fieldstone Golf Club,* Hearing No. 1492931, (Sept. 15, 2021)
- Conversely when Claimant returns to a job similar to the job where she was injured, it is encumbant on the Claimant to file a petition for partial disability benefits. It would be unfair for the Employer to have to file and petition and for the Fund to pay partial disability wages in such a circumstance.
    - *McLeod v. Dover Donut Shops, Inc.,* Hearing No. 1505951, July 28, 2021

D. Overpayment Made to Claimant.

- Overpayment to Claimant by Fund Ordered to be repaid by Claimant where settlement was reached but no Order was signed by the Board such that Fund payments continued. This case permitted Fund to cease benefits upon notification of settlement.
    - *Begley v. Frank Robino Assoc.*, Hearing No. 1189872, (April 8, 2003)
- Claimant was determined to be a true Second Injury claimant pursuant to 19 *Del. C.* §2327 such that TTD payments were reimbursed by the Fund to the carrier for over 15 years. Upon the Board finding that Claimant was working during that time, Claimant was Ordered to reimburse the Fund.
    - *Beebe Hospital and WCF v. Norwood*, Hearing No. 823156 (Nov. 27, 2013)

E. Allegation of Fraud Committed by Claimant.

- The Fund must continue to pay while termination petition even if there is an allegation of fraud. If fraud is proven at hearing, the appropriate action is for the fund then to refer the case to the Fraud Prevention Bureau for investigation and prosecution.
    - *Bradford v. Emco/Dernest Maier, Inc.*, Hearing No. 1487630 (Feb. 20, 2020)

F. Continuances:

- Continuances for unrelated medical condition is not good cause to continue the hearing and have Fund continue to pay total disability
    - *Emory-Duncan v. Addus Healthcare*, Hearing No. 1425491 (Dec. 6, 2018)

Do's and Don'ts in the Practice of Workers' Compensation

Benjamin K. Durstein, Esquire
Marshall Dennehey Warner Coleman & Goggin

Matthew R. Fogg, Esquire
Morris James LLP

Meghan Butters Houser, Esquire
Weiss, Saville & Houser, P.A.

Danielle K. Yearick, Esquire
Tybout, Redfearn & Pell

MEGHAN BUTTERS HOUSER

Ms. Houser is a Director at the law firm of Weiss, Saville & Houser, P.A. She joined the firm in 2010 and practices in the areas of plaintiff's civil litigation, personal injury, and workers' compensation. She was admitted to practice law before the Delaware Supreme Court in 2010, the U.S. District Court for the District of Delaware in 2011 and the United States Supreme Court in 2017. Ms. Houser graduated summa cum laude from Canisius College in 2007 with a B.A. in History and Political Science. She received her J.D. from Villanova University School of Law in 2010.

Ms. Houser has been a member of the Delaware Trial Lawyers Association since 2010 and is currently serving as Immediate Past President. Additionally, Ms. Houser is a member of the Randy J. Holland Workers' Compensation Inn of Court where she serves as Co-chair of the Service Committee. Ms. Houser has also volunteered with the Combined Campaign for Justice since 2011, participated in the first annual Law Day in 2012, and presented the End Distracted Driving program at two Delaware high schools.

Since 2010, Ms. Houser has served as an active member of the Delaware State Bar Association, and has recently served as Chair of the Workers' Compensation Section. Ms. Houser is also a member of the Women & the Law section and previously served as a member of the DSBA's Nominating Committee. Ms. Houser is also a member of the American Bar Association and the American Association for Justice.

MARSHALL DENNEHEY

BENJAMIN K. DURSTEIN

ASSOCIATE

AREAS OF PRACTICE

Workers' Compensation

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ADMISSIONS

Delaware
2013

EDUCATION

Widener University School of Law (J.D., cum laude, 2012)

University of Delaware (B.A., 2007)

ASSOCIATIONS & MEMBERSHIPS

Delaware Bar Association, Workers' Compensation Section

Delaware Claims Association

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

OVERVIEW

Ben is a member of the Workers' Compensation Department. He represents employers, insurance carriers and third-party administrators in defense of workers' compensation claims before the Industrial Accident Board and Delaware courts.

Ben earned his Bachelor of Arts degree from the University of Delaware in 2007, and went on to receive his *juris doctor* from Widener University School of Law in 2012. After law school, he served as a judicial law clerk to the Honorable James T. Vaughn, Jr., who was then President Judge of the Delaware Superior Court.

Ben is a member of Delaware Claims Association, Delaware State Bar Association Workers' Compensation Section and the Randy J. Holland Delaware Workers' Compensation American Inn of Court. He is admitted to practice in the State of Delaware.

CLASSES/SEMINARS TAUGHT

Are You Coming or Going – Do You Know Your Course and Scope?, Marshall Dennehey webinar, October 26, 2020

RESULTS

Morris James
DELAWARE

Matthew R. Fogg

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803 North Broom Street
Wilmington, DE 19806

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

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

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

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

Professional Affiliations

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

Delaware State Bar Association

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

Delaware Trial Lawyers Association, 2003-Present

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

Practice Areas

Injury Law

FiberCel Bone Graft Injury

Boating and Jet Ski Accidents

Motorcycle Accidents

Wrongful Death

Serious Injuries

Product Liability

Car Accidents

Dog Bites / Attacks

Slip and Fall

Truck Accidents

Workers' Compensation

Blog(s)

Delaware Personal Injury Law

Honors

Best Lawyers, 2021-Present

Delaware Today Top Lawyers, Workers' Compensation for Employee, 2017 - Present

Danielle K. Yearick, Esquire
Tybout, Redfearn & Pell
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Wilmington, DE 19809
(302) 658-6901

Danielle K. Yearick is a Director and has served as the managing partner of the Delaware law firm Tybout, Redfearn & Pell.

Practice Areas: workers' compensation and civil liability/tort litigation:
Trial practitioner in personal injury, premises liability, products liability, construction claims, contract and insurance coverage disputes.

Admitted: all Delaware state and federal courts and U.S. Supreme Court.

Rated by Martindale-Hubbell as "AV Preeminent."
2016-2021: Delaware Top Lawyer in personal injury defense and tort litigation, *Delaware Today*
2012-2021: Delaware Top Attorneys in civil litigation defense, *Philadelphia Magazine*.

Bar Admissions:
Delaware (1997)
Pennsylvania (1998)

Education:
J.D., Villanova University School of Law (1997)
B.A., Manhattan College (1994)- magna cum laude, Phi Beta Kappa

Member:
Delaware Trial Lawyers Association
DSBA
Workers' Compensation American Inn of Court
Defense Counsel of Delaware
Delaware Claims Association
DRI
CLM Alliance
Litigation Counsel of America- Trial Lawyer Fellow

Appointments:
Chair of Delaware Supreme Court's Board on Professional Responsibility;
Chair of the state courts' Rules Committee; Superior Court Civil Rules Committee;
Program Committee -Workers' Compensation Inn of the Court;
DSBA Nominating Committee;
DE Superior Court Trial Practice Forum

THE DO'S OF WORKER'S COMPENSATION

(Claimant's Perspective)

* Remember, you are a Delaware Lawyer

  - WWJHD

* Set your client's expectations from the outset

  - Explain the potential benefits
  - This is not a lottery ticket
  - No pain & suffering
  - No vengeance
  - Focus- get better & get back to work

* Make sure your case is ready before you file your petition

* Streamline your case/issues

  - No Duplicative witnesses
  - Detailed Stipulation of Facts (earlier the better)
  - Talk to opposing counsel
  - Stipulated exhibits

* Think ahead

  - Don't wait until the 30th day to figure out what you're doing!
  - Expert identified & scheduling occurs quickly!!

* Make sure your expert is prepared

  - Clear understanding of PMH

- Has prior records and knows what's in them
- Avoid the pitfalls of *Daubert*

* Know the applicable law on your issues

- Whether or not it's for or against you!
- Misrepresentations of law are bad….very bad…

* Promote the truth

- DRPR 4.1

* "R.E.S.P.E.C.T."[1]

- The Board
- Opposing Counsel
- Witnesses

* Know what you'll need before you get to the hearing

- Translator
- Technology
- Witnesses/subpoenas
- Documents
- Correct # of copies

* Make your point and move on

[1]

* Understand the definition of "highlight"

  - "pick out & emphasize"

* Be flexible & accommodating

  - What goes around, comes around…
  - Extensions
  - Scheduling of Depositions (alternative coverage)

* Concede what needs to be conceded

  - Makes your best arguments better!

* Avoid needless legal hearings

  - Some things can't be avoided
  - Reputational….RFP's
  - Before a Motion to Compel is filed in Superior Court, there is a requirement that counsel "meet and confer"

* Make sure your client is educated on options

  - Pros & Cons
  - Compromise when necessary
  - Continue to monitor expectations

* Be a zealous advocate, but don't cross the line…

LITIGATING WORKERS' COMPENSATION CASES

DON'T:

- Wait until the last minute to schedule your doctor's deposition
- Wait until the last minute to find out if your scheduled expert witness will not offer testimony that supports your case; your continuance request to find a new doctor WILL NOT be granted (Harris v. Citigroup Global Mark)
- Wait until the last minute to send the completed pre-trial memorandum to the Board
- Wait until the last minute to finalize/identify witnesses and/or amend the pre-trial memorandum
- Hold onto medical records – produce them to opposing counsel and your medical expert as soon as possible
- Forget to uphold the "Delaware Way" – try to contact opposing counsel first before filing Motions to see if the issue can be resolved; remind opposing counsel of the upcoming 30 Day Rule if you are expecting an offer, but have not yet received one; don't try to ambush opposing counsel or the Board at a Hearing; don't burn bridges, you may need a favor in return one day
- Go to mediation without first identifying outstanding medical bills; helpful to send everything to opposing counsel in advance, including a demand with specific terms
- Mediate a third party claim without getting the carrier and/or its attorney involved; dealing with a workers' compensation lien before or at mediation tends to work out better for all parties
- Waste time during a deposition or Hearing on irrelevant issues; keep it brief and succinct
- Ever be unprepared for a deposition, Motion, or Hearing
- Ever "wing it" – prepare you client, prepare your expert and fact witnesses; take the time to do it right in advance
- Rely on someone else's summary of the medical records; it's your job to know what is in the actual records and you will be amazed what you discover when you look at them yourself
- Forget to proofread – double check that the Petition is completed correctly before filing; make sure your Motion addresses your issue(s) and clearly identify what you are seeking; make sure the pre-trial memorandum identifies your issues and witnesses (double check this again prior to the 30 day deadline in case you need to amend)
- Come to a Hearing without adequate copies – have 3 copies and 1 original of your expert's deposition transcript if before a full Board; have copies of the Petition, pre-trial memorandum, exhibits, Stipulation of Facts, Attorney's Fee Affidavit, or cases for opposing counsel, the Hearing Officer, and Board Members
- Come to a Hearing without testing your technology beforehand (videos, computer, virtual witnesses, etc.)
- Forget to reserve enough time for a Hearing well in advance - note that on the pre-trial memorandum; notify the Board's administrative personnel at the time of scheduling and remind them again the day or two prior to the Hearing (understand that mistakes occur and the Board may still be surprised when you show up for a full day Hearing)

LITIGATING WORKERS' COMPENSATION CASES

Employer/Carrier Don'ts

Don't:

- Miss the 30-day deadline to make an offer;
- Go to a hearing without knowing what benefits and claims are at issue;
- Rely on a temporary job accommodation/offer by the employer as your [only] evidence of job availability;
- Rely on a "we have light duty available" from the employer as sufficient showing of accommodations for restrictions and valid job offer;
- Get caught up in arguing causation if that's a dead horse;
- Deny ongoing treatment that is under the Practice Guidelines unless you've submitted it to Utilization Review;
- Stop or cut off TTD benefits without a signed Receipt, agreement by claimant/counsel, or Board order;
- Stop or cut off TPD unless 300 weeks has been exhausted (then get a Receipt), or signed Receipt or new TPD Agreement;
- Communicate directly with the claimants if they are represented by counsel without counsel's permission (this applies to attorneys, adjusters, nurse case managers, investigators);
- Commute without first determining Medicare eligibility and considering MSA compliance;
- Accept a cookie-cutter DME opinion (e.g., treatment should have ended after 4 weeks because most soft tissue injuries resolve by then; OR, "complaints/surgery is due to degenerative disc disease and therefore not related to the accident.");

- Forget Employers Modified Duty Form;
- Forget statute of limitations written notice;
- Withhold or wait until the last minute to produce surveillance or other evidence you may intend to present at the hearing;
- Settle with a paralegal or non-attorney, but DO confirm in writing with the attorney;
- Deny benefits submitted because "claim is closed in system" unless there was a global commutation or the SOL has expired;
- Pay benefits/medicals deemed non-certified by UR;
- Ignore or fail to respond to Rule 4 submissions or *Huffman* demands;
- Withhold benefits owed, settled, or awarded pending returned Agreement or Receipt. If it's owed, it's owed within 14 days- pay it;
- Directly communicate with treating doctor for a represented claimant without the consent of counsel;
- Repeatedly make the same evidentiary objections if the Board has already ruled and nothing has changed since prior ruling;
- Object during opening or closing argument unless absolutely necessary;
- Ask questions of a witness that you do not know the answer to or do not strongly believe you know the answer to;
- Believe you know the medical evidence better than the opposing medical expert during cross-examination;
- Produce and identify documents/witnesses/arguments at 4:58 p.m. on the thirty-day deadline;

Do:

- Understand long-term goals and claim-handling philosophy of client at outset of litigation;
- Communicate with employer witnesses early and often in addition to adjuster;
- Make record to preserve issues for appeal;
- Understand and test technology before virtual hearing, presentation or deposition;
- See the forest for the trees;
- Utilize colleagues and other members of the bar when you are unsure about how best to proceed with a case;
- Make use of payments without prejudice;
- Obtain all relevant records;

Keynote Address – A Roundtable
The Art of Professionalism and Civility

The Honorable. Collins J. Seitz, Jr.
Chief Justice
Supreme Court of Delaware

H. Garrett Baker, Esquire
Elzufon Austin & Mondell, P.A.

COLLINS J. SEITZ, JR.

The Honorable Collins J. Seitz, Jr., was sworn in as Chief Justice of the Supreme Court of Delaware on November 8, 2019. He has served as a Supreme Court Justice since 2015. Before his judicial appointment, Chief Justice Seitz was a founding partner of Seitz Ross Aronstam & Moritz LLP, a boutique corporate advisory and litigation firm in Wilmington, Delaware representing clients in high-profile corporate and trust disputes in the Delaware Court of Chancery. Before founding Seitz Ross, Seitz was a partner of Connolly Bove Lodge & Hutz LLP in Wilmington, Delaware, where he litigated corporate and intellectual property disputes. A member of the Delaware Bar since 1983, he served as a member and chair of the Board of Bar Examiners and a member of the Board on Professional Responsibility. Both federal and state courts often appointed Seitz as a Master and Trustee to oversee complex corporate, commercial, and intellectual-property cases. He is a Fellow of the American College of Trial Lawyers. He received his undergraduate degree from the University of Delaware and his law degree from the Villanova University School of Law.

H. Garrett Baker is a Director in 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 for the 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.

PROFESSIONAL AFFILIATIONS

- Delaware State Bar Association:
- Nominating Committee (2014-2017)
- Chair – Workers' Compensation Section (2013-2014)
- Co-chair of the Continuing Legal Education Committee (2006-)
- Chair of the Continuing Legal Education Committee (2005-2006)

- Randy J. Holland Delaware Workers' Compensation American Inn of Court:
    - Founder and Vice-President (2013-2016)
    - President (2017-2018)
    - Judicial Liaison (2019-)

HONORS AND AWARDS

- Recipient Distinguished Service Award by Delaware State Bar Association Workers' Compensation Section 2013-2014
- Delaware Today – Voted one of Delaware's Best Workers' Compensation Defense Attorneys 2014, 2016, 2017, 2018 and 2019
- Martindale-Hubble – AV rating in legal excellence and ethics
- The Best Lawyers in America©, Workers' Compensation Law.

Case Law Update

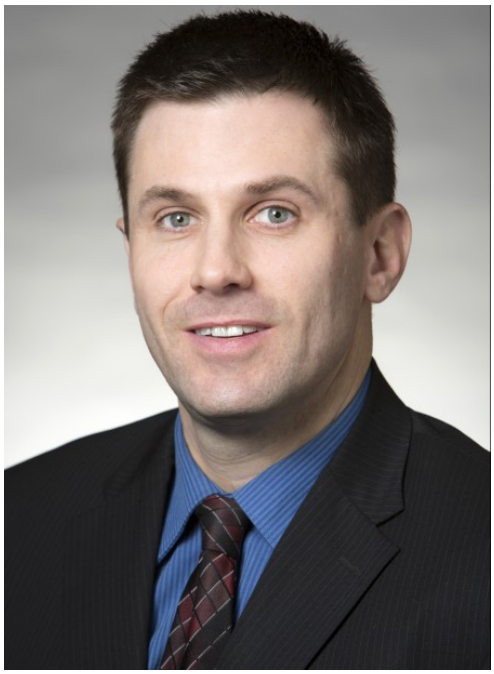
John J. Ellis, Esquire
Heckler & Frabizzio, P.A

Caroline A. Kaminski, Esquire
Doroshow, Pasquale, Krawitz & Bhaya

HECKLER & FRABIZZIO

INSURANCE DEFENSE LITIGATION

MENU



JOHN J. ELLIS

PARTNER

jellis@hfddel.com

John is a partner in the firm's Worker's Compensation Defense Department. He Is licensed to practice in Delaware, New Jersey, and Pennsylvania. John is a graduate of West Chester University and Widener University School of Law. At Widener, he served as the Senior Staff Member for the Widener Law Review. Before joining the firm, John served as a Judicial Clerk to The Honorable Francis P. DeStefano in the Superior Court of New Jersey. He is the current chair of the Delaware State Bar Association's Workers' Compensation Section, co-chair of the Case Law Update Committee, and member of the Rules Committee. John is also a member of the Randy J. Holland Delaware Workers' Compensation Inn of Court.

Outside of private practice, John is a Volunteer Attorney Guardian Ad Litem in the Delaware Office of the Child Advocate, where he provides representation for neglected children before the Family Court. He enjoys spending time with family and playing tennis and golf

‹ PREVIOUS: GREG P. SKOLNIK

NEXT: NICHOLAS BITTNER ›

CAROLINE A. KAMINSKI

Caroline A. Kaminski is an associate at Doroshow Pasquale Krawitz & Bhaya, with a practice concentrated in workers' compensation and personal injury law. She received her Bachelor's Degree from Auburn University in 2015 and her Juris Doctor from Villanova University Charles Widger School of Law in May of 2019. Thereafter, Caroline served as a judicial law clerk to the President Judge Jan R. Jurden of the Superior Court of the State of Delaware.

Caroline is an active member of the Randy J. Holland Workers' Compensation American Inn of Court and the Richard S. Rodney American Inn of Court. In addition, Caroline manages and co-authors The Delaware Detour & Frolic, a legal blog analyzing and discussing the courts' and IAB's most recent decisions regarding Delaware workers' compensation and personal injury.

Appellate Update

Superior Court Decisions

***Fowler v. Perdue Farms, Inc.*, K21A-01-002 NEP (Del. Super. Ct. Mar. 16, 2022) (Primos, J.)**
The Superior Court held that the Board (1) improperly considered extrajudicial sources, (2) rejected unrebutted testimony of both experts and the claimant when it rejected claimant's claim that he contracted COVID-19 at his workplace, and (3) imposed a higher burden on claimant and essentially charged him with proving his claim beyond a reasonable doubt, rather than the appropriate "more likely than not" standard. Accordingly, the Superior Court reversed and remanded the Board's decision for further proceedings instructing the Board to not speculate about facts not in the record concerning the claimant's contraction of COVID-19. (Schmittinger/Panico).

***Foraker v. Amazon.com, Inc.*, N21A-07-002 JRJ (Del. Super. Ct. Feb. 9, 2022) (Jurden, P.J.)**
The was a second appeal to the Superior Court and follows a remand hearing. Following both the original and remand hearing, the Board denied the clamiant's petition that sought benefits due to an ongoing low back injury. The Board accepted the opinions of the defense expert that the work injury was soft-tissue in nature and limited in duration. The Superior Court following the first appeal remanded the case back to the Board as the court did not believe the rationale in the decision was sufficient to support denying the petition. The Superior Court this time affimed the denial of the petition. Although the Board reached the same conclusion it did in its original decision, there was suffficient explanation in the remand order to explain why the Board accepted the testimony of Employer's medical expert and found the claimant incredible. (Eliasson/Ellis).

***Gonzalez v. Perdue Farms, Inc.*, K21A-01-001 RLG (Del. Super. Ct. Jan. 14, 2022) (Green-Streett, J.)**
Claimant was involved in two separate work injuries, injuring her right knee. The claimant's medical expert testified that she sustained permanent impairment to the knee. The employer's medical expert testified that the claimant's injuries had resolved. The Board found the employer's medical expert more credible. The claimant appealed and argued: (1) the Board mischaracterized Dr. Crain's previous medical examinations and misconstrued Dr. DuShuttle's testimony; (2) the mischaracterization of the medical evidence led the Board to conclude incorrectly that Claimant lacked credibility; (3) the Board misconstrued Claimant's work capabilities; and (4) the Board ignored the possibility of a interpretation error during Dr. Crain's final examination of Claimant. Superior Court affirmed the IAB's decision, finding the decision was supported by substantial evidence because: (1) The Board's reliance on Dr. Crain's medical opinion was supported by substantial evidence; (2) Given the inconsistencies between the symptoms Claimant reported to Dr. Crain and the symptoms she testified about during the Hearing, the Board's determination that Claimant was not credible was supported by substantial evidence; (3)The Board determined from a functional standpoint that Claimant was capable of returning to work, and the record indicates

that Claimant's accidents did not impair her ability to return to work; (4) The Board considered the potential interpretation error of the claimant, factored it into its determination of credibility, and ultimately afforded it no weight. (Donovan/Panico).

***Sheingold v. C & S Enters.*, N21A-08-004 DCS (Del. Super. Ct. Mar. 7, 2022) (Streett, J.)**
The Superior Court affirmed a Board decision that found that there was no work accident or injury as alleged. Although the Board found the claimant's three medical experts credible generally, the Board did not have to accept their opinions given that they relied on a claimant who the Board did not find reliable. The court declined to make credibility determinations or reweigh the evidence as those powers lie exclusively with the Board. (Long/Skolnick).

***Wilson v. Gingerich Concrete & Masonry*, N21A-08-004 DCS (Del. Super. Ct. Mar. 9, 2022) (Clark, J.)**
The Superior Court upheld the Board's denial of payment to the claimant's treating physician due to a lapse in his workers' compensation provider certification. The Court, relying on the plain language of 9 *Del. C.* §2322D, held that the physician was required to be certified at the time of the procedure or, in the alternative, to obtain pre-authorization for the treatment - neither of which occurred. Accordingly, the Superior Court determined the Board did not err and its decision that the physician's surgery bills were not compensable was affirmed. (Schmittinger/Baker).

<u>Supreme Court Decisions</u>

***Shipmon v. State*, No. 261, 2021 (Del. 2022)**
The claimant challenged a Board decision that denied his permanency petition after the opinions of both medical experts were found unconvincing. Even though the Board felt there was likely some level of permanent impairment attributable to the work accident, the claimant did not meet his burden of proof to permit an award of any kind. The Court concluded that the Board is not required to, and should not, find the existence of permanency to a specific degree when there is no evidence in the record to support that finding. Awards based on institutional experience alone are not permissible. The Board decision denying the petition was affirmed. (Legum/Bittner).

***Zayas v. State*, No. 232, 2021 (Del. 2022)**
The Supreme Court held that the Board erred in accepting the employer's medical expert testimony after he refused to testify about the claimant's treatment by a physician under unrelated disciplinary investigation, and also erred in refusing to admit that provider's medical records into evidence. The Court held that the Board's errors precluded the claimant from adequately presenting her case and violated fundamental fairness. It was improper for the employer's medical expert to unilaterally decide that he did not have to answer any questions regarding the claimant's physician because it precluded the claimant from effectively cross-examining the employer's medical expert on his expert opinion. (Nitsche&Fredericks/Klusman).

Surgical Issues

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SHAREHOLDER

AREAS OF PRACTICE

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ADMISSIONS

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1998

EDUCATION

Widener University School of Law (J.D., 1997)

University of Delaware (B.A., 1994)

ASSOCIATIONS & MEMBERSHIPS

Delaware State Bar Association (Workers' Compensation Section, Chairperson, 2009-2010)

Defense Counsel of Delaware

Randy J. Holland Delaware Workers' Compensation Inn of Court, charter member

OVERVIEW

Jessica is the supervising attorney for the firm's Workers' Compensation Department in Delaware. She represents employers, insurance carriers and third-party administrators in all manner of claims related to workers' compensation. Jessica has defended cases involving car manufacturers and government agencies. She also handles successive carrier/employer disputes.

Jessica successfully argued before the Superior and Supreme Courts that *Huffman* damages do not begin to accrue until at least 44 days from the date of a settlement, giving the employer an initial 14-day period to satisfy the settlement and 30 days to cure any default for the failure to pay timely.

A graduate of the University of Delaware, Jessica received her degree in international relations and economics. She later attended Widener University School of Law.

Jessica is a member of the Defense Counsel of Delaware, and previously served as the Delaware state liaison for the Defense Research Institute. She is also the former chair of the Workers' Compensation Section of the Delaware State Bar Association. Jessica has presented many in-house seminars and has spoken on various workers' compensation matters before members of the Bar.

YEAR JOINED

1999

THOUGHT LEADERSHIP

Special Alert—COVID-19 and Workers' Compensation Litigation Update for Delaware

Workers' Compensation
COVID-19 Task Force
June 11, 2020
On March 31, 2020, the Industrial Accident Board issued an additional order allowing hea What's Hot in Workers' Comp

COVID-19 AND THE LAW: Workers' Compensation Compensability in Delaware, Florida, New Jersey and Pennsylvania

COVID-19 Task Force
Workers' Compensation
April 1, 2020
Delaware The material in this newsletter has been prepared for our readers by Marshall Dennehey Warner Coleman & Goggin.

What's Hot in Workers' Comp, Vol. 24, No. 4, April 2020

Workers' Compensation
April 1, 2020

How COVID-19 Is Affecting Delaware Workers' Compensation

Workers' Compensation
COVID-19 Task Force
March 20, 2020
The Industrial Accident Board issued an order on March 16, 2020, suspending/continuing all Board hearings until at least April 3, 2020. What's Hot in Workers' Comp is prepared by Marshall Dennehey Warner Coleman & Goggin to provide information on recent legal developments of interest to our readers.

Special Delaware Workers' Compensation Alert - Limitations on Medications

Wilmington
Workers' Compensation
September 11, 2013

CLASSES/SEMINARS TAUGHT

Defining Voluntary Removal from the Workplace, Delaware State Bar Association, January 14, 2020

How Medical Marijuana Is Impacting Workers' Compensation, Marshall Dennehey Workers' Compensation Seminar, October 24, 2019

Bad Eggs: Defending Injuries Stemming from Violence in the Workplace, Marshall Dennehey Workers' Compensation Seminar, October 19, 2017

Nally and Successive Carrier Liability, Workers' Compensation Section of the Delaware State Bar Association, Wilmington, Delaware, January 18, 2017

Do's and Don'ts of Fact Witnesses, Marshall Dennehey Workers' Compensation Seminar, October 27, 2016

Defense Counsel Wish List, Marshall Dennehey Workers' Compensation Seminar, October 19, 2016

Double Play: What Happens When Your Claim Crosses Multiple States?, Marshall Dennehey Workers' Compensation Seminar, October 22, 2015

Presenting the Clean Claim, Delaware State Bar Association Workers' Compensation Conference, Wilmington, Delaware, May 6, 2015

Employment Law Update and Workers' Compensation Basics, Delaware State Dental Society, Dover, Delaware, March 19, 2015

Checks and Balances: A Dream Team Approach, Marshall Dennehey Workers' Compensation Seminar, October 30, 2014

Workers' Compensation Update, Office and Trial Practice, Delaware State Bar Association, Wilmington, Delaware, November 22, 2013

Tri-State Workers' Compensation Legal Update, Roadmap to Success - Understanding Workers' Compensation, Marshall Dennehey seminar, October 24, 2013

Workers' Compensation Update 2013, Delaware Employer Council, Dover, Delaware, May 8, 2013

Medicare Set-Asides: When You Need Them, When You Don't, Workers' Compensation Section of the Delaware State Bar Association and the Industrial Accident Board, Wilmington, Delaware, May 7, 2013

Discovery Issues, Workers' Compensation Section of the Delaware State Bar Association, Wilmington, Delaware, January 23, 2013

Heart Attacks, Strokes & Idiopathic Falls, Workers' Compensation Section of the Delaware State Bar Association and the Industrial Accident Board, Wilmington, Delaware, May 2, 2012

Crazy Issues of Causation, Workers' Compensation Section of the Delaware State Bar Association and the Industrial Accident Board, Wilmington, Delaware, May 4, 2011

PUBLISHED WORKS

"Death, Be Not Proud: Benefits Continue," *Defense Digest*, Vol. 12, No. 4, December 2006

Stephen T. Morrow, Esq.

Personal Injury Lawyer

Stephen T. Morrow is a partner with Rhoades & Morrow LLC. His practice areas include personal injury and workers' compensation. Steve is a graduate of Milford High School and Dickinson College in Carlisle, Pennsylvania. Steve earned his Juris Doctor degree, cum laude, from the New England School of Law in Boston, Massachusetts. Steve is admitted to the bars of the State of Delaware and Commonwealth of Massachusetts and has practiced before the U.S. District Court for the District of Delaware. He is a member of the Delaware State Bar Association, the American Association for Justice, the Randy J. Holland Workers' Compensation American Inn of Court and Workers' Injury Law & Advocacy Group. Steve is a past President of the Delaware Trial Lawyers Association, currently co-chairs its Legislative Committee and is a member of the Continuing Legal Education Committee. Steve is also a past Chair of the Workers' Compensation Section of the Delaware State Bar Association. Steve serves as a frequent presenter at seminars focused on workers' compensation practice and procedure. Steve also performs pro bono services by representing children in need who are placed in Delaware's foster care system.

Professional Associations and Memberships

- Past President, Delaware Trial Lawyers Association
    - Co-Chair, Legislative Committee
    - Continuing Education Committee
- Delaware State Bar Association
- Past Chair of the Workers' Compensation Section of the Delaware State Bar Association
- Past Secretary of the Workers' Compensation Section of the Delaware State Bar Association
- American Association of Justice
- Randy J. Holland Workers' Compensation American Inn of Court

- Workers' Injury Law & Advocacy Group

Bar Admissions

- Delaware
- Massachusetts
- U.S. District Court District of Delaware

Classes/Seminars

- Alternative Dispute Resolution Requirements & Processes (Delaware Asbestos Litigation Conference, Feb. 26, 2010)
- Ethical issues in Trial Advocacy and Representation of Litigants before the Industrial Accident Board (Delaware State Bar Association, May 5, 2010)
- Overview of Delaware Workers' Compensation Practice Guidelines: Low Back, Cervical and Chronic Pain (Delaware State Bar Association, January 18, 2011)
- Ethical Considerations- Complex Issues in Complex Litigation (Delaware Asbestos Litigation Conference, March 10, 2011)
- Heart, Attacks, Strokes & Idiopathic Falls in Workers' Compensation Cases (Delaware State Bar Association, May 2, 2012)
- Ethical Issues in Workers' Compensation Cases (Delaware State Bar Association, May 7, 2013)
- Motion Practice Before the Industrial Accident Board (Delaware State Bar Association, May 7, 2014)
- Auto Injury Litigation (National Business Institute, April 30, 2015)
- Presenting the Clean Claim in Workers' Compensation Cases (Delaware State Bar Association, May 6, 2015)
- Causation and the Unusual Diagnosis in Workers' Compensation Cases (Delaware State Bar Association, May 4, 2016)
- Workers' Compensation Law (Second Annual Work Injury Prevention and Management Symposium, September 30, 2016)
- Best Practices for Mediation (Delaware State Bar Association, Jan. 17, 2018)

- The New Face of the Displaced Worker in Delaware Workers' Compensation (Delaware State Bar Association, May 2, 2018)
- Maximizing Damages in Personal Injury Cases (New Jersey Association for Justice Boardwalk Seminar, May 11, 2018)
- The Interplay Between Workers' Compensation & Third-Party Claims (Randy Holland Inn of Court, November 13, 2018)
- Idiopathic Idiosyncrasies in Workers' Compensation Cases (Delaware State Bar Association, May 14, 2019)
- Workers' Compensation Practically Speaking, Hot Topics in Ethics (Delaware State Bar Association, September 15, 2020)
- Does Liability Ever Shift Back in a Worker's Compensation Claim? (Delaware State Bar Association, January 19, 2021)
- Idiopathic Idiosyncrasies in Workers' Compensation Cases (Delaware State Bar Association, May 4, 2021)
- "The New Industrial Accident Board" (Randy Holland Inn of Court, November 9, 2021)

Education

- New England School of Law, Boston, Massachusetts
    - J.D. cum laude – 2002
    - Honors: Moot Court and Mock Trial
    - Law Journal: New England Journal, Executive Managing Editor
- Dickinson College, Carlisle, Pennsylvania

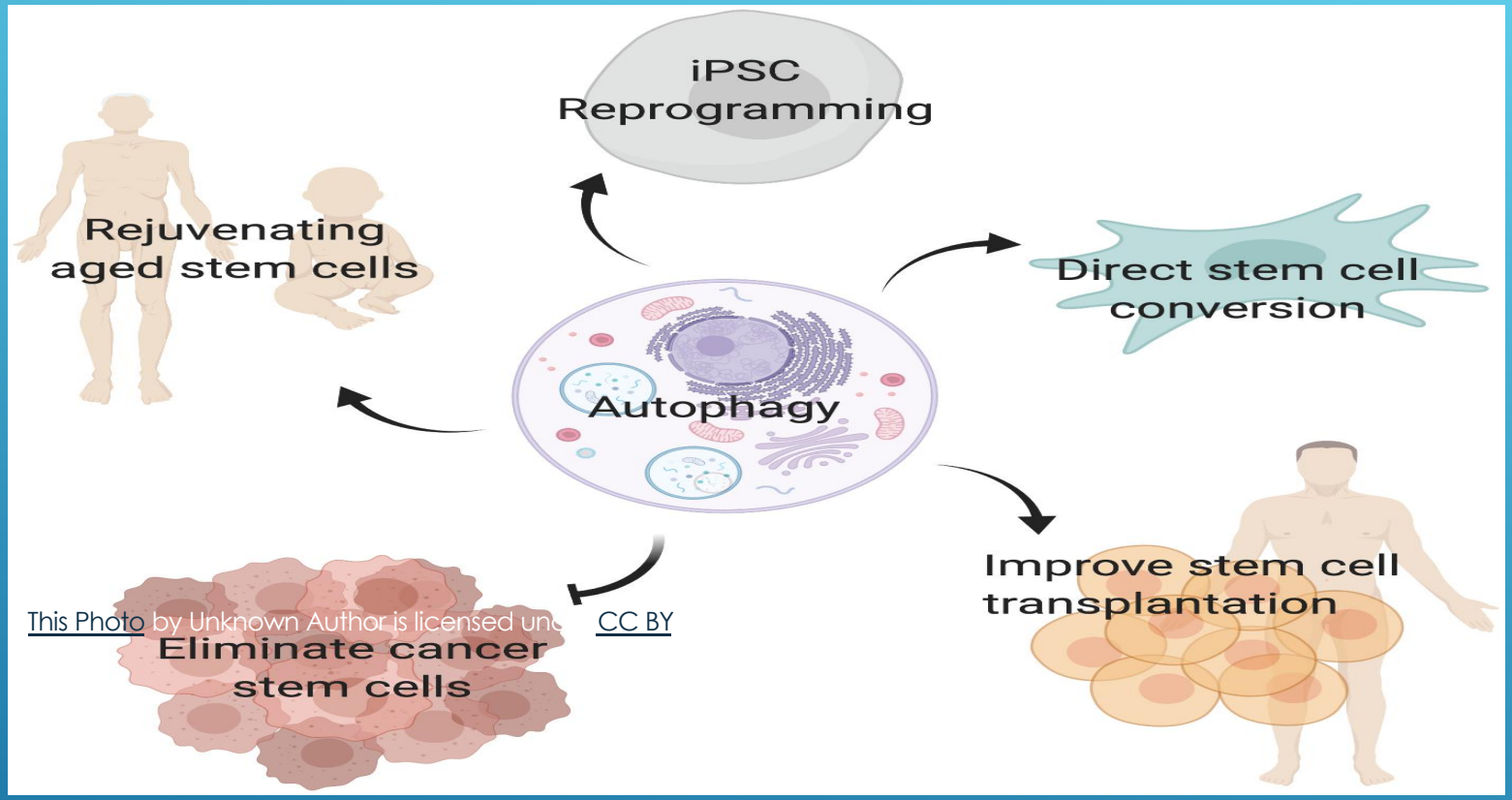
THE ART OF THE KNIFE

SURGICAL ISSUES IN WORKER'S COMPENSATION

"Nurse, get on the internet, go to SURGERY.COM, scroll down and click on the 'Are you totally lost?' icon."

TOPICS

- Oh, to be young again “Regenerative Medicine” (a/k/a stem cell)
- What goes in, must come out? (hardware removal cases)
- It’s not contagious, but it does spread (adjacent segment cases)
- It ain’t all about the back (Total Knee replacement)



REGENERATIVE MEDICINE

WHAT IT IS……

- Designed to be a restorative treatment
- Stem cells are removed, concentrated and injected into the spine
- Can be used in knees, elbows, shoulders
- These two cases dealt with their use in the back.

WHAT IT IS NOT……

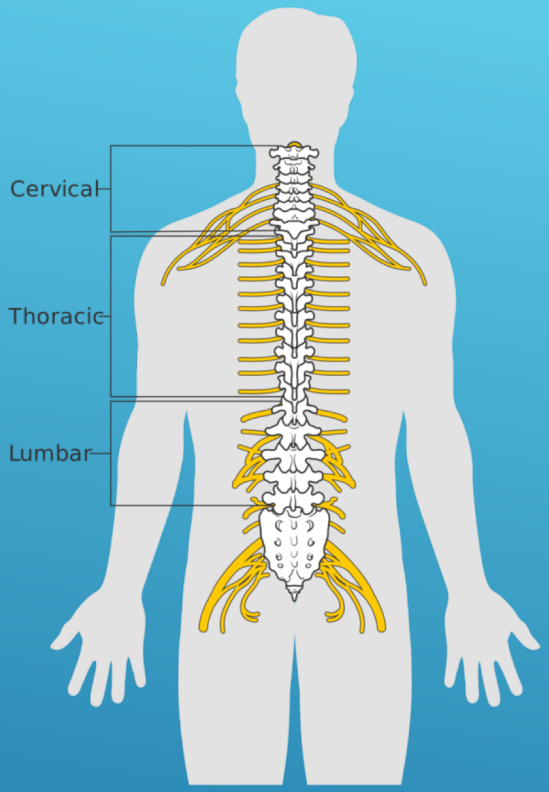
- Not FDA approved
  - This is an "off-label" use
  - Not banned
- Not HCPG certified……yet
- Peer-Reviewed with definitive studies
- Not particularly invasive
  - But side-effects have been documented.

SOMETIMES YOU WIN……

- Julius Baynard v AE Quesenberry
  - Dr. Rudin v Dr. Brokaw
  - No previous surgery
  - Good result
  - Board Found Compensable

AND SOMETIMES YOU LOSE……

- Pablo Alanis-Frederick v Asplundh
  - Dr. Rudin v Dr. Rushton
  - Two prior surgeries
  - Different "view" of history: whether Claimant did well post-treatment
  - Close review of the studies
    - Level III study in Pain Journal
  - Consideration of potential adverse effects



ADJACENT SEGMENT DISEASE

THE THEORY

- once a fusion has been performed the adjacent disc levels can be placed under strain which then requires treatment at that level

THE CASES

- Matthew Heritage v. State of Delaware - IAB Hearing No.: 1476548 (Decided March 15, 2022)(Surgery awarded)
- Bryan Gatta v. State of Delaware IAB # 1364816 (March 12, 2015) (Surgery denied)
- Anthony Cicione, Jr. v. FMC Corporation - IAB Hearing No.: 1373594 (May 3, 2016) (Surgery denied)

- William Wroten v. Lowes – IAB Hearing No.: 1358700 (July 31, 2019)(Surgery awarded)
- Jamie Phipps v. Southern Wine Spirits - IAB Hearing No.: 1432098 (October 14, 2020)(Surgery denied)

COMPARE & CONTRAST

I'VE GOT A SCREW LOOSE SOMEWHERE……

- If the Employer pays for the spine surgery, will it always have to pay for a subsequent surgery to remove the hardware?

RIDDLE US THIS……..

SOMETIMES YES……

- **Vergara v. Washington Street Ale House, IAB No. 1451481 (Oct. 29, 2021)**
- **White v. Schagrin Gas, IAB No. 1430282 (May 5, 2017)**

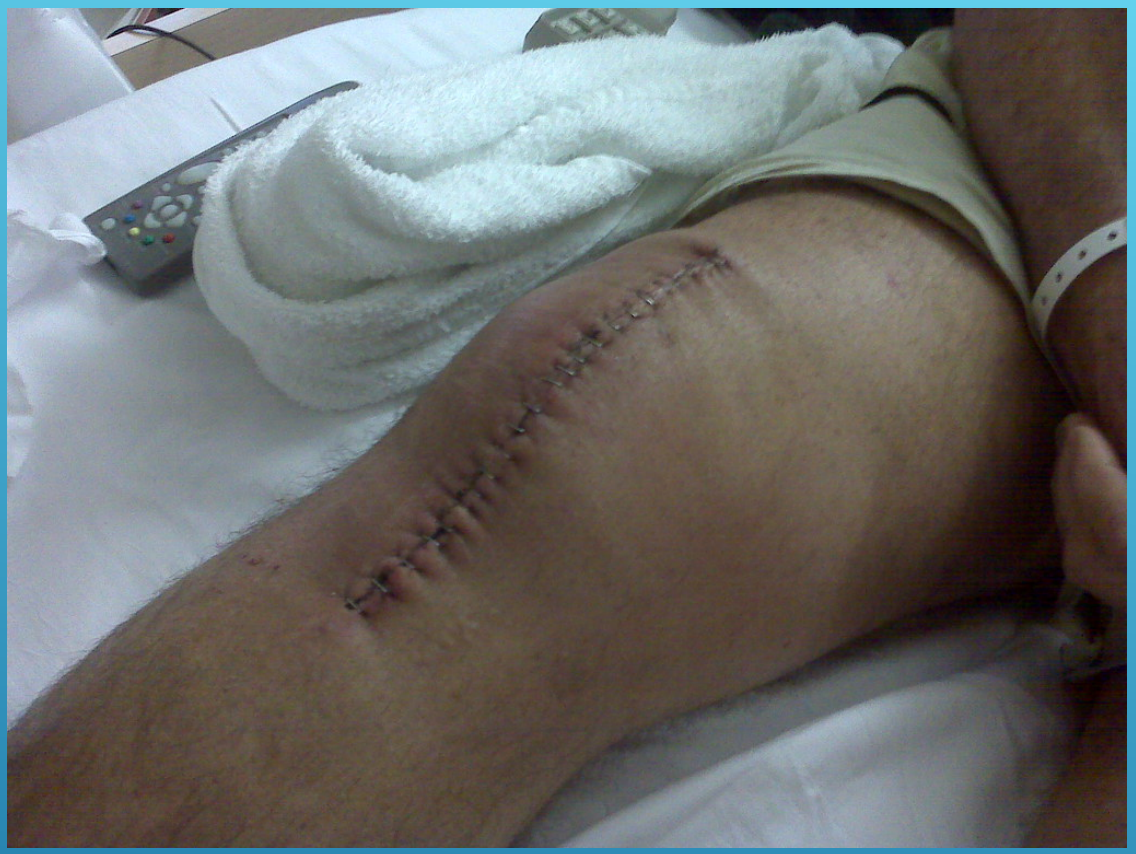
- **Davis v. RRW, Inc., IAB No. 1481986 (Dec. 27, 2021)**

AND SOMETIMES, NO

ALL THAT IS NEEDED IS A LITTLE STIMULATION……

SPINAL CORD STIMULATORS: PERMANENT PLACEMENT CASES

- David Wilkes v Recovery Innovations, IAB 1474362 (Feb.8, 2022) SCS allowed.
- Sarah Johnson v J&J Staffing, IAB 1467789 (10/29/21) SCS allowed
- Patricia Ortiz-Guzman v Apple American Group, IAB 1509245 (2/17/22) SCS allowed



KNEE REPLACEMENT

- Brian Coady v Bayhealth, IAB 1504569 (2/18/22)
  Third knee surgery denied.

POTPOURRI OF QUICK HITS

- CERTIFICATIONS…….CHECK THEM!
- PICK YOUR DME DOC CAREFULLY
  - SURGEON?
- IS SURGERY OVERLY AGGRESSIVE?

QUESTIONS? COMMENTS?

ADJACENT SEGMENT DISEASE THEORY

ASD Identified

Matthew Heritage v. State of Delaware - IAB Hearing No.: 1476548 (Decided March 15, 2022)(Surgery awarded)

First surgery was in 2018 which was a C4-5 spinal fusion. Second surgery in 2020 extended the fusion to C5 through C7. Claimant filed a Petition seeking compensability of a cervical fusion to include the C3-4 level.

Dr. Yalamanchili testified that there was evidence of a worsening disc condition above the claimant's original fusion. He noted that this is a common phenomenon with fusion procedures in as much as once a fusion has been performed the adjacent disc levels can be placed under strain which he believes was a condition developing in the claimant. He noted that the adjacent disc was deteriorating and becoming symptomatic.

ASD/Disc Replacement

Bryan Gatta v. State of Delaware IAB # 1364816 (March 12, 2015) (Surgery denied)

First surgery was to the C5-6 level in 2013. Dr. Rudin performed a disc replacement.
In 2014, he performed a fusion at C5-6 and C6-7 relating the C6-7 level deterioration to the C5-6 level.

Dr. Fedder testified that it takes years for the adjacent segment disease to develop. Further, with a disc replacement, the development of ASD is markedly decreased and one of the reasons why a disc replacement was done.

ASD/ Skipped level

Anthony Cicione, Jr. v. FMC Corporation - IAB Hearing No.: 1373594 (May 3, 2016) (Surgery denied)

First surgery was L5-S1 spinal fusion and decompression of L4-5 and L5-S1 laminectomy with decompression of bilateral L5-S1 nerve roots. In 2015, Petition filed seeking compensability of a L3-4 lumbar laminectomy surgery. Dr. Rudin testified that prior to the first surgery he noted claimant also had L3-4 disc protrusion with osteophyte mildly indenting the dursac at L3-4. Claimant also had a disc protrusion at L2-3. An updated MRI in 2015 showed a large disc herniation L3-4 with paracentral disc protrusion and facet arthrosis causing moderate central canal stenosis impinging on the nerve roots. Dr. Rudin testified that the mobilization at L5-S1

increased the stress put on the other discs. Therefore, he indicated that you would expect degeneration at L4-5 and L3-4 at a faster pace. He noted that the L4-5 was not as bad because of the prior decompressive laminectomy which gave it more room.

Dr. Townsend testified that the L3-4 disc herniation was not related to the 2011 work accident. He notes that the herniation was not reflected on the MRIs after the work accident or at the time of the fusion surgery. He also notes that it is not the level adjacent to the fusion. There is no literature supporting the theory that the entire vertebral column is affected by a fusion.

William Wroten v. Lowes – IAB Hearing No.: 1358700 (July 31, 2019)(Surgery awarded)

May 31, 2009 work injury resulted in injuries to Claimant's shoulder and cervical spine. Dr. Eskander performed a disc arthroplasty at C3-4 on April 19, 2013. He followed that up with a fusion at C3-4 at the same level.

By February 2019, the claimant was seen again by Dr. Eskander who felt the MRI showed a C6-7 disc herniation and recommended another surgery. In testifying as to the causation of the C6-7 disc herniation, Dr. Eskander noted that the C3-4 fusion caused increased pressure and required the other disc to sustain more stress and absorb more shock. As a result, the C6-7 level was related to the prior fusion which was caused by the accident. Dr. Eskander testified that the adjacent segment disease can involve different levels besides the next contiguous level.

Dr. Fedder had offered testimony stating that junctional stenosis does not skip levels. The claimant had development of a C6-7 osteophyte complex but claimant's examination did not show signs of a C6-7 radiculopathy.

Jamie Phipps v. Southern Wine Spirits - IAB Hearing No.: 1432098 (October 14, 2020)(Surgery denied)

(Identical surgeries/theories in Wroten) A 2015 work accident led to a compensable fusion at C3-4. In April of 2019, she developed symptomatology that reflected a disc problem at C6-7 and Dr. Eskander performed surgery at that level. Dr. Eskander put forth a theory of causation called "non -contiguous adjacent segment disease" and therefore believe that the C3-4 fusion caused the deterioration at C6-7.

Dr. Fedder testified that the literature discusses adjacent, contiguous disc and then none of the study support the theory that the adjacent segment disease can skip over a level to effect a disc further along the spine

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

PABLO ALANIS-FEDERICK,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1439328
	)	
ASPLUNDH TREE EXPERT CO.,	)	
	)	
	)	
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 a Workers' Compensation Hearing Officer of the Industrial Accident Board on October 1, 2020 via video conference pursuant to the Board's COVID-19 Emergency Order dated May 11, 2020.

PRESENT:

KIMBERLY A. WILSON
Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Brian S. Legum, Attorney for the Employee

Christopher T. Logullo, Attorney for the Employer/Carrier

NATURE AND STAGE OF THE PROCEEDINGS

On February 5, 2016, Pablo Alanis-Federick ("Claimant") suffered a compensable injury to the lumbar spine (also "low back") while working for Asplundh Tree Expert Co. (also "Asplundh" or "Employer"). Employer has accepted these injuries as compensable, and Claimant has received certain benefits as a result, including payment for his medical treatment expenses.

On March 13, 2020, Claimant filed a Petition to Determine Additional Compensation Due, seeking a finding of compensability for lumbar stem cell injections provided by Dr. Bruce Rudin on March 3, 2020. Dr. Rudin opines that this treatment was reasonable, necessary and causally related to the February 2016 work accident. Asplundh, based on the opinion of Dr. Scott Rushton, argues that the March 3, 2020 stem cell injections were not reasonable, necessary or causally related to the February 2016 work accident.

A hearing was held on Claimant's petition on October 1, 2020. This is the decision on the merits of the petition.

SUMMARY OF THE EVIDENCE

Claimant testified first. He has worked for Asplundt since 2012. Claimant injured his low back while cutting and removing a large tree in 2016. His typical job duties involve tree and branch removal and cleaning power lines.

Following the February 2016 work accident, Claimant's ability to work changed. He was in pain and could only work twenty-five to forty hours per week. He had conservative treatment but then ultimately required surgery in 2016. He then needed another lumbar fusion surgery at L4-5 in May 2018. It took a long time, but he began working full duty again. Unfortunately, that only lasted a couple of months. He then required light duty work again because his pain began to return after surgery.

About a year after the 2018 surgery, Claimant was experiencing significant low back pain again. He had tried injections, but they only helped for, at most, a month or two. He was told his pain was due to a pinched nerve. Dr. Rudin showed Claimant his MRI and told him that he could either have surgery again or have a stem cell procedure. Claimant told Dr. Rudin that he did not want to have surgery again, so he opted for the stem cell procedure. Claimant had the procedure on March 3, 3020. Afterward, he was out of work for three weeks. He was unable to walk, move or bend. After three weeks, he returned to work and worked a lot of hours. After the July 2020 tornadoes came through Delaware, Claimant worked about 16 hours per day. However, he was in so much pain, he could not make it to work at times. He was working over 85 hours per week at that point. He had additional pain, but had to work because he needs to take care of his family.

Before the stem cell treatment, Claimant was working between 30 and 60 hours, depending on weather. He performed light duty work, including flagging and traffic control. At times, he also would help out when needed to rake and pick up leaves. He worked light or medium duty between 25 to 30 hours per week.

After the March 2020 stem cell treatment, Claimant was able to work more. This treatment was more helpful than the prior injections that Claimant had. It also helped more than the 2018 surgery had. Claimant was very pleased with the outcome of the stem cell treatment. He had already had two surgeries and thinks that his results with the stem cell procedure were better than the surgeries.

Claimant saw Dr. Rudin on September 17, 2020 and was in a lot of pain. It was different pain than he had prior to the stem cell treatment. Claimant's pain was from his lower back to the buttocks and stayed in his leg. It was very different pain. This is why he went back to Dr. Rudin for a new MRI.

On cross examination, Claimant agreed that Dr. Rudin's most recent September 2020 note indicates that Claimant reported that his symptoms had gotten worse. He agreed that this was about six months after the stem cell procedure. Dr. Rudin indicated that Claimant was pointing down his right side in terms of his pain. He has pain on both sides, but sometimes it is more on the left side. Claimant had rated his pain at 8 out of 10 with a constant frequency. He described his pain as severe and aching. All activities were said to be aggravating of his condition. Dr. Rudin took Claimant out of work for one week and provided him with a Medrol Dosepak. Claimant has since returned to work.

Claimant agreed that before he had the stem cell procedure, his pain was also rated as 8 out of 10. He explained that he had long days at work at times and his pain was bad because of the type of work that he does. There are times when they work a lot and have to do a lot of lifting. Claimant admitted that he was released to full duty unrestricted work in May 2019. He further agreed that he testified that he was working light duty before the stem cell procedure; thus, he was restricted to light duty at some point after May 2019.

Claimant admitted that after the March 2020 stem cell injections he reported a pain level of 5 out of 10. He was still in pain. Dr. Rudin documented on May 21, 2020 "symptoms unchanged." Claimant had described right low back pain with bilateral leg and buttock pain. The pain was down both legs. His pain was said to be constant and aching. All activities were said to cause him pain. Claimant recalled telling Dr. Rudin all of this. This note was recorded two months after the stem cell injections.

Dr. Rudin told Claimant that the stem cell injections procedure itself is not FDA approved. It is also not listed under the Delaware Health Care Practice Guidelines

("DEHCPGs"). Claimant could not recall if Dr. Rudin told him that the treatment was experimental in nature.

On redirect examination, Claimant agreed that he has had low back pain since his work accident. His pain is currently more painful to a point where, at times, it cannot be tolerated. He did not have this kind of pain before the stem cell procedure; it was not as much in his legs, but mostly in his back. Claimant's pain is new and different now. He has pain all of the time.

Claimant was able to work ten hours per day before the stem cell procedure; however, he would have worked 16 hours per day if he could have. He worked less due to his physical restrictions.

Dr. Rudin told Claimant that some people were having stem cell injections and that they were working. Claimant did not want surgery, so he agreed on the injections. He is happy with this decision. Dr. Rudin told Claimant that he would not have to pay for the treatment if it was not approved by workers' compensation.

Claimant was questioned by the Hearing Officer as to why he is happy that he got the stem cell injections even though he seemed to have been doing poorly about two months afterward. He explained that he felt that he could work more after he got them. He was working 60 hours per week after the stem cell injections. However, after the tornadoes hit Delaware, he was working between 65 and 95 hours per week and was in a lot of pain once he got home. Claimant felt that his success from the stem cell injections lasted for about five months.

Claimant agreed that he complained of 8 out of 10 pain in May 2020. He worked long days at the time, and it was the work causing his problems. Claimant worked as many hours as he could work based on his pain; he worked 20 or 30 or 40 hours per week.

Claimant's leg pain became bad after the stem cell injections. His left leg pain is now worse and different. He had it before the stem cell injections, but it is worse now.

On further redirect examination, Claimant reiterated that he believes that the stem cell injections helped him in terms of pain reduction for about five months. He explained that his May 2020 pain was pain that came and went, especially when he had a long day at work with bending and lifting. Claimant worked well for about four or five months after the March 2020 stem cell injections. There were days with little pain and other days with higher 8 out of 10 pain.

Claimant's pain after the stem cell injections is different than it was before; sometimes he can handle it, and other times he cannot. He went to the emergency room ("ER") about a week before he saw Dr. Rudin because he was in so much pain that he could not even walk. He stayed home from work for two days. He told his boss that he could only work light duty and was advised that a letter was needed. Claimant then went to Dr. Rudin for the letter and told him that he could not even walk at times due to pain. Dr. Rudin took Claimant out of work for one week and scheduled him for a regular injection, not a stem cell injection. Claimant also asked for a new MRI study because his pain was very high and intolerable. He has never felt this level of pain before. Very strong pain in his left leg began about three weeks prior to the hearing.

On further recross examination, Claimant testified that he had days without pain when not working or when flagging or doing traffic control work. Claimant admitted that the May 21, 2020 note reflected that he told Dr. Rudin that the frequency of his pain was constant and that all activities were aggravating factors for his pain.

Bruce J. Rudin, M.D., an orthopedic surgeon, testified by deposition on behalf of Claimant.[1] Dr. Rudin is fellowship-trained in adult, regenerative and traumatic spine surgery. He wrote the DEHCPGs for the cervical spine and lumbar spine twelve years ago.

When Claimant first presented to Dr. Rudin in November 2016, he looked terrible on physical examination. He had had extensive conservative care, including lumbar injections. He had a disc herniation at L4-5 as well as a partial foot-drop, which is a significant neurologic deficit. Dr. Rudin performed an L4-5 microdiskectomy on December 12, 2016. Claimant's leg pain was gone after the surgery. Gradually, however, once he started to get back to work at a higher level, he began having issues again. Claimant had a lot of underlying degenerative disc disease at L4-5 and ultimately required a spinal fusion in May 2018. A CT scan revealed that the fusion was healed in September 2018, so Dr. Rudin released Claimant back to work.

Claimant performs long hours of heavy physical work. His care was managed into 2019 and, as he continued to work, he started to get worse and worse. Dr. Rudin has encouraged Claimant to try to work a different job, but he has always gone back to work for Asplundh. He worked eight-hour-days and then reported that he was in miserable 8 out of 10 pain by the end of the day. Claimant had a couple of nerve blocks, but they only helped him temporarily. He then had sacroiliac injections. The sacroiliac injections made him 90 percent better for a week and then his pain came back, and at a higher level. Toward the end of 2019, Claimant's pain was rated at 8 out of 10 and described as constant, severe, aching and worsened by all activities. Dr. Rudin ordered a new MRI. It showed a new degenerative problem and tear at the level next to his spinal fusion, at L3-4; notably, the prior July 2017 MRI showed L3-4 as a normal disc.

After Dr. Rudin received the MRI results showing an onset of degeneration and annular pathology at L3-4, and had considered the fact that Claimant's pain had been increasing over the

[1] Dr. Rudin's deposition was marked into evidence as Claimant's Exhibit #1.

past six months, he discussed treatment options with him. Claimant was unresponsive to conservative care. His ability to work was not great. His options were either a spinal fusion surgery or osteobiologics (also "stem cell procedure"). Dr. Rudin testified that the DEHCPGs recognize that when there is a spinal fusion, the stress is transferred to the adjacent disc. Claimant met every one of the requirements as a candidate for another spinal fusion, but he did not want to have that procedure again. He instead chose the regenerative medicine option, a stem cell injection procedure.

Regenerative medicine harnesses the body's ability to heal biologically using substances that are already circulating in the body, including stem cells. They are used in a patient with a degenerative disc as an alteration in the ability of the disc to get nourished. They are injected back into the disc to make the disc healthy.

Patients that have received this procedure are tracked in a federal registry in terms of outcome; about 75 to 80 percent of patients that have had this procedure are better within three months. The cost is less than a spinal fusion and the person walks out with Band-Aids in lieu of the typical extensive post-surgical recovery. Claimant opted for the stem cell procedure because he felt that if it did not work, he would end up with the spinal fusion operation anyway.

Claimant had the stem cell injection procedure on March 3, 2020. He followed up on May 21, 2020. At that point, he told Dr. Rudin that he was 65 percent better. He was already back to work as a tree surgeon, working 16 hours per day. He reported that his leg pain was great. His back pain was better. He was very happy. This was about two months after the procedure.

Dr. Rudin testified that the stem cell procedure is not experimental. It is a newer procedure, but not new. Stem cell procedures are not included in the DEHCPGs but Dr. Rudin noted that the guidelines have not been updated since 2008. The DEHCPGs are guidelines and

their preamble notes that they do not define the only means of caring for patients. The guidelines do not address every possible medical issue or treatment option.

Dr. Rudin opined that the March 3, 3020 stem cell injection procedure was reasonable, necessary and causally related treatment for Claimant in terms of his February 2016 low back injury. This procedure has been offered for the past 18 months at First State Orthopaedics ("FSO") and is an alternative to much more expensive spinal fusion procedures. FSO follows all of the FDA-recommended guidelines for doing the procedure, such as the use of certain equipment.

Dr. Rudin disagrees with Dr. Rushton's opinion that Claimant was not any better. Claimant reported two weeks before Dr. Rushton's June 2020 defense medical examination ("DME") that he was 65 percent better and working 16 hours per day performing heavy physical work, six to seven days per week. Dr. Rudin rates the treatment as highly successful. Claimant is a patient that was miserable before the treatment that was afterward able to work over a hundred hours per week doing heavy physical work. In comparison to everything involved with a spinal fusion, Dr. Rudin opined that the stem cell procedure is reasonable and necessary within a reasonable degree of medical probability.

On cross examination, Dr. Rudin admitted that he does have financial interest in SpineCare, the facility where Claimant's stem cell procedure was performed. It is a standalone facility that does nothing but spine procedures. There are nine partners. Dr. Rudin himself was not involved in providing the stem cell injection treatment to Claimant. Claimant's bill for the stem cell injection procedure is threefold: there is a charge for the doctor that does the procedure, a charge for the anesthesiologist that performs the sedation and a facility fee. Medicare and Medicaid do not pay for these procedures. The FDA does not approve this specific

procedure, but it falls under an exemption. It is an off-label procedure. A lot of care is off-label. Claimant's procedure consisted of a bone marrow aspiration of his mesenchymal stem cells, intradiscal injection of bone marrow and platelet rich plasma ("PRP") therapy in addition to facet and epidural injections. This sort of treatment has been tremendously helpful for leg pain and sciatica.

Dr. Rudin disagreed that the two surgeries were not successful for Claimant. L4-5 was treated successfully; what is unknown is when L3-4 was afterward injured. It is only known that at some point after his spinal fusion Claimant's L3-4 disc went bad and as it got worse, he got worse.

Dr. Rudin testified that he did not want to do a spinal fusion on Claimant, he preferred to do this procedure. He thought it was a much better procedure in terms of biologically helping the disc. Forty percent of patients having this procedure show MRI-documented improvement of what the actual disc looks like. This was preferable to putting three times the stress on the L2-3 or L5-S1 disc by performing a fusion at L3-4.

Dr. Rudin's September 2020 medical note was addressed. Dr. Rudin agreed that the note states that Claimant was currently describing right low back pain, bilateral leg pain and bilateral buttock pain. He had radiation into the bilateral buttock, bilateral post thigh, bilateral post calf, bilateral calf and bilateral dorsum of the foot. Claimant was rating his symptoms at 8 out of 10. It was also documented "the problem has worsened" and "the frequency is constant." Claimant also described the pain as "severe and aching." Aggravating factors included "all activities." Dr. Rudin clarified that this is what Claimant wrote and does not reflect the totality of the medical record. A new MRI was ordered in September 2020. Claimant was further instructed to take a Medrol Dosepak (steroids) and Ultram (pain reliever).

Claimant followed up on September 17, 2020. At that time, it was noted that he had a significant increase in his problems. Dr. Rudin added that in that past week it was the first time in six months that Claimant was bad. Claimant was also working a large number of hours per week before that.

Dr. Rushton is incorrect that there are no studies on these procedures; there are many studies, including in the *Pain Physician*, the preeminent journal in pain management. The procedure was rated by a Level 3 study that would be considered a "Fair" study. The study said it was safe. The results were said to be better than what is currently being done with epidurals and nerve blocks.

Scott Rushton, M.D., an orthopedic surgeon, testified by deposition on behalf of Asplundh.[2] Dr. Rushton evaluated Claimant in June 2020 and reviewed his pertinent medical records. Claimant provided a history of his work accident as well as his two lumbar surgical procedures. He stated that neither of the surgeries had provided him any benefit and that he wished that the surgeries had never been done. As of June 2020, Claimant had been working in a light duty status with a 25-pound lifting restriction for the past two months. He reported having had a recent lumbar spine injection.

Claimant complained of fairly significant pain in the lower back and pain in both legs at the DME. His leg pain was fairly diffuse and did not travel in any particular dermatome or nerve distribution. His back and leg pain were noted to be equal. Claimant's pain was daily in a thirty day period of time and he rated his pain at 8 to 9 out of 10 on a daily basis, on average. This can be considered to be fairly significant symptomatology.

On physical examination, Claimant had a very functional range of motion subjectively, despite having had a fusion procedure. He had no evidence of neurologic weakness. His

[2] Dr. Rushton's deposition was marked into evidence as Employer's Exhibit #1.

functional testing ability to recruit various muscles was normal and there was no sign of nerve root compression. Objectively, it was a normal exam of the lumbar spine.

Dr. Rushton reviewed an April 2019 MRI of the lumbar spine. It showed the L4-5 fusion. Notably, there was a complete absence of any significant stenosis. There was a minimal retrolisthesis of L3-4 with a mild disc bulge, new since the June 2017 MRI. There was really no significance to this, however; these are more incidental findings following a fusion. Dr. Rudin had confirmed that the fusion had taken and was solid in August 2019. There was no evidence of nerve root compression or clinically relevant structural pathology via MRI.

Dr. Rushton testified that stem cell injection treatment has recently been used by select practices around the country. However, stem cells are not really being used as there is no significant statistical data to support its application in the spine. There has been no FDA approval status on any of this regarding the spine. There is really no approved technique or valid research or science to support application in a person such as Claimant--a 27-year-old male with a failed fusion. It is experimental treatment. Dr. Rushton has not ever referred any patients for lumbar spine stem cell injections in his practice as a spine surgeon.

This is not reasonable treatment based on a number of factors. First, there is a lack of data and lack of statistically significant studies to validate the use in individuals. The lack of FDA approval and experimental nature of this procedure warrants further research and analysis before it is applied routinely. Secondly, Claimant has had no subjective benefit from any of the modalities provided to him. He has remained symptomatic with substantial pain levels, making this treatment all the more questionable.

Dr. Rushton agrees that Dr. Rudin's May 21, 2020 record indicates that Claimant was 65 percent improved with continued daily pain rated at 5 out of 10. He was working full time and

full duty without medications. However, none of this was consistent with Dr. Rushton's DME about two weeks later. Claimant provided a history that he wished he never had the surgery and had remained painful on an everyday basis, with an average pain level of 8 to 9 out of 10. Importantly, what is done in terms of treatment is not based or validated by subjective measures.

There is a dramatic difference between a peer-reviewed level 3 type of study with statistical significance compared to a simple white paper that is presented by a number of surgeons writing about two or three cases; these are typically prompted by the industry to be written. Dr. Rushton has not seen or is not aware of peer-reviewed scientific studies to support the use of stem cell injections in the lumbar spine. Stem cell therapy is used for other parts of the body such as the joints, elbows, shoulders and knees—soft tissue structures—mostly for tendinopathies. However, the same issue with not having a scientific basis still exists. The lumbar spine, however, does not have soft tissue elements. If one injects this material into the sacroiliac joint, there are really no soft tissue components within that joint to benefit from a regenerative-type of approach. The biomechanical loads and stress and strain on the lumbar spine makes the role of these technologies extraordinarily limited because they are not designed to restore biomechanics. Spines fail because of biomechanical forces and degenerative forces over time; a regenerative technology is not really going to apply any improvement to this type of architecture.

Additionally, there are complications and risks with any injection procedure, to include infection and disease transmission. Anything that is injected poses risks, to include disc space infections, epidural abscesses, spinal osteomyelitis and viral transmissions from autologous sources.

In Dr. Rushton's opinion, for these reasons, the stem cell injection procedure would not be medically reasonable or necessary for Claimant. Claimant essentially has failed back surgery

syndrome. No modalities that have been performed to date have improved him. Unfortunately, he has failed to have a sustained pain-free interval after any invasive treatment, and in such a case, the chances of any further improvement with further invasive modalities is horrifically low.

On cross examination, Dr. Rushton agreed that after the 2018 surgery, Claimant continued to rate his pain complaints between 8 and 9 out of 10. He was then referred for injections; he did receive some relief from the injections.

Dr. Rushton agreed that it is reasonable to try to avoid operating on patients when possible. He agreed that a surgery, like any invasive procedure, also provides risks, including infection. However, Dr. Rushton added that these are surgeries that have stood the test of time. Dr. Rushton agreed that there are treatments and procedures available today that were not available five, ten or fifteen years ago.

Dr. Rushton further agreed that just because a treatment is not mentioned in the DEHCPGs this does not mean that it is not reasonable; however, he clarified that, to be reasonable, there also needs to be scientific support from peer-review analyses, a level of significance required to mandate the treatment as well as FDA-approval status.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

When an employee has suffered a compensable injury, the employer is required to pay for reasonable and necessary medical "services, medicine and supplies" causally connected with that injury.[3] "Whether medical services are necessary and reasonable or whether the expenses are incurred to treat a condition causally related to an industrial accident are purely factual issues

[3] DEL. CODE ANN. tit. 19, § 2322.

within the purview of the Board."[4] Because Claimant has filed the current petition, he has the burden of proof.[5]

In this case, the dispute centers on the March 3, 2020 stem cell injection procedure recommended by Dr. Rudin, and whether that treatment was reasonable and necessary in relation to Claimant's compensable lumbar spine injury. After a thorough review of the evidence, I conclude that Claimant has not met his burden to show that the March 3, 2020 stem cell injection procedure represents reasonable and necessary treatment.

Here, I was not convinced by Dr. Rudin that the lumbar spine stem cell injection treatment was reasonable or necessary. Dr. Rudin testified that Claimant's lumbar spine condition in early 2020 called for either a spinal fusion surgery (Claimant's third lumbar surgery) or lumbar stem cell injections; and, given a choice, Claimant had opted for the injections over surgery. Claimant wanted to avoid another surgery, which is not surprising as he told Dr. Rushton that neither of his lumbar surgeries had been helpful.[6] Dr. Rudin admitted later in his testimony that he also preferred that Claimant have the lumbar stem cell injections in lieu of a third spinal surgery. Dr. Rudin further testified that Claimant had in mind that if the lumbar stem cell injections failed, he would just have the fusion surgery anyway, so he elected to try the injections first. While I accept the reasons why a third lumbar surgery might want to be avoided, I was not convinced that trying lumbar stem cell injections was a reasonable alternative treatment option.

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[4] *Bullock v. K-Mart Corporation*, No. 94A-02-002, 1995 WL 339025 at *3 (Del. Super. Ct., May 5, 1995).
[5] DEL. CODE ANN. tit. 29, § 10125(c).
[6] While it is understandable that Claimant wished to avoid a third lumbar surgery, Dr. Rushton was persuasive that the proposed fusion surgery represented a tried and true treatment whereas a stem cell injection treatment for the lumbar spine does not.

Here, I found Dr. Rushton convincing that there are a number of reasons why stem cell treatment, particularly when administered to address the lumbar spine, is not reasonable. There has been no FDA approval regarding the application of this treatment to the spine. Dr. Rushton added that there is no approved technique, valid statistical research or science to support this sort of application. Thus, it does represent experimental treatment. Dr. Rushton testified that he has treated thousands of spinal patients over the years, and has never referred a single patient for lumbar stem cell injections in his practice. He further noted that while the problem of a lack of scientific basis for the treatment still exists, stem cell treatment has been used for tendinopathies in soft tissue structures such as the joints, elbows, shoulders and knees. Dr. Rushton was convincing that there is no significant statistical data to support the use of stem cell injections in the lumbar spine. Importantly, the lumbar spine does not have these soft tissue elements within the joint to benefit from a regenerative-type of approach. Dr. Rushton testified that biomechanical loading and the normal stress and strain on the lumbar spine limits the role of this treatment because the treatment is not designed to restore biomechanics. He added that spines will fail because of biomechanical and degenerative forces over time, and such a regenerative technology will not apply any improvement to the spine's actual architecture.

Additionally, Dr. Rushton was persuasive that Claimant's failed treatment thus far also makes this treatment approach unreasonable and unnecessary. Claimant has had no significant subjective benefit from any of the modalities provided to him. He has remained highly symptomatic with substantial pain levels, making the recommendation for this treatment all the more questionable. Further, while not entirely definitive in terms of reasonableness and necessity of treatment, it is still notable that the stem cell treatment itself did not appear to have been successful here, as Dr. Rushton opined. I was not convinced that these treatments were

significantly helpful. Claimant testified that he was unable to do anything for approximately three weeks after the March 3, 2020 stem cell treatment; less than two months later, when he followed up with Dr. Rudin on May 21, 2020, he reported that his symptoms were unchanged, and that he had constant lumbar pain that was aggravated by all of his activities. While Dr. Rudin noted that there had been 65 percent improvement with the treatment, I was not convinced that Claimant was not suffering from essentially the same lumbar condition that he reported prior to this stem cell injection treatment. Claimant did repeatedly testify that he was happy that he had this treatment because he felt that he could work longer hours after the procedure. However, it appeared that before this treatment, Claimant's regular lumbar condition allowed him to at times work very long hours and a shorter number of hours other times. It also appeared that this was again the case after the stem cell injection treatment. In any case, I was not convinced that Claimant's condition improved after the stem cell injection treatment. In fact, Claimant reported that he was in essentially terrible condition as of Dr. Rudin's September 2020 visit with new significant symptoms and an inability to even walk at times due to pain. Claimant required a new MRI study, due to new and significant subjective complaints. Notably, however, instead of following up with lumbar stem cell injections, Claimant was provided with another type of lumbar injection to quiet his condition. It seems that if the March 2020 lumbar stem cell injections were very successful, the treatment perhaps would have been repeated in September 2020. For all of these reasons, I was not convinced that the treatment itself was significantly successful.

Finally, I note that Dr. Rushton's testimony also reflected that the risks associated with receiving injections in general was not worth it here, particularly given all of these factors that pointed against providing stem cell injections to the lumbar spine in the first instance.

In sum, I found Dr. Rushton's opinion more persuasive than Dr. Rudin's regarding the compensability of the March 3, 2020 lumbar spine stem cell injections. Thus, I conclude that Claimant has failed to meet his burden to prove that the treatment was reasonable or necessary. Therefore, Claimant's petition for DACD is **DENIED**.

STATEMENT OF THE DETERMINATION

Accordingly, for the reasons stated above, Claimant's petition for DACD regarding the March 3, 2020 stem cell injection procedure is **DENIED**.

IT IS SO ORDERED this 4TH DAY OF DECEMBER, 2020.

INDUSTRIAL ACCIDENT BOARD

KIMBERLY A. WILSON
Workers' Compensation Hearing Officer

Mailed Date: 12-17-2020 CR
OWC Staff

JULIUS BAYNARD, Employee,
v.
AE QUESENBERRY, Employer.

INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

Hearing No. 1483348

Mailed Date: March 18, 2020
March 17, 2020

DECISION ON PETITION TO DETERMINE 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 December 19, 2019, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

ANGELIQUE RODRIGUEZ

VINCENT D'ANNA

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

APPEARANCES:

Natalie Wolf, Esquire, Attorney for the Employee

Christopher T. Logullo, Esquire, Attorney for the Employer

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NATURE AND STAGE OF THE PROCEEDINGS

Julius Baynard ("Claimant") filed a Petition to Determine Compensation Due ("DACD") on May 21, 2019 seeking a finding that he suffered a disc injury to his lumbar spine in a work-related accident on February 13, 2019. Claimant seeks compensation for medical treatment for the lumbar disc injury, including a stem cell replacement procedure with Dr. Rudin. Claimant also seeks total disability benefits from May 6, 2019 and ongoing. The Employer, AE Quesenberry Carpentry, has acknowledged a sprain/strain injury to the low back in a work-related accident on February 13, 2019, but it argues that the diagnosis and treatment with Dr. Rudin for a lumbar disc injury was not reasonable, necessary, or causally related to the work accident.

A hearing was held on Claimant's petition on December 19, 2019. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

The parties stipulated to the following facts: Claimant Julius Baynard was involved in a work accident on February 13, 2019 while ripping up floor boards during the course of his employment. The Employer through its carrier Liberty Mutual acknowledged a low back strain and sprain and paid without prejudice for medical treatment for a brief period following the injury. The Employer also paid for total disability benefits from February 19, 2019 through May 5, 2019. The total disability payments were made without prejudice based on an average weekly wage of $462.84 and a compensation rate of $308.56 per week. Claimant filed a DCD petition seeking an agreement for the February 13, 2019 work injury; recognition of compensable injuries consisting of an annular tear at L5-S1, disc displacement, and radiculopathy; continued medical treatment, including stem cell injection and platelet lysate epidural injection therapy performed November 11, 2019; and total disability benefits from May 6, 2019 and ongoing. The issues presented for

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decision at the hearing are: (1) the nature and extent of Claimant's injury; (2) whether the continued medical treatment delineated in the Medical Bill Exhibit (Claimant's Exhibit 1), including stem cell treatment, is reasonable, necessary, and causally related to the work

accident; and (3) whether Claimant is entitled to total disability benefits from May 6, 2019 forward.

Bruce J. Rudin, M.D., a board-certified orthopedic spine surgeon, testified on behalf of Claimant Julius Baynard. Dr. Rudin began treating Claimant on April 10, 2019 upon referral from WorkPro. Claimant provided a history of being 30 years old and injuring his low back during demolition work on February 13, 2019. Claimant had undergone multiple imaging tests, including an MRI, and received six weeks of physical therapy and medications. Claimant described being in constant back pain with a pain level of nine out of ten. He denied any prior low back pain during the previous year. He had injured himself in a 2008 motor vehicle accident, but that injury had resolved. Claimant also acknowledged a 2017 work incident in which a box fell on him. He did not receive any treatment related to the 2017 event. Dr. Rudin observed that Claimant was in terrible condition at the first visit. He was crying. He was unable to pick up his daughter or put on his shoes. He could not work. Dr. Rudin provided Claimant with a total disability note. Dr. Rudin suspected a stress fracture in the spine at L3-4 and focused on this at first. He noted that this would be a typical source of pain for a young person. An MRI was unimpressive but showed a hint of fracture, leading Dr. Rudin to order a CT scan. The stress fracture was confirmed by CT scan. However, a nerve block to L3-4 performed to confirmed the area as a source of pain was only thirty percent helpful. This led Dr. Rudin to question the stress fracture as the source of Claimant's severe pain. A high dose prednisone and deep tissue massage also failed to help. Dr. Rudin testified that the stress fracture seen on diagnostic testing was old, so he began to suspect the L3-4 disc as the problem instead. He felt that Claimant was eligible for a discogram according to the Delaware

practice guidelines. He described Claimant as a "poster child" for ordering the test. Another injection was tried at L3-4 to see if that would help, but after it proved ineffective, Dr. Ginsberg proceeded to perform a provocative discogram. The discogram produced no pain or positive findings at L3-4 and some indication of degeneration but no pain at L4-5. However, Claimant screamed with ten out of ten concordant pain when the L5-S1 disc was put under low pressure. A post-discogram CT scan showed degenerative disc changes at L5-S1. At a follow up visit on August 6, 2019, Dr. Rudin diagnosed Claimant with a suspected circumferential annular tear at L5-S1 based on the positive discogram. Dr. Rudin explained that the most common type of annular tear is radial, going from the center out, but a circumferential tear goes around the outside of the annulus. According to Dr. Rudin, Claimant was eligible for surgery under the practice guidelines, based on his severe symptoms six months after the injury and his lack of response to conservative care.

To avoid surgery, Dr. Rudin recommended Claimant undergo a regenerative medicine "stem cell" protocol. Claimant underwent the procedure two months before the hearing. Dr. Rudin asserted that Claimant is feeling much better now in comparison to before the regenerative therapy. The protocol used involves removing stem cells, concentrating them, and re-injecting them into the spine. Dr. Rudin described this process as the first truly new, promising type of care for the spine since he was in medical school. Dr. Rudin partners with another physician to perform the procedure. The consulting physician is an expert in regenerative medicine and has been performing the procedure for twelve years. Dr. Rudin asserted that 65 to 70 percent of patients who are otherwise candidates for spine surgery show improvement with regenerative medicine and avoid surgery. Dr. Rudin differentiated the process he does from the "stem cell" procedures performed by several chiropractors and primary care physicians in Delaware who are not spine experts. He

described himself as "offended" by them calling themselves experts in this procedure after a week of training. Dr. Rudin also insisted that Dr.

