DELAWARE STATE BAR ASSOCIATION

CONTINUING LEGAL EDUCATION

Workers' Compensation 2024

May 7, 2024, 8:30AM – 4:30PM

Live at Riverfront Events/Hyatt

Seminar Materials

Sponsored by the Workers' Compensation Section of the Delaware State Bar Association

6.3 Hours of CLE Credit including 1.0 Hour of Enhanced Ethics credit for Delaware Attorneys

6.0 Hours of CLE Credit including 1.0 Hour of Enhanced Ethics credit for Pennsylvania Attorneys

Visit www.dsba.org/cle or 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.

Moderator

Leroy A. Tice, Esquire
Leroy A. Tice, Esquire, P.A.

8:30am-8:45am

Introductory Remarks

Elissa A. Greenberg, Esquire
Long & Greenberg, LLC
Chair of the Workers' Compensation Section

8:45am-9:15am

Panel 1

Address from the Industrial Accident Board

The Honorable Mark Murowany
Chairman of the Industrial Accident Board

Christopher F. Baum, Esquire
Delaware Department of Labor

9:15am-9:45am

Panel 2

The Protocols of Practice and Procedure

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

Eric D. Boyle, Esquire
Delaware Department of Labor

Tara E. Bustard, Esquire
Doroshow, Pasquale, Krawitz & Bhaya

Stephen T. Morrow, Esquire
Rhoades & Morrow LLC

9:45am-10:15am

Panel 3

Motion Day Magic

Frederick S. Freibott, Esquire
The Freibott Law Firm, P.A.

Heather A. Long, Esquire
Long & Greenberg, LLC

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

10:15am-10:30am
Break

10:30am-11:15am

Panel 4

The Discovery Channel: Pre-Hearing Avenues of Disclosure

Benjamin K. Durstein, Esquire
Marshall Dennehey

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

Christopher T. Logullo, Esquire
Cobb & Logullo

W. Christopher Componovo, Esquire
Morris James LLP

11:15am-12:00pm

Keynote Address- The Art of Direct and Cross Examination

The Honorable Francis J. Jones, Jr.
Superior Court of the State of Delaware

12:00pm-1:00pm
Lunch *(Provided)*

1:00pm-1:30pm

Panel 5

Hot Off The Press: Recent Case Law and Other Trends

Caroline A. Kaminski, Esquire
Nitsche & Fredricks, LLC

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

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1:30pm-2:15pm

Panel 6

Not Just Skin Deep- Disfigurement Issues

Tiffany Q. Freidman, Esquire
Roeberg Moore & Friedman, P.A.

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

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

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

2:15pm-2:30pm
Break

2:30pm-3:30pm

Panel 7

Evaluation and Interpretation of Diagnostic Studies

William R. Stewart III, Esquire
Pratcher Krayer LLC

Andrew J. Gelman, D.O.

Tariq Quraishi, M.D.

James Zaslavsky, M.D.

3:30pm-4:30pm

Panel 8

Ethics and the Moral Compass of Workers' Compensation

Amanda K. Dobies, Esquire
Kimmel, Carter, Roman, Peltz & O'Neill, P.A.

Andrew M. Lukashunas, Esquire
Tybout, Redfearn & Pell

Keri L. Morris-Johnston, Esquire
Marshall Dennehey

Angela G. Vest, Esquire
Doroshow, Pasquale, Krawitz & Bhaya

Moderator

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Leroy A. Tice, Esquire
Leroy A. Tice, Esquire, P.A.

Introductory Remarks

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Elissa A. Greenberg, Esquire
Long & Greenberg, LLC
Chair of the Workers' Compensation Section

Elissa A. Greenberg, Esquire
Partner
Law Office of Long & Greenberg

Elissa Greenberg is a Partner at Long & Greenberg, where she represents plaintiffs in personal injury matters. Before forming Long & Greenberg, Ms. Greenberg was a Director at the law firm of Elzufon Austin & Mondell, where she specialized in representing employers and insurance carriers in workers' compensation cases for approximately twelve years.

Elissa Greenberg received her bachelor's degree from Colgate University in 1998. She spent the next eight years working in "corporate America" before putting herself through law school. Ms. Greenberg earned her J.D., *cum laude*, from Widener University School of Law in 2009. Ms. Greenberg has since achieved SuperLawyers status; earned the SuperLawyers Rising Star award in 2019; and received numerous Delaware Today Top Lawyer awards for workers' compensation since 2019. Ms. Greenberg is also known for her successful work in the Delaware Supreme Court cases of *Rash v. Greenville Country Club*, *Weller v. Morris James*, and *Horizon Services, Inc. v. Henry*. She is currently the Chair of the Workers' Compensation Section of the Delaware State Bar Association.

Ms. Greenberg is the proud spouse of Andew Hudak, a lieutenant with the Delaware State Police.

Panel 1
Address from the Industrial Accident Board

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The Honorable Mark Murowany
Chairman of the 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

26th Annual Report

on the

Status of Workers' Compensation

Case Management

January, 2024

2023 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 2023, several issues stand out as having tremendous and far-reaching effects on Workers' Compensation in Delaware:

1. OWC continues to work to address the problem of employers operating in Delaware without workers' compensation insurance coverage with the hiring of 3 (one for each county) Labor Law Enforcement Officers in Spring of 2021. We have continued to grow this unit by reclassifying two clerical positions to fill the need of this unit. While enforcement of workers' compensation law is the unit's primary focus, they continue with steps to educate employers about workers' compensation and what is required of them by participating in community events. The enforcement efforts of this unit secured over 320 Workers Compensation policies that covered over 3027 previously uninsured employees working in the State of Delaware and conducted over 740 on site inpections of potential non compliant businesses. When companies comply with the law by securing a WC policy, compliance also generates income for the Workers' Compensation Fund through the Statement of Premium Tax.
2. The Office of Workers' Compensation (OWC) was tasked with digitizing old files in preparation of a paperless file system. The OWC researched all files with an injury date prior to 2015 that were still active in our Case Management system to ensure the file could be closed. Agreements and Petitions that were identified as still open needed to be researched and audited to determine if the document should be closed in our system. This

process would ensure the file was properly archived. There were over 750 bankers' boxes involved which equated to a minimum of 15,000 files touched by hand. All closed files were then sent to an outside agency to be digitized. The project was an enormous undertaking all while maintaining the OWC's daily workload.

3. The average dispositional speed (the time from the filing of a petition to the issuance of the decision) was reduced for the third consecutive year, for an overall reduction of 24% since 2020, despite a 6% increase in the number of continuance requests compared to 2022. This reduction in average dispositional speed was achieved even though the hearing officers (who are primarily responsible for preparing the final decisions for issuance) were understaffed for much of 2023 (a hearing officer staff reduction of over 22%). The hearing officers also decreased the average time that it took to write decisions from the date of hearing to issuance of the award by 42% (or 19 days) since 2021. That the hearing officers, while understaffed, were still able to reduce both the overall average dispositional speed and the writing speed—and to do so while still maintaining their remarkably low appeal rate—is a tribute to the high quality of attorney talent that services the Office of Workers' Compensation.

4. The Office of Workers' Compensation introduced a new email box for the acceptance of petitions as well as Pre-Trial Memorandums. These new email boxes provide an additional avenue for attorneys and claimants to submit documents electronically reducing the amount of paper documents being submitted.

5. The OWC will continue to look for ways to streamline processes as we modernize technology for the benefit of both staff and members of the public.

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

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

Workers' Compensation Oversight Panel (WCOP)

On October 11, 2023, the Insurance Commissioner announced that workers' compensation rates for 2023 would decrease on average 13.85% for the residual market and 10.03 % for the voluntary market. This is the seventh consecutive year Workers' Compensation insurance rates have dropped. OWC will continue to provide the administrative support necessary for the Workers' Compensation Oversight Panel to further its efforts at reducing costs associated with the past increases in workers' compensation rates.

Health Care Payment System - Year in Review 2023

The Delaware Workers' Compensation Health Care Payment System (HCPS) marked its fourteenth anniversary on May 23, 2023. The 6 major components of the HCPS, which fall under the purview of the Workers' Compensation Oversight Panel and its subcommittees, are:

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

Workers' Compensation Oversight Panel:

The 24 member WCOP contains representatives from the medical, legal, labor, business, and insurance communities, including the Secretary of Labor and Insurance Commissioner. Currently, the Panel has two Public Member vacancies.

In 2023, the WCOP met 1 time.

The WCOP is in the process of updating/revising the Practice Guidelines bringing them up to date with current medical guidelines and procedures. The Introduction & Fee Schedule Guidelines have been updated and approved by the WCOP and the Secretary of Labor. They have passed the Registrar of Regulations review and will be published 02/01/2024. The Practice Guidelines and Introduction & Fee Schedule Guidelines were last updated in 2016.

Medical Component:

The OWC medical component supports the operations of the HCPS. In 2023, 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, 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.

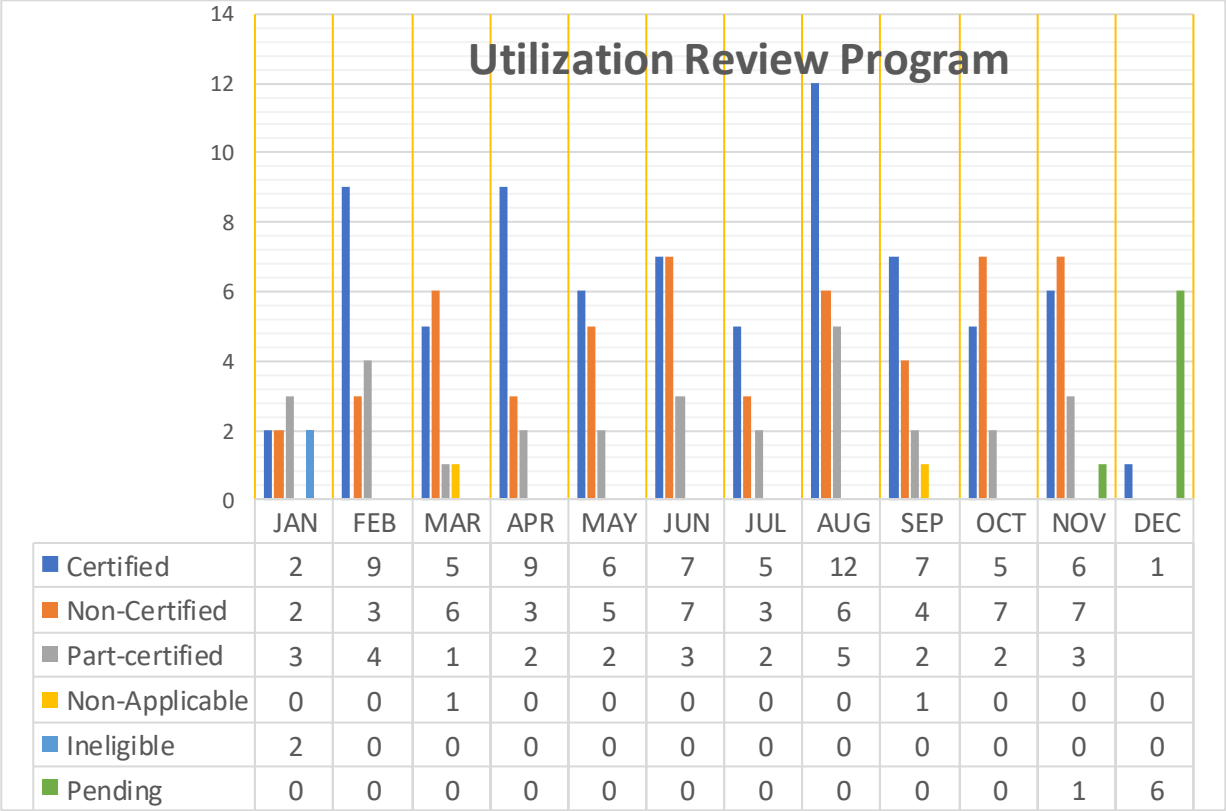
Utilization review:

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 2022, OWC received 176 requests for utilization review. In 2023 YTD, OWC received 160 requests for utilization review, which constituted an 10% decrease. In 2022, OWC received 104 Petitions to Appeal a Utilization Review. These appeals were filed in approximately 59.1% 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 2023, OWC received 126 Petitions to Appeal a Utilization Review. The percentage rate of appeal for 2023 was approximately 78.75%. The appeal rate increased by 19.65%.

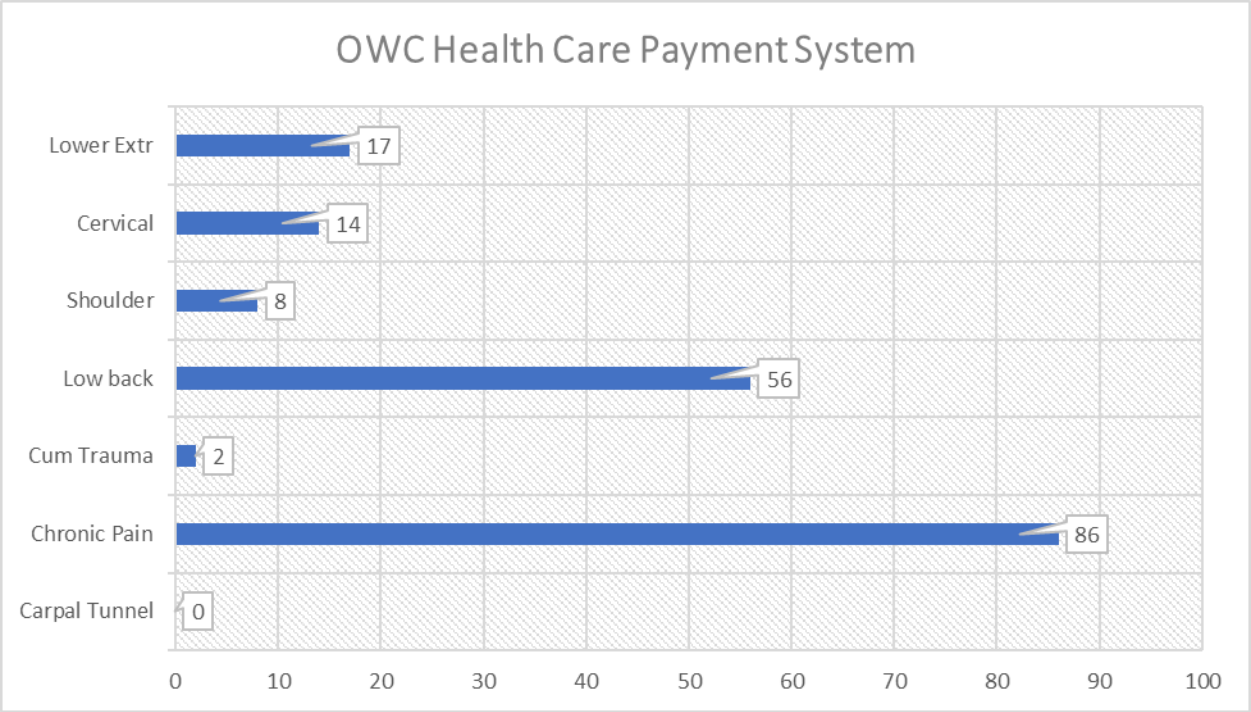
Similar to the prior year, the great majority of appeals filed were later withdrawn before going to a hearing with the Industrial Accident Board.

The chart below outlines the determinations rendered for the Utilization Review requests submitted for review.

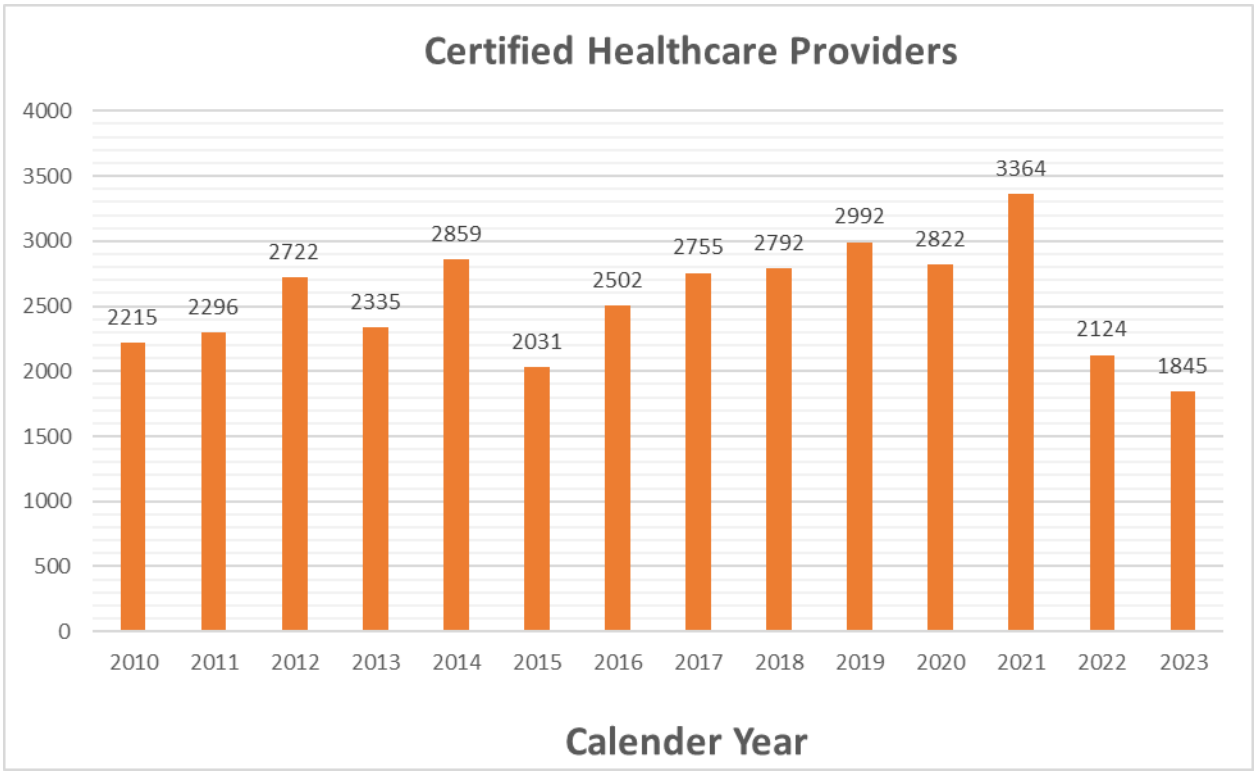


	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
Certified	2	9	5	9	6	7	5	12	7	5	6	1
Non-Certified	2	3	6	3	5	7	3	6	4	7	7	
Part-certified	3	4	1	2	2	3	2	5	2	2	3	
Non-Applicable	0	0	1	0	0	0	0	0	1	0	0	0
Ineligible	2	0	0	0	0	0	0	0	0	0	0	0
Pending	0	0	0	0	0	0	0	0	0	0	1	6

Chronic pain treatment, particularly pain medication, continued in 2023 to represent the treatment most challenged through utilization review. OWC participates on the Prescription Drug Action Committee (PDAC), which continued moving forward its recommendations to reduce prescription drug abuse in Delaware.



The number of certified health care providers has decreased within the last year. In 2022 there were 2,124 certified providers and that number has decreased by 13.14% to 1,845 active providers in 2023. 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 remains the provider's professional license renewal date. 2023 marked the tenth year of this change, which helps providers' better track the recertification deadline. To further assist the providers in avoiding a lapse in certification, the Medical Component unit has instituted an email reminder/notification process for all upcoming provider expirations. The notice provides information and a link to the required continuing education course to renew certification.



Office of Workers' Compensation

Workers' Compensation Specialists

The workers' compensation specialists scheduled 4,828 hearing in 2023. They also met with over 160 unrepresented (pro-se) claimants that were applying for workers' compensation benefits. The Specialists also field escalated calls from claimants, employers, attorneys and insurance companies during the course and scope of their daily job function.

OWC Labor Law Enforcement Unit:

Since its inception in Spring of 2021, the departments three LLEOs have continued to positively impact the workers within the State of Delaware. In 2023 they were credited with securing 320 WC insurance policies from employers who previously were not covered and therefore not paying the Statement of Premium Tax to the WC Fund. The Enforcement Unit also resolved 1,324 cases. This equates to a minimum estimate of 3027 employees who were previously not covered in the event of an industrial work accident. The officers mailed over 1,450 compliance letters and scheduled 58 hearings to compel employers to provide employees WC insurance. As a result of those hearings, the Industrial Accident Board assessed fines totaling $576,500.00 against non-compliant employers, an increase of 20% over 2022.

OWC Administrative Support Unit:

The Office of Workers' Compensation processed 1,961 requests for copies of public documents. This is down 9% from last year. OWC processed 10,691 First Report of Injury. This represented an 11% decrease in reported injuries for 2023 vs 2022. 32% of FRI's were filed electronically. The OWC processed 3329 agreements and 7899 receipts. The office answered 4333 calls, which represents 80% of all calls coming into the IA main number speaking to a live person.

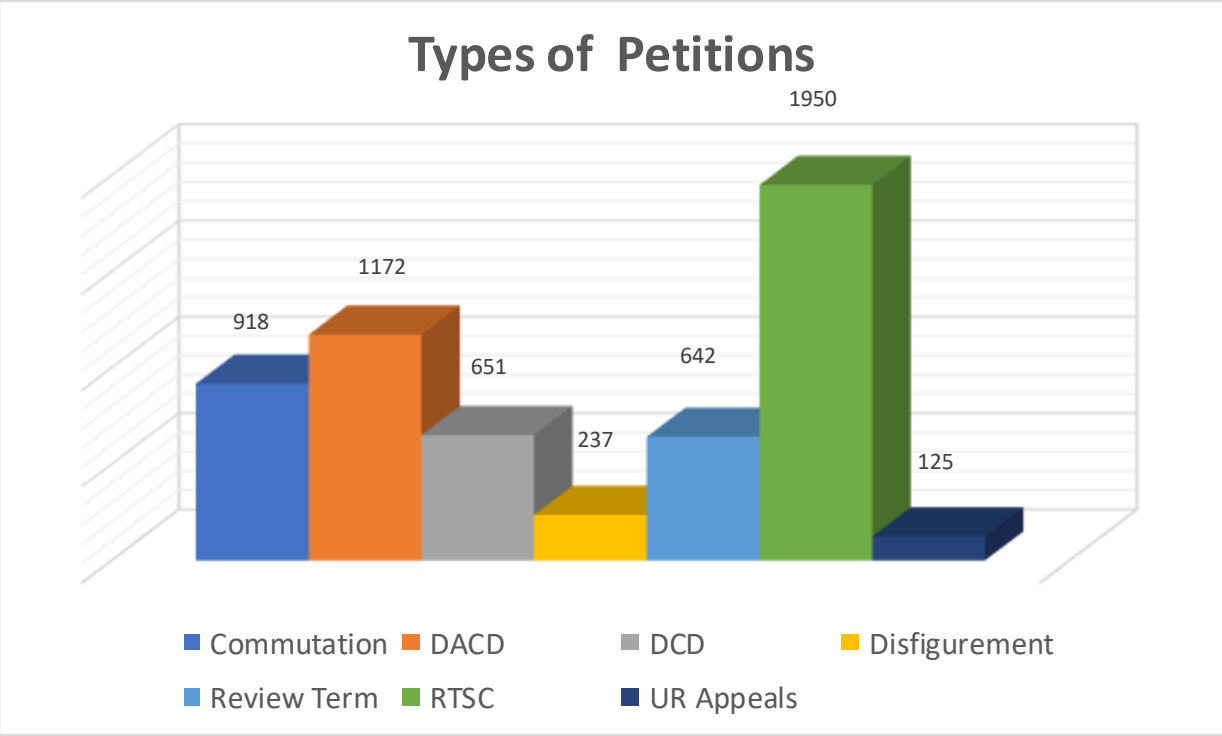
The OWC was also tasked with collection of the semi-annual tax assessment based on Statement of Premiums (revenue for the Workers' Compensation Fund), the semi-annual Administrative Assessment based on the operating expenses of the unit as it relates to the Direct Paid Losses of the Insurance companies (the OWC funding source for our daily operations) and the quarterly self-insured tax which goes to the general fund.

Petitions Filed Annually

During 2023, a total of 5697 petitions were filed. This is an increase of 3% compared to 2022. This is the first increase since 2018 in filed petitions. The Enforcement unit filed 21 more petitions for uninsured in 2023 vs 2022. There was also 25 RTSC petitions filed for allowing virtual testimony before the Board. DACD petitions represented a 3% increase in 2023.

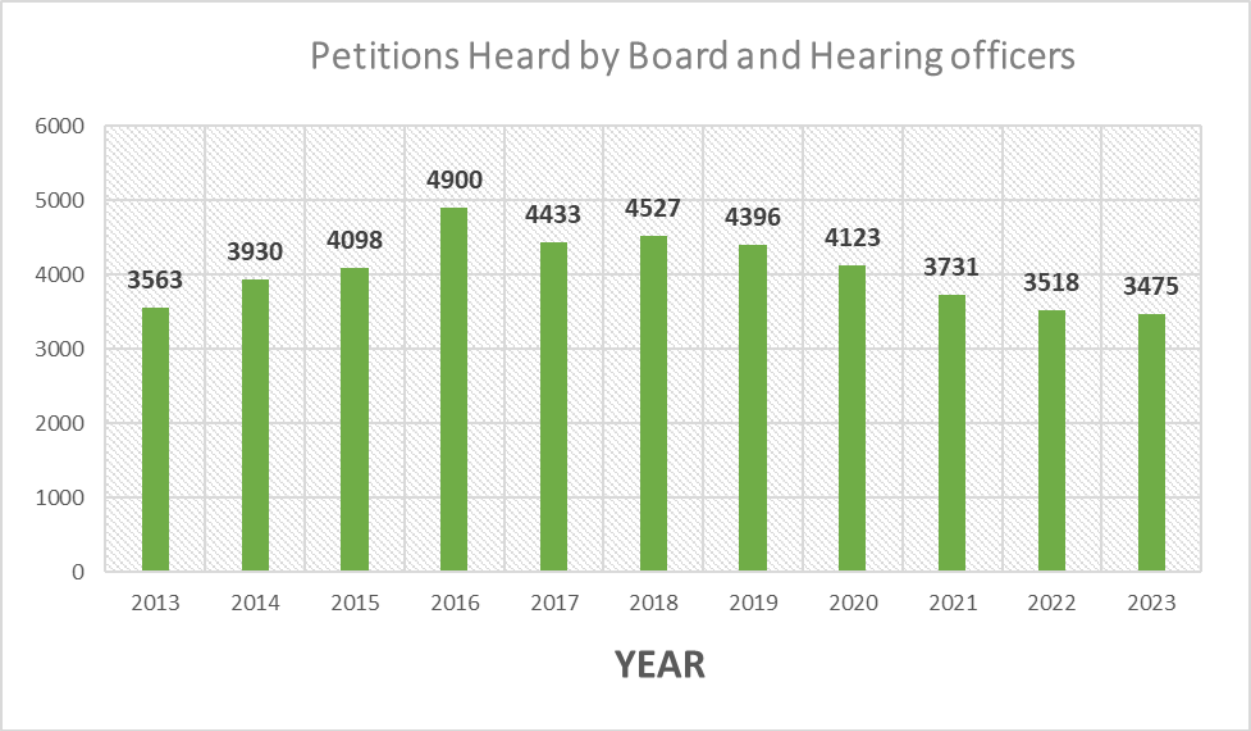
Types of Petitions

Overall, petitions filed annually increased, however, DCD petitions decreased by 5% and Review Term Petitions decreased by 2%. RTSC petitions increased 11%, mostly due to the specific types mentioned on page 11.



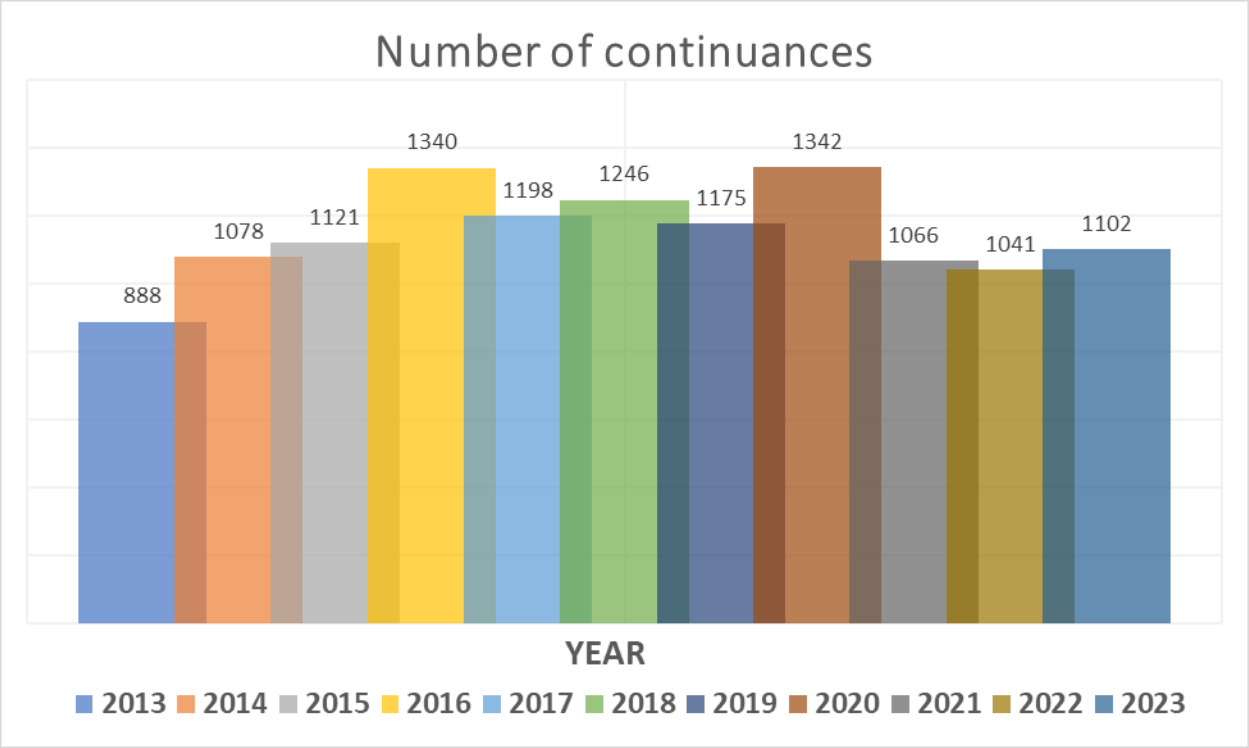
Petitions Heard by the Board/Hearing Officers

As seen in the chart on page 12, the number of petitions filed annually increaed slightly in 2023, 3%, compared to 2022; while there was a decrease of 1% in Petitions heard in CY23. This statistic is for all petitions regardless of hearing type.



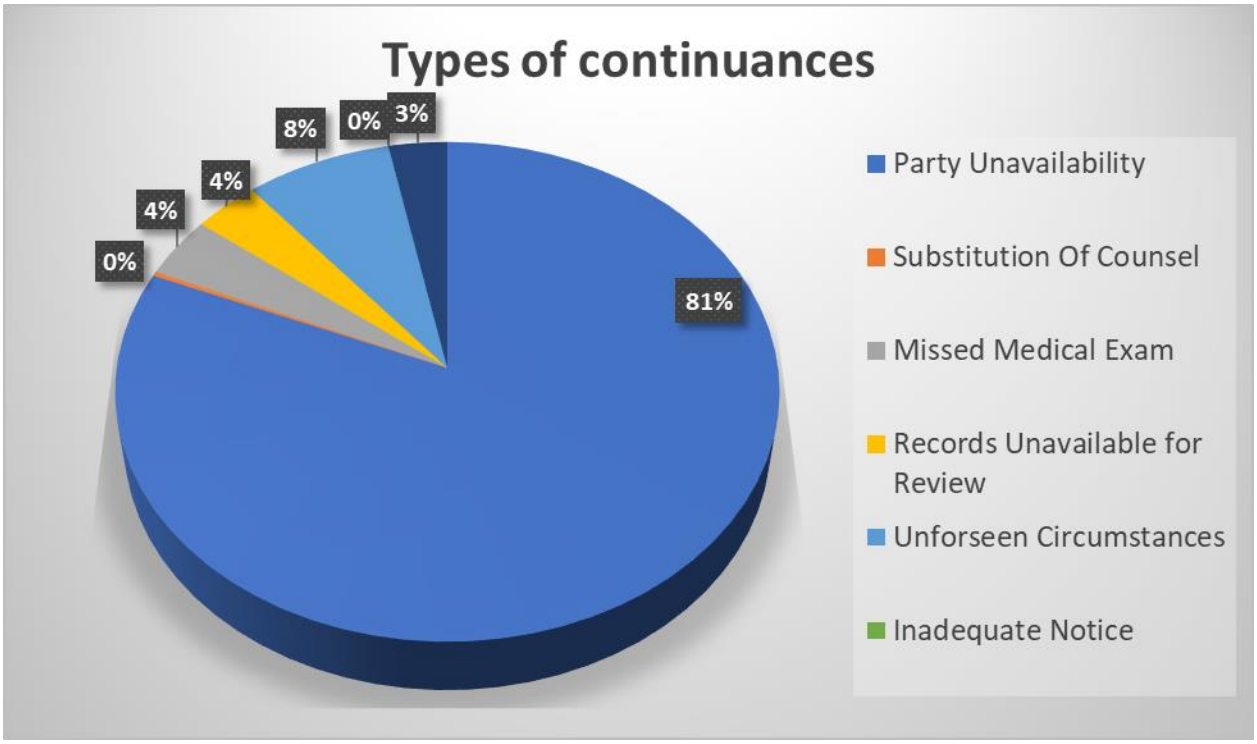
Continuances

In 2023, a total of 1,102 continuances were granted, which represents a 6% increase from the 1,041 continuances granted in 2022. The vast majority of continuances continue to be caused by the unavailability of a medical witness.



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)	883
A justifiable substitution of counsel for a party	3
Any unforeseen circumstance beyond the control of the parties:	
• Employee missed employer-scheduled medical exam	43
• Records unavailable for review by parties prior to hearing	38
• Unforeseen circumstances	85
• Inadequate notice	0
• *Case bumped*	34



Board Member Activities

The following table shows the number of days that individual board members were scheduled to conduct hearings, as well as the number of days they actually conducted hearings in 2023. Scheduled days versus actual days differ due to case settlements and continuances. The total amount of actual hearings is down 18% compared to 2022 with merit hearings down 22%.

Board Member	Number of Days Scheduled to Conduct Hearings	Number of Days Actually Conducted Hearings
Dantzler*	20	10
D'Anna	157	48
Freel	149	68
Hare	153	52
Hartranft	144	50
Hayes	147	53
Maull	110	45
Mishoe*	30	13
Mitchell	165	57
Murowany	154	58
Wilson	156	43
Total:	**1386**	**497**

- Mary Dantzler retired in March, 2023.
- Dr. Wilma Mishoe was appointed to the IAB effective September, 2023

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. There were 67 hearings that heard multiple petitions.

Two members of the Board sit for each Hearing.

Board Member	Number of Hearings on the Merits
Dantzler	4
D'Anna	37
Freel	46
Hare	43
Hartranft	33
Hayes	33
Maull	33
Mishoe	7
Mitchell	34
Murowany	41
Wilson	35
Total	346

Completed Caseload of Individual Hearing Officers

Hearing Officer	Number of Decisions, Orders and Reargruments Written
E. Boyle*	32
J. Bucklin	43
A. Fowler	38
S. Mack	29
J. Pezzner	24
J. Schneikart	34
H. Williams*	35
K. Wilson	33
C. Baum, Chief	38
Total	306

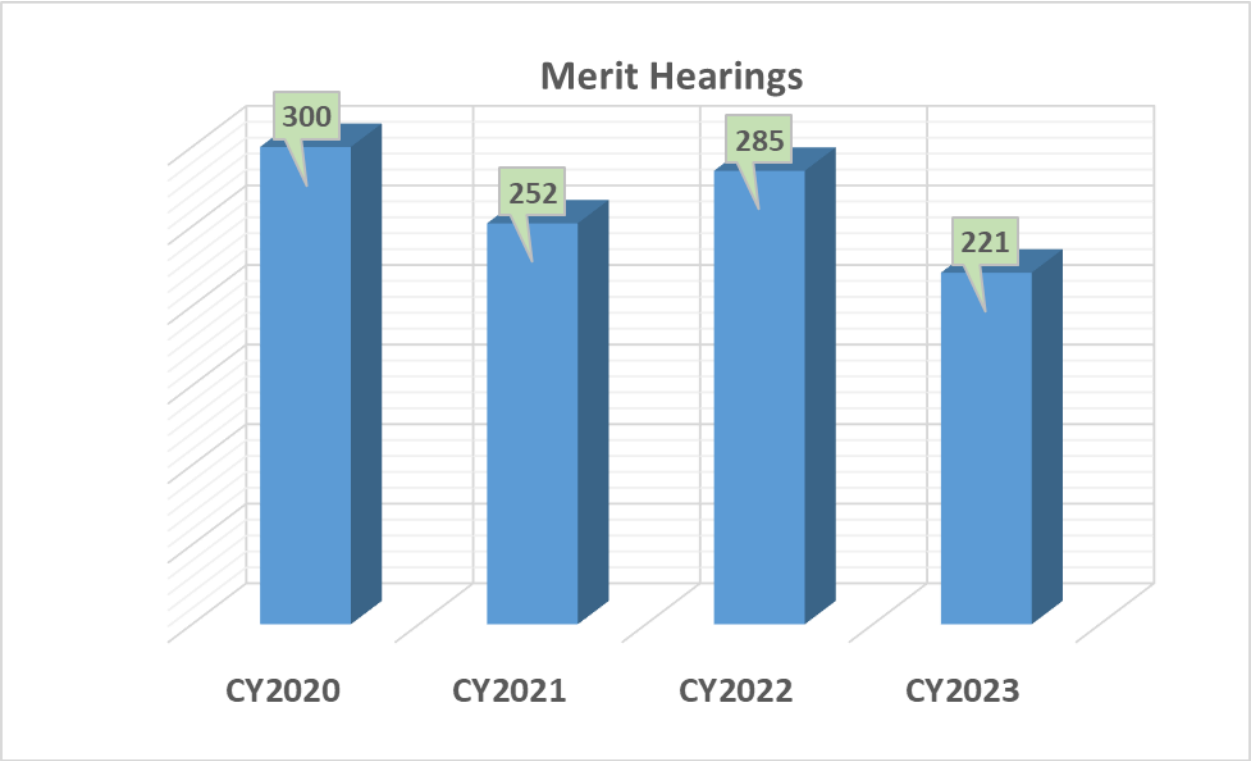
- Heather Williams transferred to the DOJ in July, 2023.
- Eric Boyle transferred to the DOJ in September, 2023.

In 2023, a hearing officer conducted one workers' compensation mediation pursuant to DEL. CODE ANN. tit. 19, § 2348A. It was concluded successfully.

Compliance with Hearing & Decisional Deadlines

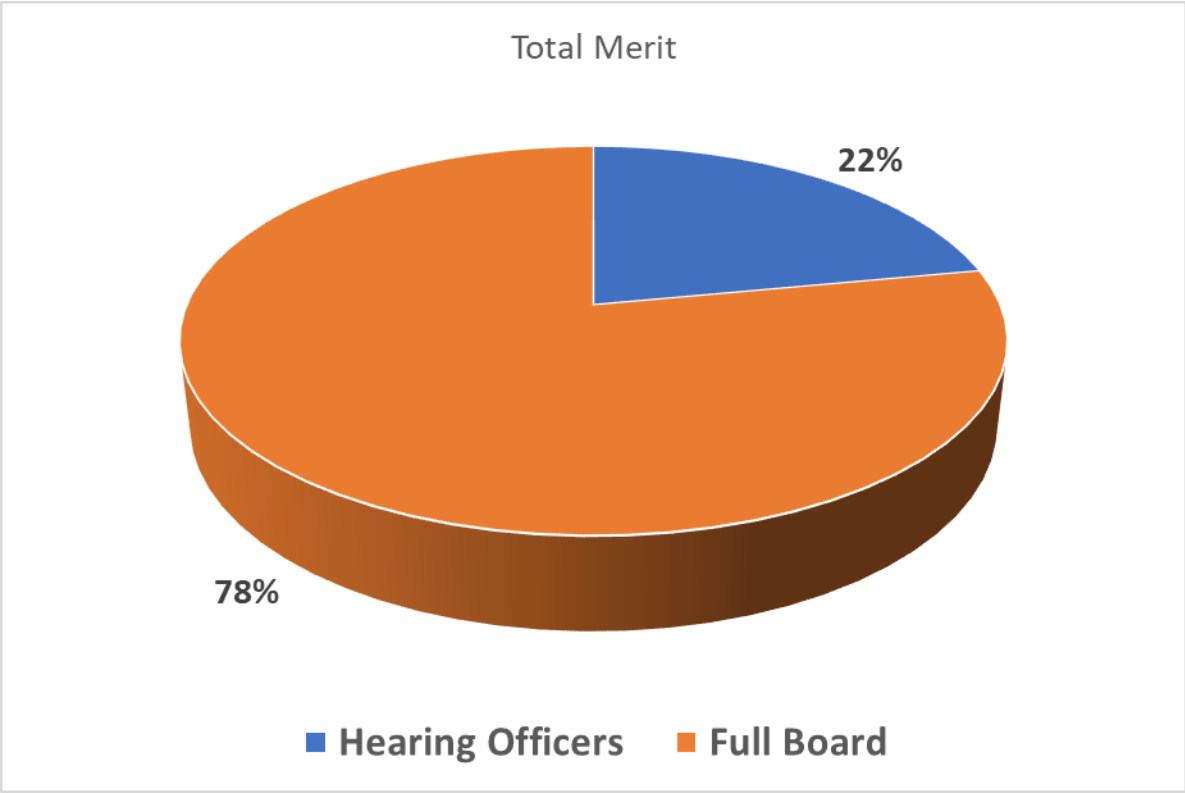
In 2023, 221 merit cases were heard which required a written decision within 14 days from the IAB or hearing officers. Written decisions from the time of the hearing to the written award have decreased in the past 2 years by 19 days or 42%.

The number of appeals continued to remain low, with only 30 appeals in 2023.

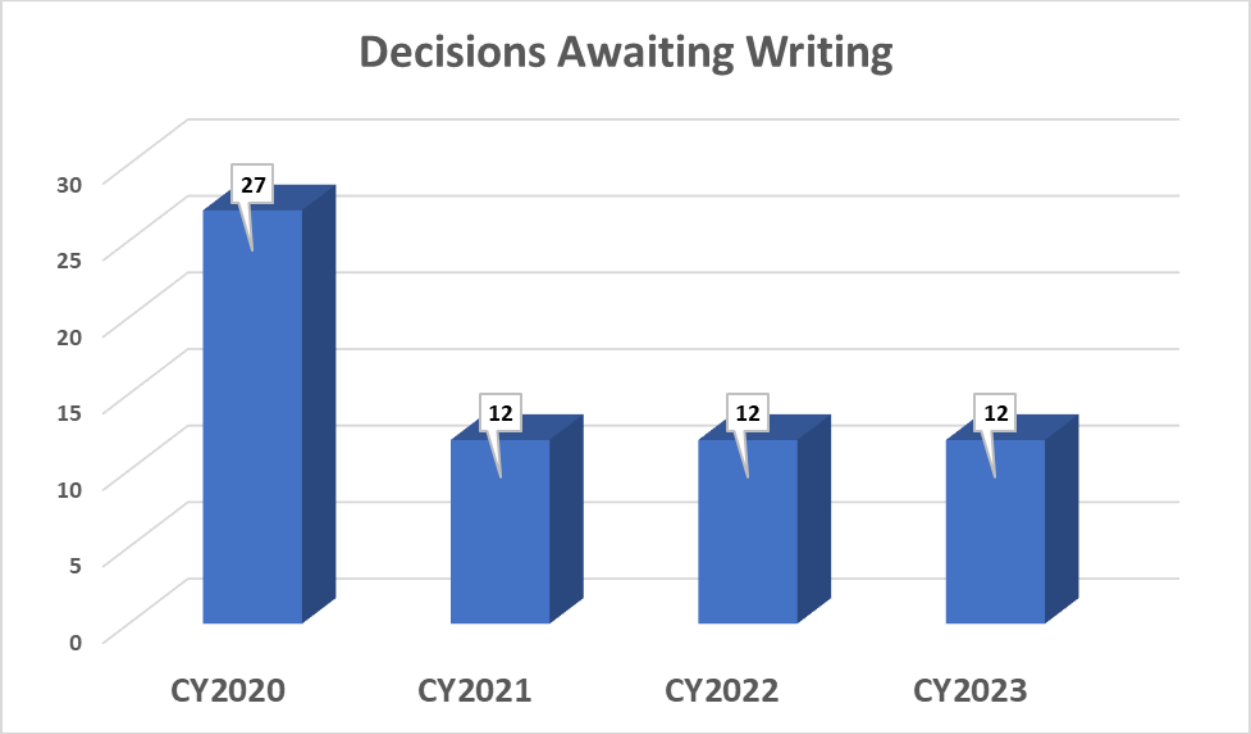


221 Merit hearings were conducted in 2023 (a decrease of 14%), of which 48 were conducted by solo Hearing Officers, an increase of 9% to last year. Of the 221 Merit Hearings, 67 had multiple petitions heard.

There were 902 commutations reviewed by a solo Hearing Officer in 2023. This represents a slight decrease of 2% in commutation settlements compared to 2022.

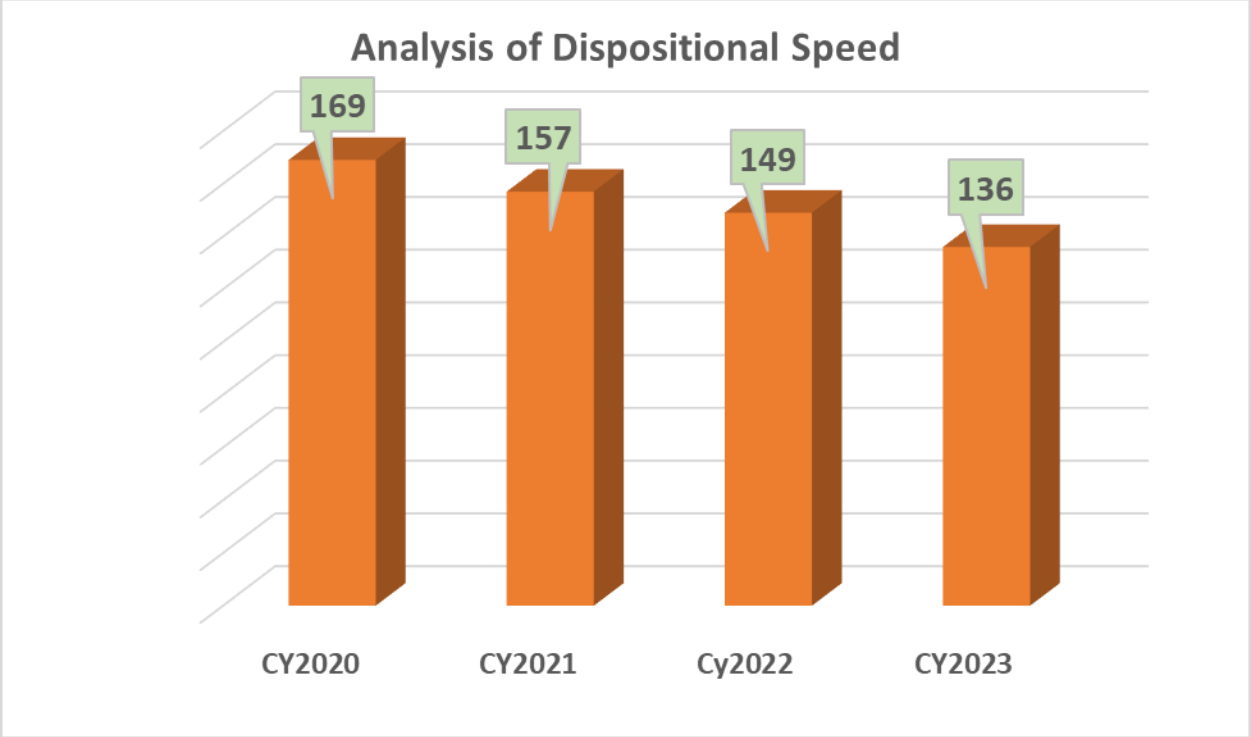


Currently, there are 12 decisions in the queue awaiting writing.



Analysis of Dispositional Speed

In 2023, the average dispositional speed for processing all petitions (from the filing of the petition to the issuance of the decision) was 136 days, compared to 149 in 2022. An improvement of 24% since 2020. 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, 2023)

In the last five years, the Board (or Hearing Officers) have rendered 1,375 decisions on the merits. Of those decisions, 193 (approximately 14.03%) were appealed (an average of 38.6 per year). 176 of those appeals have been resolved. Only 22 decisions have been reversed and/or remanded, in whole or in part. This represents a "reversal rate" of only **1.6%** of all decisions rendered in those five years.

Year Appeal Taken In:	**2019**	**2020**	**2021**	**2022**	**2023**
Total Number of Decisions:	358	254	269	275	219
Total Number of Appeals:	47	45	35	36	30
Affirmed:	14	22	15	17	4
Reversed and/or Remanded:	9	6	4	3	0
Dismissed/Withdrawn:	24	17	16	16	9
Pending:[1]	0	0	0	0	17

Summary of Appeals, Five Year Cumulative

(Status of appeals taken as of December 31, 2023)

[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 2022, some of those appeal results may change in the future because of decisions by the Supreme Court.

Five-Year Cumulative	
Total Number of Decisions:	1375
Total Number of Appeals:	193
Affirmed:	72
Reversed and/or Remanded	22
Dismissed/Withdrawn	82
Pending:	17

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 enforce the laws of the State of Delawaare as well as educate employers about workers' compensation and what is required of them. New pamphlets and videos are planned for 2024 to give employers an understanding of the requirements of the State of Delaware. This educational tool will address requirements for both in-state employers and employers out of state that are conducting business within Delaware. OWC is also reviewing current workers' compensation statutes to ensure that they contain the tools necessary to pursue non-compliant companies.

Self-Insurance:

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

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

A third area to be addressed is how the current statutes do not adequately address the way claims are to be paid from the bond proceeds when a self-insured

employer does file for bankruptcy. OWC would also like to address the lack of requirements for an employer to be granted self-insured status as well as the lack of a periodic review of an employer's self-insured status and whether that status or bond amount continues to be appropriate for the employer.

Workers' Compensation Act:

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

Panel 2

"The Protocols of Practice and Procedure"

==========

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

Eric D. Boyle, Esquire
Delaware Department of Labor

Tara E. Bustard, Esquire
Doroshow, Pasquale, Krawitz & Bhaya

Stephen T. Morrow, Esquire
Rhoades & Morrow LLC

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*OF COUNSEL

H. Garrett Baker, Esquire

H. Garrett Baker is a Director with the law offices of Elzufon Austin and Mondell and a member of the Workers' Compensation Department. Gary was admitted to the Pennsylvania bar in 1990 followed by the Delaware bar in 1992. His next bar admissions were to the U.S. District Court, District of Delaware and the U.S. Court of Appeals, Third Circuit in 1993 and in 1994 to the U.S. Supreme Court. Gary graduated from Evangel College (B.S., summa cum laude, 1986), Southern Illinois University (J.D., cum laude, 1990) and the University of Delaware (M.A. 1998). He is a member of the Phi Kappa Phi fraternity. Gary also served as Judicial Intern for the Honorable Carol Los Mansmann, Circuit Judge, U.S. Court of Appeals, Third Circuit, in 1989 and the Honorable Joseph T. Walsh, Associate Justice, Supreme Court of Delaware in 1992. Gary was the Lead Articles Editor for the Southern Illinois University Law Journal where he co-authored: "Survey of Family Law," 14 So. Ill. U.L.J. 1007 (1990). Gary is a Founder and past President of the Randy J. Holland Delaware Workers' Compensation Inn of Court, a member of the Delaware State Bar Association, and the 2013-2014 Chair of its Workers' Compensation Section. He has been repeatedly selected as a "Top Lawyer" in the field of worker's compensation defense in a peer review survey conducted by Delaware Today and holds an "AV" rating from Martindale-Hubbell.

Eric D. Boyle, Esquire is a Deputy Attorney General with the Delaware Department of Justice representing the Workers' Compensation Fund for the Department of Labor. Prior to this position he served for twelve years as a Hearing Officer for the Industrial Accident Board. Eric obtained his undergraduate degree from Gannon University in Erie PA and upon graduation served as an Armor Officer in the United States Army. Eric attended Widener University School of Law at night while working as an insurance adjuster, obtaining his J.D. in 1996. Prior to joining the State, Eric practiced insurance defense, working as house counsel for Liberty Mutual with Chrissinger & Logullo and later helping to establish the Delaware office of Franklin & Prokopic. Eric is admitted to practice in Delaware, the U.S. District Court for the District of Delaware, and the U.S. Supreme Court. He is a member of the Delaware State Bar Association, the Worker's Compensation Section of the DSBA, and the Randy J. Holland Delaware Worker's Compensation American Inn of Court.

The Protocols of Practice and Procedure

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

Eric D. Boyle, Esquire
Delaware Department of Labor

Tara E. Bustard, Esquire
Doroshow, Pasquale, Krawitz & Bhaya

Stephen T. Morrow, Esquire
Rhoades & Morrow LLC

BIFURCATED HEARINGS

1. Bifurcated hearings can serve several good purposes, in the right cases.

2. This could include:

   - Narrowing the issues before the Board

   - Addressing potential compensability issues such as scope and course of employment, statute of limitations or affirmative defenses under 19 Del. C. sec. 2353 without a Claimant having to risk incurring expert fees in the event of an adverse decision

   - Addressing who is the employer in the event of a 19 Del. C. 2311 or independent contractor dispute

   - Addressing which carrier is responsible in the event of a Nally or last injurious exposure issue

3. Of course, this should be done with client consultation and consent, especially as it could delay the time that the claimant potentially receives compensation.

CONSOLIDATING PETITIONS

1. From Claimant's perspective, consolidating petitions can streamline multiple issues and in some cases guarantee payment of a witness fee and possibly an attorney's fee.

2. By consolidating multiple petitions are you overcomplicating things and presenting too much to the board at once?

3. How many witnesses (expert and non-expert) will consolidating multiple petitions require?

4. Will you require the opinion of multiple doctors and how difficult will scheduling multiple doctors for depositions prior to a hearing be?

5. How much time will this require before the Board?

6. From Claimant's perspective, are you setting up an opportunity to "split the baby?"

7. Is there possibility of appeal of one issue that would then affect every issue you present to the Board?

HEARING OFFICER OR A BOARD?

1. This selection can be noted on the Pre-Trial Memorandum

2. When stipulating to a Hearing Officer it is best to confirm approval with the client since it does require client consent.

3. While any issue can be presented to a Hearing Officer only, most attorneys want a Board to address hearing where fact witnesses and credibility are more central and more inclined to stipulate to a Hearing Officer where the issue presented is more legal in nature, especially since the Hearing Officer would be providing legal guidance to the Board on these issues.

4. A decision might come more quickly when it is decided by a Hearing Officer since there are fewer parties involved.

OPENING STATEMENTS AND CLOSING ARGUMENTS

1. While individual styles and preferences may vary it could be helpful to the Board to have some preview of what the issues will be and the testimony so that it knows what is coming.

2. Opening statements should not meander but should be for the purpose of explaining how the evidence will show that your position, rather than your opponent's, is the correct one. As such keep it simple, focused and short.

3. Closing statements should sum up for the Board how and why the evidence which it just heard supports a finding in your client's favor.

4. While it is good to have a general outline of what to cover in closing argument it is not good to be so wedded to the outline that it does not cover the testimony actually presented. Since it is often the case that attorneys will not know what witnesses will say during the hearing, since there is limited discovery, the closing argument needs to make room for addressing the testimony as offered.

5. It is a bad idea to hold back cases that you want the Board to rely on until closing argument. Give your opponent notice and a copy beforehand. The Board doesn't appreciate ambushes and it's just the right thing to do.

TO OBJECT OR NOT OBJECT

1. The rules of evidence are more relaxed in IAB hearings than in courtrooms because the Board is a quasi-judicial body as opposed to a strictly lay jury.

2. The Board will frequently overrule an objection noting that it will "give the evidence the weight that it thinks it deserves." However, when doing so it would be helpful to the parties, especially in the event of an appeal, to know how much, if any, weight the Board assigned to the disputed evidence.

3. In order to properly preserve an issue for appeal there must be an objection raised. Otherwise, it is waived on appeal if not raised before the Board.

4. However, consideration must be given as to how significant the potentially objectionable evidence might be. If the evidence is trivial there is no reason to place an objection as it could come across as being obstreperous. Also, placing an objection to evidence requires the Board

to stop and consider the evidence which means it might be given more consideration than if it were just ignored.

5. However, if the potential of prejudice outweighs these risks an objection is proper and should be raised.

PREPARING THE CLIENT

1. NEED TO SET EXPECTATIONS EARLY

    - Be clear with your client what relief you are seeking in the pending petition
    - Familiarize your client with Board procedure and dynamic
    - Be honest about what you can and cannot do
    - Be up front about collegiality between claimant and employer bar
    - Familiarize your client with the possible outcomes
    - Prepare your client for timeframe of receiving a decision
    - Familiarize your client with standard for appeal and likelihood of success on appeal

2. Take the time to prepare your client for direct and cross exam

    - Do you need multiple appointments to prepare?
    - Review any photographs, surveillance, and reports with client
    - Provide copies of deposition transcripts to client

DEPOSITIONS AND THE BOARD

Depositions have become longer in recent years with page counts over 150 not uncommon. Why? One reason is consolidation of petitions and issues but that may mean multiple shorter depos from different witnesses also. Another reason can be attributed to some typical deposition styles. Some of these may be familiar:

A. THE TESTIFIER – A LEADING OR ONE-SIDED DEPOSITION

- The doctor hardly gets a word in edgewise, only "yes, no or correct"
- Ok to lead but not ok when the attorney reads in the expert's opinion.
- The Board wants to hear what the doctor has to say not counsel.
- Reading in records for a claimant with an extensive medical history.
- Very time consuming – let the doctor summarize the relevant records or history.
- Often with a lengthy summary of medical records the Board doesn't hear the doctor's opinion until 50 pages into the deposition.

B. THE DOCTOR WHO TIME TRAVELS IN DEPOSITION

- Dr. Who jumps in his phone booth (Tardis) and travels back and forth in time, please don't do this for medical records.
- Questioner jumps from present treatment, back to 1984, then back to the present, then back to 2004. Apologizing but continuing to do it does not help. Confusing for the deponent and the Board.
- It is better for the Board and the HO writing the decision to have an orderly timeline for a claimant with a lengthy medical history.
- Often this leads to confusion over mistaken dates in the transcript.

C. THE REPEATER

- We have all heard and maybe learned in law school that if you repeat something three times your audience will remember it.
- The doctor is repeatedly asked for his/her opinion. Several times on direct and then again on redirect.
- Doing this just annoys the Board and lengthens your deposition unnecessarily.

- A doctor was giving live testimony in a case and ultimately stopped counsel and stated, “Didn’t you already ask me that question”. That is a problem.

D. THE RAMBLER

- Can be a variant of both the Testifier and Dr Who depositions.
- The doctor summarizes or is asked about every office visit in a lengthy medical history. We may see some semblance of an opinion on page 75 of a 150 page deposition.
- Certain doctors are known ramblers and can give a lengthy answer that is not responsive to the question. You risk drawing an objection and having testimony stricken in this case.

E. THE LAST WORD

- Some people have to have it. Even if it is Re, Re, Re-Direct.
- Variant of the Repeater.
- No need to keep having the doctor restate his opinion (Unless he caves on cross of course!)

1. Discrediting the doctors. This is done either with testimony from a prior unrelated case or by asking the typical questions of how many millions of $ the insurance companies are paying them. This is not helpful, and the Board does not want to hear it in most cases. Everyone is familiar with most of the doctors and who they testify for.

2. Opposing readings of diagnostic studies. Please try and have the doctor’s address this when testifying. The Board should not left be wondering how the doctors came to diametrically opposed readings of MRI films.

3. Keep depositions short and to the point. Who remembers Dr. Case? 20 pages was a long deposition transcript for him. Read from his report and answers were on point no rambling or repeating. This will also help the Hearing Officer writing the decision get it out faster.

Panel 3

Motion Day Magic

==========

Frederick S. Freibott, Esquire
The Freibott Law Firm, P.A.

Heather A. Long, Esquire
Long & Greenberg, LLC

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

LONG & GREENBERG, LLC.

Heather A. Long

FOUNDING PARTNER

As founding partner of Long & Greenberg, Heather has advanced diversity, which enables her to better serve her clients and injured workers in the State of Delaware.

Education and Biography

TRAINING

Heather Long earned her J.D. from Widener School of Law in 2005 and has been practicing personal injury law for over 15 years. Before forming Long & Greenberg, Ms. Long was a Partner in her former firm, where she represented injured plaintiffs and averaged approximately 4 million dollars per year in recovery.

With more than 25 years of experience, Long & Greenberg will provide comprehensive legal representation to people who are personally injured in Delaware as a result of work and/or liability accidents.

Heather Long and her husband are both former paramedics.

APPROACH

Both Ms. Long and Ms. Greenberg have worked for insurance companies in the past. They bring their experience and unique perspectives from “behind enemy lines” to work for you.

AWARDS & RECOGNITIONS

Ms. Long has earned the following recognitions: Delaware Today Top Lawyer for workers compensation 2019 – present; Workers Injury Law and Advocacy Group (WILG) rising star award 2022; Best Lawyers in America 2021 -2023; First State Favorites, Favorite Law Firm Northern Delaware 2023.

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GREGORY P. SKOLNIK (Firm Tenure 2012; Position: Workers' Compensation Attorney), born Philadelphia, Pennsylvania, April 1, 1986; admitted to bar 2011, Delaware and New Jersey. Education: Pennsylvania State University (B.A., 2008); Widener University School of Law (J.D., *cum laude*, *pro bono* distinction, 2011). Member: Delaware State Bar Association (Workers' Compensation and Young Lawyers Sections); Randy J. Holland Workers' Compensation Inn of Court. Practice Areas: Workers' Compensation and Insurance Defense.

Biography:

Greg focuses his practice exclusively on representing employers and insurance carriers in workers' compensation litigation in Delaware. He is licensed to practice law in Delaware and New Jersey. He is a graduate of Penn State University, earning a B.A. in Political Science. He attended law school at the Delaware Law School, and graduated *cum laude*, in the top 10% of his class, and with *pro bono* distinction. Following law school, he served as a Judicial Law Clerk for the then five Judges of the New Castle County Court of Common Pleas. After his clerkship, he joined Heckler and Frabizzio.

Greg maintains an active membership in the Workers' Compensation Section of the Delaware State Bar Association. He was a member of the Section's Special Committee that authored revisions to modernize subsection 2347 of the Workers' Compensation Act, that were ultimately passed and signed into law. He serves as Vice President for the Randy J. Holland Workers' Compensation Inn of Court. He is a regular speaker on various topics including Delaware Workers' Compensation law. He is an Attorney Coach for the Mount Pleasant High School Mock Trial Team for the yearly Delaware State High School Mock Trial Competition. He is a Peer Mentor and frequent speaker in a Delaware Bar review program offered by the Minority Judges and Lawyers Section of the Delaware Bar. In 2021, he was selected by the Delaware Business Times to their list of Achievers & Innovators Under 40.

notice to all such parties in interest. The Board may require additional information from any party appearing before the Board to assist in adequately ascertaining the rights and liabilities of such parties. In determining the rights of all such parties, the Board may amend the title of the petition in such a manner as may be right and proper. Either party may, upon motion to the Board pursuant to Rule 8, join other entities to include, but not limited to, other employers or insurance carriers.

Rule No. 7

Mediation

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

Rule No. 8

Motions Concerning Legal Issues

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

(B) If the motion is opposed, the matter will be scheduled for the next available motion day at which both parties may be heard. If the responding party chooses to respond to the motion in writing, such response shall state, in brief, the factual and legal basis for opposing the motion, and request the motion be denied or request an alternative proposed order. The response shall be sent not less than 4 days before the date the motion is scheduled to be heard, to the opposing party by regular mail and by hand delivery or by fax or email at the same time as it is filed with the Department. The lack of a written response shall not be a waiver of the right to oppose the motion of the hearing. The hearing, unless there is a contrary agreement of the parties, shall take place at the same location that the hearing on the pending petition is to be heard.

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

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

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

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

Rule No. 9

Pre-Trial Scheduling Conference and Pre-Trial Memorandum

(A) Pre-Trial Scheduling Conference

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

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

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

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

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

ERICK TELETOR, Claimant, v. APACHE GENERAL CONSTRUCTION LLC, YLD CONSTRUCTION, INC, FIRST STATE INC., OF DELAWARE, JMC PROPERTIES, INC., AND LINDEN HILL STATION, LLC, Employers.	)	Hearing Nos.: 1520634, 1520638, 1520640, 1520641, 1533757, 1533759

MOTION FOR VIRTUAL TESTIMONY

WHEREAS, this matter is before the Industrial Accident Board and scheduled for Hearing on 02/01/24 at 9:00 a.m. upon the Claimant's pending Petition to Determine Compensation Due;

WHEREAS, one of the named employers is First State Inc. of Delaware ("First State"), whose factual witness/representative is Mr. P.J. Bale. Mr. Bale has been identified by the Claimant as a witness;

WHEREAS, Mr. Bale received a subpoena from counsel for the Claimant on 01/04/24. Upon receipt, he contacted Claimant's attorney and advised he will be out of the state at the time of the 02/01/24 Hearing;

WHEREAS, as a result, barring an unforeseen change in said plans, Mr. Bale will not be able to attend the Hearing in-person;

WHEREAS, Mr. Bale has agreed to make himself available on 02/01/24 to testify virtually at the Hearing;

WHEREAS, the substance of Mr. Bale's testimony is anticipated to be on questions of employment, insurance, and the work performed at the time of the alleged accident, to include subcontractor roles and involvement;

WHEREAS, the Board has broad discretion on the presentation of witness testimony at Hearing and in prescribing the manner in which its Hearings are conducted;

WHEREAS, the Board's rules of procedure are "for the purpose of securing a just, speedy and inexpensive determination[.]" Del. C. 19 § 2301(A)(1);

WHEREAS, First State requests Mr. Bale be permitted to testify virtually. If the Motion for virtual testimony is denied, then First State requests in the alternative a continuance of the pending Hearing to allow for Mr. Bale to be present and testify;

THEREFORE, IT IS SO ORDERED this 11th day of January 2024, that:

1. The witness testimony of Mr. Bale shall go forward at Hearing via virtual participation.

INDUSTRIAL ACCIDENT BOARD

Mark L. Reardon (CH)

Robert J. Mitchell

OWC STAFF:_____
DATE OF MAILING:

Nicholas E. Bittner, Esq. – for First State Incorporated
Christopher T. Logullo, Esquire – for Employer Apache/Liberty
Jessica L. Welch, Esquire – for Claimant
Andrew J. Carmine, Esquire – for JMC Properties
Scott Silar, Esquire – for YLD's insurance carrier

BEFORE THE INDUSTRIAL ACCIDENT BOARD
IN AND FOR THE STATE OF DELAWARE

ERICK TELETOR, Claimant, vs. APACHE GENERAL CONSTRUCTION LLC, YLD CONSTRUCTION, INC, FIRST STATE INC., OF DELAWARE, JMC PROPERTIES, INC., AND LINDEN HILL STATION, LLC, Employers.	)	IAB HEARING NO.:1520634, 1520638, 1520640, 1520641, 1533757, 1533759 (P.J. Bale, Inc.) Date of Accident : 3/22/2021

EMPLOYER'S MOTION FOR TELEPHONE TESTIMONY OF ANNEMARIE SAKS

NOW COMES, Employer Apache General Construction and its insurance carrier, Liberty Mutual, by and through their counsel, Christopher T. Logullo, Esquire of Cobb & Logullo, to hereby move for their witness, Annemarie Saks, to be permitted to testify via telephone at the hearing scheduled for February 1, 2024. In support of same, Employer/Carrier states as follows:

1. The above-captioned matter involves an alleged construction site work accident that occurred on March 22, 2021.
2. Claimant was allegedly working for Apache when he fell on the site, and allegedly sustained personal injuries. He has filed this claim against Apache, First State Inc., YLD, and JMC Properties.
3. Apparently, Claimant's petition against the other entities is that Liberty Mutual, the carrier for Employer Apache, questions worker's compensation coverage as Apache only had a New Jersey state specific worker's compensation insurance policy that covered it. Therefore, an issue has arisen as to whether the mandates of 19 Del.C.

section 2311 are triggered such that either First State Incorporated, YLD, or JMC Properties will provide worker's compensation insurance coverage to Claimant and whether the denial of coverage by Liberty Mutual is valid.

4. Apache/Liberty Mutual has listed Annemarie Saks, the insurance adjuster for Liberty Mutual, that is overseeing this matter as a witness. Ms. Saks resides in Bayonne, New Jersey and works out of her home. She will provide relevant testimony as to the insurance policy at issue, she will confirm the policy so that it can be admitted into evidence, she will offer testimony regarding the investigation that has been conducted as it impacts insurance coverage, and she will offer testimony as to whether the "other states" endorsement in the policy at issue is triggered by this accident.
5. Counsel for Apache/Liberty Mutual has requested that she be permitted to testify via telephone as travelling to Delaware to attend the hearing will be a significant inconvenience to Ms. Saks given the distance that she resides from the Delaware Industrial Accident Board. The Board's administrator advised counsel that for Ms. Saks to be permitted to testify via telephone, a motion would need to be filed and approved by the Board prior to the hearing taking place.
6. To date, counsel for the opposing parties has not objected to Ms. Saks' request.
7. The Delaware Industrial Accident Board Rules appear to be silent regarding the submission of witness testimony by telephone. However, Rule 14(c) does note that the rules of evidence of the Superior Court of the State of Delaware shall be followed as practicable. Rule 14(c) also states that the Board may, in its discretion, disregard customary rules of evidence and legal proceedings so long as such a disregard does not amount to an abuse of discretion.

8. A review of the Superior Court Rules of Evidence provides little guidance in this area. Delaware Rule of Evidence 611 does discuss the mode, order of interrogation, and the presentation of witnesses. In that rule, it is noted that, "the court shall exercise reasonable control over the mode and order of interrogating witnesses". In this matter, the "mode" of presenting Ms. Saks as a witness is via telephone or video conferencing as Employer/Carrier believes that it is a reasonable way to elicit relevant testimony from her without creating significant inconvenience to her.
9. In the matter at bar, there is no present objection to the live telephone/video testimony of Ms. Saks, her testimony is relevant to the matter before the Board, it would be a great inconvenience to require Ms. Saks to appear live, and there is no record of prejudice to any party by allowing her to testify via telephone.
10. Consequently, Apache/Liberty Mutual respectfully requests that Annemarie Saks be permitted to testify via telephone at the February 1, 2024 hearing.

WHEREFORE, Employer/Carrier requests that the Board enter an order allowing Annemarie Saks to present testimony via telephone at the February 1, 2024 hearing.

COBB & LOGULLO

/s/Christopher T. Logullo

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Attorney for Employer

BEFORE THE INDUSTRIAL ACCIDENT BOARD
IN AND FOR THE STATE OF DELAWARE

ERICK TELETOR, Claimant, vs. APACHE GENERAL CONSTRUCTION LLC, YLD CONSTRUCTION, INC, FIRST STATE INC., OF DELAWARE, JMC PROPERTIES, INC., AND LINDEN HILL STATION, LLC, Employers.	)	IAB HEARING NO.:1520634, 1520638, 1520640, 1520641, 1533757, 1533759 (P.J. Bale, Inc.) Date of Accident : 3/22/2021

ORDER

NOW TO WIT, this 11 day of January, 2023, after having considered the positions of the parties, it is hereby ORDERED that Annemarie Saks will be permitted to testify via ~~telephone~~ video at the February 1, 2024 hearing.

Mark L. Reardon (CH)
Board Member

Robert J. Mitchell
Board Member

Hearing Officer for The Board
Christopher T. Logullo, Esquire – for Employer Apache/Liberty
Jessica L. Welch, Esquire – for Claimant
Andrew J. Carmine, Esquire – for JMC Properties
Nicholas Bittner, Esquire – for First State Incorporated
Scott Silar, Esquire – for YLD's insurance carrier

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

ERICK TELETOR,	:	
	:	IAB Nos. 1520634; 1520638;
Claimant,	:	1520640; 1520641; 1533757;
	:	1533759
v.	:	
	:	
APACHE GENERAL CONSTRUCTION, LLC; YLD CONSTRUCTION, INC.; FIRST STATE INC. OF DELAWARE; JMC PROPERTIES, INC.; and LINDEN HILL STATION, LLC	:	
	:	
Employers.	:	

THE CONTINENTAL INSURANCE COMPANY OF NEW JERSEY'S MOTION FOR TELEPHONE TESTIMONY OF LISA MONTGOMERY

COMES NOW, The Continental Insurance Company of New Jersey ("Continental"), by and through its undersigned counsel, to hereby move to allow its witness – Lisa Montgomery – to be permitted to testify via telephone at the Hearing(s) scheduled for February 1, 2024. In support of its Motion, Continental alleges as follows:

1. Claimant (Erick Teletor) has alleged that he was involved in a work injury on or about March 22, 2021 in which in allegedly sustained injuries and damages.

2. Claimant filed a number of Petition(s) to Determine Compensation Due against various Employers, alleging that he was an employee of Employer(s) and was involved in a March 22, 2021 work accident.

3. Claimant's Petition to Determine Compensation Due against YLD Construction, Inc. ("YLD") was filed on or about March 17, 2023.

4. YLD was insured for purposes of New Jersey Workers' Compensation by Continental at all times material hereto. The term of the coverage was from January 20, 2021 through January 20, 2022. The Policy number for said coverage was 6S61UB-5R70894-8-21.

5. Continental was notified by the Delaware Department of Labor, sometime in June 2023, of the alleged March 22, 2021 work accident by the Claimant and his DCD Petition filed against YLD. Shortly after that notification, YLD was notified by Continental that its coverage for Workers' Compensation only covered work injuries as to the State of New Jersey.

6. Continental has listed Lisa Montgomery as a witness for the upcoming February 1, 2024 Hearing(s). Ms. Montgomery is the insurance adjuster that has been overseeing this matter and has the most knowledge of insurance issues. Ms. Montgomery lives in Oviedo, Florida and she works remotely from her Florida home. Ms. Montgomery is expected to provide relevant testimony as to the insurance policy at issue and will confirm any such policy for evidence purposes.

Ms. Montgomery will testify to Continental's investigation and the results of said investigation in terms of coverage denial for the March 22, 2021 alleged Delaware work accident.

7. Undersigned counsel is seeking permission from the Board that will allow Ms. Montgomery to testify via telephone for the February 1, 2024 Hearing(s). Traveling from Florida to Delaware to attend the Hearing(s) will be an inconvenience for Ms. Montgomery given the distance between those two States. It is also expected that the testimony of Ms. Montgomery will be brief in nature. Undersigned counsel was advised by an administrator for the Board that a formal Motion was necessary to allow the Board to consider and approve the request that Ms. Montgomery be allowed to provide testimony via telephone.

8. To date, the attorneys involved in this matter have not objected to said request or have not provided any response to the request.

9. The Delaware Industrial Accident Rules do not specifically address allowing witness testimony by telephone at a Board Hearing. Rule 14(c) mentions that the Superior Court Rules of Evidence should be followed as practicable. Rule 14(c) further notes that the Board, in its discretion, may disregard customary evidence rules and legal proceedings as long as said disregard is not an abuse of discretion.

10. Rule 611 of the Delaware Rules of Evidence mentions that the Court

should exercise reasonable control over the mode and order of interrogating witnesses. The mode of presenting Ms. Montgomery as a witness, on behalf of Continental, is via telephone or video conferencing – and Continental believes this to be a reasonable way to produce relevant testimony to the Board without creating any significant inconvenience to Ms. Montgomery.

11. There is no present objection to this requested telephone and/or video conferencing testimony of Ms. Montgomery. Her testimony is relevant to matters before the Board. It would create an inconvenience to require Ms. Montgomery to travel from Florida to Delaware to appear live before the Board. There is no record of prejudice to any involved party if Ms. Montgomery is allowed to testify by telephone.

12. In conclusion, Continental respectfully requests that Lisa Montgomery be permitted to testify via telephone at the February 1, 2024 Hearing(s) being held in Delaware.

WHEREFORE, The Continental Insurance Company of New Jersey respectfully request that the Industrial Accident Board allow Lisa Montgomery to testify via telephone at the February 1, 2024 Hearing(s).

REGER RIZZO & DARNALL LLP

/s/ Scott L. Silar, Esquire
SCOTT L. SILAR, ESQUIRE (#3139)
Brandywine Plaza West
1521 Concord Pike, Suite 305
Wilmington, DE 19803
(302) 477-7100 // ssilar@regerlaw.com
Attorney for The Continental Insurance Company of NJ

Dated: December 21, 2023

IT IS SO ORDERED THIS 11th day of January, 2024

Board Member

Robert J. Mitchell (CH)

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

KENNETH CONDIFF	)	
	)	
Claimant,	)	
	)	
v.	)	Hearing No. 1517455
	)	
CITY OF WILMINGTON	)	
	)	
Employer/Carrier	)	

ORDER

This matter is set for a hearing on April 11, 2024, at 1:00 p.m. on the Claimant's Petition to Determine Compensation Due and the Employer's Utilization Review Appeal. On this date, February 1, 2024, the Employer has come before the Board on its Motion to Compel and for Credit seeking an Order: (1) compelling Claimant to respond to Employer's Request for Production sent to Claimant's counsel on August 22, 2023; (2) compelling Claimant to appear on February 6, 2024 for a DME with Lawrence Piccione, M.D.; and (3) for a credit of One Thousand Three Hundred Dollars ($1,300.00) to compensate the Employer for the cancellation fee the Employer incurred when Claimant was a 'no show' for the (first) Defense Medical Examination ("DME").

At the hearing on Employer's Motion to Compel and for Credit, counsel for Claimant explained that Claimant had been temporarily out of touch with his office for a period of one to two months in 2023, while the document production was to have taken place. Counsel for the parties informed the Board that the Employer was recently provided some responses to its Request for Production.

Claimant explained to its counsel that he missed the first DME because his ride did not show up on time to drive him from his home in Wilmington, DE, to the doctor's office in Dover, DE. While the law permits Employer to require Claimant to be examined by a doctor whose office is in Dover, DE, the Board noted during the hearing that the location of the doctor's office has made it difficult for Claimant to comply given his circumstances. Claimant has represented to the Board and Employer that he will attend his upcoming DME as scheduled.

NOW, THEREFORE, IT IS SO ORDERED this 1st day of February 2024, that:

1. To the extent the Employer's has not received proper responses from Claimant to its Request for Production, the Claimant is compelled to provide line by line responses to Employer's Request for Production and to produce all discoverable documents subject to such requests within 10 days of the date of this Order;
2. Claimant is compelled to attend the Defense Medical Examination with Lawrence Piccione, M.D., on February 6, 2024;
3. Employer is entitled to a partial credit in the amount of Eight Hundred Dollars ($800.00) toward the no-show fee; and
4. Failure to comply with this Order may result in further sanctions as the Board deems appropriate, to include the possibility of dismissal of Claimant's Petition to Determine Compensation Due, with prejudice, and/or the granting of Employer's Utilization Review Appeal.

INDUSTRIAL ACCIDENT BOARD

PETER W. HARTRANFT

ROBERT MITCHELL

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

Mailed Date: February 6, 2024 OWC Staff

Joel Fredricks, Esquire, Attorney for Claimant
Nicholas E. Bittner, Esquire, Attorney for Employer

BEFORE THE INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

Matthew Brzezicki,	)	WC21-26818
	)	
Claimant,	)	
v.	)	Hearing No. 1485015
	)	
Bayshore Ford Truck Sales, Inc.,	)	
	)	
Employer.	)	

ORDER

WHEREAS, this matter is pending before the Industrial Accident Board, on the claimant's initial Petition to Determine Additional Compensation Due, seeking payment of medical bills/expenses with Pure Wellness, LLC for 1/20/21-4/19/21 dates of service, filed on 05/19/2021, and initially scheduled for Hearing on 11/09/2021 at 9:00 a.m.;

WHEREAS, the claimant was scheduled for a defense medical examination on 09/28/2021 with Dr. Matz;

WHEREAS, appropriate notification was given to the claimant concerning the 09/28/2021 defense medical examination. Specifically, notice letters were issued to claimant's attorney on 8/9/21, intake forms for the examination were sent to counsel for claimant's completion on 8/16/21 (upon claimant attorney's request), and a reminder letter was sent for the examination on 9/16/21. See attached;

WHEREAS, defense counsel was notified that the claimant failed to attend the defense medical examination, and Employer incurred a no show cancellation charge in the amount of $575.00;

WHEREAS, Claimant agreed to continue the Hearing to accommodate Dr. Matz's re-scheduled 10/26/21 12:30 p.m. examination, and the Hearing was subsequently re-scheduled to 1/28/22 at 1:00 p.m.

WHEREAS, defense counsel issued Rule 11 requests to claimant's attorney on 9/29/21, 9/30/21, 10/4/21, 10/18/21, and 10/19/21, for the reason claimant missed the examination and documentation supporting the same. On 10/4/21, Claimant's attorney advised that claimant "apologizes for not attending" the examination, but no reason was provided for the missed examination, nor documentation provided. On 10/19/21, claimant's attorney advised that "notice went out to the client but he didn't realize he would be out of town on the day of the exam" but no documentation provided. On 10/20/21, claimant's attorney clarified that claimant was away for "a personal trip" and she had "no idea when it was scheduled", and no documentation was provided. See attached email chain;

THEREFORE, the employer is hereby granted the following:

1. A credit in the amount of ~~$575.00~~ $300.00 to be applied against future benefits;
2. The claimant is hereby ordered to attend and cooperate with the 10/26/21 12:30 p.m. evaluation with Dr. Matz;
3. Should the claimant not appear at the rescheduled examination for any reason, Employer/Carrier is permitted to seek additional relief before the Board to include, but not limited to, further no-show fees/credits and/or 19 Del. C. § 2343 forfeiture.

SO ORDERED this 21st day of October, 2021

INDUSTRIAL ACCIDENT BOARD

Adell Wilson

, Hearing Officer for the Board

Heather Long, Attorney for the Claimant
Gregory P. Skolnik, Attorney for the Employer/Carrier

28235

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

BARBARA FISHER,	)	
	)	
Claimant,	)	
	)	
v.	)	Hearing No. 1514014
	)	
WALGREEN CO.,	)	
	)	
Employer.	)	

ORDER

This matter came before the Board in a hearing room in Dover, Delaware on February 14, 2024, for consideration of three separate motions filed by Barbara Fisher ("Claimant"), Walgreen Company ("Employer"), and the Workers' Compensation Fund, all filed relative to the above-referenced matter. Elissa Greenberg, Esquire, appeared on behalf of Claimant, John Ellis, Esquire, on behalf of Employer, and Eric Boyle, Esquire, on behalf of the Workers' Compensation Fund.

Claimant's Motion seeks to compel Employer to issue an agreement memorializing the items for which there has clearly been agreement including payment of medical expenses and compensation paid for lost wages related to the alleged injury. In this regard, Claimant asserts that while some minor issues remain in dispute, the material elements have heretofore been agreed upon such that if Employer were compelled to execute an agreement, Claimant could and would dismiss the pending action which includes claims related to bodily injury and lost wages. Employer, who opposes this motion, argues that there are numerous items remaining in dispute including the specific nature and extent of Claimants injuries and Claimant's entitlement to

ongoing disability compensation. While agreeing with Employer that substantial items remain in dispute, the Workers' Compensation Fund does not otherwise take a position on this request.

Employer, collateral to Claimant's pending Petition to Determine Compensation Due, filed its own Petition for Review to terminate the total disability compensation that Claimant has been receiving. As such and in this context, Employer filed the instant Motion to Consolidate that pending Petition for Review with Claimant's pending Petition to Determine Compensation Due. In support of the same, Employer argues that all of the same parties and issues are up for consideration as part of the two pending petitions such that judicial economy alone requires the consolidation. By contrast, Claimant asserts that this is an attempt by Employer to fast track a termination petition. More specifically, Claimant argues that had Employer issued the agreement it should have issued given the facts of this case, Employer would have to file a separate Petition for Review Termination that would proceed in its own due course rather than being sped up through consolidation with a Petition for which there is essentially no dispute. The Fund takes the position that consolidation is unnecessary to the extent that the Board has the authority as part of Claimant's underlying Petition to Determine Compensation Due to make the relevant findings that Employer seeks in its separate filing. In fact, this is the basis for the third motion now ripe for consideration herein as the Fund asserts through its own motion that the separate petition for Review filed by Employer is superfluous.

Having heard the arguments of the parties in the context of the procedural history marking this case, the Board is persuaded that both Claimant and Employer's Motions shall be DENIED, while the Fund Motion is GRANTED. More specifically, addressing Claimant's Motion to Compel Employer to issue an agreement, the Board is persuaded that several issues remain outstanding such that there is no basis upon which to compel such an agreement. As was

pointed out, the very nature and extent of Claimant's injuries remains at issue. While Claimant may well be able to ultimately prove the existence of an implied agreement, that is a finding that can only be made after the Board is given the opportunity to consider the adverse evidence. As such, the Boad is not persuaded that there is a basis to compel the agreement Claimant seeks leading to the necessary DENIAL of the requested relief.