Brokaw was incorrect in stating that no studies have been done on the use of regenerative medicine in the spine. He testified that a paper in the journal of the American Society of Interventional Pain Physicians summarizes all the studies about regenerative medicine in the spine conducted so far and concludes there is level III research evidence in support of using stem cell therapy for the spine. Dr. Rudin insisted that there is almost no downside to trying regenerative medicine other than some pain from inflammation due to the needles. He again asserted that a large percentage of patients improve after undergoing the procedure. In addition, the regenerative medicine process is much less expensive than surgery at about $10,000 and the patient walks away from the procedure with only two band-aids. The procedure is safe, cheap, and easy to do, and the patient can still undergo surgery later if necessary. Dr. Rudin compared regenerative medicine to spine surgery, which costs $125,000 and puts the patient out of work for four months. In addition, surgery patients have less than a fifty percent chance of returning to their previous job even if the surgery improves their symptoms. Dr. Rudin testified that the outcomes for stem cell treatment have been durable, lasting for years. The patient gets the full benefit of the procedure within about three months. Dr. Rudin further testified that the current Delaware practice guidelines are ten years old, and he believes a new version of the guidelines will include regenerative medicine. Dr. Rudin disagreed with Dr. Brokaw's testimony that the use of regenerative therapy was experimental. He acknowledged that the procedure used on Claimant is not FDA approved, but this is because the procedure involves harvesting the patient's own stem cells and reinjecting them. As a result, the procedure is outside of the FDA's jurisdiction. The FDA only regulates stem cell therapy where purchased stem cells are used. Dr. Rudin testified that he has sent patients to out-of-state clinics for years to have regenerative therapy

done, but the procedure is now being performed in Delaware. Dr. Rudin emphasized that medicine changes over time. The reputation of stem cell treatments has been harmed by the abuse in the use of regenerative therapy. He insisted that the new practice guidelines will try to avoid these abusive practices from occurring in Delaware workers' compensation cases.

Dr. Rudin reviewed the medical bill exhibit (Claimant's Exhibit 1). He confirmed that all the treatment represented was reasonable, necessary, and related to the work injury. The treatment, including bills from First State Orthopaedics, physical therapy, a discogram, and the regenerative medicine therapy, all occurred after the work injury. Dr. Rudin explained that the diagnostic discogram performed by Dr. Ginsberg tested three levels, whereas the discogram done to inject the stem cells was performed at one level. The stem cell procedure cost about $15,000 including the discogram. Dr. Rudin confirmed that Spine Care Delaware covers the facility charges for treatment with Dr. Ginsberg and the stem cell procedure. Professional fees are listed in the FSO bill. Dr. Rudin opined that, but for the accident on February 13, 2019, Claimant would not have needed the treatment covered by the medical bills. He opined that the treatment was all related to the work accident.

Dr. Rudin acknowledged that Claimant may have had degeneration in his spine before the work accident, but the degeneration was asymptomatic. The work accident made the condition symptomatic. He noted that Claimant was performing heavy duty work prior to the work accident. Dr. Rudin denied that Claimant had just a sprain/strain injury from the work accident. He noted that Claimant was in terrible clinical condition when he first saw Dr. Rudin two months after the accident. Dr. Rudin insisted that something other than a sprain/strain was causing the continuing pain. The injections provided at L3-4 were not helpful for Claimant, because L3-4 was not the pain generator. Dr. Rudin again pointed to the ten out of ten pain response at L5-S1 during the

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discogram. The radiologist reading the CT scan did not find an annular tear at L5-S1, but he stated that the disc was abnormal. Dr. Rudin suspects Claimant has a circumferential annular based on the positive response to the discogram at that level. Dr. Rudin also testified that part of the treatment protocol was to "seal" a circumferential tear.

On cross-examination, Dr. Rudin testified that this is the first time he has testified in person at a hearing in 28 years of practice. He is planning to retire from performing surgery but still sees injured workers. Claimant told Dr. Rudin about a 2008 motor vehicle accident that resulted in a low back injury and leg pain. Dr. Rudin confirmed a reference in Dr. Lifrak's 2010 records to a rollover accident. Dr. Rudin had not seen Dr. Xing's records for treatment after the 2010 accident. He did not believe Dr. Lifrak's 2010 report rating permanent impairment to the low back was relevant to the current low back injury and symptoms. Dr. Rudin asserted that a person with a permanent impairment rating can still be fully functional, performing heavy duty work, and not receiving any treatment or medications. Dr. Rudin focuses on the treatment record from the year preceding the work accident to assess whether Claimant had back problems and was missing work, taking medications, or receiving treatment for a back injury. Claimant's current pain is in the back, with no radiation to the legs. Diagnostic studies showed a fracture at L3-4 but, according to Dr. Rudin, L3-4 turned out not to be the source of Claimant's pain. Dr. Ginsberg saw Claimant on June 12, 2019 and did not see a lot of pathology on the MRI. He did not believe it showed a clear annular tear. When Dr. Rudin sent Claimant to Dr. Ginsberg for a discogram, he believed Claimant had discogenic pain at L3-4. The discogram and CT scan in July 2019 were negative for pain at L3-4. Both L4-5 and L5-S1 showed degenerative changes but no annular tears were visible. Dr. Rudin insisted that the absence of an annular tear finding on the CT scan was actually consistent with a circumferential tear. Dr. Rudin thought the pain at L5-S1 found during the discogram could

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be coming from the degenerative disc or from an annular tear, but he noted that degenerative discs are not typically painful on a discogram. The discogram/CT study must show an abnormal disc and a positive pain response for that level of the spine to be treatable. Dr. Rudin offered Claimant two choices, surgery or regenerative medicine. Claimant did not want to undergo surgery. Dr. Rudin has seen Claimant twice since the regenerative therapy, which took place on November 11, 2019. On November 18, 2019, Claimant reported seven out of ten pain and a post-injection flareup in symptoms. On December 5, 2019, Claimant's pain level was a six out of ten. Dr. Rudin observed that Claimant was much improved clinically at that exam. Claimant was able to put his clothes on and sit longer than before. Dr. Rudin still has not released Claimant to return to work and will not consider releasing him until three months after the procedure.

Dr. Rudin was asked to comment on a study published in the journal of the American Society of Interventional Pain Medicine in 2019. The article reviewed spinal research literature in regard to regenerative medicine. The discussion section of the article indicated that the studies reviewed provided fair evidence about the efficacy of regenerative medicine. Dr. Rudin noted that regenerative medicine was found to be at least as good as facet injections and epidurals for treatment of the spine. Dr. Rudin agreed that no high quality randomized control studies were reviewed. The reviewers gave more weight to better quality studies in reaching their conclusions. Dr. Rudin insisted that this article shows that Dr. Brokaw is wrong in stating that no studies exist about regenerative medicine in the treatment of the spine. Dr. Rudin testified that his own experience is that 70 percent of his patients that have used regenerative medicine have been able to avoid surgery. The procedure used at FSO is the best protocol for regenerative medicine in the spine.

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On re-direct, Dr. Rudin testified that he will evaluate Claimant three months post-procedure to determine if Claimant is capable of working or undergoing an FCE. He insisted that he must see Claimant to determine his work capability. He criticized Dr. Brokaw for stating that Claimant could return to work without examining him a second time. Dr. Rudin expressed his excitement about regenerative medicine as something new to offer spine patients. His hope is that this will help a lot of patients avoid surgery and the associated costs and impairment.

Under questioning by the Board, Dr. Rudin acknowledged that no long-term studies are available yet to determine the durability of the regenerative medicine treatment. Dr. Rudin pointed out that spine surgery usually requires years of followup care and surgery. The most recent documentation of back pain in Claimant's medical records that pre-dated the work accident was in 2017 after a box fell on Claimant. Dr. Rudin saw no evidence of treatment for back pain after that incident. Dr. Rudin insisted that Claimant's treatment has complied with the Delaware practice guidelines "by the book." During the discogram, the patient is asked whether the procedure reproduces the pain he has felt since he was injured. A positive response is considered concordant pain. If the Claimant experiences a new type of pain during the discogram, this is considered discordant pain. Dr. Rudin determined whether the work accident caused Claimant's symptoms by looking at how normal Claimant was prior to the accident. Dr. Rudin believes it is probable Claimant has a circumferential annular tear but this has not been proven by diagnostic studies. Dr. Rudin confirmed that Medicare and BCBS do not pay for regenerative medicine/stem cell treatment at this time, but he believes eventually insurance companies will pay when a history of longterm recovery has been shown. He noted that some insurance companies are paying for specific uses of stem cell therapy such as for tennis elbow. Double blind studies are unlikely to be performed because patients do not want to agree to no treatment.

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On additional cross-examination, Dr. Rudin testified that no insurance companies pay for regenerative medicine to the spine, so far as he knows. They do pay for the treatment in other joints. Some companies who directly pay for medical treatment, such as Amazon, do pay for regenerative medicine to the spine.

Claimant Julius Baynard testified that he worked for AE Quesenberry as a carpenter's assistant and laborer in February 2019. He had worked for the company for a little over a month. On February 13, 2019, Claimant was doing demolition work on a shed. As he applied extra force to remove a floorboard, he felt a pull in his back. He did not seek treatment immediately, because he thought it was just normal pain due to the heavy work he performs. After the injury, he did lighter work for a few days. Claimant felt bad pain in his back on February 18, 2019 when he bent down to spackle. A supervisor sent him to WorkPro for evaluation. Dr. Covington at WorkPro provided medications and physical therapy. None of the treatment helped. Dr. Covington also tried to place Claimant on light duty, but the Employer did not have any light duty work available. Claimant has not worked since February 18, 2019. Dr. Covington eventually sent Claimant to see Dr. Rudin. Dr. Rudin referred Claimant for conservative care. Some medications were helpful but Claimant experienced constant pain and limits in his activities. Claimant testified that he can take a lot of pain, but this pain was constant no matter what he did. He was in pain both sitting and standing. Claimant did not want to undergo surgery at the age of 31, so he chose to undergo the stem cell treatment offered by Dr. Rudin. No hospitalization was required after the procedure. Since the stem cell treatment, Claimant feels much better. His pain level is now three to four out of ten, and he can pick up his daughter and do activities he was unable to do before the treatment. Claimant still has some stiffness in his

back. Claimant hopes to return to work but does not want

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to do a labor job anymore due to the risk of further injury. Claimant had no physical restrictions before the work accident.

Claimant confirmed that he was involved in a bad motor vehicle accident in 2010 in which he suffered multiple injuries. He had to learn to walk again after the accident. He denied any additional treatment after June 2010. Claimant was involved in a motorcycle accident in 2013. He injured his head. Claimant was released after a visit to the emergency room. In 2017, a box fell on his head at work. His boss made him go for treatment after the incident. Claimant denied any treatment for two years prior to the work accident in February 2019. Claimant did not recall any accident in 2008.

On cross-examination, Claimant confirmed that he has been involved in three motor vehicle accidents since he became an adult. He was a passenger in the January 1, 2010 MVA when the vehicle rolled over and hit a tree. Claimant treated with Dr. Lifrak. He had head pain and pain throughout his spine after the accident. Claimant did not treat after June 2010 although Dr. Lifrak noted that he still had subjective pain and muscle spasms at that time. Dr. Lifrak rated permanency for the spine injury. Claimant also had seen Dr. Xing and undergone physical therapy after the 2010 accident. The motorcycle accident occurred on March 3, 2012. Claimant was thrown from his bike and suffered a head injury. He denied a back injury. Claimant recalled an accident in high school when he was "T-boned" by a taxi. Claimant began working for QE Quesenberry in January 2019.

Dr. Rudin documented a pain level of eight to nine out of ten leading up to the stem cell procedure. Claimant reported a pain level of seven shortly after the procedure and a pain level of six on a visit to Dr. Rudin in December 2019. Claimant's pain level is now a three. Claimant has not returned to work yet and will not do so until the doctor and the attorney tell him he can.

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Claimant does not want to undergo back surgery. Dr. Rudin told Claimant the stem cell procedure was experimental and insurance companies do not agree to pay for the procedure.

On re-direct, Claimant testified that he had no difficulty working for two years prior to his employment with QE Quesenberry in January 2019.

Under questioning by the Board, Claimant testified that he wants to return to a less physical job. He did not want to get surgery due to the long recovery period. He has young children at home who want him to be active with them. He has four children and admits to being behind in his child support.

Jason Brokaw, M.D., a specialist in physical medicine and pain management, testified by deposition for the Employer, AE Quesenberry Carpentry. (Employer's Exhibit 1) Dr. Brokaw examined Claimant on April 23, 2019 and reviewed medical records related to the case. Claimant provided a history of injuring his low back on February 13, 2019 while pulling up floorboards as he was demolishing a shed. Prior to the April DME, Claimant had treated at an urgent care center and occupational medicine clinic and seen a spine surgeon, Dr. Rudin. Dr. Brokaw has also reviewed MRIs, CT scans, and discography reports performed over the course of 2019. None of the diagnostic studies showed any posttraumatic findings such as fractures, dislocations, herniations, or tears. They showed minimal degenerative arthritis findings. Claimant has a congenital pars defect at L3-4, but this has not caused any slippage or spondylolisthesis. Dr. Brokaw described this as a coincidental finding that did not correlate to Claimant's type of pain. Claimant had received two diagnostic injections from Dr. Ginsberg. The first injection at L3-4 had a negative diagnostic and therapeutic response. Dr. Ginsberg then performed left-sided lumbar

facet injections at multiple levels in the lower lumbar spine. The second injection also had a negative diagnostic and therapeutic response. The response to the injections indicated these areas

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were not causing Claimant's pain. At the DME in April 2019, Claimant described ongoing pain in the left lower lumbar region of his spine. One episode of left leg nerve pain was brief and went away quickly. Since then, his pain had been in one area of the left lower lumbar region.

Claimant told Dr. Brokaw he had undergone treatment for low back pain after a motor vehicle accident around 2010. At that time, he was informed that he had disc herniations and a bulge. He attended therapy and chiropractic treatment, learning how to walk again. His pain resolved after about a year and he had no ongoing pain until the new injury occurred in February 2019. Dr. Brokaw relied on the history provided by Claimant, because he had not seen medical records that predated the work accident. Upon examination, Dr. Brokaw observed that Claimant weighs 339 pounds and qualifies as morbidly obese. Claimant exhibited mild leaning behavior, leaning off to the right side due to pain complaints in his left low back region. He was also leaning slightly forward. Dr. Brokaw noted tenderness to palpation at the left lumbosacral junction. Claimant had increased pain with flexion and left rotational maneuvers. Left-sided lumbar facet maneuvers were equivocal. Claimant had decreased range of motion in his lumbar spine. A neurologic exam was normal other than hypoactive ankle jerk reflexes. The examination revealed that Claimant was hurting in the left lower lumbar regions, worse with flexion, left rotation, and side bending and extension. Overall, these exam findings were most consistent with a muscular etiology, although Dr. Brokaw acknowledged that the lumbar facet maneuvers were equivocal in nature. The only objective finding was the hypoactive ankle jerk reflex, but this was not related to the lumbar spine. Dr. Brokaw assessed Claimant with a lumbar sprain in relation to the work injury on February 13, 2019. Dr. Brokaw also assessed Claimant with pre-existing disease of the lumbar spine, which included disc bulges and herniation that required treatment over 10 years ago due to a motor vehicle accident. A pars intra-articular fracture in the L3 region was a coincidental finding

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that did not correlate to Claimant/s symptoms. Dr. Brokaw diagnosed Claimant with a lumbar strain and sprain based on the mechanism of injury in the February 2019 work accident, the treatment claimant had received to date, diagnostic studies, and clinical examination results. Dr. Brokaw asserted that Claimant did not have any posttraumatic findings in his lumbar spine. Claimant did not even have significant arthritis. Dr. Brokaw felt that the mechanism of injury and the way claimant hurt when he moved was consistent with a muscular strain only.

Dr. Brokaw opined that the lumbar fusion surgery and the regenerative medicine procedure recommended by Dr. Rudin in August 2019 were not reasonable and necessary procedures for Claimant's work accident and injury. Dr. Rudin was recommending that Claimant undergo one of these procedures. Dr. Brokaw disagreed with the recommendation for surgery because the diagnostic tests did not show an annular tear or any other significant structural abnormality that would be amenable to surgery. Dr. Brokaw asserted that the discography was a subjective study and was not corroborated by the follow-up CT scan on the same day of the procedure or the diagnostic studies completed before the discogram. He did not believe this subjective test result was a good predictor of surgical success. Dr. Brokaw confirmed that the discogram was interpreted to be negative at L3-4 and negative at L4-5 but positive and concordant at L5-S1. The patient was sent for a CT scan immediately after the discogram to look for something that correlated with the pain at the L5-S1 level. Dye was placed in the middle of the disc to look for leaking out of a tear on the CT scan. No leaking was found. Dr. Rudin suspected a circumferential annular tear but no annular tear was ever seen on

the diagnostic studies of Claimant. Dr. Brokaw considered this a very equivocal clinical suspicion. He insisted that the diagnostic tests did not reveal any pathology amenable to a major surgery such as a lumbar fusion. Dr. Brokaw also testified that a main indication for surgery is the failure of conservative care. He noted that Claimant was only six

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months out from a soft tissue injury, and he felt that Claimant did not have good concordance between his objective findings and his subjective findings. Dr. Brokaw also believed that Claimant was a poor surgical candidate because of his obesity, his tobacco use, and marijuana use.

Dr. Brokaw also opined that the stem cell treatment was not reasonable for Claimant's condition. Dr. Brokaw described stem cell treatment as experimental in nature. Such treatments have been shown to be effective in certain conditions, especially around the knee and the shoulder regions. However, Dr. Brokaw testified that there are no good studies showing long-term benefit of stem cells in the lumbar spine region. He insisted that no control studies show a benefit of stem cell treatment in the lumbar spine for conditions such as Claimant has. Dr. Brokaw did not believe stem cell treatment should be performed in a workers' compensation setting. It would only be reasonable in an academic experimental setting with oversight from an investigational review board. Dr. Brokaw did not believe the stem cell treatment should be performed, because it was experimental and unlikely to benefit Claimant. In his opinion, Claimant would not be a candidate for the stem cell treatment in an academic experimental setting, due to Claimant's co-morbidities. Claimant's obesity and his workers' compensation status would preclude him from the initial investigational experiments for stem cell treatment. If such treatments proved effective and were published, Claimant might be a secondary candidate. That would not occur until years from now due to the lack of current good literature to support stem cell treatment in the lumbar spine.

Dr. Brokaw recommended weight loss, mobilization through aggressive activation-based physical therapy, and medications such as anti-inflammatories and muscle relaxers to treat Claimant's lumbar strain and sprain. Dr. Brokaw would not recommend chronic opioid medication, and he would not recommend any further aggressive procedures such as pain management injections or any other forms of surgical procedures. As of April 2019, Dr. Brokaw

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recommended two to three more months of light to medium duty work restrictions. After Claimant received appropriate treatment, he would eventually be capable of returning to full-time, full duty work without restrictions. Dr. Brokaw acknowledged that Claimant may have been disabled from work for the first couple of weeks after an acute strain such as he suffered. After that, he probably could have done sedentary to light duty work as he started to heal. Dr. Brokaw would not have totally disabled Claimant from work beyond two weeks after the work accident.

On cross-examination, Dr. Brokaw confirmed that Claimant was working full duty as a carpenter before his injury. Claimant had no restrictions on his physical capabilities to Dr. Brokaw's knowledge. He also understood that Claimant had not required any medical treatment for his low back for several years prior to the work accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Compensability

Claimant Julius Baynard seeks a finding that he suffered a lumbar disc injury in a work accident that occurred on February 13, 2019 and that the treatment for this injury, including regenerative medicine with Dr. Rudin, was reasonable, necessary, and causally related to the work accident. Claimant also seeks total disability from May 6, 2019 onward. The Employer, AE Quesenberry Carpentry, acknowledged a

sprain/strain injury to the low back in a work accident on February 13, 2019; however, the Employer contends that the diagnosis and treatment for a lumbar disc injury was not reasonable, necessary, or causally related to the work accident. Because this is Claimant's petition, he must prove his claims by a preponderance of the evidence. *See Lomascolo v. RAF Industries*, No. 93A-11-013, 1994 WL 380989, at *2 (Del. Super. Ct. June 29, 1994).

Under Delaware law, an employer is obligated to pay for reasonable and necessary medical expenses related to a work injury. *See* DEL. CODE ANN. tit. 19, § 2322; *Turnbull v. Perdue Farms*,

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C.A. No. 98A-02-001, 1998 WL 281201, at *2 (Del. Super. Ct. May 18, 1998), *aff'd*, 723 A.2d 398 (Del. 1998). In determining causation in an identifiable industrial accident, the "but for" standard of causation is applied. *See State v. Steen*, 719 A.2d 930, 932 (Del. 1998); *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992). "The accident need not be the sole cause or even a substantial cause of the injury. If the accident provided the 'setting' or 'trigger,' causation is satisfied for purposes of compensability." *Reese*, 619 A.2d at 910.

The Board first considers the nature of Claimant's injury in the February 13, 2019 work accident. The accident itself appears to be uncontested. After weighing the evidence, the Board finds that Claimant has proved by a preponderance of the evidence that he injured his lumbar disc in the February 13, 2019 work accident. The Board finds Dr. Rudin's opinion that Claimant suffered a lumbar disc injury at the L5-S1 level in the accident to be more credible and persuasive than that of Dr. Brokaw. *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). Dr. Rudin is an orthopedic spine surgeon with specialized training and extensive experience in the evaluation and treatment of spine injuries, whereas Dr. Brokaw does not perform spine surgery or specialize in the treatment of the spine. The Board accordingly gives Dr. Rudin's opinion additional weight in relation to Claimant's low back diagnosis. In addition, the failure of conservative care such as physical therapy and medications to alleviate Claimant's severe low back symptoms suggests a more significant injury than the back strain/sprain injury diagnosed by Dr. Brokaw. The potential for a more serious injury was recognized by the doctor who treated Claimant initially, because the doctor referred Claimant to see Dr. Rudin for evaluation within two months of the accident. Dr. Rudin then observed at his initial evaluation on April 10, 2019 that Claimant was in terrible

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condition, with constant back pain and a pain level of nine out of ten. Dr. Rudin initially suspected a stress fracture at L3-4 as a source of pain, but when an injection to this area did not provide adequate relief, he began to consider a disc injury. A provocative discogram was performed to investigate further for discogenic pain. The discogram produced no concordant pain at L3-4 or L4-5, but produced ten out of ten concordant pain at L5-S1 under low pressure. A post-discogram CT scan showed degenerative disc changes at L5-S1. Dr. Rudin explained that concordant pain is found when pressure to a disc during the discogram produces the same symptoms that the patient had been complaining about in seeking treatment. Dr. Rudin cited the discogram findings in concluding that the source of Claimant's pain was the L5-S1 disc. The Board finds Dr. Rudin's assessment of the test results and diagnosis of Claimant with a disc-related injury, not just a sprain/strain injury, to be persuasive.

Dr. Rudin suspects that Claimant's pain is coming from a circumferential tear to the annulus, given the discogram result and the absence of a radial tear appearing on the CT scan. He noted that a circumferential tear would not

show up on a CT scan. Dr. Rudin also acknowledged that the pain could be coming from degenerative changes in the disc, although he noted that degenerative discs typically were not painful on a discogram. Dr. Rudin insisted that any degenerative condition in Claimant's lumbar spine was asymptomatic before the work accident and the work accident made it symptomatic. Dr. Rudin's opinion relating Claimant's current lumbar spine pain to the work accident is supported by the medical records. The records do not document any low back pain or dysfunction for several years preceding the work accident. The most significant previous injury to the low back occurred in a 2010 motor vehicle accident, nine years ago. The Board further notes that, at the time of the February 2019 injury, Claimant was working in a very physical job with QE Quesenberry. Also, Claimant provided unrebutted

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testimony that he did not have any physical restrictions prior to the accident. After the accident, Claimant was unable to do his job and described significant symptoms and functional problems such as difficulty sitting and standing and an inability to pick up his daughter. These severe symptoms continued through conservative treatment with WorkPro and then with Dr. Rudin's office. Based on the evidence presented, the Board is satisfied that Claimant suffered a lumbar disc injury at L5-S1 on February 13, 2019 that caused severe pain and dysfunction and led to his treatment with Dr. Rudin.

The Board next considers whether the treatment with Dr. Rudin, in particular the regenerative medicine procedure, was reasonable and necessary treatment for Claimant's work-related lumbar spine injury. The Board chooses to rely on Dr. Rudin's opinion that the treatment provided to Claimant was reasonable and necessary for his work-related low back injury. Claimant was continuing to have severe symptoms when he first saw Dr. Rudin on April 10, 2019, two months post-injury. Therefore, Dr. Rudin was justified in ordering additional conservative treatment such as deep tissue massage and sending Claimant for injections with Dr. Ginsberg in an attempt to further diagnose and treat Claimant's symptoms. When these treatments did not succeed, Dr. Rudin also was reasonable to request a provocative discogram to assess whether a lumbar disc injury was the source of Claimant's pain and dysfunction. The strong positive "concordant" response at L5-S1 shifted Dr. Rudin's attention from a suspected disc problem at L3-4 to a confirmed disc problem at L5-S1. Dr. Rudin asserted that Delaware's treatment guidelines would allow for surgical intervention in this case, six months post-injury. However, the Board concurs with Dr. Rudin and Claimant that spine surgery for a 31-year-old individual should be avoided if at all possible. Dr. Rudin thus offered a regenerative medicine treatment for

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Claimant's disc injury instead of surgery, and Claimant decided to go forward with the treatment in November 2019.

The Employer strongly opposes the compensability of the regenerative medicine or "stem cell" procedure because it considers the procedure experimental in nature. Dr. Rudin admitted that typically insurance companies do not pay for regenerative medicine procedures to the spine and consider them experimental. Nonetheless, he insisted there was support in the medical literature for his decision to treat Claimant with regenerative medicine. Dr. Rudin also opined that insurance companies eventually will pay for the procedures as a less expensive and invasive alternative to spine surgery. He noted that insurance companies do pay for some regenerative medicine protocols such as for tennis elbow. Dr. Rudin rebutted Dr. Brokaw's claim that no studies support the use of regenerative medicine for the spine. He reviewed in detail a 2019 journal article that summarized all the studies performed so far on regenerative medicine in the spine and evaluated their findings. He insisted that the article provides support for his decision to use a stem cell protocol for Claimant's lumbar spine injury. Dr. Rudin differentiated the

procedure he uses, which harvests the patient's own stem cells and injects them into the injured area, from the "stem cell" therapies used and abused by some other medical providers. Dr. Rudin further asserted that the procedure he uses is not governed by the FDA, because it does not introduce purchased cells from another person. Dr. Rudin also favors the use of the regenerative medicine protocol instead of surgery for Claimant because of the much lower cost of the procedure and the ease and safety of the procedure from the patient's perspective. He works with a physician who is expert in the field of regenerative medicine to perform the procedure for his patients. This consulting physician has found that 65 to 70 percent of patients who are otherwise candidates for spine surgery show improvement with regenerative medicine and avoid surgery.

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The Board gives extra scrutiny to treatment that is new and not yet widely adopted by the medical community, as appears to be the case for the regenerative medicine protocol used by Dr. Rudin. Furthermore, regenerative medicine to treat spine injuries is not included in Delaware's current practice guidelines for treating low back injuries. Dr. Rudin also benefits financially from performing regenerative medicine on spine patients, which could bias his opinion on the efficacy of the treatment. Nonetheless, the Employer has not offered credible evidence to rebut Dr. Rudin's testimony about the safety and efficacy of the procedure for a spine patient such as Claimant. Dr. Brokaw does not appear to have any training or experience in the use of regenerative medicine to treat the spine or in regenerative medicine or treatment of the spine generally, so his testimony does not carry the same weight as that of Dr. Rudin in this instance. In addition, Claimant underwent the regenerative medicine treatment about a month before the hearing and reported a significant reduction in his pain level both to his treating doctor and at the hearing. It is too early to tell if the treatment will provide longterm benefit, but the improvement in symptoms described by Claimant provides evidence that, at least in the shortterm, the regenerative medicine protocol has benefited Claimant. The Board also concludes that the severity of Claimant's pain and lack of response to multiple attempts at conservative care prior to the use of the regenerative medicine therapy favored the use of the stem cell procedure in this case. The stem cell procedure was a reasonable attempt at alleviating Claimant's symptoms without undergoing the much greater expense and invasiveness of spine surgery. This is particularly true where Claimant is so young and has been out of work for so long. Thus, in consideration of the facts and evidence presented to the Board at this time, the Board finds that Claimant has met his burden to prove that the treatment with Dr. Rudin, including the regenerative medicine protocol, has been reasonable and necessary treatment for his work-related lumbar spine injury.

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After weighing the evidence, the Board finds that Claimant has proved by a preponderance of the evidence that he injured his lumbar disc at L5-S1 in the February 13, 2019 work accident. The Board also finds that the medical treatment rendered has been reasonable, necessary, and causally related to the work accident. The Employer shall pay medical expenses in accordance with the applicable fee schedule.

Total Disability

In addition to the claim for medical treatment, Claimant seeks payment for total disability benefits from May 6, 2019 and ongoing. The Employer previously paid total disability benefits without prejudice from February 19, 2019 through May 5, 2019 at the rate of $309.56 per week. Dr. Rudin testified that he placed Claimant on total disability when he first saw Claimant on April 10, 2019 and he continued to maintain Claimant on total disability as of the date of the hearing. He planned to keep Claimant on total disability for at least three months after the regenerative medicine procedure performed on November 11, 2019. On the other hand, Dr. Brokaw testified that he did not believe total

disability from work was required more than two weeks after the date of injury. He recommended two to three more months of restricted duty work after his examination of Claimant on April 23, 2109, but after that he anticipated Claimant would be able to return to full duty, fulltime work.

The Board finds Dr. Rudin more credible on the issue of disability for several reasons. Dr. Rudin and Claimant have described significant symptoms and limitations over the course of Claimant's treatment and a lack of improvement until the recent stem cell treatment in November 2019. Dr. Rudin has continued to see Claimant in person since April 2019 whereas Dr. Brokaw has not seen Claimant since the DME on April 23, 2019. This puts Dr. Rudin in a better position to judge work capability through to the present time. Additionally, Claimant recently underwent

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the regenerative medicine treatment with Dr. Rudin and the Board finds it reasonable to allow Claimant time to respond to the treatment before returning to work. Dr. Rudin has recommended at least three months of total disability after the procedure, and no one has rebutted his testimony about the necessary recovery time.

Based on the preceding discussion, the Board accepts Dr. Rudin's opinion that Claimant has been total disabled from April 10, 2019 to the present. Claimant is awarded total disability from May 6, 2019 and ongoing at the rate of $308.56 per week. The Board expects that Claimant will be released to some form of work as early as possible, since Claimant has been out of work for a year at this point. The Board has often recognized that a return to work is helpful in the recovery of injured workers. Claimant has expressed interest in returning to a less physical job than he was performing at the time of injury.

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 $10,888.40.

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. Claimant has been awarded workers' compensation benefits with respect to his lumbar spine injury. An attorney's fee award is thus warranted in this case.

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Claimant's counsel submitted an affidavit stating that she spent 34 hours preparing for the hearing on the pending petition. Claimant's counsel has been a member of the Delaware bar since 1993 and has extensive experience in the practice of workers' compensation law. Counsel has represented Claimant since May 6, 2019. Counsel does not represent Claimant in anything other than a workers' compensation context. This case was no more complex than the usual case. Claimant's counsel represents that she has a contingent fee arrangement with Claimant. A copy of the fee agreement was provided to the Board. Counsel's hourly rate for a non-contingent case is $475 per hour but she recognizes that counsel of similar experience and skill typically have hourly rates of approximately $300 to $350 per hour. Counsel represents that no fees have been or will be received from any other source. There is no evidence that Employer is unable to pay an attorney's fee.

Taking into consideration the factors set forth above and the fees customarily charged in this locality for similar services, the Board finds that an attorney's fee of the maximum statutory fee or thirty percent of the award, whichever is less, is reasonable and within statutory limits in this case.

A medical witness fee for medical 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, the Board GRANTS the Claimant's Petition to Determine Additional Compensation Due. The Board finds that Claimant has injured his L5-S1 lumbar disc in the February 13, 2019 work accident. The Board also finds that the medical treatment rendered under the direction of Dr. Rudin has been reasonable, necessary, and causally related to the work accident. The Employer shall pay medical expenses in accordance with the applicable fee schedule.

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The Board further awards total disability from May 6, 2019 and ongoing at the rate of $308.56 per week. An attorney's fee of the maximum statutory fee or thirty percent of the award, whichever is less, and a medical witness fee are also awarded.

IT IS SO ORDERED THIS 17th DAY OF MARCH, 2020.

INDUSTRIAL ACCIDENT BOARD

/s/_____
ANGELIQUE RODRIGUEZ

/s/_____
VINCENT D'ANNA

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

/s/_____

Mailed Date: 3-18-20

/s/_____
OWC Staff

ANTHONY J. CICIONE, JR., Employee,
v.
FMC CORPORATION, Employer.

INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

Hearing No. 1373594

Mailed Date: May 6, 2016
May 3, 2016

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 by stipulation of the parties came before a Hearing Officer of the Industrial Accident Board on January 13, 2016, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

CHRISTOPHER F. BAUM
Workers' Compensation Hearing Officer

APPEARANCES:

Frederick S. Freibott, Attorney for the Employee

H. Garrett Baker, Attorney for the Employer

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NATURE AND STAGE OF THE PROCEEDINGS

Anthony J. Cicione, Jr. ("Claimant") was injured in a compensable work accident on June 17, 2011, while he was working for FMC Corporation ("Employer"). Employer has acknowledged a compensable low back injury. In September of 2012, Claimant underwent an L5-S1 spinal fusion with pedicle screw instrumentation, posterior lateral bone graft with local allograft added to lateral recesses of decompression of an L4-5 and L5-S1 laminectomy with decompression of bilateral L5-S1 nerve roots.

On September 9, 2015, Claimant filed a Petition to Determine Additional Compensation Due seeking a finding that an L3-4 lumbar laminectomy surgery that he underwent on September 8, 2015 is causally related to the work accident. Employer argues that the 2015 surgery is unrelated to the work accident.

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). A hearing was held on Claimant's petition on January 13, 2016. This is the decision on the merits of the petition.

SUMMARY OF THE EVIDENCE

Claimant testified that he is sixty-three years old. He worked for Employer for forty-three years. He had had two prior back surgeries before June of 2011, but after those surgeries he was fine and had no back problems. He was able to do his work with no problem. In June of 2011, he was a maintenance specialist for Employer. On June 17, 2011, he was standing in a tube on pipes shoving filter pads out to other workers. The pads weighed about fifty-five pounds. He hurt his back doing this. He underwent fusion surgery in 2012. After that surgery,

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he still had pain. He tried to return to work, but his back hurt so much that he needed another surgery.

Claimant agreed that he has a vascular issue. The doctors have tried twice to put new veins in, but failed. He has undergone about five vascular procedures in total. He has ambulation problems. Following the 2015 surgery, he was still hurting but it feels like the blood flow is going through. He feels better, but he still has some trouble with walking. He uses a cane almost every day.

Deborah A. Cicione testified that she has been married to Claimant for over forty-two years. His first back surgery was in 1987 and the second one nine years after that. After those surgeries he felt much better. He could do things at home and in the yard without complaint. He had no restrictions. He had no problems walking prior to June of 2011.

Ms. Cicione explained that, after the June 2011 injury, Claimant was in extreme pain, although surgery was delayed until 2012. After the surgery, Claimant still had a lot of pain. He tried physical therapy, but that was too intense for him and they had to dial it back. Claimant was having trouble with his legs during that time.

Ms. Cicione stated that, since the September 2015 surgery, Claimant's condition has improved to "fair." At times, he walks better and his pain complaints have improved. He is still on pain medication.

Dr. Bruce J. Rudin testified by deposition on behalf of Claimant. He began to provide medical treatment to Claimant on July 27, 2011. In his opinion, Claimant's 2015 surgery was causally related to the 2011 work accident.

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Dr. Rudin explained that Claimant was injured in a workplace incident on June 17, 2011.[1] Claimant complained of both back and left leg pain. He had disk pathology localized predominantly to the L4-5 and L5-S1 level, although there was a little bit of pathology at L3-4. The L5-S1 level was severely degenerative and the L4-5 level severely stenotic. At L3-4, there was a disk protrusion with osteophytes (bone spurs) mildly indenting the dural sac at L3-4. There was also a disk protrusion at L2-3. Conservative care was tried for a time, but Claimant's condition did not improve. Finally, in September of 2012, he had surgery in the form of a laminectomy and fusion. The nerves were decompressed at both L4-5 and L5-S1 and the severely degenerative level at L5-S1 was stabilized with bone graft and pedicle screws. Only the L5-S1 level was fused.

Dr. Rudin stated that, post-surgery, Claimant had a decrease in his back pain and leg pain, but he never got complete relief of his symptoms. He was better than he was prior to the surgery, but not as good as he was prior to the work injury. After a functional capacity evaluation, Dr. Rudin released Claimant to return to medium-duty work in May of 2013.[2] An August 2013 EMG identified evidence of peripheral neuropathy in the lower extremities (not a pinched nerve).

Dr. Rudin saw Claimant in December of 2013. Claimant was complaining of bilateral leg pain rated as an eight on a ten-point scale. At the time, the doctor did not think that this was coming from the spinal condition. Claimant complained of persistent back and leg pain with a progressive worsening ability to walk distances. This could have been spinal-related (neurogenic claudication) or vascular-related (vascular claudication). Claimant, however, had fairly severe

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vascular disease, with calcification and blockage of blood vessels.[3] Therefore, Dr. Rudin referred Claimant to a vascular surgeon (Dr. William Schickler), believing it to be the more likely source of the leg problems. After some vascular problems were dealt with by a stenting procedure, Claimant reported a lower pain level (six out of ten) and he was able to walk longer distances. However, he continued to have bad vascular studies. Dr. Schickler eventually did a vascular bypass and after that Dr. Schickler tested Claimant's blood flow in the legs and deemed it adequate. However, after vascular stents and bypasses and surgeries and rehabilitation, Claimant was still having difficulty walking without severe pain and numbness.

Dr. Rudin testified that Claimant came back to see him on July 15, 2015. Claimant continued to have low back and bilateral leg pain. Claimant rated his pain as a nine on a ten-point scale and reported that he was could walk less than a block. Because of Claimant's difficulty walking distances even after the vascular treatment, the doctor then believed that the etiology was more spinal in nature. He also had a positive straight leg raise test, indicating a pinched nerve. An MRI was done on July 23, 2015. This revealed a large disk herniation at L3-4 with paracentral disk protrusion and facet arthrosis causing moderate central canal stenosis impinging on the nerve roots. The disk itself was extruded and

migrated proximally. L4-5 showed a disk bulge and bone spurring resulting in mild stenosis and foraminal narrowing. L5-S1 was, of course, fused.

Dr. Rudin recommended further surgery, which was performed on September 8, 2015. It was a decompressive laminectomy. Because of Claimant's other medical comorbidities, the doctor opted against more extensive surgery.

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Dr. Rudin stated that, by immobilizing L5-S1, increased stress is put on the other spinal disks, which can result in adjacent segment degeneration. One would therefore expect the L4-5 and L3-4 level to degenerate at a faster pace than would have occurred if L5-S1 had not been fused. In the doctor's opinion, over the three years from the 2012 surgery, the L3-4 disk worsened until the point that he had a disk herniation at that level with obvious spinal stenosis. L4-5 was not as badly affected because it already had a decompressive laminectomy to give it more room. It would require a lot more pathology to make L4-5 bad compared to L3-4 which was not normal to start with and had not been operated on.

Accordingly, in Dr. Rudin's opinion, the surgery at L3-4 is causally related to the work injury by way of adjacent segment degeneration caused by the fusion done at L5-S1. The doctor noted that, since the 2015 surgery, Claimant is 70% better. He is walking better, his pain has improved and his leg numbness has lessened. This indicates that those problems that Claimant has been complaining about for years were, in fact, related to the spinal condition and not to vascular pathology.

Dr. John B. Townsend, a neurologist, testified by deposition on behalf of Employer. He has evaluated Claimant on four occasions.[4] He has also reviewed pertinent medical records. In his opinion, Claimant's L3-4 disk herniation is unrelated to the 2011 work accident.

Dr. Townsend was aware that Claimant had discectomy at L5-S1 in 1979. A second surgery at the same level was done about nine years after that. No fusion had been done prior to the 2011 work accident. The doctor understood that, in June of 2011, Claimant lifted something awkwardly and felt back pain. A July 2011 MRI showed disk material herniated at L5-S1. Spondylosis, facet arthropathy and retrolisthesis were all noted. Degenerative changes were

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predominantly at L4-5 and L5-S1, but there was no substantial abnormality at L3-4 at that time. Dr. Townsend confirmed that a follow-up MRI was taken in June of 2012. It showed a mild broad-based protrusion at L2-3 and, to a lesser extent, at L3-4, which is consistent with degenerative changes.

Dr. Townsend stated that Claimant had a lumbar interbody fusion at L5-S1 level, performed by Dr. Rudin on September 18, 2012. Dr. Rudin did a bone graft fusion with pedicle screws, and he also decompressed the L4-5 and L5-S1 disk spaces. A laminectomy

was done at L4-5. Following the surgery, Claimant had some leg difficulty. He had a variety of vascular issues and eventually had stents placed to open the blood flow. There was some improvement noted by Dr. Schickler following the stent procedure. An August 2013 EMG was read as showing that Claimant had a peripheral neuropathy with no evidence of radiculopathy. When Dr. Townsend saw Claimant in September of 2013, Claimant reported that his back was still aching and he had leg pain. The pain was rated as a six on a ten-point scale, and the leg pain reportedly could go up to ten. On examination, straight leg raising was negative for radicular complaints, and Claimant had normal strength and reflexes. Dr. Schickler did further surgery in October of 2014 to help Claimant's vascular issues. Dr. Townsend saw Claimant again in November of 2014. Claimant complained that he had pain in both legs and had some numbness in the bottom of his feet. In Dr. Townsend's opinion, that was from a neuropathy, a problem with the nerves in the feet themselves rather than stemming from the back. The examination uncovered no objective findings consistent with pressure on the nerve roots.

Dr. Townsend saw Claimant again on June 30, 2015. Claimant complained of back pain rated between a five and eight on a ten-point scale. He noted that the pain would still go into his legs and he still had tingling in the legs. His legs would throb after walking for about a block.

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On examination, Claimant continued to have restricted motion of the low back. Straight leg raising was negative for radicular symptoms. The legs continued to have normal strength, reflexes and sensation. Another MRI was taken on July 23, 2015. It showed a disk herniation at L3-4, which had not been seen on prior studies. Such a herniation could cause back and leg pain, and was consistent with some (but not all) of Claimant's complaints.

In Dr. Townsend's opinion, the herniation at L3-4 is unrelated to the 2011 work accident. It was not shown on the MRIs taken after the work accident and was not present at the time of the fusion surgery. Dr. Townsend also did not think the L3-4 condition was related to the fusion surgery. It is not the level adjacent to the fusion and, as such, the abnormal forces related to the fusion at L5-S1 would not be expected to produce a disk herniation at L3-4. There is no literature supporting the theory that the entire vertebral column is affected by a fusion. Only the adjacent levels immediately above and below the fusion are affected ("adjacent segment syndrome"). The fact that L4-5 was decompressed does not change this because the effect of the fusion mechanically is still on the L4-5 disk. A decompression would not stop disk material at L4-5 herniating if it were being affected by the extra stress from the fusion at the level below. Adjacent segment syndrome would not skip the L4-5 level and then affect the L3-4 level.

In addition, Dr. Townsend observed that aging itself produces problems in disks. Claimant had mild degenerative changes at L3-4 on earlier studies and those continued to be present and progressed over time. That is what one would expect as part of the natural process of aging.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

Causation

Claimant seeks a finding that his September 2015 surgery at L3-4 is causally related to his 2011 work accident. Because this is his petition, Claimant has the burden of proof. 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. 97 A-03-005, Terry, J., 1997 WL 817889 at *2 (October 30, 1997), *aff'd,* 706 A.2d 26 (Del. 1998).

There is no dispute that Claimant injured his low back in 2011, and that that injury eventually led to fusion surgery at L5-S1 and decompression and laminectomy surgery at L4-5. The question is whether that work injury can be said to have caused the L3-4 herniation seen on MRI in 2015.

When, as here, there is a distinct and identifiable work accident, the "but for" standard of causation must be applied. *Reese v. Home Budget Center,* 619 A.2d 907, 910 (Del. 1992). *See also State v. Steen,* 719 A.2d 930, 932 (Del. 1998)("[W]hen there is an identifiable industrial accident, the compensability of any resultant injury must be determined exclusively by an application of the 'but for' standard of proximate cause.")(emphasis in original). The "but for" standard does not require "sole" or even "substantial" causation. "If the accident provides the 'setting' or 'trigger,' causation is satisfied for purposes of compensability." *Reese,* 619 A.2d at 910.

Nobody suggests that Claimant's L3-4 disk was herniated directly in the work accident. The 2012 MRI showed only minor degenerative findings at L3-4. In 2013, an EMG was negative for spinal radiculopathy, demonstrating that the L3-4 disk was not impinging neural

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elements at that time. Instead, Claimant had a peripheral neuropathy, which explained some of his leg complaints. He also had serious vascular issues, which also explained some of his leg complaints. However, Dr. Rudin argues that, but for the fusion at L5-S1, Claimant would not have had the subsequent L3-4 herniation. He argues that the fusion caused increased pressure on the other spinal levels and that this extra pressure caused the L3-4 herniation.

Dr. Townsend acknowledges that adjacent segment syndrome is a medically recognized condition, but he testified that the medical literature only supports a fusion affecting the immediately adjacent disk (hence the name). He states that there is no medical support that the detrimental effect can continue to a higher level. Dr. Townsend observes that disks can degenerate simply as the natural result of aging. Claimant's L3-4 disk had shown the early

stages of such degeneration in 2012, and it is reasonable to think that, as Claimant continued to age, the degeneration progressed until it became the herniation seen on MRI in 2015.

I find Dr. Townsend's opinion more credible than that of Dr. Rudin. While it is agreed hat a fusion can detrimentally affect an adjacent level, in the present case L4-5 has not herniated. I agree with Dr. Townsend that the fact that L4-5 had a laminectomy and decompression in 2012 does not change the issue. There is no substantial deterioration of the L4-5 disk (and certainly no herniation) since the fusion surgery, while the L3-4 disk deteriorated substantially to being a herniated disk with impingement on nerve roots. I do not accept the idea that adjacent segment syndrome can "skip a level" to affect a higher level without affecting the intermediate level and, according to Dr. Townsend, medical literature does not support such a finding. By contrast, it is true that simple aging can cause a disk to degenerate. The objective diagnostic studies show that L3-4 had mild degeneration in 2012. It seems probable that that

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degeneration simply progressed naturally over time to become a herniation, without regard to or connection with the 2011 work accident.

This is Claimant's petition and Claimant bears the burden of proof of establishing that, more likely than not, the L3-4 herniation and the subsequent surgery at that level was causally related to the 2011 work accident. For the reasons given, I find that Claimant has not met his burden.

STATEMENT OF THE DETERMINATION

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

IT IS SO ORDERED THIS 3rd DAY OF MAY, 2016.

INDUSTRIAL ACCIDENT BOARD

/s/_____
CHRISTOPHER F. BAUM
Workers' Compensation Hearing Officer

Mailed Date: 5-6-16

/s/_____
OWC Staff

Notes:

[1.] Dr. Rudin knew that Claimant had had two prior lumbar laminectomies in the remote past. He was certain that L5-S1 had been one of the levels done, but was not sure what the other one was. His guess was that it was L4-5.

[2.] Claimant had been in a motor vehicle accident in April of 2013, which led to a transient aggravation of his back condition.

[3.] This vascular problem is separate from the peripheral neuropathy identified in 2013.

[4.] Specifically, on May 2 and September 5, 2013; November 13, 2014; and June 30, 2015.

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

BRIAN COADY,	)	
	)	
Claimant,	)	
	)	
v.	)	Hearing No. 1504569
	)	
	)	
BAYHEALTH MEDICAL CENTER,	)	
	)	
Employer.	)	

DECISION ON PETITION TO DETERMINE COMPENSATION DUE
&
DECISION ON UTILIZATION REVIEW APPEAL

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 on February 18, 2022, in the Hearing Room of the Board, in Dover, Delaware.

PRESENT:

WILLIAM HARE

PATRICIA MAULL

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

APPEARANCES:

Christian Heesters, Esq., Attorney for the Claimant

Keri Morris-Johnston, Esq., Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On October 15, 2021, Brian Coady ("Claimant") filed a Petition to Determine Compensation Due, alleging that he aggravated a prior October 9, 2020 right knee injury, while he was working for Bayhealth Medical Center (Employer") on August 6, 2021. Claimant alleges a right knee aggravation on August 6, 2021 and seeks acknowledgement of that injury and compensability of a recommended third surgery. Employer disputes Claimant's Petition.

As a result of his right knee injury, Claimant has been recommended for a third right knee surgery, which was submitted to Utilization Review ("UR") pursuant to 19 *Del. C.* § 2322F(h). On October 15, 2021, a UR decision was issued, finding Claimant's proposed right knee surgical treatment to be compliant with the Healthcare Practice Guidelines. On November 19, 2021, Employer filed a UR Appeal of that UR determination. Employer disputes that Claimant's proposed surgical treatment is reasonable, necessary, and causally related to Claimant's work injury. Claimant contends that the proposed surgical treatment is reasonable, necessary, and causally related to his work injury.

A hearing on the merits of both petitions was held on February 18, 2022. These are the Board's decisions on the merits.

SUMMARY OF THE EVIDENCE

Dr. John Burger, board certified in orthopedic surgery, testified by deposition for Claimant. After reviewing Claimant's pertinent medical records, Dr. Burger began treating Claimant on August 31, 2021. The doctor explained that there are three compartments of the knee, and three knee bones, which are covered by cartilage, which can break down and cause pain, crunching, and grinding. He confirmed that Claimant has chondromalacia and osteoarthritis in his right knee, but he did not have any right knee problems prior to his October 9, 2020 work injury.

Dr. Burger testified that Claimant experienced a twisting right knee injury while he was pulling a pallet at work on October 9, 2020, which was his first knee injury. On August 6, 2021, Claimant sustained a second knee injury while getting out of a truck at work. Claimant also experienced a knee injury during physical therapy.

Dr. Burger confirmed that Claimant sought treatment for his initial knee injury on October 15, 2020, and his x-rays at that time showed no significant, but some minimal degenerative findings. Claimant's October 20, 2020 right knee MRI results showed a medial meniscal tear, patella femoral fissuring, and medial tibial femoral compartment chondrosis. On December 4, 2020, Claimant had a right knee arthroscopy and partial meniscectomy, as well as loose cartilage removal and shaving. Claimant's post-operative report showed Grade 2 and Grade 3 patellar and trochlea changes, and Grade 2 medial compartment changes. Following this surgery, Claimant sustained another knee injury while carrying a dumbbell during physical therapy.

Claimant's February 26, 2021 MRI results showed no significant changes from his prior MRI, but a questionable medial meniscal tear, likely caused by ultra weightbearing, and some stable chondral loss on the lateral femoral condyle and small knee swelling.

On April 8, 2021, Claimant underwent a second surgery involving a partial meniscectomy, which showed worsening of the medial compartment chondromalacia since the prior surgery. Claimant's August 19, 2021 MRI results showed progress posterior medial meniscus tear, tibial plateau full thickness cartilage loss, subchondral cystic changes, moderate lateral patella femoral compartment chondrosis, and some indeterminant signal along the TCL. Dr. Burger explained that Grade 4 classification means bone on bone, and reported that Claimant's full thickness cartilage loss at the medial tibial plateau finding is likely a Grade 4, which indicates a worsening since Claimant's April 8, 2021 surgery. He confirmed that Claimant's August 19, 2021 MRI

followed his August 6, 2021 work accident, during which Claimant injured his knee while stepping out of a truck. The doctor confirmed that Claimant's August 19, 2021 MRI results were the first indication that Claimant had a subchondral cyst. Dr. Burger confirmed that Claimant's December 4, 2021 surgical results showed a Grade 2 chondromalacia with no cyst, but his August 19, 2021 MRI showed full thickness, Grade 4, with a cyst in the same knee compartment, but on the opposite side of the shin bone. He confirmed that Claimant's August 2021 MRI results showed the first indication of a full thickness fissure in the patella and a subchondral cyst in the patella.

Dr. Burger testified that Claimant's findings showed cartilage damage and a meniscus tear that further degenerated his now, pain and degenerative disease findings, and a failure of conservative care. He confirmed that Dr. Piccioni recommended that Claimant undergo further injections and physical therapy prior to a total knee replacement procedure and noted that Claimant had undergone those treatments. The doctor explained that the knee replacement procedure involves cutting and resurfacing the shin bone and placing a piece of plastic in between as a spacer to tension the soft tissue structures around the knee. He reported that eighty to ninety percent of patients who undergo the surgery are satisfied with the results. Dr. Burger confirmed that Claimant's younger age could cause him to be less happy with the results of the replacement because Claimant will be able to remember what his normal knee felt like. He noted that Claimant's prior procedure history puts him at a slightly higher risk of complications, as does he immunocompromised condition.

When Dr. Burger saw Claimant on August 31, 2021, he interpreted Claimant's right knee x-rays to show severe degenerative changes with near complete loss of joint space in the medial compartment, and small osteophytes on the patella femoral view of the lateral compartment. He interpreted Claimant's MRI results as demonstrating complex tearing with near complete loss of

joint space and tibial plateau, with some fissuring of the patella femoral cartilage from the joint and lateral joint changes. In October of 2021, Claimant had a corticosteroid injection, which he reported worsened his knee condition. Claimant reported experiencing crunching, grinding, and buckling in his knee while performing physical therapy.

Claimant's October 14, 2021 physical therapy records indicate he reported decreased strength, decreased joint mobility, flexibility, and increased pain. At that physical therapy visit, Claimant's primary complaint was constant right knee pain, caused by hyperextending his knee while stepping out of a truck in August 2021. Claimant's November 26, 2021 physical therapy record indicates Claimant reported slipping on pallets at work, causing a sore knee and rib injury. Claimant's December 23, 2021 therapy record indicates Claimant fell at work after his right knee hyperextended. Claimant's December 24, 2021 therapy records indicates Claimant denied any knee improvement. Claimant's December 20, 2021 treatment record indicates Claimant reported continued knee pain and hyperextending, which causes him to fall. Claimant's January 12, 2022 treatment record indicates Claimant reported worsening knee pain even while performing desk work. Claimant's January 19, 2022, January 26, 2022 and February 4, 2022 treatment records indicate Claimant continued to report worsening knee pain, gait deviation and back and hip pain.

Dr. Burger testified that Claimant's knee pain is not improving despite his engaging in physical therapy for six weeks. He agreed with the UR decision that the recommended knee surgery is compliant with the Healthcare Guidelines. The doctor concluded that Claimant is an appropriate candidate for knee replacement surgery because he has advanced degenerative changes, has failed conservative care, and has pain impacting his activities of daily living. Dr. Burger disagreed with Dr. Piccioni's conclusion that a knee replacements is appropriate only when

there is bone on bone degeneration. He reported that Claimant's knee is currently worn down about eighty percent, but is not bone on bone.

On cross examination, Dr. Burger confirmed that Claimant is fifty-one years old and that is young for a total knee replacement recipient. He was unaware of Claimant sustaining an injury at physical therapy until he reviewed Claimant's treatment record from Dr. Piccioni. He had not reviewed Claimant's physical therapy records until he received records prior to his deposition.

Dr. Burger acknowledged that he does not normally perform a total knee replacement for a Grade 2 to 3 chondromalacia diagnosis. He confirmed that a subchondral cyst is a hallmark of osteoarthritis, but that patients with such a diagnosis do not always require a total knee replacement if they are not experiencing symptoms severe enough to interfere with their activities or if conservative treatment is ineffective.

The doctor acknowledged that he recommended the total knee replacement procedure at their initial visit on August 31, 2021. He agreed that, at the time of their initial visit, Claimant's prior conservative treatment included some physical therapy before his two prior surgeries. The doctor was unaware if Claimant had received injections prior to their initial visit. He confirmed his understanding that Claimant had received one injection on October 12, 2021.

Dr. Burger was aware that Claimant returned to full duty work following his April 2021 surgery. He explained that Claimant's pre-existing liver transplant places him at greater risk of infection following a knee replacement procedure, but not at greater risk of rejection. The doctor agreed that Claimant's report of worsening pain following his knee injection was an uncommon response. He confirmed that he first saw Claimant on August 31, 2021 and had last seen Claimant on November 9, 2021. The doctor confirmed that Claimant engaged in physical therapy from October 14, 2021 to February 4, 2022.

The doctor denied that he saw Claimant following a November 2021 fall at work, during which Claimant injured his ribs, and confirmed that the treatment record related to that incident does not indicate specifically that Claimant hurt his knee during that work fall. Dr. Burger was unaware how the physical therapist could know Claimant's knee cartilage condition at this January 12, 2022 session.

Dr. Burger reported that Claimant's April 2021 post-operative record indicates some worsening in the articular surface, which he surmised could be caused by generalized wear and tear and disease progression. The doctor agreed that Claimant's August 10, 2021 treatment record indicates no further surgery is warranted and explained that no surgery would be warranted if Claimant was not experiencing pain or continued symptoms. Dr. Burger confirmed that Dr. Gambone was not recommending any surgical treatment for Claimant's most recent knee buckling incident on August 6, 2021. He agreed that Claimant received no conservative treatment between August 6, 2021 and his initial visit on August 31, 2021.

Dr. Burger testified that Claimant would be out of work for approximately three months following a total knee replacement procedure.

On redirect examination, Dr. Burger confirmed that Claimant's diagnoses are not only chondromalacia, but also include osteoarthritis. He agreed that it is common to perform total knee replacement when a patient has an eighty percent articular cartridge loss, has failed conservative care, and cannot tolerate his symptoms.

Dr. Burger confirmed that Claimant received an injection on February 17, 2021 and in October 2021. He confirmed that Claimant's initial visit record indicates Claimant reported significant pain, which was interfering with his daily activities, and an inability to tolerate his symptoms. The doctor testified that Claimant's November 9, 2021 treatment record indicates

Claimant reported continued knee pain, which began after he stepped out of a truck at work on October 9, 2020. Claimant's physical therapy records indicate Claimant reported no improvement from injections, arthroscopic procedures, activity modification or oral steroid use. Dr. Burger confirmed that Dr. Gambone had referred Claimant to him to discuss arthroplasty.

Claimant testified that he has worked for Employer over four years, beginning as a courier and then in the warehouse. Prior to the work accident, Claimant had no right knee symptoms and had not treated for any right knee symptoms. He explained that he has minimal increased risk for a right knee replacement because he has had a liver transplant.

On October 9, 2020, he was getting out of a truck and felt his right knee "pop." He sought treatment with occupational health. Following the injury, he continued working light duty until he had knee surgery in December 2020. After the surgery, his knee felt better, but when he was at physical therapy he was carrying heavy dumbbells and his knee gave out. After the injury at therapy, his right knee symptoms returned and he returned to light duty. On April 8, 2021, Claimant had a second knee surgery, which reduced his symptoms.

Claimant returned to work in July 2021 with no restrictions. On August 6, 2021, he was climbing out of a truck and "...my knee hyperextended backwards" causing his symptoms to return.

On October 14, 2021, Claimant received disability benefits. He returned to work in November 2021. He was directed to change jobs based on his symptoms, so he returned to work in public safety.

On November 24, 2021, Claimant was wearing a knee brace and was walking backwards with an empty pallet when his knee hyperextended, causing him to fall into a stack of pallets. He

did not report the work accident because he feared he would lose his job. One of his co-workers reported the injury and his supervisor directed him to seek treatment.

On December 22, 2021, Claimant was working in public safety and his knee "gave out," causing him to fall. His co-worker saw his hands were bleeding from the fall.

Claimant reported that his knee "gives out" at home also and he has no warning before the knee gives out. He reported that he experiences knee pain "...all day every day." Claimant testified that any time he moves his knee it "...feels like there's a dagger stuck in my knee." He sleeps with icepacks on his knee every night. Claimant rated his right knee pain as a 9 out of 10 every day and reported that his hips are beginning to hurt because of his knee symptoms. He wants to have the surgery so that he can "be normal again." He does not take pain medication for his knee because he does not "...agree with it" and he does not have any more pain medication following his second surgery. He testified that he "just blocks [out]" the pain and does not take any pain medication.

He testified that his supervisor has asked him to return to work on occasion because he knows the building so well. He has gone back to work a few times to help.

Since August 6, 2021, Claimant's knee symptoms have not improved and have progressively worsened. Dr. Gambone has recommended a total knee replacement.

On cross examination, Claimant confirmed that his warehouse job was a heavy duty job. In December 2020, he had surgery, which was accepted by Employer. He engaged in physical therapy immediately after the first surgery and re-injured his knee while carrying dumbbells. Claimant testified that he reported the injury to his physical therapist ("Doug") immediately and continued engaging in physical therapy. He does not recall when he returned to Dr. Gambone to

report the second injury. Following the first surgery, in January 2021, Claimant returned to his prior position with no restrictions.

In mid -February 2021, he returned to occupational health, where he was referred to Dr. Gambone, who took him out of work and prescribed a loader brace. He did not receive the brace until the end of March 2021. By the time he received the brace, he had a second surgery scheduled. Claimant was unaware why his treatment records do not contain any documentation of the physical therapy injury.

Following his second surgery, Claimant was out from March to June 2021, and then he re-injured his knee in August 2021. In August 2021, he was getting out of a truck and hyperextended his knee. After the August 2021 event, Claimant returned to light duty work.

Claimant denied that he requested a total knee replacement and testified that Dr. Burger recommended the surgery. He testified that Employer's human resources department told him the appointment with Dr. Piccioni was a "second opinion." He has reviewed Dr. Piccioni's report, in which he recommends physical therapy, pain medication and injections. Claimant reported that he cannot take acetaminophen, but can take ibuprofen, which he takes "every day." He confirmed that his knee pain is currently a 9 out of 10 and it has been that way for the last several months. Claimant does not take any narcotic pain medication, but he requested it. He has been prescribed non-narcotic pain medication, but he cannot recall the name of it.

When questioned by the Board, Claimant confirmed that he had re-injured his knee on August 6, 2021, after which Dr. Gambone referred him to Dr. Burger. Claimant saw Dr. Burger for the first time in August 2021 and Dr. Burger recommended knee replacement at that visit. Claimant alleged that his right knee "disintegrated" over the course of fourteen months. He testified that Dr. Axe told him his knee would continue to worsen because of his meniscus tear.

On recross examination, Claimant confirmed that he only saw Dr. Axe one time and it was prior to his second surgery. He was unaware why there was no documentation of Dr. Axe's recommendation of a total knee replacement within five years.

Dr. Lawrence Piccioni, board certified in orthopedic surgery, testified by deposition for Claimant. After reviewing Claimant's pertinent medical records, Dr. Piccioni examined him on September 14, 2021, when Claimant reported an October 9, 2020 work accident during which he injured his right knee. Claimant denied any right knee problems prior to his work accident. On October 15, 2020, Claimant sought treatment for his right knee injury and had a right knee MRI, the results of which showed a medial meniscus tear and some edema, which Dr. Piccioni reported is consistent with a strain or sprain injury of the medial collateral ligament.

Claimant treated with Dr. Gambone, who performed an arthroscopic procedure on December 4, 2020, the results of which showed a medial meniscus tear and some cartilaginous loose bodies in the knee. The diagnostic results of the arthroscopy showed Grade 2 to Grade 3 changes of the patella and trochlea, and Grade 2 changes over the medial femoral condyle and tibial plateau. Claimant's ACL and PCL were inspected and found to be normal at the time of the original arthroscopy.

Claimant reported to Dr. Piccioni that he recovered well from the initial surgery and then re-injured his knee while carrying dumbbells in physical therapy. On April 8, 2021, Claimant had a second arthroscopy for additional medial meniscus tearing. Dr. Piccioni noted that Claimant's April 8, 2021 post-surgical report shows no further loose bodies or any change in Claimant's articular surface of the joint, which would lead to arthritis and cause Claimant to need a total knee replacement to fix. Claimant reported that he recovered well following his second surgery and was released for full duty on June 23, 2021.

On August 6, 2021, Claimant injured his right knee again while stepping out of a truck at work. A right knee MRI showed the possibility of some injury to Claimant's posterior cruciate ligament ("PCL"). Dr. Piccioni had reviewed Claimant's diagnostic studies and reported that the edema that was present in Claimant's initial had resolved, which indicated the ligament had undergone resolution and healing, but there was fluid surrounding the PCL, which was not completely torn. Following the August 6, 2021 injury, Claimant treated with Dr. Gambone, who did not find Claimant to be a candidate for a third arthroscopy at that time, but found Claimant might be a candidate for some type of knee replacement. Dr. Gambone referred Claimant to Dr. Burger, who saw Claimant on August 31, 2021.

When Dr. Piccioni examined Claimant in September 2021, Claimant was not taking medication, had not had any recent injections, and was not treating specifically for his knee. Dr. Piccioni expressed concern that Claimant was prescribed anti-rejection drugs for an unrelated liver transplant. At the time of their visit, Claimant reported to Dr. Piccioni that he was experiencing severe pain globally around his knee, for which he was wearing a hinge brace. Dr. Piccioni explained that typically a knee sprain with a partial PCL tear, as Claimant experienced on August 6, 2021, takes three to nine weeks to resolve, and he noted that Claimant's injury had occurred five weeks prior to their initial visit. The doctor pointed out that Claimant had sustained three knee injuries within a ten month time frame, which would cause concerns that Claimant was not fully rehabilitated at the time.

Dr. Piccioni testified that Claimant's August 10, 2021 treatment record (with Dr. Gambone) indicates Claimant had mild effusion, 4 out of 5 strength in both quadriceps and hamstrings, negative McMurray's and Thessaly's tests, no posterior cruciate ligament laxity, and no pain with valgus stress testing. Dr. Gambone ordered an MRI to assess Claimant's PCL, but

did not find that surgical intervention was warranted at that time, but recommended Claimant engage in conservative treatment.

Claimant's August 20, 2021 MRI results showed some fluid around the PCL with no significant tearing and a horizontal cleavage component to a tear. Dr. Piccioni noted that Claimant had two prior meniscal surgeries relatively close in time to the MRI and his medial meniscus would never look normal on an MRI after those procedures.

When Dr. Piccioni examined Claimant on September 20, 2021, he found Claimant to have: reported knee pain of 7 out of 10, unassisted ambulation, use of a hinge knee brace, no right knee effusion, one centimeter of atrophy of the right quadricep compared to left, no ligament instability, no crepitus, and no significant knee effusion. Claimant's most recent MRI study showed degenerative changes in the patellofemoral and medial compartments, which had been noted on prior MRIs. Claimant's August 10, 2021 weightbearing x-rays showed narrowing of the medial compartment, but no area of bone on bone.

Based on Claimant's history and examination, Dr. Piccioni concluded that Claimant sustained a right knee sprain with a medial meniscus tear and a Grade 1 MCL sprain and chondral fracture with a loose body noted at the time of his initial arthroscopy. The doctor noted that Claimant has undergone a partial meniscectomy to repair his meniscus and had the loose body removed, all of which the doctor found to be reasonable, necessary, and related treatment. Following Claimant's initial surgery, he sustained a second injury, which necessitated a partial meniscectomy, but no further ligamentous injury. The doctor diagnosed Claimant's most recent injury as a hyperextension sprain with a Grade 1 PCL injury, with no other significant damage or laxity.

Dr. Piccioni concluded that Claimant is not an appropriate candidate for a right knee replacement procedure. He noted that Claimant had returned to work full duty after his initial work injury and his second injury was a Grade 1 PCL sprain, the treatment for which involves allowing the injury to heal, but not surgical intervention. The doctor denied that a total knee replacement is appropriate treatment for a Grade 1 sprain PCL injury. Dr. Piccioni recommended Claimant engage in additional physical therapy and cortisone injections. He explained that a total knee replacement is to treat pain primarily related to bone on bone surfaces that cannot be treated appropriately or sufficiently by nonoperative management. The doctor concluded that Claimant would not be a total knee replacement candidate even if he continued to have pain, but had no areas of bone on bone, as documented by his initial arthroscopy procedure.. He noted that Claimant has an unrelated medical condition, which puts him at greater risk of complications from a total knee replacement procedure. Dr. Piccioni pointed out that Claimant returned to full duty work following his second knee surgery, and then sustained a hyperextension PCL sprain, which did not warrant a total knee replacement procedure. He denied that a total knee replacement procedure is reasonable and necessary treatment for Claimant's work injury.

On cross examination, Dr. Piccioni confirmed that he performs knee replacement procedures regularly in his practice. He agreed that the photographic exhibits are an accurate depiction of the knee anatomy. The doctor explained that Grade 4 chondromalacia means full thickness loss of cartridge, which creates bone on bone rubbing if there is Grade 4 loss on both the patella and trochlea sides of the joint.

Dr. Piccioni confirmed that Claimant's initial injury occurred on October 9, 2020 and involved a meniscus tear and a chondral fracture, which he agreed could cause osteoarthritis. He agreed that Claimant's October 15, 2020 x-ray results showed well preserved joint space

compartments. The doctor explained that a total knee replacement procedure involves resurfacing the cartilage surfaces with metal and plastic. He agreed that Claimant's October 20, 2020 right knee MRI results showed Grade 2 to 3 chondral fissuring in the patellofemoral compartment and Grade 2 to 3 chondrosis in the medial tibiofemoral compartment.

The doctor agreed that Claimant's December 4, 2020 surgical report showed Grade 2 to 3 chondromalacia over the patella and the trochlea, Grade 2 chondromalacia over the medial femoral condyle and tibial plateau, and Grade 1 over the lateral tibial plateau and condyle. He confirmed that Claimant's February 26, 2021 MRI results showed moderate to severe chondral loss over the medial condyle, but he denied those were the findings at the second arthroscopy. The doctor reported that arthroscopic evaluation of the joint surface is the most accurate and noted that when Claimant underwent the second arthroscopy in April 2021, there was no significant change on the medial side to show severe change of the medial femoral condyle as reported by the MRI study.

Dr. Piccioni agreed that Claimant's March 31, 2021 x-ray results showed medial compartment joint space narrowing, which is indicative of worsening since the October 15, 2020 x-ray, but he pointed out that the first x-ray was non-weightbearing, which is not an accurate way to measure joint space narrowing. The doctor confirmed that Claimant's April 8, 2021 surgical report noted Grade 2 to 3 chondromalacia over the patella and trochlea and Grade 2 to 3 chondromalacia over the medial femoral condyle and tibial plateau, which he concluded were the same finding as the initial surgery. He acknowledged that Claimant's first surgery findings were Grade 2 and his second surgery findings were Grade 2 to 3.

The doctor agreed that Claimant's August 10, 2021 x-rays showed medial joint space narrowing, and his March 31, 2021 x-ray results found "minimal" joint space narrowing. He confirmed that Claimant's August 20, 2021 MRI results showed full-thickness cartilage loss at the

medium tibial plateau and a subchondral cyst at the medial tibial plateau, which he explained can be caused by bones rubbing together or by arthritic changes. He agreed that Claimant had no cyst at the time of his December 4, 2020 surgery and his August 19, 2021MRI results showed additional cartilage loss at the medial femoral condyle and a full-thickness fissure. The doctor acknowledged that Claimant's August 2021 MRI results showed full thickness fissuring at the patella, but his February 2021 MRI showed shallow fissuring. He confirmed that Claimant's chondromalacia, fissuring, and cartilage loss worsened, according to the February 2021 and August 2021 diagnostic study reports.

Dr. Piccioni confirmed his opinion that a total knee replacement for Claimant at this time would be controversial and he recommended that Claimant engage in more physical therapy, injections and medication treatment to heal his most recent hyperextension episode to determine whether he would need a knee replacement procedure. He explained that Claimant has engaged in physical therapy, but was found to have continued quadricep weakness, and he has not received visco-supplementation injections. The doctor confirmed that Claimant's recent physical therapy records indicate Claimant's symptoms are worsening, and he noted that Claimant's strength had not improved from October to February, which was a concern for him. Dr. Piccioni agreed that if Claimant had a full thickness cartilage loss that worsened, then his pain would worsened, but he pointed out that Claimant's diagnostic studies did not show Grade 4 lesions or bone on bone on either side. He confirmed that Claimant's x-rays did not show any areas of bone on bone.

Dr. Piccioni acknowledged that Claimant's prognosis remained guarded at the time of their September 2021 visit. He concluded that Claimant's prognosis is poor.

On redirect examination, Dr. Piccioni confirmed that Claimant's report that the cortisone injection worsened his symptoms was subjective, as are Claimant's physical therapy reports. He

reiterated his conclusion that there must be Grade 4 lesions on both sides of the knee for there to be a bone on bone finding. He denied that any reliable diagnostic study showed any areas of bone on bone or that the full thickness fissuring in one cartilage or a cyst warranted a total knee replacement. The doctor confirmed that Claimant's April 2021 surgery was the most accurate way to determine scientifically the joint surfaces at the time.

Dr. Piccioni denied that Claimant's medial joint space narrowing finding warranted a total knee replacement. He explained that he believes Claimant's prognosis is poor because Claimant is not following physiologic response, and noted that Claimant returned to full duty work after two surgical procedures, but then sustained a third injury "...which then jumped within months, probably within weeks from that injury to needing a knee replacement. That doesn't make physiologic sense." Dr. Piccioni Deposition 65:17-20 (Feb. 8, 2022). He pointed out that Claimant's attempts at conservative treatment for his most recent PCL sprain injury have been unsuccessful and concluded that Claimant's "...symptoms are out of proportion now to what would be expected." *Id.* 66:3-4. Dr. Piccioni reported that patients who have bone on bone arthritis who have total knee replacement procedures tend to have much poorer results.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Compensability

Claimant seeks to establish the compensability of an injury alleged to have occurred on October 9, 2020. The Delaware Workers' Compensation Act provides that employees are entitled to compensation "for personal injury or death by accident arising out of and in the course of employment." 19 *Del. C.*§ 2304. Because Claimant has filed the current petition, he has the burden of proof. 29 *Del. C.* § 10125(c). Claimant has the burden to establish that the alleged injuries

occurred. *Morris v. Gillis Gilkerson*, Inc. Del. Super., C.A. No. 94A-09-006, Lee, J. (Aug. 11, 1995) at 8, citing *Grays Hatchery & Poultry Farm v. Stevens*, Del. Super., 81 A. 2d 322, 324 (1950). "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 has an obligation to prove that an injury occurred, as well as when that injury occurred. *General Motors Corp. v. Ciccaglione*, Del. Super., C.A. No. 91A-05-10, Toliver, J. 1991 WL 269935 (December 10, 1991). "Furthermore, the practicalities of all compensation cases require sufficient findings of fact by the Board so that the parties can calculate what monetary benefits are owed. *Id.* at *4.

Evidence that the accident in question accelerated the condition that required Claimant to need treatment/services is sufficient for the Board to infer that the accident proximately caused the need for treatment. *Blake v. State of Del.*, Del. Supr., C.A. No. 01-A-01-018 (March 12, 2002). A pre-existing condition does not, in and of itself, prevent a Claimant from being compensated if the conditions of the employment precipitated an acceleration of that condition. *General Motors Corp., Inc. v. McNemar*, 202 A.2d 803, 807 (Del. 1964). When the ordinary strain and stress of employment is a substantial factor in proximately causing an injury, an injured claimant can recover workers' compensation benefits when there is no specifically identifiable physical industrial accident. *State v. Cephas*, 637 A.2d at 27; *Reese v. Home Budget Center*, Del.Supr..619 A.2d 907, 911 (1992); *Duvall v. Charles Connell Roofing*, Del. Supr. 564 A.2d 1132, 1136 (1989). See also *Page v. Hercules*, Del. Supr., 637 A.2d 29, 33 (1994). When the evidence is in conflict, the Board is free to accept the opinion of one expert over the opinion of another. *DiSabitino Brothers, Inc. v. Wortman*, 453 A.2d 102 (Del. 1982).

In this case, Claimant has not proven that the proposed knee replacement surgery is reasonable and necessary treatment for his work injury. The testimony and evidence is inconsistent and does not support a finding that Claimant sustained a right knee injury, which requires a total knee replacement procedure at this time. Specifically, Claimant's own testimony was inconsistent. First, Claimant reported that he experiences constant knee pain ("all day every day"), which he rates as a 9 out of 10; however, Claimant denied initially that he takes any pain medications. In fact, Claimant testified that he does not take pain medication because he does not "agree with it." If Claimant's pain levels were as intense as he alleges, he would not be able to function or "block out" the pain as he described. Second, while Claimant initially denied that he takes pain medications for his knee pain, he then reported that he takes ibuprofen "every day" and has requested that he be prescribed narcotic pain medication, which he initially claimed he did not want to take. As noted above, Claimant's testimony regarding whether he takes pain medication (prescription or otherwise) was inconsistent and detracted from his credibility. Third, despite Claimant's claim of constant and severe "every day" pain, and the fact that he alleges he has sustained at least four (three at work and one at therapy) additional knee injuries since the initial October 2020 work injury, Claimant reported that he continues to return to work extra shifts, on occasion, when his supervisor requests it. Given Claimant's numerous injuries, reported severe pain levels, and alleged worsening condition, Claimant's returning to work extra shifts seems imprudent, at best, and detracts from Claimant's credibility further.

Furthermore, the Board finds Dr. Piccioni's testimony to be persuasive. Dr. Piccioni concluded that Claimant sustained a right knee sprain with a medial meniscus tear and a Grade 1 MCL sprain and chondral fracture with a loose body, for which Claimant underwent a partial meniscectomy (first surgery) to repair his meniscus and remove the loose body, all of which the

doctor found to be reasonable, necessary, and related treatment. After his initial surgery, Claimant sustained a second injury, which necessitated a partial meniscectomy procedure (second surgery), but did not cause any further ligamentous injury. Dr. Piccioni diagnosed Claimant's August 6, 2021 injury as a hyperextension sprain with a Grade 1 PCL injury, with no other significant damage or laxity, which does not require knee replacement surgery.

Dr. Piccioni concluded that Claimant is not an appropriate candidate for a right knee replacement procedure at this time. He noted that Claimant had returned to work full duty after both his initial work injury and his second injury. The doctor explained that Claimant's August 6, 2021 injury, a Grade 1 PCL sprain, requires treatment allowing the injury to heal, but does not warrant surgical intervention. He denied that a total knee replacement is appropriate treatment for a Grade 1 sprain PCL injury. Even Dr. Burger acknowledged that he does not normally perform a total knee replacement for a Grade 2 to 3 chondromalacia diagnosis and he confirmed that patients with a cyst diagnosis do not always require a total knee replacement, if their symptoms are not severe enough to interfere with their activities or if conservative treatment is effective. The Board notes that Dr. Burger recommended knee replacement surgery at his initial visit with Claimant on August 31, 2021, less than four weeks after the August 6, 2021 knee injury, which would not allow for the injury to heal as Dr. Piccioni recommended. The Board accepts Dr. Piccioni's findings.

In addition, Dr. Piccioni recommended Claimant engage in additional physical therapy and cortisone injections. He explained that a total knee replacement is to treat pain primarily related to bone on bone surfaces that cannot be treated appropriately or sufficiently by nonoperative management and noted that Claimant's prior surgical procedures did not show areas of bone on bone. The doctor concluded that Claimant would not be a total knee replacement candidate even

if he continued to have pain, if he had no areas of bone on bone. He pointed out that Claimant has an unrelated medical condition, which puts him at greater risk of complications from a total knee replacement procedure. Dr. Piccioni noted that Claimant returned to full duty work following his second knee surgery, and then sustained a hyperextension PCL sprain, which the doctor concluded did not warrant a total knee replacement procedure. He denied that a total knee replacement procedure is reasonable and necessary treatment for Claimant's work injury. The Board agrees.