The Board is similarly persuaded that Employer's separate filing for Review Termination is unnecessary as a consolidated matter, or at all, given the present posture of the case. As the Fund has pointed out through its collateral pleading, the Board has the discretion to determine the nature and extent of an injury and/or the nature and extent of disability created by a compensable injury as part of its initial determination. There is no agreement to review as part of a Petition for Review as clearly there exists dispute as to the nature and extent of injuries and therefore the nature and extent of disability. As such, Employer's request for consolidation is DENIED as the Board has the authority to address the issues asserted therein within the context of the underlying initial Petition to Determine Compensation Due filed by Claimant.

IT IS SO ORDERED this _____ day of February, 2024.

INDUSTRIAL ACCIDENT BOARD

/S/ William Hare
WILLIAM HARE

/s/ Patricia Maull
PATRICIA MAULL

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

Angela Fowler
Angela Fowler, Esquire
Hearing Officer

Mailed Date: February 21, 2024 JB

OWC Staff

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

VIVIAN MOSLEY,	)	RECEIVED FEB 04 2019
	)	
Claimant,	)	
	)	
v.	)	Hearing No. 1255139
	)	
GUARDIAN COMPANIES,	)	
	)	
Employer.	)	

ORDER

This matter came before the Board on January 24, 2019, on a motion by Vivian Mosley ("Claimant") seeking payment of total disability benefits from Guardian Companies ("Employer").

The underlying facts are largely undisputed. Claimant was injured while working for Employer on July 23, 2004. She underwent a spinal cord stimulator surgical implant on September 18, 2018.

By letter dated September 26, 2018, Employer's counsel wrote a letter to Claimant's counsel advising that Employer "will pay, per Fee Schedule, for the reasonable costs associated with this proposed surgical procedure."[1] The letter goes on to state that counsel was "not, however, authorized to offer to place the claimant on a new open Agreement for total disability benefit entitlement effective date of the surgery, at least until such time as I receive an actual disability certificate from a physician involved with the proposed surgery."

[1] Counsel did not know that the "proposed" surgery had already happened when this letter was drafted.

Claimant's counsel provided a total disability certification, but Employer still did not place Claimant on an Agreement for total disability, nor were disability benefits paid. Accordingly, Claimant filed a motion for the Board to compel Employer to place Claimant on an open agreement for total disability. Claimant argues that Employer approved the surgery; that the period of disability is connected to that surgery; and that Employer cannot deny it in good faith.[2]

The Board finds that it cannot grant the requested relief. The statute is clear that "[i]f the employer and employee . . . fail to reach agreement in regard to compensation under this chapter," then a party may petition the Board and a hearing on the merits will be scheduled. *See* DEL. CODE ANN. tit. 19, § 2345. Employer in the present case never agreed to place Claimant on an agreement for total disability following the surgery, nor is there any imputed agreement as a result of Employer paying disability benefits to Claimant. Claimant's only recourse is to file a Petition to Determine Additional Compensation Due.

Accordingly, Claimant's motion is denied.

---

[2] Claimant's counsel also observes that, on January 15, 2019, Employer had Claimant examined by a medical expert who disputed the ongoing nature of her total disability status. Claimant suggests that Employer deliberately delayed putting Claimant on an open Agreement in the hopes that it could instead issue a "closed period" agreement. However, under Delaware case law, until the Board has ruled on the matter, when a treating physician has instructed a claimant to stay out of work that claimant is entitled to rely on the doctor's orders and thus is considered temporarily totally disabled regardless of actual physical condition. *See Delhaize America, Inc. v. Baker*, 2005 WL 2219227 at ¶ 5 (Del. 2005)(ORDER); *Clements v. Diamond State Port Corp.*, 831 A.2d 870, 878-79 (Del. 2003); *Gilliard-Belfast v. Wendy's, Inc.*, 754 A.2d 251, 254 (Del. 2000). The critical issue is whether the claimant was under a doctor's order not to work. *See Smith v. James Thompson & Co.*, 918 A.2d 1164, 1166 (Del. 2007)("The particulars of the claimant's medical condition were not significant to the Court's holding [in *Gilliard-Belfast*]. Rather, the Court focused on the doctor/patient relationship and the risk to the claimant of disregarding her doctor's order[.]"). Thus, so long as Claimant's treating physician has kept her out on total disability, the monetary benefit to Employer from such a deliberate delay is debatable.

IT IS SO ORDERED this 28th day of January, 2019.

INDUSTRIAL ACCIDENT BOARD

ROBERT J. MITCHELL

PETER W. HARTRANFT

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

Mailed Date: 1/31/19

OWC Staff

Matthew M. Bartkowski, Esquire, for Claimant
John W. Morgan, Esquire, for Employer

26 Sec 9

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

SHAWN ROBERTSON,	)	
	)	
Claimant,	)	
	)	
v.	)	Hearing No. 1507533
	)	
MACY'S INC.,	)	
	)	
Employer.	)	

ORDER

This matter came before the Board on June 1, 2023, on a motion by Shawn Robertson ("Claimant") to compel Macy's Inc. ("Employer") to tender an Agreement as to Compensation for total disability effective April 28, 2023.

The background for the motion is simple: The Board recently issued a decision in which Claimant's total disability status was ended and partial disability was awarded. However, the Board also approved Claimant to have surgery to implant a permanent spinal cord stimulator. *See Robertson v. Macy's, Inc.*, Del. IAB, Hearing No. 1507533 (March 21, 2023). Claimant represents that he had the surgery on April 28, 2023, and that the surgeon placed him on total disability at that time. As such, Claimant argues that Employer has no good faith basis to refuse to enter into a new total disability agreement because the surgery was already approved by the Board.

Employer notes that the Board's order did not address total disability and, as such, Claimant's proper path is to file a petition.[1]

[1] In an understandable fit of caution, Claimant has filed such a petition and it is currently scheduled to be heard on August 3, 2023.

The Board has sympathy for Claimant's position, but the Board needs a proper presentation of evidence before it can find that Claimant is totally disabled. A petition and hearing is needed. Claimant's motion is denied.

IT IS SO ORDERED this 2nd day of June, 2023.

INDUSTRIAL ACCIDENT BOARD

Mark Murowany /cs
MARK A. MUROWANY

Peter W Hartranft /cs
PETER W. HARTRANFT

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

Chris Baum
OWC Staff

Mailed Date: June 5, 2023

Brian E. Lutness, Esquire, for Claimant
John Morgan, Esquire, for Employer

28209

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

RANDI WYATT,	)	
	)	
Claimant,	)	
	)	
v.	)	Hearing No. 1530995
	)	
AMAZON.COM,	)	
	)	
Employer.	)	

ORDER

This matter came before the Board on August 24, 2023, on a motion by Randi Wyatt ("Claimant") to compel Amazon.com ("Employer") to produce a "medical only" Agreement as to Compensation pertaining to a November 25, 2022 work accident.[1]

Claimant asserts that she was involved in a compensable work accident while working for Employer. Initially, Employer directed her to Concentra for medical care, but she went to Concentra near her home in Philadelphia. Because it was not care provided in Delaware, Employer's third-party administrator (Sedgwick) denied payment. Claimant then sought medical care in Delaware from a workers' compensation certified provider. Sedgwick still denied payment. On May 31, 2023, Claimant's counsel e-mailed the adjuster at Sedgwick noting that Claimant had not yet received any notice whether the claim was accepted or denied, in violation of Delaware law. Later that same day, Claimant received notice from Sedgwick that the claim was "accepted." Nevertheless, medical treatment was still being denied. Claimant now requests an order to compel Employer to proffer an Agreement as to Compensation (medical only) to document the acceptance of the claim by Employer.

---

[1] The original motion also sought production of 26-weeks of pre-injury wage information to allow for calculation of Claimant's average weekly wage. This information has since been provided to Claimant.

Employer argues that it has only accepted that Claimant was involved in a compensable work accident. It has not, however, reached agreement as to the nature and extent of injury associated with that work event. This is pending investigation into Claimant's medical history and current condition.[2] As such, Employer maintains that it is premature for it to tender an Agreement as to Compensation for the simple facts that the parties have not yet reached any agreement as to compensation.

Claimant argues that an agreement reflecting acknowledgment of an "injury" to the "elbow" would be sufficient, leaving open the specific nature of that injury. Employer responds that, pending further investigation, Employer could not commit to whether such an "injury" was ongoing or already "resolved." Employer also notes that this is a legal hearing without presentation of evidence, such that it would be impossible for the Board to rule on such details. Employer also notes that Claimant does have a remedy under the Workers' Compensation Act: when the parties have failed to reach agreement with regard to compensation due, either party may petition the Board for a hearing on the merits of the claim. *See* DEL. CODE ANN. tit. 19, § 2345.

The Board agrees with Employer that Claimant's request is premature. Legal consequences attach to what is acknowledged in an Agreement as to Compensation and Employer should not be faulted for seeking clarity on the nature and extent of injury before entering such an Agreement even when the underlying accident is accepted as being work-related. If Employer delays too long in reaching a conclusion on such matters, Claimant has a remedy and can force the issue by filing a Petition to Determine Compensation Due.

Accordingly, Claimant's motion is denied.

---

[2] Employer states that Claimant is scheduled to be examined by Employer's medical expert on October 10, 2023. The medical expert's opinion following that examination may serve to clarify these issues.

IT IS SO ORDERED this 25th day of August, 2023.

INDUSTRIAL ACCIDENT BOARD

Robert J. Mitchell /cr
ROBERT J. MITCHELL

Charles Freel /cr
CHARLES FREEL

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

Chris F. Baum

Mailed Date: 8.28.2023

C.R.
OWC Staff

Michael J. Hendee, Esquire, for Claimant
John Ellis, Esquire, for Employer

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

KIMBERLY BLUMENSCHEIN-REEVES	)	
	)	
Claimant,	)	IAB Hrg. No. 1320854
	)	
v.	)	
	)	
STATE OF DELAWARE.	)	
	)	
Employer.	)	

CLAIMANT'S MOTION TO DISMISS EMPLOYER'S PETITION TO DETERMINE ADDITIONAL COMPENSATION DUE FROM AN APPEAL OF AN UTILIZATION REVIEW

I. FACTS

1. On November 30, 2018, Utilization Reviewer, Dr. Mark Kaplan, opined that Dr. Xing's medical treatment of Claimant was compliant with the applicable Health Care Practice Guidelines.
2. Employer Appealed that decision and the parties are scheduled for a hearing on July 22, 2019.
3. The Employer relies upon the testimony Dr. Nathan Schwartz and his two defense exams dated August 30, 2018 and April 4, 2019. (See Attached reports as Exhibits "A" and "B").
4. Attached as Exhibit "C" and "D" are the defense examination notices showing each defense exam occurred at 3411 Silverside Road, Suite 102, The Weldin Building, Wilmington DE 19810.
5. The deposition of Dr. Schwartz occurred on July 9, 2019 and an expedited transcript of his deposition was requested and received by the undersigned on Friday, July 12, 2019. (Attached as Exhibit "E").

6. What was learned from Dr. Schwartz was the following:

   a. He was licensed only in New Jersey, Pennsylvania and perhaps Texas at the time of each Defense exam in this case. (page 46). It is clear that Dr. Schwartz does not, and has not, possessed a Delaware medical license;

   b. He has since moved to Houston, Texas and currently has a Texas medical license (Page 6);

   c. The letterhead of his reports containing his findings shows his name on top with Wilmington references; yet, he does not have an office in Delaware (page 45-46);

   d. Dr. Schwartz does not treat his own patients in Delaware (page 47);

   e. Dr. Schwartz performed Defense Medical Examinations in August of 2018 and April of 2019 wherein physical examination were conducted to include:

      i. physical examinations where range of motion tests were conducted on the lumbar spine as well as examination on the lower extremities (page 21).

      ii. Dr. Schwartz admits to touching Claimant. (page 21).

   f. Dr. Schwartz, when confronted as to how he can conduct a medical examination in Delaware on a Delaware Claimant without a Delaware Medical License, his response was: "I am not treating the patients and I have been certified by the Workers' Compensation organization in Delaware…I perform a Defense Medical Examination. I was not treating Ms. Reeves." (page 46).

II. LAW

7. 19 Del. C. § 2343 (a) states that after an injury, and during the period of resulting disability, the employee, if so requested by the employee's employer or ordered by the Board, shall submit the employee's own self for examination at reasonable times and

places and as often as reasonably requested to *a physician legally authorized to practice the physician's profession under the laws of such place,* who shall be selected and paid by the employer. (See Exhibit "F").

8. 24 Del. C. § 1702 (12) - defines the "Practice of Medicine" as follows:

   a. *Advertising, holding out to the public, or representing in any manner that one is authorized to practice medicine in this State*;

   b. Offering or undertaking to prescribe, order, give, or administer any drug or medicine for the use of another person;

   c. Offering or undertaking to prevent or to diagnose, correct, and/or treat in any manner or by any means, methods, or devices a disease, illness, pain, wound, fracture, infirmity, defect, or abnormal physical or mental condition of another person, including the management of pregnancy and parturition;

   d. Offering or undertaking to perform a surgical operation upon another person;

   e. *Rendering a written or otherwise documented medical opinion concerning the diagnosis or treatment of a person* or the actual rendering of treatment to a person within the State by a physician located outside the State as a result of transmission of the person's medical data by electronic or other means from within the State to the physician or to the physician's agent;

   f. *Rendering a determination of medical necessity or a decision affecting or modifying the diagnosis and/or treatment of a person*;

   g. Using the designation Doctor, Doctor of Medicine, Doctor of Osteopathy, physician, surgeon, physician and surgeon, Dr., M.D., or D.O., or a similar designation, or any combination thereof, in the conduct of an occupation or profession pertaining to the prevention, diagnosis, or treatment of human disease or condition, unless the designation additionally contains the description of another branch of the healing arts for which one holds a valid license in the State.

   For the purposes of this chapter, in order that the full resources of the State are available for the protection of persons using the services of physicians, *the act of the practice of medicine occurs where a person is located at the time a physician practices medicine upon the person.* (See Exhibit "G").

9. 24 Del. C. § 1720 (a) provides that A person *may not practice medicine in this State unless* the person: (1) Has a certificate to practice medicine issued by the Board of Medical Licensure and Discipline; (2) Registers the certificate to practice medicine and

renews it biennially; and (3) If required, has an occupational license pursuant to Part III of Title 30. (See Exhibit "H").

10. 19 Del. C. § 2322D (a)(1) provides the requirements for a certification under the Workers' Compensation Statue (See Exhibit "I").

III. ANALYSIS

11. Dr. Schwartz was not licensed in Delaware at any point when he conducted two Defense Medical Examinations on the Claimant;
12. Dr. Schwartz contends that he is a Certified Workers' Compensation provider pursuant to 19 Del. C. § 2322D (a)(1). However, a review of the certified providers shows that he was so certified as of August of 2018 (the first Defense Medical Examination) but not for the second Defense Medical Examination of April of 2018. (Exhibit "J"). A phone call to the Office of the Division of Industrial Affairs on Friday, July 12, 2019, confirmed that Dr. Schwarz has not been certified since December 31, 2018.
13. The Employer's use of Dr. Schwartz violates 19 Del. C. § 2343 (a) as he was not a physician legally authorized to practice the physician's profession under the laws of such place (Delaware).
14. Dr. Schwartz was not allowed to conduct a Defense Medical Examination in April of 2019. The Practice of Medicine, per 24 Del. C. § 1702 (12) includes:
    a. Advertising, holding out to the public, or representing in any manner that one is authorized to practice medicine in this State;
    b. Rendering a written or otherwise documented medical opinion concerning the diagnosis or treatment of a personal or the actual rendering of treatment to a person within the State by a physician located outside the State as a result of

transmission of the person's medical data by electronic or other means from within the State to the physician or to the physician's agent;

c. Rendering a determination of medical necessity or a decision affecting or modifying the diagnosis and/or treatment of a person;

15. It does not matter whether Dr. Schwartz believes he was not "treating patients." A doctor is prohibited from the practice of medicine without a Delaware medical license or proper and current certification.

16. Claimant submits the Board should find:

a. Dr. Schwartz was not properly certified for the April of 2019 examination, pursuant to 19 Del. C. § 2322D;

b. Dr. Schwartz did not possess a Delaware medical license at the time of his April of 2019 examination;

c. That the Employer's hire, use, and payment of Dr. Schwartz for the April of 2019 examination violated 19 Del.C. § 2343;

d. That the examination of August of 2018 is not relevant as it predated the Utilization Review decision and the Employer's Appeal to the current petition;

e. A doctor who possess neither a proper certification nor a proper Delaware medical license cannot testify in a worker's compensation hearing.

17. As Dr. Schwartz was not allowed to legally examine Claimant in the April 2019 examination, the Board should forbid the Employer from submitting his deposition testimony into the records of this case;

18. Should the testimony of Dr. Schwartz be stricken in this case, then the Employer's case fails as it lacks the necessary expert medical testimony needed in its appeal of the

Utilization Review Decision;

19. Claimant's attorneys have spent a significant amount of time preparing for this case. The medical treatment in this case since Claimant's date of injury on May 11, 2008, consists of three large medical binders (see page 7 of the deposition of Dr. Schwartz).
20. The preparation and attendance of the depositions of Dr. Xing and Dr Schwartz and the preparation of the hearing, including this Motion, enables Claimant's attorney to an attorney's fee of at least 20 hours.
21. Claimant should also be able to be reimbursed the deposition fee and court reporter fee associated with the deposition of Dr. Schwartz.

THE FREIBOTT LAW FIRM, P.A.

Frederick S. Freibott, Esquire
1711 E. Newport Pike
P.O. Box 6168
Wilmington, DE 19804
Attorney for Claimant

July 15, 2019

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

KIMBERLY BLUMENSCHEIN-REEVES,	)	
	)	
Claimant,	)	
	)	
v.	)	Hearing No. 1320854
	)	
STATE OF DELAWARE,	)	
	)	
Employer.	)	

ORDER

This matter came before the Board on July 25, 2019, on a motion by Kimberly Blumenschein-Reeves ("Claimant") seeking to strike the testimony of Dr. Natalio "Nathan" Schwartz and to dismiss a Utilization Review appeal filed by the State of Delaware ("Employer").

Background: Claimant was injured in a compensable work accident on May 11, 2008, while working for Employer. In November of 2018, Employer referred certain of Claimant's medical treatment to Utilization Review ("UR") pursuant to title 19, section 2322F(h) of the Delaware Code. The UR determination found that the treatment in question was compliant with the applicable Health Care Practice Guidelines. Employer then appealed this determination to the Industrial Accident Board. Such an appeal is done *de novo*, *see* DEL. CODE ANN. tit. 19, § 2322F(j), and, unlike the UR determination, the primary issue before the Board is not whether treatment is within the Health Care Practice 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).

In preparation for this appeal, Employer had Claimant evaluated by Dr. Schwartz on August 30, 2018, and on April 4, 2019. These "defense medical examinations" took place in Wilmington, during which a physical examination of Claimant was performed.

During his deposition, Dr. Schwartz testified that he was licensed to practice medicine in Pennsylvania, New Jersey and Texas. He is not licensed to practice medicine in Delaware, but noted that he provided no treatment to Claimant (or any patient in Delaware). He also testified that he was a certified workers' compensation practitioner under Delaware law, although it was later determined that that certification had lapsed after the first evaluation but prior to the second evaluation of Claimant.[1]

Argument: Claimant argues that, under the Workers' Compensation Act, an employer is entitled to have an injured worker examined "at reasonable times and places and as often as reasonably requested" by "a physician legally authorized to practice the physician's profession under the laws of such place." DEL. CODE ANN. tit. 19, § 2343(a). Dr. Schwartz was not licensed to practice medicine in Delaware although he examined Claimant in Delaware. Claimant argues that, under the Medical Practice Act (title 24, chapter 17 of the Delaware Code), the "practice of medicine" includes advertising or holding oneself out to the public as being authorized to practice medicine in Delaware; rendering a written or otherwise documented medical opinion concerning the diagnosis or treatment of a person; and the rendering of a determination of medical necessity or of a decision that affects or modifies the diagnosis or treatment of a person. *See* DEL. CODE ANN. tit. 24, § 1702(12). Claimant argues that Dr. Schwartz physically examined Claimant in Delaware and rendered a medical opinion concerning her treatment despite not being licensed to

[1] Once the lapse was brought to Dr. Schwartz's attention, he took steps to correct it and became re-certified as a workers' compensation practitioner as of July 22, 2019.

engage in the "practice of medicine" in Delaware. As such, Claimant argues that his testimony should be stricken and, because Employer would then not have any medical evidence to support its petition, the UR appeal should be dismissed.

Employer responds that the Medical Practice Act itself provides several situations that are express exceptions to the requirement of having a Delaware license to practice medicine. One of these exceptions is being a "physician from another state or jurisdiction who is in this State to testify in a judicial or quasi judicial proceeding." DEL. CODE ANN. tit. 24, § 1703(12). Hearings before the Industrial Accident Board are quasi judicial and Dr. Schwartz examined Claimant in order to testify at such a hearing. As such, because he is licensed to practice medicine in another state or jurisdiction, he is permitted by Delaware law to evaluate Claimant for purposes of preparing his testimony before the Board.

Employer notes also that the regulations from the Board of Medical Licensure & Discipline allow a physician who is "actively licensed in another State or country on a full and unrestricted basis" to do, in Delaware, consultations that "ordinarily consist of a history and physical examination, review of records and imaging pathology or similar studies" without requiring that physician to have an active Delaware certificate to practice medicine until the physician has done more than twelve consultations per year. *See* 24 Del. Admin. Code 1700-Section 6.0. A defense medical examination in Delaware typically consists of taking a history, doing a physical examination and reviewing records, imaging pathology and similar studies, just like a consultation. Employer represents that Dr. Schwartz has not done twelve such examinations in Delaware in this year and thus, under the regulations of the Board of Medical Licensure & Discipline, he is not required to have an active Delaware certificate to practice medicine.[2]

[2] Claimant argues that a physician doing an examination for an employer or insurance carrier in a workers' compensation action is not a "consulting physician." The Industrial Accident Board has been unable to find

Employer also observes that, during Dr. Schwartz's deposition, after the doctor testified that he was licensed to practice in Pennsylvania, New Jersey and Texas, Claimant's counsel stipulated to the doctor's qualifications. As such, Employer argues that Claimant has waived any challenge to the doctor's qualifications to testify. Claimant's counsel replies that, at his deposition, Dr. Schwartz provided misinformation that he was a certified workers' compensation practitioner, and it was only after the deposition that counsel could determine that the information provided was false.

Ruling: Certification: First, the Board finds that the question of whether Dr. Schwartz was properly a certified workers' compensation practitioner under the Workers' Compensation Act ("the Act") has no bearing at all on the question of the admissibility of his testimony.

While the Act does provide for certification of health care providers, such certification is only "required for a health care provider to provide treatment to an employee, pursuant to this chapter, without the requirement that the health care provider first preauthorize each health care procedure, office visit or health care service to be provided to the employee with the employer or insurance carrier." DEL. CODE ANN. tit. 19, § 2322D(a)(1). There is no requirement that a medical

---

a definition of the term "consulting physician" in either the regulations of the Board of Medical Licensure & Discipline, or in the Medical Practice Act itself. It would be odd, though, to state that a physician from another state who is unlicensed in Delaware can actively examine and consult on *actual treatment* of a patient a dozen times per year without being licensed in Delaware, but that a physician from another state who is unlicensed in Delaware who does *not* provide any treatment to the injured worker cannot perform even one similar examination for purposes of providing testimony in a legal hearing without a Delaware license. The obvious purpose of the Medical Practice Act is to promote the public health, safety and welfare by protecting a patient from receiving medical treatment from an unlicensed practitioner. *See* DEL. CODE ANN. tit. 24, § 1701. A medical witness providing testimony in an Industrial Accident Board hearing on behalf of the employer or insurance carrier is providing no treatment to the patient. There is no doctor-patient relationship created. In part, this is why the Workers' Compensation Act states that no fact communicated to or otherwise learned by a physician who has examined a claimant on behalf of the employer under section 2343 is "privileged either in the hearings provided for in this chapter or in any action at law." DEL. CODE ANN. tit. 19, § 2343(c).

witness testifying at an Industrial Accident Board hearing be a certified workers' compensation practitioner. The purpose of the certification is to allow a treating doctor to provide treatment to an injured worker without first receiving preauthorization from the employer or insurance carrier. A doctor examining an injured worker on behalf of the employer or insurance carrier is not providing treatment and has no need to have such a certification.

Waiver: The above ties in with the issue of waiver. A copy of Dr. Schwartz's deposition was attached to Claimant's motion. At that deposition, the doctor disclosed that he was licensed to practice in Pennsylvania, New Jersey and Texas. After a couple more questions, Employer's counsel asked if Claimant's counsel was willing to stipulate to the doctor's qualifications, and Claimant's counsel stated "Yes." *See Deposition of Dr. Schwartz*, at 5-6. Later in the deposition, Claimant's counsel confirmed in what jurisdictions the doctor had licenses to practice medicine and then asked the doctor how he was allowed to perform a medical examination in Delaware without a license. The doctor explained that he was not providing treatment to Claimant and that, while he performed a "defense medical examination" of Claimant, he does not see patients in Delaware.[3] Included in this exchange was a reference by the doctor that "I have been certified by the workers' compensation organization in Delaware." *See Deposition of Dr. Schwartz*, at 46-47. Claimant's counsel did not render any objection to the doctor's testimony during the deposition and Employer's counsel did not ask the doctor any questions on the subject.

Claimant's counsel argues that this does not amount to a waiver because it was only after the deposition was taken that he was able to learn that Dr. Schwartz's certification as a workers'

[3] One of the ironies in the present situation is that Employer would have been within its rights to make Claimant travel to Pennsylvania for the examination. Having it occur in Delaware can be seen as being an accommodation or convenience for Claimant.

compensation practitioner had lapsed. However, as previously discussed, the presence or absence of the certification has no bearing on the admissibility of the doctor's testimony. While, if he chooses, Claimant's counsel can challenge the doctor's credibility because of the alleged misrepresentation of his status as a certified workers' compensation practitioner, it is not a basis to entirely strike the doctor's testimony.

As such, the alleged misrepresentation as to that certification does not have any bearing on the issue of whether an objection as to the doctor's lack of a Delaware medical license has been waived. Indeed, under the Act, having a certification as a workers' compensation practitioner carries no implication that the practitioner is licensed to practice medicine in Delaware because any "health care provider who is not licensed by the State of Delaware to provide medical services may elect to become certified" under the Act. *See* DEL. CODE ANN. tit. 19, § 2322D(a)(1).

Accordingly, the Board agrees with Employer that counsel's acceptance of Dr. Schwartz's qualifications to testify waives any objections to those qualifications. Claimant's only arguable basis to strike the testimony was the doctor's lack of a Delaware medical license and counsel was fully aware of that fact when he stipulated to the doctor's qualifications.

Having found that Claimant waived any objection to the doctor's qualifications, the Board need not reach the issue of whether Dr. Schwartz was required to have a Delaware license to practice medicine in order to take a medical history and do a physical examination in Delaware for the sole purpose of rendering a medical opinion to be used in workers' compensation litigation.

Claimant's motion to dismiss is denied.

IT IS SO ORDERED this 5th day of August, 2019.

INDUSTRIAL ACCIDENT BOARD

Robert J. Mitchell /os
ROBERT J. MITCHELL

Angelique Rodriguez /os
ANGELIQUE RODRIGUEZ

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

Mailed Date:

OWC Staff

Frederick S. Freibott, Esquire, for Claimant
Jessica L. Julian, Esquire, for Employer

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

BRENDA J.WATSON,	)	
	)	
Claimant,	)	
	)	
v.	)	I.A.B. Hearing No. 1303024
	)	
CHRISTIANA CARE HEALTH SERVS.,	)	
	)	
Employer.	)	

CLAIMANT'S MEMORANDUM IN SUPPORT OF
REQUEST FOR LEGAL HEARING
TO STRIKE DEFENDANT'S MEDICAL EXPERT

Claimant Brenda J. Watson moves the Industrial Accident Board for entry of an order striking Employer's medical expert, Andrew Gelman, D.O., from testifying in this case. In support of her motion, Claimant offers the following:

1. On July 20, 2009, Claimant filed a petition seeking permanent impairment benefits due to bilateral knee injuries. Claimant's medical expert, Jeffrey Meyers, M.D., assessed permanent impairment of 60% to Claimant's left and right lower extremities.

2. Employer's medical expert, Dr. Gelman, had previously seen Claimant for defense medical examinations ("DMEs") four times in connection with earlier claims. Employer had also sent Claimant to David Stephens, M.D. for DME's on two earlier occasions. With respect to Claimant's permanent impairment claims, Employer selected Dr. Gelman as its medical expert and another DME was scheduled for September 14, 2009.

3. In his report issued on September 14, 2009, Dr. Gelman rated Claimant's permanent impairment as 5% to the left lower extremity and 5% to the right lower extremity. However, Dr. Gelman qualified the latter figure with some concerns about whether new weightbearing x-rays

would be diagnostic of any further changes in the right knee which could raise his permanent impairment opinion for the right lower extremity to 13% or even more.

4. Although Claimant was under no duty to submit to additional x-ray studies for Dr. Gelman's benefit, as such testing involves invasive radiation, Claimant agreed to have such studies performed.

5. On December 1, 2009, Claimant underwent the x-ray studies and personally delivered the films to Dr. Gelman's office. Dr. Gelman then demanded that Claimant submit to yet another examination, *at that moment*, despite the fact that no notice or request had been issued for such an examination, and despite the fact that Claimant had consented only to undergo x-ray studies. Claimant rightfully declined to submit to Dr. Gelman's demand for a spur-of-the-moment examination.

6. Dr. Gelman issued a report on December 1, 2009. Exhibit-1. In his report, Dr. Gelman states that "I had asked that she [Claimant] stay for a clinical examination to better correlate today's radiographic findings and she refused." Dr. Gelman then added that his "comments and conclusions" remain unchanged from his September 14, 2009 DME report. *See* Exhibit-1.

7. Claimant submits that Dr. Gelman's actions have clearly crossed the line, and the Industrial Accident Board needs to address his behavior. Dr. Gelman has engaged in a pattern of disturbing behavior, including in this matter, that makes him such a biased witness that he should not be permitted to testify in this case.

8. Dr. Gelman was recently rebuked by the Delaware Superior Court for inappropriate behavior relating to a DME. In *Phillips v. Pris-MM, LLC t/a Damon's Grill*, 2009 Del.Super Lexis 337, opinion, Jurden, J. (Del.Super., Sept. 21, 2009) (copy attached as Exhibit-2), the Court

addressed a situation in which Dr. Gelman treated an examinee in an unprofessional manner. The examinee arrived early for her DME and she was asked by Dr. Gelman's staff to complete "new patient" forms. The examinee declined to fill out the forms as she was not a patient. Dr. Gelman then confronted the examinee and, in a "rude, arrogant, and antagonistic manner" demanded to know why the examinee had not filled out the "new patient" forms. *Id.* at 3. The examinee responded that she had brought x-ray films with her, but Dr. Gelman was not interested in the films. As the examinee had not filled out his "new patient" forms, Dr. Gelman refused to conduct the scheduled DME, "chastised" her, and "abruptly" stormed out of the room. Dr. Gelman demanded that the DME be rescheduled and claimed a cancellation fee for the original date. *Id.* at 3.

9. The Court in *Phillips* held that Dr. Gelman improperly "scolded" the examinee and treated her "like a schoolgirl who failed to turn in an assignment." *Id.*at 3. The Court further held that the examinee was not responsible for any reimbursement of costs associated with the aborted DME. Finally, the Court ruled that any forms Dr. Gelman wished to be filled out by the examinee must be provided to her in advance as they were "essentially interrogatories" and the examination itself could constitute an "informal discovery deposition."

10. Dr. Gelman has been the subject of Superior Court chastisement on several other occasions in the past. In *Hinckle v. Short's Enterprises, Inc.*, 2004 Del.Super. Lexis 232, opinion, Babiarz, J. (Del.Super. July 28, 2004) (copy attached as Exhibit-3), the Court expressly criticized Dr. Gelman for offering as a medical opinion the unfounded theory that another accident "could have caused" an examinee's injuries when there was no evidence of any such other accident and his theory was "nothing more than good old-fashioned speculation." *Id.* at 2-3. In describing Dr. Gelman's comments on the nature of the alleged injury, the Court stated that his conclusion "defies

common sense," and it added that a factfinder may not accept expert testimony that "fails to account for relevant, reliable medical evidence." *Id.* at 2.

11. In *Avon Products v. Flaherty*, 2004 Del.Super. Lexis 325, opinion, Babiarz, J. (Del.Super., Sept. 28, 2004) (copy attached as Exhibit-4), the Court found "inherent contradictions" in Dr. Gelman's testimony and ruled that his testimony did not constitute substantial evidence. *Id.* at 2. The Court ruled that Dr. Gelman had carefully [*ie.*, deliberately] used the misleading terminology "contributing factor" in his testimony when the true legal standard in Delaware is whether a work accident was "a substantial factor" of the alleged injury. *Id.* at 2. The Court also held that "Dr. Gelman was ill-acquainted with Claimant's actual work and focused his testimony instead on what he perceived to be inadequate medical records." *Id.* at 2. The Court noted that Dr. Gelman testified that he did not believe the examinee's condition was caused by her work, but he advised the examinee to avoid repetitive bending, kneeling, and lifting more than 20-25 pounds despite the fact that her job duties entailed exactly those factors. *Id.* at 2. The Court took the admittedly "highly unusual step" in this case of reversing a Board decision based on a medical expert's testimony. Id. at 1, 2.

12. As evidenced by the situations in this case, *Phillips,* and the other cases noted above, Dr. Gelman has gone beyond merely taking sides; he has crossed the line of professionalism and has consistently engaged in bullying examinees and making unreasonable and unlawful demands in connection with DMEs.

13. The Superior Court noted in *Phillips* that DMEs are stressful on examinees and they are often "nervous and sometimes intimidated" by the DME process, particularly when the DME physician or staff are "gruff or seemingly impatient." *Phillips*, opinion at 3. In essence, physicians

who engage in an active DME practice can become "desensitized" to the stress felt by examinees. *Id.*

14. A substantial percentage of Dr. Gelman's practice consists of conducting DMEs for employers or insurance carriers. In recent deposition testimony before the Board, Dr. Gelman confirmed that he has earned more than five million dollars in the last five years conducting DMEs. Transcript of Deposition of Andrew Gelman, D.O. in *Wall v. DART*, IAB No. 1309795 (excerpts attached as Exhibit-5). Despite that staggering figure, Dr. Gelman qualified the above by stating that "I'll sit here and state that I'm probably underpaid for the amount of time and effort I put into the medical/legal part of my practice."

15. That statement must be viewed in the context of numerous complaints from examinees that Dr. Gelman's DMEs are cursory and last only minutes despite the level of detail Dr. Gelman places in his reports and testimony. The Board has previously questioned the "completeness and accuracy" of Dr. Gelman's opinions and the "limited" nature of his examination of an examinee, particularly given Dr. Gelman's admission that an examination had lasted only five to ten minutes. *Delaware Supermarkets, Inc. v. Muldoon*, 2006 Del.Super. Lexis 38 at 2, Order, Del Pesco, J. (Del.Super., Jan. 5, 2006). (copy attached as Exhibit-6). Dr. Gelman continues this practice today as evidenced by the fact that, on December 3, 2009, an examinee reported that Dr. Gelman saw her for a DME that lasted less than five minutes. Affidavit of Vanessa Hardy (Exhibit-7).

16. The pattern of Dr. Gelman's conduct, including his documented rudeness to, and disrespect for, examinees, his demands for supplemental examinations of DME examinees without prior notice, and the fact that he sees examinees for only a few minutes, establish that Dr. Gelman has gone rogue and is actively participating in litigation beyond the legitimate normal role of a

party's medical expert. There is no authority or justification for Dr. Gelman's demands for supplemental examinations on the spur-of-the-moment with no prior notice to the examinee or counsel. Certainly, no Board rules, workers compensation statutes, or Superior Court rules authorize such actions.

17. Dr. Gelman's conduct may be unprecedented in Delaware jurisprudence. Given the scope of Dr. Gelman's medical-legal practice, a substantial number of innocent persons stand to be harmed through his continuing unprofessional and adversarial conduct, and both the legal and medical systems are demeaned. As noted by the Superior Court, laymen such as examinees face considerable stress in connection with the DME process, and being bullied and treated unprofessionally by a person in apparent authority only serves to multiply this stress level. *Phillips*, opinion at 3. Dr. Gelman deliberately takes advantage of this stress level when he confronts examinees and demands examinations which the examinees do not know are unauthorized and unjustified. Dr. Gelman's actions clearly exceed the scope of DME authority, and the systematic nature of his actions make it necessary to address the matter before the Board.

18. Therefore, Claimant respectfully asks the Board to enter an order striking Dr. Gelman as Employer's medical expert in this case and barring admission of any reports or opinions of Dr. Gelman prepared in connection with the pending claims. A proposed form of order is being submitted with this Request for a Legal Hearing.

THE FREIBOTT LAW FIRM, P.A.

Frederick S. Freibott (Del. Bar #2740)
Steven F. Mones (Del. Bar #2611)

1711 East Newport Pike
P.O. Box 6168
Wilmington, DE 19804
302-633-9000
Attorneys for Claimant Brenda J. Watson

December 10, 2009

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

BRENDA J.WATSON,	)	
	)	
Claimant,	)	
	)	
v.	)	I.A.B. Hearing No. 1303024
	)	
CHRISTIANA CARE HEALTH SERVS.,	)	
	)	
Employer.	)	

ORDER

The Industrial Accident Board having considered the Request for a Legal Hearing of Claimant Brenda J. Watson seeking to strike the medical expert, Andrew Gelman, D.O., of Employer Christiana Care Health Services, and it appearing that Dr. Gelman has engaged in a pattern of activities in connection with defense medical examinations conducted for employers, including Employer in this case, that exceeds the reasonable bounds of professionalism, including but not limited to demanding that examinees submit to supplemental examinations without any prior notice to the examinees or their counsel,

IT IS ORDERED that Claimant's application is GRANTED as follows:

1. Dr. Gelman is stricken as a medical expert in this case and he may not testify at the hearing in this matter; and
2. Any opinions previously offered by Dr. Gelman concerning the issues involved in the present matter before the Board are deemed inadmissible and may not be presented in any form in this matter.

_____
Board Member

_____
Board Member

December ____, 2009

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

BRENDA WATSON,	)	
	)	
Claimant,	)	
	)	
v.	)	Hearing No. 1276498
	)	
CHRISTIANA CARE HEALTH SERVICES,	)	
	)	
	)	
Employer.	)	

ORDER

This matter came before the Industrial Accident Board ("Board") in a hearing room in New Castle County, Delaware on January 7, 2010, initially on a Motion filed by Ms. Brenda Watson ("Claimant") to request that the Industrial Accident Board ("Board") prevent Dr. Andrew Gelman from serving as a medical expert on behalf of Christiana Care Health Services ("Employer"). Employer filed a Motion to Quash Claimant's Motion. After hearing arguments from both parties on Employer's Motion, the Board denied Employer's Motion to Quash because of concerns the Board has regarding the underlying facts supporting Claimant's Motion.

It is undisputed that Dr. Gelman was retained by Employer to serve as its medical expert. Claimant submitted to a defense medical examination ("DME") by Dr. Gelman on September 14, 2009. After the DME, Dr. Gelman requested through counsel that Claimant undergo a diagnostic test to aid him in forming an opinion about Claimant's condition. Claimant consented to undergoing the diagnostic test. On December 1, 2009 when Claimant was submitting the films from the diagnostic test, Claimant contends that Dr. Gelman improperly initiated conversation with her regarding her workers' compensation claim without obtaining prior approval from Claimant's counsel. It is undisputed that during such conversation, Dr. Gelman

requested that Claimant immediately undergo another DME. Claimant telephoned her counsel and someone from her counsel's office instructed Claimant not to submit to the DME. Claimant contends that Dr. Gelman exerted great pressure on her to immediately undergo the DME. Claimant's counsel represented that Dr. Gelman's level of pressure caused Claimant to cry and shake. Claimant remained sufficiently mentally strong and did not submit to the improper request for the DME.

When a claimant is represented by counsel, an employer's medical expert does not have the right to engage in conversation with or to examine a claimant without prior consent by the claimant's counsel. Such conduct by Dr. Gelman is unacceptable, is improper and is unjust.[1] Had Dr. Gelman actually convinced Claimant to undergo the DME, Employer would have improperly obtained information that could have substantial bearing on the case and on Dr. Gelman's opinion. Furthermore, such DME could have potentially caused a level of prejudice against Claimant that could warrant the Board to determine whether it does have the authority to disqualify Dr. Gelman as a witness.

However, Claimant did not undergo the DME. The Board is denying Claimant's Motion but is ordering the following:

1. Dr. Gelman's testimony and opinions may not incorporate any information obtained during his improper and wrongful direct communications with Claimant, particularly the conversation on December 1, 2009; and

[1] Should Dr. Gelman repeat similar conduct, the Board will report Dr. Gelman to the Delaware Board of Medical Practice.

2. Dr. Gelman is permitted to testify about the findings from the diagnostic test so long as such testimony does not incorporate facts obtained directly from Claimant at the time the diagnostic test was taken.[2]

IT IS SO ORDERED this 7th day of January, 2010.

BY THE INDUSTRIAL ACCIDENT BOARD:

Lowell L. Groundland

LOWELL L. GROUNDLAND

Marilyn Dotó

MARILYN DOTO

Mailed Date: 1-7-10

Karen Miller

OWC Staff

Julie S. Pezzner, Hearing Officer for the Board
Frederick S. Freibott, Esquire, for Claimant
Maria Paris Newill, Esquire, for Christiana Care Health Services

[2] Claimant had consented to the diagnostic test being taken and the request to have the diagnostic test conducted was made through the proper channels.

THE FREIBOTT LAW FIRM, P.A.

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June 25, 2019

VIA FACSIMILE: 302-736-9170 **LEGAL HEARING REQUESTED**

Department of Labor
Division of Industrial Affairs
4425 North Market Street
3rd Floor
Wilmington, DE 19802

RE: Brian Elliott vs. State of Delaware
IAB No.: 1482704
Date of Loss: 1/14/19
Our File No.: 2019-82

Dear Sir/Madam:

Please allow this correspondence to serve as Claimant's request to schedule an immediate legal hearing regarding the above referenced matter.

On June 21, 2019, Claimant attended a defense medical examination with Dr. Gelman. Prior to my client's attendance at the DME, my office sent a fax to the defense asking for a copy of any and all forms my client would be required to fill out (see attached as Exhibit A). No forms were sent to my office.