Medical Treatment – UR Appeal

When an employee has suffered a compensable injury, the employer is required to pay for reasonable and necessary medical "services, medicine and supplies" causally connected with that injury. 19 *Del. C.* § 2322. However, to assist in assessing what is reasonable or necessary medical treatment for a workers' compensation injury, Delaware adopted Health Care Practice Guidelines.[1] These "guidelines shall apply to all treatments provided after the effective date of the regulation . . . regardless of the date of injury." 19 *Del. C.* § 2322C(1). To determine compliance with the guidelines, an employer may refer treatment for consideration by UR, which then issues a determination.

In this case, the UR determination found Claimant's proposed surgical treatment to be compliant with the Health Care Practice Guidelines. The focus of a UR determination is on whether the identified treatment is within the Health Care Practice Guidelines. Unlike the UR determinations, the primary issue before the Board is not whether treatment is within the applicable

[1] The Health Care Practice Guidelines currently consist of six separate "treatment guidelines" addressing carpal tunnel syndrome, chronic pain, cumulative trauma disorder, low back, shoulder and cervical. The adopted practice guidelines can be found at http://dowc.ingenix.com/DWC.asp.

guidelines, but whether the treatment is reasonable and necessary. *Meier v. Tunnell Companies LP*, Del. IAB, Hearing No. 1326876, at 3-4 (November 24, 2009)(ORDER).[2]

In the present case, the issue is whether Claimant's proposed surgical treatment constitutes reasonable and necessary medical treatment to treat Claimant's work injury. "Whether medical services are necessary and reasonable or whether the expenses are incurred to treat a condition causally related to an industrial accident are purely factual issues within the purview of the Board." *Bullock v. K-Mart Corporation*, Del. Super., C.A. No. 94A-02-002, 1995 WL 339025 at *3 (May 5, 1995) "The law is clear that disputes about the reasonableness of medical expenses are factual questions for the Board to decide." *Kovach v. Churchman's Village/Health Care*, Del. Super., C.A. No. 98A-02-018, Barron, J., 1998 WL 960777 at *2 (October 5, 1998).

In determining whether the proposed treatment is reasonable and necessary, Delaware's Supreme Court has stated that the Board must decide "whether the treatment is reasonable for that specific claimant and not whether the treatment is reasonable generally for anyone with the claimant's condition." *Brittingham v. St. Michael's Rectory*, 788 A.2d 520, 523 (Del. 2002). When determining "reasonableness" the Board should consider various factors, including: claimant's age, prior surgical experience, general physical condition, likelihood of success, risk of worsening the condition, or risk of death from the offered treatment. *Brittingham* at 524-25. When the evidence is in conflict, the Board is free to accept one expert's opinion over another's. *DiSabitino Brothers, Inc. v. Wortman*, 453 A.2d 102 (Del. 1982).

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[2] This comment needs a little clarification. By statute, treatment by a certified health care provider that conforms to the guidelines is "presumed, in the absence of contrary evidence, to be reasonable and necessary." 19 *Del. C.* § 2322C(6). Thus, when treatment is outside of the guidelines, a UR determination might refer to it as not being "reasonable and necessary," but that conclusion is based on whether the treatment is within the guidelines. On appeal, however, treatment that a UR determination finds to be outside the guidelines may still be found by the Board, during *de novo* review, to be reasonable and necessary if convincing evidence is submitted. Likewise, treatment that a UR determination might declare as within the guidelines (and, thus, presumptively reasonable and necessary) might still be found by the Board, during *de novo* review, not to be reasonable or necessary treatment if convincing evidence is submitted. *See Meier*, at 5. The burden of proof rests with the party challenging the UR determination.

As already outlined above, the Board does not find Claimant's proposed total knee replacement surgical treatment to be reasonable and necessary treatment for Claimant's work injury at this time. Dr. Piccioni concluded that Claimant's August 6, 2021 PCL injury does not warrant a knee replacement procedure and he recommended Claimant engage in further physical therapy and injection treatment. The Board agrees. Therefore, the UR decision is reversed.

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." 19 *Del. C.* § 2320. At the current time, the maximum based on Delaware's average weekly wage calculates to $11, 969.40. 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). 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.

Having failed to establish that the proposed surgical treatment is reasonable and necessary treatment for his work injury, Claimant is not entitled to an attorney's fee award.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board finds the proposed knee replacement procedure is not reasonable and necessary treatment for Claimant's work injury. Therefore, Claimant's Petition is denied. Additionally, having determined that the proposed surgery is not reasonable and necessary treatment, the Board concludes that the UR Appeal is reversed.

IT IS SO ORDERED THIS 28th DAY OF FEBRUARY, 2022.

INDUSTRIAL ACCIDENT BOARD

/s/William Hare
WILLIAM HARE

/s/Patricia Maull
PATRICIA MAULL

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

HEATHER WILLIAMS, ESQ.

Mailed Date: CMW 3/2/22
OWC Staff

41751-0001

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

JAIME G. PHIPPS,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1432098
	)	
SOUTHERN WINE & SPIRITS,	)	
	)	
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 by stipulation of the parties came before a Hearing Officer of the Industrial Accident Board on June 30, 2020, via video conference using the WebEx video platform pursuant to the Industrial Accident Board COVID-19 Emergency Order dated May 11, 2020.

PRESENT:

CHRISTOPHER F. BAUM
Workers' Compensation Hearing Officer

APPEARANCES:

Joseph W. Weik, Attorney for the Employee

Paul V. Tatlow, Attorney for Employer

NATURE AND STAGE OF THE PROCEEDINGS

Jaime G. Phipps ("Claimant") was involved in a compensable work accident on August 12, 2015, while she was working for Southern Wine & Spirits ("Employer"). Employer accepted that she sustained a cervical sprain with right arm radicular complaints. Her average wage at the time of injury was $1,007.71 per week, resulting in a total disability compensation rate of $679.63 per week.

On March 20, 2018, Claimant underwent a C3-4 discectomy with fusion and it is agreed that this surgery was compensable. On August 28, 2019, Claimant underwent a C6-7 discectomy with fusion, and this surgery rendered Claimant temporarily totally disabled from August 28 through November 20, 2019. Employer disputes the compensability of the 2019 surgery. Claimant filed a Petition to Determine Additional Compensation Due on December 9, 2019, seeking to have the surgery recognized as compensable.

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). A hearing was held on Claimant's petition on June 30, 2020. Because of the ongoing State of Emergency with respect to the COVID-19 pandemic and social distancing protocols, the hearing was conducted using the WebEx video platform. This is the decision on the merits of the petition.

SUMMARY OF THE EVIDENCE

Dr. Mark S. Eskander, an orthopedic surgeon, testified by deposition on behalf of Claimant. He began to provide medical care to Claimant on June 28, 2016. In his opinion, the 2019 fusion surgery was reasonable, necessary and causally related to the 2015 work accident.

Dr. Eskander stated that, when he first examined Claimant in June of 2016, she reported neck pain that radiated to the right arm since she was involved in a motor vehicle collision on August 12, 2015. A September 2015 MRI had shown a disk protrusion (herniated disk) at C3-4 and a very small disk bulge at C6-7, which did not come into contact with the spinal cord. Another MRI was taken in September of 2016. In Dr. Eskander's opinion, that MRI was essentially the same as the earlier one, although the radiologist described the C6-7 disk as being a protrusion rather than a bulge. After a course of conservative care, Claimant had fusion surgery on the C3-4 disk on March 20, 2018.

Dr. Eskander saw Claimant again on February 27, 2019. Claimant reported pain in the neck radiating to the shoulder. She had been finding physical therapy helpful and rated herself about 50% better. Her pain that day was rated as a one on a ten-point scale and she was neurologically normal on examination. There were no sensory deficits and strength was normal. The doctor ordered another six weeks of physical therapy.

Dr. Eskander next saw Claimant on May 2, 2019. At that point, Claimant was reporting neck pain radiating to the right posterior arm into the elbow. She had numbness into the thumb, index and middle fingers. She stated that the pain started the previous week and worsened two days before. She rated her pain as a three on a ten-point scale. On examination, she had a positive Spurling's sign, suggesting a potential neurological component. The doctor ordered an updated MRI. That May 2019 MRI showed a disk protrusion at C6-7 with a worsened annular fissure. The previous MRIs had just shown a small bulge that had not required any treatment. That bulge has now progressed to a disk protrusion and annular fissure pressing on the central part of the spinal cord (more on the right than the left). Claimant's subjective complaints were consistent with the

MRI findings. Claimant was sent for injections and physical therapy, but that failed to solve the problem.

Dr. Eskander performed surgery on Claimant's C6-7 level on August 28, 2019. Claimant had a right-sided herniated disk fragment at that level pressing on the nerve. The disk was removed and a fusion done at C6-7. Claimant was totally disabled following that surgery until November 20, 2019.

Dr. Eskander agreed that, in the average person, for a variety of reasons, the C6-7 disk is the one that is most common to herniate. In fact, Claimant's C6-7 disk was not perfect even prior to the work accident. The first MRI showed a bulge there, but it was not anything that needed surgery. However, in Claimant's case, she already had a C3-4 fusion, so that there are less disks in the cervical spine to do the work of the cervical spine. As such, the chance of failure of the other disks is higher and Claimant's C6-7 disk broke down such that it needed surgery. The doctor referred to this as "noncontiguous adjacent segment disease." The fact that it happened so soon after the earlier fusion surgery indicates that it is related to that earlier fusion. Dr. Eskander asserted that the "original paper" on adjacent segment disease did not specify levels immediately above and below a fusion, and that there are many papers on the topic with "different flavors" on the topic. The biomechanical principle is the same and applies throughout the entire spine, not just the cervical spine. A fusion at one level makes all the other levels in the spine do more work.

The doctor disagreed with the suggestion that Claimant had an acute event in April of 2019 that caused the deterioration of the C6-7 disk unrelated to the work accident, even though he agreed that Claimant had no C6 symptomatology or significant pathology pointing to the C6-7 disk until the end of April 2019.

Claimant testified that she is forty-three years old and she has worked for Employer for about fifteen years. She works as an outside sales consultant. As part of her job, she lifts cases of wine and spirits on a regular basis. She deals with restaurants, so the boxes can weight about forty pounds. Prior to her work accident, she was in excellent health. She had been in an accident back about twenty years ago, but she recovered from that.

In August of 2015, she was involved in a rear-end collision. Initially, she had jaw pain and pain down her arm. She first went to her primary care doctor, and then was sent to get some injections and physical therapy. She was still in pain and her primary care doctor eventually referred her to Dr. Mark Eskander, who rendered a diagnosis of a C3-4 herniation.

Claimant confirmed that she underwent fusion surgery at C3-4 in March of 2018. She was out of work for a time after that, but then returned to work. Following the surgery, the pain symptoms down her arm went away, but she continued to have neck pain. By February of 2019, she was having more neck pain and stiffness. Additional physical therapy was prescribed. It provided some benefit at first, but then it stopped helping. In April of 2019, she was making a delivery to an account and lifted some cases, which gave her some neck pain which radiated down to the inside of her thumb. This was documented in an April 23, 2019 physical therapy note. She continued working. Claimant also confirmed that, in April of 2019, she was standing for a long time at a school lacrosse tournament. Her neck pain tended to be worse when she was sitting, so prolonged standing actually made her neck pain less intense. On April 29, 2019, she reported to physical therapy stating that she had right-sided neck pain that had worsened after the lacrosse game. Claimant explained, though, that her neck pain was really about the same before the game as after. As noted, standing at the game helped to ease the pain temporarily.

Claimant stated that she saw Dr. Eskander again in May of 2019, and a new MRI was taken. It showed a herniated disk at C6-7. She got an injection and continued with physical therapy until the end of June. On August 28, 2019, she had surgery at C6-7. Following that, she was out of work until November 20, 2019, and then returned to full duty work (albeit with some assistance as work). Currently, she has no pain down her arm. There is a lot of stiffness in the neck and shoulder. She takes ibuprofen and Cymbalta for the symptoms. She is currently furloughed from work but that is because of the COVID-19 pandemic, not because of her work injury.

Dr. Stephen Fedder, a neurosurgeon, testified by deposition on behalf of Employer. He examined Claimant on September 5, 2018, and October 18, 2019. He has also reviewed pertinent medical records. In his opinion, Claimant's disk problem at C6-7 is unrelated to her 2015 work event.

Dr. Fedder was aware that Claimant was injured in a compensable accident on August 12, 2015. She underwent surgery on March 20, 2018, which Claimant reported resolved 98% of the numbness and tingling in her right arm. The surgery was an anterior cervical disk fusion at C3-4. ~~This surgery was reasonable, necessary and causally related to the work accident.~~ Claimant indicated that she felt well following her 2018 surgery.

Dr. Fedder confirmed that Claimant had physical therapy in March and April of 2019. The therapy records reflect treatment to the posterior pectoral girdle. Claimant had diffuse pain in that area, consistent with a strain. An April 23, 2019 therapy note refers to Claimant having thumb pain after lifting "a case of product" wrong that same day. Claimant did not describe any radicular pain or numbness going down the arm, just thumb pain (which, in any event, would suggest a C6 problem, while Claimant's disk pathology affected C7).

Dr. Fedder testified that there was then a significant increase in Claimant's pain and an abrupt change in her status as of April 29, 2019. The physical therapist indicated that Claimant was tearful and had an increase in neck pain while attending a child's sporting event. On May 2, 2019, Dr. Eskander noted that, one week earlier, Claimant had an onset of neck pain radiating to the right posterior arm and elbow. These were true right C7 radicular symptoms. On May 2, 2019, for the first time, numbness was noted in the thumb, index and middle fingers and there was right triceps weakness. Dr. Fedder considered this a substantial and acute change in condition compared to Claimant's presentation of symptoms prior to then. Dr. Eskander identified these acute issues as being connected to the C6-7 disk. Claimant then had surgery at that level on August 28, 2019.

Dr. Fedder noted that diagnostic studies had been done in September of 2015, September of 2016 and January of 2018. All of those studies showed a small C6-7 disk abnormality. This was an asymptomatic degenerative change. There was no evidence of interval changes at that level between the studies and Claimant had no symptoms in the C7 nerve root distribution. That disk abnormality cannot be related to the 2015 work accident and it was clinically dormant for years following the accident.

Another MRI was then taken on May 9, 2019. It showed a new annular fissure at C6-7 and there was now essential abutment of the spinal cord. However, there was no signal change in the spinal cord and, on Dr. Eskander's clinical examination, no evidence of myelopathy or spinal cord dysfunction.

In Dr. Fedder's opinion, the August 2019 fusion at C6-7 was directed to address a C7 radiculopathy of a compressive nature that had an onset in April of 2019. In his opinion, it has no connection to the 2015 work accident. There was no evidence of any C7 radiculopathy after 2015 until April of 2019. Claimant's C7 symptomatology was associated with a new anatomic change

in April of 2019.[1] The problem at C6-7 is two levels away from the fusion at C3-4 and no medical literature supports the conclusion that adjacent segment disease skips multiple levels. Rather, "adjacent segment disease" describes exactly what it states: disease developing in the level next to (*i.e.*, adjacent to) the fusion. The reasoning given by Dr. Eskander is not supported by any medical literature. There are some cases where multiple levels may get affected (such as a C6-7 fusion affecting the C5-6 level and then the C4-5 level), but there is no support for the idea of adjacent disk disease completely skipping over a level, such as Claimant has in the present case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Causation

The primary issue for the pending petition is whether Claimant's C6-7 surgery in August of 2019 is causally related to her August 2015 work accident. Because it is her petition, Claimant has the burden of proof. 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). When, as here, there is a distinct and identifiable work accident, the "but for" standard of causation must be applied. *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992). *See also State v. Steen*, 719 A.2d 930, 932 (Del. 1998)("[W]hen there is an identifiable industrial accident, the compensability of any resultant injury must be determined *exclusively* by an application of the 'but for 'standard of proximate cause.")(emphasis in original). The "but for" standard does not require "sole" or even "substantial"

[1] In saying this, Dr. Fedder clarified that he was not suggesting another traumatic accident occurred. There was an acute increase in symptoms because of a new anatomic change, which could just be part of a natural progression or a spontaneous onset.

causation. "If the accident provides the 'setting' or 'trigger,' causation is satisfied for purposes of compensability." *Reese*, 619 A.2d at 910.

Most of the basic facts are not in dispute. Claimant had a 2015 work accident that led to her undergoing fusion surgery at C3-4 in March of 2018. In April of 2019, she developed symptomatology that evidenced a disk problem at C6-7, and she had fusion surgery at that level in August of 2019. The surgery itself was reasonable and necessary to address the disk pathology at C6-7. The issue in dispute is whether that pathology is causally related to the 2015 work accident. The theory of causation put forth by Claimant is that the C6-7 disk was affected by the fusion at C3-4 by means of what Dr. Eskander called "noncontiguous adjacent segment disease" and, therefore, but for the C3-4 fusion she would not have needed her 2019 surgery.

The Board has addressed the subject of "adjacent disk disease" or "adjacent segment disease" on multiple occasions over the years. In *Cicione v. FMC Corporation*, Del. IAB, Hearing No. 1373594 (May 3, 2016), Dr. Bruce Rudin argued that a fusion at L5-S1 caused extra pressure on the other spinal levels, resulting in a disk herniation at L3-4. Dr. John Townsend testified that the medical literature only supports a fusion affecting the immediately adjacent disk. *Cicione*, at 10. Under the facts presented, the Board did not accept "the idea that adjacent segment syndrome can 'skip a level' to affect a higher level without affecting the intermediate level." *Cicione*, at10.

In *Kisco v. Kitchen Kapers*, Del. IAB, Hearing No. 1305756 (December 14, 2016), the claimant's last level fused was L3-4 and Dr. Pawan Rastogi opined that a herniation at T10-11 was the result of adjacent segment disease. The Board rejected that opinion, relying on the testimony of Dr. Ali Kalamchi that there are only "limited situations in which adjacent segment disease will affect levels other than the level right next to a fusion surgery" (such as in the case of a congenital fusion situation). *See Kisco*, at 17. In *Kisco*, the fusion was at L3-4, and the levels of L2-3, L1-2

and T12-L1 were all unaffected, and then there was a herniation at T10-11. Dr. Kalamchi testified that he was unaware of any medical literature supporting such a "skip phenomenon" and even Dr. Rastogi admitted that there was "no real literature to support his theory of adjacent segment disease relating to levels much further away than the actual fusion." *Kisco*, at 17-18.

In *Plumley v. Acme Markets*, Del. IAB, Hearing No. 995593 (July 25, 2017), however, the Board accepted the opinion of Dr. P. Tim Boulos that a herniation at C3-4 was caused as a result of a fusion at C5-6, even though the intermediate disk (C4-5) was unaffected. Dr. Boulos testified that levels can, at times, be skipped so that a second level away from the fused level can be affected. *See Plumley*, at 8-9. Thus, the Board rejected the opinion of Dr. Andrew Gelman that if the fusion at C5-6 was causing problems at C3-4, then the C4-5 level would also have been affected without skipping a level. *See Plumley*, at 7.

In *Bowers v. Morgan Properties Payroll Services, Inc.*, Del. IAB, Hearing No. 1408128 (December 29, 2017), the Board again rejected Dr. Rudin's opinion concerning adjacent segment disease. In that case, the claimant had had degeneration at L1-2 for years prior to the work accident. Claimant subsequently had a fusion at L3-4, L4-5 and L5-S1. Eventually, the L1-2 disk became a pain generator, but the intervening L2-3 level showed only minimal degeneration. The Board agreed with Dr. Fedder and concluded that what occurred at L1-2 was just part of the natural progression of an existing condition and was not related to the fusion. The Board rejected the idea that adjacent segment disease can "hop over" an intervening segment to affect one higher up the spine. *See Bowers*, at 12-13.

In *Hellstern v. Culinary Services Group*, Del. Super., C.A. No. 18A-07-008, Jurden, P.J., 2019 WL 460309 (January 31, 2019), Superior Court considered an appeal from a Board decision in which the Board rejected a causal relation of adjacent segment disease even though the claimant

had a fusion at L3-4 and the additional level in dispute was the directly adjoining L2-3 level. The Board accepted the opinion of Dr. Robert Smith over that of Dr. Rudin. Dr. Smith had testified that, under the circumstances, it would be unusual for adjacent segment deterioration from an L3-4 fusion to affect L2-3 rather than L5-S1 (which would have received more stress that L2-3) and that adjacent segment disease was "uncommon", occurring in less than 20% of fusion cases. As such, the Board found that the claimant had not met her burden of proof. *See Hellstern*, 2019 WL 460309 at *10-*11. Superior Court affirmed the Board, stating that the issue was "a question of fact" and the Board based its decision on substantial evidence because it relied on the testimony of Dr. Smith. *See Hellstern*, 2019 WL 460309 at *11.

Finally, in *Wroten v. Lowes*, Del. IAB, Hearing No. 1358700 (July 31, 2019), the Board considered an argument that a C3-4 fusion caused adjacent segment disease at C6-7, similar to the situation in the present case. Dr. Eskander testified for the claimant and Dr. Fedder for the employer. Weighing the evidence presented, the Board accepted the opinion of Dr. Eskander that the C3-4 fusion put more stress and shock on all the other cervical disks, eventually resulting in a herniation at C6-7, which is the most common cervical level to herniate. *See Wroten*, at 16-17. The Board noted that there was no evidence that the claimant had "any C6-7 level issues prior to his 2009 work accident." *Wroten*, at 17.

Not surprisingly, Claimant in the present case argues that the decision in *Wroten*, being so similar in facts, should be followed. However, as Superior Court recognized in *Hellstern* and as the above recital of other cases makes clear, this is not an issue to be decided based on legal precedent. Rather, it is a question of fact depending on the presentation of evidence made at this hearing, not that made at any other hearing. The burden of proof rests with Claimant and she must establish more than a mere possibility of causation. Rather, she must show that, more likely than

not, the disk problem at C6-7 was caused by her C3-4 fusion. I find that Claimant has failed to meet this burden.

The medical experts describe the medical literature differently. Dr. Fedder states that the literature discusses adjacent, contiguous disks and that none of the studies support the theory that adjacent segment disease can skip over a level to affect a disk further along the spine. Dr. Eskander argues that "adjacent" does not mean directly adjacent and that the entire spine, from cervical to lumbar is affect by a fusion anywhere along the spine because the fused level imparts increased stress throughout the entire spine. He coined the term "noncontiguous adjacent segment disease" for his causation opinion.

A closer reading of Dr. Eskander's testimony, though, raises substantial doubts as to this causative theory. First, as Employer's counsel points out, the doctor is treating the word "adjacent" as if it doesn't mean adjacent (which is a synonym for "contiguous"). Dr. Eskander observed that the "original paper" on the topic did not "talk about the level immediately above or below specifically," *Deposition of Dr. Eskander*, at 35, and that "they don't ever specify that adjacent segment disease is limited to the immediate level next to the fusion." *Deposition of Dr. Eskander*, at 40. Dr. Fedder denies this, stating that the articles referenced by Dr. Eskander actually do identify adjacent segment disease as being "at the level next to the index fusion." *Deposition of Dr. Fedder*, at 21.

A close review of the testimony, though, reveals that Dr. Eskander does not state that the articles in fact find that a noncontiguous level can be affected. Rather, his statements were to the effect that the articles did not specify that it had to be a directly adjacent level or specifically identify the levels directly above and below. In short, because he did not read the articles as directly specifying that the effect was limited to the immediate adjacent level, the doctor is making

an inference that that means that any level in the spine could be affected. I do not find that rationalization convincing. It is difficult to believe that scientists would use the term "adjacent" to refer to something that was not, in fact, adjacent. That is what one would have to believe to accept Dr. Eskander's theory. I therefore find Dr. Fedder's reading of the articles more credible. It is more likely than not that the scientists coined the term "adjacent segment disease" because it affected the adjacent segment, not segments spread out elsewhere throughout the spine not adjacent to the fusion level.

The belief that Dr. Eskander is reading too much into the scientific articles is support by Dr. Eskander's testimony concerning a synopsis of an article on which he relied. The synopsis, according to him, indicated that the greatest risk for symptomatic adjacent segment disease is greatest at the interspaces between the fifth and sixth vertebrae and the sixth and seventh vertebrae (although, contrary to expectation, the risk of new disease at an adjacent level was lower following a multilevel arthrodesis than a single level arthrodesis). *See Deposition of Dr. Eskander*, at 51-52. The doctor presents this as evidence that the article does not look at any specific adjacent level and that, therefore, a fusion anywhere in the cervical spine would most affect the C5-6 and C6-7 levels. However, that is not what that summary states. What it states, by the doctor's own testimony, is that, if an adjacent level is going to get adjacent segment disease, it is more likely to happen at a 5-6 or 6-7 level. That does not provide any support to Dr. Eskander's conclusion that a noncontiguous level can be affected.[2]

[2] In Dr. Fedder's deposition, his attention was drawn to a study that had two patients with a 6-7 arthrodesis who developed new disk diseases between both 5-6 and 4-5. *See Deposition of Dr. Fedder*, at 44-45. Dr. Fedder noted that that did not establish a "skip lesion" where there is an unaffected disk between the fusion and the higher disk. Even assuming that the 4-5 level was caused by the fusion, it was only with the 5-6 level also being affected. In Claimant's case, the fusion was at C3-4; she had a normal level at C4-5; a normal level at C5-6; and then disk disease at C6-7. The referenced study does not establish a scientific basis to conclude that a fusion at C3-4 causes degeneration at C6-7 without affecting two levels in between.

In short, Dr. Eskander proposes a causation theory. He speaks of spinal kinetics and biomechanics to suggest that a fusion at C3-4 can put extra stress at C6-7 to cause that disk to deteriorate faster, but he failed to identify any specific scientific literature that directly supports that theory. Dr. Fedder testified that, in fact, the scientific literature does not support the idea that adjacent segment disease can skip a level (or, in the present case, skip two levels) to affect a level further down the spine. At best, all that Dr. Eskander presented in his testimony is a colorable argument and that is not sufficient to meet Claimant's burden of proof. Indeed, the summary of the article discussed by Dr. Eskander demonstrates the danger of relying on pure theory. That article specifically noted that, contrary to the theory the authors held, a multilevel arthrodesis (which they assumed would affect spinal motion even more than a single level) actually had lower rates of adjacent segment disease than the single level arthrodesis. *See Deposition of Dr. Eskander*, at 51-52. This is why one tests theories: just because a theory is colorable does not necessarily make it true.

An argument was raised that the C6-7 level already showed some early pathology (a small disk bulge) albeit that pathology played no role at all in Claimant's earlier complaints following the work accident. Both doctors agreed that that bulge likely predated the work accident, but was causing no trouble either before or after the accident. Claimant argues that that level was already weakened and therefore was more prone to be affected by the alleged additional stress from a fusion two levels away than the intervening levels would be. However, I find the evidence to be clear that when Claimant developed C6-7 pathology, it was a sudden onset in April of 2019. The therapy records show that it did not slowly increase over time since the fusion, but rather happened suddenly. I agree with Dr. Fedder that the April 29, 2019 therapy note documented an abrupt change in Claimant's status and that is when symptomatology properly attributable to the C6-7

disk arose. Dr. Eskander agreed that the C6-7 disk is the most common one to herniate in a person under any circumstance. Thus, the fact that the C6-7 disk was not pristine prior to the C3-4 fusion does not mean that the subsequent C6-7 herniation is causally related to the fusion. C6-7 is a level that commonly herniates under normal circumstances. There is no reason to believe that Claimant's C6-7 herniation was not just a natural progression of an already existing disk defect.

Accordingly, I accept the opinion of Dr. Fedder over that of Dr. Eskander, and find that Claimant has not shown, more likely than not, the C6-7 herniation was causally related to the C3-4 fusion or the 2015 work accident. Scientific literature does not establish that the adjacent segment disease phenomenon can skip over intervening levels (leaving them unaffected to affect a level even further away). What Dr. Eskander proposes is, at best, a mere possibility. To establish proper legal causation, Claimant's burden is to show more than a colorable possibility. She must show that, more likely than not, that is what happened. For the reasons stated, I find that Claimant has not met that burden.

STATEMENT OF THE DETERMINATION

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

IT IS SO ORDERED THIS 14th DAY OF OCTOBER, 2020.

INDUSTRIAL ACCIDENT BOARD

CHRISTOPHER F. BAUM
Workers' Compensation Hearing Officer

Mailed Date:

OWC Staff

Hardware Removal Following Spine Surgery

If the Employer pays for the spine surgery, will it always have to pay for a subsequent surgery to remove the hardware?

Davis v. RRW, Inc., IAB No. 1481986 (Dec. 27, 2021)

- Claimant was injured on January 25, 2019, and on February 24, 2020, underwent a L5-S1 anterior, posterior fusion performed by Dr. Zaslavsky, which was acknowledged as compensable by Employer.

- Claimant continued with low back pain following the surgery and on September 25, 2020, Dr. Zaslavsky performed a hardware block.

- The hardware block provided Claimant with no relief.

- Dr. Zaslavsky recommended a hardware removal procedure because of her ongoing symptoms.

- On June 18, 2021, Dr. Zaslavsky performed the hardware removal surgery.

- Employer submitted the hardware removal surgery to Utilization Review and a UR Determination found that the hardware removal surgery was compliant with the Healthcare Practice Guidelines.

- Employer filed a UR Appeal of that determination contending that the hardware removal surgery was not reasonable and necessary.

- At the hearing, Claimant denied that the procedure provided relief and reported she continues to experience spasms, tightening and left sided pain.

- The Board noted that there were insufficient findings to warrant the hardware removal procedure and Claimant's post-accident symptoms remained the same after both her February 2020 surgery and her June 2021 hardware removal procedure.

- Specifically, the Board found inadequate documentation that the hardware was Claimant's pain generator.

- Even Dr. Zaslavsky acknowledged that Claimant's back pain began to worsen following the June 2021 hardware removal surgery and reported that "...we're probably almost in the same position we were before the hardware removal."

- The Board found the hardware removal surgery was **NOT** reasonable and necessary treatment for Claimant based on the medical testimony of Dr. Schwartz.

Vergara v. Washington Street Ale House, IAB No. 1451481 (Oct. 29, 2021)

- Claimant was injured on March 31, 2016, and eventually on January 14, 2019, underwent a L5-S1 anterior, posterior fusion performed by Dr. Eskander, which was acknowledged as compensable by Employer.

- Claimant continued with low back pain following the lumbar spine surgery and Claimant eventually underwent a hardware block procedure, which provided 40% relief for approximately four days.

- As a result, Dr. Eskander recommended a hardware removal procedure and on March 17, 2021, Dr. Eskander performed the hardware removal surgery.

- Employer submitted the surgery to Utilization Review and a UR Determination found that the hardware removal surgery was compliant with the Healthcare Practice Guidelines.

- Employer filed a UR Appeal of that determination contending that the hardware removal surgery was not reasonable and necessary.

- Dr. Schwartz testified for Employer. He testified that while hardware removal surgery is not as complicated as a fusion surgery, there are still the risks of undergoing general anesthesia; of spinal cord injury; of breaking the screw as it is being removed; of infection; and of surgical complications. Dr. Schwartz summarized that in Claimant's case, the surgical risks outweigh the potential benefits.

- Furthermore, Dr. Schwartz noted that Claimant underwent the surgery on March 17, 2021, and she had not benefitted.

- Dr. Eskander testified that Claimant reported experiencing significant improvement from the hardware block prior to the hardware removal surgery and following the hardware removal surgery, Claimant had improvement in her preoperative low back pain.

- The Hearing Officer noted inconsistencies with Claimant's post hardware removal complaints but said, "**When analyzing the reasonableness and necessity of surgery, the factors to be considered are those considered when deciding to proceed with surgery as opposed to the postsurgical evidence of whether such surgery was a success or failure**."

- Dr. Eskander's medical opinions were accepted over the opinions of Dr. Schwartz finding that based on the totality of the evidence, forty percent relief and sustained for 4 days was sufficient to justify proceeding with the hardware removal surgery.

White v. Schagrin Gas, IAB No. 1430282 (May 5, 2017)

- Claimant was injured on February 27, 2014, and Employer acknowledged a lumbar spine injury.

- On March 2, 2015, Claimant underwent a lumbar spine surgery performed by Dr. Eskander, which consisted of an anterior and posterior lumbar interbody fusion at L4-5 with instrumentation/hardware.

- Following surgery, Claimant continued with low back pain and Dr. Eskander recommended a hardware block, which was performed and showed 70% improvement. To further confirm that the hardware was causing Claimant pain, Dr. Eskander a second hardware block, which also showed improvement in Claimant's symptoms.

- Dr. Eskander compared the hardware in Claimant's spine to a pebble in a shoe. For some patients having a piece of metal can disrupt the local tissues. Every time Claimant moves, bends or twists he can irritate the local tissues and muscles, etc. Thus, it is comparable to a pebble in the shoe. The metal in his back is an irritant and the hope is that by removing it the back pain will improve.

- Unlike *Davis* and *Vergara*, Claimant did not have the hardware removal surgery prior to the IAB hearing. So, the outcome of the hardware surgery was unknown during the hearing.

- Board found hardware removal surgery was reasonable and necessary based on success of pre-surgical hardware blocks and Dr. Eskander's testimony.

WHAT IS THE TAKEAWAY?

- A hardware removal block, which shows improvement in symptoms (even if temporary), will be very helpful in arguing that hardware removal surgery was reasonable and necessary.

- e.g., Davis had no improvement from block (lost) and Vergara had at least some improvement (won)

- According to *Vergara*, postsurgical evidence of whether the hardware surgery was a success or failure should not be a factor when deciding whether surgery was reasonable and necessary.

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

SARAH JOHNSON,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1467789
	)	
J&J STAFFING,	)	
	)	
Employer.	)	

DECISION ON PETITIONS TO DETERMINE ADDITIONAL COMPENSATION DUE AND EMPLOYER'S UTILIZATION REVIEW APPEAL

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 Friday October 29, 2021, in the Hearing Room of the Board, in Wilmington, Delaware.

PRESENT:

ROBERT MITCHELL

VINCENT D'ANNA

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

APPEARANCES:

Tara E. Bustard, Attorney for the Employee

Andrew J. Carmine, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Sarah Johnson ("Claimant") was injured in a work accident on August 31, 2017, while in the course and scope of her employment with J&J Staffing. ("Employer"). Claimant sustained compensable injuries to her lumbar spine as a result of the work accident. Claimant has received benefits for medical expenses, including spinal fusion surgery, total disability, permanent impairment, and disfigurement. Claimant's Petition seeks approval for a permanent spinal cord stimulator. Pursuant to title 19, section 2322F(h) of the Delaware Code, the Employer referred that treatment for Utilization Review ("UR"). On April 14, 2021, the UR determination was issued and found the spinal cord stimulator (SCS) to be compliant with the Healthcare Practice Guidelines (HCPG).

On May 21, 2021 Employer filed a Petition to Determine Additional Compensation Due to appeal the UR determination. On June 1, 2021 Claimant filed a Petition to Determine Additional Compensation Due to determine compensability of the spinal cord stimulator. Employer contends that the stimulator implant was not reasonable, or necessary. Claimant's average weekly wage was $345.48 resulting in a compensation rate of $230.32. A hearing was held on October 29, 2021. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. Mark Eskander, a physician board certified in orthopedic spine surgery, testified by deposition on behalf of Claimant. Dr. Eskander first started treating Claimant in February 2018. Dr. Eskander testified that they tried a few different modalities of conservative treatment however that failed, and they ended up performing lumbar spine fusion surgery. This surgery was quite extensive involving lumbar spine segments L3 through S1 and included a deformity correction. The last surgery was April 29th, 2019. Claimant ended up with persistent pain and

radicular complaints despite the surgery. Claimant underwent a spinal cord stimulator trial with an 85% improvement in her symptoms. Dr. Eskander testified that putting in a spinal cord stimulator involves a lot of different adjustments in the programming and signals. Dr. Eskander agreed that the conservative treatment included physical therapy, opioid pain medication, steroids, nerve medication and injections.

In December 2020 Claimant had, prior to the implantation of the spinal cord stimulator, complaints of back pain radiating to the right buttock, and lateral leg down to the level of the ankle. She had numbness and tingling in that distribution and rated the pain at a 9 out of 10. She had swelling tingling, weakness and giving away of her lower extremity. Dr. Eskander made a recommendation for a spinal cord stimulator because some patients still have a lot of troubles after the stabilization of the spine with the fusion surgery. The stimulator would essentially modify the pain sensations or the signal that comes from the lower extremities up through the back to the brain. The stimulator blocks or alters that signal so the brain does not know it is pain. Dr. Eskander reviewed a note from Dr. Rowlands who saw Claimant on February 25th, 2021. Her symptoms at that time were pain in the lower back and bilateral legs at 9 out of 10 severity. Other pain management treatment had failed. At that point Dr Rowlands agreed to go forward with a trial spinal cord stimulator. He discussed it on that visit with Claimant.

Dr. Eskander described the role of spinal cord stimulator as akin to an antenna on a TV to get the picture sharper. It does not correct the underlying condition but changes the pain signals. Dr. Eskander testified that there was a transmitter and implanted paddle like devices with wires that are hooked up to a battery. The transmitter is a handheld device like a phone. The user can adjust the different patterns, signals, and algorithms to control their pain. You also work with a manufacturer's representative to dial in the signals and program the device. Dr. Eskander

testified that the simulator doesn't get turned on right after the implantation, because you want to wait until the implant incisions heal.

In accordance with the HCPG Claimant saw a psychiatrist, Dr. Detweiler. He provided a report dated March 9, 2021. Claimant was aware of the risks and expressed no concerns relative to that and the potential side effects. Dr. Detweiler also indicated that Claimant had done some additional research online herself and asked appropriate questions. He expressed an opinion that she was emotionally capable of handling and benefiting from the spinal cord simulator procedure. Claimant then obtained a second opinion with Dr. James Zaslavsky and he concurred that the stimulator placement would be a good recommendation. Following that Claimant had a trial spinal cord stimulator placed. Dr. Rowlands note of March 31, 2021 detailed the results of that trial. His note indicates Claimant had 85% relief during the trial which is a very good response. Dr. Eskander felt that this was as good as you would get with an implant. He testified that there is a high correlation between the results of the trial and a permanent implant. Usually, patients get much less relief and still go with the implant however 85% is a great response. He agreed that Dr. Rowlands note indicated that Claimant was only complaining of right leg pain after the trial. She was also down to an eight out of 10 pain from a nine she was expressing before the trial.

Dr. Eskander reviewed the utilization review report. He noted that the reviewer is a neurosurgeon familiar with the implant procedure. Dr. Eskander agreed that this surgeon determined that the permanent implantation of a spinal cord stimulator was in compliance with the HCPG. It was Dr. Eskander's opinion that the protocols were met and checked in multiple different ways. Claimant had the permanent stimulator implant done on April 27, 2021. Dr. Eskander described in detail what is involved with the implantation procedure. Following that

procedure there was a two-week post op visit. At that time, Claimant was already seeing significant improvement in having an overall 90% relief with some symptoms in the left leg. Dr. Eskander agreed that she had relief of her pain in the left leg on May 14, 2021. He also indicated that initially after the procedure they don't turn the implant on because of the fresh wound. Claimant met with the manufacturers wrap to get the algorithms and programming right. He did agree that the adjustments to get the computer algorithms correct could take a long time. He felt this process of tuning could last up to three months. Claimant had another follow-up on June 10 to the 2021 and was complaining of some achiness with walking and weakness in the right leg. She did not report any other pain. At that time, they considered a functional capacity evaluation. Claimant had a telemedicine appointment on July 22, 2021 and reported having some back pain radiating to the right leg at 7 out of 10 which would wake her from sleep. She had benefit from the stimulator on the left but not the right. She was meeting with the manufacturer rep to make some adjustments. They took x-rays to ensure that the implant was in the proper position which it was. Dr. Eskander also noted that at this point Claimant was seen Dr. De los for right hip symptoms. He felt that some of the pathology from the hip was overlapping with her back pain.

Dr. Eskander also reviewed Dr. Schwartz' DME. He disagreed with Dr. Schwartz' opinion that because there was still right leg pain the spinal cord stimulator implantation was not reasonable or necessary. Dr. Eskander pointed out that the rationale for the trial and ultimately the permanent placement was checked in a few ways and appropriately followed all the steps outlined in the HCPG. They got a great result from the trial and only after that moved ahead with the permanent implant. This is not even considering how the permanent implant is performing. The decision to go forward with it was well-founded and documented. Dr. Eskander also did not like to use the term failed back syndrome. There can be many different problems resulting in an

unsatisfactory spinal surgery. One has to follow up and determine what is causing the pain and dysfunction. He did admit that the failed back surgery diagnosis is a pre-qualifier for a spinal cord stimulator. In the end Dr. Eskander felt that the spinal cord simulator was reasonable and necessary. As to whether Claimant could work they would wait for the FCE results. Claimant did follow up with additional programming of the stimulator in August. This was in conjunction with the manufacturers rep who was able to program the device. This process has been ongoing since the implantation. This may not necessarily be an in person visit but could be over the telephone to troubleshoot the system.

On cross examination Dr. Eskander agreed that in December 2020 Claimant had bilateral leg pain as well as back pain. The note specifically indicated radiating pain on the right side. He agreed as to the listing of the risks and side effects of a spinal cord stimulator implant. Dr. Eskander testified that he does not do the trial just the permanent implants. He did indicate the following the trial placement there is a week of programming and optimization that follows. He agreed that Claimant reported her experiences for the previous six days while on the trial. He agreed that the follow-up note indicated right lower back and right leg pain with an eight out of 10 severity. At that time, Claimant was taking gabapentin 600 mg. He agreed also that there were no changes to her medication at that point. Dr. Eskander explained the discrepancy between the 8 out of 10 pain on the visual analog scale and 85% relief by stating that percentage represents a global response to the procedure as opposed to specific daily pain. He agreed that Claimant did not keep a pain diary for the trial procedure. Dr. Eskander agreed that after the trial he wrote to the carrier requesting for the procedure to be approved. This request in turn triggered the Utilization Review.

Dr. Eskander discussed his scheduling procedures in the office and the timing between his request for approval and the actual procedure. He also discussed some of the risks during the procedure which are the same or similar as risks during any back surgery. On May 14, 2021 Dr. Eskander's physician's assistant saw Claimant for the first post op follow-up. At that point she was having overall 90% relief in the left leg. Dr. Eskander noted that the disability scores were quite low during that visit as well. The stimulator helps with all types of pain. He agreed that the physical examination on May 14 was positive for a straight leg raise on the right as well as tenderness on the right side. He agreed that Claimant was still experiencing clinical symptoms on the right side, however Dr. Eskander noted this could be coming from the hip. He described how the multilevel fusion procedure might affect other areas of the body. The August 4, 2021 telehealth visit occurred of course without a physical examination. Claimant noted that het condition was unchanged and continued to rate pain at 7 out of 10 while complaining that it was waking her from sleep. The benefits were on the left side.

Dr. Eskander described his physical examination on August 4. She had back pain radiating to the right leg. The disability score was similar, and her pain was 7 out of 10. Claimant had some give way weakness in the right lower extremity but that was improved. Straight leg raising was positive on the right. There was hip irritability on the right as well. Dr. Eskander testified that Dr. Rowland was following up on the medical management after the surgery. Dr. Eskander testified that Claimant has still been out of work during this time. Dr. Eskander emphasized that these stimulators are not meant to give a hundred percent pain relief because that would be an elimination of all sensation. There has to be some feedback. Something like a hip arthritis or straight leg raise can break through but they are more tolerable, and a patient can function with a better quality of life which is the purpose of the stimulator.

Claimant testified on her own behalf. Claimant is from Newcastle Delaware. In the four years since the injury, she has had multiple and varied types of treatment. Leading up to the spinal cord stimulator trial Claimant had back pain and bilateral lower extremity pain. Claimant testified that after the surgery she was using a walker but they told her that was not good for her a so she weaned off the walker and is now using a cane. She was also taking gabapentin. After undergoing the SCS trial she felt 85% relief of her pain symptoms. Claimant testified that she felt if she went ahead with the permanent implant, they might be able to get all her pain to go away. Claimant testified they told her the pain relief would not happen overnight and it could be a long process to get it working correctly. There was also a risk that she still might have pain. After she had the SCS implant her left leg pain resolved however it did not take away her right leg pain. Ultimately, Claimant felt she had 90% relief of her pain symptoms.

Claimant testified that she met with the device representative, Sarah, who adjusted and programmed the device until even her right sided pain was gone. Claimant testified that she still has an issue with right-sided buttocks pain. She feels there is something swollen in that area and bruised. She feels discomfort when she sits on that side. She met with Sarah several times to adjust the device. Ultimately the pain in her legs resolved enough so that she no longer has to take gabapentin. She takes tramadol for pain. Claimant is trying to walk more but still gets tired quickly. The stimulator has helped relieve Claimant's pain and as a result she is more functional in her activities of daily living.

On cross examination Claimant confirmed that in the office notes a week after the beginning of the SCS trial in March indicated that her pain level was the same as it was prior to her surgery. At the same time, Claimant told the doctor that she had 85% pain relief. When asked to describe or explain this discrepancy Claimant noted that the 85% number was an average

number based on her experiences during the week of the trial. She was tolerating her daily routine more and she was able to relax without feeling the pain. After she had the SCS implanted she was having severe pain that would wake up her up from sleep. The records indicated a week after the implant that she had pain shooting down her legs. Claimant agreed that the SCS was not working in July. When Claimant saw Dr. Schwartz for the defense medical exam, she told him that she still had pain. That is when they called in the manufacturer rep to help adjust the stimulator. They tried different settings and programs to get the pain to resolve. Claimant confirmed that currently she does not have any pain going down her legs. She also testified that she was mistaken about the tramadol and is only taking tizanidine for the pain in her buttocks. She has not scheduled any follow up visits with Dr. Eskander and is feeling much better. She confirmed that when she saw Dr. Schwartz the stimulator was not working properly.

Dr. Eric Schwartz, a physician board certified in orthopedic surgery, testified by deposition on behalf of Employer.[1] Dr. Schwartz examined Claimant on several occasions, in 2018, September 2020 and July 29, 2021. In conjunction with his examinations Dr. Schwartz was also able to review medical records including the utilization review decision. During his first deposition Dr. Schwartz testified that he did not believe the proposed spinal cord stimulator provided Claimant any benefit. Dr. Schwartz reviewed Dr. Rowlands note of March 31, 2021. That record noted Claimant presented for a low back pain follow up with symptoms of back pain in the right lower back and right leg with pain at a severity of 8 out of 10. She was prescribed 300 mg of gabapentin and Dr. Schwartz testified that there was no change in medication dosage from his prior deposition. He read that the trial of the spinal cord stimulator provided 85% relief, however the note also stated that Claimant rated her pain at an 8 out of 10. The specific details of

[1] Dr. Schwartz previously testified in this case on February 4, 2021. That transcript was attached as an exhibit to this deposition.

the lumbar spine examination noted lumbar spine spasms, tenderness, pain on palpation of left and right bilateral lumbar paraspinals. Dr. Schwartz further noted there was pain on rotation and during a Kemp test.

Dr. Schwartz testified that it was correct that the practice guidelines require a minimum of 50% decrease in pain confirmed by the visual analog pain scale. He felt that the pain noted on Dr. Rowlands note after the test, 8 out of 10 represents the same pain that Claimant had prior to the test. It is also at odds with Claimant's statement that she had 85% relief. In his mind that would mean her pain level dropped down to a 2 to 3 out of 10. Dr. Schwartz testified that he disagrees with the physician reviewer because there was no second opinion and no documentation of relief required by the guidelines. There was also no evidence that medication usage was reduced. He agreed that the UR decision did not even discuss the second opinion. Dr. Schwartz testified that the implantation of the permanent device is a serious surgery with all the attendant risks that go along with that. There's a risk of infection and other complications even though it is not the same thing as fusion surgery, you still have a decent sized incision.

Dr. Schwartz testified that the goal of the Practice Guidelines for surgery was that the benefits of that procedure outweigh the risks. The benefit would be to restore functionality and alleviate discomfort. Dr. Schwartz also reviewed the postoperative notes from Dr. Eskander's office. The initial physician's assistant note provides no visual analog scale just the statement that there was 90% pain relief overall on the left side. Although he noted you could not tell whether that 90% was just to the left side or overall. The physical examination on that date reported decreased sensation on the right side in multiple distributions. There was also positive straight leg raise and tenderness on the right side. All this is inconsistent with an overall 90% improvement. She was continuing to walk with a cane on that date as well.

The next visit was six weeks postoperative and Claimant reported no pain. She has some weakness in the right leg and aching when she walks too long. However, Dr. Schwartz noted that the subjective statement is inconsistent with her disability index which was a 40 and indicative of pain. The Oswestry Disability Index (ODI) evidenced pain with difficulty sitting, lifting, traveling and social life. This was another inconsistency in his opinion. Dr. Schwartz testified that the ODI scoring would be 0 to 20 for minimum disability, 21 to 40 for moderate disability and anything over 40, which Claimant was close to here, equates to severe disability. Dr. Schwartz next reviewed Dr. Eskander's note from July 22, 2021 which was a telehealth visit. At that point Claimant was reporting that she was essentially back to where she started with back pain complaints radiating into the right leg and a pain rating of 7 out of 10. She was having trouble sleeping because of her pain. There was some benefit noted on the left side but not on the right. Claimant remained on total disability status 12 weeks from the implant. She was also continued to take her medication with very little decrease in her gabapentin. She was also taking oxycodone 5 mg and a muscle relaxer. This represented an increase in medication since the implantation of the spinal cord stimulator.

On his follow-up examination Dr. Schwartz noted that Claimant had symptoms of back pain right and lower extremity radicular complaints despite the placement of the stimulator. Claimant told him that the stimulator helped in the beginning but was not helping at this point with the right lower extremity. She was ambulating with an antalgic gait as well. Claimant specifically stated to Dr. Schwartz that the stimulator was no longer helping her. On physical examination Claimant continued with the lumbar discomfort with restricted range of motion. She had diffuse weakness in the right lower extremity. Straight leg raising produced back pain on the right but not true radicular pain. She had diminished ankle reflexes and diminished sensation in a

non-dermatomal pattern. Following his examination and review of all the records it remained Dr. Schwartz's opinion that Claimant had reached maximum benefit from all medical treatment as of his December 3, 2019 evaluation. He did not feel that further treatment including the spinal cord stimulator would be reasonable and necessary. She was capable full-time sedentary duty work at this point.

Dr. Schwartz testified further that his opinions dovetail with his prior testimony before the Board. He does not feel that the spinal cord stimulator was consistent with the guidelines but even setting that aside, Claimant has had multiple surgical interventions and treatment with no benefit. Claimant has undergone a 3-to-4-year period of extensive and life altering treatment and the medical records do not support any positive patient response or functional gain required by the guidelines. Noting Dr. Eskander's testimony that the permanent implant was justified by the successful trial, it was Dr. Schwartz's opinion that the medical records do not support that statement. He noted again that this happened previously with the Board's decision when Dr. Rowlands opined Claimant had a 90% improvement with no support from the medical records. There is no pain diary or proper documentation of the 85% reduction in pain with the stimulator trial. The 85% reduction in pain is clearly inconsistent with the visual analog scale which remained at an 8 out of 10. He would have expected to see the decreased pain with the implantation of the stimulator. Dr. Schwartz testified that by the July evaluation there was no evidence of any benefit from the implant. He would've anticipated immediate relief because it is blocking the electrical signals which should elicit an immediate response. Pain should be reduced, and function increased. Instead, Claimant had an increase in medication three months later. He also discussed her work capability.

On cross examination Dr. Schwartz admitted that he does not perform spinal cord stimulator implants. He also admitted that he had not reviewed any records from First State Orthopedics including the second opinion prepared by Dr. James Zaslavsky. Dr. Schwartz specifically indicated he did not review the March 16, 2021 note where Dr. Zaslavsky provided a second opinion on the spinal cord stimulator. While Dr. Schwartz agreed he stated that one of the requirements that was not obtained, was getting a second opinion for the spinal cord stimulator. Even the second opinion from Dr. Zaslavsky would not change his opinion after seeing Claimant over several years and on numerous occasions. He did not believe that this stimulator provided the necessary reduction in pain. Dr. Schwartz acknowledged that the May 14, 2021 note does indicate she had relief in her left leg only but that wouldn't necessarily transmit to a benefit because Claimant has had mainly complaints of right lower extremity issues for a number of years. He agreed that Claimant was reporting 90% overall pain benefit at that time, however as he said previously in his testimony that in and of itself is not a functional benefit over time. The 90% relief being reported only three weeks postoperative. He agreed that Claimant's ODI was 68 in December 2020 and 20 on May 14, 2021. He noted that the later date in June showed an ODI a 40 which is going back up again. He agreed that was still less than December 2020, but it was going back up again. The pain scale was still an 8 out of 10 and there was a slow incremental increase back to the where it was prior to the stimulator placement.

Dr. Schwartz agreed that in January 2018 lumbar surgery was an option. He noted that they all agreed she had a significant disability from the work accident and recalled that her impairment rating was 35%. He wasn't questioning that, but he was questioning the continued multiple procedures. He agreed that he diagnosed her with failed low back syndrome. He did not believe that she should have been taking the high amount of gabapentin or receive any additional

injections or nerve blocks. He would manage the symptoms with activity modification, cognitive therapy and return to work which can reduce stress and anxiety. You don't want to repetitively perform injections even after they don't work. She's at the endpoint of her treatment was significant disability.

Dr. Schwartz agreed that Claimant was 69 at the time of his original evaluation in 2018. He noted that she had issues consistent with her impairment rating of 35% like restricted lumbar range of motion and she's had significant long-term complications from the work injury and the surgeries. She continues to have weakness in her right lower extremity and decreased sensation. He felt that she was in endpoint with her treatment exercise and returning to work is always helpful. What we know is that Claimant has had a multiyear, extensive life altering treatment and has not improved. The medical records note that the range of motion is has not improved, her endurance is not improved, her strength is not improved none of the functional things you would want to see a positive patient response from have improved. Dr. Schwartz again agreed that one should see pain relief immediately after the implantation of the stimulator. He noted that even the guidelines note that you want to see significant relief within a day or two. He believes that the stimulator is turned on within 24 hours after the surgery. He agreed that the utilization review did not reference the second opinion from Dr. Zaslavsky at any time. He did not believe that the note from Dr. Rowlands immediately after the trial is sufficient to support the permanent implant. Regardless of when the actual stimulator was turned on whether was 24 hours or 48 hours afterwards the records do not support the need for the stimulator. It doesn't matter when you turn it on, however after it is on you should start to feel immediate relief. He agreed that the utilization review determination did not list the records the reviewer reviewed at the time of the

review. He did not believe that the reviewer was looking at all the medical records. The main point from the UR is the resulting 85% relief during the trial as justification.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Medical Expenses

When an employee has suffered a compensable injury, the employer is required to pay for reasonable and necessary medical "services, medicine and supplies" causally connected with that injury. DEL. CODE ANN. tit. 19, § 2322. However, to assist in assessing what is reasonable or necessary medical treatment for a workers' compensation injury, Delaware adopted Health Care Practice Guidelines.[2] These "guidelines shall apply to all treatments provided after the effective date of the regulation . . . regardless of the date of injury." DEL. CODE ANN. tit. 19, § 2322C(1). To determine compliance with the guidelines in a compensable claim, an employer must refer the treatment to Utilization Review (UR). In this case, the UR determination certified that the spinal cord stimulator implant was compliant with the Healthcare Practice Guidelines. 19 *Code Del.Regs.* 1000 1342 Part B. It is from this determination that Claimant took the current appeal, which is an appeal *de novo*. *DEL. CODE ANN.* tit. 19, § 2322F(j). As the petitioner, Employer bears the burden to prove that the non-certified treatment is reasonable and necessary.

The focus of a UR determination is on whether identified treatment is within the Health Care Practice Guidelines. Unlike the UR determination, the primary issue before the Board is not whether treatment is within the applicable guidelines, but whether the treatment is reasonable and necessary. *Meier v. Tunnell Companies LP*, Del. IAB, Hearing No. 1326876, at 3-4

[2] The Health Care Practice Guidelines currently consist of separate "treatment guidelines" addressing carpal tunnel syndrome, chronic pain, cumulative trauma disorder, low back, shoulder, lower extremity and cervical spine. The adopted practice guidelines can be found at http://dowc.ingenix.com/DWC.asp.

(November 24, 2009)(ORDER).[3] The Board finds that the spinal cord stimulator and related treatment is reasonable and necessary and consequently affirms the UR determination. The Board relies on the opinion of Dr. Eskander that the treatment subject to the UR determination was reasonable and necessary. When medical testimony is in conflict, the Board, acting as fact finder must resolve that conflict. *General Motors Corp. v. McNemar,* 202 A.2d 803 (Del. 1964). As long as substantial evidence is found, the Board may accept the testimony of one expert over another. *Standard Distributing Company v. Nally,* 630 A.2d 640, 646 (Del. 1993).

The Board does agree with Dr. Schwartz that the issue is whether the treatment is likely to or has brought about, functional gain for Claimant. Initially it appeared there was conflicting evidence of benefit to the point where Claimant told Dr. Schwartz in July it was not working for all her pain. There also appeared to be a serious contradiction in the records during the stimulator trial. Claimant stated she had 85% relief of her symptoms during the trial, but at the same time she was still stating an 8 out of 10 pain level. Aside from that there is more evidence that Claimant has seen functional gains and pain relief once the device was adjusted. The hip condition overlapping some of her symptoms is problematic and muddies the waters. In the Board's view this unrelated condition is contributing to her current pain levels and is thus responsible for some of the heightened pain level. Claimant is providing an overall pain level and was not asked to provide a pain level just for her back pain. The disability index is not

[3] This comment needs a little clarification. By statute, treatment by a certified health care provider that conforms to the guidelines is "presumed, in the absence of contrary evidence, to be reasonable and necessary." DEL. CODE ANN. tit. 19, § 2322C(6). Thus, when treatment is outside of the guidelines, a UR determination might refer to it as not being "reasonable and necessary," but that conclusion is based on whether the treatment is within the guidelines. On appeal, however, treatment that a UR determination finds to be outside the guidelines may still be found by the Board, during *de novo* review, to be reasonable and necessary if convincing evidence is submitted. Likewise, treatment that a UR determination might declare as within the guidelines (and, thus, presumptively reasonable and necessary) might still be found by the Board, during *de novo* review, not to be reasonable or necessary treatment if convincing evidence is submitted. *See Meier*, at 5. The burden of proof rests with the party challenging the UR determination.

inconsistent with the records evidencing a drop in the index number and then an increase around the time of Dr. Schwartz' final DME.

Dr. Eskander's testimony supports the conclusion that the UR determination was correct, and the stimulator placement followed the guidelines. It appears that Dr. Schwartz missed the second opinion from Dr. Zaslavsky. Dr. Eskander also testified that higher than 50% relief is a success for these devices and both in the test and permanent implant Claimant had more than that amount of relief. Setting aside the numbers Claimant testified that the left sided radicular pain and back pain was almost completely resolved, with the leg pain being completely resolved. The right sided pain took longer and currently she testified that what remains in pain in her right buttock and the aforementioned hip pain. After the initial period of adjustment, at which time the DME took place, Claimant did not get the sought-after relief. However, Claimant testified that after working with the manufacturer's rep the device programing was adjusted and she eventually did get satisfactory pain relief. This testimony is borne out by the medical records after July 2021. Even Dr. Schwartz pointed out that Claimant has permanent functional loss from the injury, resulting in a 35% impairment rating to the lumbar spine. So, to expect 100% relief is not a viable option. Dr. Eskander's opinion is supported by the evidence that Claimant had substantial relief, even if that means there is some residual symptoms.

The records and Claimant's credible testimony support the reasonableness and necessity of the spinal cord stimulator implant. The Board finds that this evidence outweighs any evidence to the contrary. Consequently, Claimant's Petition for medical expenses is granted. Employer's Petition on appeal from the Utilization Review is denied and the determination affirmed.

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." DEL. CODE ANN. tit. 19, § 2320. In determining an award of attorney's fees, the trier of fact must consider the factors outlined in *General Motors Corp. v. Cox,* 304 A.2d 55, 57 (Del. 1973), such as the time involved in the presentations, fees customarily charged in the locality, the nature and length of the professional relationship with Claimant, and the attorney's experience/reputation. Claimant's counsel represents that her fee arrangement with Claimant is on a contingency basis. There has been no indication that fees or expenses have been, or will be, received by Claimant from any other source. Claimant's counsel submitted an affidavit attesting that she spent approximately fifteen (15) hours preparing for the current hearing, which lasted approximately ninety minutes (90). Claimant's counsel indicated that her work on this case has not precluded her from taking on other cases. Counsel has been admitted to the practice of law in Delaware since 2006 and is experienced in workers' compensation, a specialized area of the law. Her firm's association with Claimant began on October 2, 2017. The issues in this case were average in nature. It does not appear that there were any unusual time limitations imposed by the Claimant or the circumstances surrounding the case. Claimant's counsel has also indicated that Employer has the ability to pay an award. Counsel's affidavit was entered without comment or objection.

Claimant has been awarded continuing compensability of medical expenses mainly in the form of a spinal cord stimulator implant and related treatment. 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, the Board finds that an attorney's fee award of $6,000.00 is reasonable, in consideration of the factors discussed above. In the Board's estimation, this does not exceed thirty percent of the total value of Claimant's award pursuant to this Decision.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Employer's Petition to Determine Additional Compensation Due appealing the Utilization Review determination dated April 14, 2021 is hereby **DENIED.** Claimant's Petition to Determine Additional Compensation Due for medical expenses is hereby **GRANTED.** Employer will reimburse Claimant for her medical witness expenses and pay an attorney fee of $6,000.00.

IT IS SO ORDERED THIS 9th DAY OF NOVEMBER 2021.

INDUSTRIAL ACCIDENT BOARD

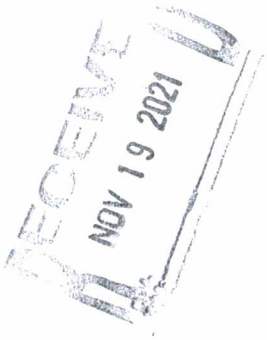
/S/
ROBERT MITCHELL

/S/
VINCENT D'ANNA

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

Mailed Date: Nov 12, 2021

OWC Staff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BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

PATRICIA ORTIZ-GUZMAN,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1509245
	)	
APPLE AMERICAN GROUP LLC.,	)	
	)	
Employer.	)	

DECISION ON PETITION TO DETERMINE 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 Thursday February 17, 2022, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

MARK MUROWANY

ROBERT MITCHELL

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

APPEARANCES:

Cynthia H. Pruitt, Attorney for the Employee

Brandon R. Herling, Attorney for Employer

NATURE AND STAGE OF THE PROCEEDINGS

Patricia Ortiz-Guzman ("Claimant") alleges that on September 1, 2020 she sustained injuries to her low back, hip and left ankle while in the course and scope of her employment with Apple American Group LLC dba Appleby's ("Employer"). On March 16, 2021 Claimant filed this Petition to Determine Compensation Due seeking acknowledgment of her injury as compensable, payment of ongoing medical expenses and lost wages. Prior to the hearing the parties stipulated that Claimant's accident is compensable and some of the medical expenses had been paid under an implied compensation agreement. Employer disputes the reasonableness, necessity and causal relationship of treatment related to the implantation of a spinal cord stimulator. Employer also disputes ongoing total disability benefits based on a job offer made on or about March 25, 2021. Finally, the parties cannot agree on Claimant's average weekly wage due to a furlough related to Covid19 prior to the work accident. A hearing was held on Claimant's petition on February 17, 2022. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant testified, through a Spanish interpreter, on her own behalf. Claimant lives in Newark Delaware and is 51 years old. She is currently single, her husband having passed away in 2018. Claimant currently works for McDonald's and has worked there for 20 years. She is now a general manager, and her duties include administrative work such as scheduling, sales and planning as well as tracking profit and loss for the restaurant. Claimant began working at Applebee's in May 2018 and worked both jobs on a full-time basis. Her job duties at Applebee's were primarily in the kitchen as a prep cook. This job was a standing position one hundred percent

of the time. She estimated that she worked 70+ hours per week between the two jobs. Claimant has two adult children.

Prior to the accident Claimant denied having had treatment for back pain. She does not remember having any leg pain like she had after the accident. Claimant acknowledged that after the accident she had to use a walker and if she had a problem that bad before the accident, she would have remembered it. Before she had the spinal cord stimulator implanted Claimant got an injection in the back. She got two sets of injections, underwent physical therapy at Concentra and Dynamic Physical Therapy as well. In August 2021 she had a trial spinal cord stimulator. Before she got the stimulator she was unable to do most activities of daily living such as cleaning her house or cooking. She required assistance with her activities at home from her daughter. Her pain level was up to a 10 out of 10 prior to the implant. After she got the spinal cord stimulator implanted Claimant estimated that her pain was down to a four out of 10 in her back and her leg. She has not had to use a walker or a cane since the implant. Claimant confirmed that these assistive devices were prescribed by her doctor. Her activity level has gotten better, and Claimant testified she feels the stimulator has given her second chance in life. Claimant testified that during this time she continued to work her job with McDonald's because it was essentially a sedentary duty position and they accommodated restrictions such as the use of the walker.

On cross examination Claimant confirmed that she had pain in her lower back, hip, and leg. Her first medical treatment was on October 11 and she saw her primary care physician, Dr. Mehta on October 13. Claimant agreed that Dr. Mehta diagnosed bursitis. She testified that Dr. Mehta referred her to a specialist. She acknowledged that the Concentra records from October list a diagnosis of a pelvic contusion, inguinal pain and a sprained ankle. Claimant confirmed that she worked 70 hours a week since her husband passed away, but she didn't feel that it was stressful.

Claimant was not aware that her doctors were concerned for her mental health. Claimant acknowledged that she was worried that due to her severe pain she would be unable to walk normally again. Claimant does recall seeing Dr. Xing in February 2021 but she did not recall discussing with Dr. Xing psychological issues such as anxiety and stress. A note from Dr. Mehta on February 23, 2021 indicated that an antidepressant was prescribed. Claimant noted that she was already taking some medication and felt that it was normal to feel depressed because she had to use a walker to get around. Claimant acknowledged that she went to Westside Healthcare as her primary care in 2015. There was a visit in April 2015 about her vomiting which Claimant testified was a stomach problem not anxiety, but the record indicated that she was under stress. Claimant acknowledged that a record from Dr. Mehta dated May 18, 2021, indicated that she was doing very well. At that time, she was on Cymbalta but denied she was taking it for depression, rather she was taking it for pain.

Claimant confirmed that at this time she was continuing to work full time for McDonald's. Claimant denied getting a note from Dr. Eskander indicating that she was not to work. Dr. Xing's records reflected that she was to be out of work and the note was provided by Dr. Eskander. Claimant acknowledged that's what the report indicated but she never had a total disability note. It was Claimant's understanding that she could do sedentary work, but she was unable to do any standing jobs. Claimant confirmed that the Cymbalta was prescribed by Dr. Rowlands in April 2021 and she hadn't taken it before that time. To Claimant not being able to work was more stressful than being out work. At that time she was responsible for two kids since the death of her husband. Her daughter was in college and her son was in high school and she had a mortgage to pay. Claimant testified that she was never sedentary and always an active woman.

Claimant described how the accident occurred. She was in front of the screen and turned to the frier twisting her ankle which caused her to fall directly on her butt and she immediately felt back pain. Claimant testified that she did not immediately have 10 out of 10 pain, however it gradually increased to that level. She got the permanent spinal cord stimulator implanted in October 2021 and no longer requires a walker. She confirmed that it is stressful for her to lose out on working hours and the money. She had the trial spinal cord stimulator for one week and seemed to recall that she had one set of injections for the back and one set of injections in her hip. Her pain increased from the back injections, and she had no improvement with the hip. Physical therapy consisted of medication, physical therapy, water therapy, massage, and ice treatments but none of these treatments improved her pain. She confirmed that she had a lengthy course of physical therapy over several months and agreed that Dr. Rowlands gave her lumbar spine injections in May 2021. They did not provide any lasting relief. Claimant disputed that the Concentra records reflected that she was an immediate pain or that the pain started a week later. Claimant testified that is when the pain started to increase, and she denied telling Dr. Mehta that she was not in any pain. Claimant wants to be able to return to work and put in more hours.

Dr. Mark Eskander, a board certified orthopedic spine surgeon, testified by deposition on behalf of Claimant. Dr. Eskander reviewed a package of records including diagnostic studies and Neil Taylor's functional capacity evaluation (FCE) in preparation for his testimony. Dr. Eskander summarized the treatment that Claimant had prior to being seen in his office. She was seen at Concentra on October 15, 2020 after being seen in the emergency room on the 11th. At Concentra she was evaluated and started a course of physical therapy. Subsequently she saw Dr. Xing who ordered an EMG and an MRI scan. The EMG done on November 19, 2020 was normal. Dr. Eskander testified that is not unusual as sometimes the test does not pick up an abnormality when

the timing is off. He agreed that the physical therapy did not alleviate Claimant symptoms. The lumbar spine MRI findings included a disc herniation and annular fissure at L5-S1 as well as a mild disc bulge at L3-4. There was some facet joint edema on the left at the L3-4 level as well. Dr. Eskander indicated this could be an arthritic or inflammatory condition. For her next treatment Claimant had a lumbar epidural injection performed by Dr. Xing. This was done on February 1, 2021 and did not provide her with significant relief.

Claimant initially treated with Dr. Eskander in March 2021. At that time her symptoms included back pain radiating bilaterally to the thighs and knees. She had numbness and tingling in that distribution as well as to the right heel. The symptoms started on September 1, 2020 from the fall at work. The mechanism of injury was a fall when she slipped, twisted her ankle and fell on her back. Claimant denied any significant back or leg symptoms prior to that incident. Claimant cited her pain as 10 out of 10. Claimant had decreased sensation in all distributions on the left side but otherwise her neurologic exam was normal. As a plan of treatment Dr. Eskander wanted to order additional testing including a bone scan and a discogram. He also thought there may have been some hip pathology.

Claimant followed up on June 3, 2021 after the discogram. Claimant was being treated by Dr. Voltz for the right hip and had an injection in that area. She also had nerve blocks done to the lower back. There was not much improvement from either of these injections. The discogram showed atypical patterns of pain coming from multiple levels in the lumbar spine. Dr. Eskander testified that this meant that they could not pinpoint which motion segment was painful in order to do a fusion surgery. This might lead them to do a multilevel fusion surgery which would not be desirable to the patient. Dr. Eskander felt a different strategy that would be less impactful on a patient's function was required. The other option was that of a spinal cord stimulator. Claimant

agreed that was the better option than doing surgery that would either be too extensive or perhaps not enough. Dr. Xing inserted a trial spinal cord stimulator according to the protocol. Dr. Eskander testified that Claimant was a good candidate and through the trial she got 50 to 60% relief as well as 60% relief of the pain in her leg. She was able to ambulate without a walker and so it was a tremendous improvement and a difference maker for quality of life. Claimant obtained the necessary follow-ups including a second opinion from another spine surgeon and a psychiatric evaluation. The option of a spinal cord stimulator seemed much better than moving forward with a partial lumbar fusion that may not work.

The permanent implant of the spinal cord stimulator occurred on October 6, 2021. Dr. Eskander explained some of the follow-up steps once a permanent stimulator is implanted. This includes neuro-monitoring by a company representative or technician from the stimulator company to program it according to a patient's pain pattern. Dr. Eskander also testified that you cannot turn the stimulator on right away because you want the surgical incisions to heal first. And it takes a few weeks or months with back and forth between the technicians and the patient to optimize the programming. Dr. Eskander indicated that his office does not handle the technical aspect just the surgical aspect. He saw Claimant at the beginning of the process when the stimulator was turned on and she was doing very well. He saw her again on November 18 and her pain was down to a 5 out of 10. The Oswestry score was down to a 30 from 78 which to Dr. Eskander is a striking difference six weeks after the implant. Three months out from the implant those results were being maintained. He felt there was successful pain control and functional improvement. Dr. Eskander went on to describe in some detail the componentry of a spinal cord stimulator. Dr. Eskander felt that Claimant got a tremendous result from the stimulator.

Dr. Eskander agreed that a functional capacity evaluation (FCE) was performed on December 7, 2021. He noted that one of the major goals in workers compensation is to return a patient to work in a safe fashion. He relies on an FCE to give guidance as to what tasks the patient can safely perform. In this case the FCE concluded that Claimant was capable full-time work in a sedentary capacity. Dr. Eskander agreed that since the accident Claimant has been able to work with sedentary restrictions at her other job as a manager with McDonald's. Dr. Eskander agreed that even his notes have indicated that Claimant has been able to work eight hours daily in a sedentary position. He felt Claimant should be restricted to 40 hours a week though. Anything beyond that would expose Claimant to additional risks and potentially a poor outcome. Dr. Eskander reiterated his opinion that Claimant is limited to 40 hours a week sedentary duty. Dr. Eskander agreed that Claimant has chronic intractable pain. She did not have significant relief from oral medication, therapy or nerve blocks. Her pain had persisted for greater than six months. Dr. Eskander diagnosed lumbar pain and radiculopathy stemming from the disc pathology at the L3-4 and L5-S1 levels. Dr. Eskander reviewed a packet of medical bills for Claimant's treatment and testified that it was reasonable, necessary and causally related to the work accident. He felt that all the treatment has been consistent with the practice guidelines.

On cross examination Dr. Eskander reviewed records from Westside Family Healthcare dated July 16, 2018. He listed several diagnoses including multiple joint pain, numbness and tingling in both hands, hypertension, dietary counseling and surveillance, and leg pain bilaterally. He agreed this was prior to the at accident. There was also a notation indicating that the patient was complaining of numbness and pain in both arms, hands, right leg, and right foot. Dr. Eskander noted that predated the accident by few years. Looking back at Dr. Eskander's records on the initial evaluation there was an indication that Claimant denied a prior history of low back or leg pain

prior to the work accident. He did note there was no definitive description of what it was she was complaining of in 2018 and noted that you can have numbness, tingling and pain in the extremities for a variety of reasons. Dr. Eskander admitted that there was a flat denial of leg and back pain prior to the accident but he was adding context to it. Dr. Eskander agreed that pain is subjective as there is no objective way to quantify it unlike a neurological or sensory disturbance. He noted that a report of pain is subjective and as a practitioner he will validate symptomatology in other ways prior to going forward with an invasive treatment. Dr. Eskander agreed that an EMG could be used to quantify subjective complaints but also that an EMG may give a false negative for a variety of reasons. It is very sensitive for determining if there is a peripheral nerve issue, however the test often falls short when applied to spinal pathology. Dr. Eskander testified that he has seen many show up as normal when there is actual radiculopathy in the cervical or lumbar region. It was a test that was not designed to pick up that type of nerve conduction well. It is a useful data point. Dr. Eskander agreed that a discogram can return a false positive as could every test. Again he noted that you don't make a decision based on just one variable or data point. The actual EMG done on November 19 did say there was a normal electrodiagnostic study but a sensory radiculopathy could not be ruled out with the test.

Dr. Eskander then testified about deconditioning from not working and that it is ultimately therapeutic for people to return to work. Lack of work can weigh on someone psychologically. In Claimant's case not being able to work is a burden and she is physically deconditioned. She was in pain and functionally unable to perform her duties. Dr. Eskander testified that he would not change his working recommendation with the knowledge that she was actually working at McDonald's. Dr. Eskander stated at great length that that he was concerned in this case that there was an infection in her back and wanted to be comfortable before returning her returning to work.

On June 3, 2021 she was at sedentary work eight hours. He agreed that a bone scan is one tool to detect an infection along with blood work and imaging. The actual bone scan indicated that there was no acute processes or abnormal uptake or septic arthritis, although there was a radio tracer uptake suggesting mild degenerative changes. He agreed that meant that there was no indication of an infection on the bone scan. Dr. Eskander also wanted to wait for bloodwork to be sure there was no infection which ultimately was confirmed.

Dr. Eskander did not recall receiving an employer's job description form on or about April 21, 2021. There was a response with Dr. Eskander's signature dated April 29, 2021 indicating his disapproval. Dr. Eskander was provided with the form for review since he could not located in his records. Dr. Eskander reviewed a summary of the physical capabilities required and felt that it sounded like it was in excess of sedentary duty. Eventually Dr. Eskander reviewed the form and noted on the top of the form it said light duty/transitional so he felt right there that was in excess of sedentary duty. He felt that they didn't release her to light duty and the FCE only indicated said sedentary duty. Dr. Eskander reviewed the essential job duties indicating that she would be prepping food for storage and meal preparation. Dr. Eskander noted if the stool was provided that's fine standing for a short period of time is fine sitting is fine but it was the demands of the body and what she was doing which was quite a bit of physical work. He thinks of sedentary work is more paperwork computer work answering phones a thinking type of job not a physical type of job. The way he reads it it's more than sedentary duty. He did admit that the description indicating up to set 10 pounds is the sedentary duty weight level. Still the frequency with which the physical tasks must be done leads them to believe it is not sedentary.

Dr. Eskander testified that certain tests cannot determine chronicity of a particular injury. Certain things that show up might be deemed acute like a fracture on an x-ray but other times you

can't determine the date that a finding occurred. A lot of times you can't distinguish from a chronic injury or whether there's an acute exacerbation but some findings can coincide with trauma such as inflammation. Dr. Eskander admitted that there was nothing in the diagnostic testing that could conclusively establish a traumatic injury. Dr. Eskander disagreed that he was basing his opinions solely on the subjective history given by the Claimant. He testified that he used a number of different data points. He indicated that they use medical training combined with the history given by the patient to come up with a reasonable diagnosis. Then you go into some other measures like physical examination and objective findings as well as imaging. Dr. Eskander reviewed a note authored by his physician's assistant indicating on March 25 that Claimant can work sedentary duty for eight hours the form seems to have originally said zero then it was crossed out and eight put in that place. Dr. Eskander agreed that all the notes from his firm and Dr. Rowlands indicated the same thing; eight hours sedentary duty.

John DeLuca testified on behalf of Employer. He is a regional manager for Applebee's and overseas five stores. This includes the Newark location where Claimant worked. He testified that all employees in the Newark location were furloughed during the Covid19 shut down in 2020. He reviewed a payroll screenshot revealing the furlough dates for Claimant. Mr. DeLuca also reviewed a job description. He did describe this job as a modified duty position which was set up for Claimant is a job offer. The job description was dated April 21, 2021. It is essentially a prep cook position where you cut items to bring to the line. This position is meant to be modified to sitting and standing as necessary with a stool and that is noted on the form. He noted that all the cooks and employees in the kitchen work as a team so she would be able to get assistance moving heavy items. The position is considered a sedentary position as modified. On cross examination Mr. DeLuca admitted that Claimant may have to move a more heavy item. He noted that prepped

items are moved to the line or to the walk-in refrigerator which was a distance of approximately 10 feet from the prep station. He admitted that having use a walker would be tough in the kitchen. While he could not say if it was sedentary or light duty, Mr. DeLuca did note that there was not a box on the form for sedentary duty.

Dr. Scott Rushton, a board certified orthopedic spine surgeon, testified by deposition on behalf of Employer. Dr. Rushton examined Claimant on October 15th, 2021. In conjunction with his examination Dr. Rushton reviewed Claimant's medical records. He received additional records for review after the examination. Dr. Rushton indicated that the initial record of treatment he reviewed was from Concentra on November 5, 2020 several months after the September 1, 2020 injury. He was corrected and agreed that there was a presentation to a different provider with a complaint of hip pain on October 13, 2021. The assessment at Concentra included pelvic contusion, lumbar strain, left inguinal pain and sprain of the left ankle. There was an MRI of the lumbar spine that was done on November 22, 2020 and another one done on February 7, 2021. Dr. Rushton reviewed the reports and the radiologist indicated that there were a number of findings including marrow edema and soft tissue edema at different levels as well as facet arthritis and comments on multilevel degenerative changes. Dr. Rushton indicated that the most relevant point was there was no findings of compression on the nerve roots. The main finding was facet joint arthritis and L3-L4. Dr. Rushton agreed that he did review diagnostic studies from prior to the accident but those were primarily for the cervical spine. These indicated mild cervical spine disease at multiple levels.