Upon my client's arrival at Dr. Gelman's office, Mr. Elliott was asked to sign a blank sheet of paper. Mr. Elliott refused, per the instruction from my office not to complete any paperwork at the appointment. Our client was told the appointment may need to be rescheduled by Dr. Gelman if he did not sign the blank sheet of paper. The appointment did go forward at that time.

During the examination, Mr. Elliott observed Dr. Gelman writing notes. Mr. Elliott further observed that Dr. Gelman was using the same piece of paper to take notes that he had asked Mr. Elliott to sign.

Mr. Elliott advised that Dr. Gelman became very hostile after his refusal to sign the blank piece of paper. Claimant also stated that Dr. Gelman was extremely belligerent and aggressive during his physical examination, causing him increased pain.

This is not the first time Dr. Gelman has proved to cause an issue at a Claimant's DME. In 2010, the undersigned was forced to request a legal hearing asking the Board to enter an order striking Dr. Gelman as Employer's medical expert in the case of *Watson v. CCHS* and barring

admission of any reports or opinions of Dr. Gelman prepared in connection with the pending claims (see attached as Exhibit B).

I also attach, as Exhibit C, a copy of the Board's decision in the matter of *Cessna v. Bayhealth*. On page 8 of the decision, the Board notes that the Claimant testified "that she was 'tearful' when Dr. Gelman began manipulating her shoulder, cried as he manipulated it more and told Dr. Gelman to stop. Claimant testified she signed a release because Dr. Gelman told her to sign it so that she would not be responsible for the bill for the examination. Claimant testified that she would have signed anything to get out of his office."

Dr. Gelman's behavior during defense medical examinations has again reached a point where Board action is required. It is the undersigned's position that Dr. Gelman should be barred from asking any client of the Freibott Law Firm to complete, or sign, any document while in his office for a DME, especially when paperwork has been requested by the undersigned prior to the examination.

Please schedule this matter for an immediate legal hearing. I look forward to hearing from you. Thank you.

Very truly yours,

Frederick S. Freibott

FSF/jls
Enclosure
cc: Brian Elliott (via e-mail)
Jessica L. Julian, Esquire (via fax: 552-4340)

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

ROBERT BAKER, Claimant, v. CANNON BUSINESS SOLUTIONS EAST, INC., Employer,	)	Hearing No. 1375489

ORDER

This matter came before the Board on Thursday August 31, 2023, on Cannon Business Solutions, Inc. ("Employer") Motion to Suspend Benefits for Claimant's failure to attend defense medical examinations (DME). Robert Baker ("Claimant") currently has ongoing medical treatment and is receiving medical benefits. All other benefits were commuted in 2015. Claimant failed to attend a DME on March 15, 2023. A new exam was scheduled, and Employer filed a Motion to Compel Claimant's attendance at that exam. The Board granted that Motion and Claimant failed to attend that second examination. In response Employer filed the instant Motion pursuant to 19 *Del.C.* §2343(b) to suspend benefits for Claimant's refusal to attend a DME. Claimant appeared *pro se* for the Motion hearing and argued that he never refused to attend the exams and in fact informed the insurance adjuster, Michele Lutz, that he would be unable to attend due to a family members medical condition. He also informed them of a conflict with the second examination date. The first notice he received that his benefits could be suspended was of this

hearing today. Employer's counsel confirmed Ms. Lutz is one of the adjusters on the case. She also noted that the exams are set up by a third party.

The Board deliberated and finds that there has been a lack of communication in this case and Claimant should have the opportunity to attend a rescheduled examination. Claimant should communicate any scheduling conflicts when he receives notice of the examination with Employer's counsel. Employer must also provide adequate and verifiable notice of the examination date. The Board notes that Claimant last communicated with his attorney in 2015 and at this point the department would need an updated letter of representation to confirm whether Claimant is still represented by counsel.

Consequently, based on the foregoing, Employer's Motion is hereby **DENIED.**

IT IS SO ORDERED this 31ST DAY OF AUGUST 2023.

INDUSTRIAL ACCIDENT BOARD

/s/
PETER W. HARTRANFT

/s/
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: 9-1-2023 CL

OWC Staff

Robert Baker, *pro se*
Kara A. Hager, Esq., for Employer

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

CHARLES LAMB,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1470033
	)	
PENINSULA OIL,	)	
	)	
Employer.	)	

ORDER

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board virtually on January 4, 2023. On December 16, 2022, Charles Lamb ("Claimant") filed a Motion to Compel Ongoing Temporary Total Disability Benefits, in which he requests that Peninsula Oil ("Employer/carrier") be compelled to pay Claimant's total disability benefits in a timely manner. In addition to the payment of his benefits, Claimant is also requesting an attorney's fee, sanctions in the amount of $1,807.30, and a fine of $1,000.00 for Employer's/carrier's failure to comply with prior orders.

Claimant argues that Employer/carrier has failed to pay his benefits since at least November of 2022 prior to this request, and that Employer/carrier has failed to pay Claimant's benefits in a timely manner on prior occasions, which has caused

Claimant to file motions to compel payments before. Employer argues that it did not receive notice that Claimant had not been paid until December 14, 2022 and when it issued a check to Claimant, the mail delayed Claimant's receipt of the payment.

The Board notes that, on two separate occasions, as recently as May 7, 2021 and September 3, 2021, the Board ordered Employer/carrier to pay Claimant's temporary total disability benefits in a timely manner, after Employer failed to pay those benefits. As the Board found in May and September of 2021, the Board once again finds Employer/carrier's failure to comply with the Board's orders to be egregious, especially given Employer/carrier's prior failures to comply on at least two prior occasions.

Claimant has successfully established that Employer/carrier has failed to pay his benefits in a consistent and timely mannter. Claimant's counsel submitted an affidavit stating that at least 2 hours were spent preparing for the hearing. Claimant's counsel has experience in workers' compensation law, which is a specialized area. Claimant's counsel's firm's initial contact with Claimant was in November of 2016, so the period of representation has been approximately six years. This case involved no difficult or unusual question of fact or law and it required only average skill to present the case properly. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the

circumstances, although naturally she could not work on other matters at the exact same time as she was working on this one. There is no evidence that counsel was actually precluded from accepting other employment because of her representation of Claimant. Counsel's fee arrangement with Claimant is on a one-third contingency basis. Counsel does not expect to receive compensation from any other source with respect to this particular litigation. There is no evidence that Employer/carrier lacks the financial ability to pay an attorney's fee.

Taking into consideration the fees customarily charged in this locality for such services as were rendered by Claimant's counsel and the factors set forth above, the Board finds that an attorney's fee in the amount of $600.00 is reasonable in this case and does not exceed thirty percent of the value of the award once the value of any non-speculative future and non-monetary benefits that may arise from this decision are taken into consideration. *See Pugh v. Wal-Mart Stores, Inc.*, 945 A.2d 588, 591-92 (Del. 2008).

Based on all of the above, the Board concludes that Employer has failed repeatedly to pay Claimant's ongoing temporary total disability benefits in a timely manner. Therefore, Claimant's Motion to Compel Ongoing Temporary Total Disability Benefits is GRANTED.

IT IS ORDERED that Employer/carrier shall pay Claimant's temporary total disability benefits in a timely manner on a consistent basis.

IT IS FURTHER ORDERED that Employer/carrier shall pay sanctions in the amount of $1,807.30.

IT IS FURTHER ORDERED that Employer/carrier shall be fined $1,000.00 for failing to comply with the Board's Orders pursuant to 19 *Del. C.* § 2362(d).

IT IS FURTHER ORDERED that Employer/carrier shall pay Claimant an attorney's fee of $600.00 for its failure to comply with the Board's orders, which required Claimant to litigate this issue again.

IT IS SO ORDERED THIS 5th DAY OF JANUARY, 2023.

INDUSTRIAL ACCIDENT BOARD

/s/Mary Dantzler
MARY DANTZLER

/s/Valencia Hayes
VALENCIA HAYES

HEATHER WILLIAMS, ESQ.
HEARING OFFICER

Mailed Date: 1-6-2023

CR
OWC Staff

Heather Long, Esq., for Claimant
Tara McManamy, Esq., for Employer
Lynn Kelly, Esq., for the WC Fund

STATE OF DELAWARE
DEPARTMENT OF LABOR
DIVISION OF INDUSTRIAL AFFAIRS
4425 NORTH MARKET STREET
WILMINGTON, DE 19802

"Official Business, Penalty For Private Use $300"
60-07-001

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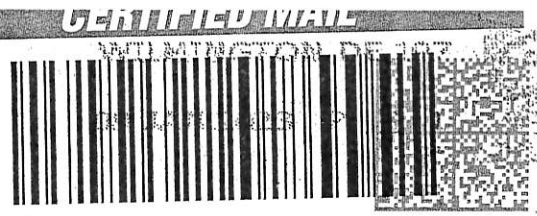

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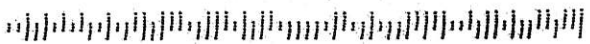

DCI Form #: SC-441

BEFORE THE INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

LARRY MARTIN,	)	
	)	
Claimant,	)	
	)	
	)	
v.	)	Hearing No. 1427892
	)	
BURNS & MCBRIDE,	)	
	)	
	)	
Employer,	)	
	)	

ORDER

This matter came before the Board on Thursday August 31, 2023, on Larry Martin's ("Claimant") Motion to Compel payment of benefits for Burns & McBride's ("Employer") failure to timely pay weekly temporary total disability benefits (TTD). The parties reached an Agreement as to Compensation for payment of TTD benefits on a weekly basis. Employer routinely failed to issue the checks for extended periods of time in March, April, May, and July. It requires significant time for Claimant's counsel to keep track of the late payments. Claimant requests an Order from the Board assessing a fine and attorney fee should further payments be delayed. Employer argues that all payments have been brought up to date and submitted payment records for verification. Further any prospective fine assessment would be unconstitutional as a violation of due process.

The Board takes note of the delays even though payments have all been issued. Additionally, the Carrier's payment log does indicate that checks up through November 2023 have been scheduled in their payment system. Hopefully this will address any delays in the payments from the Carrier's end. However, the Board finds that if there is any further delay attributable to

the Carrier, then the assigned adjuster must come before the Board to testify (in person) for hearing on any subsequent Motion presented by Claimant on this issue. Currently there is no payment in violation of the statutory requirements. Consequently, Claimant's Motion is hereby **DENIED.**

IT IS SO ORDERED this 31ST DAY OF AUGUST 2023.

INDUSTRIAL ACCIDENT BOARD

/s/
PETER W. HARTRANFT

/s/
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: 9-1-2023

CR
OWC Staff

Rachel D. Allen, Esq., for Claimant
Kristopher T. Starr, Esq., for Employer

BEFORE THE INDUSTRIAL ACCIDENT BOARD

IN AND FOR THE STATE OF DELAWARE

CHARLES LAMB,	)	
	)	
Claimant/Employee,	)	
	)	
v.	)	IAB Case File No.: 1470033
	)	
PENINSULA OIL,	)	
	)	
Employer/Carrier.	)	

CLAIMANT'S MOTION TO COMPEL ONGOING
TEMPORARY TOTAL DISABILITY BENEFITS

1. Charles Lamb was injured in the course and scope of his employment on September 23, 2016. His claim has been accepted by the employer/carrier and he is presently on an open Agreement for total disability.

2. Over the course of Mr. Lamb's claim, there have been many occasions when Mr. Lamb's total disability benefits were not received on time. In fact, the Board has ordered on three separate occasions that the carrier bring Mr. Lamb's temporary total disability benefits current and continue to pay him. The carrier's actions have been so appalling that the Board also ordered fines and sanctions. (Exhibit A.)

3. Since September 13, there have been at least three occasions when Mr. Lamb's total disability benefits did not appear without prompting from Claimant's attorney. There were other occasions when the checks were late and were delivered with the next check which was due. (Exhibit B.)

4. Mr. Lamb received a check paid him from November 21 through November 27, 2022. He then did not receive another check until December 28 despite reminder queries to employer/carrier's attorney, Krista Reale.

5. Claimant requests once again that his ongoing benefits are provided to him on a regular and consistent basis until such time as they come to an end by appropriate means.

6. Claimant also requests that once again the Board order remedial actions (including fines and sanctions) pursuant to *Casella v. Samuel Coraluzzo Co.,* IAB Case File No.: 1453963 (April 15, 2021) and award an additional attorney's fee. The Board previously imposed sanctions at the amount of 10% per day ($58.30) for every day that Mr. Lamb's temporary total disability check was late. Mr. Lamb most recently did not receive a check for 31 days. Therefore, Claimant requests the Board again impose the same sanctions against Peninsula Oil, payable to Claimant, in the amount of $1,807.30.

7. In the past, the Board previously ordered a fine against Peninsula Oil, payable to the Workers' Compensation Fund, in the amount of $2,000.00 for failing in its responsibilities under 19 *Del.C.* §2362(d) to pay Claimant's total disability benefits in a timely manner. As this obviously did not deter the carrier from continuing its bad practice, the Claimant at this time requests a fine in the amount of $3,000.00.

8. The Claimant also requests that an attorney's fee be paid for the time and effort caused by the carrier's failure to pay Mr. Lamb's temporary total disability benefits on an ongoing and timely basis.

Heather A. Long, Esq.
Kimmel, Carter, Roman, Peltz & O'Neill, P.A.
Bar I.D. No.:4910
56 W. Main St., Suite 301
Christiana, DE 19702
(302) 565-6100
Attorney for Claimant

DATE: May 2, 2024

BEFORE THE INDUSTRIAL ACCIDENT BOARD

IN AND FOR THE STATE OF DELAWARE

CHARLES LAMB,	)	
	)	
Claimant/Employee,	)	
	)	
v.	)	IAB Case File No.: 1470033
	)	
PENINSULA OIL,	)	
	)	
Employer.	)	

ORDER

AND NOW, this _____ day of _____, 20__, having considered *Claimant's Motion to Compel Ongoing Temporary Total Disability Benefits;*

IT IS ORDERED that employer/carrier continue Mr. Lamb's benefits on a regular and consistent basis.

IT IS FURTHER ORDERED that the Claimant is awarded sanctions in the amount of $1,807.30;

IT IS FURTHER ORDERED that the Carrier is fined $3,000.00 payable to the Workers' Compensation Fund.

IT IS FURTHER ORDERED that an attorney's fee in the amount of $_____ be paid. In the past, the Board previously ordered a fine against Peninsula Oil, payable to the Workers' Compensation Fund, in the amount of $2,000.00 for failing in its responsibilities under 19 *Del.C.* §2362(d) to pay Claimant's total disability benefits in a timely manner. As this obviously did not deter the carrier from continuing its bad practice, the Claimant at this time requests a fine in the amount of $3,000.00.

The Claimant also requests that an attorney's fee be paid for the time and effort caused by the carrier's failure to pay Mr. Lamb's temporary total disability benefits on an ongoing and timely basis.

ATTEST: INDUSTRIAL ACCIDENT BOARD

Allison Stein, Administrator	Hearing Officer
	Hearing Officer

2017 Del. Workers' Comp. LEXIS 32

Industrial Accident Board of the State of Delaware

December 29, 2017

Hearing No. 1408128

Reporter
2017 Del. Workers' Comp. LEXIS 32 *

TERESA A. ***BOWERS***, Employee, v. MORGAN PROPERTIES PAYROLL SERVICES, INC., Employer.

Core Terms

claimant, pain, fusion, symptom, cervical, total disability, surgery, segment, adjacent, back pain, lock, lumbar, nerve, leg, brain injury, right knee, degenerate, non-union, narcotic, confirm, attorney's fees, terminate, diagnose, memory, edema, spine, taper, disk, knee, neck

Counsel

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

Heather A. Long, Attorney for the Employee
[*1] Robert S. Hunt, Jr., Attorney for the Employer

Opinion By: Gemma Buckley; Idel M. Wilsonn

Opinion

BEFORE THE INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

DECISION ON PETITION TO TERMINATE BENEFITS

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on September 1, 2017, in the Hearing Room of the Board, in New Castle County, Delaware.

NATURE AND STAGE OF THE PROCEEDINGS

Teresa A. ***Bowers*** ("Claimant") was involved in a compensable work accident on January 17, 2014, while she was working for Morgan Properties Payroll Services, Inc. ("Employer"). Initially, Employer recognized that Claimant had sustained a closed head injury and a right knee injury. By decision of the Board, it was found that Claimant had also sustained a compensable low back injury. *See* ***Bowers*** *v. Morgan Properties, Inc.*, Del. IAB, Hearing No. 1408128 (February 9, 2015). Employer subsequently acknowledged that Claimant also sustained a cervical spine injury and, following a hearing, **[*2]** the Board found that cervical surgery in 2015 was causally related to the work accident. *See* ***Bowers*** *v. Morgan Properties, Inc.*, Del. IAB, Hearing No. 1408128 (June 28, 2016). This conclusion was subsequently affirmed by Superior Court. *See Morgan Properties Payroll Services, Inc. v.* ***Bowers***, Del. Super.,

C.A. No. N16A-07-007, Rocanelli, J. (May 31, 2017). Claimant's average weekly wage at the time of injury was $ 1,088.20, resulting in a compensation rate for total disability of $ 660.79 per week.

On February 9, 2017, Employer filed a Petition to Terminate Benefits alleging that Claimant's total disability status has ended. Disability benefits have been paid to Claimant by the Workers' Compensation Fund since the filing of the petition, pending a hearing and decision.

A hearing was held on Employer's petition on September 1, 2017. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. Stephen L. Fedder, a neurological surgeon, testified by deposition on behalf of Employer. He evaluated Claimant on January 4, 2017, and reviewed pertinent medical records. In his opinion, Claimant is capable of working full time in a light-duty capacity.

Dr. **[*3]** Fedder stated that Claimant described to him her January 17, 2014 work accident. She stated that she slipped and fell with her head hitting the pavement. The doctor was aware that Claimant had undergone surgeries to her neck, low back and right knee as a result of this work accident. Dr. Fedder reviewed Claimant's medical history. Claimant had been involved in an accident in 2013 which resulted in low back pain. The assessment in August of 2013 included an impression of degenerative disk disease at L1-2. In October of 2013, she reported right leg pain, rated as only a two on a ten-point scale. Following the work accident, Claimant complained of severe radicular symptoms, which then eased four months after her lumbar surgery.

Dr. Fedder stated that, in January of 2017, Claimant complained of having daily headaches involving the top of the head and the temple. She reported losing vision in her right eye two or three times per week, and that she had intermittent flashes and "swoops" in both visual fields. The symptoms were said to be associated with right retro-orbital pain. She reported daily ear-ringing and daily pain at the base of the skull and in the trapezius region. She also **[*4]** complained of inner left arm, forearm and hand weakness with pain every few months; daily lumbosacral pain; daily left interior hip pain; daily right buttock pain which radiated to the right leg; and daily left knee pain.

In terms of medication, Claimant was taking a Morphine Milligram Equivalent ("MME") of 112.5. Any such use above 100 is associated with significant morbidity and mortality (and there is no medical evidence that levels over 70 are associated with increased pain control). This was amplified in Claimant's case, because she is also taking depressant medications (Xanax and Seroquel). Dr. Fedder recommended that Claimant's narcotic usage be tapered in accordance with CDC Guidelines, although that tapering would be more protracted based on how long she has been using opiates. Dr. Fedder observed that there is a significant disconnect between Claimant's stated symptoms and her admitted activity level. It is unclear how much pain she is really in, but there is no relationship between it and the narcotic dosage she is taking.

On examination of Claimant in January of 2017, Dr. Fedder noted restricted cervical motion, but no spinal cord or nerve root compression signs. **[*5]** Intrinsic function of the small muscles of the hands was intact. Reflexes were intact and symmetric. [1] She had global restricted motion in the low back and hip.

Dr. Fedder commented that concussion is, by definition, a traumatic brain injury with interruptions in information processing. In Claimant's case, she can describe her January 17, 2014 work accident in detail. At the emergency room, she scored 15 out of 15 (completely normal) on the Glasgow Coma Scale and had a normal neurological assessment. On January 30, she provided a detailed list of symptoms and complaints. On February 6, 2014, Dr. P. Tymour Boulos examined Claimant and noted a completely normal mental status examination. All of this is inconsistent with there being any information processing dysfunction, memory disturbance or cognitive dysfunction. During Dr. Fedder's examination in January of 2017, Claimant continued to display good memory. In Dr. Fedder's

[1] Claimant did have evidence of left knee pathology for which Claimant was scheduled for and received a left knee replacement in April of 2017. The left knee condition is not relevant to the present petition.

opinion, at most Claimant sustained a minor concussion **[*6]** in her work accident, which then resolved on its own. Claimant does not have any ongoing brain or head injury. There is no significant probability that she has a post-concussive syndrome. She does tend to give tangential responses to questions, which may suggest a psychological issue, but that is not a manifestation of a brain injury.

With respect to Claimant's hip, Dr. Fedder confirmed that, in 2015, Dr. Straight twice indicated that Claimant's subjective pain complaints were significantly out of proportion to the objective diagnostic studies. Similarly, Dr. Fedder thought that Claimant's complaint of intermittent visual problems was inconsistent with the fact that she has been driving without accident on a regular basis.

With respect to Claimant's cervical spine, Dr. Fedder understands that Claimant has had two surgeries that have been accepted as compensable. At this point, though, she has a normal neurologic examination with no signs of any ongoing nerve root compression. Dr. Bruce Rudin's records describe a solid fusion from C5 to C7.

Dr. Fedder also was aware that, with respect to the right knee, Dr. Raisis (Claimant's treating doctor for the knee) in May of 2015 opined **[*7]** that Claimant could do office work with her right knee, although Dr. Raisis understood she was still totally disabled because of the back.

Dr. Fedder explained that four criteria need to be met to support a diagnosis of reflex sympathetic dystrophy ("RSD"). First is a traumatic insult or immobilization of some type. Second is allodynia (aberrant sensory perception, such as a burning or writhing pain). Third is associated changes such as excessive perspiration, edema and abnormal hair or nail growth. Fourth is a lack of other explanation for the symptoms. In Claimant's case, she has no evidence of allodynia, edema, hair or nail changes or perspiration changes. A sympathetic block administered by Dr. Selina Xing did not produce a significant therapeutic result. If Claimant has RSD, such a block should have had such a result. Dr. Xing also documented decreased sensation in her lower extremity (hyposensitivity) when a person with RSD would have hypersensitivity. In Dr. Fedder's opinion, Claimant does not have RSD. She merely has subjective reports of a sensitive extremity.

Dr. Fedder also concluded that Claimant did not have "adjacent segment disease" in the low back. Claimant has **[*8]** had a fusion from L3 to S 1. While Dr. Rudin has attributed the condition of L1-2 to "adjacent segment disease," it is not an adjacent segment. The adjacent segment is L2-3, which only has minimal degenerative changes. Claimant has had evidence of disk desiccation and decreased disk space height at L1-2 as far back as 2004, long before the work accident, much less the fusion surgery.

Dr. Fedder agreed that, according to a March 2017 CT scan, Claimant does have a non-union at the inferior portion of S 1. Having such a finding does not necessarily mean that it is symptomatic and it is impossible to state with assurance that it is symptomatic. Regardless, Claimant's clinical examination reflected no nerve stretch signs in the lower extremities, no reflex asymmetry and no motor loss.

Taking all of this into consideration, Dr. Fedder opined that Claimant was capable of working in a full time light-duty capacity. He does think her medications should be tapered, as discussed earlier. Apart from that, he did not think she needed any further medical care for her neck and back.

Dr. Fedder confirmed that he assessed a "no-show" fee for a medical examination that Claimant missed on December **[*9]** 13, 2016. The fee charged was $ 1,125.00.

Ellen Lock, a vocational case manager, testified on behalf of Employer. She prepared a labor market survey of jobs available to a person with Claimant's physical restrictions and educational and vocational background. Ms. Lock was aware that Claimant was fifty years old, was a high school graduate and had over twenty years of experience as a property manager/leasing specialist. In terms of physical restrictions, Ms. Lock relied on Dr. Fedder's light-duty restrictions. The survey identified fourteen jobs, all of which were within fifteen miles of Claimant's residence and all of which were accessible by public transportation. Most of the jobs are in the nature of property manager or associate property manager or leasing consultant, although there is also listed a customer service position with a bank and a couple other office positions. Ms. Lock confirmed that the listed jobs were

available and, because of her experience, an application from Claimant would be considered. Indeed, several of the positions actually requested that Claimant submit a resume to them.

Ms. Lock stated that the actual wage range reflected on the survey went from **[*10]** $ 614.00 to $ 1,200.00 per week. The average wage range went from $ 887.50 to $ 930.00 per week. The overall average wage reflected by the survey was $ 909.00 per week. Because of Claimant's lengthy experience in the property management field, Ms. Lock thought that she could likely expect to be paid on the higher end of the offered wage scale.

Ms. Lock confirmed that the survey covered the period from February to June of 2017. However, she checked and, at the time of this hearing, six of the fourteen positions were still available. Similar positions are also available, as the survey is just a representative sample.

Ms. Lock did not know if Claimant's taking prescribed narcotics would be an issue for the listed employers.

Dr. Bruce J. Rudin, an orthopedic surgeon, testified by deposition on behalf of Claimant. He began to provide medical care to Claimant in May of 2014. In his opinion, Claimant remains totally disabled as a result of her work accident.

Dr. Rudin confirmed that he first took Claimant out on total disability in May of 2014 and she remained totally disabled through August 6, 2014. Claimant underwent lumbar fusion surgery in October of 2014 at L3-4, L4-5 and **[*11]** L5-S1. Dr. Rudin continued to see Claimant on a monthly (or sometimes every other month) since then and he has kept her on total disability status. By February of 2015, it was noted that Claimant's low back was about 30% to 40% better and she no longer had any radiating leg pain. However, by October of 2015, Claimant was rating her low back pain as a ten on a ten-point scale. Reviewing a CT scan of the low back, Dr. Rudin clearly saw fusion at L3-4 and he thought it likely that there had been fusion at L5-S1 as well. Her cervical spine had become a bigger issue. Claimant had previously had a two level cervical fusion, but had a non-union at C6-7. Claimant had further surgery to repair the cervical fusion in March of 2016. This was followed by post-operative infection which required additional surgery to clean up. Ultimately, that cervical fusion healed well.

Dr. Rudin evaluated Claimant on July 18, 2016. She rated her cervical pain as a four and her lumbar pain as a seven on a ten-point scale. Claimant was sent for a sympathetic nerve block from Dr. Xing. Claimant had continued to have significant low back pain following the fusion and had "signs and symptoms" of RSD or Complex **[*12]** Regional Pain Syndrome ("CRPS"). [2] It took a couple months to get the injection done and, when Dr. Rudin saw Claimant again in January of 2017, she was not any better. Claimant was complaining of a burning sensation in her foot and pain in her leg. When pressed for more details on cross-examination, Dr. Rudin stated that Claimant had complained of hypersensitivity in the right leg. He admitted that he had not documented any swelling/edema. He also did not document any temperature changes. He did not document any redness or nail changes.

Dr. Rudin testified that a lumbar CT scan was ordered in **[*13]** February and, in June of 2017, Dr. Rudin noted that the scan showed that the fusion had healed at the top two levels, but not at the bottom level. There was also a level (L1-2) two levels above her fusion which was "completely destroyed, bone on bone." Thus, there were objective reasons for her low back complaints. The doctor thought that the three-level fusion did put extra stress on L1-2 which accelerated or exacerbated that disk wearing out (adjacent segment degeneration). He continued to consider her totally disabled from gainful employment. She constantly fidgets: standing, sitting, bending over, bending backwards and the like. She has also become physically and (probably) psychologically dependent on opioid medication. Dr. Rudin believes that she has some residual of a closed-head injury because she cannot seem to hold a thought for all that long, but he agreed that that was outside his area of expertise. [3] Taking all that into

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[2] Dr. Rudin referred to both RSD and CRPS. The Board is aware that RSD is considered an outmoded term for the condition. The more modern term is CRPS, which has a Type I and a Type II. Type I equates to the traditional RSD, while Type II equates to causalgia. Causalgia involves a documentable nerve injury. RSD describes a patient with severe pain complaints (a disruption of the sympathetic nerve system) but no documentable nerve injury. Because Dr. Fedder and Dr. Rudin, as well as the attorneys, all used the term "RSD," that is generally the term that the Board will use in this decision.

account, he does not think that she is capable of working. She is "clinically bad." **[*14]** It is a combination of the condition of her neck and her back as well as her medication usage. Dr. Rudin agrees that Claimant should work at detoxification from her opioid use.

Claimant testified that she had been a property manager for Employer. She started with Employer in November of 2013. [4] She managed two communities within a mile and a half of each other. Twice per day, she would walk the properties and investigate vacant apartments. She would also check on outside contractors (working on landscaping, snow removal and the like). She also supervised office staff and handled contract matters.

Claimant stated that she fell in January of 2014, slipping on ice and landing on her head and back. She lost consciousness and estimates that she was "out cold" for six minutes. She came under the care of Dr. Boulos. At first, she took a cousin with her because she was having difficulty remembering things and the cousin would help her. She then came under the care of Dr. Rudin and has generally seen him every month or two since then.

Claimant **[*15]** confirmed that she first had surgery to her low back, then to her right knee and finally to her neck (which had complications in the form of an infection). The right knee surgery was a meniscus repair and has been helpful. The neck surgery did take the edge off her pain but she still has some symptoms (like a "zing" feeling with certain motions). She has had a ringing in her ears since the accident. With regards to the low back, Claimant denied any changes. She still has leg pain which periodically feels like a blowtorch on her toes and bottom of her feet. The pain is mainly in the right foot and it is "super sensitive" even though the left three toes are numb. She does not like anything touching her toes and she tries to stay barefoot if she cannot find cushy inserts to walk on. The left foot has also begun to go numb. Sitting is most painful and she needs to stand repetitively. Walking and rocking back and forth helps. She would rate her back pain as a seven or eight on a ten-point scale.

With respect to her eyes, there is a dark grey floater near the top of the eyes, and she gets a "sparkly" field that can sometimes cover her vision. Sometimes it comes with pain and sometimes **[*16]** without. She reports that she is constantly falling into things or misjudging where they are.

Claimant explained that she takes care of three children ranging in ages from 19 months to ten years old. The older two children (8 and 10) are pretty independent. Claimant stated that she generally uses Uber or Lyft for driving now. Her step-son has driven her on occasion. She did drive her granddaughter to school last year (a distance of less than two miles). She also lives with her father (77 years old) and a boyfriend. Her father does most of the grocery shopping and her boyfriend and the two older children do housecleaning chores.

Claimant stated that she is currently taking Oxycodone, OxyContin, Gabapentin, Flexeril, ibuprofen and a topical cream. She believes that Dr. Xing may be adjusting these medications at her next visit. The medications make her very sleepy and "squishy-headed." Indeed, she missed a defense medical examination because she took her medications and fell asleep. She does not believe that she could make sound work decisions while on these medications.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Termination

Employer has filed a petition **[*17]** alleging that Claimant's total disability status has terminated. Normally, in a total disability termination case, the employer is initially required to show that the claimant is not completely incapacitated (*i.e.*, demonstrate "medical employability"). *Howell v. Supermarkets General Corp.*, 340 A.2d 833, 835 (Del. 1975); *Chrysler Corporation v. Duff* 314 A.2d 915, 918n.1 (Del. 1973). In response, the claimant may

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[3] Dr. Rudin agreed that Claimant had already been on medication for attention deficit hyperactivity disorder (ADHD), anxiety and depression prior to the work accident.

[4] Employer had let her go about three months after her work accident because it was unknown when she would be able to return to work.

rebut that showing, show that he or she is a *prima facie* displaced worker or submit evidence of reasonable efforts to secure employment which have been unsuccessful because of the injury (*i.e.*, actual displacement). In rebuttal, the employer may then present evidence showing the availability of regular employment within the claimant's capabilities. *Howell*, 340 A.2d at 835; *Duff*, 314 A.2d at 918n.1.

In the case, the Board finds that Employer has not met its burden of demonstrating that, more likely than not, Claimant is no longer totally disabled from a medical standpoint.

First, it is necessary to clear up some side issues. The Board agrees with Dr. Fedder that Claimant does not currently display evidence of any post-concussive syndrome or traumatic brain injury. Testing was done in the emergency room and **[*18]** subsequently, all of which was normal. While Claimant states that she initially had memory problems, the issue is how she is now. Now she displays no memory problems. The Board notes that Dr. Rudin, while he floated the suggestion that Claimant had some residual of a closed-head injury, also admitted that that was outside his field of expertise. His only observation was that she did not seem to "hold a thought" for long, while Dr. Fedder noted her tendency to give tangential responses. These are similar observations, suggesting that Claimant's attention wanders. Considering that Claimant was admittedly being treated for an attention deficit disorder prior to the work accident, such observations as made by Dr. Rudin and Dr. Fedder do not amount to substantial evidence of any cognitive dysfunction or memory dysfunction as would be expected if Claimant were truly suffering from a post-concussive syndrome related to the work accident. [5] Thus, concussion is **[*19]** not one of Claimant's current problems.

Dr. Rudin also attempts to relate the condition of the L1-2 disk to the work accident. The Board disagrees, accepting the opinion of Dr. Fedder on this point. Diagnostic imaging demonstrated that Claimant had significant degenerative findings at that level for a decade prior to the work accident. That is has progressed would be part of the natural process of the condition. Dr. Rudin's argument that the fusion has contributed to the degeneration through an "adjacent segment" process ignores the fact that L1-2 is not an adjacent segment. The adjacent segment to the lumbar fusion is L2-3, which is admittedly in pretty good condition with only minimal evidence of degeneration. The Board rejects the suggestion that "adjacent segment disease" can hop over an intervening segment to affect one higher up the spine. Thus, Claimant's L1-2 condition, while it may be a pain generator, is unrelated to the work accident.

The next side issue is Dr. Rudin's suggestion that Claimant has RSD. While the doctor, in his deposition, gave vague generalities that Claimant had the "signs and symptoms" of RSD (or CRPS), when pressed on cross-examination, the **[*20]** only sign or symptom he could identify was that Claimant complained of hypersensitivity. He admitted that he never documented any swelling/edema, any redness, any temperature changes or any nailbed changes. As Dr. Fedder correctly points out, one needs to have several documented objective physical findings to justify the RSD diagnosis. These include such things as hyperesthesia/allodynia (light touch producing pain sensation); temperature change; swelling (edema); skin shininess or color changes; hair growth changes; sweating changes; nail-bed changes; and joint stiffness. Claimant's subjective complaints of burning pain and hypersensitivity simply do not meet the necessary diagnostic criteria for a diagnosis of RSD. This does not mean that Claimant does not have the symptoms she describes: it means that those symptoms are not, in themselves, sufficient to support a formal diagnosis of RSD. As such, based on the evidence presented, the Board rejects the conclusion that Claimant currently has RSD.

What Claimant does have are recognized cervical and lumbar spine injuries. The cervical condition is stable following fusion surgery. "Stable" does not mean asymptomatic or cured. It is **[*21]** certainly reasonable for Claimant to have restrictions based on her cervical fusion. However, as Claimant herself testified, the primary problem currently is the low back.

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[5] This does not even take into account the mental fogginess that Claimant alleges she gets from her medication. Obviously, any mental fogginess from her medication regimen does not equate to a post-concussive traumatic brain injury.

With respect to the low back, it is not disputed that, objectively, Claimant has a non-union in her fusion at L5-S1. This has been identified by CT scan in March of 2017. While Dr. Fedder suggests that the presence of a non-union does not necessarily mean that it is symptomatic, the fact remains that Claimant's primary pain complaints are in the low back. She states that the pain is particularly bad with sitting, consistent with a problem at LS-S1. When Claimant has subjective symptoms consistent with objective diagnostic findings, it does seem more likely than not that the objective condition is causing those symptoms.

Both Dr. Rudin and Dr. Fedder express a desire that Claimant's narcotic medication should be tapered, and the Board agrees. Indeed, as noted above, the mental fogginess that Claimant complains of may possibly be connected to her heavy narcotic load and is suggestive that she is being overly medicated, to her detriment.

Taking into account Claimant's significant low back pain (which has an **[*22]** objective basis in the form of the non-union at L5-S1), restrictions from her cervical condition, periodic leg symptoms (even though they do not merit a diagnosis of RSD) and sedation issues from her opioid medication levels, the Board agrees with Dr. Rudin that Claimant is not currently capable of returning to work on a regular or consistent basis. The burden of proof rests with Employer to demonstrate that more likely than not Claimant is capable of working in a job readily available in the competitive job market. While the Board finds that not everything Claimant complains of is related to her work accident, what has been found to be work-related is more than sufficient to keep Claimant out of work at this time. Claimant needs to consider medical care for the lumbar non-union, as well as tapering her opioid medication level as suggested by both Dr. Rudin and Dr. Fedder.

Accordingly, Employer's petition is denied.

No-Show Fee

Employer seeks an award of a credit for the $ 1,125.00 "no-show" fee because Claimant missed a scheduled examination with Dr. Fedder on December 13, 2016. Claimant testified that she missed the appointment because she fell asleep after taking **[*23]** her narcotic medication.

With respect to the awarding of a credit for a missed medical examination, the Board has often explained that, lacking a specific statute to award a credit, an administrative tribunal with ancillary equitable jurisdiction has the power to make an award of costs (or, in this case, a credit) upon a finding of bad faith. *See, e.g., Dotterer v. American Legion Post 28*, Del. IAB, Hearing No. 1147828, at 1-2 (December 4, 2017)(ORDER); *Reynolds v. Liquid Transport Corp.*, Del. IAB, Hearing No. 1430274, at 2-3 (May 12, 2016)(ORDER); *Kaczorowski v. New Castle County Head Start*, Del. IAB, Hearing No. 1379970, at 2 (July 7, 2014)(ORDER); *Smith v. General Motors*, Del. IAB, Hearing Nos. 1203901 & 1203903, at 5 (December 17, 2002)(ORDER). The issue, therefore, is whether a claimant's conduct amounts to bad faith. Such bad faith can be shown because of repeated failure to attend examinations or particularly neglectful conduct on the part of the claimant.

In this case, there is no evidence of a pattern of conduct to suggest that Claimant has been avoiding examination. Employer references only one occasion of a missed examination. Claimant gave an explanation for **[*24]** missing the examination. That explanation demonstrates inadvertence and does not amount to bad faith. Without more evidence of bad faith, the Board declines to award a credit for the missed examination.

Attorney's Fee & Medical Witness Fee

A claimant who is awarded compensation is entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller." DEL. CODE ANN. tit. 19, § 2320. [6] At the

[6] Attorney's fees are not awarded if, thirty days prior to the hearing date, the employer gives a written settlement offer to the claimant that is "equal to or greater than the amount ultimately awarded by the Board." DEL. CODE ANN. tit. 19, § 2320. A

current time, the maximum based on Delaware's average weekly wage calculates to $ 10,304.90. The factors that must be considered in assessing a fee are set forth in *General Motors* ***[*25]*** *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. DEL. CODE ANN. tit. 19, § 2320(10)a.

Claimant has established that she remains totally disabled as a result of her compensable work injury. Claimant's counsel submitted an affidavit stating that twelve hours were spent preparing for the hearing. The hearing itself lasted over two and a half hours. Claimant's counsel was admitted to the Delaware Bar in 2006 and she is familiar with workers' compensation **[*26]** litigation, a specialized area of law. Her or her firm's initial contact with Claimant was in March of 2014, so the period of representation had been for about three and a half years at the time of the hearing. This case involved moderately difficult questions of fact but no unusual question of law. It required moderate skill to present the case properly. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances, although naturally she could not work on other matters at the exact same time as she was working on this one. There is no evidence that counsel was actually precluded from accepting other employment because of her representation of Claimant. Counsel's fee arrangement with Claimant is on a one-third contingency basis. Counsel does not expect to receive compensation from any other source with respect to this particular litigation. There is no evidence that the employer lacks the financial ability to pay an attorney's fee.

Taking into consideration the fees customarily charged in this locality for such services as were rendered by Claimant's counsel and the factors set forth above, the Board finds that an attorney's **[*27]** fee in the amount of $ 4,000.00 is appropriate. It does not exceed thirty percent of the value of the award once the value of any non-speculative future and non-monetary benefits that may arise from this decision are taken into consideration, *see Pugh v. Wal-Mart Stores, Inc.*, 945 A.2d 588, 591-92 (Del. 2008), and it works out to be slightly over $ 250.00 per hour for counsel's services, which is certainly not excessive.

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

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Employer's petition is denied. Employer shall make appropriate reimbursement to the Workers' Compensation Fund, in accordance with title 19, section 2347 of the Delaware Code.

Claimant is also awarded an attorney's fee and payment of her medical witness fees.

IT IS SO ORDERED THIS 29th DAY OF DECEMBER, 2017.

INDUSTRIAL ACCIDENT BOARD

GEMMA BUCKLEY

IDEL M. WILSON

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settlement offer was tendered by Employer in this case but it is for less than the amount awarded by the Board. Accordingly, an award of attorney's fees is appropriate in this case.

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

Mailed Date: Jan 2, 2018

OWC Staff

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Panel 4

The Discovery Channel: Pre-Hearing Avenues of Disclosure

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Benjamin K. Durstein, Esquire
Marshall Dennehey

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

Christopher T. Logullo, Esquire
Cobb & Logullo

W. Christopher Componovo, Esquire
Morris James LLP

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, having served as President in 2019-2020. 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. Since 2010, Ms. Houser has served as an active member of the Delaware State Bar Association, and previously served as Chair of the Workers' Compensation Section. Ms. Houser is also a member of the Women & the Law section and has served as a member of the DSBA's Nominating Committee.

Christopher T. Logullo, Esquire

ATTORNEY

LAW OFFICES OF COBB & LOGULLO

CONTACT

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PRACTICE AREAS

Personal Injury
Premises Liability
Automobile Liability
Worker's Compensation

EDUCATION

University of Delaware, 1990

Widener University/ Delaware Law School, cum laude, 1994

BAR ADMISSIONS

Delaware 1995
Pennsylvania 1995
New Jersey 1995
United States District Court for the District of Delaware 1995
Maryland 2012

EXPERIENCE :

Mr. Logullo has worked for Liberty Mutual as a trial attorney since 1999. His practice areas include general liability defense and the defense of worker's compensation matters. He has tried cases to verdict before the Delaware Superior Court, the District and Circuit Courts of Maryland, the United States District Court for Delaware, the Industrial Accident Board of Delaware, and the Maryland Worker's Compensation Commission. Mr. Logullo has also argued before the Delaware Supreme Court.

Prior to joining Liberty Mutual, Mr. Logullo worked for a regional based law firm and practiced personal injury work from a defense and plaintiff's perspective.