Dr. Rushton testified that an EMG can be an additive tool to assist in the diagnosis of neurologic disorders. There was an EMG performed on November 19, 2020 on the left lower extremity which was interpreted as normal. In Dr. Rushton's opinion there was no objective

evidence of a traumatic structural injury or that Claimant suffered a traumatic structural injury. The findings on the studies were age-appropriate lumbar spine changes. Claimant also underwent a bone scan which would be able to identify bone trauma or bone injury. There were no traumatic findings on the bone scan. All the diagnostic studies were indicative of pre-existing spine arthritis. Dr. Rushton performed a physical examination of Claimant. Claimant was using a cane for support during the examination and Dr. Rushton noted she was using it in her right hand. She performed a number of tests including heal and toe walking without any limitations. She was also able to stand on a single leg and forward flexed to 60 degrees with no pain in the low back. Neurologic testing was normal. Straight leg raising test was unremarkable. There were no objective findings to support the subjective complaints. The only findings objectively were pre-existing lumbar spine arthritis.

In terms of the diagnosis Dr. Rushton took the history at face value as well as the mechanism of injury that Claimant provided of the fall she sustained. After all that Dr. Rushton described and diagnosed a soft tissue injury to the lumbar spine. A lumbar spine sprain and strain. Based on his evaluation on October 15, 2021 he felt that Claimant was capable of returning to work with no limitations. He went on to state that she absolutely would have been capable of doing sedentary duty work. That would have been his recommendation if he was the treating physician. Dr. Rushton would recommend that someone return to an active lifestyle as soon as possible. He agreed that Claimant would have been able to return to work as of March 25, 2021. The fact that she had continued to work in a sedentary capacity at McDonald's would be consistent with his understanding of the incident and review of the records as well as his evaluation. Dr. Rushton also agreed that Claimant would be able to perform a job where she would be able to sit or stand as

desired and only occasionally lift 20 pounds. Although he did not think that there was any reason to limit her ability to return to work to those restrictions.

Dr. Rushton rendered opinions regarding Claimant's treatments including the spinal cord stimulator that had been placed eight days prior to his evaluation. Based on his review of the mechanism of injury, the studies and examination as well as a complete absence of any nerve root or spinal canal compression there was no support for the invasive treatments including the spinal cord stimulator. Any improvement from an injection would have been placebo based. Dr. Rushton also testified that when there is a disconnect or inconsistency between subjective complaints and objective findings significant improvement with invasive procedures is extraordinarily poor. In his opinion Claimant did not need any additional treatment after his examination. In Dr. Rushton's opinion Claimant had reached maximum medical improvement.

Dr. Rushton also testified regarding the discogram noting that it is an extraordinarily controversial test. The results of discography have not been shown to predict procedure outcome with surgical intervention. There is a significant subjective component to it. The objectivity really comes in with the post discogram CT scan. Dr. Rushton also noted that discography in high-level spine practices has fallen out of favor because it does not predict or allow a decision on surgery, or which surgical approach is best. A finding of minimal degenerative disc changes does not support a lumbar discography procedure. Discography in this case would likely result in erroneous decisions pertaining to treatment. Dr. Rushton believes in selecting patients appropriately for surgery and noted that he sees 3 to 4000 patients per year and his surgical patients number 300. An individual tolerating work capacity with no correlation on objective testing to the subjective complaints leads to poor outcome and increased risk to the patient. Dr. Rushton considers a spinal cord stimulator to be in invasive treatment with significant risks. He noted that the stimulator

involves placing electrodes on the lining of the spinal cord and implanting leads and a battery for permanent intervention. In his opinion the implantation of the spinal cord simulator was not reasonable, necessary or related to the September 1, 2020 incident.

On cross examination Dr. Rushton did not recall seeing the FCE or a June 3, 2021 report from Dr. Eskander but he did a comprehensive review of the records. He further testified that there was nothing in the records following his evaluation that would change his opinion. Dr. Rushton did not to his knowledge review a third lumbar MRI from June 9, 2021. Dr. Rushton agreed that on the two MRI scans he reviewed the radiologist's interpretation was that there was no nerve compression. He went on to testify that subjective complaints of radiating pain in the legs is a differential diagnosis and needs to be evaluated. There is a symptom complex that may or may not be related to a nerve root. He agreed that Claimant has a history of diabetes. Dr. Rushton agreed that the records from Claimant's family doctor indicated she had gestational diabetes and there were no records indicating she was currently diagnosed with it. Dr. Rushton confirmed that the third MRI completed on June 9 was done at Dr. Eskander's office. Dr. Rushton agreed that a finding of a protrusion contacting the left S1 nerve root was a different interpretation than the radiologist who did the prior MRI of February 7, 2021. At the L3-4 level this MRI which was performed at Delaware Orthopedic Specialists showed a disc bulge with facet arthrosis abutting the right L3 nerve root. Dr. Rushton agreed that this was significantly different finding from the prior MRI scans but noted that the disc bulge at L3-4 would not impact the L3 nerve root. Dr. Rushton noted that there was a significant amount of subjectivity in terms of the interpretation, who is interpreting it and their level of expertise, and the nomenclature used beyond that it is an objective test. Dr. Rushton did admit that if a nerve root is compressed it would be competent to correlate with Claimant's or an individual patient's clinical symptoms and be a validation of

lumbar radiculopathy. However he also noted that the prior MRI he reviewed found a complete absence of any spinal stenosis or nerve root compression or other pathology that would correlate with those complaints. He did not believe at that point a third MRI was necessary.

Dr. Rushton admitted that he did not mention the May 25, 2021 discography in his report. He did not have an opinion as to what the discogram may have shown other than it had no relevance to his opinion regarding a lumbar spine sprain and surgery. Dr. Rushton could not give a specific percentage of trauma related cases he treats with structural spinal change. He did note that any adult spine practice would have the vast amount of patients presenting with age-related spinal pathology. He admitted he was not provided with any records showing that Claimant had any lumbar spine injuries prior to the accident. Dr. Rushton also conceded that an injury could cause previously asymptomatic lumbar degenerative disc disease to become symptomatic but that was hypothetical since it is not his opinion in this case that is what occurred. Dr. Rushton was asked about a 2005 lumbar spine MRI and noted he was unaware of that study. He went on to indicate that that would invalidate Claimant's history denying prior diagnostic studies because now we have one that predates the 2020 accident which is inconsistent with her history. He did agree that the report from November 2, 2020 which indicates mild disc bulge at a L3-4 is new compared with March 18, 2005 scan. Dr. Rushton added that 15 years later that would be a completely expected finding but conceded that it does demonstrate a structural change.

Dr. Rushton agreed that he did not reference the emergency room visits by Claimant related to her back in October 2020 and February 2021 in his report. Dr. Rushton did not have in his notes the reduction in the disability index range following the implant of this stimulator. He did not think it had relevance to his opinion and whether it showed an increase in functionality would depend on the time frames. Dr. Rushton agreed that Claimant felt better a week after her implant however

it was too early to make a proper evaluation. What Claimant's level of pain was after the implant did not factor into his opinion as to the reasonableness, necessity and relatedness of the procedure. He did not have Dr. Eskander's January 27, 2022 note which indicated continuing relief for Claimant. He was also unaware that Claimant was working two jobs when she was injured. On the date of his deposition he was made aware that she was working and continued to work for McDonald's in a sedentary capacity. Dr. Rushton commented on the MRI scans noting that they were pictures in time and so we have three snapshots and any changes noted, if they were accurate, on the third scan would not then be related to the September 1, 2021 incident as they developed subsequent to the February 2021 MRI. In Dr. Rushton's experience people reporting 10 out of 10 pain are not working in a 40 hour week job position nor does that level of pain correlate with the MRI reports that he reviewed. It is an inconsistent subjective complaint with regard to the objective findings. He also agreed that the Oswestry index was based on subjective measurements.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board has been presented with three primary issues. First, whether the spinal cord stimulator treatment was reasonable, necessary, and causally related to the work accident. Second, what is the proper method to calculate Claimant's average weekly wage considering her furlough during the Covid-19 pandemic. Third, is Claimant entitled to total disability either for a closed period or ongoing. The Board will address these issues sequentially.

Medical Expenses

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." DEL. CODE ANN. tit. 19, § 2304. When there has been a distinct, identifiable work

accident, the "but for" standard is used "in fixing the relationship between an acknowledged industrial accident and its aftermath." *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992). When an employee has suffered a compensable injury, the employer is required to pay for reasonable and necessary medical services connected with that injury. DEL. CODE ANN. tit. 19, § 2322. What constitutes "reasonable medical services" for purposes of Section 2322 is undefined by statute and left to be determined by the Board on a case-by-case basis. *See Willey v. State*, Del. Super., C.A. No. 85A-AP-16, Bifferato, J., 1985 WL 189319 at *2 (November 26, 1985). "Whether medical services are necessary and reasonable or whether the expenses are incurred to treat a condition causally related to an industrial accident are purely factual issues within the purview of the Board." *Bullock v. K-Mart Corporation*, Del. Super., C.A. No. 94A-02-002, 1995 WL 339025 at *3 (May 5, 1995). Claimant has filed a Petition for a determination that a spinal cord stimulator is compensable treatment. Employer is challenging the reasonableness, necessity and causal relationship of the stimulator to the work accident. The parties also have been unable to agree on the method to calculate Claimant's average weekly wage. Employer provided Claimant with a job offer and asserts that any total disability should end in conjunction with said offer. Because Claimant has filed the current petition, she has the burden of proof. DEL. CODE ANN. tit. 29, § 10125(c).

After reviewing all the evidence, the Board finds that the spinal cord stimulator and related treatment to be reasonable, necessary, and causally related to the work accident. The Board accepts the testimony of Dr. Eskander over that of Dr. Rushton and finds his testimony to be more credible and reliable in this case. *DiSabatino v. Wortman,* Del., 453 A.2d 102,106 (1988) (as long as substantial evidence is found the Board may rely one expert over another). To his credit Dr. Eskander did not recommend a complicated and life altering fusion surgery. In the Board's view

this enhances the reliability of his opinion. Dr. Rushton's objections to discography are well known and not without merit.[1] However in this case rather than factor into a decision to perform surgery, it served to deter a surgery. Claimant underwent a variety of conservative treatments including spinal injections with no relief or improvement. The stimulator was at that point a viable alternative to address Claimant's radiculopathy. Dr. Eskander acknowledged that many patients do not have success or relief with these devices. In Claimant's case the trial implant had very promising results so they proceeded with the permanent implant. Claimant also testified that she has seen significant improvement in symptoms and function. She has been able to ambulate without assistive devices. The Board finds Claimant to be a credible witness. She has continued to work her primary job and only had to take the second job with Employer due to the death of her husband. Claimant credibly testified that not being able to work was more stressful than working two jobs. She is supporting 2 college age children, one in school and one just graduated from high school. Thus she has stress because she is she is concerned about supporting her children. The Board believes her subjective complaints are genuine and now this one modality has given her some relief. The Board finds that Claimant has met her burden to show the reasonableness, necessity and causal relationship of the spinal cord stimulator.[2]

Wage Rate

The wage issue centers around the 26 week look back period used to set the average weekly wage. During a portion of the 26 weeks prior to the work accident Claimant was furloughed due to a shut down because of the pandemic. Employer argues that the work weeks during which Claimant was furloughed should be included in the wage calculation. The basis for this position is

[1] The Healthcare Practice Guidelines were written by an advocate of the use of discography and as a consequence they are accepted in Delaware as a diagnostic tool despite what some medical societies may think of them.
[2] The Board notes that Employers objection to it was more on the reasonableness and necessity than causal relationship grounds.

that Claimant had access to special unemployment benefits through the CARES act and could have replaced her wages in that way but chose not to, so Employer should not be penalized for this failure to collect these benefits. Claimant simply cites to the controlling case law to argue that Claimant counts only the weeks she actually worked. *Taylor v. Diamond State Port,* Del.Supr. 14 A.3d 536 (2011). The Board finds that Claimant is correct. *Taylor* is the controlling law for the calculation of average weekly wage in this circumstance. The Board fails to see how it matters what the reason for the furlough is, as the situation is no different than in *Taylor* where work was only available intermittently. There is no distinction to a furlough in a pandemic when work was shut down for a period, Claimant remained an employee during that time and then returned when work was again permitted. The rule set forth in *Taylor* is right on point. Therefore, the Board accepts Claimant's calculation of $397.83 which result in a compensation rate of $265.22.

Total Disability

The parties agree that Claimant is owed total disability benefits, the issue is whether the Claimant should be on a continuing agreement as of January 14, 2021 or whether the benefits should end with the job offer provided by Employer. Dr. Eskander never totally disabled Claimant and she continued to work at her sedentary duty job with McDonalds on a full time basis. However, her regular job at Applebee's was clearly not within those physical restrictions. A claimant would not normally be considered totally disabled when he or she was in fact working, however the instant case recalls a scenario where it is possible. A claimant working two jobs may be disabled from only one job and still collect benefits because there is a loss of earning capacity. *Stanley Warner Corp. v. Slattery,* 235 A.2d 633 (Del.Super. 1967). Because the McDonald's job is ignored for the purposes of computing the wage rate is it only fair that it is also ignored when determining the period of disability. Dr. Eskander did send her for an FCE on December 7, 2021 and that test

confirmed the full time sedentary duty work capability. Dr. Eskander continues to limit Claimant to a 40-hour work week, effectively precluding any second job, even a sedentary duty position. However, in this instance the issue is whether Employer has made an offer of a position that is reasonably within her physical restrictions, irrespective of the hours worked at her second job. The Board finds that Employer has made a job offer within Claimant's physical restrictions and therefore total disability benefits will end on April 21, 2021, the effective date of the job offer according to the testimony of Mr. DeLuca. It should be noted that *Gilliard-Belfast* does not apply in this situation as Claimant has never been told not to work by Dr. Eskander and the claim was not previously accepted for total disability benefits. *See, Gilliard-Belfast v. Wendy's, Inc.*, 754 A.2d 251, 254 (Del. 2000). The same evidence Claimant used to show that the stimulator was a reasonable treatment now serves to provide Employer with evidence that Claimant can return to work at a higher capacity or put another way, she now has more ability to function in a work environment. There are Claimant's general subjective statements indicating a marked improvement in her condition to the point where she no longer relies on assistive devices to ambulate. Dr. Eskander pointed out the significant drop in the Oswestry Disability Index score. Essentially it was cut in half. The Board will rely on Dr. Rushton's opinion that as of March 2021 she could physically perform the functions of the modified duty position offered by Employer. Consequently, Claimant has met her burden to prove the reasonableness and necessity of the spinal cord stimulator, along with a closed period of total disability. For the aforementioned reasons Claimant's Petition to Determine Compensation Due is hereby **GRANTED.**

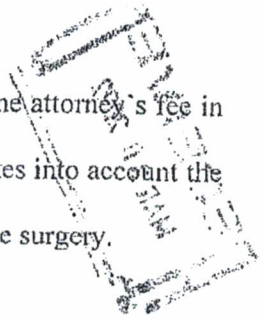
Medical Witness and Attorney's Fees

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." DEL. CODE ANN. tit. 19, § 2320. In determining an award of attorney's fees, the trier of fact must consider the factors outlined in *General Motors Corp. v. Cox,* 304 A.2d 55, 57 (Del. 1973), such as the time involved in the presentations, fees customarily charged in the locality, the nature and length of the professional relationship with Claimant, and the attorney's experience/reputation. Claimant's counsel represents that her fee arrangement with Claimant is on a contingency basis. There has been no indication that fees or expenses have been, or will be, received by Claimant from any other source. Claimant's counsel submitted an affidavit attesting that she spent approximately nineteen (19) hours preparing for the current hearing, which lasted approximately 3 and a half (3.6) hours. Claimant's counsel indicated that her work on this case has not precluded her from taking on other cases. Counsel has been admitted to the practice of law in Delaware since 2003 and is very experienced in workers' compensation, a specialized area of the law. Her firm's association with Claimant began on or about October 10, 2020. The issues in this case were average in nature. It does not appear that there were any unusual time limitations imposed by the Claimant or the circumstances surrounding the case. Claimant's counsel has also indicated that Employer has the ability to pay an award. Counsel's affidavit was entered without objection

There were three issues litigated at the hearing, whether the medical expenses sought were reasonable, necessary and causally related to the accident, the duration of total disability benefits if any, and a legal issue over how Claimant's average weekly wage should be calculated 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, the Board finds that one attorney's fee in the amount of $7000.00 is appropriate. In the Board's estimation, this fee takes into account the value of the award including compensability determination, and the costs of the surgery.



STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board finds the spinal cord stimulator reasonable, necessary, and causally related. Employer will pay medical expenses associated with Claimant's treatment in accordance with the fee schedule set forth in title 19 section 2322B of the Delaware Code. Employer will pay Claimant total disability benefits from January 14, 2021, through April 21, 2021, at a compensation rate of $265.22 based on an average weekly wage of $397.83. Employer shall reimburse Claimant's medical witness costs and pay a reasonable attorney fee of $7000. Accordingly, Claimant's Petition is **GRANTED.**

IT IS SO ORDERED THIS 24th DAY OF MARCH 2022.

INDUSTRIAL ACCIDENT BOARD

MARK MUROWANY

for ROBERT MITCHELL

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

Mailed Date: CMW 3/23/22

OWC Staff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BEFORE THE INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

DAVID WILKES,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1474362
	)	
RECOVERY INNOVATIONS, INC.,	)	
	)	
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 February 8, 2022, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

PETER HARTRANFT

VINCENT D'ANNA

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

APPEARANCES:

Jessica L. Welch, Esquire, Attorney for the Employee

Gregory P. Skolnik, Esquire, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

David Wilkes ("Claimant") filed a Petition to Determine Additional Compensation Due ("DACD") on May 12, 2021 seeking a finding that a permanent spinal cord stimulator is reasonable, necessary, and causally related to an acknowledged, work-related accident that occurred on March 23, 2018. The Employer, Recovery Innovations, Inc., has agreed that Claimant injured his lumbar spine in a work-related accident and that lumbar spine surgery on February 3, 2020 was compensable. The Employer opposes the current claim for a permanent spinal cord stimulator ("SCS"s).

A hearing was held on Claimant's petition on February 8, 2022. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

The parties stipulated to the following facts: Claimant sustained a compensable work injury to his lumbar spine on March 23, 2018. Claimant underwent compensable lumbar spine surgery, a fusion at L4-5 with Dr. Eskander, on February 3, 2020. Claimant also underwent a trial spinal cord stimulator procedure on March 31, 2021. The permanent spinal cord stimulator was installed on May 24, 2021. Claimant's average weekly wage is $759.70 with a corresponding compensation rate of $506.47 per week. After a hearing on July 7, 2021, the Board issued a decision dated July 27, 2021 finding that Claimant could return to work and terminating total disability as of the date of decision. Claimant currently receives partial disability at the rate of $47.32 per week. The sole issue before the Board at this hearing is whether the permanent implant of the SCS on May 24, 2021 was reasonable, necessary, and related to the work injury of March 23, 2018.

Mark Eskander, M.D., an orthopedic spine surgeon, testified by deposition on behalf of Claimant David Wilkes. (Claimant's Exhibit 1) Dr. Eskander began treating Claimant in June 2018 and last saw Claimant on December 23, 2021. Dr. Eskander previously testified about Claimant's work capacity in May 2021 prior to the implantation of the permanent SCS on May 24, 2021. Dr. Eskander opined at the time that Claimant was totally disabled, in part because of the pending SCS procedure. He had planned to order a functional capacity evaluation (FCE) after Claimant recovered from the procedure. The FCE was done in August 2021 and Claimant was released to medium duty work, four hours per day. Dr. Eskander has found Claimant to be a credible and very straightforward patient. He does not know of any doctor who has noted malingering or symptom magnification by Claimant.

When Claimant first came to Dr. Eskander in June 2018, Claimant reported that his low back pain began on March 23, 2018 when he was restraining a patient while working as a constable. At the June 2018 exam, Claimant's Oswestry Disability Index (ODI) was 68 percent, which indicates a very high degree of disability. Claimant was having symptoms in his low back and into his lower extremities. The lower extremity symptoms were due to a neurologic component to the injury. Claimant had numbness and pain throughout the extremities. The symptoms were predominantly on the left side. Dr. Eskander stated that this indicated nerve compression on the left. He confirmed that Claimant's activities of daily living increased his pain. Dr. Eskander testified that the goal of treatment would be to decrease the ODI score by 15 points. Patients would typically be satisfied with this amount of improvement in disability score as a result of treatment. Claimant's ODI score is now 40 percent, which reflects a huge improvement in his quality of life, even if the disability score is still relatively high. Dr. Eskander opined that it was not realistic to think any particular procedure such as surgery or a spinal cord stimulator would improve a patient

one hundred percent. He testified that Claimant's activities of daily living were better and his quality of life and functionality had improved.

Dr. Eskander testified that Claimant underwent the gamut of conservative care after his injury, including therapy, aqua therapy, numerous injections and blocks, chiropractic care, and medication. The conservative treatment was not sufficient to resolve Claimant's symptoms and functional limitations. An injection in July 2018 only provided four to five hours of relief. Dr. Rowlands performed another injection and an ablation. Steroid epidural injections would be directed toward inflammation around a nerve and leg pain, whereas medial branch blocks and ablations are intended to address low back pain from the facet joints. In Claimant's case, conservative care was done as long as possible.

Dr. Eskander confirmed that he ordered MRIs on the neck and the back. Discograms were also done; their results correlated with the MRI findings. Claimant's neck pain eventually resolved. The January 2019 discogram of the lumbar spine indicated an annular tear close to the L4 nerve root. Attempts were made to address Claimant's symptoms with additional injections at L4-5 and L5-S1. Ultimately, Dr. Eskander performed an L4-5 fusion procedure on February 3, 2020 to address the compressed nerve. After the lumbar fusion surgery, Dr. Eskander kept Claimant out of work on total disability. Dr. Eskander testified that Claimant did well after surgery and reported some early improvement in his back pain as of February 21, 2020. However, on June 18, 2020, Claimant reported an increase in his pain level to nine out of ten with pain through his back, his buttock, and left leg to the foot. His ODI score was the highest it had been at 72. He was not doing well at that time. Dr. Eskander saw him again in August 2020. Claimant reported that all activities of daily living were causing significant pain. The surgeon evaluated Claimant to see if the hardware could be causing the pain. An X-ray showed the hardware looked good, so Dr. Eskander prescribed

a Medrol Dosepak and instructed Claimant to return at the normal six-month visit. At that next visit, Claimant's ODI score was 68 and he reported significant pain. Dr. Eskander discussed a spinal cord stimulator with Claimant and ordered an MRI to plan for the implantation procedure. Dr. Eskander agreed that injections are sometimes done post-operatively when the patient continues to have pain from the hardware. Dr. Eskander opined, however, that when patients continue to have a neurological pattern to their pain, the easier way to solve the problem is to install a spinal cord stimulator. The SCS can provide more immediate and beneficial results. He believes that an SCS is reasonable to consider six months post-operatively. He insisted that the medical literature and the Delaware treatment guidelines support trying an SCS six months after a fusion surgery. He proceeded forward with that treatment for Claimant as the more likely solution to his continued pain.

Claimant initially had a trial SCS installed by Dr. Rowlands. Claimant had a good result from the trial. The trial allowed Dr. Rowlands to independently evaluate and discuss the utility of the SCS with Claimant. Dr. Eskander testified that the purpose of a trial is to get the programming correct and make sure the patient's pain pattern is controlled by the stimulator. The trial is performed for about a week. A fifty percent decrease in symptoms is the usual threshold for pursuing a permanent implant after the trial, but this can vary with the individual. He explained that for some patients, an improvement in pain is worthwhile even if their functionality does not improve. Dr. Eskander confirmed that the guidelines require a second opinion and a psychiatric exam as part of the process for getting a trial SCS, and this was handled by Dr. Rowlands. Dr. Zaslavsky provided the second opinion and confirmed that the trial SCS was reasonable and necessary treatment for Claimant. Dr. Eskander confirmed that Claimant had a pain level of 7 out of 10 and an ODI score of 62 on November 5, 2020. This ODI continued to be quite high. Claimant

described his pain as sharp, constant, and burning, and it increased with standing and squatting, bending, lifting, and stairs. Claimant was taking gabapentin. His pain went up for several days after any type of increased activity. On February 4, 2021, Claimant described back pain radiating to his left leg and a pain level of 8 out of 10. The pain was constant and woke him from sleep. He noted tingling, stiffness, and numbness. Symptoms became aggravated with standing, squatting, lying in bed, bending, sitting, walking, kneeling, and twisting. Rest, ice, and heat provided relief. The defense medical evaluator, Dr. Nancy Kim, concurred that the trial stimulator was reasonable.

The trial SCS was installed on March 31, 2020. In a note dated April 7, 2021, Dr. Rowlands indicated that Claimant was reporting his pain level decreased from a nine out of ten to a five and his back and leg pain had improved. He noted 50 percent relief during the trial. Dr. Kim saw Claimant on May 12, 2021 and felt that Claimant had not been very clear on how the trial helped his ability to function. Dr. Eskander had seen and talked to Claimant after the trial SCS and he did not know what gave Dr. Kim pause about recommending the permanent SCS implant. Dr. Eskander testified that he had seen improvement with the trial and felt it was a standard next step to do the permanent implant after a good trial. He did not believe getting an EMG as Dr. Kim recommended would add much to the decision to go forward with the permanent SCS. Even if the EMG showed irritation at L5, an SCS would still be indicated. Dr. Eskander discussed moving forward with the stimulator several times with Claimant. He opined that the permanent SCS was the most likely way to accomplish Claimant's goal of regaining some normalcy in his life.

The permanent SCS was installed by Dr. Eskander on May 24, 2020. By July 15, 2021, Claimant's pain level had decreased to between a five and seven and his ODI was 40 percent. Claimant also reported sleeping through the night, which Dr. Eskander felt was significant. Claimant no longer had to use a cane. Dr. Eskander ordered an FCE at the July 15, 2021 visit due

to the improvement. An FCE is a good way to assess work and functionality. As of September 8, 2021, Claimant had back pain but no radiating pain. His pain level was a three. His symptoms were aggravated by bending and twisting but overall he was doing well. The neurologic exam was normal, whereas before the SCS the examinations had shown neurological weakness. As of December 23, 2021, the most recent visit to Dr. Eskander, Claimant reported a pain level of six out of ten and an ODI score of 40 percent. Claimant still had some low back pain with numbness and tingling in the left leg, but he reported that the symptoms were not as bad as before the SCS. Claimant was engaged in a home exercise program. Dr. Eskander insisted Claimant had improved significantly. He commented that at some visits Claimant's left leg symptoms were almost gone and overall they had improved markedly. Dr. Eskander testified that Claimant has reached maximum medical improvement and is to follow up with him as needed.

Dr. Eskander opined that the permanent SCS had provided a good outcome for Claimant. Claimant was very happy with the results. Dr. Eskander does not believe it would be in Claimant's best interests to return to work as a constable at this point, because of the risk involved with the need to restrain people. Claimant's previous job was not consistent with the results of the FCE, either. Claimant told the FCE examiner in August 2021 that he was getting 75 percent relief from the permanent SCS and at times his pain was down to zero. His left lower extremity pain had completely resolved and he had normal neurological function and strength. Dr. Eskander had no doubt that the SCS was part of the reason Claimant was able to perform medium duty work now, as the FCE had found. He called the SCS a "game changer" for Claimant. Dr. Eskander reviewed the section of the chronic pain treatment guidelines that covers spinal cord stimulators. The patient must have failed conservative treatment, have a chronic pain condition after surgery, undergo a psychiatric evaluation, and get a second opinion. Dr. Eskander confirmed that he had complied

with every item in the guidelines prior to proceeding with the permanent SCS. He emphasized that the trial provided good coverage for the pain and reduced the pain by fifty percent by Claimant's reporting and on the visual analog scale. He opined that the SCS provided Claimant with the most likely chance of a permanent reduction in his symptoms going forward and a return to being a productive member of society.

On cross-examination, Dr. Eskander confirmed that Claimant was out of work after the fusion surgery. He was asked to review Dr. Crain's DME report from October 7, 2020. Claimant told Dr. Crain that he was recovering and getting better. He still experienced soreness in the low back at times during the day but was better post-surgery. His ability to perform ADLs had improved. The severe pain into the left leg had nearly resolved but he still had pain radiating into the hip. Dr. Rubano did not believe Claimant had major hip problems. The hip symptoms had resolved. Claimant was not taking any medication. He used a heating pad and an ice pack from time to time. He was not working and had not been released to work in any capacity by Dr. Eskander. After completing formal physical therapy, Claimant was doing home exercises. Claimant thought he could do more but expressed fear that if he did too much he could be caught on videotape. Claimant told Dr. Crain that he had discussed a possible SCS with Dr. Eskander for his residual pain symptoms. At that time he was not interested in getting the SCS if he was able to avoid it. Dr. Crain concluded in his report that Claimant was capable of at least medium duty work. Dr. Crain had testified on the issue of work capability for a previous hearing. Dr. Eskander also testified by deposition on the subject. Dr. Eskander had seen Claimant on November 5, 2020 and instructed him to remain out of work. Dr. Eskander acknowledged that the Board accepted Dr. Crain's opinion about Claimant's work capabilities at that time.

Dr. Eskander was asked to review Dr. Rowlands' note dated April 7, 2021. This was the visit after the trial was completed. Claimant reported a pain level of five out of ten. The ODI noted in the report was referring to the ODI of 62 on February 4, 2021. An ODI of 60 was also noted without a date. Dr. Eskander believes these were referring to past scores and were not the current ODI. Dr. Rowlands noted that Claimant uses marijuana. Dr. Eskander does not know if Claimant has a marijuana card. When Claimant saw Dr. Eskander on May 13, 2021, he did not have any leads in his back anymore. The ODI on that date was 56 percent. An earlier ODI of 68 was carried over from June 2018 in the note. Claimant did not have any positive neurologic findings on May 13, 2021. Dr. Eskander confirmed that the neurological exams by Dr. Rowlands on February 22, 2021 and April 7, 2021 were also normal. Dr. Eskander did not make any positive neurological findings on February 4, 2021 either. Neurologic exams by Dr. Crain on October 7, 2020 and by Dr. Eskander on November 5, 2020 were normal.

Dr. Eskander was aware that Dr. Kim had recommended EMGs and transforaminal epidural injections instead of the permanent SCS. He felt that Dr. Kim's treatment plan would cause unnecessary cost and frustration if the SCS would solve the problem. He acknowledged that a permanent SCS was more expensive than an EMG and a transforaminal injection, but he pointed out that the SCS would solve the problem more permanently.

On re-direct, Dr. Eskander confirmed his opinion that Claimant was totally disabled until he recovered from the SCS installation. He ordered an FCE at the July 15, 2021 visit and it was done at the end of August 2021. When he had the objective evidence from the FCE about what Claimant could and could not do, Dr. Eskander released Claimant to parttime, medium duty work. Dr. Eskander explained that he relies on FCEs to assess a patient's functionality because they provide more in-depth information. Dr. Eskander saw Claimant on November 5, 2020 and at the

time Claimant was still having significant symptoms. Claimant's ODI score was 62 and his pain level was a seven out of ten. He was having significant issues with his ADLs and function. Dr. Eskander further explained that a neurological finding on physical examination was different than a patient experiencing neurological trouble. Claimant had had consistent left leg pain since his injury. Early on, Claimant's neurological issues were so significant that they could be tested and identified during physical examination. After the fusion, Claimant's condition stabilized somewhat. Claimant still had radicular complaints and the sensation that the nerve was not functioning well, but evidence of the nerve problem was no longer found on physical examination.

Dr. Eskander reviewed Dr. Kim's initial report dated May 12, 2021. On exam, Dr. Kim performed a straight leg raise test and this increased Claimant's pain radiating down his low back and left leg in both the seated and supine positions. Dr. Eskander noted that this was a positive exam finding for nerve irritation. Dr. Kim performed a physical exam again on August 9, 2021 after the installation of the permanent SCS. The straight leg raise test was negative at that visit. Dr. Eskander testified that this showed the stimulator had improved some of the radicular pain. Dr. Eskander also reviewed the results of two epidural injections performed by Dr. Rowlands in November 2019. Claimant only received about two months of relief from the injections. Dr. Eskander commented that it was not reasonable to think that more injections would solve Claimant's problem or improve his quality of life.

Claimant David L. Wilkes testified that he is 60 years old and is married with adult children. He attended college for a year and served in the military for three years. He worked for Recovery Innovations as a constable. His job was physical in nature because he needed to restrain patients. He was able to work fulltime, full duty prior to the work accident. After his injury, Dr. Ginsberg provided him with injections to his back but they provided only short term relief.

Claimant described the installation of the spinal cord stimulator as changing everything about his life. Before the SCS, he had constant pain that fluctuated in level. Activities such as walking the dog or walking up and down stairs increased his pain. After the SCS, he is now able to increase his activity level without also increasing his pain level. As an example of his improvement, he cited a trip to Atlantic City in November 2021 where he could walk on the boardwalk for a couple of hours without worsening symptoms. He did not need to use a cane. The drive to Atlantic City caused a pain increase, but Claimant was able to turn up the SCS to relieve the pain. He described the SCS as providing relief similar to a TENS machine that is inside his body. He gets relief after about 15 to 20 minutes. Claimant was able to cook dinner for his wife on the vacation to Atlantic City, which was a change from before the stimulator. Claimant further testified that he was able to tolerate increased symptoms during the FCE in August 2021. The test lasted four hours. Dr. Eskander told him that he could work parttime. Claimant is looking for a parttime job and thinking about taking training classes in cyber-security. He is receiving social security but can work parttime.

Claimant testified that, eight months after getting the permanent SCS, his pain levels in the low back vary from no pain at all to as high as a five. He does not have leg pain. He does not experience increased symptoms to the same degree as he got before the SCS. Claimant tries not to take medication but has taken Tramadol, a muscle relaxer, and anti-inflammatories in the past. The medications only helped shortterm. He uses CBD oil sometimes, but not medical marijuana. He no longer uses a cane. He needed to use a cane constantly before the fusion surgery, and he occasionally used the cane after the fusion. Since the permanent SCS was installed, he has not needed the cane. Claimant has been pushing himself to do more physically. He is thinking about trying to bowl again, an activity he did three to four times a week before his injury. His goal is to

join the senior pro tour. He also played golf once or twice a week before he was injured. He has not played since the injury. He doubts he could play golf again because of the twisting required. Claimant has lost 70 pounds since August 2021 because he is able to exercise more. Since the SCS was installed, he has been able to sleep through the night, whereas before the SCS he could not. The SCS has also resulted in improved relationships with his wife and family because he is feeling much better. He uses the treadmill every day now.

Claimant confirmed that he got some relief after the fusion surgery. His pain level was six or higher in the fall of 2020. He thought about the SCS for a while before agreeing to try it. He understood the risks, and he underwent a psychiatric evaluation and got a second opinion before proceeding with the trial. The trial SCS lasted for a week. Representatives from the SCS company worked with him and adjusted the SCS to give him the best relief. The permanent SCS was installed on May 24, 2021. The company representatives were present. Claimant still can follow up with the representatives any time if he needs adjustments in the stimulator. He first noticed pain relief during the second week after the permanent SCS was implanted. Claimant recalled telling Dr. Kim in August 2021 that the SCS had given him 50 percent relief. He now estimates 90 percent relief from the SCS and is glad he got it installed. The SCS has helped him with all his activities of daily living.

On cross-examination, Claimant testified that he saw Dr. Crain several times for DMEs after the 2018 accident. Claimant denied that he rode in a golf cart prior to his injury. After the fusion surgery, Claimant reported low back soreness to Dr. Crain but told Dr. Crain that his left lower extremity pain was nearly resolved and his hip pain was gone. He told Dr. Crain that he was afraid of doing more out of concern he would get caught on videotape. Claimant recalled seeing Dr. Tuerff for a blood clot after his discogram. Dr. Rowlands is the doctor he saw for the SCS trial

in March 2021. Claimant decided to try the SCS because less invasive treatments had been unsuccessful. The first time Claimant saw Dr. Kim was between the trial SCS and the permanent SCS. He told Dr. Kim that he lived in a two-level house and did very few household chores. He was able to drive and go to the grocery store. He walked up and down the stairs ten times in the morning for exercise. Claimant indicated that he was so used to being in pain that he had a hard time knowing if the SCS trial was giving him relief. Claimant expressed concern about trying activities such as golf or bowling out of fear of getting caught on video. Claimant did not bring a cane into the exam with Dr. Kim because he was able to park in a handicapped area. Claimant denied seeing Dr. Kim's report before the permanent SCS was done. He never reviewed it. He was unaware that Dr. Kim had recommended a different injection than had been tried before. Claimant wanted to follow his own doctor's recommendations, not those of Dr. Kim.

Claimant has not looked for work since the Board decided in July 2021 that he was no longer totally disabled. If he returns to work more than parttime he would lose his social security benefits. Claimant agreed that sitting too long will increase his pain. Heavy lifting and twisting would also increase his back pain. He confirmed an incident where he swept his garage and his pain increased to a seven or eight. Claimant still has not tried bowling or golfing. He reported a pain level of six out of ten at his last visit to Dr. Eskander on December 23, 2021. He keeps the SCS turned off when he is driving.

On re-direct, Claimant testified that he still had significant issues with his activities of daily living when he saw Dr. Eskander in the fall of 2020. Claimant always tried to do some exercise such as walking but was careful not to overdue his activity. His pain would remain tolerable if he was conservative. Claimant does not take narcotics because he is a recovering addict. He was provided with detailed information about the SCS before it was implanted. He insisted that his

quality of life has improved 75 to 80 percent since the SCS was installed. If his pain increases, he now has a tool to get him back to a comfortable level.

Under questioning by the Board, Claimant testified that he started receiving social security disability benefits after the accident because he was not getting workers' compensation benefits. He had been working fulltime before the accident in 2018. Claimant leaves the SCS turned on all day. He only needs to turn it up when he overdoes activity, which is once or twice a day.

Nancy Kim, M.D., who is board-certified in physical medicine and rehabilitation and pain medicine, testified by deposition for the Employer, Recovery Innovations. (Employer's Exhibit 1) Dr. Kim testified that she is aware of the lumbar spine injury Claimant suffered at work on March 23, 2018 and underwent L4-5 posterior fusion surgery with Dr. Eskander on February 3, 2020. The Employer paid medical benefits and total disability benefits in relation to the injury. Total disability benefits were terminated by the Board on July 27, 2021. Dr. Kim evaluated Claimant on May 12, 2021 and August 9, 2021 on behalf of the Employer. The first examination took place a few weeks after Claimant underwent the trial spinal cord stimulator. The second examination took place about two and a half months after the permanent SCS was implanted. Dr. Kim issued an addendum report on November 6, 2021 after the FCE.

Dr. Kim was asked to review some medical records that preceded the trial SCS. Dr. Crain evaluated Claimant on October 7, 2020 and reported a history of Claimant recovering and getting better from the February 2020 fusion surgery. His activities of daily living had improved. The severe back pain into the leg had nearly resolved, but Claimant still had continuing back pain radiating into the hip. Dr. Rubano did not believe there was a major hip problem. The hip symptoms resolved. Claimant was not taking medication and used ice and heat from time to time. Claimant told Dr. Crain he was doing home exercises. He thought he could do more but was afraid

to be caught on videotape. Claimant hoped to avoid getting a spinal cord stimulator. Dr. Crain conducted an examination and found normal range of motion, normal straight leg raising, normal neurologic exam, and no spasm. Claimant showed a normal gait and could squat and touch the floor. The exam was consistent with Dr. Eskander's exams at the time other than the hip irritability. Dr. Crain opined that Claimant could work in his pre-injury security type job with the restriction to avoid apprehending or manually physically wrestling a person. Dr. Crain indicated Claimant had medium-DOT capability. Dr. Crain did not record anything about using a cane, sleep issues, or problems walking. Dr. Tuerff, a vascular surgeon, saw Claimant on November 12, 2020 for hand and ankle swelling. Dr. Tuerff noted this occurred after walking a mile and had been happening for two to three months. She did not think this problem was related to the surgery or work accident. Dr. Eskander saw Claimant on February 4, 2021 and did not note anything about a cane. Claimant's ODI was 62 percent. Dr. Kim described this as a subjective measure based on the patient's report of their capabilities. Claimant saw Dr. Rowlands on February 22, 2020 to review the lumbar and thoracic MRI studies and plan for the SCS trial. Dr. Kim agreed that it was standard protocol to obtain MRIs before an SCS trial. Dr. Rowlands did not mention a cane. He referred Claimant to his PCP for a sleep study and sleep apnea evaluation. Dr. Kim confirmed that sleep apnea interferes with a person's quality of sleep and was not unusual for someone of Claimant's weight, which was recorded at about 300 pounds. Dr. Zaslavsky provided a second opinion regarding the proposed stimulator on March 16, 2021. Dr. Zaslavsky performed an examination. He did not mention a cane or sleep and walking problems; however, he noted subjective complaints of considerable leg pain and low back symptoms down the left. He also noted a positive straight leg raise on the left and some weakness in the left dorsiflexors and EHL. Dr. Zaslavsky found it reasonable to proceed with the SCS trial.

Dr. Kim confirmed that the SCS trial was begun on March 31, 2021. Claimant returned to Dr. Rowlands on April 7, 2021. Dr. Rowlands recorded that Claimant's pain was better. The pain was located in the back and bilateral leg. The severity was five to ten. He reported 50 percent relief during the trial. Claimant could do grocery shopping and home chores. There was no change in medications. No Oswestry assessment was performed at the visit. Dr. Kim testified this made it more difficult to assess the effectiveness of the trial. Claimant's physical exam was unchanged. Claimant was to discuss a permanent implant with Dr. Eskander.

Dr. Kim examined Claimant on May 12, 2021. Claimant described pain across the lower back that would radiate to the left buttock, left posterior side, knee, left calf, and left foot. The pain was intermittent and described as stiffness, burning, tingling, and achy. The pain level was reported as six to seven but could increase to ten out of ten. Pain worsened with sitting more than 40 minutes, prolonged walking, sleeping in one position, and any increased activity. Pain improved if Claimant changed positions. He was not taking any pain medications. He had taken Tramadol, gabapentin, cyclobenzaprine, and Cymbalta in the past; he felt like none of them helped his pain level so he stopped taking them. Claimant was not working at the time of the DME. Claimant reported living in a two-level house with his wife and three of his four adult children. He had a small dog he could take for walks. Claimant was able to drive short distances and go to the grocery store, but he would take a cane with him. He tried to stay active by walking up his staircase ten times. He hired someone to do yardwork. Claimant told Dr. Kim he could do most of what he did before the work injury other than bowling and playing golf. Dr. Kim did not question the causal relationship between the spinal cord stimulator and the work injury, although Claimant had a history of prior low back injuries. Claimant had told Dr. Crain in November 2018 that before the

accident a preexisting back condition had some impact on his walking and his ability to do bowling and golfing.

Dr. Kim's examination found some tenderness over the lower lumbar paraspinals, more on the left than the right, and 25 percent reductions in flexion and extension of the lumbar spine with increased back pain at the end of motion. The seated and supine straight leg raise tests caused increased back pain and pain in the left buttock and posterior side. A sensory exam was normal other than the right first toe and left anterior thigh. A motor exam was normal except for mildly decreased strength in the left big toe. Claimant had some difficulty transferring from a seated to a standing position due to back pain. His gait was mildly antalgic. He was not using any assistive device to walk at her office. When Dr. Kim asked if he received any improvement from the fusion surgery, Claimant stated he initially got 60 percent improvement, but that was temporary. His pain returned to baseline with zero percent relief overall. Dr. Kim asked Claimant to describe in detail whether and how he had improved with the SCS trial. Claimant was very uncertain how much relief he got during the trial. He did not try the activities that normally increase his pain out of concern he would be videotaped and he would be questioned whether his pain was real. He also told Dr. Kim he did not want to have to keep living with the pain and did not know what else he could do. In Dr. Kim's experience, her patients who have a good outcome from a stimulator trial will describe significant improvement such as using their pain mediation less frequently or walking without assistance of a cane or walker. They also describe significant improvement in their activity level. The patients feel dramatically better and are excited about going forward with the permanent implant. Dr. Kim would then find a permanent stimulator implant worthwhile to do.

Dr. Kim opined that Claimant's trial stimulator was reasonable and necessary, because Claimant had tried conservative treatments such as physical therapy, different medications, and a

few injections without resolution of his persistent pain or a return to work. In addition, a discogram showed concordant pain at L4-5 and he underwent surgery. Unfortunately, he got only temporary relief. Dr. Kim thus agreed that a trial was a reasonable thing to do. A trial is fairly low risk compared to a permanent implant. The wire and lead are temporary and only in place for about a week. With a permanent implant, the procedure takes longer to perform and there is a risk for infection in the epidural space. Dr. Kim testified that an SCS may not be a permanent fix for pain if pressure is still being placed on the facet joint or the disc above or below the fusion site. Inflammation can build and cause pain to break through, leading the patient to seek additional pain treatment such as epidural injections and facet blocks. In Dr. Kim's opinion, a permanent SCS was not reasonable given the results of the trial. She felt the trial results were very uncertain, noting Claimant felt unsure about the result and did not really test out the SCS. She believed Claimant was desperate due to his persistent pain and wanted to try something. However, she did not believe the permanent stimulator would provide significant pain relief such that Claimant could return to most of his previous activities and return to work. Dr. Kim acknowledged that Claimant may have told Dr. Rowlands he got 50 percent relief from the trial, but when she pressed him for further details, it became clear that he did not really test the stimulator out to see if it provided significant pain relief. Dr. Kim also expressed concern that a permanent stimulator implant could be in Claimant's spine for 20 years or more, which presented a serious risk of infection or other problems developing with the implant. The SCS can also lose its effectiveness so that the patient does not use it anymore. Dr. Kim does not usually recommend a permanent implant for patients who are still relatively young and active because of these future risks. She reserves the treatment for patients who have tried everything and are older. Dr. Kim would have recommended Claimant undergo an EMG to try pinpointing which nerve was causing most of the leg symptoms. This helps

with identifying where to place injections for better pain relief. Dr. Kim also would have tried a selective nerve root block to get the steroid closer to the disc and the nerve. This type of transforaminal injection approach had not been tried for Claimant. The EMG and the transforaminal injection would be less invasive than a permanent implant, with fewer risks. Dr. Kim noted that Dr. Rowlands had done an L5-S1 interlaminar epidural, but this placed the steroid farther from the disc and nerve root. The other injections Claimant had undergone were for the facet joints and a diagnostic block preceding an ablation. Only one type of lumbar epidural injection had been performed. Dr. Kim disagreed with Dr. Eskander's assessment that doing other treatments would just delay the inevitable need for a stimulator. She pointed out that structurally everything around the fusion looked fine. She believed Claimant's persistent pain was related to inflammation, which would be reduced by the injection she recommended. Claimant had thus not exhausted all of his conservative treatment options. Nevertheless, she agreed that the trial stimulator was worthwhile.

Dr. Kim confirmed that Claimant underwent the spinal cord stimulator implant on May 24, 2021. At a followup visit on June 10, 2021, Claimant's ODI was 64 percent and he had intense mid-back pain post-surgery. This was not unusual, according to Dr. Kim. Claimant saw Dr. Eskander on July 15, 2021. His pain level was five to seven. He could now sleep through the night and did not require a cane. His ODI had decreased to 40 percent. Dr. Eskander allowed Claimant to advance his activity as tolerated and scheduled him for an FCE. Dr. Kim did not believe the ODI of 40 showed that Claimant had gotten a huge improvement in his quality of life from the SCS. She noted that the score was simply an indication of how Claimant felt at the time he was at the doctor's office and was sedentary. It gave a general idea of how Claimant was functioning, but

did not show how Claimant would do while being active. The score is based on the patient's reports and was subjective.

Dr. Kim examined Claimant for a second time on August 9, 2021. Claimant reported at the exam that he had no pain, but he stated that his pain level would still go up to a seven or eight with any increased activity. He continued to experience achy pain across the low back. Claimant felt that his left leg symptoms had improved significantly. He still would get worsened pain with sitting, sweeping, repetitive bending, lifting, and twisting. His pain level increased to a seven or eight while sweeping out his garage. Claimant was not taking any pain medication. Based on the details provided by Claimant, Dr. Kim did not think Claimant was 75 percent better as he had claimed. The same activities that caused pain before were still causing increased pain. Dr. Kim explained that if Claimant described much lower pain levels doing activities such as sweeping the garage or that he could sit a lot longer, this would indicate functional improvement. As it was, Claimant was still unable to do any of the activities he could not do before the SCS. Dr. Kim did not consider this to be 75 percent improvement. In addition, Claimant had not returned to work, his living situation was similar, and he still had not returned to bowling or golf. He did describe going to the grocery store without needing a cane and walking one mile three days a week without a cane. Dr. Kim did not perceive this as much of a change from before the SCS implant. Dr. Kim acknowledged that the physical examination in August 2021 showed improvement in the dural tension signs and absence of symptoms in the legs, buttock and posterior side. Claimant continued to have increased discomfort in the back and he reported some numbness in the mid-thoracic region where the stimulator had been placed. Claimant's ability to perform transfers from seated to standing may have been less uncomfortable than before. Dr. Kim did not observe any dramatic changes in Claimant's condition, however. She commented that patients who get great results from

an SCS usually report significant improvement such as dramatically reduced pain medications and a return to work or activities they were unable to do before.

Dr. Kim continued to opine that the permanent implantation of the SCS was not reasonable or necessary in Claimant's case. She based her opinion on the results of the trial SCS, Claimant's age, and his ability to function prior to getting the SCS. She again noted that Claimant had not been able to articulate with any detail after the trial how he had improved by 50 percent. Dr. Kim believes he told his doctors he had improved by that amount so he could get the stimulator approved. He felt he had no other treatment options. Dr. Kim further noted that Claimant was functioning well before the trial SCS in that he was not taking pain medications, he could walk his dog and do household chores, and he could do most of his activities of daily living. He would get pain with increased activity, but that was the same after both the trial SCS and the permanent SCS. Dr. Kim was not surprised by the permanent SCS results based on the results of the trial stimulator.

Dr. Kim is familiar with the result of the FCE done by Neil Taylor on August 24, 2021. Taylor felt Claimant was capable of parttime medium duty work. Dr. Kim confirmed that Dr. Crain had concluded Claimant could do medium duty work back in October 2020. Claimant's ODI score at the FCE was 38 percent. This score does not change her opinion about the appropriateness of the permanent SCS. Dr. Kim insisted that the FCE result strengthened her belief that the permanent SCS was not reasonable or necessary. She did not expect Claimant would get substantial pain relief or return to his job or increased activity levels after implantation of the permanent SCS, given the result of the trial.

On cross-examination, Dr. Kim agreed that the 38 percent ODI at the FCE was similar to what Dr. Eskander had reported on December23, 2021, which was 40 percent ODI. She confirmed this was a decrease from the 62 percent or higher ODI scores reported before the SCS trial. Dr.

Kim acknowledged that Dr. Eskander maintained Claimant on total disability from work until the FCE was performed. Dr. Kim agreed that Claimant underwent a reasonable amount of conservative treatment before the fusion surgery, and she felt the discogram and fusion surgery were reasonable. She felt that at least two selective nerve block injections could have been tried. Dr. Kim does not perform spinal cord stimulator trials herself. She refers her patients to her partner, Dr. Young Parks. Dr. Kim had opined that all the treatment Claimant received, other than the permanent SCS, had been reasonable and necessary. She is not aware of any medical records suggesting symptom magnification or malingering by Claimant. Dr. Kim confirmed that Dr. Eskander had released Claimant to return to work with restrictions before the fusion surgery. Claimant had been working fulltime, full duty as a constable before the work event. As of November 5, 2020, Claimant had an ODI of 62 percent. Dr. Eskander felt he was unable to work. Claimant told Dr. Kim that he had to use a cane in the grocery store and when he was walking before the SCS; he now reports that he does not need the cane and can walk a mile without it. Dr. Kim agreed that both she and Dr. Zaslavsky found positive neural tension signs upon straight leg raising before the permanent implant. Dr. Zaslavsky also made some neurological findings that Dr. Kim described as very mild. Claimant told Dr. Kim at the May 2021 exam that he got 50 percent relief from the trial SCS. Dr. Kim questioned this because Claimant was not able to provide any details to support this statement. Claimant reported 75 percent relief from the permanent SCS when he saw Dr. Kim in August 2021. Dr. Eskander's notes from July and September 2021 reflected an ODI of 40 percent. Dr. Kim insisted that Claimant did not report any dramatic change in his pain levels with activities or sitting. His pain level still increased to a seven or eight with more activity. Dr. Kim acknowledged that Dr. Eskander documented a pain level of three at the time of a September 8, 2021 visit in addition to the ODI of 40 percent. Claimant told Dr. Eskander he was no longer using a cane. Dr.

Eskander documented an ODI of 40 percent at the most recent exam in December 2021 also and Claimant reported significant subjective pain relief. Dr. Kim has not seen documentation of the exact activities/chores Claimant does in the home. In July and September 2021 medical records, Claimant reported almost complete resolution of his left leg pain. Claimant had been reporting leg pain consistently since the accident. At the August 2021 DME, Dr. Kim found the straight leg raising exam to be negative, which was a change from May 2021. Dr. Kim agreed that Dr. Eskander thoroughly reviewed the risks of various procedures with Claimant, according to the records. She acknowledged that so far Claimant is not reporting any problems with the SCS implant itself. She explained that her concern was more about five to ten years from now. She agreed that the protocol set forth in the workers' compensation treatment guidelines had been followed with regard to the SCS trial and implant. She confirmed that the standard of care for proceeding from trial to permanent implant was a 50 percent improvement in symptoms. Dr. Kim prepared an addendum report in November 2021. Claimant had been released to work at a medium duty capacity.

Dr. Kim testified that Dr. Eskander could have recommended a hardware block or facet joint diagnostic block prior to trying the SCS to assess these areas as sources of pain. Another discogram could have been done to see if the disc above or below the fusion site was causing pain. Dr. Kim agreed that Dr. Eskander is an excellent spine surgeon. Dr. Kim acknowledged that the pain level of three that Claimant reported to Dr. Eskander in September 2021 was the lowest pain level he had reported since his injury occurred. Dr. Kim testified that she would have thought the stimulator was reasonable if Claimant had been able to report 50 percent pain reduction with increased activities such as sweeping, doing yard work, or sitting significantly longer. Claimant was not able to report such a reduction to her. Dr. Kim felt that Claimant was pretty functional

before the SCS was implanted. She questioned whether the FCE result would have been much different before the SCS. She acknowledged that Claimant is now subjectively reporting that he is able to sleep, is not using a cane, and can do more after the installation of the SCS.

On re-direct, Dr. Kim reiterated her opinion that Claimant did not get 50 percent improvement from the SCS trial. When she asked Claimant detailed questions, he was not able to say where the 50 percent improvement came from. She felt he was desperate to try something else and gave the 50 percent number because he knew that was required to get the stimulator done. Dr. Kim believed that Claimant should get an EMG done and undergo transforaminal injections instead of the permanent SCS implant. She pointed to the unclear results of the trial SCS, the risks of the permanent implant, Claimant's relatively young age, and the possibility he would need injections in the future anyway. She did not see the SCS as a permanent fix for Claimant's pain. An SCS would have been her last choice for Claimant if he was her patient. She did not think the permanent implant was reasonable, necessary, or guideline compliant for Claimant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Compensability of Permanent Spinal Cord Stimulator

Claimant David Wilkes seeks a finding that a permanent spinal cord stimulator (SCS) is reasonable, necessary, and related treatment for an acknowledged work accident that occurred on March 23, 2018. The Employer, Recovery Innovations, previously agreed that Claimant injured his low back in a work-related accident that day and that lumbar spine surgery on February 3, 2020 was compensable. The Employer disputes that the permanent spinal cord stimulator installed on May 24, 2021 is reasonable, necessary, and causally related to the work injury.[1] Under Delaware

[1] The permanent SCS was installed shortly after the DACD was filed on May 12, 2021. Thus while the petition initially sought pre-approval of the medical procedure, the procedure had already taken place by the time the Board heard the petition in February 2022.

law, an employer is obligated to pay for reasonable and necessary medical expenses related to a work injury. *See* DEL. CODE ANN. tit. 19, § 2322; *Turnbull v. Perdue Farms*, C.A. No. 98A-02-001, 1998 WL 281201, at *2 (Del. Super. Ct. May 18, 1998), *aff'd*, 723 A.2d 398 (Del. 1998). Because this is Claimant's petition, he must prove his claims by a preponderance of the evidence. *See Lomascolo v. RAF Industries*, No. 93A-11-013, 1994 WL 380989, at *2 (Del. Super. Ct. June 29, 1994).

After weighing the evidence presented, the Board finds that the permanent SCS implanted on May 23, 2021 was reasonable, necessary, and causally related treatment for Claimant's work-related lumbar spine injury. In reaching this decision, the Board chooses to rely on the opinion of Dr. Eskander over that of Dr. Kim. *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 medical experts agreed that Claimant suffers from chronic pain as a result of the work-related low back injury and lumbar spine surgery. Claimant underwent multiple conservative treatment modalities including physical therapy, aqua therapy, chiropractic care, medications, injections, and ablations. He also underwent a spinal fusion at L4-5 of the lumbar spine in February 2020. Nonetheless, in early 2021, Claimant continued to suffer from subjective symptoms in the low back and into the left lower extremity that affected his ability to function and enjoy his desired quality of life. The Employer's medical expert, Dr. Kim, agreed that the trial of the spinal cord stimulator that began on March 31, 2021 was reasonable given the history and circumstances of Claimant's case. She also acknowledged that the steps set out in the chronic pain treatment guidelines for an SCS trial were followed in that a second opinion was obtained from Dr. Zaslavsky and a psychiatric evaluation was conducted. Where the experts diverged is over the results of the

trial SCS and whether Claimant experienced enough relief in his symptoms from the trial to justify a permanent implantation of a spinal cord stimulator.

The Board accepts Dr. Eskander's opinion that the permanent SCS was a reasonable next step in the treatment of Claimant's chronic pain condition based on the history of Claimant's injury and treatment and his response to the SCS trial. The Board also finds that Claimant has shown substantial improvement since the SCS was implanted and this supports his contention that the treatment reasonable and necessary for his low back injury. Dr. Eskander is persuasive for several reasons. Dr. Eskander has been one of Claimant's treating doctors since June 2018, a few months after the work accident, and has observed Claimant's condition and functional abilities throughout that time. Dr. Kim never examined Claimant until May 12, 2021, after the SCS trial was performed and just before the permanent SCS was installed. Dr. Eskander was therefore in a better position to judge Claimant's response to the SCS trial in relation to his condition before the trial and assess whether the SCS was the most reasonable next step in this case. Dr. Eskander provided a reasonable explanation for his recommendation to move forward with the SCS as opposed to trying the transforaminal injections suggested by Dr. Kim. He felt that the SCS would provide more immediate and beneficial results for Claimant and provide a more permanent solution to his pain in comparison to additional more conservative treatment options. He insisted that a trial of an SCS six-months post-surgery was supported by the medical literature and the Delaware treatment guidelines, and both he and Dr. Rowlands believed Claimant had gotten a good result from the trial. Dr. Eskander emphasized that the trial provided good coverage for the pain Claimant had been experiencing in the low back and lower extremity and reduced the pain by fifty percent both by Claimant's reporting and on the visual analog pain scale. Claimant reported a pain level of five out of ten to Dr. Rowlands on April 7, 2021 at the end of the trial, which was reduced from a pain

level of nine out of ten prior to the trial. Dr. Eskander examined Claimant in May 2021 before proceeding with the permanent implant, and he was satisfied that Claimant had reported enough relief from the trial SCS to move forward to the permanent SCS.

Dr. Eskander noted that Claimant's symptoms and dysfunction had been significant before the SCS trial. Claimant had initially responded well to the fusion surgery in February 2020. However, by June 2020, Claimant was reporting a pain level of nine out of ten with pain through his back, buttock, and left leg to the foot. His Oswestry Disability Index (ODI) was 72 percent, the highest it had been since his accident. Claimant also reported that all activities of daily living caused significant pain. In November 2020, Claimant continued to report a pain level of seven out of ten and had an ODI of 62 percent, which Dr. Eskander noted is still quite high. The last time Dr. Eskander saw Claimant before the SCS trial was February 4, 2021. At that visit Claimant described back pain radiating to his left leg and a pain level of eight out of ten. The pain was constant and woke him from sleep. The symptoms were aggravated by standing, squatting, lying in bed, bending, sitting, walking, kneeling, and twisting. In Dr. Eskander's view, the permanent SCS would be the most likely way for Claimant to achieve his goal of regaining some normalcy in his life. The outcome of an EMG proposed by Dr. Kim would not have changed Dr. Eskander's recommendation to do the permanent implant. The Board finds that Dr. Eskander has provided a convincing rationale for proceeding with the permanent SCS implant on May 23, 2021.

Dr. Eskander's decision to proceed is bolstered by the results Claimant has reported since the SCS was implanted. By July 15, 2021, Claimant reported an ODI score of 40 percent. Dr. Eskander testified that even a 15 percent reduction in ODI is significant for a patient and would make them feel that a treatment was worthwhile. The ODI at subsequent examinations through December 2021 has remained about the same. Claimant also reported reduced pain levels of five

to seven at the July 2021 visit to Dr. Eskander and indicated that he was sleeping better and no longer had to use a cane. Claimant was sufficiently improved that Dr. Eskander ordered an FCE to determine his functional capabilities and work status. Dr. Eskander ultimately released Claimant to parttime, medium duty work based on the FCE results. On September 8, 2021, Claimant reported a pain level of three and no radiating pain. The last time Dr. Eskander saw Claimant before the hearing was on December 23, 2021. Claimant's pain level at the visit was a six out of ten, but the ODI was still 40 percent. Claimant continued to have low back pain; however, Dr. Eskander noted that Claimant's left leg symptoms had improved markedly. Claimant told the FCE examiner in August 2021 that at times his pain was zero and he felt that overall he had gotten 75 percent relief from the SCS. Dr. Eskander described the SCS as a "game changer" for Claimant.

Claimant testified that his pain levels in the low back now vary from no pain to as high as a five. He no longer has leg pain. Dr. Eskander felt the change in leg pain was significant given that Claimant had consistently reported left leg pain after the work injury. He acknowledged that the fusion surgery stabilized Claimant's condition somewhat but the SCS had been a "game changer" for Claimant. Claimant insisted that the SCS has changed everything about his life. Before the SCS implantation, he had constant pain that fluctuated in level. Simple activities such as walking the dog or up and down stairs increased his pain. After the SCS implantation, he found himself able to increase his activity level without also increasing his pain level. If his pain did increase, such as on a long drive, he could turn up the SCS to relieve the pain. He estimated that he turns up the SCS one to two times a day when he overdoes activities. He described the relief as similar to how a TENS machine works. Claimant also testified that he no longer uses a cane since the SCS was installed, whereas before the SCS he occasionally used a cane. In addition, his symptoms do not increase to the same degree they did before the SCS was installed. Claimant is

thinking about trying bowling again, an activity he engaged in several times a week before his injury. Overall, he estimated that his quality of life was 75 to 80 percent better with the SCS. The Board found Claimant's testimony to be generally credible and consistent with the medical records.

The Board acknowledges Dr. Kim's concerns about long-term risks of the permanent SCS implant and that Claimant may require additional treatment such as injections in the future. The Board is satisfied that Dr. Eskander discussed the SCS multiple times with Claimant and Claimant understood the risks involved with the treatment before proceeding. Dr. Kim also expressed doubt that the trial SCS provided Claimant with as much relief as he claimed, because Claimant was desperate to find a way to relieve his pain. Claimant did not express the detailed, dramatic improvement Dr. Kim would expect from a patient who had a good response to a trial SCS. Dr. Kim concluded that Claimant would be better off trying some additional injections of a different type rather than proceeding with the permanent SCS. Dr. Kim also doubted that Claimant experienced as much pain reduction after the permanent implant as he has claimed, since he had not returned to work or to activities he had avoided since the accident. While Dr. Kim provided a rational basis for her opinion, the Board is unconvinced that her concerns outweigh the evidence discussed in the preceding paragraphs in support of the permanent SCS implant. The Board is satisfied that the permanent SCS implantation has provided Claimant with significant symptom relief, particularly from radiating pain, and improved his ability to function as reflected by substantially reduced ODI scores.

Based the above discussion, the Board finds that Claimant has shown by a preponderance of the evidence that the permanent spinal cord stimulator was reasonable, necessary, and related

treatment for his compensable low back injury. The Employer shall compensate Claimant for medical/surgical expenses in accordance with the applicable fee schedule.

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.

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. Claimant has been awarded medical/surgical expenses for the permanent spinal cord stimulator. An attorney's fee award is thus warranted in this case.

Claimant's counsel submitted an affidavit stating that she spent 18.5 hours preparing for the hearing on the pending petition. Claimant's counsel has been a member of the Delaware bar since 1996 and has extensive experience in the practice of workers' compensation law. Her initial contact with Claimant occurred on March 28, 2018. Counsel does not represent Claimant in anything other than a workers' compensation context. This case was no more complex than the usual case. Claimant's counsel represents that she has a contingent fee arrangement with Claimant. A copy of the fee agreement was provided to the Board. Her fee for hourly work is $400 per hour. Counsel represents that no fees have been or will be received from any other source. There is no evidence that Employer is unable to pay an attorney's fee.

Taking into consideration the factors set forth above and the fees customarily charged in this locality for similar services, the Board finds that an attorney's fee of $7000 or thirty percent

of the award, whichever is less, is reasonable and within statutory limits in this case.

A medical witness fee for medical 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, the Board GRANTS the Claimant's Petition to Determine Additional Compensation Due and orders the Employer to pay expenses related to the permanent spinal cord stimulator in accordance with the appropriate fee schedule. The Board also awards an attorney's fee of $7000 or thirty percent of the award, whichever is less, and a medical witness fee.

IT IS SO ORDERED THIS 7th DAY OF APRIL, 2022.

INDUSTRIAL ACCIDENT BOARD

/s/ Peter Hartranft

PETER HARTRANFT

/s/ Vincent D'Anna

VINCENT D'ANNA

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

Susan D Mack

CL

OWC Staff

Mailed Date: 4-8-2022


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Head Cases: The Role of Psychological and Psychiatric Experts in Workers' Compensation Claims

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- Adult, Adolescent and Child Psychology
- Assessment of Learning Disabilities

Behavioral Psychology & Forensic Psychology

Curriculum Vitae

Education

Clemson University, Clemson, South Carolina
B.A. 1974 Secondary Education in Psychology
Minor: Philosophy, Psychology

New School for Social Research, N.Y.,N.Y.
M.A. 1978 Clinical Psychology

Temple University, Philadelphia, PA
Ph.D. 1987 Educational Psychology, with emphases in Developmental, Behavioral and Physiological Psychology. Dissertation: Cardiovascular Psychophysiology and Attentional Mechanisms; Attentional Differences in Type A/B Individuals , awarded with distinction.

Professional Experience

Private Practice: 5/1981-Present Hockessin, DE

Specialization in the areas of Developmental, Cognitive/Behavioral, and Family Psychology, Forensic Psychology, and Assessment of Learning Disabilities, with particular emphasis within the area of hospital-based liaison psychology addressing the rehabilitation needs for traumatic brain injured and stroke patients. I work with children and adults, ages 6 and above, coordinate closely with the areas of Family practice, Psychiatry, and Neurology. I lecture extensively on topics related to stress management, developmental-behavioral conflict, violence in the workplace, Post Traumatic Stress Disorder, and parenting.

state of Delaware, Division of Medicare and Medicaid, 5/2013 to present
Consultant Psychologist, completing PASRR Level II Psychological assessment with recommendations for treatment and placement needs.

St. Francis Hospital: 4/1997-2015 Wilmington, DE
Clinical Liaison Psychologist- Consulting Psychologist for the St. Francis Chronic Pain Treatment Program and Consultant Psychologist for the Department of Rehabilitation, completing evaluation, diagnosis and treatment recommendations for patient from admission to post-discharge planning.

state of Delaware, Division of Developmental Disabilities 8/1989-Present
Consultant Psychologist, completing PASRR Level II cognitive and adaptive assessment with recommendations for treatment and placement needs.

state of Delaware, Division of Mental Health and Substance Abuse 8/2012-Present
Consultant Psychologist, completing PASRR Level II cognitive and adaptive assessment with recommendations for treatment and placement needs.

Specialty Select Hospital 10/1998-Present Wilmington, DE
Consultant Psychologist for the Post- stroke Rehabilitation Unit, completing evaluation, diagnosis and treatment planning for all CVA patients.

Delaware Curative Workshop, 3/1987-12/1997 Wilmington, DE
Consultant-Rehabilitation Psychologist for the Physical Rehabilitation and Chronic Pain Treatment Programs, completing initial assessment, diagnosis, treatment recommendations, direct care, group therapy, and familial support programs. Coordinated with the departments of Physical and Occupational therapy, and Physical and Rehabilitation Medicine, as well as coordinating with adjunctive providers and specialists, Rehabilitation and Insurance Agencies, and defense/ plaintiff counsel as needed.

Ancillary Experience

I have added training and experience working with physically disabled children and adults, civilians and Armed Services personnel experiencing post traumatic stress, and chronic pain patients. With a focus on rehabilitation and return to maximal functioning, I coordinate with specialists in the fields of Physiatry, Psychiatry, Neurology, Surgery, Orthopaedics, Family Practice and Anesthesiology, as well as Vocational Rehabilitation.

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I have provided testimony as both Fact and Expert witness in Superior and Family Court, and have testified as an expert for the Worker's Compensation Board, am certified with the Delaware

Worker's Compensation Board as a treating psychologist, and have greater than 30 years experience providing court testimony for plaintiff and defense counsel.

Honorary Positions

2002-2016 Medical Advisory Board, Epilepsy Foundation of Delaware

1984 – 1998 Board of Directors, Institute for the Development of Human Resources, Newark, DE; Board President, 1985 – 1991 and 1992-1998.

1990-1992 Board of Directors, Riverside Hospital, Wilmington, DE

Lectures and Presentations

1996, February Invited Scholars Conference, Keynote speaker
Tracking the Roots of Violence, a presentation to faculty and students of Cheney University

1997 -- 2004 Widener University Intensive Trial Advocacy Program Moot court invited participant, Widener University school of Law, Wilmington, DE.

1998 Keynote Speaker, Delaware Trial Lawyers Association annual conference, Wilmington DE.

2000, June Keynote Speaker, Recognizing Stress in the Professional Workplace , Richard S. Rodney Inn of Court, Delaware Bar Association

2001, October Invited Speaker, Hidden Disabilities in the Workplace , a presentation to Andersen Consulting, Inc., Wilmington, DE

2001, February Keynote Speaker, Coping with Stress in the Professional Workplace , Richard S. Rodney Inn of Court, Delaware Bar Association

2001, May Keynote Speaker The Pennsylvania Society of Behavioral Medicine and Biofeedback spring conference of 2001, Post-traumatic Stress Disorder and Applications for Biofeedback, Jefferson University hospital, Philadelphia, PA.

2001, September Invited Speaker Building Self Esteem and Self-confidence, a presentation to New Directions, a mental health advocacy and support organization, Wilmington, DE

2002, November Invited Speaker Cognitive -- Behavioral Psychology and its Application to Head Injury, a presentation to The Brain Injury Association of Delaware, Christiana hospital, Wilmington, DE

2003, September invited Speaker Adolescent Depression, Diagnosis and Treatment Issues. A presentation to the News Journal, Wilmington, DE

2003, October invited Speaker Depressive Illness and the Special Role of Spirituality , a presentation to New Directions, Wilmington, DE

2004, March invited Speaker Mental Stress Claims in Delaware a presentation to Lormam Associates , Christiana, DE.

2004, April Depression and Spirituality a presentation to New Directions, Wilmington, DE

2004, October invited Speaker Depression and Meditation, intervention for improving mood. , a presentation to New Directions, Wilmington, DE

2004, October invited speaker Stress management and meditation, a presentation to New Directions, Wilmington, DE

2005, April invited speaker Understanding Depression and Anxiety; a presentation to the News Journal, New Castle, De.

2005, May Understanding Therapy: A presentation to New Directions Depression Workshop Invited Lecturer Series Wilmington, DE.

2005, November Cognitive Rehabilitation John Wm. Dettwyler Ph.D. Brain Injury Association of Delaware, A.I. Dupont Hospital for Children, Wilmington, DE

2006, May Preparation for Bariatric Weight Loss Surgery, a Psychologists Perspective John Wm. Dettwyler Ph.D. St. Francis Hospital Bariatric Services Program, Wilmington, DE

2007, January Depression and Obesity; co-morbid conditions , A presentation to the St. Francis Bariatric and Surgery Program, St. Francis Hospital, Wilmington, DE.

2007, April Depression and Spirituality, an invited speaker presentation to New Directions, Inc.

2007, October 11 Developing Self Worth and Self Esteem, invited speaker to New Directions and the Mental Health Association of Delaware,

2008, February 28 Adherence to Weight Loss Management, a Behavioral Approach to Compliance, invited speaker to the CHRIAS Group, Wilmington, DE

2008, March 6 Psych 101; Understanding the role of Psychological Theory and its Application to Mental Health Treatment. A presentation to New Directions

2008, March 25 Emotional Factors in Weight Loss and Stabilization following Bariatric Surgery. A presentation to CHRIAS

2008, Sept 18 Psychology 101, a Presentation to New Directions, Wilmington, DE

2008, Nov 8 Obesity and Depression; intervention and treatment. An invited speaker presentation to Blue Cross and Blue Shield of Delaware

2009, Feb 19 *The Psychology of Depression,* a presentation to New Directions, Wilmington, DE

2012, Feb 12 Cognitive Rehabilitation and Traumatic Brain Injury, a presentation to the Head Injury Association of Delaware, A.I. duPont Hospital for Children, Wilmington, DE

2012, March *28* Addressing difficult people in the workplace*,* a presentation to Blue Cross/Blue Shield of Delaware, Wilmington, DE

2012, June 23 Understanding and recognizing Depression and Anxiety; a presentation for Care Managers. Blue Cross of Delaware, Wilmington, DE

2019, June 7 Navigating Post Trauma with Veterans of War: a presentation to Veterans for Sussex County, DE

Professional Associations

Association for Psychological Science
American Academy for the Advancement of Science

Professional License

State of Delaware Clinical Psychology DE B10000210

Neil S. Kaye, M.D. is Assistant Professor of Psychiatry and Human Behavior at Jefferson Medicine College and has been a Special Guest Lecturer at Widener University School of Law. He completed a residency in psychiatry at the Albany Medical Center Hospital and Syracuse University College of Medicine. He completed a fellowship in forensic psychiatry at Syracuse University College of Medicine. He has been an Expert Reviewer for the United States Department of Justice Special Investigation Unit and a Member of the Governor's Advisory Committee on Mental Health, Alcohol and Substance Abuse. He has been recognized by Delaware Today Magazine as a Top Doc four times in a row and as a Top Psychiatrist in America by the Consumer Research Council.

Dr. Kaye is Board Certified in General Psychiatry, Geriatric Psychiatry, and Forensic Psychiatry. He has been licensed in New York, Delaware, New Jersey, Pennsylvania, Massachusetts, Maryland, North Carolina, Virginia and Washington.

He is a member of numerous national organizations including the American Academy of Psychiatry and the Law where he has served as a Councilor on the Executive Committee and is a recipient of the Red Apple Award for service. He is the founder, past Chairman of the Task Force on Psychopharmacology and the Law and Chairs the Government Affairs Committee.

He has been a member of the Advisory Board to the Board of Medical Practice for the State of Delaware, Past-President of the Psychiatric Society of Delaware, and is Co-chairman of the Ethics Committee of the Psychiatric Society of Delaware. He has been politically active as a member of both the Medico-Legal Affairs Committee and the Public Laws Committee of the Medical Society of Delaware and Chairman of the Mental Health, Alcoholism and Drugs Committee. He is a member of the Advisory Board of Directors of the National Alliance of Mentally Ill Delaware.

Dr. Kaye specializes in forensic psychiatry, neuropsychiatry, psychopharmacology, and psychiatric research and has performed over 10,000 psychiatric evaluations. He has experience in criminal, civil, and regulatory law as well as family/domestic issues working with plaintiffs, defendants and courts. He has delivered over 1,000 lectures and has authored over 70 publications. His special interests include helicopters and cooking. His web address is: www.courtpsychiatrist.com.

Dr. Jim Langan is a graduate of Hahnemann University in Philadelphia, where he earned his doctorate in Clinical Psychology with a sub-specialization in Clinical Neuropsychology in 1987. He is board-certified in Clinical Neuropsychology by the American Board of Professional Psychology. He has been in private practice in Wilmington for 29 years. His practice involves evaluating patients with various neurological disorders such as Alzheimer's disease, multiple sclerosis, traumatic brain injury, and epilepsy. He has testified at the Industrial Accident Board for over 20 years.

Cassandra F. Roberts

Director

Having devoted her entire career — over 35 years — exclusively to Delaware workers compensation law, Cassandra Roberts is widely acknowledged as the preeminent authority in the field. Known for her broad skill set in representing employers and insurance companies in the quasi-judicial setting of Delaware's Industrial Accident Board (IAB), she is also an accomplished mediator in the state's Superior Court.

Cassandra's encyclopedic knowledge of worker's compensation law makes her highly attractive to clients seeking cost-effective "full and final" outcomes that insulate them from future exposure. Her reputation as an aggressive litigator precedes her, and often serves as a strong incentive for plaintiffs to settle short of litigation.

As founder and editor of The Delaware Workers Compensation Update, Cassandra reads, absorbs, and comments on every decision of the Delaware IAB. Four times per year, she identifies trends, assesses outcomes, and maintains a comprehensive inventory of case law, which she makes available to every worker's compensation lawyer in the Delaware bar.

PROFESSIONAL AFFILIATIONS

- Delaware State Bar Association, Workers' Compensation Section; current Section Chair
- Randy J. Holland Workers' Compensation Inn of Court, Administrator and co-founder
- DSBA Case Law Update Committee, Chair
- DSBA Continuing Education Committee, Member
- American Bar Association, Member
- Larson's National Workers' Compensation Advisory Board
- Defense Research Institute

HONORS AND AWARDS

- Larson's National Workers Comp Advisory Board. Delaware Delegate
- The Best Lawyers in America®, Workers' Compensation Law, 2005 – Present
- Cases featured in The News Journal and Delaware Today magazine

- Repeatedly named a “Top Lawyer” in Workers Compensation by Delaware Today magazine, and has the distinction of being the only practitioner ever cited as outstanding for both claimant and defense practice
- Selected in 2007 as a “Top Lawyer” in Corporate Counsel for its Annual Guide to Health Care, Workers’ Compensation and Employee Benefits Law
- Selected in 2009 to join the Larson’s’ National Workers Compensation Advisory Board as its Delaware expert
- Annual faculty member, speaker and author for Sterling Education’s Advanced Workers’ Compensation Seminar
- Faculty for annual seminars sponsored by Coventry Managed Care, ATI Physical Therapy, and The Delaware State Bar Association’s Annual Workers Compensation Seminar, among others.

HEAD CASE:
The Role of Psychology and Neuropsychology in Workers Compensation Litigation

Dr. John Dettwyler
Dr. Neil Kaye
Dr James Langan
Cassandra F. Roberts, Esq. (Moderator)

GENERAL TOPIC OUTLINE:

- The basis and role of psych pre-approval for spinal cord stimulator (the why and the how)
- The role of neuropsychological testing in fleshing out traumatic brain injury residual and cognitive impairment (and what are the "red flags" for malingering or invalid profile)
- What is the difference between functional overlay, conversion disorder and somatoform disorder?
- What information of value is gleaned from an MMPI?
- Is there a difference between secondary gain motivation and malingering?
- When is a psychiatric or emotional abnormality a contraindication for work? (What to make of it when we have surveillance and see a lot of what appears to be "normalcy" vis a vis someone claiming to be emotionally impaired from employment?)
- The role of surveillance video in psychiatric claims
- The unavailability of psychiatrists to treat workers' compensation claimants
- Why we so rarely see emotional FCE's (and what is one?)
- The tensions between doing what is right for treatment and minimizing costs for the insured

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

DOMINIC ANEPETE,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1477130
	)	
CITIGROUP GLOBAL MARK,	)	
	)	
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 August 26, 2019, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

MARK A. MUROWANY

ROBERT J. MITCHELL

Kimberly A. Wilson, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Robert C. McDonald, Attorney for the Employee

H. Garrett Baker, Attorney for the Employer/Carrier

Neuropsych Eval plays role in evaluating Concussion residual

NATURE AND STAGE OF THE PROCEEDINGS

On September 17, 2018, Dominic Anepete ("Claimant") suffered an injury during a slip and fall incident while working for Citigroup Global Mark (also "Employer" or "Citigroup"). Claimant's average weekly wage at the time of the work accident was $1,918.13, and his compensation rate for total disability is $713.65.

On March 14, 2019, Employer filed a Petition to Review Compensation, alleging that Claimant is capable of working in some capacity. Claimant maintains that he is still totally disabled from all gainful employment due to ongoing symptoms relating to the concussion he suffered in the work accident.

On March 26, 2019, Claimant filed a Petition to Determine Additional Compensation Due ("DACD"), seeking a finding of compensability of a post-traumatic stress disorder ("PTSD") condition that he contends also causally relates to the September 2018 work accident. Employer contests that Claimant has a PTSD condition; or, in the alternative, contests that any such PTSD condition causally relates to the work accident. Thus, Employer maintains that any treatment for PTSD is not compensable.

A hearing was held before the Industrial Accident Board ("Board") on Claimant's petition on August 26, 2019. Disability benefits have been paid to Claimant by the Workers' Compensation Fund since the filing of the petition, pending a hearing and decision. This is the Board's decision on the merits of Claimant's petition and Employer's petition.

SUMMARY OF THE EVIDENCE

John Townsend, III, M.D., a neurologist, testified by deposition on behalf of Employer.[1] He evaluated Claimant in two defense medical examinations ("DMEs") in January and July 2019. He has also reviewed the pertinent records in this case. In Dr. Townsend's opinion,

[1] Dr. Townsend's deposition was marked into evidence as Employer's Exhibit #1.

Claimant has no evidence of ongoing injury relative to the September 2018 fall and, therefore, no need for medical treatment or work restrictions are needed in that regard. Further, in his opinion, Claimant does not meet the criteria for PTSD.

Dr. Townsend confirmed that he reviewed Claimant's extensive records. Claimant has a history of concussion and neck pain predating the September 17, 2018 work accident. Claimant has admitted to suffering concussions when playing sports when he was younger. On April 29, 2013, Claimant had a slip and fall event with complaints of head pain and neck pain and was felt to have a postconcussive syndrome. Claimant was treated by Dr. Zhang at least four times in 2013 for complaints of feeling spacy, being unable to focus, having eye discomfort made worse with laptop use, a numb sensation on the top of his head, occipital headaches and a feeling of depression with all of his symptoms worsening throughout the day. Dr. Townsend found these complaints to be significant because they were pretty similar to those he complains about after his September 2018 work incident. For example, Claimant complained about dizziness when looking at colorful clothes and when watching a movie with his son, dizziness and headaches after using a computer and trouble sleeping. These are all similar to things which he has complained about following the September 2018 accident.

Following the 2013 incident, Dr. Zhang ultimately referred Claimant to Dr. McGowan for neuropsychological testing. Dr. Townsend noted that neuropsychological testing is important, particularly in patients with persistent symptom complaints because it helps determine whether or not there are valid physical objective findings that corroborate subjective complaints or whether there is any psychological overlay playing a role. Dr. McGowan tested Claimant in November and December 2017. He concluded that there were some validity issues. He felt that the patient had issues on several tests in terms of effort; he had one test that was normal, but two

others were not normal. Dr. McGowan wrote: "He failed two performance validity items. Failing two or more of these performance validity measures indicates that the cognitive data obtained during this assessment is likely not valid for interpretation." Dr. Townsend noted that this means that very low scores should not be taken seriously because the patient does not appear to be giving a full effort. This tends to make a lot of the substantial abnormalities questionable. Dr. McGowan also indicated that Claimant should be checked out for possible convergence insufficiency.[2] Dr. Trieu was involved in exploring this possibility.

Dr. Townsend noted that Dr. Watanabe testified that Claimant told him that as a result of the 2013 accident, he was a "different person," had difficulty speaking, trouble reading, memory issues, difficulty seeing colors, headaches, increased anxiety and light-headedness, dizziness and visual difficulties. Claimant noted that these symptoms had never gone away. Dr. Townsend first noted that it is unusual to have symptoms that are persistent for many years after a concussion; one would expect there to be improvement over time. Claimant has had substantial complaints over the years, but the records reflect that he has had waxing and waning of his symptomatology. Thus, if Claimant has similar symptoms now to those he had before when he was able to work, it is again likely that he could work in some capacity.

Dr. Townsend reviewed the records showing that Claimant was having similar issues prior to the work accident. An October 2017 Dr. Zhang record indicates that Claimant's symptoms actually increased in 2015. Claimant reported at that time that he was having more cognitive issues with difficulty finding words and was complaining about headaches, insomnia, anxiety, dizziness and depression. There also were concerns about neck pain and visual

[2] Dr. Townsend explained that convergence insufficiency is where the eyes have to come in in a smooth fashion when focusing on an object that is coming closer and closer; at some point, everyone will have a break in the ability for both eyes to maintain fixation on the item. When that occurs, there is usually double vision. People with convergence insufficiency have more difficulty keeping the eyes focused on the item and they will complain of double vision. There is training to improve and strengthen the muscle weakness involved.

disturbance. Dr. Zhang suggested neuropsychological testing. Notably, in October 2017, Claimant was also complaining of difficulties going into a supermarket, being exposed to lots of stimulation and color and stated that these made his symptoms worse. Again, these were similar to some of the complaints that he has had both with Dr. Watanabe and with the neurooptometrist. Thus, Dr. Townsend noted that if Dr. Watanabe assumed that the visual disturbances began after the September 2018 slip and fall, this was inaccurate. Claimant had had these issues for about three years at the point of the October 2017 medical record, at which time it was noted that they were still producing complaints and this was, notably, prior to the September 2018 accident.

Dr. Townsend turned to Claimant's September 17, 2018 slip and fall accident. When he first saw Claimant, he complained of headaches. He noted that when he was in areas with lights and colors or watching action shows on television he got headaches. He had difficulty getting to sleep and headaches woke him from sleep. He complained of an unsteady sensation, particularly when shopping. He got a wavy-looking sensation when looking at a computer or watching a movie. Claimant denied double or blurry vision but said he had trouble concentrating when reading. He had trouble filling out forms because the small lines bothered him. He had anxiety and depression. He also complained of some neck pain, noting that it was tight when he worked on it in physical therapy. He had some low back complaints. Again, Dr. Townsend noted that these complaints were similar to those that Claimant had prior to the September 2018 work accident. He had issues suggestive of convergence insufficiency after September 2018, but also had them as late as 2017 when Dr. McGowan tested him. Almost all of the symptoms Claimant complains of now are similar to those he has had over several years prior to the work accident. Dr. Townsend does not believe that there was any obvious aggravation of his condition as a result of the September 2018 accident based on what he was reporting before the incident.

Dr. Townsend compared the 2013 fall with the September 2018 fall. Claimant had a very good recollection of the September 2018 event and did not lose consciousness; in contrast, the 2013 event resulted in a loss of consciousness and some anterograde amnesia. The first event was mild to moderate; this event was mild, at best. Dr. Townsend noted that Claimant fell forward and landed on his elbows; therefore, the head could not have been that impacted. In fact, the only abnormality on physical exam when he was seen at the hospital was an abrasion to the forehead. Dr. Townsend testified that the 2013 event was clearly a more substantial blow to the head. Additionally, Dr. Townsend pointed out that a CT scan could show intracranial abnormalities, like blood, skull fractures or an area of swelling on the forehead or back of the head, depending on the injury. Claimant had none of these findings on CT scan. Dr. Townsend would not expect Claimant to have any issue working his predominantly sedentary job, given the 2013 event, which produced comparable symptoms.

At the January 2019 DME, Dr. Townsend noted that although Claimant complained that bright lights bothered him, he did not seem to have issues with the office lighting. Dr. Townsend has patients with photophobia and he has to change the lighting to assist them. Claimant did not seem particularly uncomfortable. Further, he did not appear to have any difficulty with balance, such as getting in and out of chairs and onto the exam table. Dr. Watanabe noted that when he tested Claimant's balance it was off but when he was distracted, it was improved. This suggests that the patient is making an effort to show Dr. Watanabe that he has a problem. Neurological dysfunction does not generally improve just because a patient is not being watched.

Dr. Townsend also noted that while Claimant had a lot of complaints, he did not have a lot of findings on examination to back them up. Claimant also seemed less forthcoming at the second DME; he seemed to give vague answers as opposed to the fairly specific answers he had

provided before. Dr. Townsend did not see any sign of Claimant having difficulty finding words or confusion. During the neurological evaluation, Dr. Townsend noted that Claimant's point of convergence was 14 centimeters, which is moderately abnormal. It should be about 4 to 6 centimeters. Claimant reported that it caused eye burning as opposed to double vision; notably, double vision is what is looked for in terms of abnormality in convergence testing.

On physical exam, Claimant had normal strength and reflexes. He walked normally but swayed a little on Romberg testing. Claimant stated that he had difficulty doing tandem gait tasks, though this would not be expected given the minor findings on Romberg.

Claimant's findings were mild in nature. The only objective findings were mostly the eye issues, but those still rely on the patient stating that there is a problem. There are only a limited amount of eye movement findings that are objective. This was the issue that Dr. McGowan noted in late 2017 should be checked out.

Dr. Townsend reiterated that while Claimant seemed to downplay the preexisting issues and attribute his symptoms to the 2018 work accident, the records reflect that he had all of his current symptoms at one time or another leading up to the new accident. He had an exacerbation of many of those complaints in late 2017. Accepting his complaints following the September 2018 incident, Dr. Townsend might be able to conclude that Claimant had an exacerbation of his preexisting headache issues and unsteadiness. However, it appeared that all of the issues he has had over the years have waxed and waned in intensity. There was no evidence specifically of injury related to the September 2018 accident. Claimant has the issue with convergence but that issue dates back to his previous concussion in late 2017; thus, Dr. Townsend would not relate that specifically to the September 2018 accident.

Dr. Townsend further does not believe that Claimant needs ongoing treatment in relation to the September 2018 accident. He opined that Claimant's treatment would be related to his preexisting problems being evaluated in the months leading up to September 2018; likewise, his treatment with the psychiatrist and psychologist would also predate this accident.

Finally, Dr. Townsend found no reason to place any restrictions on Claimant's work capabilities relative to the September 2018 accident versus his preaccident condition as Claimant had similar complaints that he was working with prior to this accident. Prior to the accident, he had issues returning to work due to dizziness, neck complaints and headaches; eventually, he returned to work despite those symptoms. As his job does not involve balancing and he could take breaks, Dr. Townsend opined that Claimant could continue to work that job.

Claimant had repeat neuropsychological testing with Dr. James Langan in April and May 2019. Again, there were issues with his validity testing. Dr. Langan wrote that he had difficulty administering the test because the patient had complained that it was disturbing his vision and because he was so light sensitive. Dr. Langan felt it unexpected that someone would have worsening memory performance over the years in relationship to the previous alleged concussion in 2013. He was also unsure why Claimant had such substantial difficulty controlling his eye movements to a point where he could not answer questions. Dr. Langan noted that Claimant performed in an improbably poor fashion, even in response to the auditory, verbal and memory testing, none of which would be affected by his eyes. This evaluation was similar to Dr. McGowan's in that Claimant failed the validity criteria. Again, when someone has effort-related issues on neuropsychological testing, that generally calls into question the validity of their subjective symptoms. Notably, Dr. Watanabe had also documented that Claimant could not participate in any visual testing because of problems in controlling his eye movements and

because visual stimuli were reportedly moving all over the place. Dr. Watanabe also testified that he found this to be much more severe than anticipated. He had also agreed with Dr. Langan that this was probably not really the case and, instead, due to exaggeration. Dr. Townsend agrees with Dr. Langan on this point as well. Dr. Watanabe had also found evidence that Claimant was not always giving consistent effort.

Dr. Townsend pointed out that if Claimant were having visual issues to the extent he complains, he would not be expected to be driving, outside in the sunlight or engaging in social media. Claimant also told Dr. Townsend at the July 2019 DME that he was going to Planet Fitness three days a week, and this would be expected to be bright and noisy. This was inconsistent as Claimant stated he could not grocery shop due to the bright lights. There also is a lot of motion at gyms, yet Claimant complains of that these sort of motions bother him while shopping at big box stores.

At the July 2019 DME, Dr. Townsend performed a Mini-Mental status exam. Claimant was alert and oriented. When asked to recall items, he recalled two out of three without hints; the third he got wrong. On three step commands, Claimant missed one. It was unclear if this was due to lack of attentiveness or not giving effort, as these were relatively simple activities. Claimant's near-point convergence was worse than at the first DME, and he now complained of double vision, whereas he had not before. This was unusual, as Dr. Townsend would expect that Claimant should be improving since the September 2018 concussion, which would be the normal progression of a closed head injury. Claimant also closed his eyes and swayed toward Dr. Townsend on Romberg's testing, grabbing his shoulder. This was unusual because he only had a little amount of sway at the first DME. Claimant did seem to know where Dr. Townsend was and did not fall. He thought that maybe Claimant was trying to demonstrate how bad his balance

was as opposed to actually having bad balance. He had some difficulty when asked to do tandem activities, particularly with starting; everything else on the exam was unremarkable. Dr. Townsend again concluded that Claimant's subjective complaints were disproportionate to his objective findings. His findings appeared exaggerated and inconsistent. At both DMEs, Claimant had expressed a lot of anger about his workplace. Dr. Townsend concluded that Claimant had no evidence of ongoing injury relative to the September 2018 fall and, therefore, no need for medical treatment or work restrictions in that regard.

Dr. Townsend addressed the claim of PTSD. PTSD assumes that the patient has had a life-threatening incident. This would be something such as a fire fight in a war or being attacked with a weapon. This would produce symptoms of anxiety, hypervigilance and reliving of the incident. Claimant has not had any such life-threatening experience, so Dr. Townsend would not expect him to have PTSD as a result of his work-related incident. His anxiety is generalized as opposed to being related to this specific work accident.

On cross examination, Dr. Townsend agreed that Claimant has a longstanding history of anxiety and depression. Anxiety and depression can produce somatic symptoms and this was a concern when Dr. McGowan saw Claimant in 2017.

Claimant was complaining in October 2017 of being in a supermarket and exposed to stimuli and colors, which likely reflects visual issues. A neuro-optometry evaluation was suggested. In November 2017, Claimant told Dr. Napoletano that visual stimulus tended to be overwhelming. He also had a variety of complaints about visual scanning in December 2017. Dr. Townsend agreed that Claimant was apparently able to function full-time at work despite all of this, however. Claimant told Dr. Townsend that he was a vice president of data privacy at Citigroup and that his job involved phone conversations with people in different countries. He

also performed computer work and faxing. He would not doubt that Claimant might work with double monitors in this capacity.

Dr. Rudin's note regarding Claimant's request to work from home prior to the September 2018 work accident mentions issues with his low back.

Dr. Townsend agreed that Christiana Care diagnosed Claimant with a concussion in relation to the September 2018 work accident. Dr. Watanabe also indicated that Claimant suffered a concussion in this incident. Dr. Townsend would note that it was very likely a mild concussion, and that he is exaggerating his symptoms. A considerable amount of time has passed and yet he is still complaining of substantial symptoms.

Dr. Townsend does not believe that Claimant meets the criteria for PTSD. He describes nightmares about the incidents, but it is unclear why he would have PTSD from this relatively innocuous event.

On redirect examination, Dr. Townsend testified that the February and March 2018 records indicated that Claimant had substantial issues with balance. Apparently, Claimant's symptoms wax and waned in intensity.

Dr. Townsend testified that Claimant may have had a mild concussion in September 2018, but it would be expected to have gotten better. The fact that Claimant's condition has reportedly gotten worse, in light of the evidence for symptom magnification, makes it less likely that it is related to a concussion.

James Langan, Psy. D., a board-certified neuropsychologist, testified by deposition on behalf of Citigroup.[3] He evaluates patients suspected of having a brain-related impairment of cognition. Dr. Langan performs a lengthy exam consisting of a clinical interview and a neuropsychological test, which evaluates intelligence, memory, learning executive functioning

[3] Dr. Langan's deposition was marked into evidence as Employer's Exhibit #2.

and emotional functioning. Neuropsychological testing is a way of quantifying a person's subjective complaints. For example, many patients who complain of memory problems do not actually have a memory problem; instead, there is a problem with attention or depression. This testing quantifies in a very precise way a person's subjective complaints; it also guides treatment. Dr. Langan has administered between 200 to 250 tests per year for about thirty years.

Dr. Langan first met with Claimant in April 2019 and, unfortunately, was just limited to a clinical interview at that time. Claimant indicated that he needed certain accommodations during Dr. Langan's evaluation including dim lights in the exam room as well as breaks. He wore sunglasses for part of the time. Claimant complained of headache pain, light sensitivity, word-finding problems and memory problems. He attributed all of these to the September 2018 work accident.

In April 2019, Claimant described the September 17, 2018 accident. He had a fall when he was walking from his car back to his work building. Claimant added that Citigroup had rejected his request to be able to park closer to the building due to a prior injury. He noted that his back was hurting and his right leg gave out and he fell forward onto the pavement. Claimant tried to get up and, when trying to get back up, he fell again and struck his forehead.

The past medical records indicate that Claimant has a history of concussion. He had a slip and fall in 2013 and was seen for a concussion. He also had a motor vehicle accident as well as a slip and fall in the spring of 2018. He had this work accident in September 2018. In all of these regards, Dr. Langan noted that Claimant's symptoms were very extensive in comparison to his injury. Generally, a person who hits his head and does not have a loss of consciousness, does not have any neuroimaging abnormalities nor any posttraumatic amnesia following the concussion. All of those absences of signs and symptoms suggest a relatively mild injury. Most

of the scientific research would suggest that individuals with those injuries would recover in a matter of weeks and months. Dr. Langan saw Claimant a while after the September 2018 injury and he stated that he had not gotten better and, if anything, he had worsening problems on a number of different fronts.

Dr. Langan noted that the records after the 2013 incident also indicate significant subjective complaints. In 2017, Dr. McGowan did extensive testing. Claimant had many different complaints; he had visual issues, headaches and issues with memory and concentration. After the testing, Dr. McGowan indicated that he was not able to associate the subjective complaints with the 2013 injury given the four-year length of time that had lapsed. He voiced concern over the idea that memory complaints were getting worse over the years, because this was contrary to the usual pattern of recovery. Generally after a concussion, a person has the most severe problems directly afterward, with a pattern of improvement; progressive worsening of cognitive function is not typical of head injuries and is more typical of dementia, which Claimant clearly does not have. In any case, Dr. McGowan concluded that Claimant had a form of somatoform disorder affecting cognition and he recommended psychological treatment.[4]

Claimant had a lot of anxiety issues prior to the September 2018 incident. He was seeing a psychologist, Mr. Baldino, for at least a couple of years. He talked about issues pertaining to frustration, anger, dealing with his ex-wife, parenting and work stress.

After each accident Claimant has been involved in—in 2013, 2017 and twice in 2018—he described each as being cataclysmic. He complained of a multitude of symptoms after each

[4] Dr. Langan explained that somatoform disorder is a disorder where there are psychological stressors in terms of relationships and the patient develops physical or cognitive symptoms as a result of these stressors. Usually, the expression of those symptoms have the effect of getting the person out of difficult situations where they adopt a sick role or they are excused from work or problematic relationships and in some way it solves a problem for them. In somatoform disorder, the physical or cognitive symptoms are medically unexplained.

and was seen by many different specialists. He reported reduced functionality after all of them, most dramatically after the September 2018 incident.

During Dr. Langan's evaluations, Claimant complained of visual impairment to a point where he did not want to perform any task that involved vision whatsoever. Claimant reported that his vision was getting worse. His optometrist prescribed him prism lenses, but they were not helpful. Dr. Langan noted that this is unusual. He has examined many patients with concussion and even those with problems with convergence are able to take neuropsychological tests with accommodations. Claimant was offered to take the testing on paper and pencil at a table with reduced or dimmed lighting, but he declined that as well as the computer version. Dr. Langan has never seen a level of visual dysfunction complaints where they interfered with an examination. This was also notable as Claimant reported that he was driving, which is a visually complex activity. Claimant is apparently using Facebook online and is also outside. It does suggest that Claimant is more functional outside the exam room than how he presented himself. It is also inconsistent with the refusal to take the testing. This all suggests that Claimant was trying to impress on Dr. Langan how severely impacted by a work accident he was.

Dr. Langan testified that there is validity criteria contained within the neuropsychological testing. For example, a very easy memory task is given that just about everyone would pass, including individuals with early onset of dementia or Alzheimer's disease; if a person does not pass those tests, this is a red flag for effort. Patients are compared relative to brain injury populations and, if they are scoring below that population, that would indicate a problem. This is especially an issue if a person with a mild concussion is scoring below a person who was in a coma for a couple of weeks with bruising on the brain. This all provides information to help determine whether a person is making a full effort.

With Claimant, there were some credibility issues. First, Claimant was really limited to auditory verbal tests, which can be performed with the eyes closed. This would include reciting strings of digits in forward and reverse sequences. Claimant's ability to do that was extremely poor and at a level that was not credible. He could only string three digits forward and two digits in a reverse sequence. This is considered excessively poor and would be below people with severe brain injuries as well as people with dementia. He also could not recognize target words he learned fifteen minutes prior, considered an extremely easy test. This was not a credible performance, as it placed him below individuals with severe brain injuries. Additionally, Claimant took an auditory verbal learning test where he had to listen to and learn a list of ten words over a series of four learning trials; again, the learning that took place over the four trials was below individuals with severe brain injuries. Dr. Langan felt that this was hard evidence of diminished levels of effort, at the least.

In terms of Dr. McGowan's suggestion of a potential somatoform disorder, one of the difficult situations Claimant might have wanted to "get out of" was work. He confided to Dr. Napolitano on a number of occasions that he had work stress. He felt that his supervisor was a bully or being abusive and he talked of anxiety about going back to work. He also had an acrimonious relationship with his ex-wife, and there was financial stress in regard to their son's daycare expenses. Dr. Langan confirmed that one way of relieving these stresses would be to play up a work injury in order to render himself unavailable for work. Dr. Langan concluded that Claimant is a person that is very unhappy with his job and his relationships. He has a lot of psychological stressors, which are well documented in the record. He is complaining of symptoms that existed prior to his September 2018 fall, such as problems with memory, anxiety, dizziness, headaches, vomiting and a whole host of psychophysiological and cognitive

symptoms. The accident itself was quite minor and would not ordinarily be the kind that would lead to persistent cognitive and psychophysiological complaints. Dr. Langan felt that Claimant's presentation was atypical of the literature. All of the literature would suggest that a person would tend to recover from a concussion, especially a mild one. The rule is improvement as opposed to decline. Claimant's subjective complaints seemed disproportionate to what would be expected for someone having sustained the same injury. Thus, non-brain related factors would have to be considered, such as emotional factors, anxiety, depression and motivational problems. Biological factors would not cause a progression of symptoms. Claimant's poor test performance and behavior during his exam also were very atypical and unusual for people who have concussions and this implicated his credibility. It would be very difficult to conclude that any of them are attributable to the September 2018 fall. He had very similar complaints over recent years.

Dr. Langan addressed Claimant's allegation that he has PTSD. Claimant had reported to Dr. Langan that since the accident he was having nightmares where he would wake up sweating and fear falling. He said that he put his mattress on the floor instead of on his bed frame. Walking downhill was anxiety-provoking for him. He talked of being irritable, angry, combative and aggressive. Dr. Langan testified that PTSD is a very serious psychological disorder reserved for people who have been involved in life-threatening situations. This would include combat, rape and robbery at gunpoint. He has seen workers' compensation patients with PTSD, but it is a very serious psychological injury and Dr. Langan does not find that Claimant has symptoms of re-experiencing the trauma, a pattern of avoidance or a life-threatening nature of the accident itself. A fall would not be something really meeting the threshold for life-threatening trauma, which would then cause a psychological injury.

Dr. Langan has no basis to restrict Claimant from any activity for neuropsychological reasons. There is no valid data upon which to base such restrictions. If Claimant does have restrictions or if he needs treatment, this would stem from and relate to his preexisting condition. Claimant's symptoms are quite similar to those existing prior to September 2018.

On cross examination, Dr. Langan agreed that Claimant suffered a prior fall in September 2013 while working for another employer. He admitted that there was no specific treatment for concussion at that time, but Claimant was complaining of waves of dizziness and neck pain. Dr. Langan further admitted that there was no treatment for dizziness or concussion other than the referral to Dr. McGowan for cognitive dysfunction in 2017.

Claimant had a tonsillectomy and developed some neck issues in April 2017. In 2016, he complained to his family doctor of headache, nausea, vomiting, anxiety, photophobia and dizziness. He did not specifically complain of these issues in relation to the tonsillectomy.

Claimant told Dr. Langan he fell in the bathroom in May 2018. He said he had hip pain or fell onto his buttocks. He did not specifically complain of any dizziness or blurred vision after that incident. He also told Dr. Langan that he had pain complaints during the drive to Wilmington from Bucks County, Pennsylvania and that this was aggravating his pain. Dr. Langan had no information about whether or not Claimant was able to do his job or was missing or late for work prior to September 2018.

Claimant's testing with Dr. Langan had him at an IQ of 69, a range akin to mental retardation/intellectual disability. He is a man who went to college, so this does not appear realistic. Dr. Langan believes that the exam was colored by a substandard effort, his symptomatic complaints, and his withdrawal from tasks.

Dr. Langan clarified his opinion. His opinion is that if Claimant did sustain a concussion in the September 2018 accident, it was quite mild and not likely to cause the extent of symptoms he is offering right now. The characteristics of the fall would suggest a mild concussion, if he even had one. Most people with the kinds of injuries that Claimant sustained in September 2018 would not have these extensive, persistent problems.

Dr. Langan would not agree that Claimant is having a number of symptoms from a concussion due to biological changes in the brain. Many of his symptoms were present before this accident, and he did have preexisting psychiatric problems. They are not due to biological changes in the brain that would be considered when talking about a brain injury or postconcussion syndrome.

On redirect examination, Dr. Langan agreed that Dr. Zhang's 2013 records are indicative of reports of difficulty finding words, headache, dizziness, difficulty sleeping, grogginess, depression and anxiety. Claimant complained of dizziness and headache when looking at colorful clothes or when using a computer to check e-mail. These are similar to his current complaints. Even at the point when Dr. Zhang released Claimant in November 2017, Claimant was still reporting headaches and memory impairment. Claimant had fairly consistent complaints of anxiety, particularly after 2017.

A May 2017 physical therapy record indicates that Claimant believed that his concussion had never healed from his prior incident. Claimant also reported to Dr. Langan that he consistently had problems over the years and that he had never completely healed from the 2013 accident. Claimant also complained to Dr. Abrams in May 2017 of photophobia and dizziness associated with headache. This led to a psychologist referral and a brain MRI.

Robert Vandergrift, an investigator, testified on behalf of Citigroup. He has worked as an investigator for 18 years. He performed a field investigation of Claimant on December 14th, December 21st, December 23rd and December 28th of 2018 and June 2nd, June 7th, June 26th, and July 11, 2019. Mr. Vandergrift submitted video showing the most relevant points of the investigation.[5]

During the footage, Claimant is shown outside without sunglasses, including days that appeared to be sunny. Claimant is shown walking and driving without sunglasses.

Claimant appears to walk with a steady pace and does not seem unbalanced. He climbs three to four steps at what appears to be a normal pace. He performs everyday tasks such as cleaning out a car without any obvious or apparent difficulty.

On cross examination, Mr. Vandergrift agreed that during the investigations he was specifically tasked in taking note of whether or not Claimant was wearing sunglasses. He agreed that Claimant had a baseball cap on each time he was outside and that this might have helped to shade his eyes.

Catherine Nance, Claimant's former supervisor, testified on behalf of Citigroup. She is the leader of data privacy controls, and works in Florida. She supervises a team of 14 people around the world. Claimant joined Ms. Nance's team in February 2017 and there were issues right away. In his first few weeks, he needed time off for his health. His first disability leave started in March 2017, when he had only been with the team for one month. That first leave began a series of disability leaves, both short and long term, which kept him out of the office for all of 2017 and some of 2018. During 2017, Claimant was only there for about one month; he was on leave for the rest of the year. Citigroup is very supportive, so Claimant's job was kept open and other workers performed his work while he was out.

[5] Four surveillance DVDs were collectively marked into evidence as Employer's Exhibit #3.

Claimant returned to Citigroup in January 2018. There were issues with Claimant's communication, and this was important because he was working remotely and Ms. Nance was in Florida. There were protocols in place in terms of reporting periodically and being available for video conferencing, such as for team meetings. Claimant had issues with letting Ms. Nance know when he was working or not.

Additionally, Claimant had performance issues. He struggled with making sure that his weekly and monthly status reports were timely filed. His overall work product was slower than anticipated. There was a service level target for their group as to how quickly requests were closed out and Claimant was unable to meet that timeframe. This put Citigroup at risk. Ms. Nance had to address this with Claimant, and she then had weekly one-on-one meetings with him. These meetings were for Claimant to advise her of any delays and justification. Ms. Nance often stepped in to help him overcome these issues.

At one point, Claimant had an issue with a coworker that Ms. Nance also had to address. A coworker expressed concern that Claimant was having loud conversations about non-work-related issues in a very open office space. She told the coworker to tell Claimant directly. Later, the coworker advised Ms. Nance that the conversation had not gone well as he felt threatened. As a result, Ms. Nance talked to Claimant via video conference about being considerate and using conference rooms for such conversations. Claimant was very unhappy about the discussion and became loud and accusatory and ultimately hung up on Ms. Nance.

Ms. Nance testified that Citigroup used to have a liberal remote work policy, which supported the ability to work from home ad hoc or on a regular schedule. Many employees worked remotely prior to 2018. In early 2018, certain management above Ms. Nance determined that workers should be on site more often instead of working remotely. She communicated with

her team that everyone that was not a full time telecommuter needed to be in the office five days per week. Claimant did not say anything to Ms. Nance about changing his schedule. However, complained to Citigroup's ethics hotline in the May 2018 timeframe about the work from home situation as well as her one-on-one performance conversations with him. He reported her for discriminating against him with this policy despite the fact that the decision had come from the policy managers above her. He filed at least two complaints against Ms. Nance through Citigroup's ethics hotline. Ms. Nance was surprised as she was trying to work with Claimant and was not aware there was an issue until the first complaint was filed. To Ms. Nance's knowledge, both complaints were closed without merit.

Ms. Nance believes that after the May 2018 accident, Claimant asked to be able to work from home two days per week and Citigroup approved his request.

On cross examination, Ms. Nance testified that Claimant had not disclosed any issues with his vision or with difficulty performing his work.

Ms. Nance had no information about why Claimant was out on leave; he told her during the first leave that he had to have surgery and would be out for a while, but she was not sure why he was out the second time.

Ms. Nance agreed that she saw Claimant's performance as less than stellar. She further agreed that other Citigroup managers had noted in performance reviews that Claimant was "always professional" and a "team player." She noted that Claimant had not had a performance review from her because he was only on her team for four weeks at the point when his first performance review was to be completed. Claimant returned to work in January 2018 and worked until the May 2018 fall. He returned briefly until the September 2018 fall. During that time, he did not complain about problems with using computer screens or with his balance.

The Board questioned Ms. Nance. Claimant had hung up on Ms. Nance after telling her that she was making too big of an issue of the complaint from his coworker. He told her he was not talking about it anymore and hung up. It was concerning to her. It was not the first time they had had difficult conversations that had not ended well. It was challenging. She called human resources ("HR") to ask about what to do to improve the relationship. HR told her to reach out to Claimant. However, it was around this same time that he lodged another complaint through the ethics hotline.

Ms. Nance confirmed that Claimant's timeliness was an issue in terms of the weekly report. He also was not submitting the report in the prescribed format. It was only three times that he provided status-related notes before the time of their weekly one-on-one call.

Thomas Watanabe, M.D., a physician board certified in physical medicine and rehabilitation as well as brain injury medicine, testified by deposition on behalf of Claimant.[6] Dr. Watanabe has treated Claimant since December 14, 2018 and reviewed his pertinent medical records. In his opinion, Claimant suffered a concussion in the September 2018 work accident that may have set off a worsening of his anxiety, which would impact his performance overall, such as with his balance, cognition and some of his other symptoms.

Dr. Watanabe first saw Claimant in December 2018 upon referral from a neurologist, Dr. Cook. Claimant provided a history of multiple concussions. The first was a fall at work in 2014, with a loss of consciousness and little recall of the event. He also reported an injury in May 2018 when he fell on a bathroom floor at work. Finally, he reported the September 2018 fall while walking from a parking spot at work.

Claimant was referred to Dr. Watanabe for deficits including some dizziness, light-headedness, headaches and trouble with visual activities like tolerating the computer. On

[6] Dr. Watanabe's deposition was marked into evidence as Claimant's Exhibit #1.

examination in December 2018, Dr. Watanabe noted that Claimant had some difficulty tolerating convergence, a test of vision. He had trouble tolerating other aspects of visual testing as well. He had deficits in balance. He would tend to fall backwards, even when his eyes were open. When asked to march in place with his eyes closed, he demonstrated a very irregular cadence and his upper extremities--which were extended outward--shook a lot. Claimant had difficulty with finger to nose examination. He was very slow and deliberate, more so than expected.

Cognitively, he had good memory of recent and more remote events, such as the history regarding his injury. He did have difficulty recalling or reproducing a series of numbers and letters and shapes, however. He had difficulty performing the Serial 7 examination, a test to subtract sevens from 100. Claimant said he was too nervous to do so, but he was able to do a similar test subtracting by threes. He had some difficulty calculating simple change. He became more irritable as the examination progressed. Claimant had difficulty recalling three words. He was occasionally tearful. His speech was fluent. From history and exam, Claimant's diagnoses were concussion, anxiety, frequent headaches, dizziness, photophobia, sleep disturbance, cervicalgia and significant anxiety.

Dr. Watanabe was questioned about whether he could tell that Claimant suffered a concussion in any of the three falls he sustained. He testified that he could not determine which of the falls would typically cause all of Claimant's symptoms.

Dr. Watanabe referred Claimant to psychiatry because he felt that Claimant's anxiety was a big component leading to or exacerbating his symptoms, as well as his sleep problems. He told Claimant to follow up with Dr. Cook on managing his headaches and also recommended physical therapy to help him with his dizziness, balance problems and neck pain. He also recommended a neurooptometrist for his visual problems.

Claimant had some light sensitivity and difficulty with balance at the first exam. Dr. Watanabe testified that he believes that most of the balance deficits were related to anxiety. For example, if the eyes are closed and one is anxious about falling, one might actually sway more than if not anxious. Dr. Watanabe is unsure that the visual problems would be related to anxiety, however. If the visual problems were new, and because he was complaining of some vision deficits related to the fall, Dr. Watanabe would say that it is likely that the problems with convergence insufficiency and others were related to the concussion. It is Dr. Watanabe's opinion that Claimant sustained a concussion in 2018.[7] The concussion itself may have set off a worsening of anxiety, which would impact performance overall; even if preexisting, if his anxiety was exacerbated by the concussion, it could have an effect on balance, cognition and some of the other symptoms he was complaining about.

Claimant was able to give a history in a clear and pretty organized fashion. He did show evidence of over exaggerating his deficits when examined. Dr. Watanabe felt that Claimant's inability to perform any of the visual testing for Dr. Langan due to problems with controlling his eye movements as well as because visual stimuli were reportedly moving all over the place was much more severe than he would anticipate. He would agree with Dr. Langan that this is an exaggeration. Further, like Dr. Langan, Dr. Watanabe also found evidence that Claimant was not always providing consistent effort on exam. He agrees that despite Claimant's issues, he should still be able to perform some of the visual activities.

When questioned about what would cause Claimant to exaggerate or give inconsistent effort, Dr. Watanabe testified that this could be related to the concussion itself. However, he personally does not believe there was neurologic injury from the blow to the head to cause that; that being said, if one is concerned that he has been injured and people might not take him

[7] Dr. Watanabe testified that some grade concussions, though he does not. He does not find it clinically helpful.

seriously, he might consciously or subconsciously exaggerate any deficits. Alternatively, if one simply wanted to look bad for gain or other conscious reasons, this is another reason not to sustain good effort.

Dr. Trieu's April 2, 2019 letter addressed to Dr. Watanabe indicates that Claimant sustained a concussion on September 18, 2018 and that he had a history of a prior concussion in 2013. She noted that he was currently experiencing difficulties with fluorescent lighting, motion on screens and balance. He had dizziness and frontal headaches. She diagnosed him with convergence insufficiency. Dr. Watanabe testified that Dr. Trieu's conclusion of concussion was consistent with his findings on examination. He confirmed that Claimant's visual issues would be related to a concussion injury.

Dr. Watanabe confirmed that the degree of neurologic problems should get better over time after a concussion. However, if there is an adverse adjustment to your deficits, one can get functionally worse. For example, if there is a concussion and then problems develop because of anxiety or depression, one might stop doing things for fear it might set off symptoms; functionally, that person might look a lot worse over the following weeks or months or longer. The neurological injury itself that caused difficulties with memory and cognitive tests, however, should not get worse.

Dr. Watanabe was questioned about Dr. Townsend's opinions. He confirmed that Dr. Townsend opined that all of Claimant's complaints predate the September 2018 accident, including headaches, unsteadiness and gait. He noted that he did not have access to all of those medical records himself. He is aware, however, that Claimant had made a comment that between 2013 and 2018 he had not fully recovered.

Dr. Watanabe opined that, more likely than not, Claimant suffered a mild concussion in September 2018. He believes that Claimant also has neck pain, as well as some of the problems with his eyes that Dr. Trieu treated. These are also related to the concussion. Dr. Watanabe's treatment and that of Dr. Trieu is reasonable and necessary and causally relates to the September 2018 fall. However, he also agrees with Dr. Townsend that the severity of Claimant's complaints are out of character with someone who primarily has just convergence insufficiency. He further agrees with Dr. Townsend that it is likely that most of Claimant's symptoms are related to his pre-existing issues with anxiety and depression. Additionally, like Dr. Townsend, Dr. Watanabe believes that Claimant has no objective signs of post-concussive syndrome.

On cross examination, Dr. Watanabe admitted that he has not seen any of Claimant's medical records predating the September 2018 fall. He is unsure of Claimant's complaints over the last several years. Dr. Watanabe agreed that he testified that it is difficulty to tease out what was caused by the September 2018 fall versus what was preexisting. He agreed that Claimant told him that he believes he lost consciousness in the 2013 fall. He could not recall the event. This was not the case with the September 2018 fall. Claimant told Dr. Watanabe that he felt like he had become a "different person" following the 2013 event. He described a lot of symptoms including trouble reading, memory issues, difficulty seeing colors, headaches, increased anxiety and light-headedness. Some of these issues are similar to those for which Claimant sought Dr. Watanabe's treatment. Claimant had told Dr. Watanabe that he had not fully recovered to baseline following the 2013 incident. He had worked notwithstanding all of those symptoms. Subjectively, Claimant was doing at least as well as he was doing when complaining of the same symptoms following the 2013 incident.

Claimant's September 2018 CT scan was negative, with no acute findings.

Claimant has a number of triggers for anxiety in his life. Dr. Watanabe had noted in a December 14, 2018 record that Claimant noted stress related to being "in contempt of court for child support." He further documented that Claimant had been in counseling for preexisting anxiety issues.

Claimant drives. Dr. Watanabe believes that Claimant wears sunglasses when he is outside, at least sometimes. He is not sure if this is the case all of the time. He is unaware if Claimant uses social media or if he watches television.

Dr. Watanabe agreed that he documented that Claimant's balance issues, which are potentially attributed to his anxiety, improve when he is distracted.

Claimant had trouble with Luria 3-Step testing. This is a repetition of a sequence of three hand movements. This was first documented in May 2019, despite the fact that Claimant had good recall, his speech was fluent and his thoughts were generally well organized. Dr. Watanabe confirmed that not only would it be unusual for this problem to emerge eight months after an accident, it would be an unusual finding at any point just related to a concussion. He would not relate this finding to a concussion.

In terms of objective findings, Dr. Watanabe testified that there is neurologic or functional difficulty. Claimant's balance is off. His rapid, repetitive alternating movements are slower than expected. These are findings that he would not anticipate in someone without an injury. However, Dr. Watanabe admitted that these depend somewhat on the patient's voluntary control and advisement. The patient does have some influence on it.

On redirect examination, Dr. Watanabe agreed that Claimant was working in 2018, though he was unsure when he stopped working.

On recross examination, Claimant reported to Dr. Watanabe that he had trouble seeing colors in 2013. Dr. Watanabe testified that Claimant had made the comment that he had not gotten back to baseline after 2013 but had not been specific about what had gotten better and what had not.

Claimant testified next on his own behalf. He totally disagrees that he performed substandard work for Citigroup. There is a performance evaluation document that is produced to show deficiencies and Claimant has not gotten one in five years with Citigroup. Claimant denied that he did not produce his reports to Ms. Nance as required by his job.

Claimant was out of work for most of 2017 due to a diagnosis of stroke, though it turned out he did not have a stroke. He also had a tonsillectomy surgery in 2017. He returned to Citigroup from January to May 2018. Citigroup terminated him in August 2019.

In 2013, Claimant fell on oil that was on the floor at work. He was not the only one that fell. He suffered a concussion. He had symptoms after the fall of dizziness, headache, fogginess and all of the other symptoms that have been mentioned.

In early 2018, Claimant suffered another fall at Citigroup. He originally hurt his low back. He came into work because his ability to work remotely had been taken away. He was in at 5:45 a.m. for a 6:00 a.m. conference call with the United Kingdom. Claimant went into a dark bathroom and there was a strong bleach smell present. The light came on and he put his foot in a copper drain and fell down onto his right buttock, neck and back. He could not recall hitting his head on the floor; he thought he had hit his elbow. He did not have a concussion. Claimant ultimately saw Dr. Rudin for his injuries, and was restricted by him. Claimant lives in Pennsylvania and had to drive two hours to and from Citigroup in Delaware. There was a lot of traffic. It killed his buttocks to drove that far in stop-and-go traffic. He asked Ms. Nance if he

could work from home. She told him to fill out the ADA forms, and Dr. Rudin helped him with those. He was approved to work from home two days per week due to his low back issues.

In September 2018, Claimant was walking in Citigroup's parking lot when his foot caught in tar and he went down face first. He then got up and fell down a second time. He was taken by ambulance to the hospital, where he was diagnosed with concussion. Claimant treated for three months with Concentra, and was then referred to a neurologist, Dr. Cook. Dr. Cook diagnosed Claimant with a concussion and referred Claimant to Dr. Watanabe.

Claimant agreed that he had anxiety and depression prior to the September 2018 injury. It began about ten years ago around when he got divorced. Before Claimant got hurt, the anxiety kicked up a lot. This was because he was in the Citigroup office every day and the price of gas was high. He also could not watch his son because he was not working from home, so there was financial stress as well. There was additional stress because his son told him that his stepfather scared him.

Claimant's headaches are currently right behind his eyes. This differs completely from those he had after the 2013 fall. After he hurt his neck, his headaches were in the left cervical area to the left temple area over the ear. His headaches are currently enhanced when he uses his eyes. He will need Advil later from taking part in the hearing. Claimant can use a computer but he can only be online for ten or fifteen minutes. During the neuropsychological testing, he could not last more than 45 minutes. He had dizziness and blurred vision with headache right behind his eyes and he was sick to his stomach. He threw up twice at the office.

Claimant did not have issues with double vision or blurriness before the September 2018 accident.

Claimant denied that Dr. Townsend offered him any accommodations during the DME. Dr. Langan told Claimant that he was going to have to take a five-hour test after asking him a bunch of questions. Claimant told him he was having vision therapy from Dr. Trieu for issues such as following objects on a screen and trying to cross his eyes. Dr. Langan seemed clueless about this, so Claimant gave him Dr. Trieu's card. Dr. Langan then told him he could leave.

Claimant eventually was called to see Dr. Langan again. He told him he could not take a five-hour test. He asked for the ability to perform the test in segments, but was told it was not possible. Dr. Langan just asked him ten verbal questions and then thanked him for coming. He did not darken the room for Claimant and asked him to repeat certain words. That was it with Dr. Langan's testing.

Claimant found it interesting that his effort has been questioned. He did not think that Dr. Trieu had ever questioned his effort after seven weeks of vision therapy. He does not care for Dr. Watanabe's bedside manner, so he does have issues with the doctor. He did not think that Dr. Cook had questioned his effort. Claimant testified that he has been truthful to everyone.

Claimant described his current symptoms at the hearing. His eyes were killing him with a burning feeling and pressure on both eyes. His eyes were also blurry. He was feeling very anxious with his heart beating fast.

If Claimant's eyes are sensitive, he wears sunglasses. He is not restricted to having to wear them, however.

Claimant is currently treating with Dr. Trieu, Dr. Watanabe, Dr. Kalra (psychologist) and Dr. Baldino (psychologist).

As far as Claimant knows, all of his symptoms relate to the September 2018 work accident. He had anxiety and depression beforehand but they were definitely amplified by the concussion. Claimant cannot work.

On cross examination, Claimant admitted that he told Dr. Watanabe that after the 2013 concussion he was a different person. His symptoms relating to the 2013 work accident were headaches, dizziness, issues with lighting and that sort of thing. Dr. Watanabe was questioned about the prior records in that Claimant described a lot of symptoms including trouble reading, memory issues, difficulty seeing colors, headaches, increased anxiety and light-headedness. Claimant testified that Dr. Watanabe is not his primary doctor. He feels constantly on the defensive with the doctor.

Claimant thought that he had not failed the validity data testing with Dr. McGowan. The documents had been read to Claimant.

Claimant believes that Dr. Zhang, Dr. McGowan, Dr. Langan, Dr. Watanabe and Dr. Townsend are all wrong in their conclusions that Claimant lacked effort during testing.

Claimant drives. He also takes flights. He visited his parents in Florida with his son after September 2018. Claimant does use Facebook.[8] He agreed that his posts seem to have stopped after July 1, 2019. He explained that his Facebook, email and Netflix accounts were was hacked. He went to the police over it. Claimant denied having any interest in the concerts or sporting events where "likes" were indicated on Facebook, except for one.[9]

The Board questioned Claimant. Claimant returned to work in January 2018 after being out for most of 2017. He was out of work three times between 2017 and 2018: (1) stroke

[8] A copy of a Facebook message was marked into evidence as Employer's Exhibit #4.
[9] A packet containing Claimant's Facebook account activity was marked into evidence as Employer's Exhibit #5.

diagnosis; (2) back injury from slip and fall on oil and (3) parking lot incident in September 2018.

Claimant testified that Dr. Kalra, a psychologist, has diagnosed him with PTSD. The diagnosis was made earlier this year.

Claimant agreed that he did not wear special glasses at the hearing, though he does have them. He has been prescribed reading glasses by Dr. Trieu to help with bright lights.

Claimant's activities of daily living are not restricted but he watches his driving, particularly at night.

Claimant is a high school graduate with 120 college hours. He also has a police certificate and military experience.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petition to Determine Additional Compensation Due

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, he has the burden of proof.[11] "The claimant has the burden of proving causation not to a certainty but only by a preponderance of the evidence."[12]

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[10] DEL. CODE ANN. tit. 19, § 2304.

[11] DEL. CODE ANN. tit. 29, § 10125(c).

[12] *Goicuria v. Kauffman's Furniture*, No. 97A-03-005, 1997 WL 817889 at *2 (Del. Super. Ct., Oct. 30, 1997), *aff'd*, 706 A.2d 26 (Del. 1998).

When there has been a distinct, identifiable work accident, the "but for" standard is used "in fixing the relationship between an acknowledged industrial accident and its aftermath."[13] That is to say, if there has been an accident, the resulting injury 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 purposes of compensability."[14] The primary issues in terms of Claimant's DACD petition are (1) whether Claimant has evidence of ongoing symptomatology relating to a September 2018 concussion and (2) whether that concussion also resulted in a PTSD condition. After a thorough review of the evidence, the Board concludes that Claimant has failed to meet his burden as to both issues.

First, in finding for Employer, the Board notes that it found Dr. Townsend's and Dr. Langan's opinions to be most convincing in this case, and did not find Claimant credible in terms of evidence of ongoing symptomatology relating to a September 2018 concussion. In so finding, the Board notes that various medical experts and treatment providers, including Dr. Watanabe, have questioned Claimant's credibility. In fact, Claimant's counsel acknowledged at the hearing that based on the various medical experts' opinions in this regard, Claimant's subjective complaints, particularly during validity testing, were likely exaggerated. However, Claimant (through Dr. Watanabe) maintains that his preexisting anxiety and depression conditions were exacerbated and/or aggravated by the September 2018 concussion, and that he has exaggerated his complaints, consciously or subconsciously, in order to convince the evaluator that he has been injured. Nonetheless, the Board did not find Claimant credible and, based on the totality of

[13] *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992).

[14] *Reese*, *id.* at 910.

the evidence presented, concluded that Claimant has not proven that any of his current subjective complaints have any relationship to the minor injury suffered in the September 2018 accident.

The Board first found it notable that Dr. Townsend, Dr. Langan and Dr. Watanabe all agree that the level of concussion that Claimant suffered in September 2018 should have improved as opposed to having worsened after the work accident. Significantly, the Board also felt that Claimant's subjective complaints could not be trusted as his validity testing showed significant signs of exaggeration, while his physical examinations also displayed a high level of subjective complaints coupled with minimal correlating objective findings. The Board must note that in addition to the variety of credibility issues Claimant displayed to multiple treatment providers in terms of his validity testing, it also appears that Claimant had motivation to exaggerate his injuries. Dr. Watanabe acknowledged that this could be a potential cause for Claimant's unusual presentation. Claimant made it clear to the Board that he was very upset with his employer's actions in his regard. He was very upset that Citigroup had taken away his ability to work from home, as it had caused him extreme inconvenience as well as serious financial and personal problems. He was further upset that his request for a closer parking spot at work was not granted after his May 2018 back injury. The evidence further supported that he also felt targeted by Ms. Nance, his supervisor. Ms. Nance had talked to him about performance problems as well as issues with his office habits, and Claimant had not responded favorably. In fact, Claimant made two reports to Citigroup's ethics hotline regarding Ms. Nance's supervision. All of this collectively might be motivation for Claimant to exaggerate any injuries he might have sustained in the September 2018 work accident, even if just to convince Citigroup to allow him to work from home again.

Any consideration of Claimant's motivation aside, however, there were still many credibility problems here in terms of the extent of Claimant's September 2018 injuries. As already noted, Claimant's effort was questioned by several treatment providers/medical experts. The fact that Claimant's subjective complaints were excessive in relation to his objective findings was also a frequent theme. Additionally, Claimant was shown during surveillance on various occasions driving without sunglasses or otherwise not wearing sunglasses in sunlight. This was in direct contravention to his high level of subjective complaints in this regard, such as not being able to participate in *any* of Dr. Langan's visual testing because he was "so light sensitive." Dr. Langan was convincing that in thirty years he has never had a testing patient so limited, to include even those with severe brain injuries or dementia. Further, while Claimant attributed most of his social media activity to a hacker, the Board did not find this credible. It seemed that Claimant was in fact using a computer for social media, which contradicted his claims of being very limited in performing such activities and simply further hurt his credibility. Finally, while Claimant maintained that he could not grocery shop because of extreme light sensitivity inside stores, he drove and walked outside without sunglasses as well as attending a gym three times per week. The Board found that all of this further put Claimant's credibility into question.

Second, even if Claimant's credibility issues are set aside and his subjective complaints are accepted as authentic, it appears that Claimant's subjective complaints have not changed following this incident. Dr. Townsend and Dr. Langan both reviewed the prior medical records and concluded that Claimant's complaints after the 2013 accident at one time or another were very similar--if not the same as--his current subjective complaints. Dr. Langan opined that *if* Claimant did sustain a concussion in the September 2018 accident, it was quite mild and not

likely to cause the extent of symptoms for which he currently complains. The characteristics of the fall would, at most, suggest only a mild concussion. Dr. Langan testified that most people with the kind of injury that Claimant sustained in September 2018 would not be having these extensive, persistent problems. Dr. Langan's opinions were persuasive to the Board.

Dr. Townsend's opinions were also convincing in this regard. He testified that there was no specific evidence of injury relating to the September 2018 accident.[15] He added that if he were to accept the veracity of Claimant's complaints following the September 2018 incident, he might be able to conclude that Claimant had an exacerbation of his preexisting headache and balance issues. However, he also noted that it appears that the many issues Claimant has had over the years waxed and waned in intensity and are similar, if not identical, to those issues he complains of now. He pointed out that Claimant has had the issue with convergence dating back to his previous concussion that had flared up in late 2017; thus, Dr. Townsend would not relate that issue specifically to the September 2018 accident. Dr. Watanabe notably also agreed that the severity of Claimant's complaints are out of character for someone who primarily has just convergence insufficiency. He also agreed with Dr. Townsend that Claimant has no objective signs of post-concussive syndrome.

Employer's experts additionally noted that the medical records support that Claimant's injury was much more extensive in relation to the 2013 incident than the September 2018 accident. Dr. Townsend noted that Claimant had a very good recollection of the September 2018 event and did not lose consciousness; in contrast, the 2013 incident resulted in a loss of

[15] Dr. Townsend also testified that he does not believe that Claimant needed ongoing treatment in relation to the September 2018 accident. He opined that Claimant's treatment would be related to his preexisting problems being evaluated in the months leading up to September 2018; likewise, his treatment with the psychiatrist and psychologist would also predate this accident. Dr. Langan concurred with Dr. Townsend that Claimant did not require any treatment in relation to the work accident, as his symptoms were quite similar to those existing prior to September 2018.

consciousness and some amnesia. The 2013 event was mild to moderate; the 2018 event was mild, at best. Dr. Townsend testified that Claimant fell forward and landed on his elbows in the September 2018 incident, so the head could not have been that impacted. In fact, significantly, an abrasion to the forehead was the only abnormality documented on exam at the hospital after the September 2018 event. Dr. Townsend testified that the 2013 incident was clearly a more substantial blow to the head. He pointed out that a CT scan can show intracranial abnormalities like blood, skull fractures or areas of swelling on the forehead or the back of the head, depending on the injury. Notably, Claimant had none of these findings on CT scan following the September 2018 incident. The Board notes that Dr. Watanabe's testimony also supports that the 2013 incident was more significant than the 2018 accident. Dr. Watanabe testified that Claimant told him that he was a "different person" after the 2013 work accident and that he never returned to baseline afterward.

Finally, the Board did not find Dr. Watanabe's expert opinion persuasive that there is a relationship between the September 2018 concussion and Claimant's current complaints. The Board notes that Dr. Watanabe admitted that he had not seen *any* of the preexisting medical records in providing his own opinion in this case. He further admitted that, for this reason, he was unaware of Claimant's condition in the years leading up to the September 2018 fall. Dr. Watanabe's causation opinion relating the September 2018 concussion to Claimant's current symptomatology hinges on the theory that Claimant's symptoms relate to his preexisting anxiety and depression, and that they are compensable because his preexisting conditions were exacerbated by his concussion. The Board did not find this opinion convincing. As stated before, Claimant's subjective complaints are essentially identical to those he complained of after 2013 and prior to the September 2018 work accident. In not having reviewed any of the records prior

to September 2018, and thus having relied so thoroughly on Claimant's own subjective reporting, the Board did not find Dr. Watanabe's causation opinion persuasive, particularly as the Board also found Claimant's credibility lacking.

In sum, the Board was not convinced that the minor concussion suffered in the September 2018 work accident continues to exacerbate and/or aggravate Claimant's preexisting anxiety and depression conditions, which, in turn, are causing him to suffer from various physical maladies. Instead, the Board accepts Dr. Townsend's and Dr. Langan's opinions that there is no causal relationship between the mild concussion (at most) suffered in the September 2018 work accident and any of Claimant's current subjective complaints, most or all of which he complained of at points in time prior to the September 2018 accident. For the aforementioned reasons, the Board concludes that Claimant has failed to show that any of his current symptoms causally relate to the September 2018 work accident.

Post-traumatic Stress Disorder

In relation to the PTSD condition that Claimant alleges, the Board agrees with Employer that there was no medical opinion presented that supports either a PTSD diagnosis in general or, in the alternative, a PTSD condition causally relating to the September 2018 work accident. Dr. Watanabe did not testify that Claimant has PTSD, or that he has a PTSD condition that causally relates to this work accident. The extent of Claimant's proof in this regard is his own testimony that a mental health professional, Dr. Kalra, diagnosed him with PTSD earlier this year. There was no other evidence presented in that regard. Thus, the Board notes that there was no medical opinion presented to indicate, by a reasonable degree of medical certainty, that Claimant suffers from PTSD and/or that he suffers from PTSD in relation to the September 2018 work accident.

This was more than problematic for Claimant's cause in terms of compensability of a PTSD condition.

Further problematic, the Board also found Dr. Townsend's and Dr. Langan's opinions persuasive that there is no support for a PTSD diagnosis regarding Claimant's rather innocuous September 2018 incident. Dr. Townsend and Dr. Langan testified that PTSD presumes that a patient has had a life-threatening incident. This would be something such as a firefight in a war or being attacked with a weapon. PTSD would be expected to produce symptoms of anxiety, hypervigilance and a reliving of the incident. Claimant has not had any such life-threatening experience, so Dr. Townsend would not expect him to have PTSD as a result of this work-related incident. Dr. Townsend testified that Claimant's anxiety is also generalized as opposed to being related to this specific work accident.

The Board notes that in support of his PTSD claim, Claimant testified that he has relived the incident, has had nightmares, and sleeps on his mattress on the floor by a door. However, the Board reiterates that Claimant was not found to be credible in this hearing and, most importantly, there was no expert opinion presented in support of a PTSD condition. For these reasons, the Board finds that Claimant failed to meet his burden to show that he has a PTSD condition that causally relates to the September 2018 work accident.

Employer's Petition for Review

The party seeking to modify a worker's compensation award bears the burden of proving that the award should be modified.[16] Here, Employer must prove by a preponderance of the evidence that Claimant's incapacity has diminished or ended.[17] The trier of fact may "make an award ending, diminishing, increasing or renewing the compensation previously agreed upon or

[16] *C.F. Braun and Company v. Mason*, 168 A.2d 105, 107 (Del. 1961); *Santiago v. Food Crafts, Inc.*, 268 A.2d 762, 764 (Del. Super. Ct. 1971), *aff'd*, 300 A.2d 2 (Del. 1972).
[17] 19 *Del. C.* § 2347.

awarded."[18] After a thorough review of the evidence presented, the Board finds that Employer has met its burden to show that Claimant is capable of full time non-restricted work.

In concluding that Claimant is capable of working in some capacity, the Board found Dr. Townsend's and Dr. Langan's opinions to be most convincing. Dr. Townsend opined that Claimant's findings were mild in nature. His only objective findings were mostly eye issues, but even these are somewhat subjective as they still rely on the patient's input as to problem areas. Dr. Townsend was convincing that there are only a limited amount of eye movement issues that are objective, but these had preexisted the work accident, as Dr. McGowan documented that these issues needed to be evaluated in late 2017. This was almost a year prior to this work accident.

Dr. Townsend further testified convincingly that while Claimant seemed to downplay his preexisting issues and attribute all of his current symptoms to the 2018 work accident, the records reflect that he had all of his current symptoms at one time or another leading up to the new accident. He had an exacerbation of many of the same complaints in late 2017, about a year before this accident. Thus, Dr. Townsend found no reason to place any restrictions on Claimant's work capabilities relative to the September 2018 accident versus his preaccident condition. In his view, Claimant had similar complaints prior to this work accident and was working full time without restriction. For example, prior to the September 2018 accident, Claimant complained of issues with dizziness, neck complaints and headaches. Eventually, he returned to work despite those symptoms. As his job does not involve balancing and he can take breaks, Dr. Townsend opined that Claimant could continue to work the Citigroup job.

Likewise, Dr. Langan testified that there is no basis to restrict Claimant from any activity for neuropsychological reasons. He noted that there is no valid data upon which to base such

[18] *Id.*

restrictions. Dr. Langan also noted that if Claimant has restrictions, they would stem from his preexisting condition, not from the mild September 2018 event. Dr. Langan noted that Claimant's symptoms continue to be very extensive in comparison to his injury. He pointed out that a person who hits his head without any loss of consciousness, any neuroimaging abnormalities nor any posttraumatic amnesia suggests a relatively mild injury. He further noted that the scientific research would suggest that individuals with that type of injury would recover in a matter of weeks and months. The Board notes that the issues Claimant currently complains of were present the year prior to the September 2018 incident; therefore, the Board was not convinced that any such current subjective complaints causally relate to this work accident. Again, the Board was not convinced of Dr. Watanabe's theory that Claimant's preexisting anxiety and depression continue to be aggravated by this minor concussion injury.

Having found Dr. Townsend and Dr. Langan most persuasive, the Board concludes that Claimant is capable of full time unrestricted work. Based on their opinions, the Board also finds that any limitations Claimant currently has relate back to his preexisting conditions. The Board was not convinced that Claimant has any continuing symptoms specifically attributable to the September 2018 work accident. Having so concluded, the Board terminates Claimant's total disability benefits effective the date of filing of Employer's petition, March 14, 2019.

STATEMENT OF THE DETERMINATION

Accordingly, for the reasons stated above, the Board **DENIES** Claimant's DACD petition and finds that he failed to meet his burden to show that he continues to suffer symptoms that causally relate to the September 2018 work accident. Further, the Board finds that Claimant failed in his burden to show that he has a PTSD condition that causally relates to the September 2018 incident.

Additionally, for the aforementioned reasons, Employer's Petition to Review is **GRANTED**. Claimant's total disability benefits are terminated as the date of filing of Employer's petition, as the Board was convinced that Claimant is capable of working in a full-time sedentary capacity without restrictions.

IT IS SO ORDERED this 31st day of DECEMBER, 2019.

INDUSTRIAL ACCIDENT BOARD

Mark A. Murowany /kw
MARK A. MUROWANY

Robert J. Mitchell /kw
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.

Mailed Date: 1/3/20

OWC Staff

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

SESCILY CONEY,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1449999
	)	
J.P. MORGAN CHASE,	)	
	)	
Employer.	)	

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ORDER AMENDING
DECISION ON PETITION TO DETERMINE COMPENSATION DUE

This matter came before the Board on March 12, 2019 for a hearing on the merits of Sescily Coney's Petition to Determine Compensation Due alleging a work related injury during her employment with J.P. Morgan Chase. On April 18, 2019, the Board issued a decision in the above matter with the incorrect employer captioned as a party. *Sescily Coney v Bank of America,* DE I.A.B., Hearing No.: 1449999 (April 18, 2019). The Board hereby amends that decision and caption to reflect that J.P. Morgan Chase is the Employer.

IT IS SO ORDERED this 10th day of MAY 2019.

INDUSTRIAL ACCIDENT BOARD

PETER W. HARTRANFT

Robert Michell
ROBERT MICHELL

JP
OWC Staff

Mailed Date: 5/20/19

Eric D. Boyle, Esq., Hearing Officer
Adam R. Elgart, Esq. for Claimant
Scott A. Simpson, Esq. for Employer

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

SESCILY CONEY,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1449999
	)	
BANK OF AMERICA,	)	
	)	
Employer,	)	

DECISION ON PETITION TO DETERMINE 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 March 12, 2019, in the Hearing Room of the Board, in Wilmington, Delaware.

PRESENT:

PETER HARTRANFT

ROBERT MITCHELL

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

APPEARANCES:

Adam R. Elgart, Attorney for the Employee

Scott A. Simpson, Attorney for Employer

NATURE AND STAGE OF THE PROCEEDINGS

Sescily Coney ("Claimant") alleges that on November 7, 2016 she sustained multiple injuries including a head injury as the result of a fall, while in the course and scope of her employment with JP Morgan Chase ("Employer"). On August 17, 2018 Claimant filed this Petition to Determine Compensation Due seeking acknowledgment of her injury as compensable, ongoing total disability, and payment of medical expenses. Employer disputes the allegation that an injury occurred and that any injury arose out of the course and scope of Claimant's employment. Claimant's compensation rate is the maximum for 2016, $689.45. A hearing was held on Claimant's petition on March 12, 2019. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. Vincent Schaller, a physician board certified in family medicine, testified on behalf of Claimant. Dr. Schaller is a certified ImPact consultant through the University of Pittsburgh's concussion care program. Dr. Schaller has been practicing for approximately 23 years and had previously owned an urgent care facility. Through his treatment of patients in that urgent care facility over 10 years, he saw many patients with concussions who came for initial treatment and then subsequently bounced back with headaches and other difficulties. He noted that neurologists could not see those patients for 6 to 8 weeks so there was in need for providers to see them on a more urgent basis. Dr. Schaller now is the medical director of the Mid Atlantic Concussion Center. He testified that in 2008 there was a number of different new protocols for treating concussions. In particular, there was the ImPact program developed at the University of Pittsburgh. He trained for two years under Dr. Collins in Pittsburgh and was certified as an ImPact consultant. This means that he is able to train physical therapists and occupational therapists in the use of the ImPact method and those protocols. Dr. Schaller noted that in order to become certified he had to use this

method on no fewer than 50 patients. He also trains these therapists in vestibular rehabilitation. Dr. Schaller also has a research grant to work for with the Department of Defense on concussions in the military population. He has not yet been published. Dr. Schaller noted that the ImPact test is one tool among a number of different protocols used for the treatment of concussion patients. These can include prescription medication, vestibular therapy and ocular therapy. Dr. Schaller confirmed that he is an M.D. board certified in family practice.

Dr. Schaller testified that Claimant came to see him approximately nine months post-accident. Claimant provided a history of the incident. Claimant had scheduled a day off in advance for a dermatology appointment. She indicated to Dr. Schaller that she had asked for the day off on Friday. On Monday, she had a disagreement with her supervisor, who had denied her request. Claimant was on the phone with her mother during the this argument. One of her supervisors Susan Bambara came over and banged her fist on her cubicle, which her mother overheard. Dr. Schaller noted that Claimant's mother drove her to all of her appointments. Claimant told him that she got up to go to the bathroom and had a vasovagal event. Dr. Schaller noted that when someone gets one of these so-called syncopal episodes it happens very fast. Another way of saying it is the patient faints. Dr. Schaller questioned whether the patient fell slowly because of how these events occur. As a result of this fall she sustained a severe come concussion and has ongoing symptoms as a result of that concussion. Dr. Schaller questioned the account of the witnesses who stated that she fell slowly and they caught her.

Dr. Schaller explained that you don't even have to hit your head to get a concussion. Dr. Schaller explained at length what occurs when you get a concussion such as whiplash in a motor vehicle accident. He noted that this is called "coup contra coup" meaning that the brain does not stop moving when the skull does and it hits the back and front of the skull. This is similar to what

happens to a football player. Dr. Schaller noted that you can't see a concussion on an MRI scan. You can do certain diagnostic testing to rule out other head injuries such as a fracture or a brain bleed. Claimant was first seen on August 27, 2017 by Dr. Schaller's physician's assistant. There are number of tests that they do to ascertain whether someone has the effects of a concussion. There is a vestibular ocular motor test which was developed by the NIH and something called a convergence test. Dr. Schaller had a tongue depressor with him with a dot on it and explained that this held in front of the patient and gradually brought closer and closer towards their nose. The patient has to focus on the spot and indicate when they get double vision. The normal distance is 3 inches from the face. Someone with a convergence disorder due to concussion would have a much greater distance. In this case Claimant had a 30 cm convergence. Dr. Schaller, noting that Dr. Townsend had commented that congenitally a percentage of the population has a higher than normal convergence but countered that Claimant could not have gone to Spelman or Howard University to study law if she had this bad of a congenital convergence disorder. Dr. Schaller also explained that one looks for eye movements called saccades. This is where the eyes are asked to flip back and forth between a target. With a concussion patient the eyes will develop a wiggle and sometimes, as in Claimant's case, you can develop dizziness with this testing. There is a third test which involves the patient holding their thumb out and moving their head back and forth while watching their thumb. With a concussion patient they will have hand drift and the thumb will tend to follow the head or drop from the vertical position. Dr. Schaller noted this is asking the brain to do three tasks at once something that is affected by a concussion. Passing these tests allows clearance of the concussion.

For a treatment plan Dr. Schaller focuses on the standards from the University of Pittsburg. He also follows Dr. Groll in Maryland who has a program called the Headfirst program and sees

24,000 patients per year. Ideally a patient would need to be seen within 5 to 7 days and tested weekly. Neurologists such as Dr. Handler in Delaware cannot see patients at this frequency. Claimant was administered an Impact test and scored 1% on the verbal memory score which means that 99% of the patient population scored higher than she did. There were several other tests testing visual processing at which the Claimant tested extremely low. Dr. Schaller testified that there is a reliability built-in for sandbagging to these tests. This is called the cognitive efficiency index and Claimant scored well enough to indicate validity. Dr. Schaller's treatment plan consisted of starting with vestibular therapy then moving on to ocular therapy with Dr. Blackburn. This therapy takes around 3 to 6 months to show improvements. He also increased Claimant's gabapentin to 300 mg which is the concussion dosage. She was also on Neurontin. Both gabapentin and Neurontin have effects on the nerves. He also placed Claimant on Ambien because concussion symptoms can affect the sleep cycle. The nerve medication helps with headaches and other concussion symptoms. Even though it was nine months on from the accident he still followed the normal concussion protocol of brain rest and limiting screen time. This treatment is helpful to alleviate stress on the brain.

Dr. Schaller examined Claimant two weeks after she first presented to his office. Although her headaches were better there was very little progress. His recommended ocular therapy treatment with Dr. Blackburn had been denied by insurance. Altogether Dr. Schaller has seen Claimant on thirteen (13) occasions and noticed a steady improvement in her condition. By October 11, 2018 Claimant had cleared some of the concussion tests. She no longer had saccades with only an occasional wiggle of her eyes. Claimant's problem remains her convergence disorder. Her results were better due to some therapy at Jefferson. Her memory score however was still low, and Claimant still needed more ocular therapy for the convergence issue. Claimant still presented

with a right sided weakness. Dr. Schaller also reviewed all of Claimant's medical records from the treatment she received prior to presenting to his office. He also was able to review the defense medical examinations (DME) of Dr. Townsend and Dr. Langan. In Dr. Schaller's opinion, Claimant's concussion was causally related to her sudden fall at work. But for this fall she would not have the symptoms she has today. He disagrees with Dr. Townsend's opinions. He noted that Dr. Townsend's opinion that any concussion would have been mild is not correct. Dr. Schaller noted that in the emergency room there was some confusion over whether Claimant hit her head when she fell. Therefore, they never went through the proper concussion protocols (VOM). Dr. Townsend never did these tests either. When asked about Dr. Langan's neuropsychological testing Dr. Schaller testified that Claimant must have been very agitated and emotionally upset to receive such low scores. He agreed that even with the concussion and low ImPact scores she should have scored in the 60 to 70-percentile range on one of Dr. Langdon's tests where she only scored 49%. Dr. Schaller indicated that Claimant needs future care with particular emphasis on ocular therapy for the convergence. She also could use some speech therapy and cognitive therapy as well. Dr. Schaller testified that in his opinion Claimant did not improve before he started treatment because no one was doing the proper treatment protocols and no one did a complete VOM protocol. In his opinion medical treatment has been reasonable and necessary and causally related to the work incident.

On cross examination Dr. Schaller confirmed that his November 12, 2018 report was a full and comprehensive summary of Claimant's care and his opinions. He tried to provide the best summary of events and the history of the incident. He also confirmed that it is his opinion that Claimant sustained a severe concussion caused by a traumatic brain injury. Dr. Schaller confirmed that his opinion was based on the history provided by Claimant, witnesses and the medical records.

In Dr. Schaller's opinion, it is not as important whether Claimant hit her head as she could have still suffered a severe concussion. He confirmed that this is because of the "coup contra coup" effect of the head moving back and forth. It is his opinion in the absence of a blow to the head a sudden fall to the floor would be sufficient to cause this effect. Dr. Schaller went on to state that it is unlikely that someone was going to be able to catch her in the event of a vasovagal event or syncope. Dr. Schaller admitted that Claimant did have extensive care for 2 ½ years but he noted that this was sequential care. He further admitted that there are several different versions of the history of events recorded in the emergency room. This includes one where she actually fell in the bathroom. Dr. Schaller agreed that Claimant's reaction to prescription medication she received in the hospital increased the length of her stay in the hospital. He agreed that the neurologist consulting in the emergency room was considering a concussion and noted that the syncope was not likely related to the argument at work. Dr. Schaller admitted that Claimant's family doctor as well as Dr. Abrams, a neurologist, ultimately did diagnose post-concussion syndrome. He agreed that Kessler Rehabilitation treats head injury patients. Claimant treated there in 2016 and 2017. He agreed that in the emergency room they were working on differential diagnoses. Claimant had a normal EEG and a cardiac workup as well. He agreed that Claimant received treatment at Magee Rehabilitation a facility that treats brain injuries. Dr. Schaller testified that that treatment was focusing on the weakness on her right side. He agreed that the MRI scan showed stenosis but that was not related to her concussion. He agreed that Claimant did have some ocular therapy at Jefferson, speech therapy at the University of Delaware speech clinic and saw a Dr. Getson, a family physician who treats reflex sympathetic disorder.

Dr. Schaller noted that she Claimant had to switch from NovaCare to ATI physical therapy because of her insurance issues. He explained that sandbagging is when high school athletes were

given a baseline test and then asked to fool the second test. These studies were done to stop patients fooling the ImPact test. Dr. Schaller verified that there was still a need for more extensive therapy. Because of her convergence disorder, Claimant needs further ocular therapy. He confirmed that his diagnosis is a severe concussion due to the fall. Currently the treatment is controlling her migraine headaches. Dr. Schaller also noted that Claimant struggled with anxiety, depression and migraine headaches. He confirmed that all treatment takes place in his office with the exception of the ocular therapy and vestibular therapy.

Claimant testified on her own behalf. She lives in Wilmington. Claimant received her undergraduate degree from Spelman University and her law degree from Howard University. She is also working on an LLM in taxation. Claimant passed the New Jersey bar but has yet to be sworn in. When the incident happened she was working as a tax analyst for J.P. Morgan. This job involved answering client's questions about compliance with US tax laws, researching tax law and keeping up with the tax code. Many of the clients were international. Claimant was hired in May 2015 and started her current position in January 2016. Her annual salary was 53,000.

Claimant testified about the day that the incident occurred, November 7, 2016. She was supposed to have a half day off for a doctor's appointment. Claimant testified that she had been subject to stress in her work place which included a racial letter that had been circulated including by a vice president and Claimant's director. Claimant testified that she used the company's online system on Friday to put in for her time off. She had not heard anything by Monday and her mother told her to check to make sure she got the time off. Claimant's immediate supervisor, Sherry Tokash did not approve her time off. She told Claimant that she did not have the time to take off. On Monday Claimant talked to the HR department and they said she did have the time, so after speaking with the person from HR she told her supervisor, Sherry that HR wanted to talk to her

about letting Claimant take the time off. Claimant was on the phone with her mother in New Jersey when the executive director of the department, Susan Bambara came over to her cubicle and sat next to her. Miss Bambara slammed her hand down on Claimant's desk several times and was yelling at the top of her lungs. Her mom, who was still on the phone, asked her who was shouting and what was the noise. Claimant began feeling ill. Her hands were sweaty and clammy and she was feeling lightheaded. She was crying. Claimant never felt this way at work before. Her mom was on the phone the whole time. Her mom told her to calm down and go to the restroom and splash some water on her face. Claimant hung up the phone and got up to go to the restroom but does not remember what happened after that.

Claimant vaguely remembered being in the hospital and then when she got home her mother told her she was in the hospital for eight days. She never talked to anyone from J.P. Morgan. After she returned from the hospital she was in a wheelchair and then had to use a walker. Claimant testified she could hear people talking at her but could not effectively respond to them. Her hearing was off, she was throwing up and her whole body hurt. Claimant went to see her family physician, Dr. Patel who had been treating her since she was in middle school. He sent her for treatment at Kessler Rehabilitation and then to McGee rehabilitation. Claimant testified that she maxed out on her physical therapy visits. She also saw an ENT for hearing loss in her right ear. Claimant testified that previously she had fluid in her ears. Her hearing was always 100% before this incident. She also had to see a psychologist for depression and anxiety. She still has depression. Because of the argument and the fall at work, Claimant's whole life has changed. Claimant testified she also saw Dr. Abrams. She could not recall what exactly he did but remembers that he concluded that she sustained a concussion. She never got better and how she feels depends on the day. All of the

treatment she had only provided a little help. She and her mom did not know about her convergence disorder.

Claimant then went to see Dr. Schaller who did testing and everything started to make sense. She started going to treatment and saw improvements. She is now using a cane because of her right sided weakness. At home she has difficulty walking and going up and down stairs. Claimant feels that she has gotten better but is not 100%. She used to go to physical therapy but not does not do that any longer. She feels like she is a burden on her family and is upset at what happened. Claimant also has issues with her neck and back and it hurts all the time. It helps for her to sit but then if she sits too long her back starts hurting. Claimant testified that she went to a number of defense medical examinations. She saw Dr. Townsend three times and Dr. Langan two times. Claimant testified that on each of these exams she gave her best effort. She felt the doctors were uncooperative and denies that she was uncooperative in any of these examinations. She acknowledged that Dr. Langan examination was on a computer and involved a lot of writing and reading but she gave her best effort. Dr. Townsend did some verbal testing and a physical exam. On the last Dr. Townsend visit they arrived on time but Dr. Townsend began asking a lot of questions about Dr. Schaller and his report. Claimant testified that her mother then started asking Dr. Townsend questions at which point Dr. Townsend got irate and left the office. He told them that he knew the Board members and she would lose her case and refused to see her. Claimant testified their mother is highly educated and asked detailed questions. She wanted to see Dr. Townsend's medical license. Claimant confirmed that her mother did not interfere with the examinations that Dr. Langan gave her. Claimant testified that she is not the same person as she was before the accident. She was fine in the morning and then now she is a different person.

On cross examination, Claimant confirmed that she felt she had a stressful work environment. She also confirmed that she has other claims against Employer regarding the work environment and the incident. Claimant testified that not getting the time off was not upsetting to her; rather it was the aggression and anger of the executive director Susan Babra. She confirmed that she did not remember anything after the fall. She remembers Miss Babra being at her desk and the telephone conversation with her mother. After the conversation, Ms. Babra walked back to her office. Claimant does not remember how long it was before she got up, but it may have been a few seconds after she hung up the phone. Claimant confirmed that her mother went with her to all her doctor's appointments and did the driving. Claimant confirmed that the doctors told her she did not have a stroke. Claimant now has a small therapy dog. Claimant noticed her neck and back pain when she got home after the accident.

Dr. Stephanie Coney testified on behalf of Claimant. Dr. Coney he now lives in Wilmington with her daughter. She is not a medical doctor but a doctor of education. She has a Ed.D. She confirmed that she was on the phone with her daughter at the time the incident occurred. Dr. Coney was at Fort Dix attending a meeting for her business. Claimant had her car and was going to pick her up after the doctor's appointment. While she was on the phone with her daughter she heard screaming and banging. She asked Claimant who was making that noise. Claimant said it was one of her supervisors. She heard Claimant say please leave me alone. She also heard Claimant say please stop with the racial letters. After this occurred she told Claimant to put water on her face in the bathroom and to calm down and then she hung up. Ten minutes later she received a phone call from someone named Audrey telling her that her daughter had fallen and hit her head. She could hear the paramedic talking in the background. The paramedic wanted to get on the line

to talk to her. The paramedic told her that Claimant had been unconscious and they were going to take her to Christiana hospital.

Dr. Coney he did not have a car with her so she had to take an Uber from Fort Dix to Christiana. Once she got there they could not identify her daughter in the system. At reception they told her no one by her daughter's name was in the hospital. They suggested that maybe her daughter went to the hospital in Wilmington. Fortunately a lady came out from the back and asked her if she was looking for Cecily Coney. Then they took her back to see her daughter. Dr. Coney he is incredulous as to why Claimant came in the hospital with no ID and was in the ambulance alone. Dr. Coney later took an Uber to J.P. Morgan to collect Claimant's personal things. When she got there, she noticed that Claimant's ID was wrapped around her book bag. She questioned why no one thought to go with her to the hospital and why they would take her ID from her. While in the office they told her she was being taped and had security escort her out of the building. Dr. Coney felt that somebody should have seen something about the incident because there are cameras at J.P. Morgan everywhere.