Mr. Logullo is a frequent lecturer in the field of personal injury and worker's compensation for the National Business Institute and the Delaware State Bar Association. He has also been selected as one of Delaware's Top Lawyers in Delaware Today Magazine in the areas of personal injury and worker's compensation defense.

W. Christopher Componovo, Esq. – Morris James LLP

Chris earned his Bachelor of Arts Degree from the University of Notre Dame, where he earned his Varsity monogram as a member of the Track and Field team. He earned his law degree, cum laude, from Widener University School of Law.

He is a past President of the Delaware Trial Lawyers Association and past Chair of the Workers' Compensation Section of the Delaware State Bar Association. He is currently a member of the Holland Inn of Court.

THE INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

,	)	
	)	
Claimant,	)	
	)	IAB HEARING NO.:
v.	)	
	)	
,	)	
	)	
Employer.	)	

EMPLOYER'S REQUEST FOR PRODUCTION*

Employer requests Claimant to produce on or before fifteen (15) days from the date of receipt of this Request in the office of the undersigned attorney located at 3 Mill Road, Suite 301, Wilmington, Delaware 19806, the following:

1. Copies of all medical records reflecting any treatment, care or hospitalization of the employee, and the names of all physicians and health care providers who treated the claimant prior and subsequent to the industrial accident.

2. Tax returns and W-2 forms for the last three (3) years.

3. All pay stubs for the last two (2) years from any employer.

4. All records concerning prior and subsequent accidents and/or worker's compensation claims. Included in this should be any court records, medical records and medical reports.

5. All records showing benefits which are being received from any collateral source including pension, union, private plan, etc.

6. Copies of all medical bills you claim are due and owing, along with the supporting medical documentation showing the relationship between the bill and the industrial accident.

7. All documentation in your possession showing that the medical bills referred to in paragraph 6, above, have been forwarded to the carrier or carrier's counsel for payment.

8. All documentation reflecting any and all efforts by claimant or by others on his behalf to obtain employment including but not limited to job search logs, correspondence, job applications, web-sites visited, job descriptions, aptitude testing and the like. Said documentation should reflect all efforts made in the one year preceding the date of this request.

9. Copies of any and all pleadings, deposition/arbitration transcripts, medical records, and expert reports for any other action civil action filed in any Court of law or before any administrative agency and to which Plaintiff is or was a party. If the documents are no longer in Plaintiff's possession, then provide the name, address and phone number of any person, including attorney(s), who have or, to the best of Plaintiff's recollection had, a copy of the same.

*This request is a continuing one and must be supplemented as additional material is received.

COBB & LOGULLO

/s/Christopher T. Logullo
Christopher T. Logullo, Esquire (#3410)

Mailing Address:
P.O. Box 6835
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(302) 252-0053
Christopher.Logullo@LibertyMutual.Com

Physical Address:
3 Mill Road, Suite 301
Wilmington, DE 19806
Attorney for Employer

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

ANITA L. SOMMERS,	)	
	)	
Claimant,	)	
	)	
v.	)	Hearing No. 1360322
	)	
CHRISTIANA CARE HEALTH SERVICES,	)	
	)	
Employer.	)	

ORDER

This matter came before the Board on February 23, 2023, on a motion by Christiana Care Health Services ("Employer") seeking to compel responses to a Request for Production. Specifically, Employer seeks to have Anita Sommers ("Claimant") produce a signed Statement of Facts with paragraphs #8 through 20 substantively completed.

Background: Claimant was injured on October 4, 2010, while working for Employer. The injury was accepted as compensable. Claimant's average weekly wage was given as $288.82, with an associated compensation rate for total disability of $203.27 per week. Claimant was out on total disability until that was terminated in December of 2012 (with partial disability awarded). *See Sommers v. Christiana Care Health Services*, Del. IAB, Hearing No. 1360322 (December 19, 2012). Claimant has undergone two cervical fusion surgeries and she had a recurrence of total disability in March of 2013 until August of 2013. She has been awarded 42% permanent impairment to her left upper extremity and 33% percent permanent impairment to her cervical spine.

In a decision dated March 6, 2014, the Board found that Claimant had evidence of a mild left upper extremity Chronic Regional Pain Syndrome ("CRPS"), but that that CRPS had not

spread to her right upper extremity nor to her feet. *See Sommers v. Christiana Care Health Services*, Del. IAB, Hearing No. 1360322, at 35 (March 6, 2014). The Board went on to state that Claimant did have previous unrelated knee injuries, but that she was, in 2013, registering complaints of numbness and burning in both feet of uncertain origin. *Id.*, at 38.

The Board notes that, because of the litigation in 2012 and 2013 culminating in the Board's decision in March of 2014, the parties took depositions of the following medical experts (with deposition dates given): Dr. Selina Xing (September 20, 2012); Dr. John B. Townsend, III (October 1, 2012 & November 26, 2013); Dr. Kennedy Yalamanchili (September 11, 2013); and Dr. Ali Kalamchi (November 18, 2013). Copies of these depositions exist in the Board's file.

Litigation in front of the Board paused after the March 2014 Board decision until Claimant filed a Petition to Determine Additional Compensation Due on November 17, 2022, seeking payment of certain medical bills. This is a gap of over eight and a half years. In the interim, Claimant had engaged new counsel. While Employer remains represented by the same law firm, the attorney previously working on the case has died. In reviewing Employer's file, Employer's current counsel was unable to locate any completed "Statement of Facts Upon Failure to Reach an Agreement." Claimant's current counsel also has no previously completed copy of the Statement, although Claimant reported to him that the form is familiar and she thinks she has completed it a couple of times in the past. If that is true, it does not appear that anybody (including the Board) actually has a copy.[1]

In any event, Employer seeks to have Claimant complete the Statement and sign it, making it a sworn statement. Claimant objects that the request is unreasonable, overly broad and unduly

[1] The Board observes that the Statement is normally attached to an initial Petition to Determine Compensation Due. In Claimant's case, there was no need for her to file such an initial petition because Employer accepted her injury as compensable back in 2010. The first litigation in this case was Employer's Petition for Review filed on April 11, 2012.

burdensome. The major dispute seems to be over the requirement of listing all treating doctors. Employer wants all doctors for a period of ten years prior to the work accident. Claimant is willing to provide the names of doctors for just the past ten years. Employer also wants a statement concerning all "prior" injuries, which Claimant considers burdensome considering that the claim has been accepted for over a dozen years now.

Ruling: The Board agrees that, in light of the long gap in time since this case was last actively litigated, Employer has a right to have some of the questions on the Statement completed and signed off on by Claimant, but the Board also agrees with Claimant that certain limitations are appropriate in light of the fact that this injury has long been acknowledged and litigated over.

Paragraph 8: This asks for the list of affected body parts. It has already been recognized that Claimant has permanent injury to the cervical spine and left upper extremity. Claimant should update this list with any additional body parts that she claims are related to the work accident.

Paragraphs 9 & 10: There is no need to respond to these. Paragraph 9 asks whether the employee received medical, surgical or hospital services. Considering that the petition is for medical benefits, the answer would obviously be yes. Paragraph 10 asks when notice was given to Employer. However, this is an accepted work accident on which benefits have been paid. Notice is a moot point.

Paragraph 11: This asks for a list of employers for the "last five years." Even though the petition is apparently only for medical expenses, it is appropriate for Claimant to respond whether she has had any employers for the past five years.[2]

[2] The Board only states that the petition is "apparently" for medical expenses because the pretrial memorandum actually asserts a claim for total disability from October 4, 2010. This claim makes no sense, considering that Claimant has already been paid for two periods of total disability since that date, and both

Paragraph 12: This need not be answered. It asks for Claimant's weekly wage at the time of injury. That has already been established in the prior agreements.

Paragraph 13: This asks for the names and address of all treating doctors for this claim. This should be responded to fully, particularly in light of the fact that there has been no litigation in this case for over eight and a half years. Providing an updated provider list is reasonable and appropriate.

Paragraph 14: This is the problematic one for the parties. It asks for a list of all treating doctors "for the last 10 years." Employer seeks a list of doctors for ten years prior to the 2010 work accident (*i.e.*, all doctors since October 2000). Claimant asserts that this is overly burdensome but she is willing to provide a list of all treating doctors for ten years prior to the current petition (*i.e.*, back to November 2012). The Board agrees with Claimant that the past ten years is sufficient. It will cover the eight-and-a-half-year gap since the last litigation, which is of critical importance. Employer argues that Claimant is asserting that a "new" body part is compensable in the current petition and it needs to investigate whether Claimant had complaints to that body part prior to the work injury in 2010. The Board finds that unnecessary. As discussed earlier, there has been substantial litigation in this case, with multiple doctors' depositions taken in 2012 and 2013. These doctors were looking at not just cervical complaints, but at both upper extremities and, in 2013, at the lower extremities. The Board has issued decisions as to what it found to be Claimant's compensable condition back in 2012 and 2013. Remote records predating 2010 are of doubtful relevance in light of the established record in this case.

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those periods were terminated by the Board. Claimant's counsel, at this motion hearing, asserted that the petition was only for medical expenses. This order is accepting that representation as accurate.

Paragraph 15: This asks for the names, addresses and dates of treatment of all hospitals and institutes providing treatment for this injury. As with the request in Paragraph 13, the Board finds it reasonable and appropriate for Claimant to provide such a list.

Paragraphs 16 & 18: These ask whether the injury prevented Claimant from working, for how long and whether Claimant has resumed work. Assuming the Board is correct (see footnote 2) that the petition is only for medical expenses, there seems to be no need to respond to these paragraphs.

Paragraph 17: This asks whether Claimant has fully recovered (and if only partially, to what extent). Claimant is seeking payment of medical expenses for an allegedly related condition. It is reasonable to ask her to make a declaration as to whether she has recovered from that medical condition and to what extent.

Paragraph 19: This asks for all "previous and subsequent" injuries. For the reasons stated with respect to Paragraph 14, the Board sees no need for Claimant to try to remember injuries prior to 2010. In its 2014 decision, the Board already recognized prior unrelated knee injuries. However, the Board agrees that it is very relevant for Claimant to respond as to whether she has sustained any subsequent injuries since the last time this matter was before the Board in late 2013.

Paragraph 20: This asks for "any other important facts bearing on the case." Claimant should respond to this request.

The Statement ends with an assertion that the declarant swears or affirms to the accuracy of the information presented, and Claimant should make such a declaration in her responses provided in accordance with this order.

Claimant shall provide these responses to Employer within ten business days of the receipt of this order.

IT IS SO ORDERED THIS 2nd DAY OF MARCH, 2023.

INDUSTRIAL ACCIDENT BOARD

Robert J. Mitchell /os
ROBERT J. MITCHELL

Bud Freel /os
BUD FREEL

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

Mailed Date: 3/3/2023

NL
OWC Staff

Joel H. Fredericks, Esquire, for Claimant
Maria Paris Newill, Esquire, and Gregory Skolnik, Esquire, for Employer

BEFORE THE INDUSTRIAL ACCIDENT BOARD
IN AND FOR THE STATE OF DELAWARE

Claimant,	)	
v.	)	HEARING NO.
Employer.	)	

EMPLOYER'S REQUEST FOR PRODUCTION*

Employer requests Claimant to produce on or before fifteen (15) days from the date of receipt of this Request in the office of the undersigned attorney located at 3 Mill Road, Suite 301, Wilmington, Delaware 19806, the following:

1. Copies of all itemized billing statements from all providers that you claim have an outstanding balance, along with the supporting medical documentation showing the relationship between the bill and the industrial accident.

2. All documentation in your possession showing that the medical bills referred to in paragraph 1 above have been forwarded to the carrier or carrier's counsel for payment.

3. Copies of any and all pleadings, deposition/arbitration transcripts, medical records, and expert reports for any other action civil action filed in any Court of law or before any administrative agency and to which Plaintiff is or was a party. If the documents are no longer in

Plaintiff's possession, then provide the name, address and phone number of any person, including attorney(s), who have or, to the best of Plaintiff's recollection had, a copy of the same.

*This request is a continuing one and must be supplemented as additional material is received.

COBB & LOGULLO

/s/Christopher T. Logullo
Christopher T. Logullo, Esquire (#3410)

Mailing Address:
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Christopher.Logullo@LibertyMutual.Com

Physical Address:
3 Mill Road, Suite 301
Wilmington, DE 19806
Attorney for Employer

BEFORE THE INDUSTRIAL ACCIDENT BOARD
IN AND FOR THE STATE OF DELAWARE

Claimant,	)	
vs.	)	HEARING NO.
Employer.	)	

EMPLOYER'S REQUEST FOR PRODUCTION*

Employer requests Claimant to produce on or before fifteen (15) days from the date of receipt of this Request in the office of the undersigned attorney located at 3 Mill Road, Suite 301, Wilmington, Delaware, the following:

1. Copies of updated medical records reflecting any treatment, care or hospitalization of the employee.

2. Copies of any and all updated report(s) prepared by your medical witnesses.

3. Copies of any and all pleadings, deposition/arbitration transcripts, medical records, and expert reports for any other action civil action filed in any Court of law or before any administrative agency and to which Plaintiff is or was a party. If the documents are no longer in Plaintiff's possession, then provide the name, address and phone number of any person, including attorney(s), who have or, to the best of Plaintiff's recollection had, a copy of the same.

*This request is a continuing one and must be supplemented as additional material is received.

COBB & LOGULLO

/s/Christopher T. Logullo
Christopher T. Logullo, Esquire (#3410)
3 Mill Road, Suite 301
Wilmington, DE 19806
302-252-0053

BEFORE THE INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

SITTING AND FOR NEW CASTLE COUNTY

Claimant,	)	IAB Hearing No.
v.	)	
Employer.	)	

REQUEST FOR PRODUCTION DIRECTED TO EMPLOYER*

The claimant requests the employer to produce for examination and copying at the office of the attorney for the claimant on or before fifteen (15) days from the date of receipt of this request, the following items:

1. All medical records and reports regarding claimant, including any notes/records from a Nurse Case manager.

2. All written materials outlining the physical requirements of all jobs being performed by claimant for employer on the date of the accident which is the subject of this petition.

3. Any items the employer will use as evidence at trial.

4. All records concerning other accidents and/or workmen's compensation claims. Included in this should be court records, medical records, and documents evidencing settlement, Board award or judgment in any court.

5. All records showing benefits which are being received from any collateral source including pension, union, private plan, etc.

6. All surveillance reports, records, photographs, video and audiotapes.

7. All vocational rehabilitation reports and records including but not limited to labor market surveys.

8. All written denials issued by the carrier or an agent of the carrier regarding any medical bills of the claimant.

9. All copies of bills and records submissions by providers.

10. Any transcribed or written copies of statements made to the carrier;

11. A copy of the carrier's payment log showing all payments made to date.

MEGHAN BUTTERS HOUSER, ESQUIRE
Weiss, Saville & Houser, P.A.
1105 N. Market Street, Suite 200
P. O. Box 370
Wilmington, DE 19899
Attorney for Claimant

DATED: _____

Morris James LLP

February 27, 2024

Re:

Dear

Pursuant to Industrial Accident Board Rule 11, Claimant requests that the Employer supply the following:

1. Any and all medical records pertaining to Claimant, including company medical records (dispensary), in possession of Employer/Carrier, not previously produced.

2. The entire personnel file pertaining to Claimant in possession of the Employer including, but not limited to, all attendance/payroll/disciplinary records, Employee Handbooks/Business Policy Manuals and the like in effect as of the date of the work accident as well as Claimant's application for employment.

3. A written job description of the Claimant's position at the time of the work accident.

4. All payroll/wage documentation regarding the Claimant in possession of the Employer.

5. All documents regarding labor market surveys, including, but not limited to, any reports, letters or memoranda prepared by any vocational counselor or vocational rehabilitation specialist employed or consulted on behalf of the Employer concerning Claimant. In addition, any records and billing statements stating time spent working with this Claimant and all records concerning communications between the counselor or specialist and any potential employer identified by the counselor.

6. Any photograph, video, or movie of the Claimant made by the Employer or on the Employer's behalf, as well as copies of any investigator's report, irrespective of whether the Employer/Carrier intends to rely upon them for use at trial.

7. Any documents which the Employer intends to introduce into evidence at the hearing for this matter or use to cross examine witnesses.

8. An itemized carrier's payment log pertaining to the above-captioned matter.

9. Any Explanation of Benefit documents or the like from the workers' compensation carrier regarding billing statements for treatment rendered to Claimant.

10. All DME reports in possession of the Employer/Carrier.

11. Any and all Agreements and Receipts in possession of the Employer/Carrier.

12. Any and all written or recorded statements of any co-worker or employee, irrespective of whether those individuals will be called to testify.

13. Any statements of Claimant given to the Employer/Carrier and/or any of their agents, including nurse managers.

14. A copy of the First Report of Injury filed with the Department of Labor by the Employer.

15. Any and all documents relating to the Claimant's termination from the Employer, if applicable.

16. Any and all documentation regarding any offers to the Claimant to return to work in a modified duty capacity with the Employer, if applicable.

17. All documents upon which the Employer intends to rely to support the allegations of the Employer in the Petition for Review filed with the Industrial Accident Board, if applicable.

18. All documents that the Employer intends to rely upon in support of the defense that the Claimant's injuries are not causally related to the accident, if applicable.

19. All documents that the Employer intends to rely upon in support of the defense that Claimant has a pre-existing condition, if applicable.

20. All documents that the Employer intends to rely upon in support of the defense that the claim is barred by the statute of limitations, if applicable.

21. All documents that the Employer intends to rely upon in the defense that the Claimant has failed or refused to return to work, if applicable.

22. Any reports, opinions, memoranda or other written documentation substantiating or verifying the Employer's contention that the Claimant has forfeited his/her right to compensation pursuant to 19 *Del. C.* §2353, if applicable.

23. All documents on which the Employer intends to rely to support the allegation of the Employer that Claimant's medical expenses are not reasonable, necessary or related to the work accident, if applicable.

24. Any Utilization Review decisions in possession of the Employer/Carrier.

25. Any documentation, photograph and/or video of Claimant from any social media site, including but not limited to Facebook, Twitter, Instagram, etc.

26. Any and all HCFA billing statements received by carrier.

27. With regard to all witnesses whom Employer has identified on the Pre-Trial Memorandum, please provide:

a. All documents that each witness will reference or offer any testimony about at the hearing;

b. To the extent that such witnesses are employed by the Employer, a copy of said individual's employee file;

c. To the extent that such witnesses are identified as experts, a copy of said expert's *curriculum vitae*.

Please also accept this as notice of the following:

PRESERVATION OF POTENTIAL EVIDENCE: With regard to any expert whose testimony you intend to introduce at any hearing in this matter, please accept this as our request that such experts retain all documents of any nature provided to said expert that said expert relies upon in any way in forming his/her opinions, all notes, documents and measurements from any physical examination, and any forms or documents completed by the claimant in conjunction with said examination. Claimant specifically demands that employer's expert have all of this documentation

at the deposition of said expert or at the hearing in the event the expert is testifying live.

IDENTIFICATION OF EVIDENCE: Please accept this as notice that claimant reserves the right to utilize at the deposition of claimant's medical expert, stills from any diagnostic test results including x-rays, MRI's, and CT scans, the reports of which have been provided.

USE OF CASE LAW OR MEMORANDA OF LAW AT THE HEARING: To the extent the employer intends to introduce any Memoranda of Law or case law at the hearing in support of any defense or position taken by the employer, claimant demands that such Memoranda of Law and/or case law be supplied at least two (2) weeks in advance of said hearing. Claimant specifically objects to the introduction of any case law or Memoranda of Law being introduced into evidence at the hearing if such is not provided to claimant's counsel in conjunction with this request.

These requests are continuing and supplemental responses must be provided up to the date of the hearing.

Very truly yours,

The Discovery Channel: Pre-hearing Avenues of Disclosure

I. The First Report of Injury (FROI):

- If not filed by Employer Petitions get rejected
  -what happens if a SOL issue
  - pro se Claimants in tough spot
  - penalties enforced? and who has authority to notify of violations 19 Del. C. 2313

  § 2313. Record and report of injuries by employers; penalty; admissibility as evidence.
  (a) Every employer to whom this chapter applies shall keep a record of all injuries, fatal or otherwise, received by employees in the course of their employment. Within 10 days after knowledge of the occurrence of an accident resulting in personal injury, a report thereof shall be made in writing by the employer to the Department in duplicate on blanks to be procured from the Department for that purpose. The employer shall provide a copy of the report of injury to the employee upon completion of the report. Upon the termination of the disability of the injured employee, the employer shall make a supplemental report to the Department.

  (b) The reports shall contain the name and nature of the business of the employer, the location of the employer's establishment or place of work, the name, age, sex and occupation of the injured employee and shall state the time, nature and cause of the injury and such other information as may be required for properly carrying out this chapter. The employee's copy shall contain a summary of the law as provided by the Department.

  (c) Whoever, being an employer, refuses or neglects to make a report required by this section shall be fined not less than $100 nor more than $250 for each offense. In the event the employer can show that the failure to make a report required by this section was caused by the refusal of the insurance carrier for the employer to report a reportable injury which the insurance carrier had knowledge of and of which the employer had no knowledge, after written request therefor, the aforementioned fine may be levied against said insurance carrier. The fine shall be assessed by the Industrial Accident Board after the employer and/or the insurance carrier for the employer is given notice and a hearing on the violation. The fine shall be payable to the Workers' Compensation Fund.

(d) Reports made in accordance with this section shall not be evidence against the employer in any proceedings under this chapter or otherwise but shall be exclusively for the information of the Department in securing data to be used in connection with the performance of their duties.

II. Implications of an incomplete Statement of Facts:

- Lack of information on prior claims/accidents/injuries
- Timing problems for Employer to defend the case
- Request completion of Statement of Facts or file a motion to compel/dismiss petition for incompleteness of same

III. Request for Production of Documents:

- Tailor to specific nature of issues, don't send same generic (long form) pleading each time when its not needed/overkill
- If you need something specific, just ask, filing a pleading may not be needed

IV. Production of Expert Reports:

- Technically only required when a petition for permanency is filed.

V. Obtaining Medical Records:

- The use of Vendors to obtain medical records and the complications of same.
- Objections to subpoenas without HIPPA releases
- Using the petition to act as a HIPPA release

VI. The need for an Agreement or production of payments to file a petition for review:

- Effect of implied Agreement

VII. Proposed changes to Industrial Accident Board Rule 11 as it applies to disfigurement:

2024 WL 1110401
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

Joan TRINCIA, Claimant-Appellant,
v.
DICK'S SPORTING GOODS, Employer-Appellee.

C.A. No. N23A-03-006 MMJ
|
Submitted: February 1, 2024
|
Decided: March 14, 2024

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

Attorneys and Law Firms

Emily Laursen Raisis, Esquire, Kimmel, Carter, Roman, Peltz & O'Neill, P.A., Christiana, Delaware, Attorney for Claimant-Appellant.

Maria Paris Newill, Esquire, Heckler & Frabizzio, Wilmington, DE, Attorney for Employer-Appellee.

MEMORANDUM OPINION

JOHNSTON, J.

***1** Joan Trincia ("Claimant") has appealed the **Industrial Accident Board** ("Board")'s January 20, 2023 decision denying Claimant's Petition for Compensation Due. Claimant asserts that she was injured on September 23, 2020, while she was an employee of Dick's Sporting Goods ("Employer" or "Dick's"). The Board held a hearing regarding a motion to strike Employer's expert testimony on Claimant's previous medical records. Claimant's expert did not get the opportunity to testify during the January 19, 2023 hearing ("Hearing"). The Hearing Officer concluded that Employer performed its due diligence in obtaining Claimant's past medical records and the fact that Claimant and Claimant's expert doctor did not have the records was not Employer's fault. On February 10, 2023, Claimant filed a Notice of Appeal with this Court. Claimant asserts that the Board's decision is an error of law, prejudicial, and should be reversed in favor of Claimant. Employer request that the Court affirm the Board's decision, since it is sufficiently supported in fact, and free of legal error.

FACTS AND PROCEDURAL CONTEXT

On September 23, 2020, Claimant suffered a work accident at Dick's Sporting Goods lifting a heavy box. The Board considered several issues: (a) whether the alleged September 23, 2020 work accident occurred; (b) whether the alleged work accident resulted in an injury to, or aggravation and/or exacerbating injury of, Claimant's cervical spine; (c) whether the treatment for the cervical spine, including cervical fusion, was reasonable, necessary, and causally related to the September 23, 2020 work accident; (d) whether the alleged work accident on September 23, 2020 resulted in an injury to, or aggravation and/or exacerbating injury of, Claimant's left shoulder; (e) whether the treatment to date for the left shoulder was reasonable, necessary, and causally related to the September 23, 2020 work accident; (f) whether claimant is entitled to partial disability for the period of October 21, 2020 through November 18, 2021; and (g) whether an implied agreement as to compensation existed. [1]

[1] **Industrial Accident Board** Decision on Petition to Determine Compensation Due at 2.

On September 20, 2022, Claimant filed a Petition to Determine Compensation Due with the **Industrial Accident Board**. Claimant alleged that injuries to her cervical spine and left shoulder resulted from a work-related injury that happened on September 23, 2020. A hearing on the merits was scheduled to take place on January 20, 2023. On January 16, 2023, Claimant's primary care physician produced Claimant's medical records dated before the stipulated accident date. The next day, January 17, 2023, Employer's expert, Dr. Schwartz, testified to the newly-produced records. On January 18, 2023, Claimant filed an emergency motion seeking to strike portions of Dr. Schwartz's testimony or to continue the hearing to allow Claimant's medical expert to offer additional testimony. On January 19, 2023, Claimant's motion was heard, and the Hearing Officer denied Claimant's motion, concluding that Employer reasonably obtained the records, timely produced the records, and is not at fault for the fact that Claimant and Claimant's expert did not have the records. On January 20, 2023, the Board denied Claimant's Petition for Compensation Due in its entirety and ruled that Claimant was not credible and failed to meet her evidentiary burden.

***2** On February 10, 2023, Claimant appealed to the Superior Court the Board's January 19, 2023 legal decision and January 20, 2023 merits decision.

Some of the findings of the January 20, 2023 decision denying Claimant's petition are as follows:

- Employer offered testimony of the adjuster assigned to Claimant's claim to rebut Claimant's evidence of implied agreement. [2] The adjuster made many unsuccessful attempts to investigate the claim and issued a notice letter denying the claim on December 18, 2020. [3] Additionally, Claimant did not make any other payments on the claim before or after January 2021. [4] These actions, by the adjustor and Claimant, explain how the November 12, 2020 notice letter and January 2021 medical payments were issued by mistake. [5] The Board found that the mistakes by Gallagher Bassett in processing the claim and paying the medical bills were careless or negligent, but did not find they were done as a result of compulsion by the Delaware Workers' Compensation Act. [6]

- Claimant failed to prove by a preponderance of the evidence that she injured herself at work on September 23, 2020 after a consideration of multiple factors. [7] First, Claimant delayed reporting the accident to the Employer and admitted that she did not tell anyone at work about the accident. [8] Claimant continued to work for two more weeks after the accident. Claimant asked to be taken off the work schedule at the end of her shift on October 14, 2020. [9] Claimant did not report a work accident or injury but instead told her manager that she did not feel well and lacked energy. [10] Second, Claimant's manager testified that Claimant worked her normal hours between September 23, 2020 and October 14, 2020. [11] Claimant did not tell the manager about an alleged work injury until she called him in November 2020, which correlates with the date on the first report of injury submitted to Gallagher Bassett. [12] Claimant's primary job was to fold the clothes that were brought to her in boxes. [13] Other workers were available to lift the heavy boxes for her. [14] Third, the initial medical records from Drs. Ivins, Galinat, and Rowlands for treatment after the alleged September 23, 2020 work accident did not document a work accident or injury. [15] The records were changed later by the providers to include a reference to the work accident. However, the changes by Drs. Ivins and Rowlands were not dated and none of the providers who actually made changes to their records testified about the circumstances that led them to do so. [16] Finally, the evidence of pre-existing degenerative problems in Claimant's left shoulder and cervical spine suggested that Claimant was symptomatic before the alleged accident at work or her symptoms worsened for reasons unrelated to any trauma at work. [17]

- The Board found Dr. Schwartz's testimony persuasive. Dr. Schwartz acknowledged that he initially concluded Claimant had aggravated her pre-existing left shoulder condition in the alleged September 23, 2020 accident. [18] Dr. Schwartz changed his opinion, after reviewing a more complete set of records prior to the hearing. [19]

- Claimant's credibility was questioned. The changes made to the treating physicians' records, regarding the accident, caused concern about the accident. [20] Additionally, Claimant failed to provide timely and accurate information about her claim to the insurance adjuster. [21] Claimant never provided a credible explanation as to why the first report of injury specified an accident date of October 7, 2020 and not September 23, 2020, the date Claimant claims is the accident date. [22]

2 *Id.* at 35.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.* at 37.

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.* at 37–38.

12 *Id.* at 38.

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.* at 39.

19 *Id.*

20 *Id.* at 40.

21 *Id.*

22 *Id.*

CLAIMANT'S GROUNDS FOR APPEAL

***3** Claimant asserts that the Board abused its discretion in admitting Claimant's pre-existing medical records into evidence after the trial deposition of Claimant's expert. [23] Claimant asserts this creates significant prejudice for the Claimant whose expert was not afforded an opportunity to comment on the records. [24]

23 Employee-Appellant's Opening Brief on Appeal of the **Industrial Accident Board's** Decisions at 8.

24 *Id.*

Claimant relies on *Lopez v. Method Hospitality PB, Inc.*, [25] in asserting that the Board prejudiced Claimant by their decision. Claimant asserts that *Lopez* provides the standard to apply when pertinent documents are produced less than thirty days prior to a hearing—"whether the production is unduly prejudicial to the party who received the documents late." [26] Claimant relies on the Board's decision in *Lopez* to weigh the fault and harm to the respective parties. [27]

25 *Lopez v. Method Hospitality PB, Inc.*, IAB Hearing No. 1532370 (July 6, 2023).

26 Employee-Appellant's Opening Brief on Appeal of the **Industrial Accident Board's** Decisions at 10.

27 *Id.* at 11.

Claimant asserts that in *Lopez*, the Board considered multiple factors in concluding that the fault and harm weighed more towards Method Hospitality PB, Inc., the employer in the case. The factors that the Board considered included: (1) Lopez was compliant by attending the defense medical examination at the request of his Employer and had agreed to continuance to accommodate the anticipated timeline of Dr. Rushton's report; (2) Lopez was completely without fault; and (3) the Employer voluntarily chose Dr. Rushton as its expert despite knowing ahead of time that Dr. Rushton would take several weeks to prepare his report. [28] The Board in *Lopez* found that Method Hospitality PB, Inc. was at fault and allowing Dr. Rushton's testimony would have caused prejudicial harm to Lopez. [29] The Board struck the entirety of Dr. Rushton's opinion and preclude his testimony. [30]

28 *Id.*

29 *Lopez*, IAB Hearing No. 1532370 at *4 (July 6, 2023).

30 *Id.*

Claimant argues that allowing pre-existing medical reports of Claimant, produced after the trial deposition of Claimant's medical expert, would be prejudicial because Claimant's expert did not get the opportunity to comment on the report. Claimant contends that neither Claimant nor Employer bear any fault for Dr. Ivins, Claimant's primary care physician, producing Claimant's pre-existing medical reports late. [31] Claimant asserts that Dr. Ivins was neither identified nor retained as a medical expert by either party. [32] Claimant complied with Board Rules and Statutes identifying providers from whom she had sought medical care in the years preceding the work incident. [33] Claimant signed medical authorizations giving Employer the ability to subpoena her medical records in preparation for their case. [34] Employer subpoenaed Claimant's medical records, which were produced. [35] Claimant asserts that her case differs from *Lopez* in that no parties are at fault; therefore, no party should be prejudiced when there are alternatives that could minimize the prejudice. [36] Claimant argues that she should have been afforded the same opportunity Employer had to have her expert comment on her records, which the Board could have done by allowing a brief continuance of the hearing. [37]

31 Employee-Appellant's Opening Brief on Appeal of the **Industrial Accident Board's** Decisions at 11.

32 *Id.*

33 *Id.* at 11–12.

34 *Id.* at 12.

35 *Id.*

36 *Id.*

37 *Id.*

***4** Claimant also cites to *Parke v. Sunrise Assisted Living, Inc.* [38] in discussing whether Claimant could not be surprised by her medical records. Claimant contends that the distinction between *Parke* and her case is the fact that both medical experts in *Parke* had been deposed prior to the production of the MRI. Whereas in Claimant's case, Claimant's medical expert testified eleven days before the additional Dr. Ivins records were produced, and Employer's medical expert testified a day after the records were produced. [39] Claimant asserts that this gave Employer's medical expert the opportunity the comment on the records while Claimant's medical expert did not have that same opportunity. [40] Claimant recognizes that the Court in *Parke* held that Claimant could not be surprised by her own medical records. [41] However, Claimant asserts that she was not surprised by the existence of her medical records but rather what was contained in them. [42] Claimant argues that Claimant had no reason to believe the pre-existing medical records would have any relevance to the case. [43] Claimant had never experienced or reported neck pain to Dr. Ivins, and to the best of her knowledge, Dr. Ivins never diagnosed Claimant with a neck problem prior to her work injury. [44]

38 2005 WL 268044 (Del. Super. Ct. 2005), *aff'd*, 878 A.2d 461 (Del. 2005).

39 *Id.* at 14.

40 *Id.* at 14–15.

41 *Id.* at 15.

42 *Id.*

43 *Id.* at 17–18.

44 *Id.* at 18.

Claimant asserts that the timing of the production of Claimant's pre-existing medical records by Dr. Ivins failed to afford an equal opportunity for Claimant's medical expert to review and comment on them, creating unfair prejudice. [45]

45 *Id.* at 17.

EMPLOYER'S RESPONSE

Employer asserts two things: (1) there is substantial evidence to support the Board's finding that Claimant failed to prove that she injured herself at work on September 23, 2020; and (2) the Board did not abuse their discretion in admitting the Claimant's pre-existing medical records. [46]

46 Employer-Appellee's Answering Brief at 24.

First, Employer argues that Claimant provides inconsistent reports of the alleged date of accident. [47] Claimant was not sure when she actually reported the accident. [48] Employer asserts that Claimant could not keep her story straight, while Employer has dated records to show when Claimant filed an injury report. [49] Employer further asserts that Claimant did not tell anyone about her injury prior to the documented November 5, 2020 report to her manager. [50] Claimant explained to her manager that she wanted time off not due to a work injury but because she lacked energy. [51] Claimant also explained to her coworker that she was leaving work because she was sick and not because she was injured. [52] Additionally, Claimant continued to work her normal parttime schedule between September 23, 2020 and October 14, 2020. [53] Employer asserts that the Board also took note of Claimant manager's testimony that Claimant's job did not entail lifting boxes and that there were strong people with whom Claimant worked who could lift the box for her. [54] Employer asserts the Board was concerned about the credibility of the Claimant. [55]

47 *Id.* at 29.

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.* at 30.

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

Second, Employer contends that this case is different from *Lopez* because Claimant was at fault. [56] Claimant failed to timely obtain and produce Claimant's pre-existing medical records to adequately prepare Claimant's expert. [57] Employer asserts that the reason why the Board found that the claimant was prejudiced in *Lopez* was because the defense medical expert's report was in the sole possession of the Employer. [58] In *Lopez*, there was no way the claimant would have been able to know what was in the expert's report without reviewing it. [59] Employer argues that this case is different because Claimant's pre-existing medical records always were available to the Claimant. [60] Employer asserts that under *Parke* it does not matter when medical records are produced to the claimant. [61] The legal takeaway from *Parke* is a claimant cannot authentically claim to be surprised by their own medical records. [62]

56 *Id.* at 25.

57 *Id.*

58 *Id.* at 26.

59 *Id.*

60 *Id.*

61 *Id.* at 28.

62 *Id.*

STANDARD OF REVIEW

***5** In reviewing the decisions of the Board, [63] this Court must determine whether the finding and conclusions of the Board are free from legal error and supported by substantial evidence in the record. [64] The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence. [65] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. [66] Substantial evidence is more than a scintilla, but less than a preponderance of the evidence. [67] The appellate court merely determines if the evidence is legally adequate to support the agency's factual findings. [68] It also determines if the Board made any errors of law.

63 Pursuant to 19 *Del. C.* § 2301B(a)(6), all references to the Board also refer to the Hearing Officer.

64 *General Motors Corp. v. Jarrell*, 493 A.2d 978, 980 (Del. Super. 1985); *Talmo v. New Castle County*, 444 A.2d 298, 299 (Del. Super. 1982), *aff'd*, 454 A.2d 758 (Del. 1982).

65 *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *Johnson v. Chrysler Corporation*, 213 A.2d 64, 66–67 (Del. 1965).

66 *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battisa v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986), *app. dism.*, 515 A.2d 397 (Del. 1986).

67 *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988).

68 29 *Del. C.* § 10142(d).

On appeal "[t]he 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." [69] The Superior Court may not overturn a factual finding of the **Industrial Accident Board** unless there is "no satisfactory proof" supporting the Board's finding. [70] It is also well established that "[t]he credibility of the witnesses, the weight of their testimony, and the reasonable inferences to be drawn therefrom are for the Board to determine." [71]

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

70 *Id.* at 67.

71 *Coleman v. Department of Labor*, 288 A.2d 285, 287 (Del. 1972).

ANALYSIS

A. BOARD'S DECISION IN ALLOWING MEDICAL RECORDS INTO EVIDENCE

Claimant and the Employer provide different interpretations of the same case law provided in *Lopez* and *Parke*. Essentially, Claimant argues that the Board in *Lopez* looks at fault and weighs the fault and harm to the respective parties. Because neither Claimant and Employer are at fault, it would be unfair and prejudicial to allow Claimant's pre-existing medical reports into evidence for Employer's expert to review and testify on when Claimant's expert did not receive the same opportunity to do so. Employer argues that Claimant is at fault because it is not the Employer's duty to obtain medical records for Claimant. Claimant has the burden to prepare her own expert and her case.

Claimant argues that although the Court in *Parke* held that Claimant could not be surprised by her own medical records, Claimant was not surprised by the existence of her medical records but rather Claimant was surprised by the contents contained within those records. Employer argues that none of that matters because the medical records were Claimant's own medical records to which Claimant had easy access. Thus, Claimant cannot claim that she was surprised by her own medical records.

In *Lopez*, the Board recognized that there are Board Rules that state that pretrial memoranda may be amended or modified by the parties at any time prior to thirty days before the hearing, also known as the "Thirty-Day Rule." [72] The Board recognized that these Board Rules do not mention certain items. [73] Nonetheless, the Board also noted that it has long been held that a party does have a duty to produce reports in a timely fashion such that "fundamental principles of justice and fairness still apply." [74] The Board held that "a late-produced report can be stricken ... if the delayed production results in undue prejudice or unfair surprise." [75]

72 *Lopez v. Method Hospitality PB, Inc.*, IAB Hearing No. 1532370 at *2 (July 6, 2023).

73 *Id.* at 3.

74 *Id.*

75 *Id.*

***6** Dr. Ivins produced Claimant's pre-existing medical records late, violating the Thirty-Day Rule by producing the report on January 16, 2023, four days before the scheduled hearing. However, Dr. Ivins medical records cannot be considered to be an unfair surprise for the Claimant. The *Parke* Court discussed "unfair surprise." The Court ruled that Parke's 1993 MRI was not obtained surreptitiously. [76] Having participated in the 1993 MRI, Parke should have been aware of the MRI. [77]

76 *Parke v. Sunrise Assisted Living, Inc.*, 2005 WL 268044 at *3 (Del. Super. Ct. 2005), *aff'd*, 878 A.2d 461 (Del. 2005).

77 *Id.*

The Court finds that the same logic applies in this case. Dr. Ivins medical reports of Claimant were not obtained surreptitiously. Claimant admits that Employer gave notice to Claimant once Employer received the medical records from Dr. Ivins. [78] Additionally, as in *Parke*, Claimant should have been aware of her own medical records.

78 Employee-Appellant's Opening Brief on Appeal of the **Industrial Accident Board's** Decision at 5.

B. BOARD'S DECISION TO DENY CLAIMANT'S PETITION TO DETERMINE COMPENSATION

The Board's decision to deny Claimant's Petition for Compensation Due turned on Claimant's credibility. First, there is conflicting testimony between the Claimant and Claimant's manager and the adjuster regarding when the accident happened. Claimant testifies that she experienced the work injury on September 23, 2020. However, the first report of injury date was on November 5, 2020 and Claimant's manager was unaware of Claimant's injury until November of 2020. Claimant fails to explain this discrepancy. Additionally, the initial medical records from Drs. Ivins, Galinat, and Rowlands after the alleged September 23, 2020 work accident did not document a work accident or injury. The records were changed to include a reference to the work accident, but the changes were not dated. None of the doctors were available to testify on the circumstances resulting in the changes.

The Board found it concerning that Claimant had many discrepancies that were not explained. The Board's decision was supported by substantial evidence and clearly stated the reasons why Claimant's testimony did not seem credible.

CONCLUSION

The Board's January 19, 2023 decision found that the Employer was not at fault. The Employer obtained the medical records and timely produced those documents. It is up to the Claimant, not the Employer, to make sure she has the documents necessary for her expert and her case.

The Board's January 20, 2023 decision on Claimant's Petition to Determine Compensation found Claimant not credible. It is the exclusive function of the Board to address the credibility of witnesses. The Board supported its decision with objective evidence.

Claimant had the burden of proving that an accident occurred and that she is entitled to the claimed disability and medical benefits. Claimant failed to meet her burden to the satisfaction of the Board. The Court will not substitute its judgment for that of an administrative body where there is substantial evidence to support the decision.[79] The Board based their opinion upon its evaluation of Claimant's credibility and on medical records. This Court must take "due account of the experience and specialized competence" of the Board and of the purposes of the Workers' Compensation Act.[80]

79 *Olney v. Cooch*, 425 A.2d 610, 613 (Del. 1981).

80 29 *Del. C.* § 10142(d).

Therefore, the January 19, 2023 and January 20, 2023 decisions of the **Industrial Accident Board** are hereby **AFFIRMED**.

***7 IT IS SO ORDERED.**

All Citations

Not Reported in Atl. Rptr., 2024 WL 1110401

Keynote Address- The Art of Direct and Cross Examination

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The Honorable Francis J. Jones, Jr.
Superior Court of the State of Delaware

Panel 5

Hot Off The Press: Recent Case Law and Other Trends

==========

Caroline A. Kaminski, Esquire
Nitsche & Fredricks, LLC

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

Panel 6

Not Just Skin Deep- Disfigurement Issues

==========

Tiffany Q. Freidman, Esquire
Roeberg Moore & Friedman, P.A.

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

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

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

MARIA PARIS NEWILL (Firm Tenure: 26 years; Position: Workers' Compensation 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 Chair, Section on Workers' Compensation; Past Executive Committee and Past Chair, Section on Women and the Law) and American Bar Association; Defense Counsel of Delaware; Defense Research Institute. PRACTICE AREAS: Workers' Compensation Litigation; General Civil and Trial Practice.