When she got back to the hospital, her daughter was sleeping. The doctor told her that Claimant had fallen and hit her head and was going to be admitted for observation. No one at J.P. Morgan informed the hospital that Claimant had hit her head, so they never checked the concussion protocols. Dr. Coney also testified that Claimant had paralysis on the right side and her tongue started sticking out. On discharge from the hospital they wanted her to go to a nursing home because of the effects from the drug that she had been prescribed. She met with the CEO and medical director of the hospital. They told her it takes two days for this medication to get out of the system after someone has been given Benadryl as an antidote. One doctor did tell her that Claimant may have post concussion syndrome. They ruled out a stroke or a heart attack.

After Claimant came home Dr. Coney he drove her everywhere. She noted that her daughter was very smart and had two degrees by the time she was 20 years old. Now she had to be her caretaker and was giving her speech therapy and physical therapy. Dr. Coney related that eventually J.P. Morgan took away her insurance. She bought insurance for her daughter but found out that it was secondary coverage only. Then they applied for Medicaid. The problem with Medicaid is that Claimant could only do one form of therapy at a time so she had to pick and choose which one to take. Dr. Coney said that she put about 47,000 miles on her car driving 1000 miles a week over two years. She did say it may be closer to 40,000 miles. Dr. Coney also attended the defense medical examinations. She had a medical power of attorney which she produced to Dr. Townsend who did not receive it very well. Dr. Coney denied threatening Dr. Townsend with a lawsuit and never told him what should be done on the exam. She did acknowledge that Dr. Langan was very cooperative in explaining what testing was being done on her daughter. Dr. Townsend was upset because she questioned him about Dr. Schaller and refused to allow him to ask Claimant about Dr. Schaller. Dr. Coney said that her daughter is not the same as she was before this incident.

On cross examination Dr. Coney confirmed that she did not see her daughter fall because she was not there. She believed that the insurance changes occurred in either December 2017 or January 2018. Claimant was fired from J.P. Morgan around that time. Dr. Coney testified that she is originally from New Jersey and has put a lot of miles on her car traveling between Delaware Pennsylvania and New Jersey. She works nationally but is home-based in New Jersey.

Sherry Tokash testified on behalf of Employer. Ms. Tokash resides in Chesapeake City Maryland. In 2016 she was working for J.P. Morgan in the private banking tax department. Claimant was working on the tax management team. She was Claimant's direct supervisor at the time. Ms. Tokash related the events of November 7, 2016. When she first saw Claimant that day

she was not feeling well and asked to be able to go home and work remotely. Ms. Tokash said that if she was not feeling well enough to work she should take a sick day. She also indicated that with the role Claimant was in she could not work at home. Ms. Tokash did not receive or did not recall receiving a time off request email on the computer. Miss Tokash denied telling Claimant that she was not able to leave. She confirmed that once an employee requests time off in the system it generates a message to the manager for approval automatically. She does not recall getting any notice that Claimant had requested time off for that day.

On cross examination Ms. Tokash confirmed that she would have looked at the system that day, meaning the day that the request was submitted. A request such as this may or may not be in the system to this day. Claimant was definitely scheduled to be at work on that day. Ms. Tokash confirmed that they have a corporate nurse named Maureen Kemble. She did not recall an email from her dated November 16, 2016 for her to contact Broadspire about Claimant. She confirmed that Claimant was supposed to be at work that day and was not feeling well. She confirmed that she did not see the incident. She does recall that Susan Dabra also told Claimant that she could go home if she didn't feel well. From what she remembers, and she did not see the incident, she was told that one of the team members asked her to sit down because she wasn't feeling well and then they called the nurse and the EMTs. Ms. Tokash was at her desk about three or four rows away from Claimant's location. She did notice that a lot of people were standing around and the nurse and EMTs came. Someone had also called her mother so Ms. Tokash felt there was nothing for her to do. She felt they all worked as a team and the team members were on top of the situation. She denied having any specific responsibility as the supervisor in this situation. There was no set policy at J.P. Morgan for this kind of incident. She confirmed that Claimant had requested to work remotely on previous occasions and did admit that she was lenient in the past and let her do it. She

also confirmed that she did not hear any outburst or yelling when this occurred. Ms. Tokash allowed Claimant to work from home before because Claimant was badgering her to do it. On this day Claimant indicated to her that she was not feeling well so she needed to take a sick day. She did see the paramedics there and she indicated that she didn't go over because there was already enough people attending to Claimant.

Suzanne Babra testified on behalf of Employer. Ms. Babra is an executive director in the tax department. She is Ms. Tokash's supervisor. Claimant did not approach her about time off rather that was Ms. Tokash. She understood that Claimant was feeling ill so she would need to take sick time. Claimant had requested to work off-site but she could not do that in her position. She spoke with Ms. Tokash and then went to see Claimant. When she got to Claimant's desk she was sitting with her head down. She leaned in and told Claimant that she should go home. She believes that Claimant did not have any sick time left, but she told her not to worry about itMs. Babra denied slapping or hitting Claimant's desk. She confirmed there was only one chair in the cubicle where Claimant was sitting. The cubicles are not full-length cubicles rather they are short walls. Ms. Babra denied yelling at Claimant. She testified that Claimant was not on the phone while she was standing at her desk.

On cross examination Ms. Babra did not believe that there were any cameras in the area. She walked up Claimant's aisle and Claimant sat at the front desk in the aisle. Ms. Babra described the aisles and the desks and the cubicle walls in more detail. She told Claimant that she could go home. She had no idea whether Claimant had put in time off for a doctor's appointment. She did have a conversation with Ms. Tokash. She was not in the area at the time of the fall. She came back out of her office and saw Claimant on the ground. Someone told her the nurse was there. She was not aware of whether there was any specific J.P. Morgan policy regarding an incident like this

one. She was not aware of whether Claimant was conscious or unconscious. Ms. Babra testified that after she told Claimant she could go home Claimant stood up and lashed out at her. This was upsetting so she went back to her office and shut the door. Ms. Babra did not check on Claimant because she felt the situation was under control. The nurse had been called, security had been called and she believes EMTs were already there. Ms. Babra indicated that in 40 years of working she had never encountered a situation like this one. As far as she knows the procedure if someone gets ill is to call security first and they will call 911. She does not recall another health event like this with another employee in her department. She did not know who called security. Security would have records of the activities and who called them. She did not feel she needed to intervene because the floor was full of people and two other team members were there. Initially she was in her office with the door closed and only saw what was happening when she got up to go to the bathroom. Once she did that all the proper personnel were there. No one came in and told her what was happening. She saw who it was when she came back from the ladies room and was told what happened to Claimant.

Kim Brombacher testified on behalf of Employer. Ms. Brombacher is a tax compliance officer. In 2016 she was a manager in the tax compliance section. She worked in the same department as Claimant but did not know her personally. She also described the layout of the office. She is in the second row of desks facing the windows and one row over and four seats down from Claimant's desk. She would estimate the distance as approximately 30 feet. She felt the incident occurred around lunchtime and she is always there because she eats at her desk. Ms. Brombacher denied hearing any sort of verbal altercation or pounding noise before seeing Claimant. She had taken a moment to look out the window and then noticed Claimant walking strangely down the aisle and looking to be in distress. Ms. Brombacher noticed that Claimant was

holding her hands in front of her, forward and down. There were other coworkers around but no one was doing anything or noticing anything. She started turning in her chair to follow her but lost sight of Claimant as she passed by a whiteboard. She then got up and asked Claimant if she was okay to which Claimant said that she felt faint. Ms. Brombacher tried to guide Claimant into her chair. She was trying to lower her down to the chair but Claimant went down. She did manage to get behind her holding her hands on one of Claimant's shoulders. Audrey noticed what was going on and came and held on to the other side of Claimant as she went down. They were cradling her as she was gently set down on to the carpeted floor.

On cross examination Ms. Brombacker indicated that Audrey called the nurse, Maureen Kemble. There was some mistake with her name in one of the reports. She did not hear any commotion before Claimant came down the aisle. Ms. Brombacher described how she had her hand upon the scapula area of Claimant's shoulder as she guided her down. It was actually her and Audrey who guided Claimant down onto the floor. She denied having placed her hand on Claimant's head. She confirmed that it was a controlled fall and that the floor was carpeted. This was right in front of her desk. Also she noted that Audrey grabbed a pillow to put under her head. Audrey also called the nurse, dialed 911 and eventually called Claimant's mom. She does not recall who called security. After this occurred she was holding Claimant's hand. She noted that it is a 10 to 15 minute walk for the nurse who is stationed in one of their other corporate buildings, whereas the hospital is right across the street so the EMTs get there quickly.

Audrey McCarthy testified on behalf of Employer. She is still employed by J.P. Morgan and in 2016 she was a tax analyst in a similar position to Claimant. She knew Claimant as well. Her desk is in close proximity to where Claimant sat. She recalled the incident to have occurred in the late morning somewhere between 10 or 11 AM. Ms. McCarthy denied hearing any commotion

or shouting coming from Claimant's desk. She recalled hearing Kim say "what happened to Cecily". She then saw Kim get up and meet Cecily in the aisle. Cecily looked sad which is not unusual for her. She heard Kim say to her take a seat you don't look well. Ms. McCarthy testified that Claimant started kneeling down so they grabbed her and set her down on the floor. Ms. McCarthy demonstrated that Claimant was sagging at her knees and she grabbed her around the arm and a guided her backwards. Ms. McCarthy said that Claimant did not fall to the ground. She noted that in her church people fall all the time and she felt Claimant was in control. She remembers every detail very clearly because she was right there and was very concerned about Claimant's well-being. She called 911 because something was wrong with Claimant. She also called security. The EMTs she had to call several times because they went to the wrong building. She did not believe that this was sufficient just to call the corporate nurse because she felt that paramedics were required. She also remembered that she had Claimant's mother's phone number because she wanted to get Dr. Conley to give a talk at her church. She called Dr. Conley and told her that her daughter had passed out. Dr. Coney said that she was just talking with her.

When she looked back down at Claimant, she noticed that her eyes were fluttering and she asked Claimant to open her eyes. Claimant shook her head. Ms. McCarthy noted that when the paramedics got there they asked Claimant to hold up her hand and provide a finger for a blood stick, which she did. One of the paramedics asked her who she was on the phone with and when she told him it was the mother, the paramedic then spoke with Claimant's mother. Ms. McCarthy also indicated she talked with Claimant's mom later who said that they were in the hospital and told them that her daughter had hit her head. Ms. McCarthy told Dr. Conley that Claimant did not hit her head, but then she was told to stay out of it. Her current manager is Jennifer Myers but at

the time of the incident, she reported to Kim. Ms. McCarthy acknowledged that she told paramedics who Claimant was and what happened.

On cross examination Ms. McCarthy elaborated on when she saw people passing out. She noted that in her Charismatic Church people fall out but then wake up on their own. She has also experienced people medically passing out and testified that if that happens they are just a dead weight and they fall very fast. She had to dial 911 several times and she was somewhat in a panic because they were not coming. And she also thought that Claimant was unconscious at that time. She called 911 first because she thought Claimant was sick and needed medical attention right away. She is not aware of the official policy for an incident but she thinks it is to call 911. Ms. McCarthy confirmed that when she called Claimant's mother someone else answered the phone and she had to ask to have her put on. She told her that Claimant passed out. She did not make any mention of Claimant hitting her head at the time. Ms. McCarthy also noted that the paramedics ended up putting her on a stretcher. One of them was a heavyset lady who picked Claimant up hugged her and told her that everything was going to be okay and ushered claimant over to the stretcher. Ms. McCarthy confirmed that she looked at Claimant and felt that Claimant's eyes were moving quite frantically. Ms. McCarthy had not seen Claimant ill like this before.

Dr. John Townsend, a board certified neurologist, testified on behalf of Employer. He examined Claimant on three occasions, February 24, 2017, March 9, 2018 and January 3, 2019. Dr. Townsend summarized the interaction between the specialty of neurology and head injuries. He noted that neurologists are often called upon in acute situations in the hospital for head injuries or structural injuries to the skull. Neurologists are often involved in determining whether or not the abnormalities are from the central nervous system. Dr. Townsend is also involved in ongoing treatment of patients who have suffered head injuries resulting in severe concussions. He sees

many patients with mild concussions all the way up to patients who have had structural lesions resulting in physical and cognitive issues. He is involved in designing treatment plans for those types of patients as well. In his opinion neurology is at the forefront of treating concussions and brain injuries. Dr. Townsend agreed that he reviewed a number of medical records in conjunction with his evaluations of Claimant.

At the first evaluation in February 2017 Claimant was using a wheelchair and came in with her mother. The history provided to him by Claimant was that she was working at J.P. Morgan when she requested a half day of sick leave. She told him she had a dermatology appointment and wanted to see her primary care physician because she was having headaches every day because of the stress at work. Claimant indicated that she was talking to HR because they had denied her time off and her supervisor was yelling at her. She was on the phone with her mother at the same time and her mother told her to go to the bathroom and splash some water on her face. After that, she does not remember anything. She does not remember going to the hospital and notes that she does not remember anything until she got home. Claimant told Dr. Townsend that she was unresponsive when the ambulance arrived and she was treated as a "Jane Doe" at Christiana hospital. That did not make sense to him because the incident occurred when she was at work with people who knew her identity. Claimant told the doctor that she was in the hospital for eight days. Her mother noted that at work Claimant was sent racially discriminating letters. Claimant then saw a neurologist, Dr. Abrams, went to a rehab facility called Kessler and was getting therapy. She also had been to see ENT doctor for hearing problems.

At that first evaluation, Claimant had headaches and described shooting pain in the back of the head, down the neck and into the right arm. She complained of hearing loss in the right ear and pain down the back into the shoulder blades, pain in the low back and pain in her whole right

leg. She felt that she did not have the full use of her right leg and foot and that is why she was in a wheelchair. Claimant had an MRI of both her back and neck and also had an EMG. She was using Imitrex for headaches which was helpful. She had a headache every day with varying intensity. Claimant denied photophobia, she complained of a constant ringing in her ears and she would have vertigo when standing up. She always felt she was off-balance. As far as a past medical history Claimant indicated she had a history of fluid in her ears. She denied having problems with her back and neck before this incident. Claimant's mother also said she had fluid in her ears. Dr. Townsend asked several times whether Claimant had any prior injuries to her neck or back and she continued to deny it. Dr. Townsend agreed that Claimant did have a prior history of accidental injuries to the neck and back based on the medical records he reviewed. Claimant's mother did not offer any additional information regarding prior incidents. Dr. Townsend asked Claimant about her activities of daily living. She was able to cook and helped around the house. She drove, dressed and washed herself. Claimant's mother indicated that they did cognitive therapy at home. Claimant told Dr. Townsend that she was an attorney in the tax department at J.P. Morgan. At the time of the first evaluation, Claimant was taking singular for asthma, Naprosyn, Imitrex for headaches, Zofran for nausea, clonazepam for anxiety and Lyrica for nerve pain.

Dr. Townsend next reviewed the medical records he had available during his evaluation. He agreed that he had records dating back to the 2012 timeframe. This included records from Dr. Abrams and Dr. Patel. Dr. Abrams was a neurologist who treated Claimant previously and Dr. Patel was her family physician. Dr. Townsend learned that Claimant had been previously treating for headaches, neck pain, numbness and tingling in her arms, low back pain and numbness and tingling in her left leg and in February 2012 she was diagnosed with a left C5-C6 radiculopathy and carpal tunnel syndrome as well as right ulnar neuropathy. Claimant had received occupational

and physical therapy and was using medication for headaches. She was being treated by Dr. Patel for a general anxiety disorder. Dr. Patel's notes indicated that Claimant had been involved in a motor vehicle accident in June 2012 and had complaints of bilateral carpal tunnel syndrome, neck pain as well as back and leg spasms. Claimant was also in physical therapy at that time. In 2013 Claimant continued with similar complaints, in particular occasional headaches with weakness and occasional neck pain with numbness. She had a positive Spurling maneuver. An EMG showed a nerve lesion at the L5 level. Records of Dr. Patel continued in 2015 when Claimant noted that her whole body hurt. She felt sleepy on Naproxyn. She continued with pain complaints down both arms. She obtained accommodations for the bar exam. There was also a note in the records indicating she had lumbar disc problems. There was a work note indicating that she was totally disabled from June 2011 to the present and for another year after that. Dr. Patel's records in 2015 also indicate that Claimant had complained of her ears feeling clogged. She was seen at Virtua Health for right ear pain and congestion was felt to have a Titus Medea and ringing in the years. She was seen at Jefferson ENT complaining of right ear fullness and ringing in the ear. An audiogram showed hearing loss at low frequencies in the right ear.

Looking at the records pertaining to the 2016 incident, Dr. Townsend reviewed the emergency rescue record. Medics were on the scene in her office where she was found lying on the floor. They arrived and there was a suggestion that a coworker saw her pass out and helped her to the floor. She was responsive to verbal and painful stimuli and was slurring her speech. She stated that she felt dizzy and was said to have been assisted to the floor and then became unresponsive. They noted she had good muscle tone and fluttering eyelids. The record indicated when they tried to open her eyes she forcibly closed them suggesting that she was awake. She was noted to have purposeful movement of her arms. She was rated at a Glasgow Coma Scale of 14

which means that everything was working except she had a point taken off for the slurring of speech. The actual emergency room records indicated that Claimant told them she had not been feeling well since the previous Friday. She had had headaches, generalized fatigue and a sensation of shortness of breath through the weekend. She did not sleep well the night before. She noted that she had severe headaches and felt weak and tingling on the right side of her body and complained of some musculoskeletal pain that she was relating to a fall at work. She denied any change in her vision or hearing and had no difficulty with speech or swallowing and no difficulty moving the extremities. There was no evidence for trauma to the head or facial swelling. She had full range of neck range of motion with some tenderness. She had tenderness on the hip on the right side. There was some weakness on grip strength testing on the right side as well. She had intact cranial nerves and no drift. This is important for determining if someone has had a stroke. She was sent for a CT scan of the head which was read as normal.

The doctor in the emergency department noted that Claimant had no obvious injury. The doctor also observed diminished grip strength and range of motion in the right upper extremity and suggested a sub optimal effort with motor testing. The ER doctor felt that she may have had a vasovagal event. The admissions record also noted that she had headaches for four days prior to the admission. Dr. Townsend explained the findings the emergency room doctor as a giveaway weakness, which suggests that the patient is not giving a good effort whether that was due to pain or volition on the patient's part. Dr. Townsend agreed that the emergency department attempted to do a very thorough evaluation to ascertain the cause of Claimant's symptoms. Dr. Townsend agreed they actually admitted her to the hospital. Claimant indicated that she had had a headache four days prior but had not taken medications for her occasional headaches previously. The history that she provided into the hospital of the incident was that she had an argument with her supervisor,

got off the phone, got up from her chair and started to walk across the room. She then felt dizzy, hot, flushed and short of breath. The record suggests that she fainted to into a chair and fell to the floor. There was no witness, seizure, no loss of bowel or bladder function. Claimant noted that she had been under increased stress and had been having difficulty sleeping. She complained of increased dizziness when standing and walking. She was ambulating to the bathroom with the assistance of her mother. The neurologic exam also questioned the effort on strength testing and they were to work up for a vasovagal incident. Dr. Townsend noted that there was an addendum to the admission record with a subsequent history given by Claimant that she was walking down the hallway to the rest room when a coworker saw her and asked her how she was doing. She then passed out. In this history the doctor noted that she struck her head. This is inconsistent with the previous history as given to the EMT and in the emergency room. The nurse's notes indicate Claimant seemed to have an unsteady gait. There was also a neurology consultation on November 8.

Dr. Townsend noted that usually a syncope diagnosis is referred to cardiology but occasionally neurologists are involved because there could be a neurologic cause for the incident. On the neurologic review Claimant again denied a history of migraine headaches or previous syncope. It was noted that facial sensation was decreased on the right compared to the left and there was a drift in the upper right extremity. The record indicates that the etiology of the dizziness was unclear. Dr. Townsend summarized some other causes for migraines and treatment that they were doing in the hospital to try and distinguish what was causing her headaches. Dr. Townsend agreed that Claimant ended up staying in the hospital for seven or eight days. She had some physical therapy and then was given medication that produced a side effect. Because of nausea she had been given Reglan and had a dystonic reaction to that medication. This is a common side

effect. Treatment is to give patients Benadryl that is effective in stopping the complaints. She was having issues controlling her tongue, could not keep it in her mouth, and had slurred speech. Because of this dystonic reaction she had another neurology consult. Claimant's mother requested transfer to Jefferson but the doctor indicated that this was a known side effect of the medication and she was being treated appropriately. On 13 November Claimant had a headache at three out of 10 pain but her tongue protrusion had cleared. She was able to get up and talk with her mother. She had diminished sensation on the right side of her face and was said to have giveaway weakness in the right upper extremity. She had a cervical MRI showing mild neural foraminal stenosis but no cord involvement. She denied dizziness. Her headaches were resolving. She complained of swelling in the right hand and a tremor. Claimant was ultimately discharged on the 15th following a physical therapy evaluation showing she could walk 150 feet with slightly slowed gait. There was also an MRI of the brain which was normal. After being discharged Claimant was followed by her family physician Dr. Patel.

Claimant continued to complain of headaches that were more severe than her usual headaches as well as right knee and hip tenderness and she was feeling that her right leg was giving out. After she saw her family physician she saw the neurologist Dr. Abrams. She complained of daily headaches, neck pain, numbness and tingling in the right arm and low back pain. She also complained of confusion, blurry vision, ringing in the ears, memory loss and anxiety. Dr. Abrams noted that Claimant had previously been in a motor vehicle accident. Dr. Abrams thought that Claimant may have a deficit in cranial nerve number three. Dr. Townsend was not clear why that would show up a week after her discharge in the hospital and not be found in the hospital. Dr. Abrams also found four out of five weakness in the right upper extremity. Claimant had normal reflexes and the report indicated she had normal gait. Dr. Townsend felt that this was unusual

because she came for his evaluation in a wheelchair. Dr. Abrams opinion was that Claimant had post traumatic headaches and concussion syndrome. He also diagnosed a close head injury as well as cervical and lumbar radiculopathy. Dr. Abrams also suggested a prescription of Imitrex and referred Claimant for psychological treatment and physical therapy. Dr. Townsend reviewed the records from Kessler Rehabilitation.

On the initial assessment at that facility Claimant stated she couldn't use her right hand for computer work and had trouble sitting for extended periods of time. She rated pain at 5 out of 10. The evaluation suggested that Claimant gave sub maximal effort and suggested questionable malingering. The evaluation suggested there were no upper extremity limitations and her subjective responses to therapy were inconsistent with her complaints. Dr. Townsend also indicated that the note revealed that Claimant's mother was instructed to limit her assistance so the patient could do more on her own. Claimant is also seen at Jefferson heart Institute because of the syncopal episode. A follow-up note from Kessler indicated that Claimant was using a walker for short distances and a wheelchair for longer distances. She was dragging her right foot along the floor when she walked area this was inconsistent with some of her other postures during therapy and their evaluation. Auditory testing is felt to be normal with a no worse than mild hearing loss. Cognitive rehabilitation at Kessler revealed some problems with word finding and short-term memory. Claimant noted that she would forget things that happened a week before and lose whole portions of a day. Dr. Townsend testified that this was unusual. Normally you would have someone with short-term memory difficulty forgetting where they put an item but not forgetting chunks of time. This was inconsistent with memory dysfunction related to a concussion. Dr. Townsend noted that that would be unusual in someone with a normal EEG. Dr. Townsend agreed that a further note from Dr. Patel indicated that Claimant's mother was having issues with Kessler.

Dr. Townsend testified about his initial physical examination of Claimant. As he previously noted she was sitting in a wheelchair and was leaning to the left. She had tenderness over the occipital notches which can become the part of a headache syndrome. There was a muscle spasm in the cervical spine and there was complaints of pain on and ranges of motion. She was also tender in the low back. Dr. Townsend had difficulty with low back range of motion because Claimant had difficulty with balance. He noted that she had a flat affect. Dr. Townsend testified that Claimant was aware of the date and time and could name items but very slowly. She had difficulty remembering words. She was hesitant with commands. On the cranial nerve exam Dr. Townsend found some tenderness over the right TMJ. Her tongue was in the midline. She had full extraocular movements without nystagmus. Halpike's maneuver did not elicit any dizziness or vertigo. That is a test for inner ear function. Dr. Townsend noticed that Claimant was holding onto her walker with her right hand very tightly but when asked to make a fist she gave limited effort. She would only bring the right arm up to about 45°. Dr. Townsend testified that Claimant had a positive Hoovers test on the right, which looks for diminished effort when the patient is laying down. Reflexes were equal and Hoffman sign was absent. Claimant complained of being off-balance and having pain when Dr. Townsend tried to do cerebral testing.

Following his review of the records, the history and his physical examination Dr. Townsend had the impression that Claimant had an inconsistent neurological examination. She also had symptom magnification with testing. He went on to testify that Claimant denied pre-existing issues but the records were clearly inconsistent with that denial. Many of the symptoms that Claimant had predated the work incident. This included headaches, dizziness, and changes in hearing. Dr. Townsend felt that she presented with the syncopal episode without hitting her head. He felt it was unlikely that Claimant sustained a concussion based on the history that she was

lowered to the floor. If you believed that she struck her head she could possibly have some mild post-concussion symptoms. If you accepted the history that she actually fell she might have some cervical and lumbar strain. Dr. Townsend did note that she also had the pre-existing neck and low back issues dating back to the injury in 2011. Dr. Townsend felt that it was unlikely Claimant would be able to return to work given the complaints. Dr. Townsend testified that he felt that Claimant could do more than she claimed. In particular with regard to the claims of weakness which was not present objectively and was questioned by other providers. Dr. Townsend suggested that Claimant have neuropsychological testing. He noted that this would help establish whether or not the patient was giving a good effort. It would also determine whether or not the anxiety and depression were playing a role in the symptoms and whether there was any organic reason for the cognitive complaints.

Dr. Townsend next saw Claimant a year later on March 9, 2018. At this time Claimant was now walking with a cane and once again came with her mother. She was still treating with Dr. Patel, seeing a psychologist and also being treated at Mid Atlantic Concussion and the University of Delaware speech and language center. She now had complaints of headaches in the back and front of her head approximately four times a week and was getting help from medications. She had some photophobia and acoustic phobia. She could not give a definite range of a length of time that her headaches lasted. She had complaints of pain in her right ear, neck and low back. She continued to have balance problems and had difficulty going up and down stairs. In the interim Claimant had been seen at Magee Rehabilitation Hospital. Dr. Townsend noted that this is a center for brain injuries. Dr. Townsend did not have any records from Mid Atlantic Concussion at that time. Dr. Townsend summarized some of the updated records. Claimant was taking Zofran for nausea, Imitrex for headaches and Ativan for anxiety. She also had seen ENT doctor. She was having pain

and ringing in the right ear every other day. She was diagnosed with hypertrophy of the nasal turbinates, which can be related to allergy or infection. She was also taking Lyrica but that wasn't helping very much. She continued with complaints of headaches, restricted range of motion, blurry vision, ringing in the ears, memory difficulties and anxiety. There was a suggestion that Claimant had PTSD and stated that she could not complete activities of daily living without the help of her mother.

At Jefferson she was diagnosed with postural orthostatic tachycardia syndrome. There was a note that this could have been the cause of the syncope during the event in November. Dr. Townsend noted that this syndrome is found in younger women. Blood pools in the legs resulting in a rapid heartbeat when they stand up. It can produce a number of the symptoms that Claimant has. While it wouldn't necessarily be something aggravated by work activities, stress can also make your heart beat faster so it could be a combination of those things. Dr. Townsend also noted that Claimant had some issues prior but to the actual incident including severe headaches, fatigue and not feeling well. At Magee Claimant had been diagnosed with complex migraine with right sided weakness. Again he noted that Claimant had had headaches prior to the fall. Claimant was treating for a number of her complaints including the POTS syndrome. She had intermittent episodes of lightheadedness could be related to that syndrome. Dr. Townsend felt that there was not any substantial change in the complaints since 2017. He noted that she hadn't seen a pain management physician. Dr. Townsend noted that POTS could account for lightheadedness and fatigue as well as feeling foggy and blurry vision. One would have expected the treatment for that which could include prescriptions to have seen an improvement.

Dr. Townsend's physical examination was similar to the first one. She still had complaints of pain in the neck and low back as well as difficulty with range of motion. There was some issues

for with speech and her affect continued to be flat. She still had no nystagmus. Her near point convergence was measured at 24 inches and she complained that caused her headache but not double vision. Dr. Townsend indicated you are looking for double vision with that testing. Dr. Townsend noted that she Claimant did not have Hoover sign on this examination. She had a negative Halpike maneuver and still complained about being off-balance. Dr. Townsend noted that on some maneuvers she was able to keep her balance where he would've expected some difficulty. She had some loss of sensation around the right leg which Dr. Townsend testified was not in the usual pattern. This examination did not change Dr. Townsend's previous impressions. He was concerned about continued inconsistencies in the evaluation. Dr. Townsend confirmed that he felt the finding of POTS would have preexisted any brain injury to the extent one occurred. Dr. Townsend indicated that there was no objective reason that Claimant could not work on a sedentary full-time basis. Dr. Townsend also felt there was no reason that Claimant could not undergo neuropsychological testing. He noted that at this point she had had her complaints for over a year and a half and that 80% of patients with a mild concussion have had resolution of their symptoms by this time. He felt that there were likely psychological issues that were impacting recovery. Neuropsychological testing would be beneficial. Dr. Townsend further noted that Claimant had been capable of going to several different rehabilitation facilities including speech pathology and occupational therapy so there be no reason she could not participate in a neuropsychological evaluation.

Dr. Townsend's third evaluation was on January 3, 2019. He testified that this was an interesting experience. Claimant presented with her mother and was using a four pronged cane. Claimant's mother handed Dr. Townsend a durable power of attorney and indicated that she had multiple questions regarding his past reports. Claimant's mother wanted to see his medical license

which he noted was on his website and on display in the office. She also asked whether he had been sued before and he provided an example of someone who was unhappy with a diagnosis during the course of a workers compensation examination who subsequently filed a federal lawsuit. Claimant's mother wanted to record the examination which Dr. Townsend would not allow. She started asking him numerous questions and Claimant appeared to be laughing, writing notes and passing them to her mother. Claimant's mother suggested that he was not respecting the fact that she was a PhD and an attorney. She also indicated that his attitude was due to the fact that she was black and female. Dr. Townsend testified that he excused himself and placed a call to Employer's counsel to indicate that the evaluation was not going to be helpful. He then returned and indicated that the evaluation was complete. He then placed a summary of what occurred to attach to his records. Dr. Townsend testified that he was able to review updated records including those from Dr. Schaller at Mid Atlantic concussion.

Dr. Townsend also reviewed records from Jefferson Heart Institute. The impression from that facility was that Claimant had an episode of vasovagal syncope. The tilt test was apparently negative but they did not exclude the diagnosis of POTS. It was felt that if she started to feel the symptoms again she should lie down immediately. They suggested that Claimant stay well hydrated and increase her salt intake. Claimant was seen at Occupational Therapy and Dr. Schaller sent her to the Delaware speech and language clinic. The records indicated that Claimant was no longer seeing her psychologist because of some disagreements. Claimant continued with cognitive complaints and complaints of headaches. The records indicate that Claimant only attended one of four sessions at the speech and language facility. She became nervous when presented with an informal reading assignment which would involve recall of information. The records noted that Claimant had been referred to a neurophysiologist for evaluation. There was a notation that she

saw a Dr. Getson who is a family doctor treating complex regional pain syndrome. Dr. Getson suggested that Claimant get thermography. Claimant was being prescribed gabapentin, Ambien and Effexor. She went to ATI physical therapy with an abnormal gait and a 6 out of 10 pain. she was also treating on and off with Mid Atlantic Concussion. Dr. Townsend testified that Claimant saw Dr. Langan in July 2018. This was for a neuropsychological evaluation. Dr. Townsend then summarized Dr. Langan's report and observations and difficulties obtaining an interview. He noted that Dr. Langan could not give a firm diagnostic conclusion due to lack of cooperation from Claimant. He noted that she had an invalid profile on validity testing. Dr. Townsend also reviewed an updated report from Dr. Langan dated January 2, 2019 regarding a subsequent evaluation. This was for the administration of an MMPI which had previously been refused. Dr. Townsend noted that Claimant's mother did the same thing when arriving at Dr. Langan's office as she had done during his third evaluation. He then summarized Dr. Langan's findings on the testing. Again it was essentially that he was unable to provide an opinion based on lack of information. Dr. Townsend agreed that he reviewed all of Dr. Schaller's records including a November 12, 2018 report summarizing the treatment in providing his opinions.

Dr. Townsend noted that there was a very detailed history of the accident that was provided in Dr. Schaller's report including the name of Claimant's supervisor. There was a description of Claimant suddenly collapsing to the floor which had not been previously noted in the records. There was a mention of witnesses stating that she fell and struck her head as well. Dr. Townsend was unclear why Dr. Schaller would conclude that it was unlikely someone helped her to the floor. Dr. Schaller's opinion was that Claimant's vasovagal syncopal episode was rapid and unexpected. Dr. Townsend disagreed and noted that many times a person knows when this is going to happen because they begin to feel lightheaded. Dr. Schaller then went on to state that Claimant definitely

hit her head. It's his diagnoses of a severe concussion is based on that presumption. Dr. Townsend also noted that Dr. Schaller began seeing Claimant nine months after the accident. Dr. Schaller's opinion is that Claimant didn't get better because she didn't have the appropriate care as the doctors did not treat her for a concussion. Dr. Townsend did note that in this case there were many other conditions that they had to rule out and concussion would be rather far down on the list. Dr. Townsend also commented on the weakness and that the providers are trying to come up with a medical reason for the weakness on the right side. There are number of different or differential diagnoses including conversion disorder or effort related weakness. There were no neurologic physical findings to suggest an injury to the nervous system. Dr. Schaller suggestions regarding the dystonic reaction are also not founded by the Claimant's presentation.

Dr. Townsend criticized Dr. Schaller's treatment approach because he began with the conclusion that Claimant suffered a severe head injury and a severe concussion based on the symptoms. There was no differential diagnosis as to what could be causing the symptoms. There wasn't much of a physical examination as far as weakness or sensory loss. Dr. Townsend noted that Dr. Schaller did perform the ImPact test, which is performed on students who have concussions and normally have a baseline score. Dr. Schaller also took issue with the hospital neurology department's consultation making a diagnosis of a typical migraine with no traumatic brain injury. There was already a question of whether there was any actual trauma to the head. Dr. Townsend indicated that this would be an appropriate course for the hospital physicians to take given Claimant's history of prior headaches. Dr. Schaller's assumption that Claimant did not have any pre-existing migrate headaches was incorrect. Dr. Townsend also indicated the whole notion that the weakness was related to the concussion is interesting because Dr. Schaller sees a lot of sports related concussions but not a whole lot whole lot of patients who have been in the hospital

with a severe brain injury. Those patients would have a reason to have weakness because of a severe structural abnormality in the brain. In this case it's not even clear there was any traumatic impact to the head. Dr. Townsend noted that reviewing the history it was not clear that Claimant struck her head and there was no reason to consider a concussion. Based on her symptoms the neurologist was considering post concussion syndrome within several weeks. Dr. Townsend took issue with the statement that Claimant suffered an extreme sent back because of the failure to treat and diagnose a concussion. He noted that Claimant had physical therapy and treatment within weeks of her discharge from the hospital. Dr. Townsend felt that calling a severe concussion based on the screening test and her eye movements is incorrect noting that Dr. Schaller failed to consider all the other things that could be potentially causing her symptoms. Dr. Townsend noted that telling a patient that they have a severe concussion, a patient that has a known underlying anxiety disorder is not going to be helpful and may make the situation worse. Dr. Townsend agreed that none of the other facilities that Claimant was treated in diagnosed a severe concussion. He agreed that Dr. Schaller is on his own with that diagnosis. Dr. Townsend did note that Claimant had many the symptoms that could be post concussive symptoms even before the incident at work including the headaches, dizziness and fatigue. Much of the diagnosis of severe concussion is based on subjective symptoms and cognitive testing which waxed and waned over time.

Dr. Townsend testified about the ocular testing and screening that Dr. Schaller did including the finding of saccades. Dr. Townsend noted some of the limitations with the Impact testing and noted that acutely a concussion may interrupt some of the brain activity you'd expect to see improvement over the ensuing several weeks. He did agree that a concussion is a clinical diagnosis and testing like MRIs won't necessarily detect it. He did note there were several other tests that could be helpful such as the King-Devick test. Dr. Townsend did agree that at the hospital

they failed to do any testing regarding concussions. He noted that some of the tests are a standard part of the neurologic exam. You do some eye-movement testing although he agreed that they did not do any convergence testing. He reiterated that here was someone who may or may not have hit their head. The concern was not for a concussion based on the symptoms and the history of the event. Dr. Townsend also indicated that it appeared that Dr. Schaller was hyper focused on diagnosing someone with a concussion as opposed to looking at all possible diagnoses. In this case there were multiple symptoms that could have other causes as well.

In Dr. Townsend's opinion, it was not reasonable to conclude that she had a concussion as a result of the incident. He did not believe Impact testing would be of great utility in this case. If the patient is not giving good effort the scores are going to vary sporadically from time to time. He noted that the first time she took the test she was in the 1st percentile and that's not something you would've expected to see if they were giving a reasonable effort. Dr. Townsend testified that the use of the Impact testing is meant for people acutely and showing improvement. You're not supposed to do that test every time you see a patient and that isn't getting better. Dr. Townsend did note that he's taken the test course work for the impact testing. He just has not been certified because of the cost associated with it. Dr. Townsend noted that Claimant had a number of different findings that do not make sense from a neurologic point of view. There were also some complicating factors with respect to concussion syndromes such as someone for who has a depressive disorder and anxiety issues. Dr. Townsend again stated that if it was determined that she did not suffer a blow to the head he felt that any opinion that she had a concussion would be irrelevant because she didn't have one. Dr. Townsend's opinion Claimant's syncopal episode was not based on her stress at work or related to her work activity. She was noting symptoms prior to that day and prior to having syncopal event. He did feel it was reasonable for her to be treated in

the hospital and evaluated. Follow up with neurology was reasonable and it would be reasonable to get a cardiac evaluation. He did not feel that any of this would be related to her work activity.

On cross examination Dr. Townsend again summarized his understanding of the history of the event. He agreed that there was a dispute in the workplace over whether or not Claimant could take time off to see a doctor. Dr. Townsend admitted that dispute could have added to Claimant's stress. Dr. Townsend indicated that Claimant was improving prior to seeing Dr. Schaller. Dr. Schaller based a lot of Claimant's improvement on her subjective complaints. Some of her symptoms got better some of them did not. The impact testing did show fluctuations. Dr. Townsend felt that even though she was getting better there were certain things that were markedly abnormal on neuropsychological testing when Dr. Schaller saw Claimant eight months from the accident. Dr. Townsend agreed they did not specifically do the Impact test but Claimant did have neuropsychological testing. Dr. Townsend noted that the Impact test is 20 minutes worth of computerized testing while a neuropsychological evaluation takes a whole day. Dr. Townsend also indicated that the convergence insufficiency is also seen in 20% of the normal population. Moreover, whether or not she had nystagmus is seen in 20% in the normal population.

So those are all tests which gives a lot of information on somebody who had an acute event. Somebody who's nine months out and having the same symptoms you would want to consider some other possible causes. Dr. Townsend summarized how a neurologist would treat a concussion. He also would use certain medications for cognitive issues and for the headaches. Dr. Townsend agreed that Dr. Schaller did provide medications for headaches. Dr. Townsend wasn't sure whether or not Claimant, although referred to Dr. Blackburn for ocular therapy, was actually evaluated or went to that therapy because he did not have any notes from Dr. Blackburn. Dr. Townsend also agreed that Claimant had several rounds of physical therapy at Kessler, at Magee

briefly and then at University of Delaware. Dr. Townsend again indicated that as a neurologist he would be more aggressive with giving medication for the headaches if there was no improvement. He would send a concussion patient to vestibular rehabilitation and ocular rehabilitation much sooner. He noted in this case Claimant did have significant treatment prior to seeing Dr. Schaller. Dr. Townsend again reiterated some of the things including Impact testing that he thinks are useful to test people after they have had a blow to the head. Impact testing is useful because you have a baseline to look at verbal memory and visual memory. Dr. Townsend further defined an acute concussion. This is somebody who has had a head injury or they were shaken about or dazed. He indicated many people do not have to have a loss of consciousness and you can have a concussion with a very rapid acceleration, deceleration of the head. Usually it is somebody who's had an impact to the head. In a car for example somebody striking their head on the headrest. Often there is an impact except with military concussions and then you have a type of concussion with an explosion. Dr. Townsend and agreed that you don't have to have a head impact to have a concussion. In that case one would expect some sort of event where there was enough force for moving the head back and forth or rotational forces that would've caused some dysfunction of the brains electrical apparatus. Dr. Townsend indicated there wasn't really any testing for a chronic concussion. You make a diagnosis based on the history and you can do testing to determine whether there is ongoing symptoms like convergence insufficiency. He did agree that some of the testing was useful even after the acute phase.

Dr. Townsend summarized what saccades is and how it is tested. Dr. Townsend indicated that for Claimant he did not see saccades. He did note a problem with convergence in March 2018. She did have also have some photophobia. Also balance issues can be related to convergence insufficiency. He disagrees with the diagnosis of a severe concussion as the diagnosis and cause

for various symptoms that Claimant has. He thought it was difficult to assess a concussion in a patient with effort related problems during physical examination. Additionally Dr. Townsend noted that we know Claimant did not sustain a substantial blow to the head based on the history. He did indicate that it's possible she sustained a blow to the head because of the various histories that are contradictory. There is one suggesting that she was helped to the floor and one suggesting that she fell to the floor. Dr. Townsend would not have expected that to produce a severe concussion. Generally a severe concussion is somebody that has a loss of consciousness because they hit their head not because they had a syncopal episode. Then you see retrograde amnesia and other functional abnormality and sometimes structural abnormalities. In this case he takes that diagnosis with a grain of salt as there appear to be other factors playing a role in the persistent symptoms. Whether or not there's an impact to the head in this case is depending on which history you believe. Dr. Townsend disagreed with Dr. Schaller's explanation of the dystonia as based on a delayed brain swelling. Dr. Townsend did note that there was something called delayed brain bleeding but with swelling of the brain you'd have other symptoms such as alteration of awareness. This would be progressive meaning she would be less responsive over time. Often one would have a brain bleed that would show up on CAT scan after a severe traumatic brain injury. Dr. Townsend also disagreed with Dr. Schaller's opinion that Claimant would have fell suddenly and no one would have been able to catch her. He noted that Claimant knew herself that she wasn't feeling well, she was short of breath, felt sweaty and had other symptoms that are typical to an impending vasovagal syncope. There was also a note where one of the co-workers asked her if she was feeling all right. He felt it was more likely she could've been helped to the floor by the person who is asking her how she felt. He also indicated that this type of event is more gradual than someone with a seizure which can be rapid.

Dr. Townsend also answered some questions regarding Dr. Langan's report and testing. He felt it would've had to been a substantial cognitive issue that would a patient from completing the testing. Dr. Townsend explained some of the testing that he did and the findings that indicated Claimant was lacking effort. Dr. Townsend explained how the POTS likely preexisted a brain injury. He noted that she had many of the symptoms associated with this just before the fall. This could likely be the cause of the fall and that subsequent syncope and loss of consciousness as opposed to having a loss of consciousness or from striking her head. Dr. Townsend agreed that stress can create a syncope as well. Dr. Townsend explained his opinions on the convergence abnormalities. He noted that since Claimant had a headache and didn't state she had double vision it was difficult to say whether there was really a convergence problem or she just had a headache. He did agree that the POTS diagnosis can cause someone to have a foggy notion of what's going on. Dr. Townsend disagreed with Dr. Abrams assessment that there was a cranial nerve three issue. He believes this because multiple neurologists have not been able to find any cranial nerve palsy. There would be some other physical findings if the third cranial nerve was involved. There wasn't any description of a ptosis something that you would find with that condition. Dr. Townsend explained this is a droopy eye. Dr. Townsend agreed that there was a record indicating that there was some effort related drift in the upper right extremity but some other providers did duplicate that finding. Dr. Townsend agreed that the history provided to him of the event was based on what Claimant told him or what he read in the medical records. He agreed there was a dispute of whether the patient's head hit the floor. Dr. Townsend felt it would be very unlikely that Claimant sustained a concussion if she did not hit the floor and was held by a coworker. He does not see how that would cause a concussion. Even if Claimant hit the floor he does not see any medical evidence that there was a severe concussion. Some of the symptoms present she had even before the event.

Dr. James Langan, a board certified neuropsychologist, testified by deposition on behalf of Employer. Dr. Langan saw Claimant on two occasions, July 18, 2018 and January 2, 2019. He briefly summarized the practice of neuropsychology including the evaluation of patients with concussions among other neurological issues. In connection with his examination of June 28, 2018 Dr. Langan reviewed a number of Claimant's medical records. This was in preparation for his interview with Claimant. Dr. Langan testified that his initial step is to conduct an interview with a patient. In this instance Claimant declined to participate in the interview process. Claimant told Dr. Langan that she was in the office only to take tests. Dr. Langan testified that this ran against the grain of his experience in doing defense medical examinations. He noted that claimants normally want to discuss their accident, injuries and symptoms. He felt that not only was this situation unusual it was fairly unique. Dr. Langan did indicate that Claimant was responsive when they were discussing the formal testing process.

Dr. Langan reviewed the history provided in the medical records. He touched on the Claimant stating that she had not been feeling well and had headaches several days prior to the incident. On the date of the incident, Claimant requested to call out sick and this request was not granted. She then reported that she got into an argument while she was on the phone and thereafter felt dizzy and flushed. The records reveal that Claimant had no recollection of what happened next. He discussed the symptoms that Claimant had reported in the hospital. He did note that there was no objective evidence of trauma to the brain based on the diagnostic testing done in the hospital. Dr. Langan noted in his review of the records that Claimant was seen by a psychiatrist and expressed anger about the adverse drug reaction she had in the hospital. Dr. Langan agreed that there were conflicting histories given through the medical records as to how the incident occurred. This included whether Claimant had hit her head on the floor or was assisted or lowered to the

floor and never hit her head. He did not think that we would be discussing concussion symptoms if the patient had a syncopal episode and did not strike her head. He noted it was possible to have a fainting spell and then strike ones head on the way down or on the floor and then have a concussion. Dr. Langan also discussed some of the past medical records including those following a motor vehicle accident.[1]

Dr. Langan discussed the testing that he performed on that day. Neuropsychological testing for head injury patients involves tests of effort and motivation as well as intelligence, learning and memory, visual spatial abilities, executive functioning and emotional health. He uses the Word memory test and the Victoria Symptom Validity Test to verify the accuracy of the testing results. There is a word recognition test where individuals should normally get about 85% accuracy. Even individuals with moderate to severe brain injury should be able to perform the tasks. These tests are insensitive to bona fide brain related memory disorders. Claimant's ability on the word memory test was at a 65% accuracy level which is well below the 85% cutoff. This is considered to be a invalid result. On the Victoria Symptom Validity Test individuals with severe brain injuries can perform to a 85 to 90% level. On one subtest Claimant performed well below the cutoff and below the guessing probability of 50%. In other words she got 9 out of 24 correct. Dr. Langan indicated that this was a possible means to sabotage results of the test. To score that poorly somone would have to have determine the correct answer and then reject it. This shows a negative response bias. The testing showed that there was a behavioral or motivational or psychological effect going on. This was not typical performance for individuals with brain injuries.

On the intelligence tests Claimant's performance range was from low average to borderline. This was not consistent with an individual who had a law degree but also it would not

[1] A further detailed summary of the records is omitted as being duplicative.

be consistent with an individual who has a brain injury. A verbal IQ is resistant to decline after anything but a very severe brain injury. Claimant's overall IQ was noted to be at the 4th percentile relative to the general population. Dr. Langan testified that the significance of this finding was that Claimant was underperforming given demographic factors, her age and her educational background. Dr. Langan indicated that lowering the score would require a brain injury involving breeding in the brain or injuries to the white matter of the brain such as a diffuse axonal injury. Nothing like that is present in this case. Dr. Langan then performed another test, which is a grouping of neurocognitive tasks. Claimant's performance there was poor being at the 3rd percentile in her age bracket. Dr. Langan thought that this test may have been administered previously. Her scores again were from borderline to average in learning and memory and her recall of visual stimulus was extremely low.

Dr. Langan testified that in light of Claimant's poor performance on the validity testing it is difficult to evaluate the meaning of these test results. It was his opinion that the testing scores are not related to a brain impairment rather they are reflective of effort, psychological factors and motivational factors. He did note some of the other testing including the Trail Making Test which is a paper and pencil test connecting circles. Claimant score was below the 1st percentile for age. He felt with that score suboptimal effort was the only way to account for it. He has patients with early onset Alzheimer's that perform at a higher level on this testing. He also performed basic mental status testing including questions pertaining to orientation of time and place. Dr. Langan testified that Claimant's answers to these questions were sometimes flippant or sarcastic. When asked where she was Claimant responded with "hell". He then noted that Claimant refused to take the MMPI which is a psychological test that can give indications for depression and anxiety. In conclusion, Dr. Langan felt that Claimant's performance on the testing was poor and reflective of

diminished effort. One would have to conclude that there was a non-brain factor affecting the cognitive performance. It was impossible for him to conclude that there was a brain injury based on the testing. Dr. Langan agreed that this finding was consistent with some of the other rehabilitation records where the therapists also made effort-based comments. He noted that red flags were raised concerning the testing.

At the second examination Claimant completed the MMPI. She had earlier indicated that it was too long for her to do at the first evaluation. Dr. Langan indicated that this test normally takes 30 to 45 minutes for most people. This test is given to many different types of patients. Dr. Langan noted that at the outset of this testing there was some controversy between the patient, her mother and himself. He testified that Claimant's mother wanted to be present at all times and stated she had medical power of attorney. Ultimately, Dr. Langan agreed to have her present and she promised not to interfere. Dr. Langan testified that the issue with this testing was that Claimant did not complete all of the questions. She left out about 60% of the items. Dr. Langan noted that this is very unusual and he has never experienced it before. He testified there are 338 true/false items on the test and Claimant failed to respond to 203. She only responded that she could not answer those questions when asked about the lack of responses. Dr. Langan testified that essentially the testing could not be interpreted because Claimant did not complete of all the items. His conclusion was that it was extremely unusual and it was simply not cooperative. Dr. Langan reiterated that he could not draw any conclusions from his testing whether there was any brain injury suffered because of the incident. There was no evidence in the medical records that would support a brain injury either. The reason he states that is based on the findings of the imaging that was normal. There was nothing in Dr. Schaller's records that would alter his conclusions.

Dr. Langan did look at the Impact testing. He noted this was a computer-based test normally given to athletes for concussions. Generally, it is administered in the preseason so that the athlete has a baseline to be compared to should they subsequently have a concussion during an event. He did indicate that it was a neuropsychological task measuring memory, reaction time, decision-making and attention. He does not actually administer this test. The testing that he does is more in-depth and more elaborate. He considers the Impact testing more of a screening test. This is normally used during the acute stages of a concussion to determine whether an athlete can return to play. In this case there was no baseline for comparison purposes. Dr. Langan noted that Claimant's performance on the Impact test is extremely variable and questionable. He noted that in August 2017 when she first took the test the verbal memory score was 49 which is far below what most individuals would with concussions would score which was 79. He noted that in some ways Claimant was not performing like the average person who has had a concussion. The word memory subtest of the Impact measure was also extremely poor over multiple testing. Even with a concussion she should have been able to score 85% but on these tests her scores are often 50 to 60%. Dr. Langan questioned the validity of the Impact test in this case. Dr. Langan also testified that Dr. Schaller's opinions regarding Claimant's symptoms were diametrically opposed to a number of other specialists who evaluated her. He noted that there was a lack of evidence for a concussion although Dr. Schaller seem to dismiss the eyewitness reports indicating that Claimant did not hit her head.

On cross examination Dr. Langan testified a severe concussion or severe brain injury would generally have some neuroimaging findings. If it was moderate or mild it may not show on the imaging. Most severe concussions would show on neuroimaging. Dr. Langan admitted that it is possible that given the records in the hospital indicating that she did not hit her head that no one

did any kind of concussion protocol on Claimant. Dr. Langan qualified what he meant by an issue with effort or other interference when describing testing results. He noted this could be a person who does not want to be taking the test, with something on their mind and not paying attention or a person who is experiencing pain and disengaged from the task. There are a number of other factors that could interfere with a patient's cognitive performance. In other words the low score is not attributable to a brain injury rather to something else. He felt that depression could cause someone not to want to be there taking the test and also lead to a lack of effort. Dr. Langon noted that individuals with major depression can perform relatively well on the validity test that he administers. He agreed that presumes that they wanted to be participating in it. Dr. Langan clarified some of the testing scores he referenced. According to the accepted standard on the Word memory test 85% is the standard and Claimant scored a 65%. A score of 49% on the Impact test was far below what individuals would score with a concussion, which would be approximately 79%. This raises a red flag for him. Dr. Langan agreed that the initial impact testing could be used as a baseline for subsequent testing. Dr. Langan agreed that he could not say one way or the other whether there was a brain injury because the testing was scored as invalid. Dr. Langan testified that the testing was reflective of problems with effort and not similar to well-motivated individuals with brain injuries. He indicated that this could be due to effort or other interference.

Dr. Langan confirmed that he did tell Claimant he was there for insurance company defense medical evaluation. He confirmed that Claimant did tell him that she couldn't complete the exam. When he noted that there were questions uncompleted Claimant stated that that was all she could do. Dr. Langan confirmed he has no direct knowledge of whether Claimant hit her head. All he has are the reports of the witnesses and the records, in other words secondhand reports. He agreed that there was also a statement indicating that she fell and did hit her head. Dr. Langan was not

sure why Claimant was not feeling well and having headaches before the incident at work. She may have had a stress-related issue at work he wasn't sure. The argument that she got into at work may have given her more stress. Dr. Langan agreed that stress could produce a syncopal event. Dr. Langan described what happens to a person with a severe brain injury. Generally their unconscious after the concussion and then after that they have a period of amnesia. This type of incident will show something on neuroimaging such as a brain bleed, or in axonal injury. Dr. Langan testified that the vast majority of people, particularly young people, tend to recover in a matter of weeks or months from a concussion. This could be without any specific treatment. Dr. Langan agreed that Claimant had a history of headaches in the records. He noted that the testing performed by Dr. Schaller called a brain scope was not particularly relevant to his conclusions. He was not even aware that she had that test before he reached his conclusion. The test is essentially a quantitative EEG. It may be able to determine the difference between a normal person and one with concussion but it could not make the distinction between someone who had a concussion and who might have a psychological illness for example. It is not a specific test and not recommended by the American Academy of Neurology. Dr. Langan did acknowledge that another example of interference with test results or validity could be intentional malingering. Regarding the test results Dr. Landon could say that they were more like patients who are not making a full effort. He also noted that Claimant was not fully cooperative and clearly did not want to be there or talk with him. He said this was unique in his 30 years of experience as usually people want to describe what happened to them. Dr. Langan also noted that Claimant spontaneously brought an issue at the end of the exam. She cautioned him about not wanting to see anything about faking in his report. Dr. Langan felt that it was interesting that she was able to verbalize a warning but not tell him about what was wrong with her. He felt that was ironic. Dr. Langan also noted that the presence of a third party

can also interfere with test results. Dr. Langan did admit that Claimant's mother did not interfere with the testing at all when she was present.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Causation

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." DEL. CODE ANN. tit. 19, § 2304. This is the Claimant's Petition for acknowledgment of injuries relate to a fall at work on November 7, 2016. Claimant seeks ongoing total disability benefits and payment for medical treatment. Because Claimant has filed the current petition, she has the burden of proof. 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). When there has been a distinct, identifiable work accident, the "but for" standard is used "in fixing the relationship between an acknowledged industrial accident and its aftermath." *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992). That is to say, if there has been an accident, the resulting injury 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 purposes of compensability." *Reese*, 619 A.2d at 910. "A preexisting disease or infirmity, whether overt or latent, does not disqualify a claim for workers' compensation if the employment aggravated, accelerated, or in combination with the infirmity produced the disability." *Reese*, at 910. *See also State v. Steen*, Del. Supr., 719 A.2d 930, 932

(1998). After hearing all the testimony and reviewing the evidence presented, the Board finds that Claimant has not met her burden to prove that she sustained a work related injury on November 7, 2016. The crux of this case is not really the extensive medical testimony; rather it is the testimony surrounding the incident itself.

In order to obtain benefits Claimant must prove that she sustained an injury and the injury is related to her employment. There are two elements in the statute quoted above that Claimant must prove to obtain benefits. Essentially these elements are first where the accident occurred and second the activities that Claimant was performing at the time. The injuries must be causally related to those work activities. Claimant's allegation is that she passed out and fell because of an argument with her supervisor, sustaining a severe concussion that continues to be disabling. We will first examine what the evidence shows on the issue of course and scope of employment. For this issue the Board finds the testimony of the two co-workers Ms. McCarthy and Ms. Brombacher credible and relies on it for this decision. The testimony of Ms. McCarthy was particularly compelling. Clearly, the accident occurred on Employer's premises so that element is not a factor. Claimant alleges she was in a heated argument with her supervisors concerning the denial of time off for a medical appointment. More specifically her direct supervisor denied her request and then a more senior manager come to her desk and confronted her in a very upsetting way. This argument allegedly occurred while she was on the phone with her mother. Neither Ms. McCarthy nor Ms. Brombacher heard any kind of verbal altercation that morning. The office is an open space with desks divided by low cubicle walls. They sat in the same area as Claimant, just a few desks away. Their testimony contradicts Claimant's assertion that Ms. Barba was "yelling at the top of her lungs" and slamming her hand down on Claimant's desk. Once Claimant got up from her desk to go to the bathroom at her mother's suggestion Ms. Brombacher noticed that something was wrong

in the away she was walking and was concerned enough to ask Claimant if she needed help. She got up and attempted to direct Claimant toward a chair. At this point Ms. McCarthy got up to help and Claimant began slowly sagging to her knees. Both of these coworkers testified that Claimant did not fall or hit her head; rather they gently helped her to the floor and Ms. McCarthy even put a pillow under her head. Then she made a number of calls, one of which was to 911 for the EMTs. Claimant testified that she did not recall what happened after she got up from her desk. She also testified that she had no recollection of being in the hospital.

Therefore, the testimony of these witnesses is inconsistent with Claimant's version of events. The Board notes that the supervisor and director also testified, but the Board does not rely on their testimony. Additionally Ms. McCarthy testified that Claimant was able to respond to requests from the medical personnel and she noticed Claimant's eyelids fluttering. The medical records also bear this out. This evidence is inconsistent with Claimant's testimony and it supports Dr. Townsend's medical testimony. Moving to the hospital records and medical evidence the Board relies on the medical opinions of Dr. Townsend and Dr. Langan in this matter and finds them to be more reliable and credible than Dr. Schaller. *DiSabatino v. Wortman*, Del., 453 A.2d 102,106 (1988) (as long as substantial evidence is found the Board may rely one expert over another). Dr. Schaller's testimony that Claimant could have sustained such a severe concussion even if she had not hit her head is just not credible. Claimant did not suffer whiplash in a car accident or another type of collision that would have shaken her head back and forth. The credible evidence is that Claimant was gently lowered to the floor and her head positioned so as not to touch the floor. Accepting this evidence, the Board finds that Claimant did not suffer an injury at her work place on November 7, 2018. Further, even if she had sustained an injury, there is no credible evidence that her employment caused it. Dr. Schaller readily discounts the evidence from

the eyewitnesses and even some of the hospital records. He also discounts records from Claimant's early treatment as well as other providers who questioned the validity or source of the symptoms. Of course, none of this evidence would support his narrative of a severe concussion, which required ongoing treatment nine months after the incident. To be fair Dr. Schaller relies on the subjective symptoms and complaints provided by Claimant. The Board finds that evidence too inconsistent with other witnesses and the medical records to be reliable. Claimant came to the hearing using a cane and was in a wheelchair during the first examination with Dr. Townsend. At that examination, Claimant had a litany of pain complaints including her neck and back. There is little evidence that this incident resulted in injuries to multiple body parts let alone the primary diagnosis of a concussion. To put it simply the subjective complaints were out of proportion to the objective findings. Dr. Schaller also relies on the findings from his testing. The troublesome issue here is that Claimant did her best to thwart Dr. Langan's more extensive neuropsychological testing. Dr. Langan testified that the results from the validity testing called into question Claimant's responses. Claimant also failed to complete a substantial portion of the MMPI, which is a standard test that was given on a separate day from the other testing. Both Dr. Townsend and Dr. Langan question the utility of the Impact testing in this situation removed in time from the incident. They also noted be utilized correctly Impact testing requires a baseline score established prior to the concussion. Dr. Townsend also questioned Claimant's effort on the Impact testing given the abnormally low results even for someone with post-concussion syndrome.

As noted above Claimant provided Dr. Townsend with a number of symptoms effecting multiple body parts. The trouble is that all of these complaints, including neck and back pain, arm and leg pain, hearing loss and ringing in the ears, were present in some form prior to the incident on November 7, 2016. Claimant saw a neurologist prior to the incident for some of these

symptoms. She also saw an ENT related to her hearing problems and testing showed hearing loss. It is important to note that Claimant denied having these problems prior to the incident. In her testimony, she did admit to having water in the ear, but clearly, it was more extensive than that. The records reveal that Claimant had a motor vehicle accident resulting in neck and back injuries serious enough to keep her on disability for up to five years. Claimant also sought treatment for anxiety and depression prior to this incident. She also obtained accommodations to take the bar exam. She was still following with the neurologist Dr. Abrams in 2015. Another issue raised by the records is Claimant's history of headaches. There is evidence that Claimant was having headaches and not feeling well for several days leading up to the incident at work. This evidence results in some inconsistency regarding Claimant's request for time off that allegedly led to the confrontation. One version is that she was not feeling well and wanted to work from home and Claimant's testimony was that she needed time off for scheduled doctor's appointments. All the medical evidence noted above casts doubt as to whether the vasovagal event diagnosed in the ER was related to Claimant's employment or work environment. The initial ER records noted a history of headaches, lightheadedness and difficulty sleeping during the weekend prior to this event.

Employer has no burden to provide alternate reasons or explanations for Claimant's injuries or symptoms. Again, it is Claimant's burden to show by a preponderance of the evidence that she sustained a personal injury while in the course and scope of her employment to be successful on her Petition. In this case, the weight of the credible evidence falls against Claimant. The medical records support the testimony of Ms. McCarthy and Ms. Brumbacher. Evaluations that Claimant received in the hospital and later at Kessler Rehabiliation reveal findings such as giveaway weakness that are consistent with suboptimal effort. These records support the opinions of Dr. Langan and Dr. Townsend. Another key factor is that many of the symptoms that could be

related to a post-concussion syndrome predated the event and may have precipitated it. Viewing all the testimony and evidence presented globally the Board finds that Claimant has failed to meet her burden to prove that she sustained an injury at work on November 7, 2016. Moreover, even if one were to accept the premise that an injury occurred, there is again insufficient evidence to conclude that it was causally related to her employment. For the aforementioned reasons Claimant's Petition to Determine Compensation Due is hereby **DENIED.**

STATEMENT OF THE DETERMINATION

Based on the foregoing, the Board hereby **DENIES** Claimant's Petition to Determine Compensation Due.

IT IS SO ORDERED THIS 18th DAY OF APRIL 2019.

INDUSTRIAL ACCIDENT BOARD

Peter W. Hartranft
PETER W. HARTRANFT

Robert Mitchell
ROBERT MITCHELL

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

Mailed Date: 4/23/19

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BIOGRAPHY

DONALD E. MARSTON, ESQUIRE

Don Marston is a graduate of the University of Delaware and Widener University School of Law. He is former counsel to the Industrial Accident Board and has represented claimants and employers in workers' compensation matters for over 30 years. Don is a partner at the law firm of Doroshow, Pasquale, Krawitz & Bhaya where he represents claimants and plaintiffs in workers' compensation and personal injury litigation. He is a member of the Delaware State Bar Association and the Randy J. Holland Workers Compensation Inn of Court.

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ADMISSIONS

Delaware
2005

U.S. District Court for the District of Delaware
2005

U.S. Court of Appeals 3rd Circuit
2005

EDUCATION

Widener University School of Law (J.D., 2003)

University of Delaware (B.A., 1998)

HONORS & AWARDS

Top Lawyer, Workers' Compensation for Employers, Delaware Today Magazine, November 2020

OVERVIEW

Keri's practice is devoted to Delaware workers' compensation and employment law defense (including discrimination and whistleblower protection), in addition to federal employment law defense. Throughout her legal career, she has represented clients including automobile assembly plants, nursing homes, hospitals, security companies and retailers in matters pertaining to workers' compensation and employment law. She is also experienced in handling matters for non-profits and fast food franchises, and advising clients in relation to owner controlled insurance policies. Keri is especially adept at assisting and educating small employers on issues pertaining to workers' compensation.

While attending Widener University School of Law, Keri worked for the Delaware Department of Labor, where she handled a wide variety of employment, labor and civil rights issues. Keri investigated allegations of employment discrimination and wage and hour violations, including alleged prevailing wage violations and child labor violations.

Keri is a graduate of the University of Delaware, where she received a Bachelor of Arts degree in Criminal Justice. She remains involved with her alma mater, serving as an advisor for the Alpha Sigma Alpha sorority.

ASSOCIATIONS & MEMBERSHIPS

Associated Builders and Contractors, associate member, Legislative and Legal Rights Committee

Delaware State Bar Association; chair, Workers' Compensation Section

Pennsylvania Bar Association

Randy J. Holland Delaware Workers' Compensation Inn of Court

YEAR JOINED

2005

THOUGHT LEADERSHIP

What's Hot in Workers' Comp, Vol. 24, No. 6, June 2020

Workers' Compensation
June 1, 2020

Workers' Compensation Hot Tips From Delaware

Wilmington
Workers' Compensation
June 1, 2020
What’s Hot in Workers’ Comp is prepared by Marshall Dennehey Warner Coleman & Goggin to provide information on recent legal develop

Special Alert—COVID-19 and Work-from-Home Claims in Delaware

Workers' Compensation
COVID-19 Task Force
April 22, 2020
In Delaware, an individual injured at home may be entitled to workers’ compensation benefits. What's Hot in Workers' Comp

Legal Updates for Employment Law

Wilmington
Employment Law
May 11, 2016
New EEOC Procedures for the Release of Position Statements By Keri Morris-Johnston The material in this law alert has been prepared for our readers by Marshall Dennehey Warner Coleman & Goggin.

Workers’ Compensation Benefits and Unemployment Compensation Benefits … Are Injured Workers Entitled to Both?

Wilmington
Workers' Compensation
September 1, 2014
By Keri L. Morris-Johnston, Esq.* Key Points: Defense Digest, Vol. 20, No. 3, September 2014

CLASSES/SEMINARS TAUGHT

Workers' Compensation Winter Roundup, Graham Company webinar, December 15, 2020

Understanding the Debate with the ADA, FMLA and Workers’ Compensation, Marshall Dennehey webinar, October 27, 2020

Subsequent Injury and Successive Carrier Liability, Holland Inns of Court, October 13, 2020

Ethical Considerations During COVID-19, Delaware State Bar Association, September 15, 2020

Pot For Pain, Marshall Dennehey Workers' Compensation Seminar, October 25, 2018

Ingredients for Successfully Defending Claims for Work Injuries at Home, Marshall Dennehey Workers' Compensation Seminar, October 19, 2017

Defense Counsel Wish List, Marshall Dennehey Workers' Compensation Seminar, October 27, 2016

Put Me In Coach: Top 10 Opportunities in Claims and Litigation Management, Marshall Dennehey Workers' Compensation Seminar, October 22, 2015

Employment Law Update and Workers' Compensation Basics, Delaware State Dental Society, Dover, Delaware, March 19, 2015

Case Law Update, Delaware State Bar Association Workers' Compensation Seminar, January 21, 2015

Navigating The Bermuda Triangle: The Intersection of Workers' Compensation, FMLA and ADA, Roadmap to Success - Understanding Workers' Compensation, Marshall Dennehey seminar, October 24, 2013

Prevailing Wage Law in Delaware, April 2005

PUBLISHED WORKS

"New EEOC Procedures for the Release of Position Statements" and "EEOC Lawsuits Challenge Sexual Orientation Discrimination as Sex Discrimination," *Legal Updates for Employment Law,* May 2016

"Workers' Compensation Benefits and Unemployment Compensation Benefits ... Are Injured Workers Entitled to Both?," *Defense Digest*, Vol. 20, No. 3, September 2014

"Delaware Whistleblowers' Act Applies to Constructively Discharged Employees?," *Defense Digest,* Vol. 18, No. 4, December 2012

Case Law Alerts, regular contributor, 2011-present

"Updates To Delaware's Workers' Compensation Statute," *Defense Digest*, Vol. 13, No. 4, December 2007

DELAWARE STATE BAR ASSOCIATION
WORKERS' COMPENSATION SEMINAR
MAY 3, 2022

POTPOURRI OF ETHICS

Presented by:

Wade Adams, Esquire
Don Marson, Esquire
Keri Morris-Johnston, Esquire
Jonathan O'Neill, Esquire

1. Ethical Issues/Concerns with Video Hearings

2. Ethical Issues/Concerns with Working from home

3. Behavior of Attorneys – What the courts can do? What ODC can do?

4. Ethical Issues when you withdraw from a case with a longtime client.

5. Ethical issues with the defense contacting the injured workers' medical providers.

6. Covid claims – ethical issues related to disclosing medical information and HIPPA

ETHICAL CONSIDERATIONS DURING COVID

I. Overall Ethical Considerations in the Time of Covid-19

a. Competency

Delaware Rule of Professional Responsibility 1.1 provides:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Delaware Rule of Professional Responsibility 1.3 provides:

> A lawyer shall act with reasonable diligence and promptness in representing a client.

These rules require that attorneys diligently monitor restrictions and changes to procedures and rules that are issued in the numerous orders from the Delaware Supreme Court and the Industrial Accident Board.

These rules require that attorneys be able to handle technology in a competent fashion.

- *Reyes v. Tanaka*, 2020 WL 1683452 (D. Haw. Apr. 6, 2020). Attorney inadvertently contacted a juror through LinkedIn was prohibited from further use of electronic devices during proceedings before the Court.[1]

- DLRPC 1.1, Cmt. 8 provides:

  > *Maintaining competence*. -- To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

[1] *See* Court Is Not Persuaded by Attorney's Claimed Ignorance as the Court of LinkedIn Contact with Juror, by Molly DiBianca, Esq., DSBA Bar Journal, July/August 2020

b. Communication

Delaware Rule of Professional Responsibility Rule 1.4 provides:

> (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.

c. Confidentiality

Delaware Rule of Professional Responsibility Rule 1.6 provides:

> (c) A lawyer **shall make reasonable efforts** to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Factors considered for “reasonable efforts” include:

1. The sensitivity of the information;
2. The likelihood of disclosure if additional safeguards are not employed;
3. The cost of employing additional safeguards;
4. The difficulty of implanting the safeguards;

5. The extent to which the safeguards adversely affect the lawyer's ability to represent clients.

See DLRPC 1.6(c), Cmt. 18

Comment 19 expands on this duty:

> 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.

Ways to ensure Remote Meetings remain confidential[2]

- Do not publicly share meeting ID numbers or Meeting Passwords
- For Zoom use the randomly generated Meeting ID option rather than the Personal ID meeting room
- Set a password for your meeting
- Allow only the host to screenshare
- Disable the Record Feature

Considerations on working remotely and ensuring confidentiality

- Home Internet Security
- Third Parties Present
- Ensuring Confidentiality of Documents

d. Planning for the Possibility of Contracting Covid-19[3]

[2] *See* Zooming In on the Security Risks of Videoconferencing by Kevin M. Levin, Esq., DSBA Bar Journal, May 2020

[3] The Time is Now: Planning for your Death or Disability, by Patricia Bartley Schwartz, Esq., DSBA Bar Journal May 2020.

- Notify the attorney that you have identified on your Delaware Supreme Court Annual Registration and make the necessary arrangements with that attorney.
- Communicate with your designee regarding your practice, and where client lists are kept, the billing system, etc.
- Review Succession Planning resources through the DSBA and the American Bar Association
- Comment 5 to DLRPC 1.3
- Consideration of incapacity of staff

Ethical Considerations During the COVID-19 Pandemic

COVID-19 is having a profound effect on global society and business, including the practice of law. Even when government emergency orders and restrictions are lifted, the aftershocks of this pandemic may continue to affect our personal lives, clients, law practices, and professional obligations for years to come. The following informal guidance responds to some commonly asked questions over the past several weeks, and is provided as a means to help lawyers navigate the professional challenges that may lay ahead.

"What should I do in case I become ill or in the event I have to self-quarantine?"

Hope for the best and plan for the worst. The COVID-19 pandemic highlights the need for attorneys in private practice to engage in thoughtful succession planning to protect their clients and law practice should they become unexpectedly unable to practice law. If a lawyer is unable to handle client matters competently, the lawyer must determine whether Rule 1.16(a) requires the lawyer to withdraw from the representation. In larger firms, other firm lawyers may be able to step in to take over a representation on short notice.

This duty is especially pressing for a lawyer who has no partners, associates, or employees. Absent advance planning, if a sole practitioner with no staff becomes incapacitated, there may be a significant lapse of time after the problem arises during which the lawyer's clients' needs are not met. Comment [5] to Rule 1.3 provides each sole practitioner should prepare a plan to protect clients' interests in the event of incapacity or death. In the face of this pandemic and increased risk of serious incapacitating illness or worse, lawyers should have a ready succession plan for other lawyers to assume responsibility for legal representations and, at a minimum, a plan for promptly communicating with clients and for taking necessary protective action. Solos should consider partnering with each other in reciprocal agreements to advise clients and courts when the lawyer has become incapacitated or is deceased.

Lawyers should also consider the potential impact of a nonlawyer assistant's incapacity and make appropriate plans.

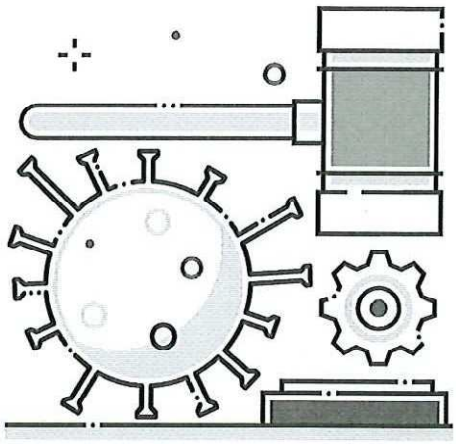
"What if my client becomes ill and/or I lose contact with them?"

In addition to the dangers of disability or death from COVID-19, clients may become financially insolvent, geographically displaced, and/or experience a myriad of derivative familial, social, and emotional burdens that interfere with their ability to communicate with their counsel. For this reason, lawyers may want to reevaluate the modes and frequency of their communications with clients and seek to facilitate those communications whenever possible.

Rule 1.4 (communication) provides, in part, that a lawyer shall promptly inform a client of any decision or circumstance with respect to which the client's informed consent is required. A client may authorize a lawyer to take specific action on the client's behalf without further consultation and unless otherwise revoked, a lawyer may rely on such advance authorization. See Rule 1.2 cmt. 3. A lawyer may also take such action on behalf of a client as is impliedly authorized to carry out the representation. Rule 1.2(a). Rule 1.4 also requires a lawyer to reasonably consult with a client regarding the means by which the client's objectives are to be accomplished and to keep the client reasonably informed about the status of a matter. Rule 1.6(a) provides a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent or the disclosure is impliedly authorized to carry out the representation. Finally, Rule 1.14 (client with diminished capacity) provides when a client's capacity to make adequately considered decisions in connection with a representation is diminished, "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship." Rule 1.14(a). In limited circumstances, a lawyer "may take reasonably necessary protective action," such as consulting with individuals who have the ability to take action to protect the client and, if appropriate, seeking the appointment of a guardian. Rule 1.14(b). When doing so, a 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." Rule 1.14(c).

Specific conversations with clients regarding their objectives and authorizations, as well as timely communications thereafter

Hope for the best and plan for the worst. The COVID-19 pandemic highlights the need for attorneys in private practice to engage in thoughtful succession planning to protect their clients and law practice should they become unexpectedly unable to practice law.



regarding the status of the case, will facilitate the representation and make it easier for lawyers to keep track of their clients. If a client goes "missing," case law and ethics opinions suggest a lawyer must undertake reasonable efforts to locate the client. At all times, the lawyer should continue to protect the client's interests. This includes requests submitted to opposing counsel or courts for extensions due to the client's illness, which must preserve the client's confidentiality unless the client has consented to the disclosure of health-related information or such disclosure is warranted due to the client's diminished capacity.

"What ethical concerns should I have about working remotely?"

As national guidelines and state emergency orders restricted "non-essential businesses" operations, some law firms and staff began working from home, many for the first time. Working from home or any remote location requires lawyers to implement appropriate safeguards to ensure the confidentiality of client information, including any technology utilized for remote access.

The Rules, generally, require lawyers to take appropriate safeguards to protect physical files, privileged communications with clients, and computer systems (including internet or cloud-based storage) from inadvertent disclosure and cybersecurity risks. Lawyers should make "reasonable efforts" to protect client information from "unauthorized access by third parties" and "inadvertent or unauthorized disclosure" by lawyers and their non-lawyer assistants. Rule 1.6, cmt. 18; *see also* Rules 5.1 and 5.3. Likewise, when transmitting communications that include information relating to clients, lawyers "must take reasonable precautions to prevent the information from coming into the hands of unintended recipients." Rule 1.6, cmt. 18.

In the context of working remotely, lawyers should ensure their communications with clients and staff, during which client information may be discussed (*e.g.* videoconferencing), are conducted in a private setting, over a secure platform, and in a manner that minimizes inadvertent disclosures. This may include using virtual private networks when available, avoiding shared or public Wi-Fi hotspots, and using strong passwords, two-factor identification, or encryption, when possible. In addition, lawyers and staff should utilize workspaces that are, as much as practicable, private and organized to prevent inadvertent disclosures of verbal, electronic, and hard copy client information. Shared workspaces at home present unique issues where other family members may overhear conversations or smart devices such as Apple's Siri, Amazon's Alexa, or Google's voice assistants may be activated on personal devices. Finally, lawyers should evaluate the systems and procedures utilized to secure and back up information, given the likelihood that additional devices may be necessary to manage the law firm's business.

Lawyers are responsible for complying with the Rules and reasonably ensuring their subordinates and nonlawyer assistants comply with the lawyers' professional obligations under the Rules. Rules 5.1 and 5.3. Consequently, lawyers should consider and, if necessary, seek appropriate education or guidance regarding particular precautions that may be necessary to manage their law practice during these trying times. Clients may also require additional security measures or agree to forgo security measures, which may otherwise be required by the Rules. For this reason, a full and frank discussion with clients regarding the advantages and limitations of any special technology your firm is utilizing during the COVID-19 pandemic may be advisable.

"What else should I do?"

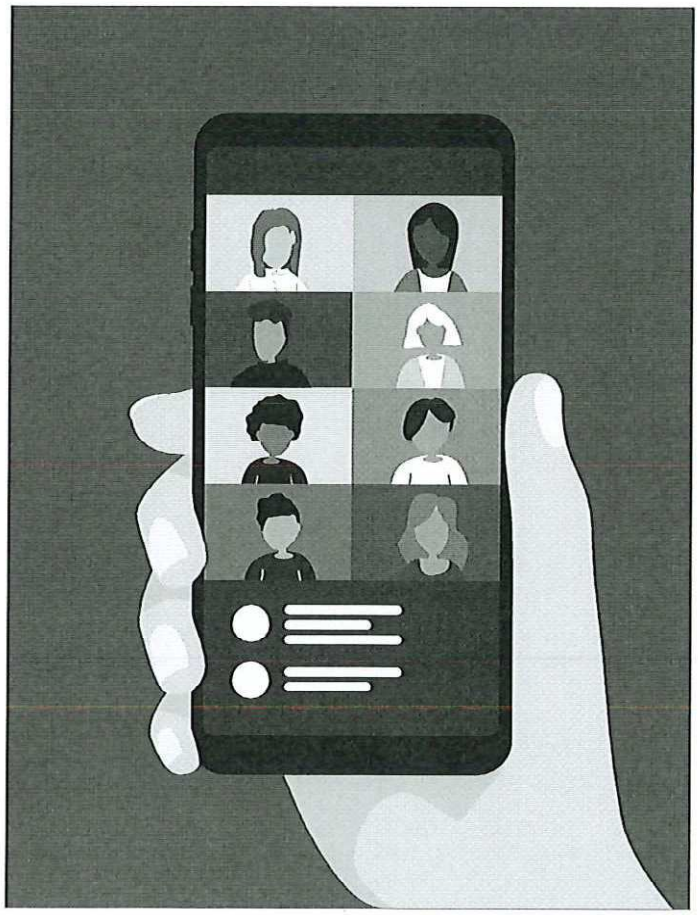
Lawyers are expected to competently and diligently represent their clients. *See* Rules 1.1 and 1.3. One component of competence and diligence has always been to manage calendars and adhere to court dockets. Over the course of the last three months, numerous orders have been issued by Delaware tribunals, which temporarily restrict schedules and alter procedures. www.courts.delaware.gov/. Lawyers should diligently monitor these restrictions and changes, advocate for their clients accordingly, and timely communicate with opposing counsel and the courts to the extent postponements or other relief are requested.