Biography:

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 2500 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 & 2016.

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 mother to two boys, Nicholas and Charles Newill. Ms. Newill's civic participation includes or has included: Smyrna Downtown Renaissance Association – Board Member, current Chairperson; Organization Subcommittee of SDRA – Member; PEO (Philanthropic Education Organization raising money for Women's Education) – 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), reading and spending time with family and friends.

DELAWARE WORKERS' COMPENSATION
Industrial Accident Board
CASELAW Update
& Appellate Outcomes

By John J. Ellis, Esq.
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DSBA ANNUAL WORKERS' COMP SEMINAR

May 7, 2024

IAB DECISIONS

ADJACENT SEGMENT DISEASE

Eric Starling v. Formosa Plastics, IAB #1471909 (5/5/23). Surgery awarded based on adjacent segment disease with Dr. Zaslavsky as Claimant's expert and Dr. Schwartz testifying as the defense expert. Employer was denying the compensability of a fourth lumbar procedure, having paid for the first three. [O'Neill/Gin]

Natalie Tursi v State, IAB #1329706 (5/3/23). Surgery awarded based on adjacent segment disease with Dr. Zaslavsky as Claimant's expert and Dr. Rushton testifying as the defense expert. Employer had already paid for lumbar spine surgeries in 2009, 2010, 2011, 2013, 2014, and 2017. Dr. Zaslavsky was given deference due to his 9-year relationship with Claimant, having taken over when Dr. Katz passed away, Dr. Katz having performed the initial surgeries. Even allowing for Dr. Rushton's opinion that age played a role in the spinal degeneration, under *Blake* and *Reese*, the surgery would still be compensable. [Morrow/Bittner]

Matthew Bowman v. Trans. Drivers, Inc. IAB #1402293 (12/4/23). Surgery awarded to a 73-year-old claimant, based on adjacent segment disease with Dr. Zaslavsky as Claimant's expert and Dr. Schwartz testifying as the defense expert. Employer was denying the compensability of a May 2023 surgery, noting prior surgeries in 2015 and 2017. Claimant presented highly credibly per the Board and even returned to work promptly following the 2023 surgery. [Welch/Gin]

CAUSATION

David Brooks v. Viking Pest Control, IAB #1532541 (10/19/23). Intervening event lifting weights at the gym does not break chain of causation for 2022 shoulder injury. Dr. Douglas Palma as the treating versus Dr. James Bonner for the DME. This case fits the standard of an injury following "as the direct and natural result of the work-related injury". [O'Neill/Silar]

David Christian v. Delaware Contracting Co., IAB #1536707 (2/8/24). The Claimant's DCD Petition was denied by the Employer arguing that a fall at work was a non-work-related syncopal event with the Board rejecting the idiopathic fall defense. The Claimant was managing and directing trucks to dump loads of fill dirt at a job site when he "stumbled and fell" while walking backwards and executing his job duties. There was a factual issue as to whether the Claimant felt light-headed

prior to losing consciousness, which was resolved in the Claimant's favor. Claimant had worked for Employer for several decades without any prior syncopal history and there was no medical testimony or history to support a pre-existing syncopal or fainting condition. [Freibott/Parker]

Russell Willey v. Wholesale Millwork Inc, IAB #1503457 (12/29/23). On a DACD Petition seeking payment for a cervical spine surgery which occurred in August 2022, the Board awards benefits as causally attributable to an August 2020 work injury based upon the testimony of Dr. James Zaslavsky and rejecting the opinion of Dr. Close, the defense medical expert. [Evans/Bittner]

Patricia Pettit v. OTAC Inc., IAB #1536730, (1/23/24). The Claimant is awarded a total knee replacement surgery in spite of the significant prior history of treatment and complaints with the Board commenting "an Employer takes the Employee as it finds him." Dr. Petrera testified on behalf of the Claimant and Dr. Schwartz testified on behalf of the Employer. It was not disputed that the Claimant had a longstanding preexisting history of right knee issues that included a decades-old arthroscopy, intermittent periods of medication management, and imaging studies evidencing what both physicians agreed was a fairly significant right knee arthritis and degeneration. Dr. Petrera found that temporal relationship of Claimant's work fall and increased symptoms to be quite persuasive, commenting that "it is far more likely than not that the fall in question served to ignite the course of care that was required thereafter to address an admittedly arthritic knee." [Silverman/Gin]

Timothy Hughes v. UPS, IAB #1518517 (3/12/24). On a DACD Petition seeking an award of lumbar spine surgery, the Board is persuaded by the defense medical experts, Dr. Gelman and Dr. Rushton, that the need for surgery was prompted by an unrelated diagnosis of multiple myeloma and osteopenia. [Gambogi/Herling]

COMMUTATION

Jeremiah Wiggins v. State, IAB #1513621 (5/5/23) (ORDER). The Board grants the State's Motion to Enforce a Termination Agreement consisting of consent to the Termination, a global commutation of $10,000 and the execution of a General Release to not seek re-hire. [Elgart/Skolnik]

COURSE & SCOPE

Kimberly Wallace v. Chester Co. Home Assocs., IAB #1535066 (11/14/23). Caregiver who leaves dementia patient home alone during her shift to go out and grab dinner is *not in course and scope* for purposes of an auto accident on the way

back to her patient. Impacting the decision was a Policies and Procedures Handbook that dictated a patient should not be left alone without pre-approval by management and arrangements for a replacement, which claimant clearly violated. Reliance on *Spellman v. CCHS*, 74 A.3d 619 (Del. 2013). [Sharma/ Harrison]

Elvira Jimenez Gonzalez v. Selbyville Food Mart, IAB #1526724 (12/4/23). Assault by co-worker on Claimant, whose shift had ended several minutes prior to the attack *is deemed by be an injury in course and scope*. The argument that Claimant remained past her shift was unpersuasive, noting Claimant had regularly been requested to stay to provide coverage and assistance during transition of shifts. The Board also rejected a horseplay defense noting that it was the co-worker, if anyone, engaging in horseplay. Of note, a video of the assault was entertained by the Board to allow them to view the activities of the parties and any attendant provocation, or lack thereof. Also, Claimant and co-worker had no personal relationship beyond the work environment. [Stanley/Lukashunas]

DISFIGUREMENT

Nicole Curley v. Blue Pearl Veterinary Partners, IAB #1471486 (1/29/24). With regard to the Claimant's Petition for disfigurement benefits and noting that she was a 39 year-old former model, the Board awarded a total of 23 weeks of benefits for five scars appearing on the upper back, low back, and abdomen. [Marston/Wilson]

DISCOVERY

Shawn Reynolds v. DHL Holding USA, IAB #1317151 (ORDER) (11/20/23). The Board grants Employer's Motion to Compel production of credit card and bank statements, along with travel documents, as being relevant to Claimant's activities including travel and recreation. The Board imposed a time limit, however, on the documents, from 1/1/2023 to the date of its 11/20/2023 Order. [Houser/Wilson/Boyle]

FORFEITURE – INTOXICATION

Timothy Willis v. UPS, IAB #1512050 (5/8/23). This was a single vehicle MVA where claimant's truck struck a guardrail, allegedly to avoid hitting a deer. Claimant refused a field sobriety test and medical treatment. Claimant pled not guilty to DUI charges in Maryland and was sentenced to probation before judgment. Employer raised a Section 2353 Intoxication defense. Of note, officers testified that Claimant threw three cold beer cans out of his truck, slurred his speech, and had trouble standing up. The beers in question were Miller Lite. According to the Board, the

video of the event did not depict Claimant as "altered" as the police testimony suggested, nor did the audio. Pivotal to the outcome in Claimant's favor was the fact that there *was* a heavy deer presence in the area of the accident (per the local police), along with witness testimony that to operate a Mack Pinnacle requires great skill and ample concentration. In denying the intoxication defense, the Board also rejected the reckless indifference defense and stated the employer did not meet its burden to establish intoxication as a proximate cause of the accident. [Marston/Herling]

Larry Smith v. New Castle County, IAB #1529319 (8/24/23). Intoxication defense fails and BAC is not controlling. Claimant was killed as a result of catastrophic injuries sustained in an MVA while driving a water jetting truck. The accident occurred with Claimant responding to an "on call" request at 10 p.m. on a Saturday evening, a request he had the option to decline. Claimant's truck was driving in the left lane, was cut off by another vehicle, and swerved sharply to avoid hitting that vehicle. Because Claimant's truck was loaded with water, the weight and shift caused the truck to overturn. A supervisory witness testified on Claimant's behalf that his job is to ensure safe transport of this water-filled vehicle and that before Claimant left with the truck, he did not appear to be impaired. There was also a co-worker passenger who testified similarly, stating "as a passenger in a water jetting truck, a vehicle that is particularly dangerous, she is putting her life in the driver's hands." She verified that they were cut off by another vehicle and she herself was seriously injured, having been ejected from the truck. A physician testified that Claimant's BAC was approximately 0.2, but stated that given the overwhelming inconsistent evidence, he could not deem the BAC obtained at the hospital to be reliable or valid. Benefits were awarded with the Board concluding that even if there were alcohol consumption, it did not play a role in the accident. [Kimmel/Norris]

LABOR MARKET SURVEY

Valerie Palombi-Ferrell v. Physicians Mobile X-Ray, IAB #1536348 (4/22/24). The IAB strikes jobs in a labor market survey which involves a distance of 40 miles or almost a one-hour commute as being unreasonable and temporary partial disability is awarded based on the remaining jobs. [Minuti/Roberts]

MEDICAL TREATMENT

Demetrias Davis v. JP Morgan Chase, IAB #1462133 (8/7/23). Per Section 2322(f) the Employer must repair or replace a prosthetic device "for life." Claimant sustained a CDE injury to her right upper extremity, in tandem with an unrelated existing congenital injury to the left upper extremity, which ends at the wrist. In a

prior ruling, the Board in December 2019 ordered Employer to pay for a prosthesis to allow more use of the non-injured limb. That prosthesis became damaged and required repair or replacement, denied by the Employer. The device in question provides claimant with a left hand to manipulate items. The defense expert testified that the claimant could experience complete resolution of her deQuervain's symptoms with a minute surgery. He observed that myoelectric prosthetics are expensive, not durable, and require a lot of maintenance. They are also difficult to use as the claimant testified. While suggesting they would have liked to have heard from an expert in prosthetics in addition to Dr. Eichenbaum and Dr. Schwartz, they awarded the repair/replacement, citing Section 2322(f) as controlling. [Schmittinger/Simpson]

Two Farms, Inc. v. Bayhealth Med. Ctr., IAB #1535737 (ORDER) (9/13/23). The Board can enjoin a medical provider from billing private insurance. Despite having received multiple notices from the employer, the claimant and the TPA, Bayhealth continued to bill claimant's private insurance, which was subject to a $10,000 deductible. Claimant's Benefits Account was then depleted when claimant's minor daughter became ill and required treatment. Bayhealth was enjoined from further billing to the private carrier and ordered to reimburse the private insurance and bill Gallagher Bassett. Failure to do so will trigger a Section 2322F(g) fine and Employer's attorney's fees. [Andrews/Capocardo/Morris-Johnston]

John West v. State of Delaware, IAB #1443512 (2/22/24). On a DACD Petition the Board awards orthobiologic treatment as well as a spinal cord stimulator based on the testimony of Dr. Yalamanchili and Dr. Downing and rejecting the DME testimony of Dr. Rushton. [Donovan/Panico]

PARTIAL DISABILITY

Erik Cuevas v. Best Buy, IAB #1501069 (4/26/23). The burden of proof on establishing the *Maxey/Wade* adjustment for temp partial rests with the claimant. Even allowing for a *Maxey/Wade* adjustment, claimant's transferrable skills are such that he could earn the same or more, and no TPD is awarded with regard to the Petition to Review. [Welch/Newill/Kelly]

Blanca Gonzalez v. Amazon.com, IAB #1524776 (11/7/23). Claimant is injured working full-time evenings for Amazon but also holds another full-time day job at Gainwell Technologies. On a Petition to Review, she is seeking partial disability at her TTD rate of $421.73. As of 6/23/23, Dr. Zaslavsky released claimant post-op for fulltime sedentary and the Amazon job exceeds that work tolerance

level. Claimant relies on *Hoey v Chrysler*, arguing she is a displaced worker at Amazon and held a reasonable expectation of returning there. Additionally, she claims ongoing TTD due to the insufficiency of the labor market survey which fails to identify jobs that are full time *and* match her ability to work overnight and on weekends, given that the LMS jobs were admittedly offering an 8 am to 5 pm schedule. The *Hoey* entitlement is rejected due to the specific facts of this case. Looking at the second argument, the Hearing Officer invoked *Warner Corp. v. Slattery, 235 A.2d 633 (Del. Super. Ct. 1967)*, which would require Employer to present a LMS compatible with claimant's "available time and skills". Per the Hearing Officer, the LMS addresses claimant's skills but not her time availability. As such claimant was awarded temp partial at her TTD rate. [Greenberg/Starr/Kelly]

PRACTICE AND PROCEDURE

Donnalee Whitaker v. DART/State, IAB #1363910 (5/5/23) (ORDER). A letter from the treating physician releasing claimant to return to work is not a basis to force a signed Final Receipt. [Schmittinger/Klusman]

Marcus Denton v. Qdoba Restaurant, IAB #1532804 (1/4/24) (ORDER). This is an example of a Motion to Dismiss for failure to prosecute relying on 19 *Del. C.* § 2348(h)(2)(c) where the pro se claimant repeatedly ignored the Employer's Request for Production and also missed multiple defense medical evaluations. The Motion was granted and the Claimant was assessed costs of $1,300.00 for missed DMEs. [Pro se/Andrews]

Sandra Galloway v. Perdue Foods LLC, IAB #1485128 (1/26/24) (Order). The IAB grants Claimant's Motion to Vacate Decision, where the IAB denied Claimant's DCD Petition as it found that Claimant's vicious assault occurred due to purely personal reasons that were completely unrelated to her work. Claimant argued that a new hearing was required in light of evidence and information that was withheld and/or misrepresented to the Board by Employer during the original DCD hearing which was critical to the Board's decision. The IAB held that there was a *material misrepresentation and omission of facts* during the original hearing with respect to the sticky note with the assailant's name on it and the reason for the assailant's termination from Employer's employment that were consequential to the IAB's decision. In vacating its decision, the IAB explained that Employer had a duty to provide accurate information, but the information presented was incorrect, and Employer had within its possession the documents that contained the correct

information, and the Board relied upon the incorrect information provided during the hearing. [Nitsche/Panico]

TERMINATION

Juan Sanchez v. Old Jersey Janitorial, IAB #1478005 (3/18/24). On a Petition to Terminate, the Board awards partial disability benefits and rejects the Employer's argument that Claimant has adopted a retirement lifestyle and withdrawn from the workforce. Curiously, the Board recognized that Claimant obtained three job offers in 2022 and when the job at Western Express fell through, he did not pursue the other two options or seek alternate employment. He also failed to follow up on earlier job offers and had been released for work four years prior to the Hearing. However, the Board stated that a secondary element of the Employer's burden of proof is to establish that the Claimant is "content with the retirement lifestyle" and that the Employer did not introduce any evidence on that issue (and apparently they were unwilling to infer the Claimant's state of mind from his apparent disinterest in obtaining employment). [Schmittinger/Morgan]

TOTAL DISABILITY

Tabre Nelson v. Prof'l Realty Mgmt., IAB#1520650 (5/4/23). On a Petition to Review, treating physician Dr. Grossinger is slammed for his bogus TTD testimony and PTR is granted. IAB does not buy Dr. Grossinger's explanation for a gap in treatment due to his own extended vacation in Florida, stating "Good for him; he could have easily referred claimant to another practitioner in his office." Additionally, given Dr. Grossinger's testimony as to claimant's severe-- but non-existent-- head injury, the Board adopted the RTW opinion of Dr. Matz and granted the Term. [Minuti/Bittner]

Erik Cuevas v. Best Buy, IAB #1501069 (4/26/23). The Board rules that reaching MMI is not a precondition to a return to work, commenting that Dr. Eskander has conflated return to work status with MMI in testifying that he wanted claimant to reach MMI, then be referred for an FCE, and then he would contemplate a RTW release. The Termination was granted per the DME testimony of Dr. Gelman. [Welch/Newill/Kelly]

APPELLATE OUTCOMES

Quality Assured Inc. v. David, N22A-05-012 SKR (Del. Super. Ct. Dec. 6, 2022), aff'd, No. 86, 2023 (Del. 2023). Claimant sustained a neck and low back injury as a result of a 2009 compensable work accident. Since then, Claimant had been engaged in active treatment for his low back, which included consistent epidural injections. In November 2021, Claimant sought payment of medical expenses for his treatment from September 2020 and ongoing, which consisted entirely of injections directed to his low back. Claimant's physician, who began treating Claimant a couple months after the work accident and continues to treat him, testified that Claimant's treatment of his lumbar spine has not changed since 2009 which consists of typically one to three epidural injections per year. Claimant had one injection in 2019, three in 2020, and three in 2021. Claimant's physician opined that the injections were causally related to the 2008 work accident because Claimant has not had any lumbar injections before then and has been consistently receiving them at relatively the same frequency since the accident. Conversely, Employer's physician testified that the injections are not causally related but rather attributed to Claimant's pre-existing degenerative conditions. The Board found that the injections were causally related to the work accident, relying upon Claimant's physician's opinion who had been overseeing his care and administering the injections since 2009. The Board also cited that Employer had paid for injections administered prior to those at issue. On appeal, Employer argued that the Board applied a less stringent legal standard to Claimant's burden of proof; the Board should not have considered past payments of medical expenses; and the Board's decision to accept the testimony of Claimant's treating physician over Employer's physician was not supported by substantial evidence. While the Superior Court agreed that the Board's consideration of payments for previous injections in determining causation or compensability of present, disputed medical expenses improper, the Court did not find that, standing alone, rendered the Board's whole decision reversible and affirmed it. [Bittner/Crumplar].

Hawkins v. United Parcel Service, N22A-07-002 CLS (Del. Super. Ct. May 30, 2023). The employer contended that collateral estoppel and res judicata should have applied to support dismissal of a claimant's DACD petition. Similar petitions had been filed previously. The first was filed by Claimant in 2019 seeking total disability benefits and payment for two surgeries. After consolidation with a termination petition, the parties settled the petitions by agreeing to termination of total disability and initiation of partial disability benefits. As part of settlement, the claimant

withdrew his petition. In 2021, the claimant filed a similar petition seeking total disability benefits dating back to date of surgery plus payment for two surgeries. That petition was withdrawn and refiled. The employer filed a motion to dismiss on the grounds that: the 2021 petition was dismissed with prejudice under the 'two dismissal' rule; the newest petition was barred by res judicata due to the prior dismissal with prejudice; and 3) the total disability claim was barred by collateral estoppel due to the termination stipulation and order signed in 2019. The Board denied the motion and the employer appealed. The court affirmed the order. Collateral estoppel did not apply since the prior stipulation and order did not address whether the claimant could have a change of condition supporting recurrence of total disability. Res judicata did not apply since none of the claimant's prior petitions were dismissed by the Board, let alone with prejudice. Finally, the 'two dismissal' rule did not apply as the Board was not required to apply that Superior Court rule. [Stewart/Herling]

Hunsucker v. Scott Paper Co., K22A-11-001 RLG (Del. Super. Ct. June 16, 2023). The claimant in this matter filed an appeal challenging the Board's decision to reduce his opioid intake following a six-month weaning program. The defense expert was deemed most credible. The OxyContin medication was not just unreasonable but the dosage was dangerously high. The claimant contended that the Board decision was not supported by substantial evidence as it mischaracterized the evidence which led to a faulty analysis. The Superior Court affirmed. The Board was entitled to choose between the competing expert opinions, and the relied-on testimony constitutes substantial evidence for purpose of appeal. [Pro Se/Morgan]

This & That Service Co. Inc. v. Nieves, No. 441, 2022 (Del. 2023). The Supreme Court reversed a Superior Court opinion and reinstated a Board decision that granted Employer's UR appeal petition on narcotic medication. The Supreme Court first found that the employer timely filed an appeal directly from the Superior Court to the Supreme Court. It was not an interlocutory appeal as the Superior Court reversed the Board decision and its remand was only ministerial in nature. The Court then found that the Superior Court erred as a matter of law by determining that the employer's petition did not raise any justiciable issues. The Superior Court had found that unless the claimant submits bills to the employer for payment, the underlying treatment is not "at issue" and cannot be the subject of a UR challenge. The Supreme Court relied on statutory language to support that both 'provided' and 'proposed' treatment can be challenged via UR. The Superior Court also erred by finding the Board lacked jurisdiction because the employer did not file multiple applications for Utilization Review concerning narcotic medication. That conclusion

was found inconsistent with the facts of the case, the purpose of UR to achieve prompt resolution of issues and a prior holding from the Superior Court in this case. The employer was entitled to challenge ongoing treatment as it did in its UR application. [Ellis/Schmittinger]

Ranstad Staffing v. Stansbury, N22A-06-001 CLS (Del. Super. Ct. July 14, 2023). The Superior Court addressed a challenge to the Board's decision to decline to enforce a commutation settlement. The claimant authorized her attorney to agree to a commutation for $22,000.00 and the parties reached settlement. The claimant then contacted her attorney to advise she did not want to move forward with the commutation. Her attorney responded that he would withdraw if she backed out from settlement. The attorney stated that the claimant then wished to move forward with the commutation while the claimant claimed this was not accurate. The attorney withdrew as counsel. The employer filed a motion to enforce the commutation. The Board denied the motion. While there was a settlement between the parties, the Board declined to enforce the settlement as being in the claimant's best interest. The employer appealed and contended that the 'best interest' standard was impermissibly vague. The Court disagreed. Section 2358(a) does not require the Board to concretely determine whether a commutation is in a claimant's best interest. It instead requires the Board focus on the appearance of the settlement. The Board was entitled to find the claimant's testimony credible as to why she did not believe the settlement to be in her best interest. In contrasting this case with a similar case where the Board approved such a commutation, the Court suggested in the former case the claimant did not present evidence that there may have been an issue of inadequate representation. The Board's order was affirmed. [O'Brien/Greenberg]

State v. Williams, N22A-06-003 CEB (Del. Super. Ct. July 26, 2023). The State filed an appeal challenging a Board decision in claimant's favor that awarded permanency benefits. The claimant sustained a work injury to his head. The Board accepted the testimony of the claimant's expert over the defense expert and awarded benefits for permanency to four areas affected by the injury. The Board also found the claimant's ongoing condition work-related despite the defense expert testifying that psychiatric and pre-existing issues were responsible for the ongoing condition. The State appealed, contending that the Board failed to set forth the proper causation standard and that its finding that symptoms worsened after the work injury was unsupported by the record. The Superior Court affirmed. The Court was able to infer the Board's findings on causation from review of the facts section of the Decision. A remand was not appropriate just to ensure a more technically precise opinion. Next, the Board found there was sufficient evidence from medical expert testimony,

on which the Board relied, to support that symptoms increased after the work injury. Finally, the Court found the Board did not need to address the Claimant's pre-existing condition in greater detail. A Decision does not need to address every shred of evidence or argument presented. Since both experts addressed the pre-existing condition, that was sufficient to support the Decision. [Klusman/Owen, Weeks]

Mullins (Deceased) v. City of Wilmington, N23A-01-004 CLS (Del. Super. Ct. Aug. 18, 2023). The issue before the Court was whether the Board erred by failing to give any weight to City determination to award a disability pension to the claimant. The claimant's widow had filed a petition alleging work-related ocular melanoma and entitlement to survivor benefits. The employer presented a medical expert in support of its causation defense. The claimant did not call a medical expert, but contended that the City was estopped from making any causation defense due to its decision to award a pension under the City Pension Code. The petition was denied as the claimant did not meet their burden of proof. The determination concerning the pension did not impact any defense as it was a distinct proceeding from worker's compensation and the City had legitimate reasons for paying the disability pension. On appeal, the claimant contended the Board erred by not giving any weight to the determination to pay the disability pension. This should have created an unrebutted presumption that the condition was work-related. The Superior Court disagreed. The standard and considerations for deciding entitlement to a disability pension differs from the causation standard before the IAB for worker's compensation benefits. The court indicated that the burden of proof was higher before the IAB. [Schmittinger/Bittner]

Shaffer v. Allen Harim Foods, LLC, S23A-03-003 MHC (Del. Super. Ct. Aug. 29, 2023). Claimant sustained injuries to her left thumb and both wrists in September 2018. Over the course of the next four years, Claimant underwent four surgeries and was receiving total disability benefits. Employer then filed a Petition for Review, alleging that Claimant was released to work and could work with some restrictions. The Board granted the Employer's Petition and terminated Claimant's total disability benefits. Claimant appealed the Board's decision, arguing that she remained totally disabled because she was a *prima facie* displaced worker. Claimant argued: (1) the Board's decision that she was no longer medically disabled was not supported by substantial evidence; (2) the Board's finding that she was not a *prima facie* displaced worker was an error of law and not supported by substantial evidence; and (3) the Board's decision that Employer met its burden of proof in proving available jobs is not based on substantial evidence. First, the Court held that it was "extremely clear" that the Board's finding that Claimant to be no longer

medically disabled was supported by *all* the evidence as all three medical experts examined and/or worked with Claimant found her to be able to physically work full-time in at least a medium-duty capacity. Second, the Court's reliance on Employer's vocational expert was supported by substantial evidence as the labor market survey identified entry-level customer service jobs that Claimant was capable of working. Last, "Claimant's preference to work with her hands and testimony that she is quick to argue with people does not preclude her from working customer service-based positions." The Court held that the jobs listed on the LMS were appropriate and therefore, there was substantial evidence that Employer met its burden of showing the required job availability establishing that she was not a displaced worker. [Morrow/Baker]

Hudson v. Beebe Med. Ctr., K22A-11-022 NEP (Del. Super. Ct. Sept. 19, 2023). The Superior Court of Kent County, *sua sponte*, denied jurisdiction of Claimant/Appellant's IAB appeal. 19 Del. C. 2349 provides that appeals must be filed in "the Superior Court for the county in which the injury occurred…" Here, the alleged injury occurred in Sussex County, but the appeal was filed in Kent County. Therefore, the Superior Court of Kent County held it lacked jurisdiction to decide this appeal. [Donovan/Morris-Johnston]

Mabrey v. State, K22A-06-001 JJC (Del. Super. Ct. Sept. 21, 2023). Claimant sought compensation for permanent impairment to his cervical spine arising from a February 27, 2019 work incident. The parties stipulated that their competing experts had contrary opinions regarding the permanency: twenty percent (20%) impairment to the cervical spine versus zero percent (0%). At the hearing, the evidence disclosed that Claimant had a prior work accident in 2014, where he suffered injuries to his right upper extremity. And, while no medical provider or retained expert diagnosed him with a cervical spine injury related to the 2014 work incident, his medical records referenced neck pain and radiculopathy dating back to 2014. In its decision, the Board found that Claimant's expert's testimony regarding causation of permanency unpersuasive. First, it discredited his opinion because it relied on the fact that Claimant had only a single positive Spurling's test finding in September 2019 when his treating physician performed seven Spurling's tests over the course of his treatment which produced all *negative* results. Second, the Board found that Claimant's expert assigned too little weight to the chiropractic reports that described the prior neck pain. Third, the Board took issue with the expert's "blanket discounting" of other cervical related entries in Claimant's early 2019 and 2018 medical records that predated the accident. On appeal, Claimant argued the Board committed legal error because it did not conclude that the 2019 accident aggravated

his pre-existing injuries, and that the record required the Board to award at least a lower permanent impairment percentage even if Claimant failed to prove a 20% impairment. The Court first held that while there was evidence to support a finding of an aggravation of a pre-existing cervical condition, the record *also* contained substantial evidence to support the contrary - Claimant's medical history, Employer's expert's opinion that the accident caused no permanent impairment, and Claimant's recent chiropractic treatment immediately before the 2019 work incident. Second, the Court held that the Board did not commit legal error by not awarding some lesser percentage of permanent impairment. "[H]ad the record contained uncontroverted expert testimony that the accident had contributed (in a but for sense) to an increase in permanency, then the Board would have been required to either (1) determine the exact percentage of permanency to award by keeping within the expert's ranges, or (2) independently and clearly articulate the facts upon which it based a different conclusion." In this case, however, Employer's expert's opinion and the evidence regarding the pre-existing cervical complaints and limitations freed the Board to apply its judgment in favor of assigning weight to only Employer's expert. [Schmittinger/Lukashunas, Trayner]

Cline v. Nemours Foundation, N23A-11-003 FWW (Del. Super. Ct. Oct. 11, 2023)
The Board denied payment of Claimant's total knee replacement surgery based on the Health Care Practice Guidelines requiring *exhaustion of conservative treatment* as a precursor to surgical intervention, and Claimant "should have pursued some type of conservative treatment first… it may have helped." On appeal, Claimant argued: (1) the Board failed to consider the *Brittingham* factors and determine whether the total knee replacement was reasonable specifically for Ms. Cline – not generally for someone with the same condition; (2) the Board incorrectly applied the Guidelines in its application of review of Claimant's Petition when it held that "proceeding to a total knee replacement surgery without exhausting conservative care was not reasonable or necessary," and disregarded that the Guidelines specifically identify that a knee replacement is reasonable when there is "severe osteoarthritis and all *reasonable* conservative measures have been exhausted and other reasonable surgical options have been considered;" and (3) the Board's finding of Dr. Schwartz's medical testimony more credible than Dr. Rubano was not supported by substantial evidence because (1) Dr. Schwartz's opinion lacked a factual foundation as he never reviewed the diagnostic films; (2) Dr. Schwartz offered contradictory and inconsistent opinions regarding Ms. Cline's diagnosis and treatment; and (3) Dr. Rubano's opinions regarding the diagnostic films were uncontradicted. On appeal, the Superior Court that the held Board failed to expressly apply the *Brittingham* standard that the necessity and reasonableness of a

claimant's surgery is specific to that claimant. Specifically, the Court held that the Board failed to consider whether all reasonable conservative measures had been exhausted to that Claimant's treatment specifically; it failed to explain why it was willing to discount Dr. Rubano's testimony about what the actual films showed without having its stated interest in Dr. Schwartz's interpretation of the actual films satisfied; and it failed to explain how or even if it considered Claimant's pressing need to return to full-duty in its evaluation of the reasonableness of her surgery. Then, the Court held that the Board did not correctly apply the Guidelines when it stated that the Guidelines call for the "exhaustion of conservative treatment" – not *reasonable* conservative treatment. And, last, the Court held the Board's decision was not supported by substantial evidence as the Board "couched its decision in such a conclusory fashion" that the Court was unable to identify specific facts it relied upon in determining that Claimant's surgery was not reasonable or necessary. Moreover, the Board failed to explain why Dr. Rubano's medical opinion was discredited when he reviewed the diagnostic films and confirmed his readings of the films when he performed the TKR. [Welch/Morris-Johnston]

Fowler v. Perdue Farms, Inc., K23A-01-001 NEP (Del. Super. Ct. Oct. 18, 2023)
In this case's first appeal, the Superior Court reversed and remanded the Board's decision, holding 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. On remand, the Board found (1) Claimant had proven by a preponderance of the evidence that he had contracted COVID-19 at the Perdue plant, but (2) that it was not an occupational disease in the context of his employment. On its second appeal, Claimant argued that because he contracted COVID-19 in the cafeteria at the Perdue Plant, where he faced a "heightened risk" of contracting the disease, his illness is an occupational disease. In response, Employer argued that the illness was not an occupational disease because it is not a natural incident of his particular occupation in such a way that it "attaches to his occupation a hazard distinct from and greater than the hazard attending employment in general." The Court held that while Claimant did face a "heightened risk" of contracting COVID-19 in the cafeteria, his COVID-19 *did not result from the peculiar nature of his employment*, and for that reason the Board correctly determined that his COVID-19 did not qualify as an occupational disease. The Court explained that a finding of a compensable occupational disease requires the presence of a hazard not only "greater than" but also "distinct from" that attending employment in general. Citing *Air Mod Corp. v.*

Newton, "[t]here must have been a recognizable link between COVID-19 and some distinctive feature of Claimant's job as a boxer at Perdue." Accordingly, the Court found that the hazard of contracting COVID-19 in the cafeteria was greater than that attending employment in general; *however*, Claimant's illness did not result from the peculiar nature of his employment. Therefore, under Claimant's circumstances, COVID-19 is not an occupational disease. [Schmittinger/Panico]

Hudson v. Beebe Med. Ctr., S23A-10-002 NEP (Del. Super. Ct. Jan. 3, 2024). Claimant appealed the Board's decision that Claimant failed to prove by a preponderance of the evidence that (1) she contracted COVID-19 at the workplace of her employer and (2) COVID-19 was an occupational disease in the context of her employment at Beebe. On appeal, Claimant argued (1) the Board applied a higher burden of proof and required her to prove the exact date of infection; and (2) the Board's decision was not supported by substantial evidence. First, the Court held that the Board's analysis addressed more than the alleged date of contraction but also the possible timeline of exposure and symptom onset. The Board did not require Claimant to prove that any one specific exposure at work caused her illness - it required her only to prove that the COVID-19 exposure leading to her illness more likely than not, occurred at work. In addition, the Court held that there was substantial evidence to support the Board's decision. The Board considered the competing experts' opinions and data submitted, and adopted Employer's expert's conclusion that it was more likely that Claimant acquired COVID-19 from her son, rather than while working at Beebe. [Donovan/Morris-Johnston]

Mid-Sussex Rescue Squad v. Hearne, S23A-06-002 RHR (Del. Super. Ct. Feb. 15, 2024). The issue on appeal was whether the IAB correctly excluded sick and vacation time from average weekly wage calculation and used a reduced divisor to reflect the exclusion. Relying on *Taylor* and Section 2302, the IAB calculated AWW of the claimant, who was a paramedic and worked a "sporadic" schedule as follows:

> Claimant worked for 26 weeks prior to his injury. He was out of work (and thus not performing actual work) for a total of 3.6 weeks (24 hours sick leave + 12 hour holiday not worked + 108 hours vacation = 144 hours or 3.6 weeks). His proper gross amount of wages is $19,984.61, as the vacation, sick, and unworked holiday leave paid should not be added to his gross wages because it would artificially inflate his wages for those weeks. The IAB reduced the 26-weel period by 3.6 weeks, which created the 22.4-week divisor.

The Court held that the IAB thoughtfully considered *Taylor* and reasonably concluded that the phrase "actually worked" in Section 2302 means work "actually performed;" and therefore, the IAB correctly interpreted Section 2302 and *Taylor*

when it subtracted holiday, sick, and vacation pay from the total amount earned during the 26-week period and also reduced the divisor to reflect the work actually performed. [Harrison/Karsnitz]

Amazon.com v Rook, N23A-04-003 KMM (Del. Super. Ct. April 25, 2024). The Board in this case found the claimant sustained a work injury and that treatment, including surgery, was reasonable and related. The employer appealed the decision, contending that the Board failed to take judicial notice of the Delaware Treatment Guidelines when considering whether surgery was reasonable and necessary. The decision was affirmed. The court agreed in general that the Board could take judicial notice of the Guidelines. However, the employer was improperly seeking to have the Guidelines weighed by the Board without any supporting medical expert testimony. The defense medical expert testified that he could not opine on the reasonableness of surgery as that was outside his specialty. The employer was not entitled to use the Guidelines as affirmative expert testimony. Even though the Board is not required to accept unrebutted medical testimony by the claimant's expert, they chose to in this case, and that determination was supported by substantial evidence. The court also held that judicial notice can only be applied to undisputed facts, such as the parameters of the Guidelines. It could not be used when there is a disputed fact, such as whether the surgery was reasonable and necessary. Finally, the statute does not allow for a presumption that treatment was unreasonable based on argument that is does not comply with the Guidelines. [Starr/Gambogi]

NOT JUST SKIN DEEP -

DISFIGUREMENT ISSUES

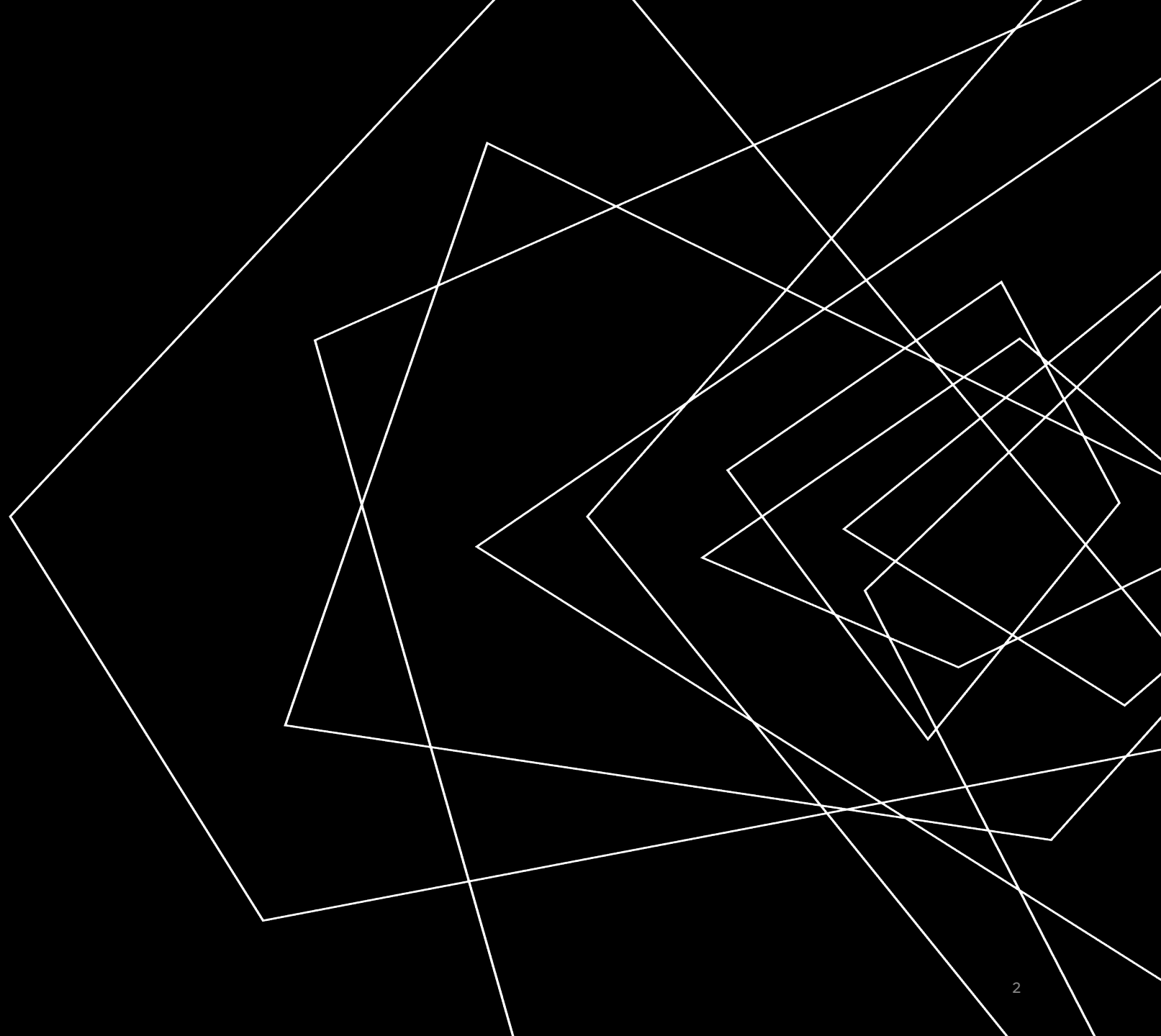
PRESENTED BY

Cassandra Roberts

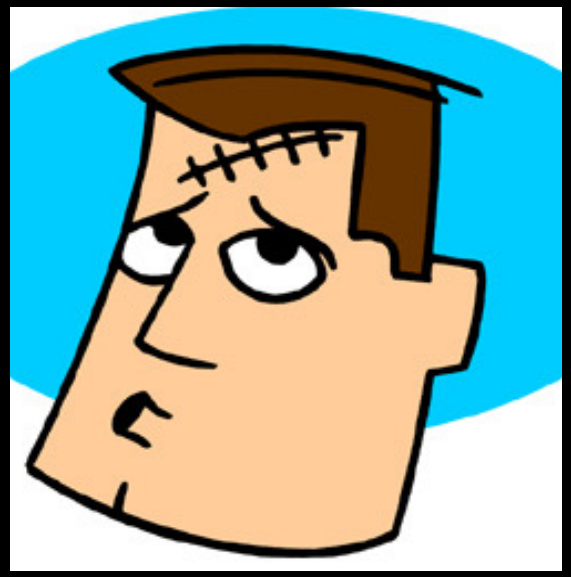
Maria Paris Newill

Tiffany Quell Friedman

Walt F. Schmittinger



19 DEL. C. SECTION 2326



THE PERMANENCY PLUS 20% ALLOWANCE VERSUS THE 150-WEEK CAP

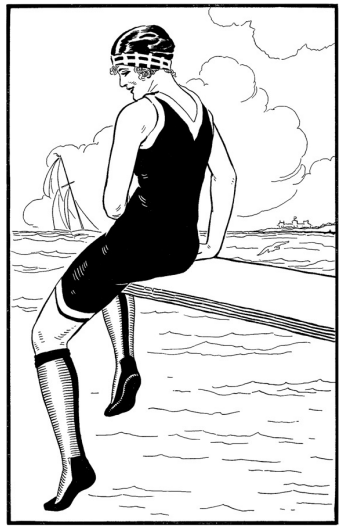
DISFIGUREMENT HEARINGS:

(WHEN *"LET'S MAKE A DEAL"* FAILS)

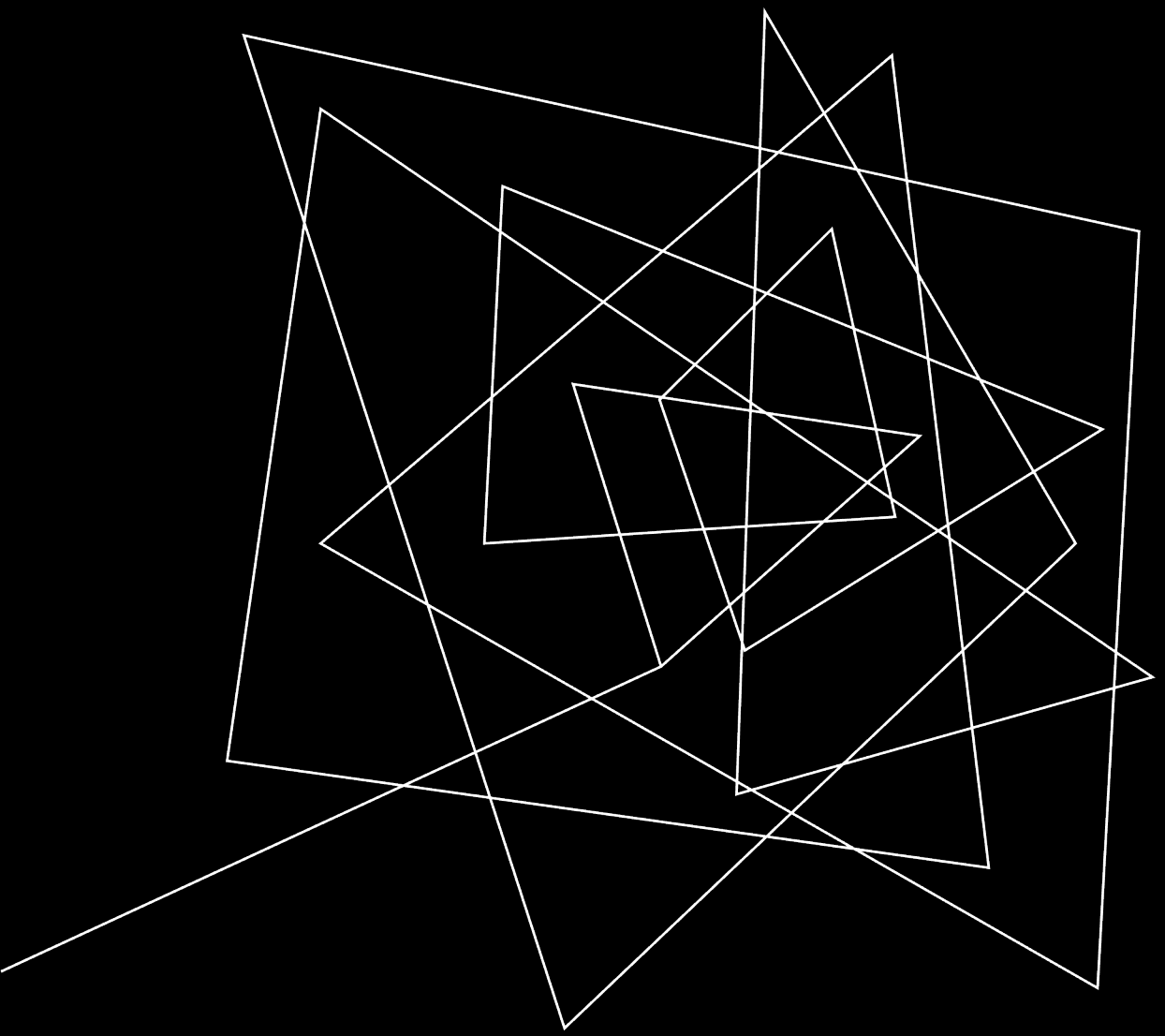
Do's

Do Nots

THE BATHING SUIT RULE (ROCKIN' THE SPEEDO)



ALTERED GAIT, POSTURAL DEVIATIONS AND DURABLE MEDICAL GOODS

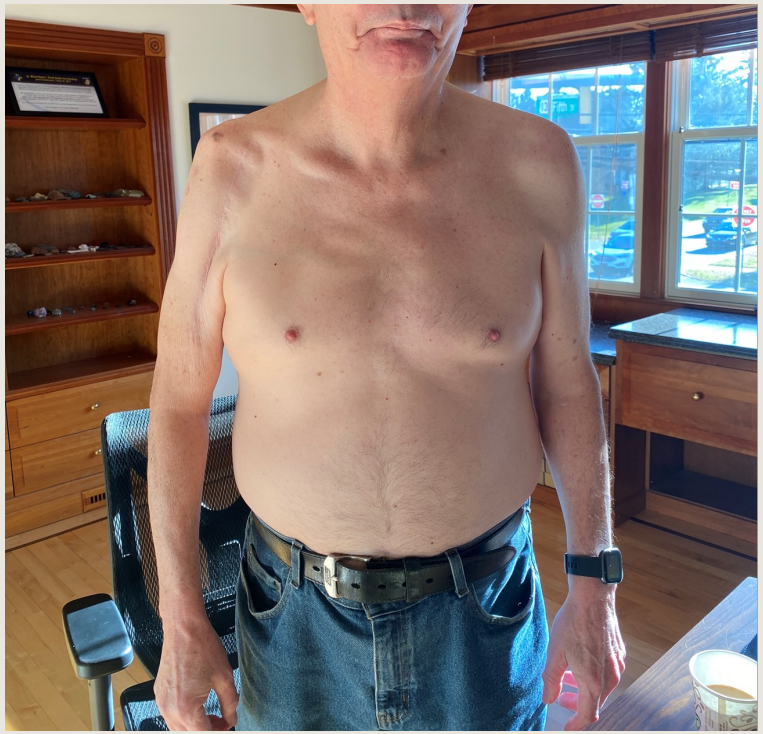


THE QUIRKY CLAIMS

(WE CAN'T MAKE THIS STUFF UP)

PUT A VALUE ON IT.....

Mr. O



MS. C.D. V CCHS

Scar:

Gait:

MS. F. V.
S. GREGORY SMITH MD & ASSOCIATES:

Altered Gait:

MR. RAM.....

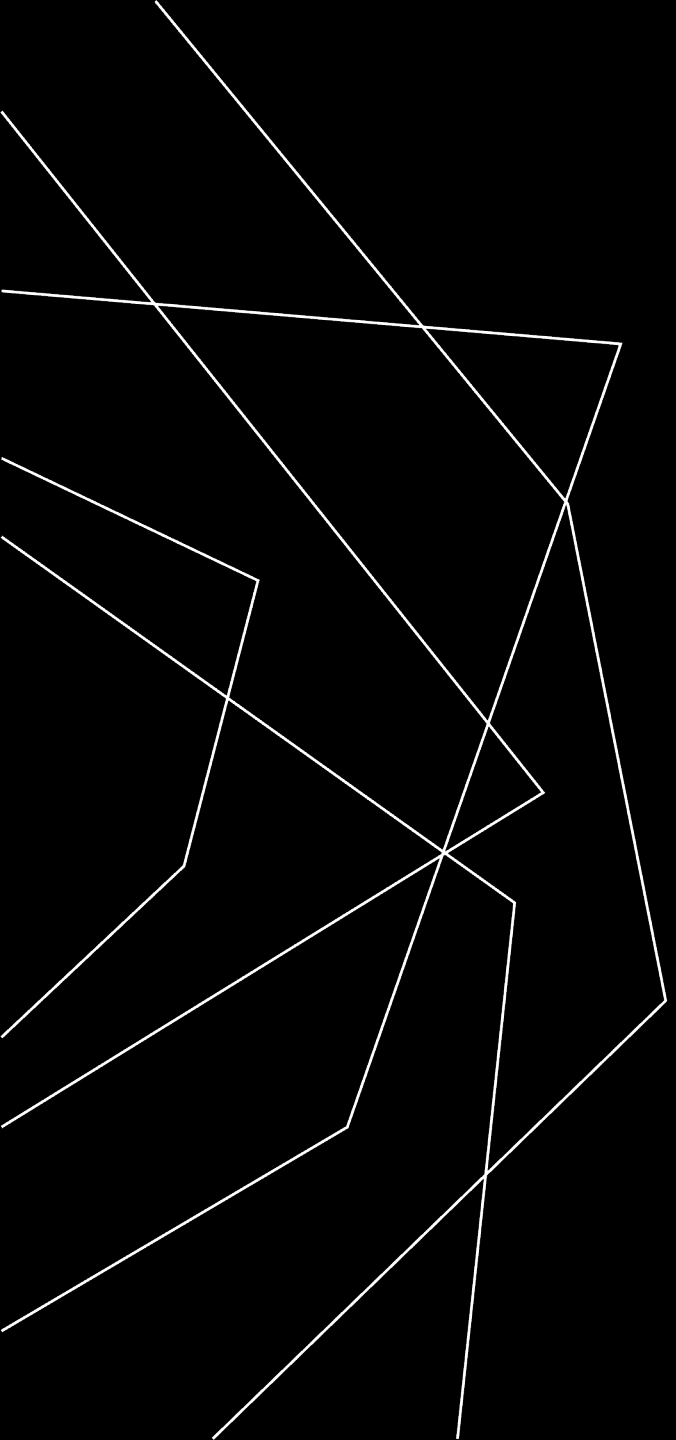
MR. ROB....

Mr. S.

MR. D.M. V. STATE OF DELAWARE

Scar:

Gait:



THANK YOU!

Cassandra Roberts

Maria Paris Newill

Tiffany Quell Friedman

Walt F. Schmittinger

Panel 7

Evaluation and Interpretation of Diagnostic Studies

==========

William R. Stewart III, Esquire
Pratcher Krayer LLC

Andrew J. Gelman, D.O.

Tariq Quraishi, M.D.

James Zaslavsky, M.D.

TARIQ QURAISHI, M.D., A.B.R.

Limestone Open Mri and Imaging Center
2060 Limestone Road, Suite 202
Wilmington, De 19808
Cell: (610) 406-7760
tariqdoc7@hotmail.com

SUMMARY

Board Certified Radiologist with more than 20 years of professional experience. Comprehensive background in radiology with specialty in MRI and special interest in **neuroradiology** and **musculoskeletal imaging**. Highly adept at interpreting all modalities including mammography and PET/CT. Experienced in minor procedures including arthrograms, PICC placement, paracentesis, thoracentesis, and lumbar punctures. Proven ability to establish and direct radiology departments. Able to oversee quality assurance programs and ensure compliance with all federal safety requirements. Familiar with equipment review and selection, capital purchasing, and evaluation of new diagnostic processes. **Greatly enjoy serving local community and interacting with local health care providers.**

LICENSES AND CERTIFICATIONS

Certified in Diagnostic Radiology by the American Board of Radiology (2003)

Active Medical Licenses in *Delaware, Maryland, New Jersey, Pennsylvania*

Previous FDA accreditation in mammography with MQSA

EDUCATION AND TRAINING

Thomas Jefferson University Hospital, Philadelphia, PA
Combined Musculoskeletal, Neuroradiology and Body MRI Fellowship *(2003-2004)*
Residency, Diagnostic Radiology *(1999-2003)*

Jersey Shore Medical Center, Neptune, NJ
Internship (*1998-1999)*

Robert Wood Johnson Medical School (University of Medicine and Dentistry of New Jersey, Camden, New Jersey)
Medical Degree (1998)

Lehigh University, Bethlehem, PA
B.S. in Electrical Engineering (1993)

PROFESSIONAL BACKGROUND AND EXPERIENCE

Limestone Open MRI and Imaging Center, Wilmington, De *2007-present*

Limestone Open Mri and Imaging Center
2060 Limestone Road, Suite 202
Wilmington, De 19808
Cell: (610) 406-7760
tariqdoc7@hotmail.com

Medical Director
Built program from initial startup. Responsible for all imaging reports and protocols. Maintain highest standards meeting criteria by the American College of Radiology. Supervise and coordinate healthcare and administrative personnel.

Jennersville Regional Hospital, West Grove, PA *2011-2017*
Director of MRI
Responsible for all MRI studies performed including patient safety, quality assurance, and final reports. Perform interventional procedures such as placement of peripherally inserted central catheters, and drainages. Provide final reports on CT, US, XRAY, and Mammography. Instruct students and staff on radiology principles and technique. Evaluate new imaging procedures. Review, select, and approve purchase of new equipment.

Jennersville Hospital Credentialing Committee
Involved in reviewing, approving or denying doctors requesting medical privileges to the hospital.

Jennersville Hospital Patient Safety Committee
Coordinate activities with a team of section heads, nurses, physicians, pharmacy and administrative personnel to review all medical and nonmedical incidents affecting patients, staff, and visitors on a monthly basis. Root cause analysis methods are utilized with development of appropriate solutions.

Delaware Diagnostic Group, Wilmington, De *2007-2011*
Medical Director
Principal partner. Played key role in building three successful imaging centers.

Papastavros' Associates Medical Imaging, Wilmington, De *2004-2006*
Associate radiologist

HOSPITAL APPOINTMENTS

Jennersville Regional Hospital, West Grove, PA (*2011-2017*)
Riddle Memorial Hospital, Mainline Health System, Media, Pa (*2003-2008*)
Thomas Jefferson University Hospital (*1999-2004*)
Jersey Shore Medical Center, Neptune, NJ (*1998-1999*)

PROFESSIONAL MEMBERSHIPS

American College of Radiology (1998-present)
Medical Society of Delaware (2018-present)

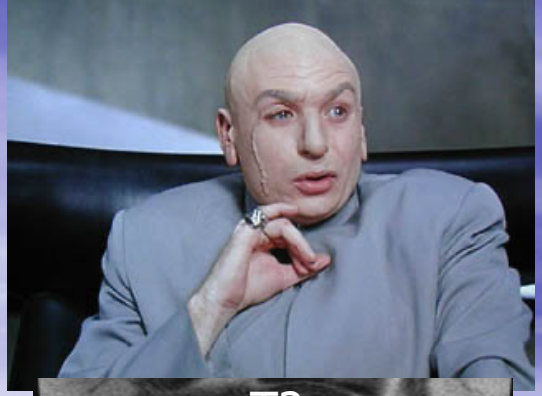
AWARDS AND RECOGNITION

Limestone Open Mri and Imaging Center
2060 Limestone Road, Suite 202
Wilmington, De 19808
Cell: (610) 406-7760
tariqdoc7@hotmail.com

Eta Kappa Nu, Honor Society for Electrical Engineers
Alpha Omega Alpha, Honor Society for Medical Students

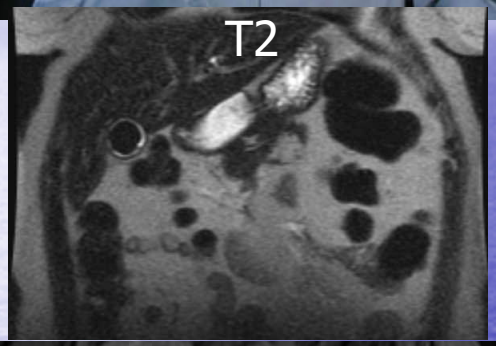
COMPUTER SKILLS

Multiple PACS/RIS systems, proprietary healthcare and laboratory information systems, Voice Recognition, Windows, Word, Excel, PowerPoint



Limestone Open Mri and Imaging Center

T2 – fluid/edema are **bright**
fat is bright (hyperintense)

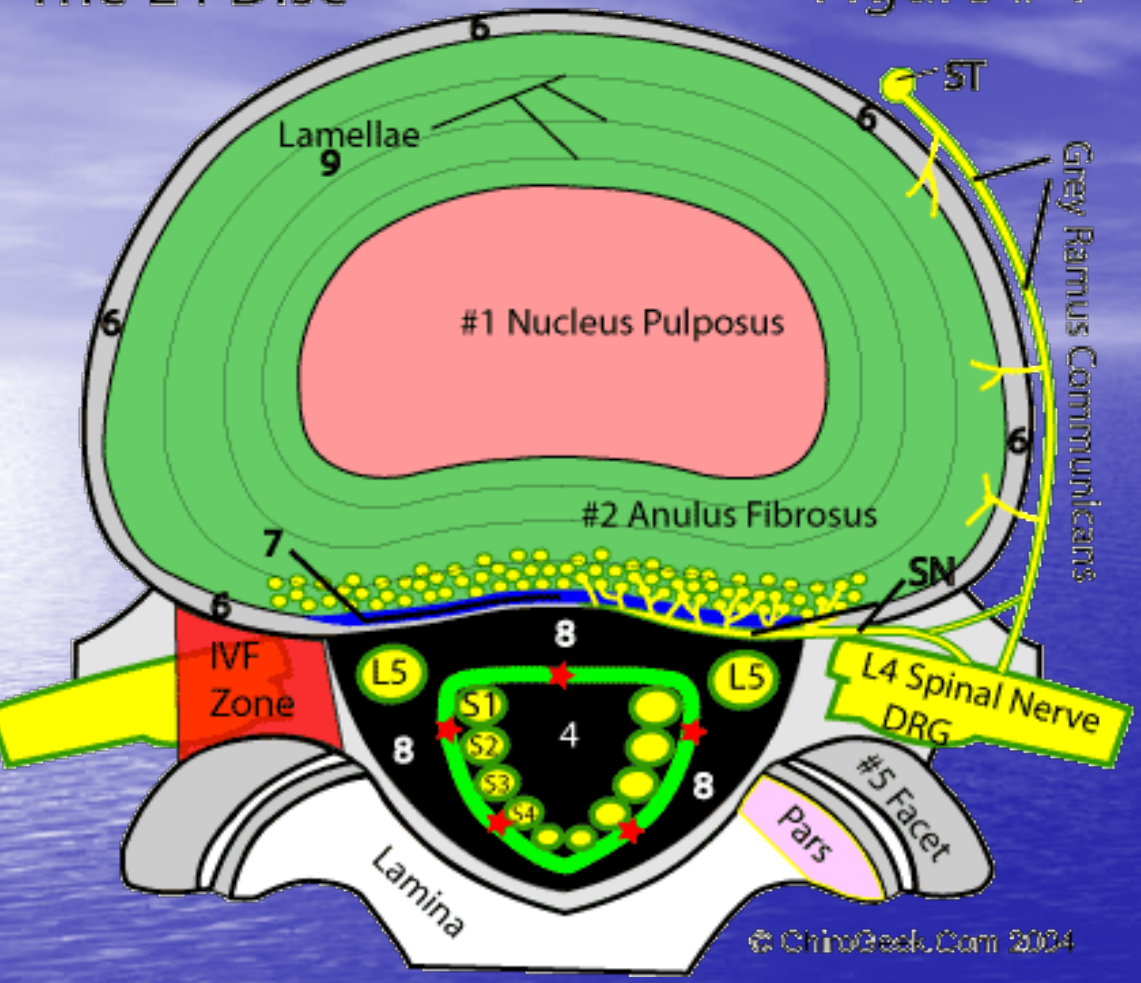


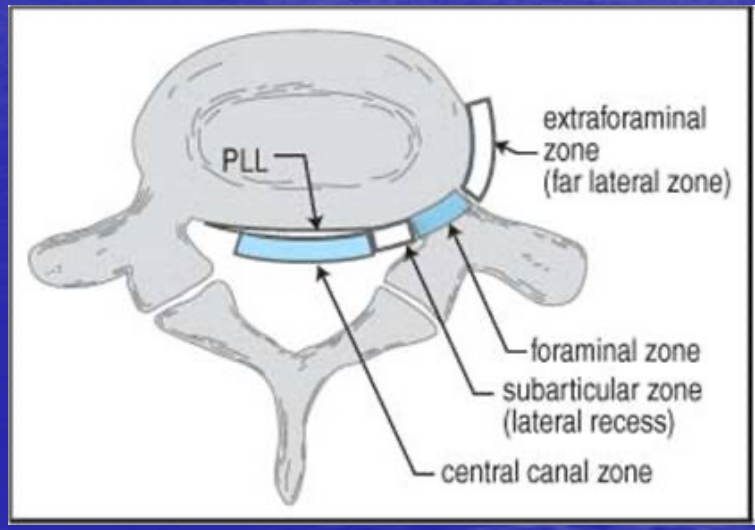
T1 – fluid/edema are **dark (hyointense)**
fat is bright

T2 with fat suppression aka STIR
fluid/edema are bright(hyperintens
fat is dark (hypointense)

The L4 Disc

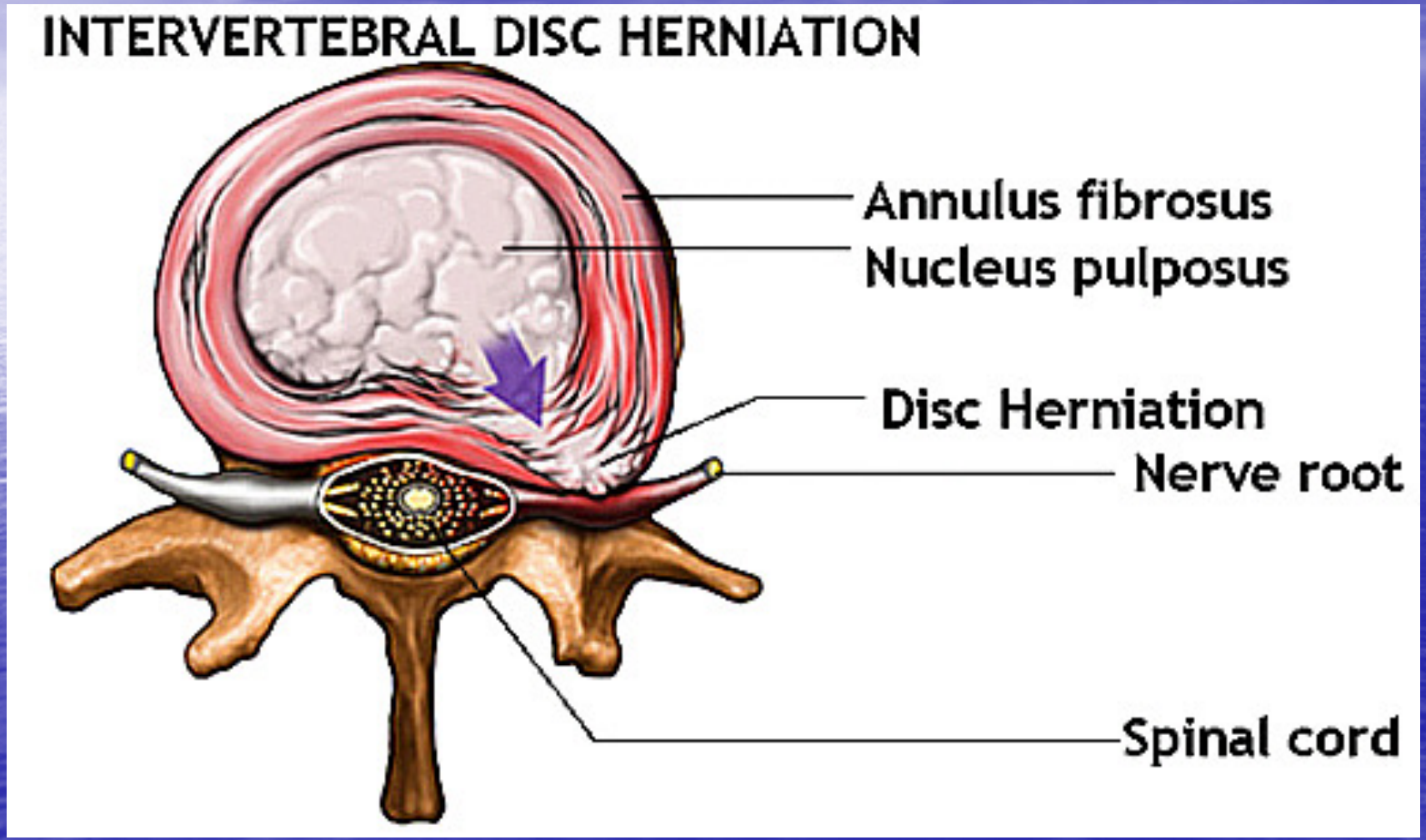
Figure # 1

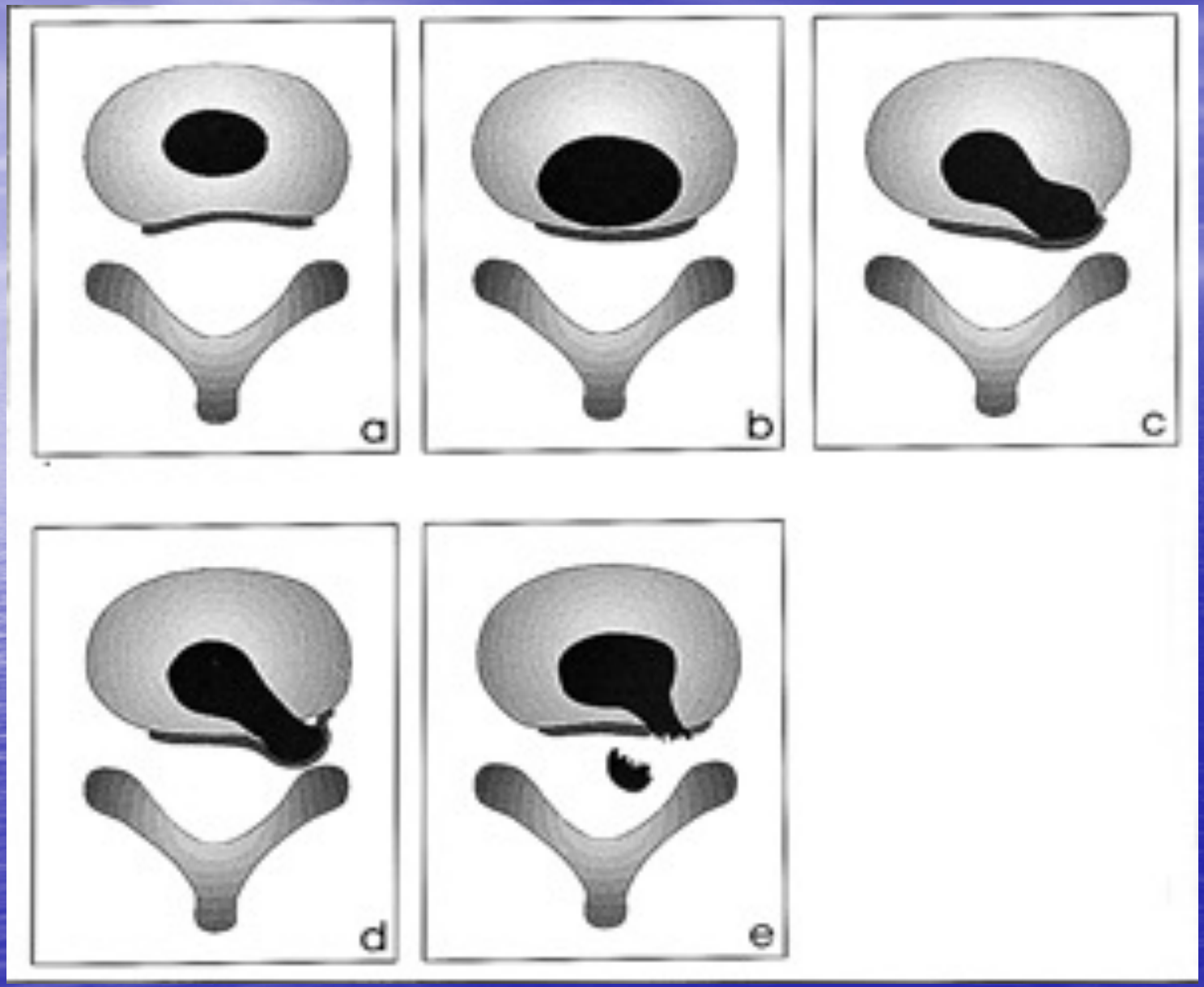


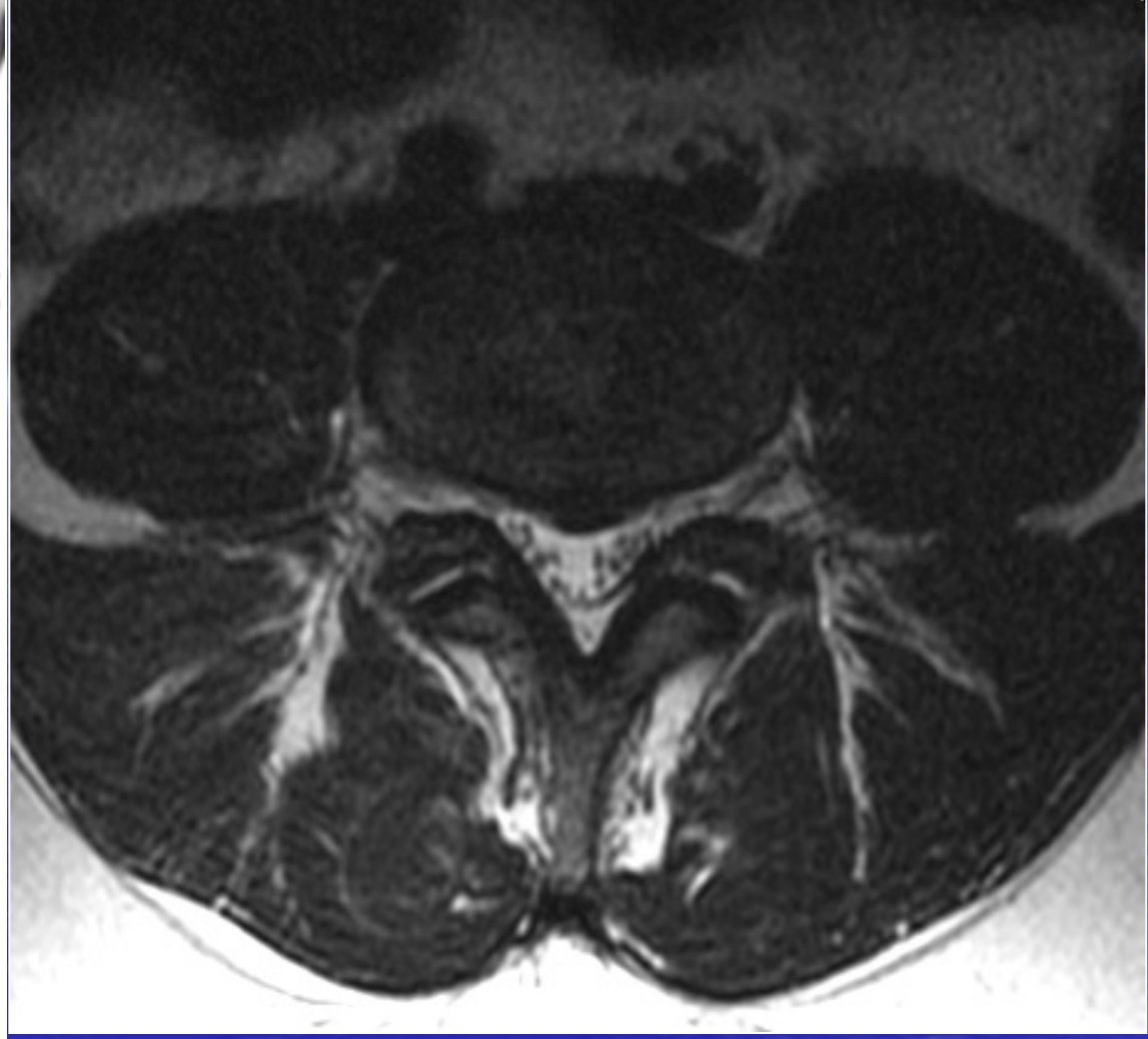


Limestone Open MRI and Imaging Center

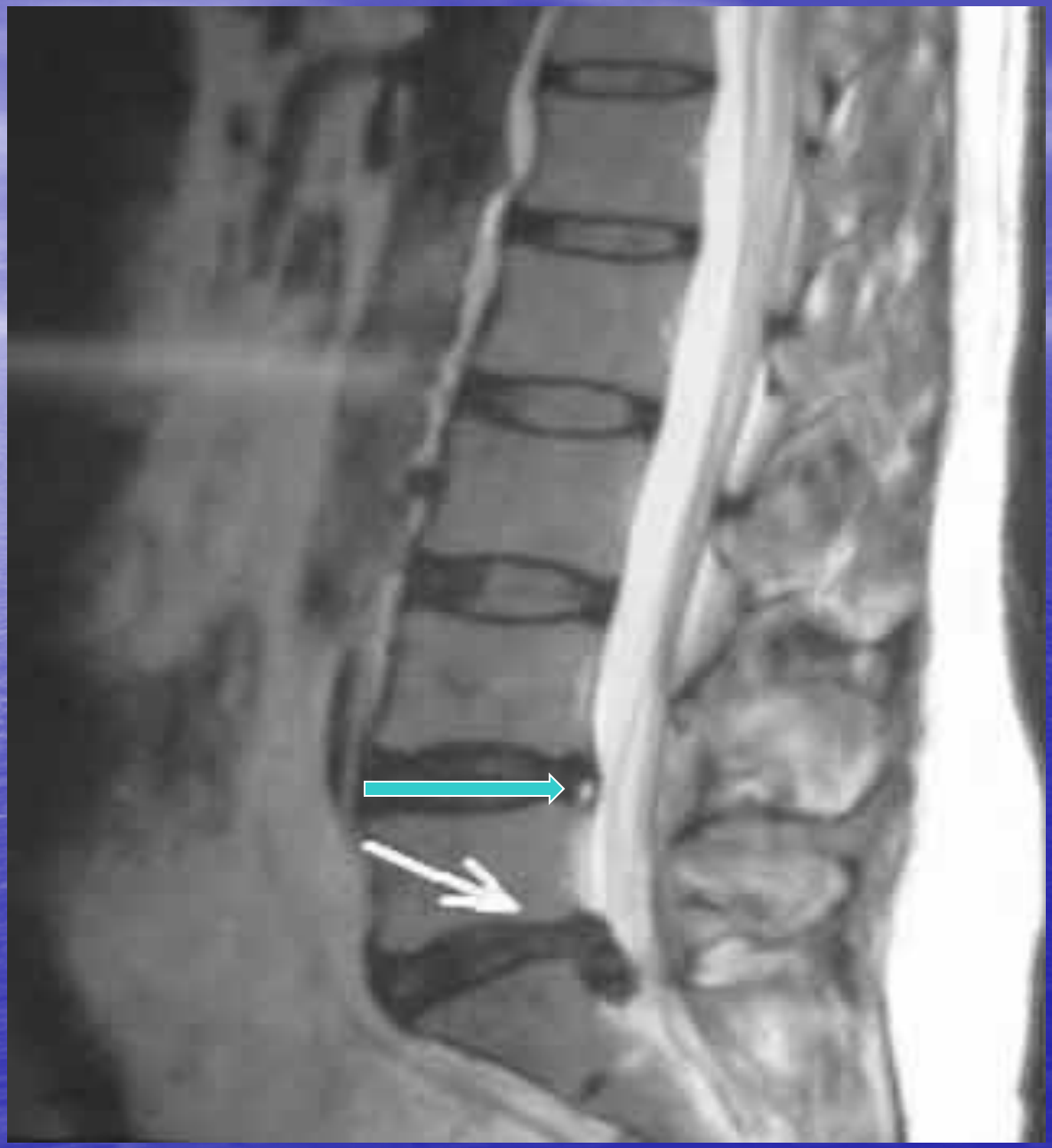
Disc herniation = **MECHANICAL FAILURE OF THE DISC**

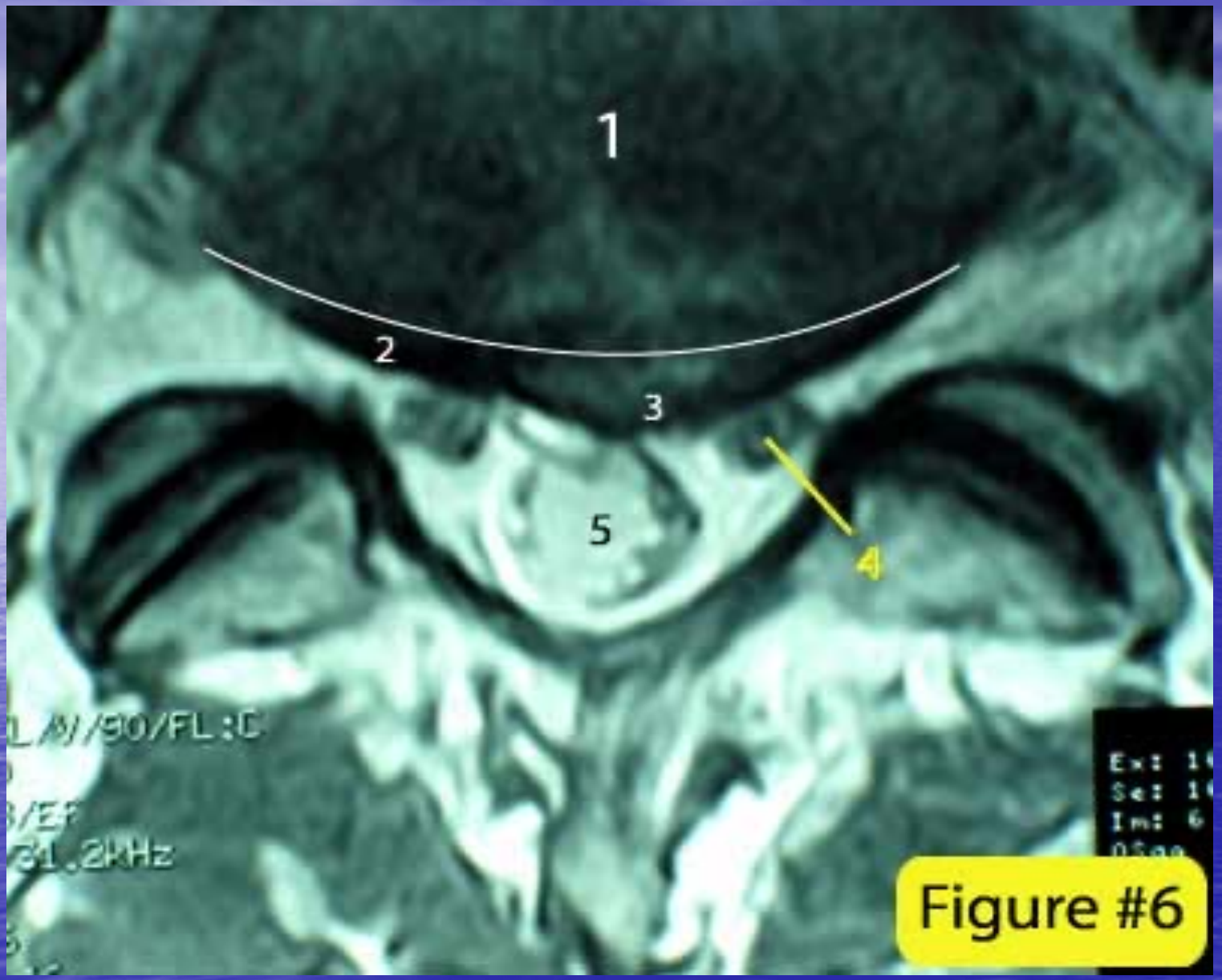



a
b
c
d
e



Limestone Open MRI and Imaging Center





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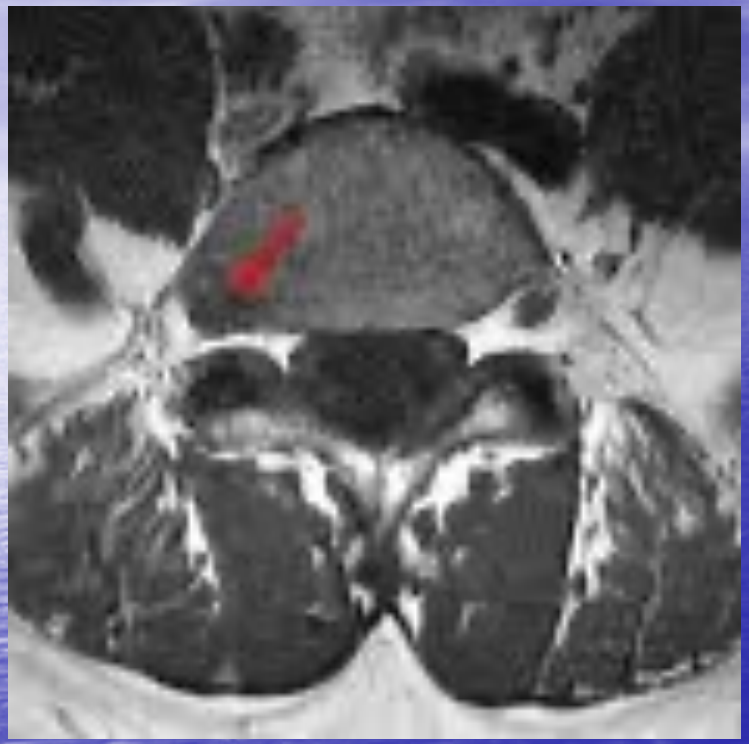
FAILURE TO DIAGNOSE



1. Inadequate TIME spent on looking at images.

   High volume centers

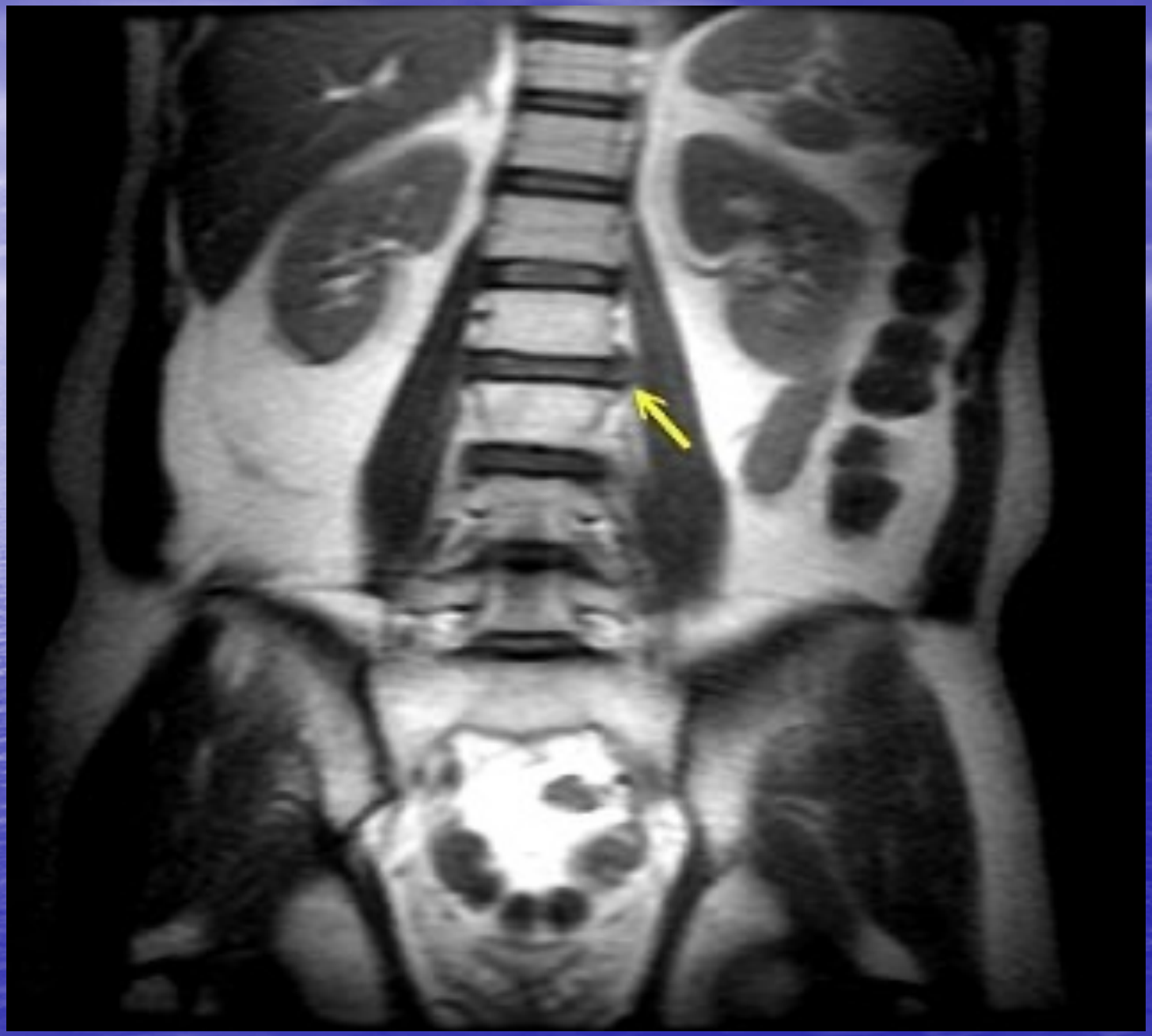
   MRI Reports generated on average in less than **3 min**