Finally, during this time of crisis, when tensions are already running high, lawyers are reminded they are members of the Delaware Bar and, as such, are expected to exercise the civility and professionalism commensurate with that status.

Zooming In on the Security Risks of Videoconferencing

BY KEVIN M. LEVINE, ESQUIRE

During these days of self-isolation and social distancing, many attorneys have turned to online videoconferencing as a way to get face-to-face interaction when interpersonal connections seem otherwise impossible. Zoom videoconferencing has outpaced its rivals and become the most used platform, through both paid and free versions of the application. As attorneys, we have an obligation to maintain the confidentiality of our client's privileged statements. Security concerns surrounding Zoom should not be taken lightly, particularly if using the program for confidential discussions.



What Rules Apply to Maintaining Client Confidentiality?

Considering the "Client-Lawyer Relationship," the Delaware Lawyers' Rules of Professional Conduct state that a "lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[1] Whether a "reasonable effort" has been taken to prevent unauthorized access to client information — *i.e.* privileged conversations or statements — includes considering "the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients."[2]

And lawyers must also take "reasonable precautions to prevent [client] information from coming into the hands of unintended recipients."[3] But this duty "does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy."[4]

What Are the Security Concerns Associated with Zoom?

The nearly overnight necessity for millions of American workers to meet or conference remotely due to the global pandemic has exponentially ballooned the usage of Zoom to a degree that even the company's founder acknowledged was beyond the company's expectation.[5] A number of cybersecurity experts have been critical of Zoom as ill-equipped to handle the attendant security risks surrounding the widespread increase in use of the software. These concerns include recorded Zoom conferences being made public on the internet, unwanted sharing of user data, and even secretly installed software that can turn on a user's webcam without consent.[6]

But the security risk receiving the most media attention is the new phenomenon known as "Zoombombing." A Zoom video conference is "bombed" when an uninvited user joins a

Zoom meeting, hijacks the video or audio, and begins speaking or sharing images on the attendee's computer screen in a process known as "screensharing." This may sound relatively harmless, but many Zoombombers engage in hate speech or screenshare pornographic imagery, which is a matter serious enough for the FBI to issue a press release.[7] Apart from sparing yourself and your client from an unpleasant Zoombomb, preventing this intrusion is critical to ensuring the confidentiality of your privileged attorney-client conversations.

What Should I Do to Address These Concerns and Comply with the Rules?

Every Zoom meeting has a "Meeting ID." It should go without saying, but do not publicly share or post this number. Only send this number in the Zoom invitation to the client with whom you will be conferencing. Zoom accounts can also have a "Personal ID" that serves as an always available meeting room for each user. You should not use this for conferences with clients. Instead, use Zoom's randomly generated "Meeting ID" feature for your client meetings.

Set a password for your meetings. Zoom enables you to protect the privacy of your Zoom conference by creating a password that you distribute to invited participants. This form of "encryption" greatly enhances the security of your Zoom conference, but just make sure your client has enough tech savvy to figure out how to enter a password. And, in an abundance of caution, you may want to change the "screensharing" settings to "host only." This way, even if a Zoombomb does occur, the hijacker will not be able to overtake the screen and share unwanted images.

Finally, all Zoom calls have a recording feature that can be enabled by the host. As unlikely as it may seem, the last thing you want is for your privileged conversations to be hacked or disseminated. The best way to protect recordings of your client conversations is to not record them in the first place. Simply make sure the "record" feature is disabled on all of your Zoom client meetings.

These measures should not only ensure that your Zoom conferences with clients will remain confidential, but should also constitute the sort of additional "safeguards" against invasion of client privacy envisioned by the Delaware Lawyers' Rules of Professional Conduct.

Notes:

1. DLRPC 1.6(c).
2. DLRPC 1.6(c), Cmt. 18.
3. DLRPC 1.6(c), Cmt 19.
4. *Id.*
5. "A Message to Our Users." Zoom Blog, April 15, 2020. https://blog.zoom.us/wordpress/2020/04/01/a-message-to-our-users/.
6. Harwell, Drew. "Everybody Seems to Be Using Zoom. But Its Security Flaws Could Leave Users at Risk." The Washington Post. April 2, 2020. https://www.washingtonpost.com/technology/2020/04/02/everybody-seems-be-using-zoom-its-security-flaws-could-leave-people-risk/.
7. "FBI Warns of Teleconferencing and Online Classroom Hijacking During COVID-19 Pandemic." FBI, March 30, 2020. https://www.fbi.gov/contact-us/field-offices/boston/news/press-releases/fbi-warns-of-teleconferencing-and-online-classroom-hijacking-during-covid-19-pandemic.

Kevin Levine is an Associate in the Labor & Employment Business Unit of Clark Hill, PLC. He can be reached at klevine@clarkhill.com.

Court Is Not Persuaded by Attorney's Claimed Ignorance as the Source of LinkedIn Contact With Juror

BY MOLLY DIBIANCA, ESQUIRE

During a trial before U.S. District Judge Jill A. Otake in the District of Hawaii, one of the plaintiff's lawyers, Myles S. Breiner, googled the name of one of the jurors ("Juror No. 1"). He clicked on some of the search results, including Juror No. 1's LinkedIn profile, and found himself the subject of a Motion for Sanctions. The resulting decision is a wonderful lesson to all lawyers.[1]

The LinkedIn Request to Connect

Mr. Breiner is a criminal defense lawyer in Honolulu, Hawaii. He and an another attorney, Terrance Revere, represented female inmates in a sexual-assault case. After the sixth day of trial recessed, Juror No. 1 notified the Court that the juror believed she had been contacted via LinkedIn by someone associated with the plaintiffs.

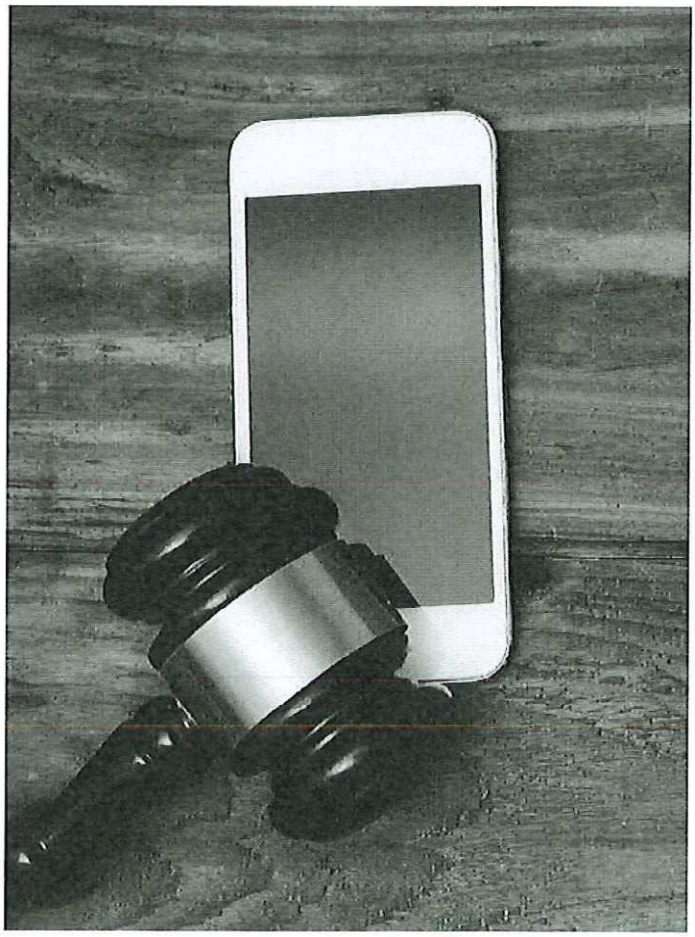
The following day, the Court conducted a sidebar with counsel for both sides (Mr. Revere on behalf of plaintiffs) and informed them that the juror had reported that a person named Myles Breiner had sent her a request to connect via LinkedIn, but that the profile did not have a photo so she could not be sure if it was the same Myles Breiner who represented the plaintiffs. At the Court's request, the juror submitted to the Court a copy of the LinkedIn request, which showed that the request had been made at 2:26 p.m. while trial was in session and while a witness was testifying.

The Excuse(s)

The Court, out of the presence of the jury, ordered Mr. Breiner to submit an declaration by the end of the day indicating whether he or his staff had attempted to contact the juror via LinkedIn. In the courtroom, Mr. Breiner initially denied that he had ever made any effort to contact the juror and that he would make the same representation in his declaration. Later in court, though, he changed his position, saying that he "may have accidentally clicked on a button" but he did not think so.

Mr. Breiner's first declaration said that he and his paralegal were "discussing jurors' profiles in anticipation of closing arguments." He averred that he "initiated a Google search, and as [he] was scrolling, [he] apparently inadvertently touched the "Connect" button on Juror No. 1's LinkedIn profile. He claimed that he then, "immediately terminated" the request to connect.

After his paralegal submitted a declaration that slightly contradicted his own sworn statement, Mr. Breiner submitted a revised declaration in which he admitted that he had acci-



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dentally sent a request to connect to Juror No. 1, but that he thought in the moment that he had successfully terminated the request. He tried to disavow the mistake by saying that he does not "actively use LinkedIn," and is not "familiar with this program as [he] literally [has] no connections to anyone in this program."

The Court allowed both parties to brief the question of whether an order of sanctions should be entered against Mr. Breiner. In the end, the Court declined to award sanctions, finding that inadvertent conduct is not a basis for sanction pursuant to the Court's inherent power. But the Court's written opinion, which exposes in detail the several misrepresentations Mr. Breiner made to the Court and cites to the ethics rules, is a strong warning against claiming ignorance as a defense when an ethics misstep involves technology.

The Order

The Court first noted that Mr. Breiner's use of his cellphone during trial did not comport with the Court's General Order regarding uses of electronic devices in the courtroom. The General Order, the Court found, was intended to prohibit unnecessary use of a cellphone by a lawyer or staff. Because the Google search could have been done after trial, the Court explained, Mr. Breiner's use of the phone did not align with the General Order.

The District Court's Local Rules permit research of jurors via social media, but explicitly prohibit an attorney from sending an "access request to a juror's social media accounts." The Court found that, although Mr. Breiner's actions were not intentional, they were at least somewhat reckless. The Court explained that he put himself at risk of accidental contact unnecessarily by searching from his phone in the courtroom.

The Court also found that by failing to report the inadvertent contact immediately, he failed in his duty of candor under the Hawaii Rules of Professional Conduct. The Court noted that Mr. Breiner had submitted two declarations apparently without first checking his LinkedIn status. This was made particularly plain when the Court herself observed that Mr. Breiner had 12 connections on the platform instead of the zero connections as stated in his declaration.

Finally, the Court made clear that Mr. Breiner's conduct had been problematic in other ways. During trial, the Court observed him on his cellphone "far more often than other attorneys." He had been admonished for distracting behavior three times during trial — including by "blatantly flash[ing] a 'thumbs up' signal to a non-client witness after she left the stand." At one point, he "had to be told to sit down after a sidebar when the Court had issued its ruling and he continued to argue." And then, after trial, during a telephonic conference with the Court, Mr. Breiner "shouted and used profanities."

The Takeaway

In the end, the Court declined to order sanctions, but did prohibit Mr. Breiner from using electronic devices in any future proceeding before the Court. The absence of sanctions should not detract from the importance of this case. In accordance with the Delaware Lawyer's Rules of Professional Conduct, lawyers are required to understand the technology they use. (DLRPC 1.1., cmt. [8]). Lawyers also are prohibited from contacting a juror (DLRPC 3.5), and are obligated to correct material misstatements made to the Court. (DLRPC 3.3). Lawyers who use Google, social media, or other technology to search parties, witnesses, or jurors should ensure they are familiar with and knowledgeable about the tools they use.

Notes:

1. *Reyes v. Tanaka*, No. 17-00143-JAO-KJM (D. Hawaii) (Apr. 34, 2020) (D.I. 400).

Molly DiBianca is a Member of Clark Hill, PLC, in Wilmington. She is the co-chair of the Supreme Court Commission on Law & Technology. She can be reached at mdibianca@clarkhill.com.

The Time Is Now:
Planning for Your Death or Disability

BY PATRICIA BARTLEY SCHWARTZ, ESQUIRE

Seven months ago, in September 2019, the *Bar Journal* contained the article "Planning for Your Death or Disability: Why a Little Action Now Is Better than a Lot of Anxiety for Others Later" as part of the Office of Disciplinary Counsel: Quarterly Corner column. The article highlights why it is important for lawyers to protect their law practice in the event of incapacity or death. A copy of the article is reprinted below. As promised at the end of the article, in late January 2020, the ODC began its series of free CLEs about succession planning. For those of you who read the article and/or attended the CLE, hopefully, you started your succession planning. If not, the time is now. The following link is an excellent resource to assist in your succession planning: https://www.americanbar.org/groups/professional_responsibility/resources/lawyersintransition/successionplanning/. In addition, please feel free to contact me at patricia.schwartz@delaware.gov or (302) 651-3931.

Regardless of age, health, or wealth, an unplanned event such as injury, illness, incapacitation, disability, or even death can make it temporarily or permanently impossible to continue the practice of law. Such an interruption or cessation of practice, voluntary or otherwise, carries with it the substantial risk clients will be abandoned by their chosen lawyer in the middle of representation.

In an effort to mitigate the possibility of client abandonment, the Delaware Supreme Court's Annual Registration Statement asks Delaware lawyers, whether "[I]n the event of my death or incapacity" they have "made arrangements for another Delaware lawyer who is capable of conducting [their] legal practice to protect the interests of [their] clients." Although most attorneys designate a Delaware lawyer on their Annual Registration Statement, many fail to make necessary arrangements with the lawyer to assume responsibility for the law practice. In more than a handful of cases over the last few years, the Delaware Supreme Court had to call on members of the Delaware Bar to step in as receivers for attorneys who died or became disabled. In those matters, although the attorneys designated a Delaware lawyer on their Annual Registration Statement, they failed to make appropriate arrangements with the lawyers to assume the responsibility of the practice and, in some instances, never even notified the lawyer who had been so designated. Even more concerning, the lawyers failed to take any specific steps to protect their clients. These failures place a significant burden on the Delaware Bar. Moreover, control of your law practice may be turned over to another lawyer with whom you have had no prior professional relationship.

Given a lawyer's obligation under the Delaware Lawyers' Rules of Professional Conduct to exercise diligence, safeguard client's property, and ensure client's interests are protected when the representation ends, it is ethically incumbent on you to take affirmative steps to ensure your clients are protected in the event you are unable to continue the practice of law due to disability or death. Failure to do so can have serious consequences for you, your clients, and your family. Family members often do not have access to crucial information, including your client lists, court calendaring, and law practice bank account information.

Although the Delaware Supreme Court does not require you to designate a person or engage in succession planning, creating such a plan is essential to protect your clients and your estate. There are a

Regardless of age, health, or wealth, an unplanned event such as injury, illness, incapacitation, disability, or even death can make it temporarily or permanently impossible to continue the practice of law.

number of steps to consider in preparing for others to carry on without you.

The first step is to select someone to take charge. If you are in a firm, the logical person would be a partner or associate of the firm. If you are a sole practitioner, or do not have an associate who can or will manage your practice, consider finding a colleague with a comparable practice. You should select someone you trust, who understands the issues of managing a law practice, and is willing to assume the managing of your practice. You should also annually assess who your designee is because circumstances may have changed.

Consider whether your designee will take over the representation of your clients or simply inventory your files and funds and distribute them to the clients and substitute counsel and close your practice. If your successor will take over your practice, are there any things you can do now to make the transition easier? For example, what legal documents are needed to execute in order for the person taking over to sign on your bank accounts? What sort of written agreement do you need to have with the person taking over? How will clients, courts, and opposing counsel be notified? Is your will up to date and does your personal representative know about the plans for your law practice?

The second step is to ensure your client list and contact information is up to date and your designee knows, at a minimum, where your passwords and list of client matters are located, as well as how to access your computer, calendar, billing system, client ledgers, and bank accounts.

The Office of Disciplinary Counsel in 2020 will offer a program on succession planning in each county. You can also find additional resources through the following link: www.americanbar.org/groups/professional_responsibility/resources/lawyersintransition/successionplanning/.

Patty Schwartz has been Deputy Disciplinary Counsel for the Office of Disciplinary Counsel of the Supreme Court of Delaware since 2004. Patty currently serves as President Elect for the National Organization of Bar Counsel. She can be reached at patricia.schwartz@delaware.gov.

FROM THE DSBA SECTIONS

ELDER LAW SECTION

By Tanya S. Sellers, Esquire, Chair

The most significant and problematic change for the members of the Elder Law Section is access to our clients. Many of our clients reside in long-term care facilities, which have strict no visitor policies. As the pandemic continues and nursing homes are forced to create separate "Covid Units" the restrictions continue to increase. Our Section members are extremely concerned about this issue and have been discussing ways to increase awareness, so the emotional and legal needs of this vulnerable, underserved population do not get ignored. The virtual notary act put in place by our governor has been of great value. Through intense coordination with the employees of the facilities, we are now able to have virtual meetings with clients to review and execute legal documents. While this serves the legal needs of most, it does not help those who are extremely ill or lack the competence to attend a virtual meeting. It also does not address the loneliness and isolation occurring because family members have little or no access. Obtaining guardianships of incapacitated individuals continues to be a problem. This is an ongoing discussion of our members.

Below is a model one of our firms has adopted in order to continue to serve the needs of the elderly living in the community:

With the arrival of COVID-19, our firm reacted swiftly so all employees WOULD — not could — work remotely. We set up out-of-office phone and email messages. We took a "no client in the office policy." It remains our priority to make ensure all clients and staff are safe.

Now, our days begin with a daily Zoom staff meeting. For initial and routine client meetings, we offer Zoom or a conference call. The biggest question became, "How to execute Wills and Trusts?" We implemented "drive-by signings." After our attorneys have a Zoom meeting, the client drives to our office to sign, but never leaves their car. We bring the signature pages out on clipboards, which are disinfected after each appointment. We offer unused pens, but most clients bring their own. We have had a few hiccups, but the overwhelming response from our clients is gratitude!

TOURISM AND HOSPITALITY SECTION

By Ciro C. Poppiti III, Esquire, Chair

Sad irony — that is the overwhelming emotion the Section is feeling. Yes, we are sad that it took a pandemic to make palatable what we attorneys have long been preaching: The tourism-and-hospitality sector is the backbone of the Delaware economy, employing, or better put, providing a safety net, for tens of thousands of our neighbors. That point has now been scarred into our collective memory, with theaters, hotels, bars, and restaurants shuttered (or nearly shuttered). Proprietors say aloud that they just hope to weather through the pandemic, but what is not said is that they fear their doors may never open again.

Despite the societal convulsion, we attorneys are busy, lending our clients an ear as business analyst ("Do you think I should furlough my employees?"); negotiator ("Can we convince my Landlord to postpone the rent?"); and psychologist ("When do you think things will be normal again?"). Sadly, this is not the kind of busy we want to be. Bar President Bill Brady has strongly advocated for *pro bono* service. I think he would be proud indeed if we could tally all the no-fee hours being contributed by the Section to help businesses now so at risk.

DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

FORMAL OPINION 2021-1
July 9, 2021

This opinion ("Opinion") is merely advisory and is not binding on any attorney, court, or any other tribunal.

Nature of the Inquiry

Members of the Delaware State Bar Association have asked the Committee on Professional Ethics ("the Committee") to address whether an attorney licensed in Delaware may practice Delaware law while working remotely from another jurisdiction in which the lawyer is not licensed, such as from a home office, without engaging in the unauthorized practice of law in violation of Rule 5.5(a) of the Delaware Lawyers' Rules of Professional Conduct ("DLRPC"). This Opinion addresses only the application of Rule 5.5(a) of the DLRPC.

Conclusion

The Committee concludes that lawyers licensed in Delaware (the "licensing jurisdiction") may ethically engage in the practice of Delaware law, for clients with Delaware matters, while physically present in another jurisdiction in which they are not admitted ("local jurisdiction") unless a statute, rule, case law, or opinion of the local jurisdiction prohibits the conduct, provided that such lawyers may not hold themselves out as being licensed to practice in the local jurisdiction and may not advertise or otherwise hold themselves out as having an office in the local jurisdiction, or provide or offer to provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.

Background

In light of the COVID-19 pandemic, it has been increasingly common for lawyers to practice remotely. The emergency restrictions that the Governor of the State of Delaware and the Chief Justice of the Delaware Supreme Court have imposed have led many Delaware law offices to require their lawyers and staff to work from home over the past year or more. Lawyers who are working remotely have sought clarification as to whether and under what conditions they may work remotely on

matters of Delaware law, from other jurisdictions, without engaging in the unauthorized practice of law in violation of Rule 5.5(a) of the DLRPC.

Discussion

The American Bar Association Standing Committee on Ethics and Professional Responsibility addressed this issue in Formal Opinion 495, Lawyers Working Remotely (December 16, 2020). The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, together with the Philadelphia Bar Association Professional Guidance Committee, adopted the reasoning and conclusion of the ABA Formal Opinion 495 in a joint opinion, Ethical Considerations for Lawyers Practicing Law from Physical Locations Where They Are Not Licensed, Joint-Formal Opinion 2021-100 (March 2, 2021).

ABA Formal Opinion 495, as well as the Pennsylvania and Philadelphia Bar Associations' Joint Formal Opinion 2021-100, concluded that a lawyer who is admitted in one jurisdiction may practice the law of that licensing jurisdiction while working remotely in a local jurisdiction, with certain conditions. We agree with the reasoning of these opinions as set forth herein and conclude that a Delaware-licensed lawyer may practice Delaware law, for clients with Delaware matters, while in a local jurisdiction, even if not licensed in such jurisdiction, subject to the conditions discussed herein.

This Opinion does not address whether and in what circumstances a lawyer who is *not* licensed in Delaware may represent Delaware clients from an office located outside of Delaware. *See generally, In re Tonwe*, 929 A. 2d 774 (Del. 2007); *In re Nadal*, 82 A. 3d 716 (Del. 2013).

ABA Formal Opinion 495 concluded:

> The purpose of Model Rule 5.5 is to protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible *as a lawyer* to a local jurisdiction where the lawyer is physically located, but not licensed. The [ABA] Committee's opinion is that, in the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction, while

> physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.

Rule 5.5 of the DLRPC is substantially similar to Model Rule 5.5. We conclude that the analysis of Model Rule 5.5 applies as well to Rule 5.5 of the DLRPC.

ABA Formal Opinion 495 addressed the question of establishing an office in a local jurisdiction in which a lawyer is not licensed as follows:

> Model Rule 5.5(b)(1) prohibits a lawyer from "establish[ing] an office or other systematic and continuous presence in [the] jurisdiction [in which the lawyer is not licensed] for the practice of law." Words in the rules, unless otherwise defined, are given their ordinary meaning. "Establish" means "to found, institute, build, or bring into being on a firm or stable basis." A local office is not "established" within the meaning of the rule by the lawyer working in the local jurisdiction if the lawyer does not hold out to the public an address in the local jurisdiction as an office and a local jurisdiction address does not appear on letterhead, business cards, websites, or other indicia of a lawyer's presence. Likewise it does not "establish" a systematic and continuous presence in the jurisdiction for the practice of law since the lawyer is neither practicing the law of the local jurisdiction nor holding out the availability to do so. The lawyer's physical presence in the local jurisdiction is incidental; it is not for the practice of law. Conversely, a lawyer who includes a local jurisdiction address on websites, letterhead, business cards, or advertising may be said to have established an office or a systematic and continuous presence in the local jurisdiction for the practice of law.

Subject to any contrary law of the local jurisdiction in which a Delaware lawyer may be practicing remotely, the Committee adopts the reasoning above with respect to Model Rule 5.5(b)(1) as applicable to lawyers licensed in Delaware who are providing legal services remotely in a local jurisdiction.[1] The purpose of Rule 5.5

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[1] Rule 5.5(b)(1) states that "A lawyer who is not admitted to practice in this jurisdiction shall not: (1) except as authorized by these Rules or other law, establish

of the DLRPC is to protect the public from unlicensed and unqualified practitioners of law.[2] This purpose is not served by barring Delaware-licensed lawyers from practicing the law of Delaware, for clients with matters in Delaware, just because such lawyers are physically located in a local jurisdiction where they are not licensed, provided that the law of the local jurisdiction does not prohibit such conduct, and such lawyers do not hold themselves out publicly as a lawyer in that jurisdiction or offer to or accept representation of clients in that jurisdiction.[3] Finally, for the avoidance of any doubt, this Opinion does not address any applicable court or similar rule, including Delaware Supreme Court Rule 12(a) and the requirement stated therein regarding the maintenance of a *bona fide* office for the practice of law in the State of Delaware.

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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." This Opinion addresses only the permissibility under Rule 5.5(a) of Delaware lawyers working remotely in a different, local jurisdiction. This Opinion does not address the permissibility under Rule 5.5(b)(1) of lawyers who are not admitted to practice in Delaware working remotely from Delaware.

[2] Other issues of legal ethics that may be raised by remote lawyering, but are not addressed in this Opinion, include Rule 1.6 (confidential information) and Rules 5.1, 5.2 and 5.3 (supervision of attorney and non-attorney staff). *See generally,* Rule 8.4(a) (one cannot attempt to violate the DLRPC through the acts of another.)

[3] ABA Formal Opinion 495 opines that: "[i]f a particular jurisdiction has made the determination, by statute, rule, case law, or opinion, that a lawyer working remotely while physically located in that jurisdiction constitutes the unauthorized or unlicensed practice of law, then Model Rule 5.5(a) also would prohibit the lawyer from doing so." We adopt that view with respect to Rule 5.5(a) of the DLRPC as well.

WORKER'S COMPENSATION SEMINAR

May 3, 2022

ETHICS

By Donald E. Marston, Esquire

Doroshow, Pasquale, Krawitz & Bhaya

I. Carter Page v. Oath, Inc. A/K/A: The Lin Wood Case

Judicial authority to discipline lawyers

- Role of the Supreme Court
- Role of the Trial Court

II. Superior Court Civil Rule 11

III. Contempt power of the Industrial Accident Board

- 19 Del. C. § 2320 (6)

IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

CARTER PAGE, an individual,	:	
	:	
Plaintiff,	:	C.A. No. S20C-07-030 CAK
	:	
v.	:	
	:	
OATH INC., a corporation,	:	
	:	
Defendant.	:	

Date Submitted: January 6, 2021
Date Decided: January 11, 2021

MEMORANDUM OPINION AND ORDER

Opinion following the Issuance of a Rule to Show Cause

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T. Brad Davey, Esquire and Jonathan A. Choa, Esquire, Potter Anderson & Corroon LLP, Hercules Plaza, P.O. Box 951, Wilmington, DE 19899. Attorney for Defendant

Elbert Lin, Esquire and David M. Parker, Equire, Hunton Andrews Kurth LLP, 951 E. Byrd Street, Richmond, VA 23219. Attorney for Defendant. *Pro Hac Vice*

Jonathan D. Reichman, Esquire and Jennifer Bloom, Esquire, Hunton Andrews Kurth LLP, 200 Park Avenue, New York, NY 10166. Attorney for Defendant. *Pro Hac Vice.*

Several weeks ago, and pursuant to Superior Court Civil Rule 90.1, I issued a Rule to Show Cause why the approval I had given to L. Lin Wood, Esquire to practice before this Court in this case should not be revoked. Mr. Wood is not licensed to practice law in Delaware. Practicing *pro hac vice* is a privilege and not a right. I respect the desire of litigants to select counsel of their choice. When out of state counsel is selected, however, I am required to ensure the appropriate level of integrity and competence.

During the course of this litigation, a number of high profile cases have been filed around the country challenging the Presidential election. The cases included, *inter alia*, suits in Georgia, Wisconsin and Michigan. Opinions were delivered in all of the States which were critical in various ways of the lawyering by the proponents of the lawsuits. In the Rule to Show Cause, I raised concerns I had after reviewing written decisions from Georgia and Wisconsin. Specifically, in Georgia, a lawsuit filed by Mr. Wood resulted in a determination that the suit was without basis in law or fact. The initial pleadings in the Wisconsin case were riddled with errors. I had concerns as listed in the Rule to Show Cause.

I gave Mr. Wood until January 6, 2021 to file a response. He did so at 10:09 p.m., January 6. The response focused primarily upon the fact that none

of the conduct I questioned occurred in my Court. The claim is factually correct. In his response, Mr. Wood writes:

> Absent conduct that prejudicially disrupts the proceedings, trial judges have no independent jurisdiction to enforce the Rules of Professional Conduct.

Mr. Wood also tells me it is the province of the Delaware Supreme Court to supervise the practice of law in Delaware and enforce our Rules of Professional Conduct. With that proposition I have no disagreement. In my view it misses the point and ignores the clear language of Rule 90.1. The response also contains the declaration of Charles Slanina, Esquire. I know Mr. Slanina and have the highest respect for him, especially for his work and expertise in the area of legal ethics. His declaration here focused on my lack of a role in lawyer discipline and was not helpful regarding the issue of the appropriateness and advisability of continuing *pro hac vice* permission.

Rule 90.1(e) reads in full:

> Withdrawal of attorneys admitted *pro hac vice* shall be governed by the provisions of Rule 90(b). The Court may revoke a *pro hac vice* admission *sua sponte* or upon the motion of a party, if it determines, after a hearing or other meaningful opportunity to respond, the continued admission *pro hac vice* to be inappropriate or inadvisable.

The standard then I am to apply is if the continued admission would

be inappropriate or inadvisable.

I have no intention to litigate here, or make any findings, as to whether or not Mr. Wood violated other States' Rules of Professional Conduct. I agree that is outside my authority. It is the province of the Delaware Office of Disciplinary Counsel, and ultimately the Delaware Supreme Court, or their counterparts in other jurisdictions, to make a factual determination as to whether Mr. Wood violated the Rules of Professional Conduct. Thus, the cases cited by Mr. Wood are inapposite and of no avail. In *Lendus, LLC v. Goode*, 2018 WL 6498674 (Del. Ch. Dec. 10, 2018) and *Crumpler v. Superior Court, ex. rel New Castle County*, Del. Supr., 56 A.3d 1000 (Del. 2012), the courts allowed the foreign lawyer to withdraw as *pro hac vice* counsel and referred alleged ethical violations to the Office of Disciplinary Counsel. Neither of those is happening here. Similarly, in *Kaplan v. Wyatt*, 1984 WL 8274 (Del. Ch. Jan. 18, 1984), Chancellor Brown, on very different facts, allowed *pro hac vice* counsel to continue his representation but stressed that this did not constitute approval of his conduct and that ethical violations could be addressed elsewhere.

What I am always required to do is ensure that those practicing before me are of sufficient character, and conduct themselves with sufficient civility and truthfulness. Violations of Rules of Professional Conduct are for other entities to

judge based upon an appropriate record following guidelines of due process. My role here is much more limited.

In response to my inquiry regarding the Georgia litigation Mr. Wood tells me he was (only) a party, and the case is on appeal. He also tells me that the affidavit filed in support of the case only contained errors. Neither defense holds merit with me. As an attorney, Mr. Wood has an obligation, whether on his own or for clients, to file only cases which have a good faith basis in fact or law. The Court's finding in Georgia otherwise indicates that the Georgia case was textbook frivolous litigation.

I am also troubled that an error-ridden affidavit of an expert witness would be filed in support of Mr. Wood's case. An attorney as experienced as Mr. Wood knows expert affidavits must be reviewed in detail to ensure accuracy before filing. Failure to do so is either mendacious or incompetent.

The response to the Rule with regard to the Wisconsin complaint calls the failings "proof reading errors". Failure to certify a complaint for

injunction or even serve the Defendants are not proof reading errors. The Complaint would not survive a law school civil procedure class.[1]

Prior to the pandemic, I watched daily counsel practice before me in a civil, ethical way to tirelessly advance the interests of their clients. It would dishonor them were I to allow this *pro hac vice* order to stand. The conduct of Mr. Wood, albeit not in my jurisdiction, exhibited a toxic stew of mendacity, prevarication and surprising incompetence. What has been shown in Court decisions of our sister States satisfies me that it would be inappropriate and inadvisable to continue Mr. Wood's permission to practice before this Court. I acknowledge that I preside over a small part of the legal world in a small state. However, we take pride in our bar.

One final matter. A number of events have occurred since the filing of the Rule to Show Cause. I have seen reports of "tweets" attributable to Mr. Wood. At least one tweet called for the arrest and execution of our Vice-President. Another alleged claims against the Chief Justice of the Supreme Court of the United States which are too disgusting and outrageous to repeat. Following

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[1]Mr. Wood in his response tells me he is not responsible, as he is listed as "Counsel for Notice". My reading of the docket is he was one of the counsel of record for the Plaintiffs, and thus fully responsible for the filing. Moreover, since I am not addressing choice of law issues with respect to professional misconduct, Delaware Rule of Professional Conduct 8.5 need not be discussed. Nor am I imposing any sanctions under Delaware Superior Court Civil Rule 11.

on top of these are the events of January 6, 2021 in our Nation's Capitol. No doubt these tweets, and many other things, incited these riots.

I am not here to litigate if Mr. Wood was ultimately the source of the incitement. I make no finding with regard to this conduct, and it does not form any part of the basis for my ruling. I reaffirm my limited role.

I am revoking my order granting Lin Wood, Esquire the privilege of representing the Plaintiff in this case. Given my ruling, here the hearing scheduled for January 13, 2021 is cancelled.[2] My staff will contact the parties to schedule as soon as possible a date for argument on the Defendant's Motion to Dismiss.

IT IS SO ORDERED.

Craig A. Karsnitz

cc: Prothonotary

FILED PROTHONOTARY
SUSSEX COUNTY
2021 JAN 11 P 1:16

[2] Rule 90.1 requires either a hearing on the issue or other meaningful opportunity to respond. Mr. Wood was afforded the latter.

EFiled: Jan 19 2022 09:07AM EST
Filing ID 67244130
Case Number 69,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CARTER PAGE, Defendant Below, Appellant, v. OATH INC., Plaintiff Below, Appellee.	§ § § § § § § § § § § §	No. 69, 2021 Court Below—Superior Court of the State of Delaware C.A. No: S20C-07-030

Submitted: November 10, 2021
Decided: January 19, 2022

Before **SEITZ**, Chief Justice; **VALIHURA**, **VAUGHN**, **TRAYNOR**, and **MONTGOMERY-REEVES**, Justices, constituting the Court *en banc*.

PER CURIAM:

O R D E R

This 19th day of January, 2022, the Court has considered the parties' briefs, the record on appeal, and the argument of counsel, and it appears that:

(1) In July 2020, Carter Page filed a defamation action in the Superior Court against Oath, Inc., alleging that certain of Oath's subsidiaries had published articles falsely accusing him of colluding with Russian agents to interfere with the 2016 presidential election.

(2) Shortly after that, Page's Delaware counsel moved under Delaware Superior Court Civil Rule 90.1 for the admission *pro hac vice* of L. Lin Wood, a

lawyer licensed to practice in Georgia, so that he could appear as Page's attorney in Page's defamation action. The court granted the motion.

(3) After Page filed an amended complaint, Oath moved to dismiss it. The parties briefed the motion and, on December 16, 2020, the court notified counsel that the court would hear oral argument on the motion on January 13, 2021.

(4) Two days later, the Superior Court *sua sponte* issued a Rule to Show Cause directing Wood to show why his admission *pro hac vice* should not be revoked. According to the Rule, "[i]t appear[ed] to the Court that, since the granting of Mr. Wood's [*pro hac vice*] motion, he ha[d] engaged in conduct in other jurisdictions, which, had it occurred in Delaware, would violate the Delaware Lawyers' Rules of Professional Conduct. . . ."[1]

(5) The Rule identified specific concerns regarding Wood's conduct in litigation in Georgia and Wisconsin related to the recent 2020 presidential election on November 3, 2020. Specifically, the court pointed to several pleading irregularities in an action filed in the United States District Court for the Eastern District of Wisconsin. As far as we can tell, the pleadings in that case were not signed by Wood but named him as an "attorney to be noticed." The court also referred to a complaint of questionable merit filed in the United States District Court for the Northern District of Georgia, in which, the court suspected, "Wood filed or

[1] App. to Opening Br. at A5.

caused to be filed [an expert affidavit] . . . [,] which contained materially false information. . . ."[2] In the Georgia case, Wood was the named plaintiff and was represented by counsel.

(6) The court directed Wood and his Delaware counsel to respond to the Rule to Show Cause by January 6, 2021, and stated that it would "hear counsel on [January 13, 2021—the date set for oral argument on the pending motion to dismiss] in response to the Rule to Show Cause."[3] The court also invited Oath to state its position, if it had one, but Oath declined.

(7) In his response, Wood denied generally that he had violated "any of the Delaware Professional Conduct Rules or conduct rules in any other jurisdiction in connection with his involvement in the matters cited by the Court."[4] More specifically, he noted that he had not appeared as counsel in the Georgia litigation but was the plaintiff and represented by counsel in that matter. And he further stated that there had been "no claim of sanctionable or disciplinary conduct against [his counsel] or his firm and certainly none against Wood as plaintiff"[5] in the Georgia litigation. In connection with a questionable affidavit referred to in the Rule to Show

[2] App. to Opening Br. at A7.
[3] *Id.* at A8.
[4] *Id.*at A12.
[5] *Id.* at A11.

Cause, Wood "denied any intent of the parties, including himself, to mislead the Court."[6]

(8) As to the Wisconsin litigation, Wood pointed out that he was not the attorney of record in that matter and was merely listed as "Counsel to be Noticed"[7] on the court's docket sheet. He further stated that he "never appeared" in the case during the brief eight-day period between the filing date and the date of dismissal.

(9) Despite legal argument that revocation of his *pro hac vice* admission was not warranted, Wood "request[ed] to withdraw his application for *pro hac vice* admission and his appearance"[8] in this case.

(10) On January 11, 2021, two days before the hearing on the defendant's motion to dismiss and the court's Rule to Show Cause, the Superior Court issued a Memorandum Opinion and Order revoking its prior order admitting Wood *pro hac vice* and cancelling the January 13 argument on the motion to dismiss. As of that date, neither the Georgia nor the Wisconsin court had cited Wood for sanctionable conduct.

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[6] *Id.* at A12.
[7] *Id.*
[8] *Id.* at A14.

(11) After Wood appealed to this Court, we appointed Matthew F. Boyer, Esquire as *amicus curiae* to file an answering brief in opposition to Wood's opening brief.[9]

(12) Superior Court Civil Rule 90.1(e) provides that "[t]he Court may revoke a pro hac vice admission sua sponte or upon the motion of a party, if it determines, after a hearing or other meaningful opportunity to respond, the continued admission pro hac vice to be inappropriate or inadvisable." We review a trial court's decision to revoke a lawyer's *pro hac vice* motion for abuse of discretion.[10]

(13) Despite the concerns expressed by the Superior Court in its Rule to Show Cause regarding whether Wood's conduct in the Georgia and Wisconsin case, had it occurred in Delaware, violated the Delaware Lawyers' Rule of Professional Conduct, it insisted in its opinion and order that it was not engaging in lawyer discipline. Instead, according to the court, it was merely making a determination under Superior Court Civil Rule 90.1(e) of the appropriateness and advisability of Wood's continued *pro hac vice* admission.

(14) The court did not explain, however, why Wood's request to withdraw his *pro hac vice* application and appearance did not adequately address the court's

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[9] We thank Mr. Boyer and his associate, Lauren P. DeLuca, for their assistance, which was professionally rendered in the best traditions of the Delaware Bar.

[10] *Vrem v. Pitts*, 44 A. 3d 923, 2012 WL 1622644, at *2 (Del. May 7, 2012) (TABLE) (noting that "the decision whether to admit an out-of-state attorney *pro hac vice* lies within the discretion of the Superior Court" and reviewing the trial court's revisiting and vacating of its prior order admitting attorney under abuse-of-discretion standard).

putatively limited concern. Instead, without affording Wood the opportunity to appear at the hearing that was scheduled two days hence, the stated purpose of which was to hear his response to the Rule to Show Cause, the court made factual findings adverse to Wood. For instance, the Court found that Wood's conduct in the Georgia and Wisconsin litigation, "albeit not in [the court's] jurisdiction, exhibited a toxic stew of mendacity, prevarication and surprising incompetence."[11]

(15) The Court also found that the Georgia court's conclusion that there was "no basis in fact or law to grant [Wood] the [injunctive] relief he [sought],"[12] "indicate[d] that the Georgia case was textbook frivolous litigation."[13] Yet neither the Georgia trial court nor the Eleventh Circuit Court of Appeals,[14] to which Wood appealed, made any findings that Wood's complaint was frivolous or filed in bad faith. As to this point, we do not view the Georgia court's determination that Wood's request for injunctive relief was without factual or legal merit as equivalent to a finding that his complaint was frivolous. To the contrary, our own ethical rules, by prohibiting a lawyer from asserting claims "unless there is a basis in law for doing so that is not frivolous,"[15] implicitly recognize that a claim ultimately found to lack a basis in law and fact can nonetheless be non-frivolous.

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[11] *Page v. Oath, Inc.*, 2021 WL 82383, at *2 (Del. Super. Ct. Jan. 11, 2021).
[12] 501 F. Supp. 3d at 1331.
[13] 2021 WL 82383 at *2.
[14] *See Wood v. Raffensperger*, 981 F.3d 1307 (11th Cir. 2020).
[15] DPCR Rule 3.1.

(16) More questionable yet was the court's insinuation that Wood was at least partially responsible for the troubling events that occurred at the United States Capitol on January 6, 2021—a topic not addressed in the Rule to Show Cause.

(17) In reaching these conclusions, the Superior Court resolved factual issues raised in Wood's written response and did so on a paper record and in advance of a hearing that had been scheduled to address the matter. And though the court said that its decision was not influenced by its conjecture that Wood's conduct had precipitated the traumatic events of January 6, its willingness to pin that on Wood without any evidence or giving Wood an opportunity to respond is indicative of an unfair process.

(18) Both the tone and the explicit language of the Superior Court's memorandum opinion and order suggest that the court's interest extended beyond the mere propriety and advisability of Wood's continued involvement in the case before it. In fact, one cannot read the court's order without concluding that the court intended to cast aspersions on Wood's character, referring to him as "either mendacious or incompetent"[16] and determining that he was not "of sufficient character"[17] to practice in the courts of our State. We offer no opinion on the accuracy of these characterizations, but we see no evidence in the Superior Court's

[16] 2021 WL 82383 at *2.
[17] *Id.*

record that supports them. Similarly, the court's foray into the events of January 6 and its unequivocal finding that "[n]o doubt [Wood's] tweets . . . incited the [] riots,"[18] was not justified given the scope of the Rule to Show Cause and the record.

(19) Because the Superior Court's revocation order is based on factual findings for which there is no support in the record and because the court failed to explain why Wood's withdrawal would not moot the court's concerns about the appropriateness or advisability of Wood's continued admission, we find that the court's revocation order was an abuse of discretion.

(20) To be clear, when a lawyer admitted *pro hac vice* to practice in a trial court of this state is accused of serious misconduct in another state, the admitting trial court is not powerless to act. It might be appropriate to issue—as the court did in this case—a rule to show cause why the out-of-state lawyer's *pro hac vice* status should not be revoked, and to act upon that rule if cause is not shown. But when, as here, the allegations of misconduct in another state have not yet been adjudicated, there is no assertion that the alleged misconduct has disrupted or adversely affected the proceedings in this State, and the lawyer agrees to withdraw his appearance and *pro hac vice* admission, it is an abuse of discretion to preclude the lawyer's motion to withdraw in favor of an involuntary revocation of the lawyer's admission.

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[18] *Id.*

NOW, THEREFORE, the Superior Court's January 11, 2021 Memorandum Opinion and Order revoking its August 18, 2020 Order granting Wood's application for admission to practice in this action *pro hac vice* is hereby VACATED.

contractor both in tort founded upon fraud and in contract for breach, the case was such that the plaintiff was required to separate various claims into separate counts. Twin Coach Co. v. Chance Vought Aircraft, Inc., 52 Del. 588, 163 A.2d 278 (1960).

Rule 11. Signing of pleadings, motions, and other papers: Representations to Court, sanctions.

(a) *Signature.* Every pleading, motion, and other paper shall be signed by at least 1 attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by statute or rule, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless it is corrected promptly after the omission of the signature is called to the attention of the attorney or party.

(b) *Representations to Court.* By representing to the Court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) *Sanctions.* If, after notice and a reasonable opportunity to respond, the Court determines that subdivision (b) has been violated, the Court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How initiated. (A) By motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the Court unless, within 21 days after service of the motion (or such other period as the Court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the Court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's initiative. On its own initiative, the Court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of sanction: Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or

comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a non monetary nature, an order to pay a penalty into Court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the Court's initiative unless the Court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the Court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) *Inapplicability to discovery.* Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37. (Amended, effective Nov. 1, 1984; Nov. 1, 1989; Jan. 1, 1991; Jan. 1, 1995.)

Cross references. — As to signing of motions and other papers, see Civil Rule 7(b)(3) of the Superior Court.

NOTES TO DECISIONS

Analysis

Pleadings.
— Signing: representations to court.
—— Honesty and good faith.
—— Evidentiary support.
—— Sanctions.
—— Signature requirement.

Pleadings.

— Signing: representations to court.

—— Honesty and good faith.

The party and his counsel who use a general denial under Superior Court Civil Rule 8 are subject to the obligations of honesty and good faith established by this rule. Bruce E.M. v. Dorothea A.M., 455 A.2d 866 (Del. 1983).

When a former husband, acting pro se, alleged in his motion for a protective order that an attorney for his former wife had physically coerced a child into giving an affidavit, these specious and libelous allegations put the motion in violation of Super. Ct. Civ. R. 11(b), and it was stricken in its entirety sua sponte. Buchanan v. Gay, 2006 Del. Super. LEXIS 382 (Del. Super. Ct. Sept. 20, 2006).

Where the bulk of the claims and legal contentions asserted by the attorney had no foundation in existing law, nor were they supported by a nonfrivolous argument for reversal or modification of existing law, the attorney proceeding pro se failed to act appropriately as an officer of the Superior Court of Delaware by violating Super. Ct. Civ. R. 11 and Law. Prof. Conduct R. 3.3(a)(1); as neither the county nor county officials which the attorney sued requested sanctions or a fee-shifting award in the case, the trial court did not impose any. Abbott v. Gordon, 2008 Del. Super. LEXIS 103 (Del. Super. Ct. Mar. 27, 2008), aff'd, 957 A.2d 1 (Del. 2008).

No abuse of discretion occurred in awarding attorneys' fees to a credit union as a sanction against a customer under Super. Ct. Civ. R. 11 for repeated, unwarranted litigation since the customer had brought previous claims which had been resolved against the customer involving the same issues. Shahin v. Del-One Del. Fed. Credit Union, 950 A.2d 659 (Del. 2008), cert. denied, — U.S. —, 129 S. Ct. 1040, — L. Ed. 2d — (2009).

—— Evidentiary support.

Trial court dismissed a limited liability company's (LLC's) claim that another company breached its contract to acquire the LLC because the LLC's complaint failed to allege that it met all conditions required for acquisition or that an extension which the other company allegedly gave it so it could meet those conditions was supported by consideration, but the court granted the LLC leave to amend its complaint to remedy those deficiencies. Merchantwired, LLC v. Transaction Network Servs., Inc., 2003 Del. Super. LEXIS 252 (Del. Super. Ct. July 16, 2003).

Where injured party's signed complaint and

(d) Covered incidents shall include any incident where the HAZMAT team members are notified to respond, including travel to and from the incident, the incident itself, and cleanup after the incident, and any training exercises.

§ 2320. Subpoena of witnesses; oaths; service of process; medical examination and testimony; various fees.

At the request of any party, subpoenas shall be issued under authority of the Department of Labor. The party requesting the subpoena shall obtain a blank subpoena from the Department and shall complete the necessary information.

(1) Every subpoena shall:

a. State the name of the Industrial Accident Board;

b. State the title of the action and the IAB hearing number;

c. State the last known address of the person(s) to be served;

d. Command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified;

e. Command each person directed to give testimony to appear at hearing or at deposition at a time and place therein specified;

f. Identify the name, address and phone number of the person issuing the subpoena;

g. State the following in boldface: "If you object to this subpoena you must immediately contact the Department of Labor, Office of Workers' Compensation and request a hearing to present your objections. Objections may be made if the subpoena (a) fails to allow reasonable time for compliance; (b) requires disclosure of privileged or other protected matter and no exception or waiver applies; or (c) subjects a person to undue burden."

(2) The following shall apply to the service of a subpoena:

a. A party issuing a subpoena shall be responsible for service of the subpoena and shall provide a copy of the completed subpoena to the Department of Labor.

b. A subpoena may be served by the Sheriff or by any person who is not a party and is not less than 18 years of age or by certified/return receipt requested mail to the last known address of the person listed on the subpoena.

c. Proof of service when necessary shall be made by filing with the Department of Labor a statement of the date and manner of service and of the names of the persons served.

d. A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The Board shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(3) Response to subpoena(s):

a. A person commanded to produce and permit inspection and copying may object to the inspection or copying of any or all designated materials or of the premises. If objection is made, the party serving the subpoena may, upon notice to the person commanded to produce, move at anytime for an order to compel production.

b. If a party objects to a subpoena they must immediately contact the Department of Labor and request a hearing before the Board to present the objection. The Board may quash or modify a subpoena if it (a) fails to allow reasonable time for compliance; (b) requires disclosure of privileged or other protected matter and no exception or waiver applies; or (c) subjects a person to undue burden.

c. A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

d. When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications or things not produced that is sufficient to enable the demanding party to contest the claim.

(4) The Board may administer oaths in any proceedings and in all other cases where it is necessary in the exercise of its powers and duties. The Board may examine persons as witnesses, take evidence, require production of documents and do all other things conformable to law which are necessary to effectively discharge the duties of office.

(5) Any process or order of the Department or any notice or paper requiring service may be served by any sheriff, deputy sheriff, constable or any employee of the Department and return thereof made to the Department. Such officer shall receive the same fees as are provided by law for like service in civil actions, except that if service is made by an employee of the Department, the employee shall not receive any fee but shall be paid the employee's actual expenses.

(6) If any person, in proceedings before the Board, disobeys or resists any lawful order or process, misbehaves during a hearing or so near the place thereof as to obstruct the hearing, neglects to produce after having been ordered to do so any pertinent document, refuses to appear

after having been subpoenaed or, upon appearing, refuses to take the oath as a witness or, after having taken the oath, refuses to be examined according to law, the Board shall certify the facts to any judge of the Superior Court, who shall thereupon hear the evidence as to the acts complained of. If the evidence so warrants, the judge shall punish such person in the same manner and to the same extent as for a contempt committed before the Superior Court or shall commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of or in the presence of the Superior Court.

(7) The Board may, in any case, upon the application of either party or on its own motion, appoint a disinterested and duly qualified physician to make any necessary medical examination of the employee and testify in respect thereto. Such medical examination shall not be referred to as an "Independent Medical Examination" or "IME" in any proceeding or on any document relating to a matter under this chapter; nor shall any examination, required by the employer, by any other doctor, who is an employee of an insurance company, or who is paid by an insurance company, or who is under contract to an insurance company, be referred to as an "Independent Medical Examination" or "IME." The physician will be allowed a reasonable fee subject to the approval of the Board, which fee shall be taxed as costs. The Board may impose a fine not to exceed $500 for each use of the term "Independent Medical Exam" or "IME" in violation of this subsection.

(8) Witness fees and mileage shall be computed at the rate allowed to witnesses in the Superior Court. Costs legally incurred may be taxed against either party or apportioned between parties at the sound discretion of the Board, as the justice of the case may require.

(9) Fees of physicians for services under Part II of this title shall be subject to the approval of the Board.

(10) Attorneys' fee. --

a. A reasonable attorneys' fee in an amount not to exceed 30 percent of the award or 10 times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller, shall be allowed by the Board to any employee awarded compensation under Part II of this title and taxed as costs against a party. A reasonable attorneys' fee in an amount not to exceed 30 percent of the award or 10 times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller, shall be allowed by the Board to any employee awarded compensation under Part II of this title and taxed as costs against a party. In order for the Board to award a fee under this section, counsel for an employee shall submit to the Board an Attorneys' Fee Affidavit in a form prescribed by or substantially in compliance with Board rules, along with a copy of the written fee agreement signed by the employee. Any fee awarded to an employee under this paragraph shall be applied to offset the fees that would otherwise be charged to the employee by that employee's attorney under the fee agreement.

b. In the event an offer to settle an issue pending before the Industrial Accident Board is communicated to the claimant or the claimant's attorney, in writing, at least 30 days prior to the trial date established by the Board on such issue and the offer thus communicated is

equal to or greater than the amount ultimately awarded by the Board at the trial on that issue, the provisions of paragraph a. of this subdivision shall have no application. If multiple issues are pending before the Board, said offer of settlement shall address each issue pending and shall state explicitly whether or not the offer on each issue is severable. The written offer shall also unequivocally state whether or not it includes medical witness fees and expenses and/or late cancellation fees relating to such medical witness fees and expenses.

c. Attorneys shall have written fee agreements to represent employees. Fee arrangements shall be governed by the rules of the Supreme Court concerning professional conduct.

d. If the fee agreement provides for a percentage of recovery, the attorney may collect the percentage at the time of payment of lump sums of accrued benefits. Any such fee shall be offset by fees paid by the employer or carrier as a result of agreement or Board order relating to that monetary amount.

e. An attorney shall not collect a fee from ongoing checks issued by the workers' compensation fund while a petition for review is pending.

f. An attorney shall not collect the fee from ongoing weekly benefit checks except in the following circumstance and as approved by the Board in paragraph (10)g. of this section:

1. Where the attorney certifies in an affidavit that the case is not economically viable for an attorney to agree to represent the employee without fees being deducted from ongoing weekly benefits and that the employee is likely to not be able to obtain the services of an attorney without paying a fee in such manner;

2. With the application the attorney shall submit a proposed fee agreement that limits the overall fee in that case to an amount equal to or less than the fee authorized in paragraph (10)a. of this section;

3. The application shall also contain an affidavit of the employee that the employee understands the fee arrangement, wants to be represented, and requests the Board authorize the arrangement, and further states whether and when the employee has been declined representation by other attorneys without approval under this paragraph.

g. When an attorney files an application to collect fees from the ongoing checks of an employee in accordance with the preceding paragraph (10)f. of this section, the designated hearing officer shall, within 10 days of receipt of the written request, respond in writing with an approval or denial. The response of the hearing officer shall be sent to the attorney upon disposition of the request. Upon notice of approval or denial of the request, that decision is a final decision of the Board.

h. Attorneys for employees may take such action as is necessary to comply with domestic support garnishment orders, or any other valid court orders, requiring sums be deducted from ongoing benefit checks.

(11) Except as otherwise provided in Part II of this title, all money or income received by the Department or the Board from taxes, fees and/or operations and all other sources whatsoever, directly or indirectly, shall be deposited to the credit of the State Treasurer and shall be credited to the General Fund of the State.

JONATHAN B. O'NEILL

Mr. O'Neill is a partner in the firm of Kimmel, Carter, Roman, Peltz & O'Neill, P.A., a Delaware personal injury and workers' compensation law firm. His practice is primarily focused on personal injury, workers' compensation, nursing home neglect, and construction accidents. Mr. O'Neill received his B.A. from the University of Delaware in 1997, and his J.D. from Widener University School of Law in 2003. Mr. O'Neill is admitted to practice law in Delaware, New Jersey, and the U.S. District Courts for the District of Delaware and the District of New Jersey. Mr. O'Neill is a Delaware State Bar Association (DSBA) member and was a past President of the Delaware Trial Lawyers Association (DTLA), as well as a member of the American Bar Association (ABA), and American Association for Justice (AAJ) Mr. O'Neill was recognized as The National Trial Lawyers Top 40 Under 40 in 2012-2015 for the State of Delaware. He was also recognized as a 2012-2015 Super Lawyers Rising Star, as well as a Top Lawyer in Delaware Today in 2014-2021.

Rule No. 11

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

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

(F) If a claimant is represented by legal counsel, legal counsel for the employer, the employer's insurance carrier or the employer may have direct contact with the claimant's healthcare provider only with the written or oral consent of the claimant's legal counsel. Legal counsel for the employer or the employer's insurance carrier may submit the healthcare records authorization to any healthcare provider for the production of existing healthcare records with notice to claimant's legal counsel.

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 request or fail to make reasonably diligent efforts to comply with a legally proper discovery request 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 the 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.

NOTES TO DECISIONS

Analysis

Client relations.

— Conflicts of interest.

It was plain error for the scrivener of a contested will to testify at trial and also participate in the proceedings as an attorney for one of the parties. In re Estate of Waters, 647 A.2d 1091 (Del. 1994).

Enforcement.

When a plaintiff, acting pro se, alleged that plaintiff's former spouse's attorney had violated the Lawyers' Rules of Professional Conduct, the plaintiff did not have standing to recover damages, even if there had been ethical violations; there was no basis for enforcement of a lawyer's ethical duties outside the framework of disciplinary proceedings. Buchanan v. Gay, 2006 Del. Super. LEXIS 382 (Del. Super. Ct. Sept. 20, 2006).

Attorney who had knowingly violated a protective order was properly sanctioned to public reprimand because the misconduct was serious, caused potential injury to the vulnerable teenage victim and caused actual injury to the legal system. In re Koyste, 111 A.3d 581 (Del. 2015).

Because the integrity of the proceedings and the court's truth-finding function involving company management disputes between the parties was threatened by plaintiffs' actions, based on their payments to witnesses in exchange for certain testimony, threats against witnesses and threats of civil litigation on baseless claims, their conspiracy claims were dismissed against all defendants; certain adverse inferences were also drawn as to other claims. OptimisCorp v. Waite, — A.3d —, 2015 Del. Ch. LEXIS 222 (Del. Ch. Aug. 26, 2015).

Professional conduct.

— Candor toward the tribunal.

Attorney violated subsection (b) of this Rule and Prof. Cond. Rules 3.3(a)(1) and 8.4(c) when he identified himself as client's "nephew" and submitted falsified evidence to the tribunal in the form of a petition that identified him as such. In re McCann, 669 A.2d 49 (Del. 1995).

Deputy attorney general was suspended from the practice of law for 6 months and 1 day for 7 ethical violations because the attorney initially falsely denied making statements (corroborated by a prothonotory also present) threatening a criminal defendant by implying that the State would brand that defendant an informant; the attorney admitted only part of the

substance, falsely accusing the defendant of eavesdropping, although later admitting that the attorney intended for the defendant to hear the intimidating statements about possible prison reprisals. In re Favata, 119 A.3d 1283 (Del. 2015).

Attorney was suspended for an additional 6 months where: (1) the attorney filed 2 complaints in Superior Court without maintaining a Delaware office, conduct prejudicial to the administration of justice; (2) the attorney created a false impression by testifying in a prior disciplinary matter that the attorney did not currently have any suits pending in Delaware; (3) the violations were knowing and caused potential harm to the legal system; (4) suspension was the presumptive sanction; and (5) the aggravating factors did not sufficiently outweigh the mitigating factors to warrant disbarment. In re Lankenau, 158 A.3d 451 (Del. 2017).

Disbarment was the appropriate sanction for an attorney's intentional misconduct in a medical negligence case, which included failing to disclose altered medical records, failing to supplement discovery responses and failing to correct a client's false testimony (despite multiple opportunities for corrective action); although the attorney had no prior disciplinary record and presented evidence of good character and reputation, dishonesty and other aggravating factors outweighed the mitigating factors. In re McCarthy, 173 A.3d 536 (Del. 2017).

— Illegal conduct.

Court imposed an 18-month suspension from the practice of law upon a lawyer who, inter alia, had concealed or destroyed potential evidence relevant to criminal charges against lawyer. In re Melvin, 807 A.2d 550 (Del. 2002).

In an attorney disciplinary matter, an attorney was disbarred as a result of committing various felonies (violently physically attacking that attorney's spouse in front of their children, destruction of evidence and continual violation of a protective order) in the State of Maine which violated Law. R. Prof. Conduct 3.4(a) and (c) and 8.4(b), (c), and (d); the Supreme Court of Delaware rejected the attorney's defense that the conduct was the result of 2 brain injuries, as the medical evidence did not address mental state at the time of the crimes and there was nothing in the

record to suggest that the attorney raised any defense to those crimes based on the claimed infirmity. In re Enna, 971 A.2d 110 (Del. 2009).
Because there was evidence to support the finding that a suspended attorney knowingly practiced law multiple times over more than 1 year during a disciplinary suspension, the lawyer violated multiple disciplinary rules; the appropriate sanction in the circumstances was disbarment. In re Member of the Bar of the Supreme Court of Del. Feuerhake, 89 A.3d 1058 (Del. 2014).

— Obligations to tribunal.

Failure to comply with directions of Court in relation to pleadings is a violation of this Rule. In re Tos, 576 A.2d 607 (Del. 1990).
Attorney violated subsection (c) when, in connection with the receivership of his law practice, he failed to cooperate with the receiver's efforts to gain control over the books and records of the practice. In re Maguire, 725 A.2d 417 (Del. 1999).
Where attorney violated Rule 1.2(a), Rule 1.3, Rule 1.4(a) and (b), Rule 1.15(a) and (d), Rule 1.16(b) and (d), and Rule 3.4 (c), attorney agreed to pay all the costs of the disciplinary proceedings, the costs of the investigatory audits performed by the Lawyers' Fund for Client Protection, the restitution noted in the parties stipulation, and consented to the imposition of a public reprimand with a public four-year probation with conditions. In re Solomon, 745 A.2d 874 (Del. 1999).
Where attorney failed to timely file the affidavit required by Rule 4(a)(1) of the Delaware Rules for Mandatory Continuing Legal Education, he violated subsection (c) of this section; thus, a public reprimand was the appropriate sanction, as the attorney had received a prior private admonition for similar misconduct in the past. In re McDonald, 755 A.2d 389 (Del. 2000).
Where attorney who had practiced for over 20 years and was found to be a good lawyer committed professional misconduct by failing to appear at a scheduled family court hearing and by failing to reschedule two other teleconferences in family court, which constituted violations of Del. Law. R. Prof. Conduct 3.4(c) and 8.4(d), the public probation period that attorney was already serving for prior misconduct was extended for an

additional year. In re Solomon, 847 A.2d 1122 (Del. 2004).

Law. R. Prof. Conduct 1.15(a), 1.15(d), 1.15A, 1.16(d), 3.4(c), 8.1(b), 8.4(d) were violated when for several years the attorney mishandled and improperly accounted for the attorney's client's funds and the attorney's escrow account and inaccurately completed certificates of compliance; the attorney was suspended for 3 years, could apply for reinstatement after 2 years if the attorney fulfilled conditions, and could not return to solo practice. In re Fountain, 878 A.2d 1167 (Del. 2005).

When an attorney handling 2 estates, inter alia, failed to probate the estates in a timely manner, the attorney violated Law. R. Prof. Conduct 3.4(c). In re Wilson, 886 A.2d 1279 (Del. 2005); In re Wilson, 900 A.2d 102 (Del. 2006).

Attorney, who was not authorized to practice law in Delaware, was disbarred for violating Law. R. Prof. Conduct 3.4(c) as, even if the attorney contacted Pennsylvania authorities to determine whether the attorney's conduct violated Delaware law, the attorney was told to contact Delaware authorities, and did not do so; the attorney knowingly violated a cease and desist order that prohibited the conduct. In re Tonwe, 929 A.2d 774 (Del. 2007).

While an attorney's violation of a cease and desist order would have supported a finding of contempt under Bd. Unauthorized Prac. L. R. 19, the Delaware Office of Disciplinary Counsel did not abuse its discretion in proceeding under the attorney disciplinary rules as the same conduct also constituted knowing disobedience of a court order in violation of Law. R. Prof. Conduct 3.4(c). In re Tonwe, 929 A.2d 774 (Del. 2007).

Attorney's conduct in meeting with a former client to provide legal advice, discussing legal services and fees with a potential client which led the client to believe that the attorney's residential services company could provide legal services and using the attorney's former law firm email address in communications with the public at least 6 weeks after a suspension order violated Law. Prof. Conduct R. 3.4(c). In re Davis, 43 A.3d 856 (Del. 2012).

The Board on Professional Responsibility did not find by clear and convincing evidence a violation of Law Prof. Conduct R. 3.4(c) where: (1)

the attorney constructively refused court-ordered appointments by presenting that attorney's own abilities in such a poor light to clients as to encourage them to seek other representation; but (2) the attorney requested documentation and continuances in both cases, a nominal sign of a willingness to proceed as attorney of record. In re Murray, 47 A.3d 972 (Del. 2012).

Where an attorney engaged in lateness or failure to appear at scheduled court appearances, tardy requests for postponements, failure to comply with court-imposed deadlines, "sloppy work and complete disregard to the Court's rules and procedure" and wasted judicial resources in 3 Delaware Courts, in addition to violating the duty of candor to the Supreme Court of Delaware, the attorney violated Law Prof. Conduct R. 1.1, 1.3, 3.3, 3.4 and 8.4. In re: Poliquin, 49 A.3d 1115 (Del. 2012).

Suspension for 6 months and 1 day was warranted where an attorney: (1) violated Law Prof. Conduct R. 1.1, 1.3, 3.3, 3.4 and 8.4; (2) had a record of 2 prior private admonitions; (3) engaged in a pattern of misconduct consisting of multiple offenses; (4) suffered from personal or emotional problems; (5) cooperated with the Office of Disciplinary Counsel in connection with the hearing; (6) was generally of good character, as evidenced by willingness to represent those who might not otherwise have had representation; and (7) exhibited remorse. In re: Poliquin, 49 A.3d 1115 (Del. 2012).

Attorney admittedly committed disciplinary violations by failing to comply with continuing legal education (CLE) requirements, and by failing to respond to communications with the CLE Commission about that deficiency. In re Poverman, 80 A.3d 960 (Del. 2013).

Attorney who committed various disciplinary violations with respect to the failure to complete continuing legal education requirements and reporting obligations relating thereto was publicly reprimanded with conditions, because: (1) the attorney acted knowingly and had no remorse; (2) the attorney did not cause injury to a client; and (3) the aggravating factors outweighed the mitigating ones. In re Poverman, 80 A.3d 960 (Del. 2013).

Where an attorney, in order to benefit a client, knowingly violated the

Chancery Court's seizure order enjoining persons from bringing claims relating to an insurer except in that Court, thereby causing injury to the insurer and the Insurance Commissioner and prejudice to the judicial system, the presumptive sanction of suspension was nevertheless reduced to public reprimand; mitigating factors outweighed the aggravating factors in the case. In re Brown, 103 A.3d 515 (Del. 2014).

Lawyer engaged in knowing misconduct, for which suspension was the appropriate discipline, by: (1) assisting a suspended lawyer in the unauthorized practice of law when the lawyer engaged the suspended lawyer to work on cases without determining the applicable restrictions; (2) failing to supervise the suspended lawyer adequately; and (3) giving the suspended lawyer a percentage of a contingency fee that included work performed both before and after the suspension. In re Martin, 105 A.3d 967 (Del. 2014).

It was prosecutorial misconduct to vouch for 1 of the State's 2 key witnesses, a friend of the victim, by stating in an objection during crossexamination that the witness had not spoken to defendant since the point in time defendant shot the victim. McCoy v. State, 112 A.3d 239 (Del. 2015).

Office of Disciplinary Counsel proved by clear and convincing evidence that an attorney committed professional conduct violations by knowingly causing images from a sexual abuse victim's cell phone to be shown to both the victim's parent and defendant in violation of a protective order. In re Koyste, 111 A.3d 581 (Del. 2015).

— Opposing counsel.

While an attorney has duties of fairness to an opposing party and may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, an attorney need not affirmatively reveal the weakness of his case to his opponent. In re Enstar Corp., 593 A.2d 543 (Del. Ch. 1991), rev'd on other grounds, 604 A.2d 404 (Del. 1992).

New trial was granted where defense counsel's comments to jury included an unjustified attack on the integrity of opposing counsel. Putney v. Rosin, 791 A.2d 902 (Del. Super. Ct. 2001).

— Witnesses.

All Delaware lawyers are bound by the Delaware Lawyers' Rules of Professional Conduct to refrain at trial from expressing a personal opinion on the credibility of a witness. Trump v. State, 753 A.2d 963 (Del. 2000). Defense counsel did not violate subsection (e) of this rule when, during closing argument, counsel made comments which compared a witness' testimony on the stand to information provided during meetings conducted prior to trial. Russo v. Medlab Clinical Testing, Inc., 2001 Del. Super. LEXIS 464 (Del. Super. Ct. Nov. 14, 2001).

First corporation's motion to approve its designation of a consultant was granted because, although the consultant was also to be a fact witness, the compensation the first corporation proposed to pay to the consultant related to that consultant's work as such, and not to any willingness to testify as to the facts underlying the claims; there was no Prof. Conduct R. 3.4(b) violation. BAE Sys. Info. & Elec. Sys. Integration v. Lockheed Martin Corp., 2011 Del. Ch. LEXIS 117 (Del. Ch. Aug. 10, 2011).

TERRI PARTON,	)	INDUSTRIAL ACCIDENT BOARD
CLAIMANT,	)	STATE OF DELAWARE
V.	)	IN AND FOR NEW CASTLE COUNTY
STATE OF DELAWARE,	)	
EMPLOYER.	)	HEARING NO. 807607

NATURE OF ACTION
LEGAL HEARING

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 14, 1989 in the Hearing Room of the Board, Sixth Floor, State Office Building, 820 North French Street, Wilmington, New Castle County, Delaware.

PRESENT:

Joyce L. Wright
William E. Matthews
James J. Hanley, Attorney, for the Board.

APPEARANCE:
Philip E. Herrmann, Esquire, for the Claimant.
B. Wilson Redfearn, Esquire, for the Employer/Carrier.

#

A hearing was held before the Industrial Accident Board on September 14, 1989, pursuant to a request for a legal hearing. The question presented to the Board is whether medical management personnel should have direct access to the medical provider. The medical provider includes the health-care provider, primarily the treating physician. The attorney for the claimant stated that there is no statutory basis authorizing this procedure, and it is also contrary to the Board's Rules.

The attorney for the employer stated that the employer does not have to pay for medical expenses unless they are reasonable and necessary, and the employer should have some way to determine whether the expenses being paid are reasonable and necessary. The attorney added that the employer also has an obligation to return the claimant to work and access to the health-care provider will assist these efforts.

DECISION

Board Rule 11(D) states that:

> "Legal counsel for the insurance carrier or self-insured employers will go through the claimant's legal counsel to obtain any medical information concerning the claimant. Legal counsel for one party may speak to the opposing party's medical witness(es) with the oral or written consent of the opposing party's legal counsel."

The Board finds that Board Rule 11 is determinative of the Board's Decision in this matter. The employer is asking for direct access to medical information without the consent of the opposing party's legal counsel. The Board concludes that if this Rule is to be amended, it should be amended by the specified rule-making process. The Board is without authority to amend its Rule as a result of a Legal Hearing. The attorney for the employer has advised the Board that "in the tort-law arena, Delaware Courts have held unequivocally that defense counsel enjoys the right to contact treating physicians directly", and cited the Board to Green v. Bloodsworth, Del. Super., 501 A.2d 1257 (1985). Essentially, the employer is requesting that the Industrial Accident Board extend the Court's holding in Green v. Bloodsworth to workman's compen-sation cases.

In the tort-law arena, a defendant cannot speak informally with the plaintiff's physician, unless the plaintiff signs a medical authorization or an order is obtained from the Court. Similarly, the employer in a workman's compensation case must obtain the consent of the claimant's attorney to have informal access to the claimant's medical witnesses. There is, however, one compelling difference between the procedures in Superior Court and the Board's Rules. In adopting Board Rule 11(D), the Board did not retain the authority to order the claimant to consent, if the claimant decides not to consent to the employer's request. The Board did not reserve authority to compel consent.

Since the Board is a creature of statute, it has only those powers that the statute expressly or impliedly grants. Since there is no express provision in the statute permitting the Board to issue orders compelling activity that is voluntary in the Board's Rules, the Board is without authority to bypass Rule 11(D) and grant the employer and its agents informal access to the health-care providers. Board Rule 11 clearly limits access to medical information and medical witnesses. The Board finds that it does not have authority to grant the employer's request in this case.

The public policy arguments discussed in the Green decision are equally applicable to the circumstances in a workman's compensation matter. The Green decision, however, concerned medical witnesses prior to the trial, and the request for direct access by medical management personnel and vocational rehabilitation personnel seems to concern the period after a hearing when compensability has been admitted.

The information sought by the medical management personnel and the vocational rehabilitation personnel seems only marginally related to litigation. It seems to be information that the service providers need to perform their services. The Board has no basis on the record to find that the service-care providers are sufficiently handicapped under the present Board procedures for the Board to recommend a change in Board Rule 11(D). The Board recommends this matter to the Rules Committee so that a full discussion of the present problems and the possible solutions can be commented upon by the attorneys practicing before the Board.

IT IS SO DECIDED this 14th day of September, 1989.

INDUSTRIAL ACCIDENT BOARD

/s/ Joyce L. Wright

Joyce L. Wright, Board Member

/s/ William E. Matthews

William E. Matthews, Board Member

ATTEST:

Edwina A. Gagnon
Secretary of the Board
This is to certify that the above and foregoing is a true and correct copy of an Award of the Industrial Accident Board of the State of Delaware in the case of Terri Parton v. State of Delaware.

Secretary - Mailed

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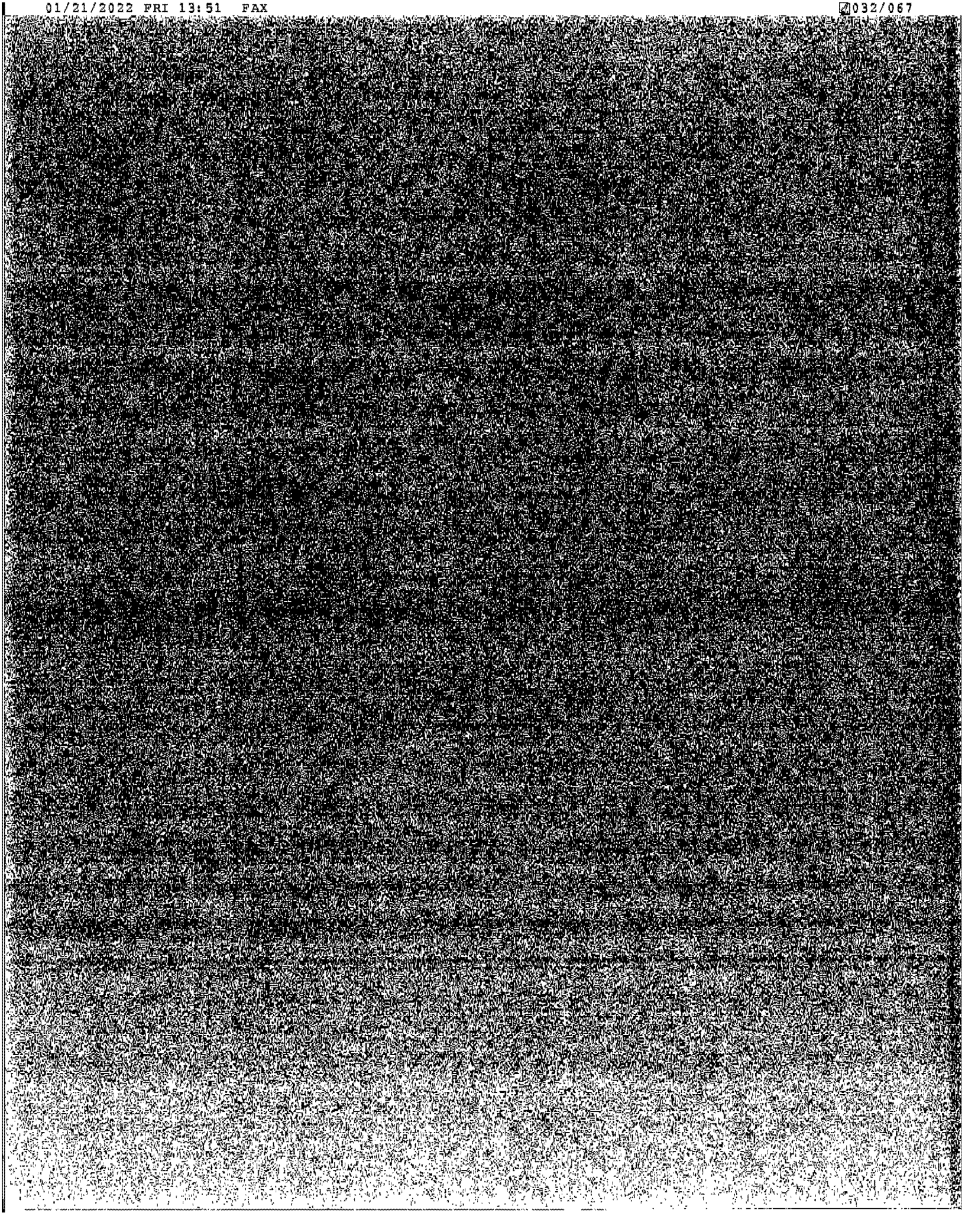

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

CHARLES HALL, Employee,	)	
v.	)	Hearing No. 908223
STANDARD DISTRIBUTING, Employer.	)	

ORDER

Presently before the Industrial Accident Board are two separate motions: one, filed by Charles Hall ("Claimant"), seeks sanctions from the Board against Standard Distributing (Standard") for alleged improper contact between counsel for Standard and Claimant's treating physician; and second, Standard requests a stay of a pending Petition to Determine Additional Compensation Due because a portion of the file is on appeal. The Board will address each motion *in seriatim*.

Claimant alleges, in his motion, that counsel for Standard violated the *Rules of the Industrial Accident Board*, Rule 11 (d) when he contacted Dr. Ali Kalamchi on or about December 20, 2005. More specifically, Claimant alleges that counsel contacted Dr. Kalamchi without permission and did not copy his counsel as a recipient of the letter. By way of answer, Standard does not dispute the existence of the communication but instead, claims that it did not violate Rule 11 (d) insofar as any contact through written means is allowable. Standard contends that the plain language of the rule only implicates "speaking" communication and not written communications.

Rule 11 (d) states, in pertinent part, that "[l]egal counsel for the insurance carrier or self-insured employers will go through the claimant's legal counsel to obtain any medical information concerning the claimant. Legal counsel for one party may speak to the opposing party's medical witnesses with the oral permission or written consent of the opposing party's legal counsel." In light of such language, the Board is convinced that Standard has violated the prohibition on contacting a claimant's medical witness without approval. No dispute exists that the communication occurred without the appropriate consent. As for whether the prohibition only extends to verbal communication, the Board believes the clear intent of the rule implicates both written and verbal communication. Irrespective of the impetus on which Standard wishes to assign or characterize his communication with Dr. Kalamchi, the ultimate result is that the contact violates the intent of the rule to protect and/or shield a claimant's medical file from dissemination *without some modicum of notice*. (Emphasis added). At minimum, an employer must obtain oral permission from seeking further discussion or clarification with a physician. To allow counsel for an employer the opportunity to communicate with a claimant's physician through written correspondence, and without notice to the party, violates the intent and rationale of the rule. Accordingly, the Board will not allow such contact to occur.

The Board, with over twenty-one years of experience in workers' compensation matters, is disturbed by the apparent wanton disregard of an applicable rule by an attorney with vast experience in these matters. Even more bothersome is the fact counsel never copied of notified counsel for Claimant. It was not until Dr. Kalamchi provided Claimant with a letter referencing his answer to Standard did such conduct come to light.

Under these circumstances, the Board will not let further conduct proceed unfettered. The goal of workers' compensation matters is to disseminate and litigate matters fully, fairly and

equitably. When one party violates these principles, as occurred here, the fairness of the entire system comes into question. While limited in the sanctions available to correct such behavior, the Board hereby ORDERS Standard to have no further contact with Dr. Kalamchi, or any other treating physician without the appropriate consent. Failure to comply with this order will warrant more aggressive action in the future should the need arise.

Claimant also requests the Board impose other sanctions on Standard, including, among others, implementation of a fine. The Board declines to do so at this time, noting that the *Rules of the Industrial Accident Board* do not provide such remedies to its disposal.

Claimant also requests the Board preclude Standard from using the opinion of Dr. Kalamchi as a basis for its upcoming Petition to Terminate Benefits. This request places the Board in a difficult situation. On one hand, the Board must evaluate whether Standard should reap the benefits of its unsavory conduct. Concurrently, the Board must examine whether Claimant should continue to remain on total disability although her own treating physician posits otherwise.

Considering all the above factors, the Board believes Standard may allege and/or use the opinion of Dr. Kalamchi in its upcoming Petition to Terminate Benefits. In reaching such a conclusion, the Board believes the proper method to remedy the situation is to allow a full and fair hearing on the merits. Only at that point, with the prospect of cross-examination, can the Board evaluate the totality of the evidence.

As to the request for a stay in the pending Petition to Determine Additional Compensation Due, the Board hereby DENIES said request. In particular, the Board finds no reason to stay the proceedings when the issue in the present petition appears to have no nexus to the matter on appeal.

IT IS SO ORDERED, this 17th day of March, 2006.

INDUSTRIAL ACCIDENT BOARD

LOWELL GROUNDLAND

IRVING LEVITT

bac
3-21-06

99 A.3d 639
Supreme Court of Delaware.

In the Matter of a Member of the Bar
of the Supreme Court of Delaware:
Fred BARAKAT, Respondent.

No. 397, 2013.
|
Submitted: Sept. 18, 2013.
|
Decided: Dec. 11, 2013.

Synopsis

Background: In attorney disciplinary proceedings, the Board on Professional Responsibility found misconduct and recommended a suspension.

[Holding:] The Supreme Court held that two year suspension was warranted for attorney who violated **rules** of professional conduct by failing to maintain Delaware office and failing to maintain adequate books and records.

Suspension ordered.

West Headnotes (7)

[1] **Attorneys and Legal Services** Court of last resort; Supreme Court

Supreme Court has the inherent and exclusive authority to discipline members of the Delaware Bar.

[2] **Attorneys and Legal Services** Recommendations below in general

Attorneys and Legal Services Evidence, verdict, and findings

Although recommendations in attorney discipline proceeding by Board on Professional Responsibility are instructive, Supreme Court is not bound by them; Court reviews the record independently to determine whether there is substantial evidence to support the Board's factual findings.

[3] **Attorneys and Legal Services** Obedience to court **rules**, orders, and **rulings**

Attorney violated **rule** of professional conduct by **knowingly** **disobeying** an **obligation** under the **rules** of a **tribunal** to maintain a bona fide office in Delaware; attorney's arrangement with landlord in which attorney could rent a conference room and utilize secretarial reproduction, facsimile, word processing, and shipping services did not constitute a "bona fide office," even if attorney was reachable by telephone. Sup.Ct.Rules, **Rule** 12; **Rules** of Prof.Conduct, **Rule** 3.4(c).

1 Cases that cite this headnote

[4] **Attorneys and Legal Services** Conduct as to Disciplinary Process

Attorney violated **rule** of professional conduct by **knowingly** making a false statement in connection with a disciplinary matter and by engaging in conduct involving dishonesty when he informed the Office of Disciplinary Counsel he was meeting the requirement to maintain a bona fide office for the practice of law in Delaware, where attorney claimed to have four employees at his Delaware office when in fact he had no employees and only occasionally rented office space in the building. Sup.Ct.Rules, **Rule** 12; **Rules** of Prof.Conduct, **Rules** 8.1(a), 8.4(c).

1 Cases that cite this headnote

[5] **Attorneys and Legal Services** Money; Funds

Attorney violated **rule** of professional conduct regarding safekeeping of client property when he deposited any fee under $2500 automatically into his operating account; attorney was required to put any portion of an unearned advance fee into a fiduciary account. **Rules** of Prof.Conduct, **Rule** 1.15.

1 Cases that cite this headnote

[6] **Attorneys and Legal Services** Agreements and retainers in general

Attorney violated **rule** of professional conduct by providing written retainer agreements that failed to state the advance fee was refundable if it was not earned; although retainer agreements stated that a portion of the retainer was non-refundable at a certain point, the agreements did not state that unearned fees were refundable. **Rules** of Prof.Conduct, **Rule** 1.15(f).

[7] **Attorneys and Legal Services** Definite Suspension

Attorneys and Legal Services Mishandling of trust account or client funds

Two year suspension from the practice of law was warranted for attorney who violated **rules** of professional conduct by failing to maintain Delaware office, making false statements in a disciplinary investigation, and failing to maintain adequate books and records. Sup.Ct.Rules, **Rule** 12; **Rules** of Prof.Conduct, **Rules** 1.15, 8.1(a), 8.4(c).

3 Cases that cite this headnote

***640** Disciplinary Proceeding Upon Final Report of the Board on Professional Responsibility of the Supreme Court. **SUSPENSION IMPOSED.**

Attorneys and Law Firms

Patricia Bartley Schwartz, Esquire, Office of Disciplinary Counsel, Wilmington, Delaware.

Fred Barakat, Esquire, Wilmington, Delaware.

Before HOLLAND, BERGER and JACOBS, Justices.

Opinion

PER CURIAM:

Pending before us is an attorney disciplinary proceeding. Fred Barakat, Esquire, was found to have failed to maintain a bona fide office for the practice of law in Delaware, and to maintain adequate books and records as required by the Delaware Lawyers' **Rules** of Professional Conduct (the "**Rules**"). In a Report dated July 25, 2013, the Board on Professional Responsibility of the Supreme Court of Delaware (the "Board") found that Barakat's course of conduct violated **Rules** 1.5(f), 1.15(a), 1.15(d), 3.4(c), 8.1(a), 8.4(c), and 8.4(d). Barakat maintains that his conduct has not violated the **Rules**, and objects to the Board's findings on both factual and legal grounds. The Office of Disciplinary Counsel ("ODC") does not object to the Board's Report, which recommends that Barakat be suspended for two years.

We find that, with respect to Counts I through V, and VII through XII of the ODC Petition, Barakat's objections lack merit. Regarding Count VI, we find the record not sufficiently developed to support the Board's finding of a violation, [1] and thus dismiss that Count. We, therefore, adopt the Board's findings on Counts I through V and VII through XII. Lastly, we independently determine that Barakat should be suspended from the practice of law for two years, as the Board recommended.

Facts [2]

Barakat has been a member of the Delaware Bar since 1992. [3] Since January 2005, Barakat's address of record with this Court has been 901 North Market Street, Suite 460, in Wilmington, Delaware. Barakat also works from his home in Chadds Ford, Pennsylvania. [4]

Barakat's 901 North Market Street office is not an "office" in the traditional sense. Barakat's lease does not include any designated office space that is exclusively his. Rather, the employees of the landlord collect Barakat's mail and greet any visitors Barakat may have. [5] The building security guards direct visitors to the fourth floor, where a receptionist is stationed during normal business hours. [6] Under this arrangement, Barakat is entitled, ***641** for additional fees, to rent a conference room or office space, and utilize

secretarial, reproduction, facsimile, word processing, and shipping services. [7]

The landlord's billing records (the "Occupant Ledger"), and the testimony of two employees who work on the fourth floor, evidence that Barakat's presence at 901 North Market Street is "sporadic and unscheduled." [8] The Occupant Ledger reflects that in 2010, Barakat rented conference space approximately three times in April, four times in May, twice in June, once in both September and October, and twice in November. [9] This pattern of use continued through August 2012. [10] In October 2011, Barakat informed the United States Internal Revenue Service ("IRS") that "all of [his] work aside from meeting clients, court room appearances and depositions are conducted at [his] home [in Pennsylvania]," and that he has no employees at his Wilmington office. [11]

In 2005, the ODC inquired about Barakat's compliance with Supreme Court **Rule** 12, which requires Delaware attorneys to maintain a "bona fide" office for the practice of law in Delaware. [12] By letter dated May 5, 2005, the ODC informed Barakat of the requirements of **Rule** 12. [13] Barakat responded to that letter on May 6, 2005. There is no evidence, however, that he responded to the ODC's later (May 17, 2005) request for additional information. [14]

In 2010, the ODC renewed its inquiry into Barakat's **Rule** 12 compliance. Barakat responded by letter dated December 19, 2010, asserting that advances in technology enabled him to handle client matters effectively, despite his lack of presence in the Wilmington office. [15] The ODC again reminded Barakat that **Rule** 12 requires, at a minimum, a " 'responsible person acting on [your] behalf'—i.e., accountable and answerable to you, by employment or by contract." [16] On July 2, 2011, Barakat sent the ODC a letter, asserting, *inter alia,* that he had four employees in his Wilmington office and that he would be present in the Wilmington office "some portion of ... 3 days per week, most weeks." [17] **Based on** that representation, the ODC dismissed the investigation with a formal warning, stating that its purpose was "to directly inform and educate [Barakat] as to conduct which ... has raised ***642** professional concerns." [18]

Barakat's books and records were first reviewed in 2008 by the firm of Master, Sidlow, the auditors for the Lawyers' Fund for Client Protection (the "LFCP"). That compliance audit, which covered the six month period ending December 31, 2007, revealed that Barakat's "books and records were deficient based upon his failure to prepare bank reconciliations or client subsidiary ledgers and the inability to prove cash receipt entries to deposit totals." [19] In a letter dated July 7, 2008, Barakat assured the LFCP that the "deficiencies noted in the report have been corrected and the books are now and will continue to be properly maintained." [20]

In February 2012, after a judicial referral alerting the ODC to possible professional misconduct, Bryan Morgan, a senior Master, Sidlow accountant, performed a second compliance audit covering the six month period ending December 31, 2011. Mr. Morgan's 2011 Audit Report concluded that Barakat's books and records practices were irregular. [21]

After the February 2012 audit, the ODC requested an in-depth, forensic audit of Barakat's books and records for the period January 1, 2008 through December 31, 2011. Mr. Joseph McCullough, who conducted that audit, found similar deficiencies in Barakat's bookkeeping practices, including not reporting or improperly recording fees received in cash, depositing most retainer fees directly into his operating account, commingling personal funds into the operating account, and failing to prepare monthly bank reconciliations or client subsidiary ledgers. [22] Indeed, Barakat's accounts and records were in such disarray that McCullough was unable to complete the audit. [23] During the Board proceedings, Barakat admitted that he "pockets" cash retainers, rarely deposits retainers he receives into his escrow account, commingles personal funds in his operating account, and does not maintain bank reconciliations. [24]

Procedural Background

The ODC filed a Petition for Discipline with the Board on October 10, 2012. The Petition alleged twelve Counts of **Rules** violations "arising out of (1) a failure by Respondent to meet the requirements of a bona fide office for the practice of law in Delaware, (2) misrepresentations by Respondent regarding whether he maintains a bona fide office, (3) books and records deficiencies, (4) mishandling of client funds, and (5) misrepresentations by Respondent on his Supreme Court Certificates of Compliance from 2008 to 2012." [25] The Petition alleged that this conduct violated **Rules** 1.5(f), 1.15(a), 1.15(d), 3.4(c), 8.1(a), 8.4(c), and 8.4(d). [26]

*643 Barakat filed a Response to Petition for Discipline on October 25, 2012, and an Amended Response on October 31, 2012.[27] The Board held a hearing on February 12, 2013, at which Ms. Patricia Fry Cox and Ms. April Yanacek,[28] as well as Messrs. Bryan Morgan and Joseph McCullough, the auditors, testified. Barakat also testified.[29]

After the hearing, the Board granted two motions by Barakat to supplement the record. The ODC and Barakat both submitted written closing submissions on March 22, 2013, and on April 4, 2013 both parties submitted written replies. The Board issued its findings and recommendations in a report dated July 25, 2013 (the "Board Report"). The Board concluded that the ODC had established by clear and convincing evidence all twelve Counts of the Petition, and recommended that a two-year suspension be imposed.[30]

ANALYSIS

[1] [2] This Court has the "inherent and exclusive authority to discipline members of the Delaware Bar."[31] Although Board recommendations are instructive, we are not bound by them.[32] We review the record independently to determine whether there is substantial evidence to support the Board's factual findings.[33] We review the Board's conclusions of law *de novo.*[34]

I. Bona Fide Office

[3] Under Count I, the Board concluded that Barakat violated **Rule** 3.4(c) by "**knowingly** **disobeying** an **obligation** under the **rules** of a **tribunal** to maintain a bona fide office in Delaware."[35] Barakat advances several weak objections to that finding.

First, he argues that that finding is barred by *res judicata* and collateral estoppel because of the May 5, 2005 and May 17, 2005 letters he received from the ODC that (he alleges) acquiesced in his office arrangements.[36] Addressing Barakat's Motion *in Limine,* the Board correctly concluded that the bona fide office issue had not yet been adjudicated, and that the "Supreme Court's final order will be the first adjudication of the bona fide office issue to which the principles of *res judicata* and/or collateral estoppel may apply."[37]

*644 Second, Barakat argues that he meets the requirements of Supreme Court **Rule** 12, because he is reachable by phone, and, therefore, has complied with the **Rule**.[38] The **Rule** requires that the *office* "be a place where the attorney or a responsible person acting on the attorney's behalf can be reached in person or by telephone," and have "the customary facilities for engaging in the practice of law."[39] Barakat's July 2, 2011 letter to the ODC undermines his claim that being reachable by phone is sufficient under **Rule** 12. Were (remote) phone access sufficient, Barakat would have had no reason to represent that he was present three days per week and that a paralegal was present two days per week.[40]

Finally, Barakat appears to suggest that Supreme Court **Rule** 12, as interpreted by the ODC, imposes an unconstitutional residency requirement, and violates the commerce clause of the United States Constitution.[41] That claim is unsupported. Barakat cites *Tolchin v. Supreme Court of the State of N.J.,* a case that involved a challenge of New Jersey's bona fide office requirement. In *Tolchin,* the Third Circuit held that the requirement violated neither the commerce clause, nor the privileges and immunities clause, nor the equal protection clause.[42]

[4] With respect to Counts II and III, the Board found that Barakat violated **Rule** 8.1(a) "by **knowingly** making a false statement in connection with a disciplinary matter," and also **Rule** 8.4(c),[43] "by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation when he informed the ODC he was meeting the requirement to maintain a bona fide office for the practice of law in Delaware."[44] Barakat claims that his July 2, 2011 letter was neither **knowingly** false nor dishonest or fraudulent, because when he wrote the letter, his court schedule and record of bank deposits showed that he was in Delaware approximately 12–15 days per month.[45] Even if Barakat was in his "office" three days per week, that does not cure his misrepresentations about his staff in the Wilmington office and their activities managing his practice.[46]

Regarding Count IV, the Board found that Barakat violated **Rule** 8.4(d) by "engaging in conduct that is prejudicial to the administration of justice by failing to maintain a bona fide office for the practice of law in Delaware."[47] Although Barakat objects generally to all of the Counts, he *645

advances no specific argument regarding this particular one. Therefore, the finding is conceded.

It is clear from the record that the Board's findings on Counts I–IV are supported by substantial evidence.

II. Accounting Misconduct

Counts V through X are based on Barakat's books and records practices, including the safeguarding of client funds. V and VI are based on Barakat's dealings with a particular client (Giles). VII through X charge general violations. [48]

As for Counts VII through X, the Board concluded, based on the findings of the audits conducted by Messrs. Morgan and McCullough, that Barakat had violated Rules 1.5(f) (Count VII), [49] 1.15(a) (Count VIII), [50] 1.15(d)(3) (Count IX), [51] and 1.15(d) (Count X). [52] Barakat objects to the admission of the 2011 Audit Report, Mr. McCullough's Audit Report, and the testimony of both Mr. Morgan and Mr. McCullough. [53] Barakat claims that the testimony and reports lack scientific validity under both Delaware Rule of Evidence 705 and the standard established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). [54] Messrs. Morgan and McCullough are both experienced auditors who are very familiar with the auditing procedures of the LFCP. [55] Morgan has performed "approximately one hundred Rule 1.15 and 1.5(f) compliance audits for the LFCP using the standard procedure and following the outline developed by LFCP...." [56] Morgan testified that when conducting his compliance audit of Barakat, he followed LFCP's standard procedure. [57] McCullough is an experienced accounting professional who spent thirty years as a special agent in the criminal division of the IRS specializing in white collar crime and financial recordkeeping. [58] He has also performed approximately two hundred forensic audits, and between fifty and sixty audits for the LFCP. [59]

[5] Barakat also contends that he has maintained his records and accounts in ***646** compliance with the Rules. [60] Barakat's primary argument is that he complied with the Comments to Rule 1.5 and that the auditors erroneously failed to account for those Comments in their audits. Barakat specifically relies on Comments 10 and 12. [61] Comment 10 provides in relevant part that:

> 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.... 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.* [62]

Comment 12 is substantially similar. It provides that in certain contexts, such as bankruptcy representation, fees greater than $2500 may be deemed earned upon the occurrence of a particular event. [63]

First, these Comments do not mean what Barakat claims they do. By their plain language, the Comments do not authorize an attorney to deposit any fee under $2500 automatically into his operating account (which Barakat admitted is his practice). [64] By the Comments' own terms, if an attorney receives an advance fee of less than $2500, of which he earns a portion upon commencing work, *the unearned portion of the advance fee must still be placed in a fiduciary account.* [65] Even if (counterfactually) the Comments could be read to condone Barakat's accounting practices, the Preamble to the Rules clearly states that the Comments are not authoritative and are meant only for interpretive guidance. [66]

[6] Regarding his retainer agreements (at issue in Count VII), Barakat argues that he satisfied Rule 1.5(f) because his agreements state that a portion of the retainer is "non-refundable" at a certain point. [67] Although one might infer from this that the balance of the retainer is refundable, Rule 1.5(f) requires an explanation that *unearned* fees are refundable. Barakat's retainer agreement does not explain that unearned fees are refundable.

The audit reports and the testimony of Morgan and McCullough establish that the Board's findings on Counts VII–X are supported by substantial evidence.

Count VI charges Barakat with failing to deposit an advance fee from his client, Giles, into his trust account. [68] Barakat objects to this Count. The record on ***647** Count VI is unclear and undeveloped. Barakat claims that Giles paid him $800 upon the signing of a bankruptcy fee agreement (dated April 16, 2008), [69] which "basically covered the work [he] had done that day." [70] The Board Report does not adequately

address Barakat's claim that he earned the fee *that same day.* [71] We therefore conclude that the Board's findings on this Count are not supported by substantial evidence.

III. Certification Statements

Counts XI and XII charge false statements made by Barakat on his 2008–2012 Certificates of Compliance. Barakat certified that (i) "[a]ny and all fiduciary funds held are maintained in an attorney trust/escrow account;" (ii) "[c]heck register balances are reconciled monthly to bank statement balances;" [72] (iii) "[w]ith respect to attorney trust/escrow account(s), there is a client subsidiary ledger maintained with monthly listings;" and (iv) "[w]ith respect to attorney trust/escrow account(s), the reconciled end-of-month cash balance agrees with the total of the client balance listing of the client subsidiary ledger." [73] The Board concluded that Barakat did not follow any of these procedures, should have so reported, and therefore violated **Rules** 8.4(c) and 8.4(d). [74] We agree.

In his objection to the Board Report, Barakat points to (allegedly) exonerating statements made by the auditors during cross-examination. [75] This objection lacks merit. The testimony to which Barakat points is either in response to hypothetical questions that assume the Comments to **Rule** 1.5 (as interpreted by Barakat) govern, or is cited out of context. [76] Moreover, Messrs. Morgan and McCullough were called to testify about their respective audits, not to offer legal opinions.

IV. Sanctions

[7] This Court follows the ABA standards for imposing lawyer sanctions. "The ABA framework consists of four key factors to be considered by the Court: (a) the ethical duty violated; (b) the lawyer's mental state; (c) the extent of the actual or potential injury caused by the lawyer's misconduct; and (d) aggravating and mitigating factors." [77]

Regarding the first three factors, the Board found that Barakat had violated duties owed to clients, the legal system and the legal profession. The Board also concluded, that **based on** the history of interactions with the ODC, Barakat was aware of his **obligations** to maintain a bona fide office in Delaware and to maintain his books and records in accordance with the **Rules**. Although no actual harm to clients was demonstrated, the Board concluded that Barakat's failure to maintain adequate books and record presented a serious risk of harm to clients. [78]

***648** In determining the appropriate sanctions for Barakat, the Board identified six aggravating factors—dishonest or selfish motive, a pattern of misconduct, multiple offenses, the submission of false and/or misleading statements, an unwillingness to admit the wrongful nature of his conduct, and substantial experience in the practice of law—and only two mitigating factors—absence of a prior disciplinary record, and Barakat's cooperative attitude. [79]

Barakat argues that the two year suspension recommended by the Board is disproportionate to the adjudicated violations. He points to *In re Doughty,* as support for a more lenient punishment. [80] Although that case involved similar violations, this Court found that Mr. Doughty had "negligently" engaged in the misconduct, had no dishonest motive, and had engaged in "timely, good faith remedial efforts." [81] The factors supporting relative leniency in Doughty's case are simply not present in Barakat's case.

CONCLUSION

For the reasons stated above, we adopt the terms of the Board's recommendation with respect to Counts I–V, and Counts VII–XII, and dismiss Count VI. It is hereby ordered that Barakat be disciplined as follows:

1. Barakat hereby is immediately suspended from the practice of law in this State for a period of two years;

2. During the period of suspension, Barakat must fully cooperate with the ODC in its efforts to monitor his compliance with the suspension order and shall not: (a) have any contact directly or indirectly constituting the practice of law, including the sharing or receipt of legal fees, **except** that Barakat is entitled to any legal fees earned prior to the date of this order; (b) share in any legal fees earned for services by others during such period of suspension. Barakat also shall be prohibited from having any contact with clients or prospective clients or witnesses or prospective witnesses when acting as a paralegal, legal assistant, or law clerk under the supervision of a member of the Delaware Bar;

3. The Office of Disciplinary Counsel (ODC) shall file a petition in the Court of Chancery for the appointment of a

Receiver for Barakat's law practice pursuant to Rule 24 of the Delaware Lawyers' Rules of Disciplinary Procedure; the Receiver shall provide notice to clients, adverse parties, and others as required by Rule 23 of the Delaware Lawyers' Rules of Disciplinary Procedure; and the Receiver shall make such arrangements as may be necessary to protect the interests of any of Barakat's clients and the public;

4. Barakat shall cooperate in all respects with the Receiver, including providing him/her with all law office books and records;

5. Barakat shall promptly pay the costs of the disciplinary proceedings in accordance with the Delaware Lawyers' Rules of Disciplinary Procedure when presented with a statement of costs by the ODC;

*649 6. As reinstatement is not automatic, should Barakat apply for reinstatement, any such application must be made pursuant to Rule 22 of the Delaware Lawyers' Rules of Disciplinary Procedure following the suspension period; and

7. This Order shall be disseminated by the ODC as provided in Rule 14 of the Delaware Lawyers' Rules of Disciplinary Procedure.

All Citations

99 A.3d 639

Footnotes

1 The Board addressed Count VI in only a conclusory manner that, because of the lack of analysis, gives us nothing of substance to review.
2 Barakat's objections to the facts, if any, are addressed in the Analysis, *infra.*
3 Report of the Board on Professional Responsibility, Board Case No. 2012–0019–B (July 25, 2013), at 3 (Bd. Rep.); Amended Resp. to Petition, para. 1 (Am. Resp.).
4 Bd. Rep. at 4; Am. Resp., paras. 1, 6.
5 Bd. Rep. at 4; Tr. at 32, 43–44, 60.
6 Bd. Rep. at 4; Tr. at 43–44.
7 Bd. Rep. at 5; ODC Ex. 8.
8 Bd. Rep. at 9; ODC Ex. 10; Tr. at 49–50, 56–57.
9 Barakat also incurred charges for other, undated use of a conference room. Bd. Rep. at 9; ODC Ex. 10.
10 Bd. Rep. at 9–10; ODC Ex. 10.
11 Bd. Rep. at 7–8; ODC Ex. 17.
12 SUPR. CT. R. 12(d) defines a “bona fide” office as an office where the “attorney practices by being there a substantial and scheduled portion of time during ordinary business hours in the traditional work week. An attorney is deemed to be in an office even if temporarily absent from it if the duties of the law practice are actively conducted by the attorney from that office. An office must be a place where the attorney or a responsible person acting on the attorney's behalf can be reached in person or by telephone during normal business hours and which has the customary facilities for engaging in the practice of law. A bona fide office is more than a mail drop, a summer home which is unattended during a substantial portion of the year or an answering, telephone forwarding, secretarial or similar service.”
13 Bd. Rep. at 5; ODC Ex. 1.
14 Bd. Rep. at 6.
15 *Id.;* ODC Ex. 4.
16 Bd. Rep. at 6; ODC Ex. 5.
17 Bd. Rep. at 7; ODC Ex. 6.
18 ODC Ex. 7.
19 Bd. Rep. at 10–11; ODC Ex. 26.

20 Bd. Rep. at 11; ODC Ex. 27.

21 Bd. Rep. at 11–13; ODC Ex. 28. The 2011 Audit Report noted that Barakat did not maintain monthly bank reconciliations; cash receipt entries could not be proved to deposit totals; Barakat's retainer agreements did not state that the "fee is refundable if not earned;" and that Barakat deposited retainers directly into the operating account, or personally retained cash retainers. In addition, Barakat incorrectly answered four questions in his 2011 Certificate of Compliance (to this Court) regarding his books and records practices.

22 Bd. Rep. at 14; ODC Ex. 29.

23 *Id.*

24 Bd. Rep. at 15; Tr. at 319, 338, 347, 365.

25 Bd. Rep. at 3; Petition for Discipline.

26 *Id.*

27 A supplement to the original response was received by the Board on November 5, 2012, and a supplement to the amended response was received on February 11, 2013.

28 Ms. Fry Cox is a property manager for 901 N. Market Street, and Ms. Yanacek is an assistant to Ms. Fry Cox. Both work on the fourth floor of the building and Ms. Yanacek sits in the center of the fourth floor lobby. Tr. at 24–25, 54.

29 Bd. Rep. at 1–3.

30 *Id.* at 20–29, 37.

31 *In re Martin,* 2011 WL 2473325, at *3 (Del. June 22, 2011) (citing *In re Abbott,* 925 A.2d 482, 484 (Del.2007)).

32 *Id.*

33 *Id.*

34 *Id.*

35 Bd. Rep. at 21; SUPR. CT. R. 12(d); PROF. COND. R. 3.4(c).

36 Respondent's Obj. at 9–10. Barakat filed a Motion *in Limine* prior to the hearing to bar the testimony of April Yanacek and Patty Fry Cox **based on** the same theory. Bd. Rep. at 2.

37 Bd. Rep. at 20. Barakat's reliance on *Betts v. Townsends, Inc.,* 765 A.2d 531 (Del.2000), and *City of Newark v. Unemployment Ins. Appeal Bd.,* 802 A.2d 318 (Del.Super.Ct.2002) is misplaced. Both cases dealt with administrative bodies that had adjudicated claims. Moreover, in both cases the court held that the principles of collateral estoppel and *res judicata* did not apply.

38 Respondent's Obj. at 33.

39 SUPR. CT. R. 12(d).

40 Bd. Rep. at 7; ODC Ex. 6.

41 Respondent's Obj. at 30–31, 34–35. Barakat also argues that the days that he is in court in Delaware should be counted toward his presence in the office. However, it is unclear how presence in court constitutes presence in the office. Barakat has admitted that "aside from stopping at the office prior to court, or to pick up mail," he goes to the office only "to meet clients by appointment." ODC Ex. 16.

42 *Tolchin v. Supreme Court of the State of N.J.,* 111 F.3d 1099 (3d Cir.1997).

43 The Board Report refers to **Rule** 8.3(c). However, the language following the **rule** is that of 8.4(c).

44 Bd. Rep. at 21.

45 Respondent's Obj. at 38–39. He claims that a change in fortune—a failure to sign new Delaware clients—caused him to be absent from the office for the remainder of 2011.

46 Bd. Rep. at 7, 23; ODC Ex. 6.

47 Bd. Rep. at 21–22.

48 Bd. Rep. at 26–28.

49 As for Count VII, the Board found that by "depositing unearned advance fees into his operating account, and by providing written retainer agreements that fail to state the advance 'fee is refundable if [it] is not earned,' [Barakat] violated **Rule** 1.5(f)." *Id.* at 27.

50 As for Count VIII, the Board found that by "depositing unearned advance fees into his operating account, [Barakat] failed to safeguard client funds in violation of **Rule** 1.15(a)." *Id.*

51 As for Count IX, the Board found that by "commingling personal funds into his attorney operating account, [Barakat] violated **Rule** 1.15(d)(3)." *Id.*

52 As for Count X, the Board found that by "(1) retaining advance fees for personal use and not depositing them into any account, (2) not proving cash receipt entries to deposit totals, (3) depositing unearned advance fees directly into his operating account, (4) not preparing monthly bank reconciliations, and (5) not preparing reconciled client subsidiary ledgers, [Barakat] failed to abide by the requirements for maintaining his books and records in violation of **Rule** 1.15(d)." *Id.* at 28.

53 Respondent's Obj. at 5–7.

54 *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 593–94, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

55 Bd. Rep. at 26.

56 *Id.;* Tr. at 110.

57 Tr. at 110.

58 Tr. at 180–81.

59 Bd. Rep. at 26; Tr. at 182.

60 A difficulty in evaluating Barakat's objections arises from the general disarray of Barakat's accounts and records. Both auditors testified that the lack of standard records made it difficult to get a clear sense of exactly what was happening with Barakat's accounts. In fact, McCullough could not finish the audit. Tr. at 115–123, 191.

61 Respondent's Obj. at 7, 20.

62 PROF. COND. R. 1.5, Comment 10, (emphasis added).

63 *Id.,* Comment 12.

64 Bd. Rep. at 27; Respondent's Obj. at 20.

65 Although Barakat asserted at certain points that his retainer fee in bankruptcy cases is earned at his initial consultation with a client, he also stated that a portion of his bankruptcy retainer is not refundable once the bankruptcy petition is substantially prepared, and that the remainder of the retainer is not refundable upon the petition's filing. That explanation of his bankruptcy fees, and his bankruptcy retainer agreement, undermine Barakat's claim that the bankruptcy retainer fee is fully earned at the initial consultation. Respondent's Obj. at 16–17.

66 PROF. COND., preamble, para. 21.

67 Respondent's Obj. at 17.

68 Bd. Rep. at 25.

69 Respondent's Obj. at 23.

70 Tr. at 314.

71 Bd. Rep. at 17. The Board relies on the language in the fee agreement that states that "the full fee must be paid prior to filing." *Id.*

72 In his 2008 and 2012 Certificates of Compliance, Barakat responded "N/A" to this question.

73 Bd. Rep. at 18–19; ODC Exs. 39–43.

74 *Id.* at 18–19, 28–29.

75 Respondent's Obj. at 21–22, 26–27.

76 *See, e.g.,* Tr. at 230–31, 239, 245, 252–54.

77 *In re Bailey,* 821 A.2d 851, 866 (Del.2003) *reinstatement granted,* 842 A.2d 1244 (Del.2004) (citing *In re Lassen,* 672 A.2d 988, 998 (Del.1996)).

78 *See In re Benson,* 774 A.2d 258, 262 (Del.2001) ("[E]ven though Benson's violations did not result in any injury to her clients, her careless record keeping certainly had the potential to cause injury because of the difficulty in ascertaining that all client funds in fact were being properly maintained.").

79 Bd. Rep. at 33–35. The Board noted that the two mitigating factors were partially negated by the years-long span of Barakat's wrongful conduct, and by Barakat's false and misleading statements to the ODC.

80 *In re Doughty,* 832 A.2d 724 (Del.2003). Doughty was publicly sanctioned and placed on probation for two years.

81 *Id.* at 736.

173 A.3d 536 (Table)
Unpublished Disposition
This unpublished disposition is
referenced in the Atlantic Reporter.
Supreme Court of Delaware.

IN the MATTER OF: Daniel
J. MCCARTHY, Respondent.

No. 229, 2017
|
Submitted: October 18, 2017
|
Decided: October 23, 2017

Before VALIHURA, VAUGHN, and SEITZ, Justices.

PER CURIAM:

***1** This 23rd day of October 2017, it appears to the Court that the Board on Professional Responsibility has filed its Report and Recommendation in this matter under **Rule** 9(d) of the Delaware Lawyers' **Rules** of Disciplinary Procedure. The Board's Report recommends that the Respondent, a Pennsylvania lawyer who was admitted *pro hac vice* by the Delaware Superior Court to represent a doctor in a medical malpractice action, [1] be disbarred for his intentional misconduct that included the failure to disclose altered medical records and the failure to disclose his client's fraudulent conduct and to correct her false testimony. The Board concluded that the "Respondent's actions in this matter were at best dishonest and at worst criminal which resulted in actual and potential harm to the litigants, the judicial process and the public." [2]

The Respondent, through counsel, filed objections to the Board's findings and recommendation of disbarment. The Office of Disciplinary Counsel responded to the objections, and the Respondent replied. Oral argument was held on October 18, 2017.

The Court has reviewed the matter under **Rule** 9(e) of the Delaware Lawyers' **Rules** of Disciplinary Procedure and concludes that the Board's Report should be approved. The Board's recommendation of disbarment is appropriate under these circumstances and, contrary to the Respondent's **assertions**, is consistent with the Court's precedent. [3]

***2** NOW, THEREFORE, IT IS ORDERED that the Board's June 6, 2017 Report (attached hereto) is ACCEPTED. Daniel J. McCarthy is hereby DISBARRED. He is unconditionally excluded from the admission to or the exercise of any privilege to practice law in this State. [4] The contents of the Board's Report shall be made public. The Office of Disciplinary Counsel shall disseminate this Order in accordance with **Rule** 14 of the Delaware Lawyers' **Rules** of Disciplinary Procedure. The Respondent shall pay the costs of these disciplinary proceedings, pursuant to **Rule** 27 of the Delaware Lawyer's **Rules** of Disciplinary Procedure, promptly upon presentation of a statement of costs by the Office of Disciplinary Counsel.

Attachment

SERGOVIC CARMEAN WEIDMAN

McCARTNEY & OWENS, P.A.

John A. Sergovic, Jr.

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Shannon Carmean Burton

Deirdre A. McCartney

Seth L. Thompson

George B. Smith, of Counsel

June 5, 2017

Delaware Supreme Court

The Renaissance Centro, Suite 509

405 North King Street

Wilmington, DE 19801
RE: BOARD ON PROFESSIONAL RESPONSIBILITY IN THE MATTER OF A MEMBER OF THE BAR OF THE SUPREME COURT OF DELAWARE, DANIEL J. MCCARTHEY. BOARD CASE NO. 2011–055–B

To whom it may concern:

Enclosed is the fully executed Report and Recommendations of the Hearing Panel concerning the above-captioned matter.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

/s/

Deirdre A. McCartney, Esquire

DE Bar No. 4290

REPORT AND RECOMMENDATIONS OF THE HEARING PANEL

Pending before a panel of the Board on Professional Responsibility (the "Board") is a Petition for Discipline filed by the Office of Disciplinary Counsel (the "ODC") in Board Case No. 2001–055–B (the "Petition") against Daniel J. McCarthy, Esquire ("Respondent"), a member of the Bar of the Supreme Court of the State of Pennsylvania. The Petition alleged violations of **Rules** 3.3 (b), 3.4 (a), 3.4 (c), 4.1 (b), 8.4 (c) and 8.4 (d). Respondent, through his counsel, Charles Slanina, Esquire, filed an Answer to the Petition (the "Answer"). On June 17, 2016, ODC filed an amended petition for discipline. On July 6, 2016, Respondent filed an answer to the amended petition denying the counts alleged in the petition.

On November 2, 2016, a panel of the Board on Professional Responsibility, Deirdre A. McCartney, Esquire, Chair, D. Benjamin Snyder, Esquire and Ms. Louise Roselle ("the Panel") held a liability hearing on a petition for discipline filed by the Office of Disciplinary Counsel (ODC) in the above-captioned matter. Jennifer Kule Aaronson, Esquire, presented the petition for ODC, Charles Slanina, Esquire represented Daniel J. McCarthy, ("Respondent"). The Panel found that Respondent violated **Rules** 3.3 (b), 3.4 (c), 3.4 (c), 4.1 (b), 8.4 (c) and 8.4 (d) of the Delaware Lawyers' **Rules** of Professional Conduct ("**Rules**"). A sanction hearing was held on December 21, 2016.

Procedure Background

On October 24, 2016, prior to the hearing, Counsel for ODC, Respondent and panel chair held a pre-hearing teleconference to discuss the upcoming hearing. At the request of the Respondent the hearing was bifurcated and the liability portion of the hearing and the sanction portion of the hearing were scheduled on separate days. At the liability portion of the hearing on November 2, 2016, Counsel for Respondent requested leave to amend his answer to the amended petition for discipline. ODC did not object to this request. The panel granted Respondent's request pursuant to **Rule** 15(b) of the **Rules** of Disciplinary Procedure. At the Liability portion of the Hearing, the Panel received into evidence a joint exhibit book. The Panel also heard testimony from the Respondent and Kenneth Roseman, Esquire. Following the liability portion of the hearing, the panel concluded that Respondent had violated all of the counts in the amended petition for discipline. At the sanctions portion of the hearing, the Panel received into evidence an additional joint exhibit book. The panel also heard evidence from Kenneth Roseman, Esquire, Frank Murphy, Esquire, Kristy McCabe, Esquire, James Zeris, Esquire, Jay E. Mintzer, Esquire, Stephen Levde, Jr. and Respondent. The sanctions portion of the hearing was then conducted on December 21, 2016.

***3** After the sanctions portion of the hearing, at the request of the hearing panel, the record was supplemented by post hearing memorandum on sanctions by Ms. Aaronson on February 14, 2017; Mr. Slanina on March 21, 2017; and Ms. Aaronson on April 3, 2017. The record was closed on April 3, 2017.

For the reasons stated below, the Panel finds that Respondent violated Delaware **Rules** 3.3 (b), 3.4 (a), 3.4 (c), 4.1 (b), 8.4 (c) and 8.4 (d) by failing to take reasonable remedial measures by failing to disclose to the **tribunal** his client's criminal and/or fraudulent conduct; by unlawfully concealing a document having potential evidentiary value by failing to disclose the **existence** of the notes; by **knowingly** **disobeying** an **obligation** under the **rules** of a **tribunal**; by failing to disclose a material fact when disclosure was necessary to avoid assisting a fraudulent act by a client; by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation by failing to provide the notes to the plaintiff, plaintiff's attorney, or the **tribunal**; and by engaging in conduct that was

prejudicial to the administration of justice by failing to disclose the notes and the panel recommends a sanction of disbarment.

Facts

The record in this proceeding consists of the testimony of witnesses at the hearing, exhibits submitted in connection with the hearing and other submissions of the parties. The transcript of the liability portion of the hearing is cited hereinafter, as "Tr. at _____." At the liability portion of the hearing, the parties admitted joint exhibits. The joint exhibits admitted at the liability portion of the hearing are cited hereinafter, as "Ex. at_____." The transcript of the sanctions portion of the hearing is cited hereinafter, as "S.H. Tr. at_____." The parties admitted joint exhibits at the sanctions portion of the hearing. The joint exhibits admitted at the sanctions portion of the hearing are cited hereinafter, as "S.H. Ex. At _____."

Respondent was admitted to the Pennsylvania bar in 1984. S.H. Tr. at 84. Respondent was admitted pro hac vice to represent Dr. Phyllis James in connection with a medical negligence claim in Wilson v. James. *See* Tr. at 93 and Ex. 25. One of the issues in the case was the extent of the jaundice on the baby at the time he was examined by Dr. James. Tr. 94–96. The central issue in the case was the care that Dr. James rendered to the baby on July 21, 2016. Tr. at 97.

During the litigation, plaintiff's counsel (Kenneth Roseman, Esquire) served Respondent on behalf of Dr. James with discovery requests. Tr. at 27. Plaintiff's interrogatories asked "Have you signed any written statements which you have made concerning this matter?". Tr. at 28. On November 12, 2007, Respondent filed responses which indicated that there were no written statements other than those in the medical chart. Tr. at 28 and Ex. 5b. Plaintiff's request for production asked for "copies of any and all writings in your possession or available to you identified or referred to in any way in your answers to Plaintiff's interrogatories." Tr. at 28. On November 12, 2007, Respondent filed responses and enclosed a copy of the medical chart. Tr. at 29 and Ex. at 5c. Respondent on behalf of Dr. James never supplemented the discovery responses. Tr. at 30. Respondent received the altered medical records from Michelle Montague's counsel before the deposition of Dr. James on September 4, 2008. Tr. 98–99 and Ex. 9.

***4** Plaintiff's counsel subsequently represented Dr. James in a bad faith and legal malpractice claim against the insurance company and Respondent. Tr. at 32. During discovery in that litigation, Plaintiff's counsel learned for the first time about the **existence** of the altered medical records that were never produced during the medical negligence litigation. Tr. at 33–34. In the first altered record, Michelle Montague (Dr. James' physician assistant) changed the location of the yellowing on the baby from the abdomen to the sternum. See, Ex. 1, Ex. 2 and Tr. at 34–35. In the second altered record, Dr. James added a sentence indicating that she had instructed the mother to monitor and call the office immediately with any changes because an older sibling had been treated for jaundice and the baby was at increased risk. See Ex 3, Ex. 4 and Tr. at 35–36. The altered medical records were of significant evidentiary value from the perspective of plaintiff's counsel and impacted the amount of the jury verdict. Tr. at 36–19. Respondent agreed that the care rendered by Dr. James on July 21, 2006 was the crux of the case. Tr. at 97.

Dr. James testified at her deposition that the orifice records produced in her discovery responses were her office records even though she had previously reviewed the altered records with her counsel. Ex. 9 at 14 (52:53). She further testified that she hadn't reviewed anything other than the medical chart in preparation for the deposition. *See* Tr. at 120 and Ex 9 at 2 (2:3) Respondent testified that he did not believe that Dr. James' testimony was inaccurate. Tr. at 121. Dr. James testified at her deposition that she didn't **know** whether or not Michelle Montague's note was her original note even though she had reviewed the altered note with her counsel prior to her deposition. Ex. 9 at 18 (66:67). Dr. James further testified that her office note was written on July 26, 2006 at 4:00 p.m., even though she added the last sentence at a later date. Tr. at 116–119. Respondent testified that he did not believe his client's statement was misleading. Tr. at 118. Respondent was also present at the deposition of Michelle Montague and did not correct the deposition transcript or update discovery responses when she testified that the office records produced were a complete record of her examination. Tr. at 3–4.

Respondent did not correct the pretrial stipulation which stated that the exhibits included the office records of New Castle Family Care. Ex. 22. The office records produced during discovery and admitted during trial did not include the altered medical records. Tr. at 58. At trial, Dr. James testified that the yellowing was not in the face and had not progressed to the sternum. *See* Tr. at 61–62 and Ex. 24–B at 95–97. Dr. James further testified that she had given the mother instructions to call her if the condition worsened due to the family history of jaundice. *See* Tr. at 63–64 and Ex. 24–

B at 100. Plaintiff's counsel believes that Dr. James testimony regarding the location of the jaundice and the instructions to the mother negatively impacted the jury's verdict. Tr. at 65–66. Respondent also highlighted the mother's failure to follow Dr. James instructions in his closing argument. Tr. at 67–69. Plaintiff's counsel believes that if the altered medical records were produced it would have impacted the outcome of the trial and the verdict. Tr. at 78 79.

Respondent testified during the hearing that he did not think that the altered medical records needed to be produced at the time of the litigation. Tr. at 100. Respondent further testified that he now would have produced those records. Tr. at 100 and 128. Respondent testified that he was aware of what **Rule** 26 says regarding the requirement to supplement responses, but did not think that duly included the duty to provide the altered medical records. Tr. at 107–108. Respondent testified that he also did not believe that it was necessary to produce them before Dr. James' deposition Tr. at 111–12. Respondent conceded that the office visit (the subject or the altered records) was the primary issue in the case. Tr. at 114–115. Respondent testified that one of the reasons why he did not produce the altered records was that it would have hurt his client's credibility. Tr. at 128. Respondent had over a year between when he acquired the records and trial on March 22, 2010 to produce the records. S.H. Tr. at 155–156 and Ex. 24.

Standard of Proof

***5** The allegations of professional misconduct set forth in ODC's petition must be established by clear and convincing evidence. (Disc. Proc. **Rule** 15(c))

Violations of the Rules

ODC's petition alleges that Respondent violated six separate **rules** of the Delaware Lawyer's **Rules** of Professional Conduct (the "**Rules**"). The panel finds that Respondent violated each **Rule** alleged in the petition for the reasons which follow:

Count One: Respondent violated Rule 3.3 (b) by failing to take reasonable remedial measures by failing to disclose to the tribunal his client's criminal and/or fraudulent conduct.

Rule 3.3 (b) provides: "(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**." Respondent was aware of medical records altered by his client, yet failed to produce them during discovery. Tr. 98–99. Respondent had reviewed them with his client prior to her deposition, yet allowed his client to testify falsely at her deposition concerning the medical records. *See* Tr. at 120, Ex 9 at 2 (2:3), Ex. 9 at 14 (52:53). Respondent further allowed his client to testify falsely at trial concerning the medical records. *See* Tr. at 63–64, Ex. 24–B at 96–97 and 100 and S.H. Tr. at 138.[5] Respondent did not disclose his client's false testimony during the deposition, following the deposition, prior to trial or at trial. Respondent failed to take reasonable remedial measure to disclose his client's criminal and/or fraudulent conduct to the **tribunal**.

Count Two: Respondent violated Rule 3.4 (a) by unlawfully concealing a document having potential evidentiary value by failing to disclose the existence of the notes.

Rule 3.4 (a) provides: "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." Respondent unlawfully concealed the altered medical records by failing to disclose the **existence** of the altered medical records despite being aware of the documents potential evidentiary value. S. H. Tr. at 136–137. Notably, the altered medical records were never produced by Respondent. Plaintiff's counsel learned for the first time about the altered medical records from discovery responses received from Preferred Professional Insurance Company in the bad faith litigation lawsuit. Tr. at 32–33. It was clear, however, that Respondent was aware during the course of the medical malpractice lawsuit that the medical chart had been altered. Ex. At 11.

Count Three: Respondent violated Rule 34 (c) by knowingly disobeying an obligation under the rules of a tribunal.

***6** **Rule** 3.4 (c) provides "A lawyer shall not (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**." Respondent was aware of the requirements of **Rule** 26 to supplement discovery responses. Despite being aware of the requirements. Respondent intentionally failed to supplement his discovery responses when he became aware of the **existence** of the altered medical records. S. H. Tr. at 107.

Count Four: Respondent violated Rule 4.1 (b) by failing to disclose a material fact when disclosure was necessary to avoid assisting a fraudulent act by a client.

Rule 4.1 (b) provides "In the course of representing a client a lawyer shall not knowingly: (b) fail to disclose a material fact when disclose is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule l.6." Respondent intentionally failed to disclose the existence of the altered medical records, S. H. Tr. at 107. Respondent also failed to correct his client's deposition and trial testimony when he knew that her testimony was false. S. H. Tr. at 106–107, 137–138. Respondent was aware that the treatment the baby received on July 26, 2006 was the crux of the case. Tr. at 97. Respondent was also aware as of September 2, 2008 and before his client's deposition that the medical records from July 26, 2006 were altered, yet failed to disclose them at any point during the litigation. Tr. at 99–100. Respondent assisted his client with perpetrating a fraud by failing to disclose the existence of altered medical records, a material fact in the medical malpractice action where the care provided was a central issue in the case.

Count Five: Respondent violated Rule 8.4 (c) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation by failing to provide the notes to the plaintiff, plaintiff's attorney, or the tribunal.

Rule 8.4 (c) provides: "It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonestly, fraud, deceit or misrepresentation." Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation when he failed to disclose the existence of the altered medical records throughout the course of the litigation. S. H. Tr. at 106–107, 137–138. Respondent intentionally failed to disclose his altered medical records and was aware that the altered medical records would have made his client more culpable and would have been supportive of Plaintiff's case. Tr. at 102–103. Respondent's conduct was dishonest and deceitful.

Count Six: Respondent violated Rule 8.4 (d) by engaging in conduct that was prejudicial to the administration of justice by failing to disclose the notes.

Rule 8.4 (d) provides: "It is professional misconduct for a lawyer to: (d) engage in conduct that is prejudicial to the administration of justice," Respondent engaged in conduct that was prejudicial to the administration of justice when he failed to disclose the existence of the altered medical records. S. H. at 107. Respondent instead made the determination that the altered medical records did not have any evidentiary value, despite his knowledge of discovery rules. S. H. Tr. at 150.

Rationale for Recommended Sanction

At the Hearing, the ODC contended that the presumptive sanction in this matter is disbarment. The Respondent, through his counsel, contended that the presumptive sanction in this matter is a public reprimand. For the reasons which follow, the panel recommends that Respondent be disbarred. In making its recommendation, the Panel has utilized the four-part framework set forth in the ABA Standards for Imposing Lawyer Sanctions (1991 as amended February 1992) ("ABA Standards"), as required in *In re Steiner*, 817 A.2d 793, 796 (Del. 2003) To promote consistency and predictability in the imposition of disciplinary sanctions, the Delaware Supreme Court looks to the ABA Standards. *See*, *In re Doughty*, 332 A.2d 724, 735–736 (Del. 2003) (citations omitted). A preliminary determination of the appropriate sanction is made by assessing the first three 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. *See*, *In re Steiner*, 817 A.2d 793, 796 (Del. 2003). Once the preliminary determination is made, the fourth prong addresses whether an increase or decrease in the preliminary sanction is justified because of the presence of mitigating or aggravating factors. *Id.*

I. The Ethical Duties Violated

*7 As previously recited, the ODC alleged, and the Panel determined that the Respondent committed misconduct in violation of Professional Rules of Conduct Rules 3.3 (b) (by failing to take reasonable remedial measures by failing to disclose to the tribunal the client's criminal and/or fraudulent conduct), 3.4 (a) (by unlawfully concealing a document having potential evidentiary value by failing to disclose the existence of the notes). 3.4 (c) (by knowingly disobeying an obligation under the rules of a tribunal). 4.1 (b) (by failing to disclose a material fact when disclosure was necessary to avoid assisting a fraudulent net by a client), 8.4 (c) (by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation by failing to provide the notes to the plaintiff, plaintiff's attorney, or the tribunal) and 8.4 (d) (by engaging in conduct that was prejudicial to the administration of justice by failing in disclose the notes) Under the ABA

Standards, this misconduct constituted violations of duties owed by the Respondent to the public and legal system. **Rules** 3.3 (b), 3.4 (a), 3.4(c), 4.1 (b) 8.4 (c) and (d)). *See* ABA Standards 5.0 and 6.0.

2. State of Mind

The ODC contends that Respondent's state of mind was **knowing** and intentional. The Respondent contends that the Respondent's state of mind was **knowing**. The Panel finds that the Respondent's mental state was intentional. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. ABA Standards, Definitions. "Intent" is the conscious objective or purpose to accomplish a particular result. ABA Standards, Definitions. Respondent intentionally chose not to disclose the **existence** of the altered medical records in order to protect his client's credibility among other reasons. Tr. at 127–128, 152–153. Respondent further intentionally chose to avoid correcting his client's false testimony at her deposition and at trial.

3. Actual or Potential Injury Caused by Respondent's Misconduct

The Panel finds Respondent's conduct caused actual and potential harm to the Plaintiff, the Court, the legal system and the public. "Injury" is harm to the client, the public, the legal system, or the profession which results from a lawyer's misconduct. ABA Standards. Definitions. "Potential Injury" is the harm to the client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct. ABA Standards, Definitions. Respondent caused injury and/or potential injury to the Plaintiff when he failed to take reasonable remedial measures by failing to disclose to the court his client's false deposition and trial testimony, by unlawfully concealing a document having potential evidentiary value by failing to disclose the **existence** of the altered medical notes. There was testimony from Plaintiff's counsel that the altered medical records would have had probable evidentiary value. Plaintiff's counsel further testified that the failure to disclose the altered medical records likely impacted the results of the trial and the verdict for the plaintiff.

Respondent caused actual and/or potential injury to the legal system and the public by **knowingly** **disobeying** an **obligation** under the **rules** of a **tribunal** when he failed to supplement his discovery responses and by failing to disclose a material fact when disclosure was necessary to avoid assisting a fraudulent act by a client by failing to correct the deposition or trial testimony of his client that he **knew** to be false. Respondent caused actual and/or potential injury to the plaintiff, the legal system and the public engaging in conduct involving dishonesty, fraud, deceit or misrepresentation by failing to provide the altered medical records to the plaintiff. plaintiff's attorney, or the **tribunal** and by engaging in conduct that was prejudicial to the administration of justice by failing to disclose the altered medical records.

Respondent's actions resulted in actual or potential harm by wasting judicial resources. There was testimony that the case likely would have settled earlier had the altered medical records been disclosed. As a result of the failure to disclose, a had faith/malpractice claim was litigated and settled. As a further result of the failure to disclose, a fraud/civil conspiracy case was litigated and settled. Prior to both cases settling, the Court, litigants and attorneys involved spent countless hours and funds litigating the claims.

4. Presumptive Sanction

***8** In the Panel's view, analysis of the ethical duties violated by the Respondent, the Respondents state of mind and the actual and potential for injury caused by Respondent's misconduct raise a presumptive sanction of disbarment. The ethical duties violated direct the Panel to the following factors contained in the ABA Standards: 5.11, 6.11 and 6.21 for violations of **Rule** 3.3 (b), 3.4(a), 3.4 (c), 4.1 (b), 8.4 (c) and 8.4 (d). Where, as in this matter, the conduct involves acts with serious or potentially serious injury to a party, or causes significant or potentially significant adverse effect on the legal proceeding, these provisions point, generally to a disbarment as an appropriate sanction. *See* ABA Standards 5.11, 6.11 and 6.21. Disbarment is generally appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice. ABA Standard 5.11.

Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding. ABA Standard 6.11, Disbarment is generally appropriate when a lawyer **knowingly** violates

a court order or **rule** with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes potentially serious interference with a legal proceeding. The presumptive sanction must then factor in the presence or absence of any mitigating or aggravating factors.

5. Aggravating and Mitigating Factors

Aggravating Factors

ABA Standard 9.22 sets forth the following non-exhaustive list of aggravating factors:

(a) prior disciplinary offenses;

(b) dishonest or selfish motive;

(c) a pattern of misconduct;

(d) multiple offenses

(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with **rules** or orders of the disciplinary agency;

(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

(g) **refusal** to acknowledge wrongful nature of conduct;

(h) vulnerability of victim;

(i) substantial experience in the practice of law;

(j) indifference to making restitution;

(k) illegal conduct, including that involving the use of controlled substances

(ABA Standard § 9.22)

A. Prior Disciplinary Offenses

There is no evidence in the record that this aggravating factor **exists**.

B. Dishonest or Selfish Motive

There is evidence in the record of a dishonest motive. Respondent withheld a portion of the medical record which contained altered medical records made by his client, a physician, whom he was defending in a medical malpractice case. When Respondent learned of the altered records he did not supplement his client's discovery responses, despite being aware of the requirements under **Rule** 26 to supplement. *See* Tr. at 30 and Tr. at 107.

In addition, after discussing the **existence** of the records with his client just prior to her deposition, he did nothing to correct the deposition transcript when his client falsely testified that she didn't **know** whether or not Ms. Montague's note produced as part of the medical chart was the original note. *See* Tr. at 108–109 and Ex. 9 at 18 (66:67). Respondent also did not correct the deposition transcript when his client falsely testified that the July 21, 2006 office note was written at 4:00 p.m. *See* Tr. at 21 (78:79). Respondent did not correct the deposition transcript when his client falsely testified that the medical records that had been produced were a copy of the office records. Ex. 9 at 14 (52:53).

Respondent was clearly aware of the **existence** and potential evidentiary value of the additional/and or altered records as he notified the insurance carrier PPIC of their **existence**. *See* Ex. at 11 and Ex. at 19. Respondent testified that he believed that the medical records that were not produced in the underlying medical negligence case and should have been produced. S. H. Tr. at 89–90. Respondent also did not correct the medical records by the time that the pretrial stipulation was filed and represented that the incomplete chart without the altered records were the office records of New Castle Family Care. Ex. at 22.

C. Pattern of Misconduct

***9** There is not sufficient evidence in the record of a pattern of misconduct. Respondent does not have a prior disciplinary record. The misconduct here relates to a single case.

D. Multiple Offenses

There is evidence in the record that this aggravating factor of multiple offenses **exists**. The panel found that Respondent violated six different **Rules** of Professional Conduct. Respondent failed to supplement discovery responses and failed to disclose the **existence** of altered medical records.

Respondent also failed to correct false deposition testimony and/or take sufficient remedial measures. Respondent further failed to take sufficient remedial measures when his client testified falsely at trial.

E. Bad Faith Obstruction of the Disciplinary Process

There is no evidence in the record that this aggravating factor **exists**.

F. Submission of False Evidence or False Statements During the Disciplinary Process

There is no evidence in the record that this aggravating factor **exists**.

G. **Refusal** to Acknowledge Wrongful Nature of Conduct

There is evidence in the record that this aggravating factor **exists**. Respondent in his testimony **refused** to acknowledge that he would have been required under the Discovery **Rules** to disclose or supplement his responses with the altered medical records. He further did not acknowledge that he had a duty to take sufficient remedial measures when his client testified inaccurately at her deposition and at trial. Respondent did acknowledge that he would have done things differently today, but his testimony fell short of acknowledging the wrongful nature of his conduct.

H. Vulnerability of Victim

There is evidence in the record to support this aggravating factor. The Plaintiff in the underlying medical negligence action was on infant who has suffered permanent brain injuries and disabilities.

I. Substantial Experience in the Practice of Law

There is evidence in the record to support this aggravating factor. Respondent testified that he was admitted to the Pennsylvania bar in 1984. S.H. Tr. at 84. Respondent has been an attorney for thirty-three years. Respondent's testimony was unrebutted.

J. Indifference to Making Restitution

There is no evidence in the record that this aggravating factor **exists**.

K. Illegal Conduct, Including that Involving the Use of a Controlled Substance

There is evidence that this aggravating factor **exists**. By failing to disclose the **existence** of the altered medical records. Respondent assisted his client in concealing evidence and perpetrating a fraud on the legal system. Respondent further assisted his client in committing fraudulent conduct when he did not take remedial measures in conjunction with his client's deposition testimony and trial testimony when he **knew** such testimony to be false.

Mitigating Factors

ABA Standard 9.32 sets forth the following non-exhaustive list of factors to be considered in mitigation:

(a) absence of a prior disciplinary record;

(b) absence of a dishonest or selfish motive;

(c) personal or emotional problems;

(d) timely good faith effort to make restitution or to rectify consequences of misconduct;

(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;

***10** (f) inexperience in the practice of law;

(g) character or reputation;

(h) physical disability;

(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;

(j) delay in disciplinary proceedings;

(k) imposition of other penalties or sanctions;

(l) remorse;

(m) remoteness of prior offenses.

(ABA Standard § 9.32)

A. Absence of a Prior Disciplinary Record

There is evince in the record that this mitigating factor **exists**. Respondent does not have a prior disciplinary record.

B. Absence of a Dishonest or Selfish Motive

As discussed under aggravating factors, there is evidence of a dishonest or selfish motive This mitigating factor does not apply.

C. Personal or Emotional Problems

There is no evidence in the record that this mitigating 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 **exists**.

E. Full and Free Disclosure to Disciplinary Board and Cooperative Attitude toward Proceedings

There is evidence in the record that this mitigating factor **exists**. Respondent offered unrebutted testimony that Respondent was cooperative with the disciplinary process.

F. Inexperience in the practice of law

There is no evidence in the record that this mitigating factor **exists**. As discussed in the aggravating factors. Respondent has substantial experience in the practice of law.

G. Character or Reputation

There is evidence in the record to support this mitigating factor. Respondent offered testimony from Kristy McCabe, James Zeris, Jay E. Mintzer and Stephen Levda in support of his good character and reputation. Ms. McCabe testified that she worked with Respondent at the same law firm from 2007 to 2016 and that Respondent was her supervisor for the last six years at her time at the firm. S.H. Tr. at 45. Ms. McCabe testified that she believes Respondent to be an honest, loyal and ethical person. S.H. Tr. AT 46.

Mr. Zeris testified that he first met Respondent in law school and had worked with him a number of years at Mintzer Sarowitz Zeris Ledva and Meyers. S.H. Tr. 52 and 53. Mr. Zeris testified that Respondent's character and reputation was impeccable and that he was admired by the associates that he worked with over the years. S.H. Tr. 54. Mr. Mintzer testified that he has **known** Respondent since the late 1990's. S. H. Tr. 65 Mr. Mintzer testified that he believed that Respondent had the highest character, morals and ethics. S.H. Tr. 66–67. Mr. Ledva testified that he has **known** Respondent since the mid 1980's. S.H. Tr. 73. Mr. Ledva testified that he has a high opinion of Respondent's character and reputation. S.H. Tr. 74. The panel finds the testimony of Ms. McCabe, Mr. Zeris, Mr. Mintzer and Mr. Levda to be credible and accepts their testimony as evidence of Respondent's good character and reputation.

H. Physical Disability

***11** There is no evidence in the record that this mitigating factor crisis.

I. Mental Disability or Chemical Dependency

There is no evidence in the record that this mitigating factor **exists**.

J. Delay in Disciplinary Proceedings

There is no evidence in the record that this mitigating factor **exists**.

K. Imposition of other penalties or sanctions

There is insufficient evidence in the record that this mitigating factor **exists**. Although, Respondent contends that there have been other penalties or sanctions because Respondent's malpractice carrier settled a claim on his behalf, there is no

evidence in the record that Respondent personally contributed to that settlement, S.H. Tr. at 61–62.

L. Remorse

There is insufficient evidence in the record that this mitigating factor **exists**. Although, Respondent contends that he is remorseful, as discussed to the aggravating factors. Respondent still **refuses** to acknowledge the wrongful nature of his conduct. Respondent did testify that he regretted not disclosing the records and that he has thought about his decision since then, his testimony fell short of acknowledging that the altered medical records should have been disclosed. Respondent never disclosed the altered medical records in the underlying litigation and it was not until the records were disclosed by a third party in discovery during subsequent litigation that he acknowledged their **existence**. Respondent further never self reported to the ODC.

M. Remoteness of Prior Offenses

There is no evidence in the record that this mitigating factor **exists**.

The panel finds that on balance the aggravating factors outweigh the mitigating factors. As discussed above the panel found that the following aggravating factors **existed**: (b) dishonest or selfish motive. (d) multiple offenses, (g) **refusal** to acknowledge wrongful nature of conduct. h) vulnerability of victim. i) substantial experience in the practice of law, and (k) illegal conduct, including that involving the use of controlled substances. As discussed above the panel found that the following mitigating factors **existed**: (a) the absence of a prior disciplinary record, (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings, and (g) character or reputation.

The intentional concealment of the altered medical records and the failure to take remedial measures to correct false deposition and trial testimony is dishonest. In addition, Respondent had multiple opportunities to disclose the **existence** of the altered medical records or correct or counsel his client regarding the inaccurate testimony, yet tailed to do so. Instead, he assisted his client with concealing the altered medical records and did not take any steps to correct the record when he **knew** that his client testified falsely. Further, Respondent in his testimony continued to try to justify his actions in his failure to disclose the altered medical records or to take remedial measures, instead of acknowledging the wrongfulness of that conduct. The victim in this matter was particularly vulnerable and Respondent had substantial experience not only in the practice of law, bur in litigating these type of cases and should have recognized the potential evidentiary value of the altered medical records to Plaintiff's counsel. In fact, Ms. McCabe who had previously worked for Respondent recognized it without hesitation. S.H.Tr. at 51.

Conclusion

***12** The Panel believes that recommending disbarment in tills matter is consistent with Delaware Supreme Court precedent. "[T]he objectives of any lawyer sanction should be to protect the public, to advance the administration of justice, to preserve confidence in the legal profession, and to deter other lawyers from similar misconduct." *In re Doughty*, 832 A.2d 724, 735–736 (Del. 2003) (citations omitted). The facts in this case are similar to the facts in *In re* Melvin, 807 A.2d 550 (Del. 2002), where Melvin destroyed documents with potential evidentiary value and attempted to downplay the severity of his misconduct in his testimony before the Board. Similarly, Respondent concealed the altered medical records when he **knew** that they had potential evidentiary value and would have at a minimum adversely impacted his client's credibility. Respondent in his testimony before the Panel also failed to admit the wrongfulness of his conduct and instead attempted to make technical arguments about why disclosure was nor required under discovery **rules** and why the evidence likely would not have impacted the amount recovered by Plaintiff at trial. It is disingenuous to suggest that a medical record altered by a physician and her staff concerning her treatment of the patient would not be relevant in a medical negligence action alleging that the physician's treatment of the patient was negligent and violated the standard of care. "The preservation of evidence, regardless of its subjective value, is fundamental to the orderly administration of justice." *Id.* Like Melvin, Respondent also had substantial experience in the practice of law as an aggravating factor. However, unlike Melvin where the attorney's deceitful conduct was in connection with his personal domestic dispute matter without harm to a client, here Respondent's conduct involved actual and potential injury to the litigants, the public and the judicial process. Respondent intentionally concealed evidence in a case and took no remedial measures in spite of his client's false testimony.

Other jurisdictions have found that disbarment was appropriate when lawyers have intentionally concealed evidence and assisted their clients with testifying falsely. See *In re David M. Druten*, 301 P. 3d 319 (Kon. 2013) (disbarment where attorney intentionally concealed evidence, assisted his client with providing false testimony at deposition, failed to comply with multiple discovery requirements and failed to appear at the disciplinary hearing). This Court has emphasized the important role of attorneys as officers of the Court "[t]his Court does not treat lightly its officers who violate their fundamental duties to the Court, the legal community and society." *In the Matter of John P. Cline, Jr.*, 581 A.2d 1118, 1127 (Del. 1990) (disbarment where attorney neglected client cases, failed to cooperate with disciplinary counsel, made misrepresentations to the Supreme Court and attempted to cover up the misrepresentations). Respondent's actions in this matter were at best dishonest and at worst criminal which resulted to actual and potential harm to the litigants, the judicial process and the public. This Court has emphasized the importance of honesty in the legal profession "[w]hen there can be no reliance upon the word or oath of a party, he is, manifestly, disqualified, and when such a fact satisfactorily appears the court[s] not only have the power, but it is their duty to strike the party from the rol[l] of attorneys." *In the Matter of Michael R. Davis*, 43 A.3d 856, 867 (Del. 2012) (attorney disbarred for engaging in the unauthorized practice of law during suspension and making misrepresentations in his reinstatement questionnaire concerning his conduct in a single vehicle accidently.

Based **on** the foregoing considerations, the Panel recommends as action of the Board that the sanction of disbarment be imposed upon the Respondent, including the imposition of costs of these disciplinary proceedings.

making misrepresentation in his reinstatement questionnaire concerning his conduct in a single-vehicle accident).

Based **on** the foregoing considerations, the Panel recommends as action of the Board that the sanction disbarment he imposed upon the Respondent, including the imposition of costs of these disciplinary proceedings.

All Citations

173 A.3d 536 (Table), 2017 WL 4810769

Footnotes

1 This Court has authority to discipline non-Delaware lawyers who provide legal services in this State. *See In re Nadel*, 82 A.3d 716, 719–20 (Del. 2013); *In re Kingsley*, 950 A.2d 659, 2008 WL 2310289 at *3 (Del. 2008) (TABLE); *In re Tonwe*, 929 A.2d 774, 781 (Del. 2007). This includes lawyers admitted *pro hac vice. See, e.g.*, Del. Supr. Ct. R. 71(b)(ii); Del. Super. Ct. R. 90.1(b)(ii). Further, in *In Re Tonwe*, this Court stated that:

> "We assume that the Board did not recommend disbarment, as such, on the basis that one has to be a member of the bar before one can be disbarred. The **Rules** do not specifically address this issue, but in at least one other jurisdiction, disbarment 'when applied to an attorney not admitted ... to practice law, means the unconditional exclusion from the admission to or the exercise of any privilege to practice law in this State.' We adopt that definition, and conclude that disbarment is the appropriate sanction ...."

929 A.2d at 781 (citations omitted).

2 *In re McCarthy*, No. 2011–055–B, at 24 (Del. Bd. Prof. Resp. June 6, 2017). Although the Board found, among other facts, that the "Respondent assisted his client with perpetrating a fraud" (Report at 9), the Board's Report is limited to addressing the Respondent's conduct and does not address whether there was a wider-ranging "conspiracy," as argued in the Office of Disciplinary Counsel's responsive memorandum on appeal. We similarly limit our conclusions to the Respondent's conduct.

3 *See, e.g.*, *In re Sullivan,* 2014 WL 982500 (Del. Mar. 7, 2014); *In re Sanclemente*, 2014 WL 644437 (Del. Feb. 14, 2014); *In re Davis*, 43 A.3d 856 (Del. 2012); *In re Clyne*, 581 A.2d 1118 (Del. 1990).

4 *See In re Tonwe*, 929 A.2d at 781.

5 Perjury is defined under Delaware law as follows: Perjury in the third degree: "A person is guilty of perjury in the third degree when the person swears falsely. Perjury in the third degree is a class A misdemeanor."

11 *Del. C.* § 1221. Perjury in the second degree: "A person is guilty of perjury in the second degree when the person swears falsely and when the false statement is:

(1) Made in a written instrument for which an oath is required by law; and

(2) Made with intent to mislead a public servant in the performance of official functions; and

(3) Material to the action, proceeding or matter involved. Perjury in the second degree is a class F felony."

11 *Del. C.* § 1222. Perjury in the first degree: "A person is guilty of perjury in the first degree when the person swears falsely and when the false statement consists of testimony and is material to the action, proceeding or matter in which it is made. Perjury in the first degree is a class D felony." 11 *Del. C.* § 1223.

DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS
Opinion 2011-1
November 16, 2011

This opinion is merely advisory and is not binding on the inquiring attorney or the Court or any other tribunal.

Nature of the Inquiry

The inquirer, a Delaware attorney, seeks guidance on the issue of whether, during settlement of a matter, it is ethical for a lawyer to propose, demand, or agree, to personally indemnify or satisfy any and all claims by third persons as to settlement funds.

Conclusion

The Committee is of the opinion that any agreement by a lawyer to personally satisfy or indemnify any claims to the settlement funds made by a third party is made in violation of Rules 1.7(a)(2) and 1.8(e) of the Delaware Lawyers' Rules of Professional Conduct ("DLRPC").[1]

Background Facts

Lawyers who represent plaintiffs in civil actions, such as personal injury or medical malpractice often represent clients who have incurred substantial medical bills as a result of their injuries. In many cases, a settlement agreement provides an outcome beneficial to both parties.

The settlement funds received by lawyers on behalf of their clients are subject to many considerations, both practical and ethical. It may take months or years to reach settlement and clients may be in dire need of a quick disbursement of funds from the settlement proceeds. Often, under the terms of a settlement agreement, the lawyers' payment for their services on the case will be taken from the settlement funds and the clients must satisfy, by payment in full or in compromise, all valid liens out of the clients' share of the settlement proceeds. In some cases, these third party liens may not yet be known, valid, or identified at the time a settlement

[1] The Committee is not alone in finding such agreements unethical under one or both of these rules of professional conduct. Advisory opinions from eleven (11) other jurisdictions addressing this issue have also found such agreements to be unethical. *See, e.g.*, Supreme Court of Ohio Board of Comm'rs on Grievances and Discipline Op. 2011-1 (Feb. 11, 2011); Bd. of Prof'l Responsibility of the Supreme Court of Tennessee Formal Ethics Op. No. 2010-F-154 (Sept. 10, 2010); Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics Formal Op. 2010-3 (2010); Adv. Comm. of the Supreme Court of Missouri Formal Op.125 (Nov. 13, 2008); Ethics Adv. Comm. of the South Carolina Bar Ethics Adv. Op. 08-07 (Aug. 22, 2008); Illinois State Bar Ass'n Adv. Op. 06-01, 2006 WL 4584284 (July 2006); Arizona Ethics Op. 03-05 (August 2003); Kansas Bar Ass'n Ethics Op. 01-05 (2001); North Carolina State Bar Ass'n Op. 228 (July 26, 1996); Florida Ethics Op. 70-8 (Revised Apr. 23, 1993); State Bar of Wisconsin Formal Ethics Op. E-87-11 (1987); State Bar of California Formal Op. No. 1981-55 (1981).

agreement is reached. However, if a lawyer's client refuses, or is unable to repay a lien (for example, because the client has spent his or her share of the properly distributed settlement funds), it is possible that a lien holder may make a claim, or file suit, against any releasees for payment of such liens. Ordinarily, the recourse of the releasees would be against the claimant who signed the settlement agreement and agreed to indemnify or hold the releasees harmless against any and all liens claims.

The desire of the releasees not to be involved in subsequent litigation over liens after settlement of the underlying claims has increasingly led releasees to request or demand that, in addition to an agreement with the claimant to hold releasees harmless or indemnify them against such claims as a condition of settlement, the claimant's attorney also enter into such an agreement with releasees. These requests present significant problems.

Further complicating the issues, various amendments to the Medicare and Medicaid laws and related regulations of the United States ("US") arguably create new and enhanced rights of the US to have priority in proceeds arising out of a personal injury settlement, and/or to create a lien in those settlement proceeds. *See generally* 42 U.S.C. § 1395; 42 C.F.R. § 411.37 (hereinafter, the "Medicare Amendments").

The Medicare Amendments further impose upon the "primary payer" or "entity that receives payment from a primary payer" an obligation to reimburse the US for any payments made to the claimant upon notice. 42 C.F.R. § 411.22. The genesis for these Medicare Amendments is that the US pays medical bills and related expenses relating to the injury of a claimant, on an upfront and on-going basis. After a pot of money has been created through a personal injury settlement, the US desires to recoup monies it paid to the claimant out of the settlement proceeds.

Therefore, the "primary payer" is often an insurance company. Naturally, an insurance company does not wish to be found liable for a reimbursement obligation to the US, and the various insurance companies who find themselves confronted with this situation have therefore attempted to insulate themselves and/or transfer their obligations by requiring plaintiff's counsel to indemnify the insurance company.

This opinion is intended to address the ethical concerns associated with a lawyer's personal agreement to indemnify. This opinion does not address legal issues involved in the disbursement of settlement funds.

Discussion

Entering into a personal indemnification agreement by a lawyer is, essentially, an agreement by the lawyer to provide financial assistance to the client. The lawyer is undertaking an obligation to pay the client's bills. A lawyer who undertakes an obligation of this nature creates a significant risk that the representation of that client will be materially limited by the lawyer's personal interest, in violation of DLRPC 1.7(a)(2).

Further, an obligation to pay the client's bills is in direct conflict with DLRPC 1.8(e). Because a lawyer would be in violation of the DLRPC if the lawyer entered into a personal indemnification agreement, any proposal or demand made by a lawyer that requires another lawyer to enter into such an agreement would constitute knowing assistance or inducement of a colleague to violate the DLRPC, in violation of DLRPC 8.4(a).

(1) DLRPC 1.7(a)(2)

The mere request that a lawyer agree to indemnify releasees against lien claims creates a potential conflict of interest between the claimant and the claimant's lawyer. A lawyer's refusal to accede to a request for personal indemnification as a condition of settlement may, at best, involve compromise or concessions resulting in the removal of such terms or, at worst, prevent the client from completing a settlement that the client desires. DLRPC 1.7(a)(2) states, in pertinent part, that:

> (a) [A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: ... (2) there is a significant risk that the representation of one or more clients will be materially limited ... by a personal interest of the lawyer.

If a lawyer's personal indemnification is required as a condition of settlement, a lawyer may, for example, recommend that the client reject an offer that may be in the client's best interest, because it would potentially expose the lawyer to liability for hundreds of thousands of dollars in lien expenses, or the litigation costs associated with those expenses. In such a case, any required or requested personal indemnification from the lawyer as a condition of settlement creates a significant risk of material limitation of the representation of the client.

If a client explicitly wishes to settle the case for a certain amount and the lawyer's personal indemnification is a condition of settlement a direct conflict of interest arises. Under DLRPC 1.2(a), "A lawyer shall abide by a client's decision whether to settle a matter." Therefore, once a client has decided to settle a case, the lawyer has a professional obligation to effectuate that goal. Any reluctance to incur personal liability, or concessions made to avoid potential personal liability, will conflict with the lawyer's professional obligation to complete the settlement as directed by the client.

The Committee recognizes that DLRPC 1.7(b) provides exceptions to DLRPC 1.7(a)(2). However, even if a situation arises in which the significant risk of a conflict of interest under DLRPC 1.7(a)(2) can be ameliorated, an agreement that contains a lawyer's personal indemnification would still be in violation of DLRPC 1.8.

(2) DLRPC 1.8(e)

Delaware lawyers are expressly prohibited from providing this type of financial assistance to their clients. DLRCP 1.8(e) states:

> 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 litigations, 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.[2]

Since, under DLRCP 1.8(e), a Delaware lawyer may not provide financial assistance to a client by paying, or advancing, the client's medical expenses before or during litigation, a Delaware lawyer may not agree, voluntarily or at the client's or releasee's insistence, to guarantee, or otherwise accept ultimate liability for, the payment of those expenses. Any insistence on the part of a client that the lawyer accept a settlement offer containing such a condition would also therefore require the lawyer to withdraw from representation, because any such insistence would put the lawyer in violation of DLRCP 1.16(a)(1), which states, in pertinent part, that, "a lawyer shall not represent a client, or, where representation has commenced, shall withdraw from the representation of a client if... the representation will result in violation of the rules of professional conduct...."

(3) DLRPC 1.15

Rule 1.15, Safekeeping property, states as follows:

> "(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."

While the decisional case law may not be entirely uniform, there is substantial legal precedent for the proposition that a lawyer is liable for wrongful release of settlement proceeds under certain factual circumstances, whether pursuant to Rule 1.15 or general principles of breach of fiduciary duty. *See e.g*, *Western States Insurance Co. v. Olivero*, 283 Ill. App. 3d 307, 670 N.E.2nd 333 (3d Dist. 1996) (plaintiff's lawyer directly liable to third party subrogation claimant where lawyer wrongfully released funds); *Aetna Cas. & Sur. Co. v. Gilreath*, 625 S.W. 2d 269, 274 (Tenn. 1981) (lawyer civilly liable to a non-client where he delivers to his client funds that he knows belong to a third party); *Greenwood Millls, Inc. v. Burris*, 130 F.Supp.2nd 949 (Dist. Central Tenn. 2001); *Accord* IL. Adv. Op. 06-01, 2006 WL 4584284 (lawyer representing a plaintiff is ethically obligated to identify funds due to a lien or subrogation claimant and to

[2] There are two narrow exceptions to DLRPC 1.8(e), neither of which is implicated when an attorney enters into a personal indemnification agreement

ensure that those funds are properly paid); City of New York Committee on Professional and Judicial Ethics, Opinion 2010-3 (similar ruling).

The Medicare Amendments and Rule 1.15 provide the legal/factual context in which the Delaware attorney contacted the Committee for an opinion. Indeed, certain of the advisory opinions cited in footnote 1 of the Opinion apply the Rules of Professional Conduct in this specific context. It is therefore important to observe that nothing in the Opinion should be construed to derogate from the lawyer's obligations under Rule 1.15(a) or other subsections of Rule 1.15 with respect to third parties. Notwithstanding the lack of a written indemnification agreement, a Delaware attorney may still be liable for wrongful disbursement of funds.