   Automated reporting results in minimalistic reports that lack detail and medicolegal documentation

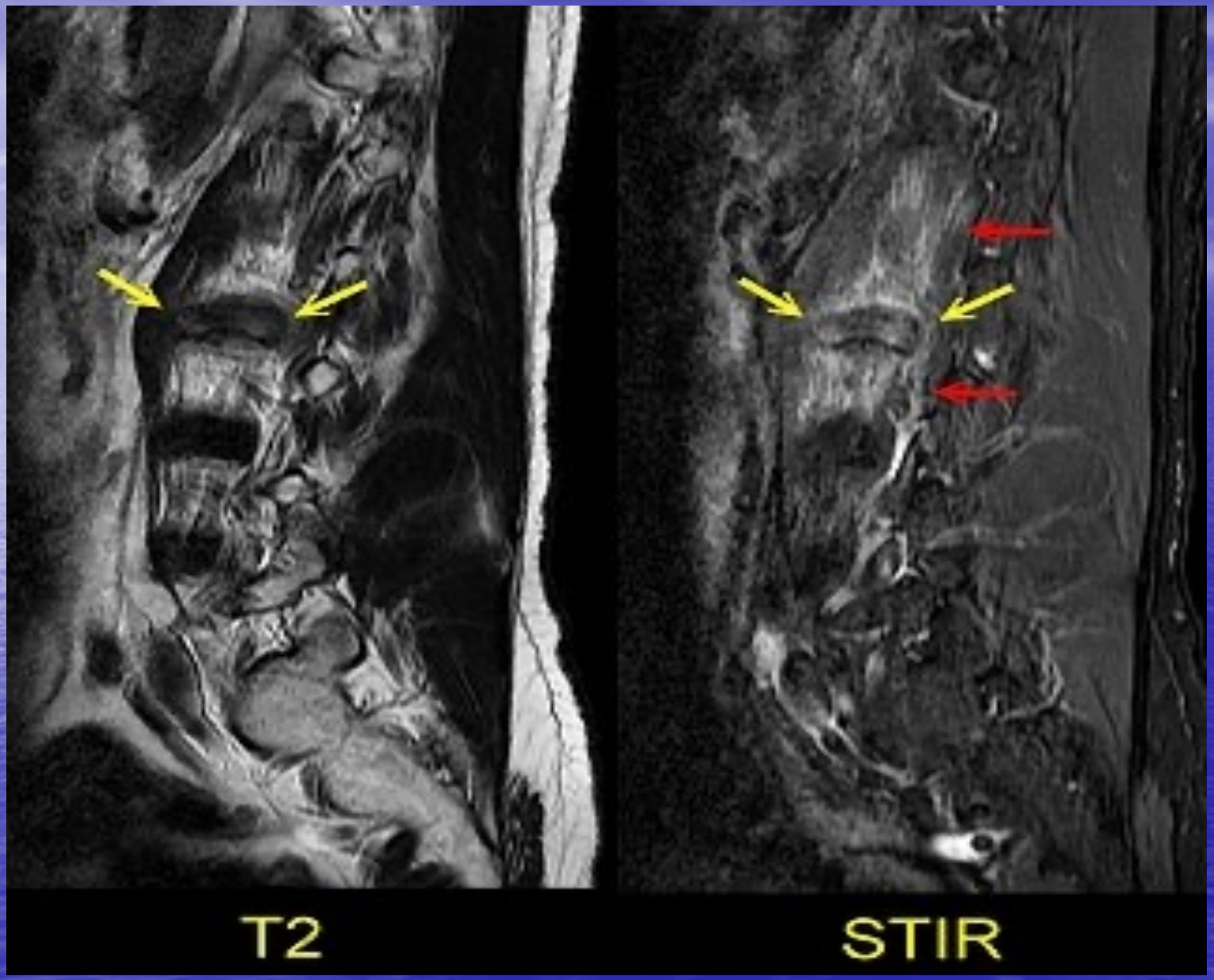
2. Inadequate TRAINING

   Lack of understanding of pathophysiology

   Lack of neuroradiologists and musculoskeletal radiologists

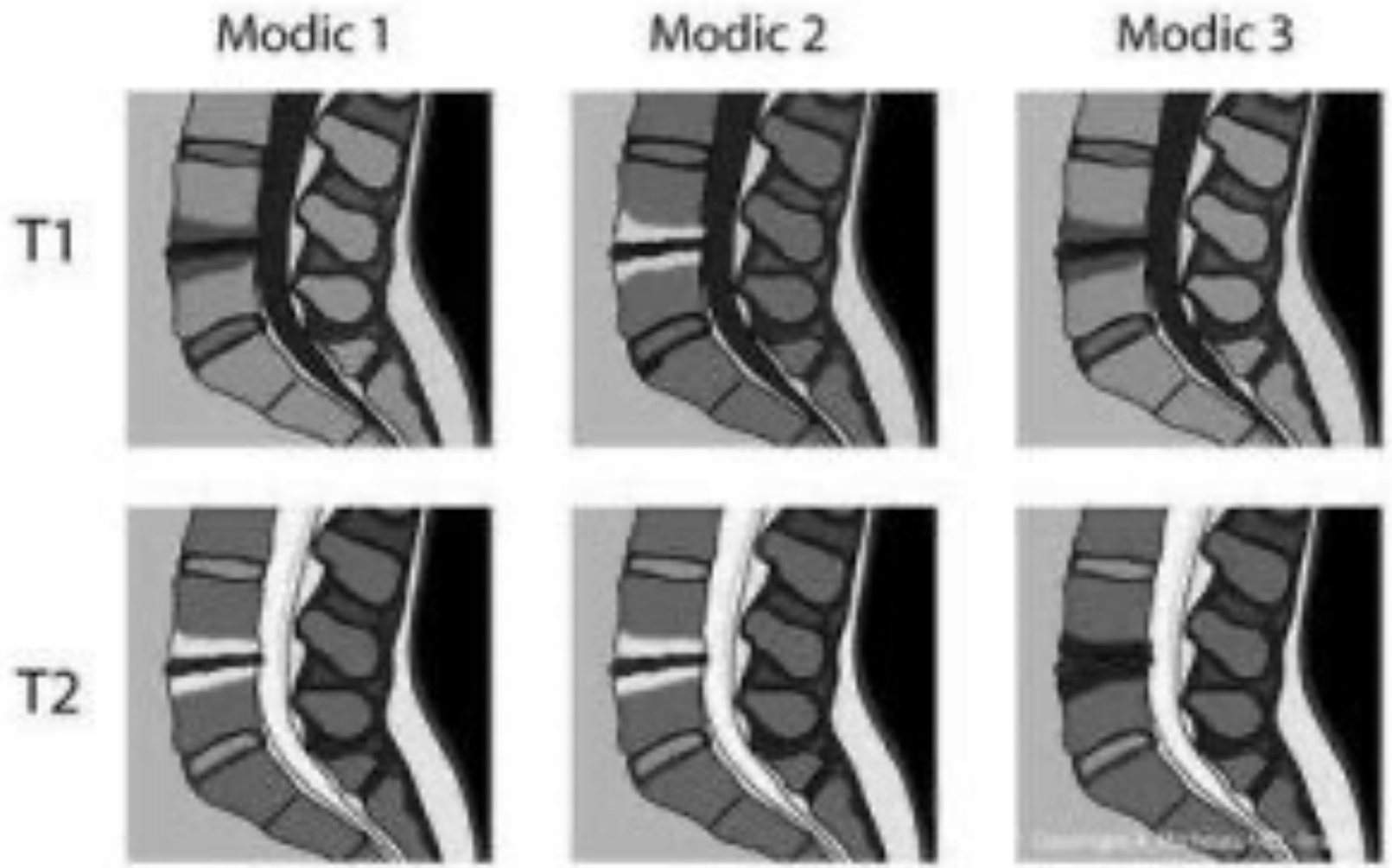


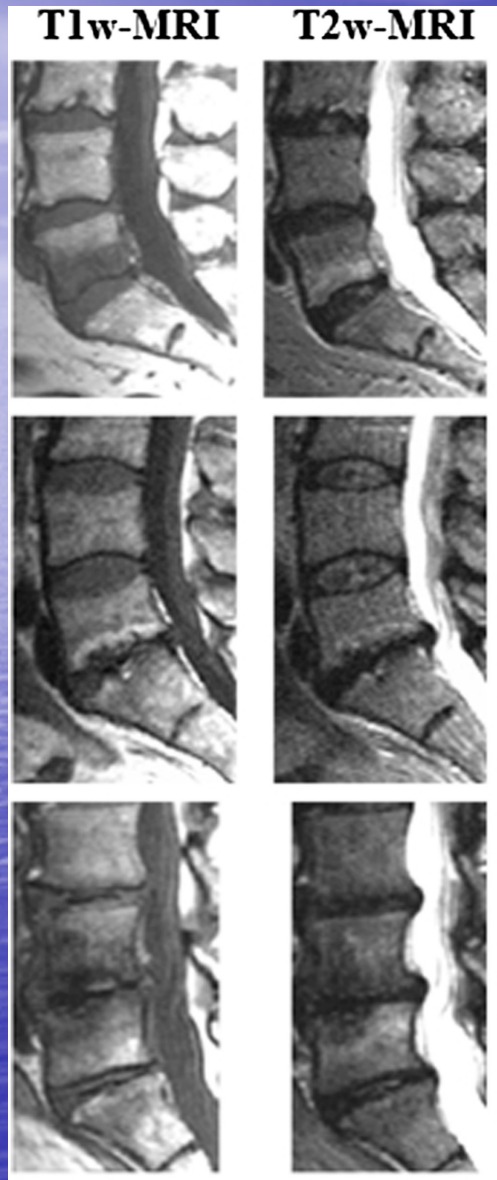
Limestone Open MRI and Imaging Center



Limestone Open MRI and Imaging Center

Modic changes





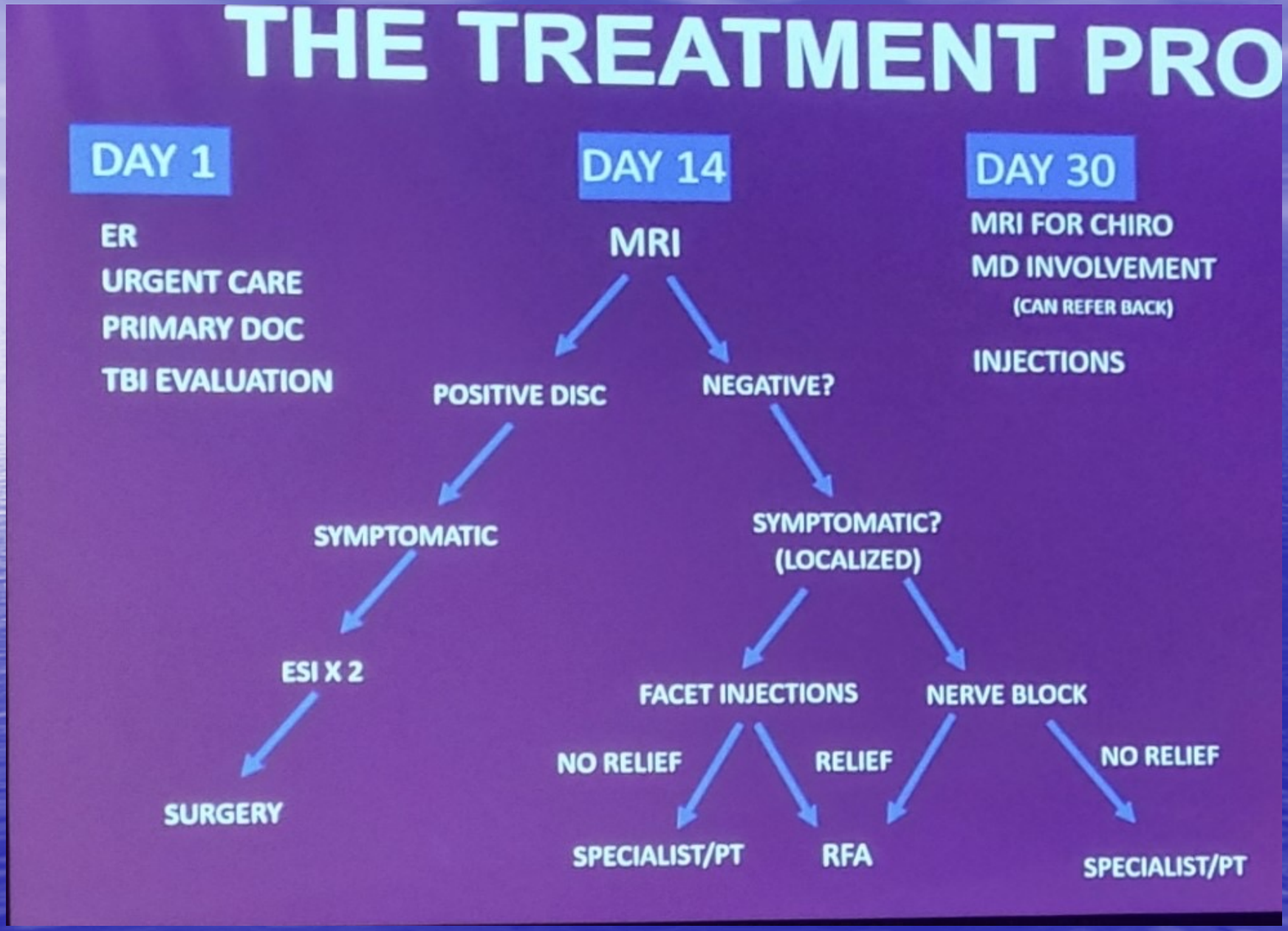
MC type 1
Hypointense on T1w and hyperintense on T2w.
Characterized by reactive or inflammatory changes.

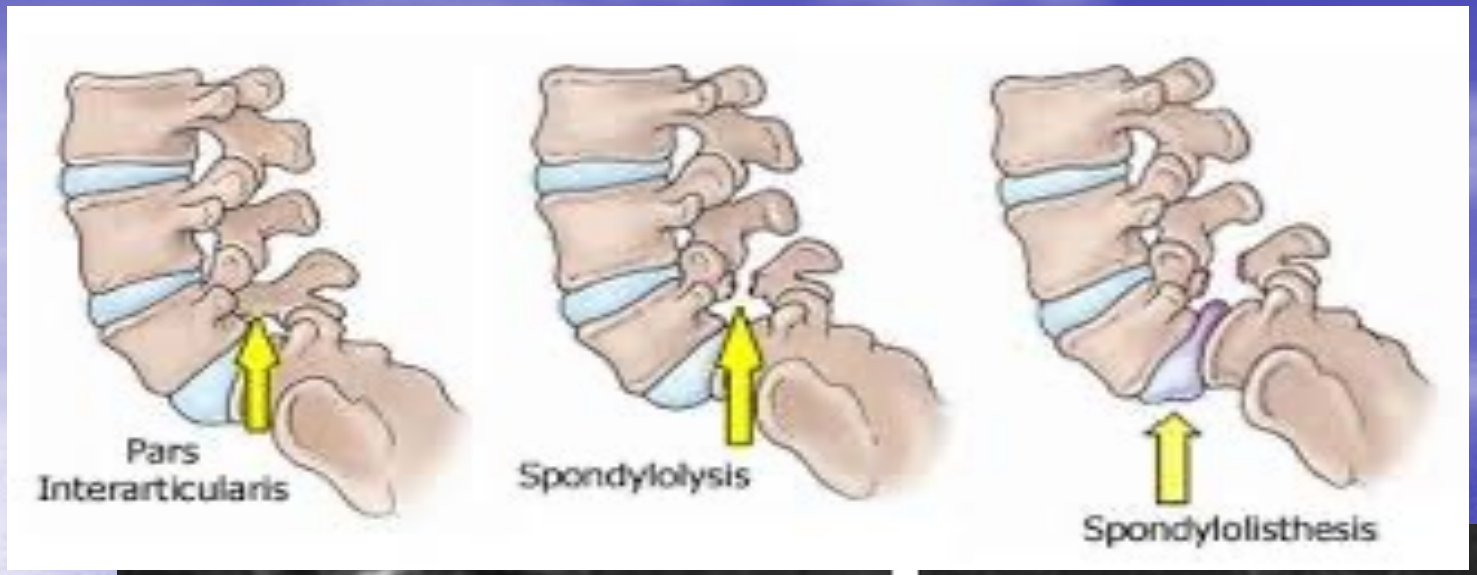
MC type 2
Hyperintense on T1w and hyper- or isointense on T2w.
Characterized by lipid marrow replacement.

MC type 3
Hypointense on T1w and T2w.
Characterized by calcification of the endplate and subchondral vertebral marrow.

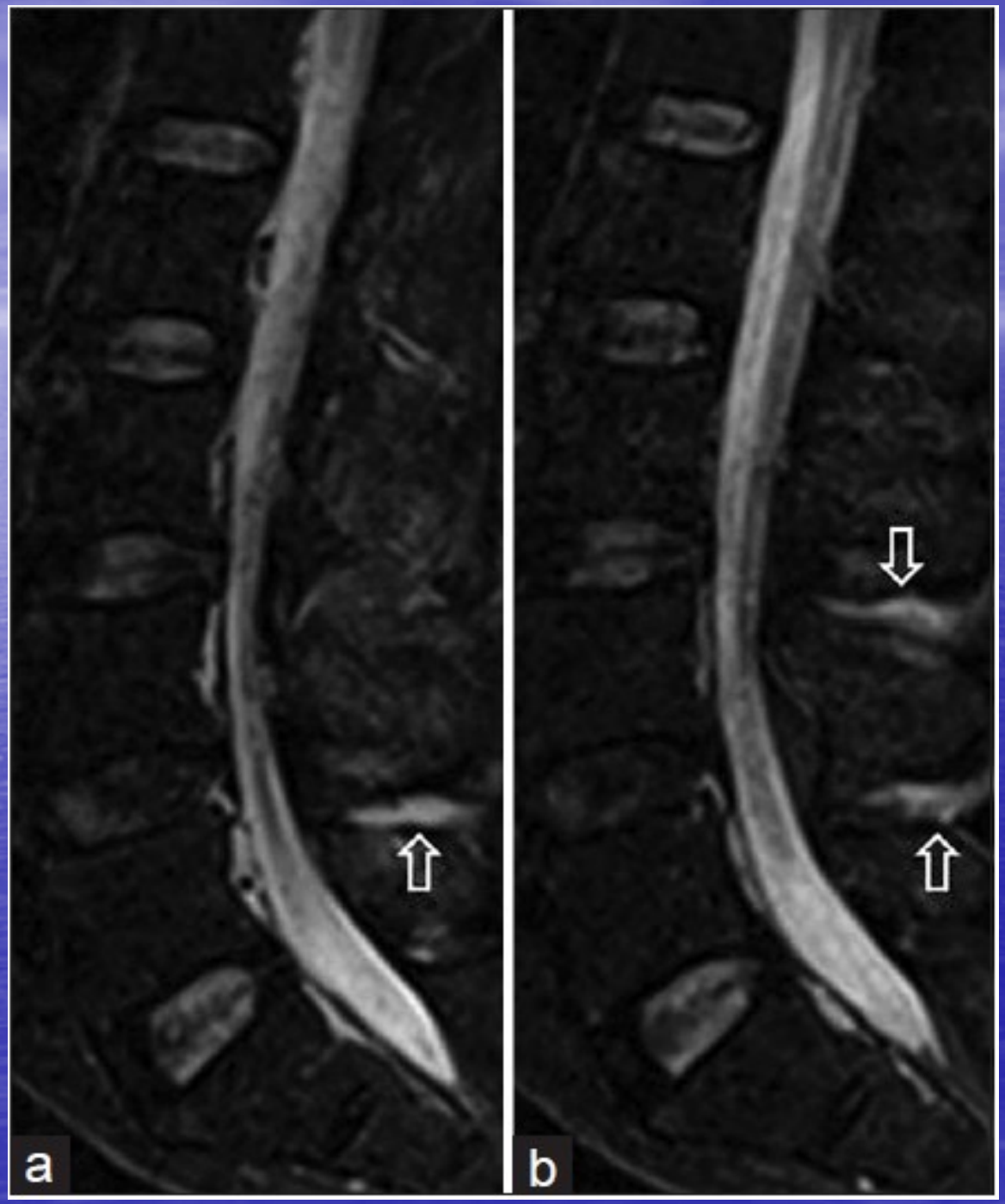
T1-weighted (T1w)
T2-weighted (T2w)

THE TREATMENT PRO

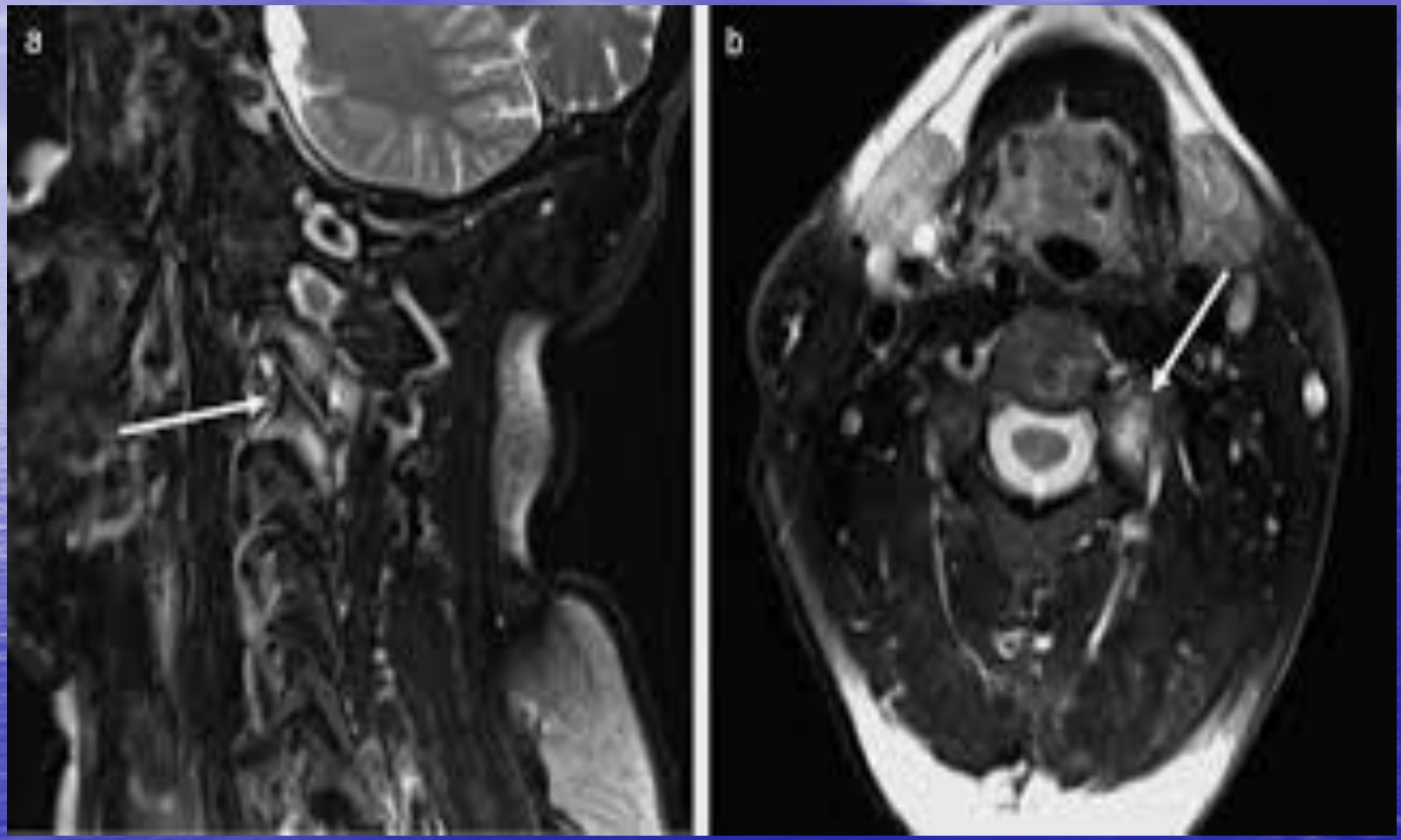



Pars
Interarticularis
Spondylolysis
Spondylolisthesis


a.
b.

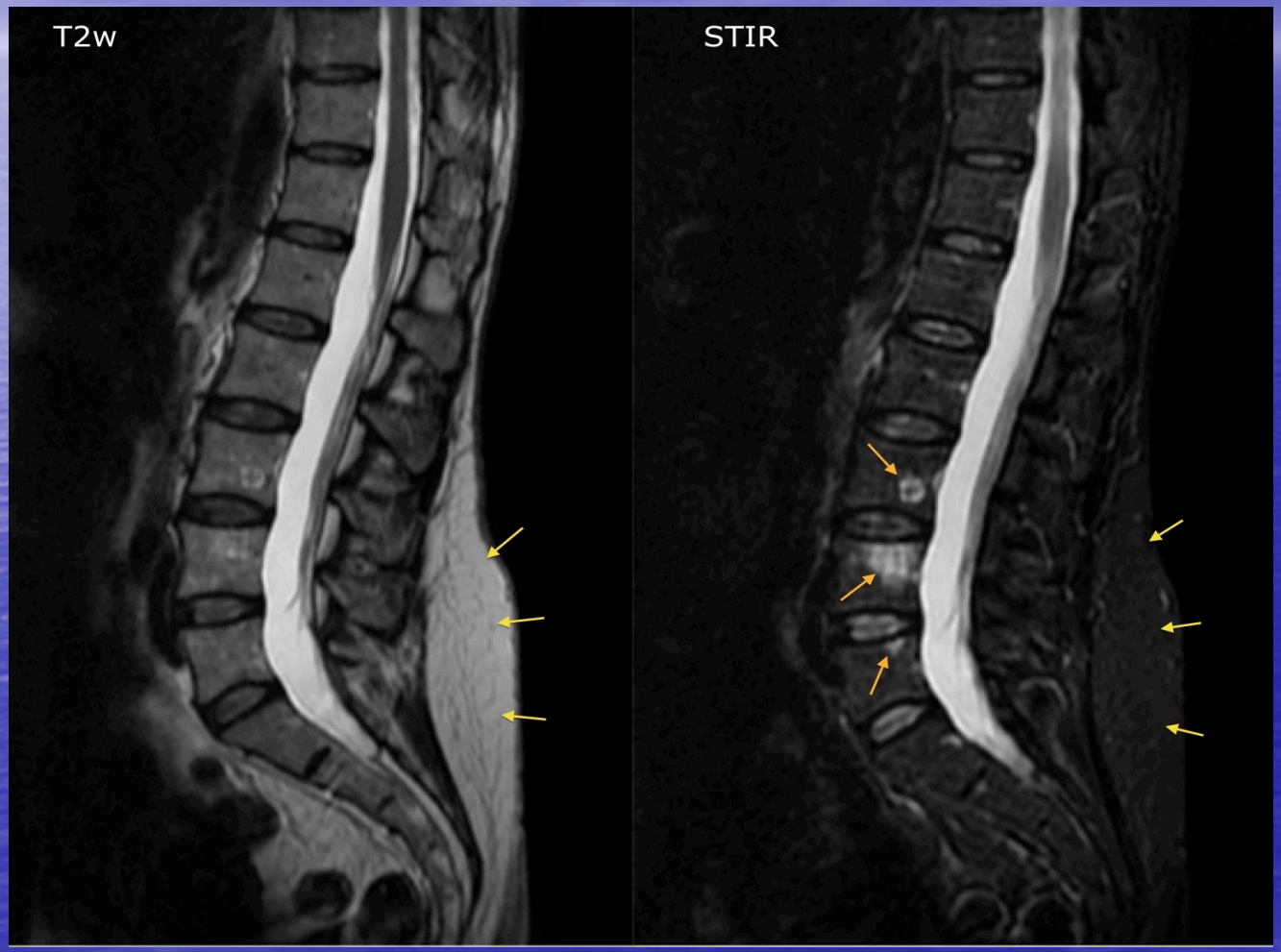

a
b

Traumatic Facet Arthropathy

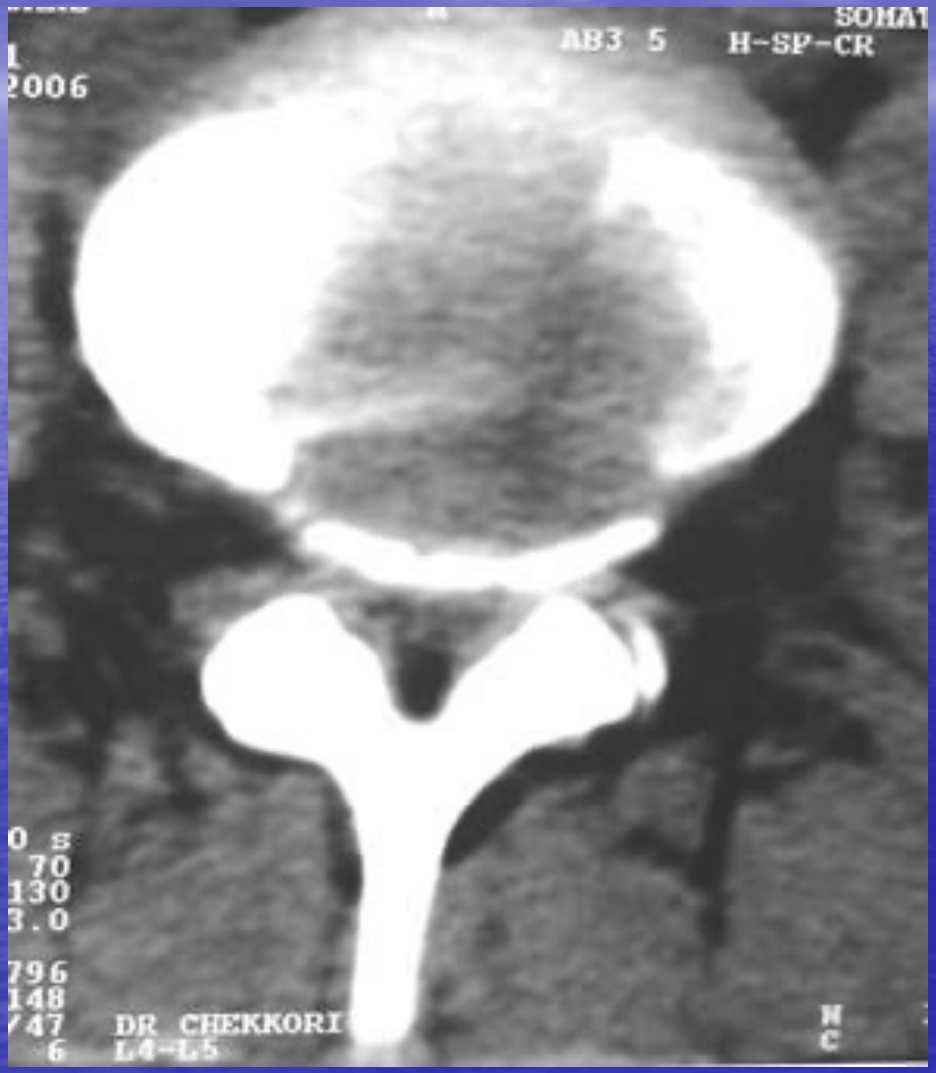


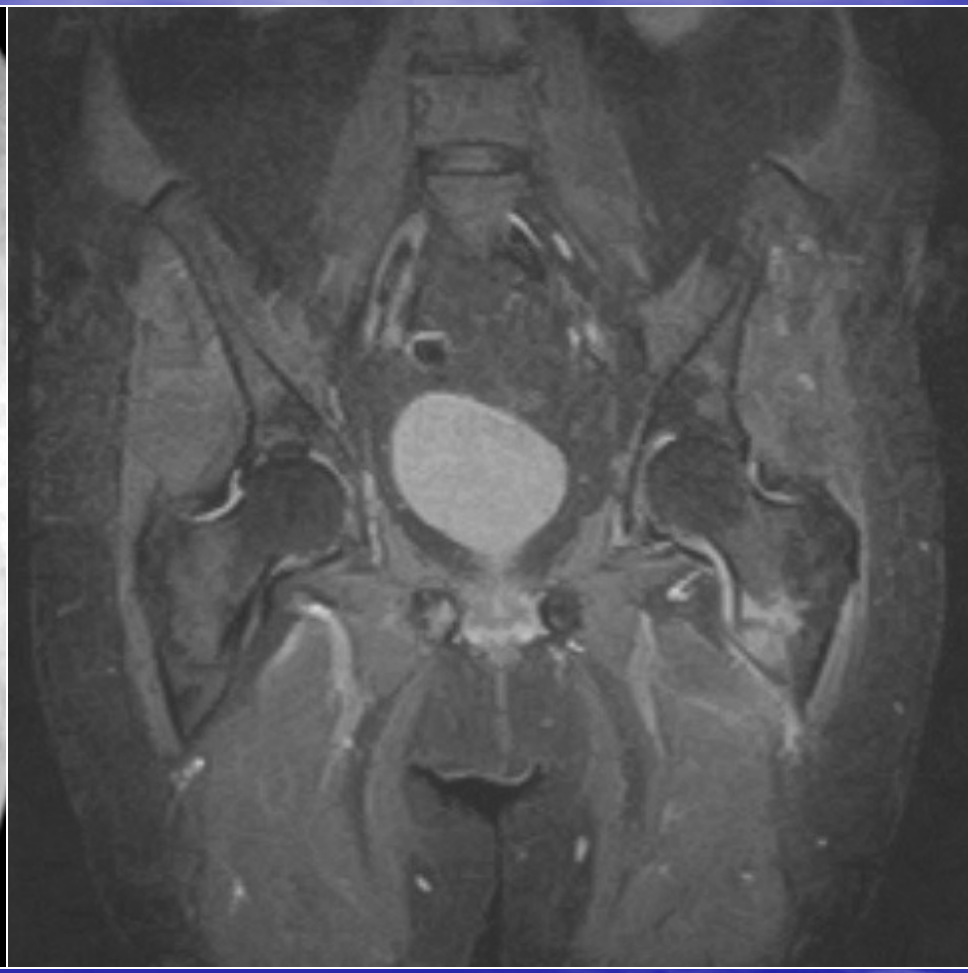

Signa 0.7T SYS#MROSOC1
COMRI SCMC
Ex: 781
Se: 102
Im: 6
OSag L3.2
ET:16
FSE/FL02A
TR:4500
TE:120/Ef
EC:1/1 12.5kHz
Cervical CTL
FOV:26x26
3.0thk/1.5sp
L1/04:39
320X224/4 NEX
AP/VB/TRF/FT/SPF
W = 289 L = 130

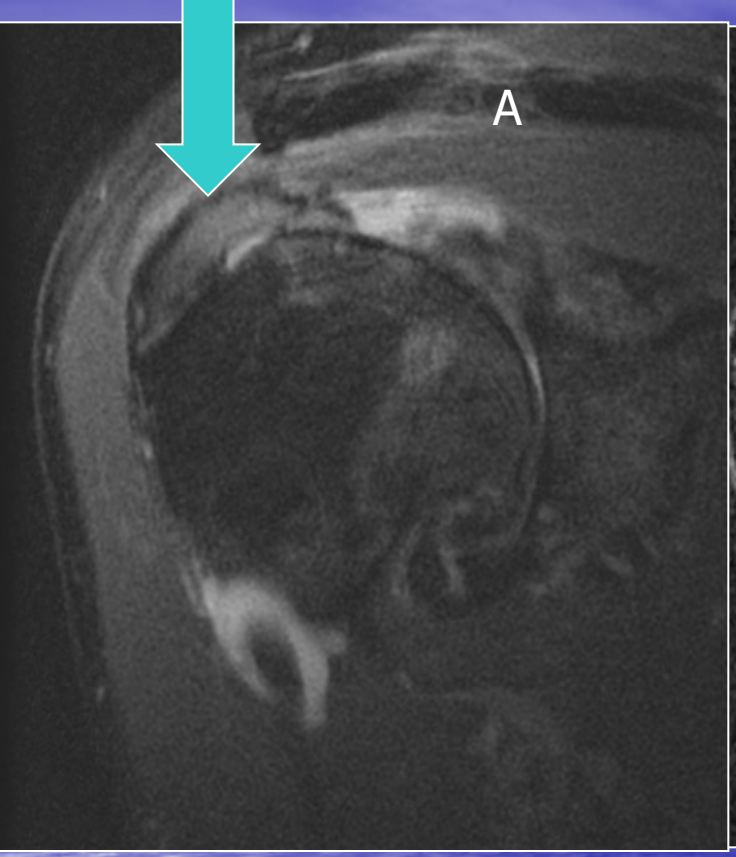
BONE METS



CT scan



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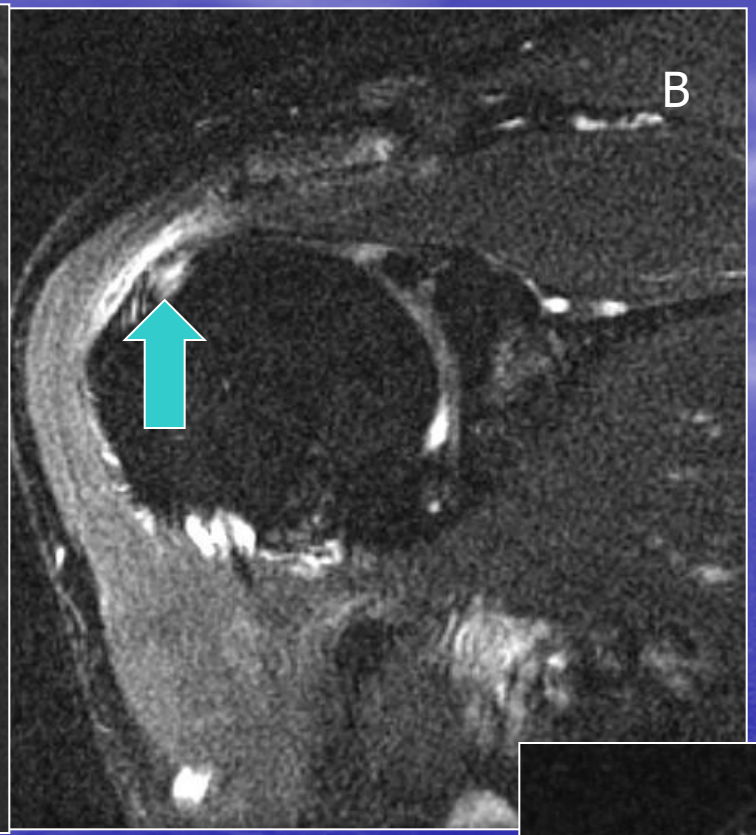
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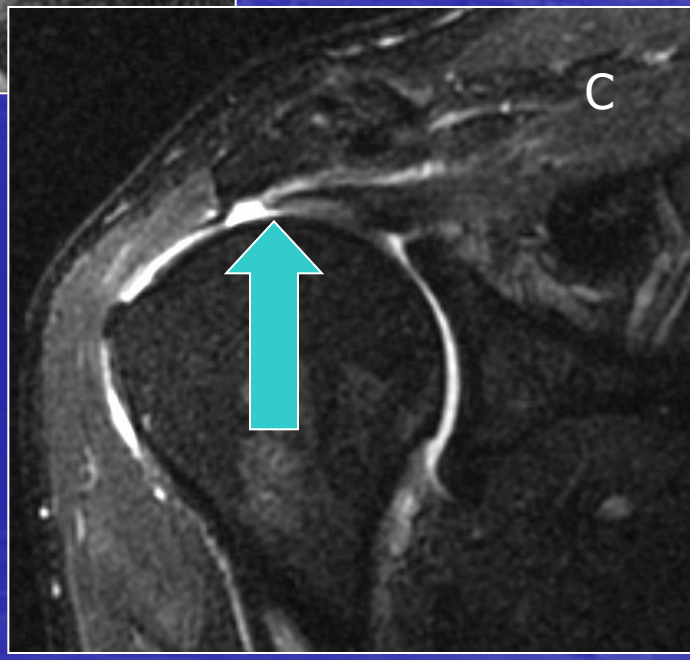
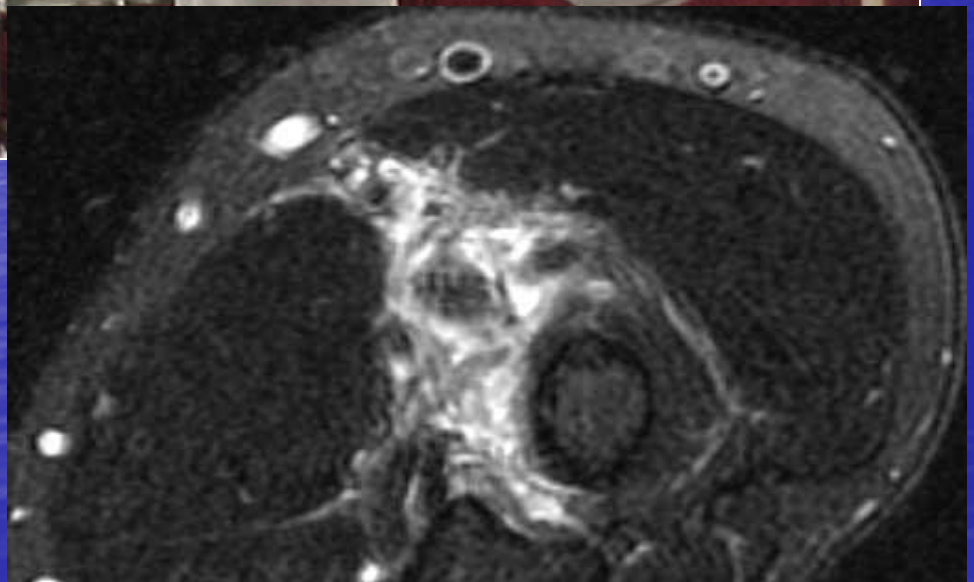
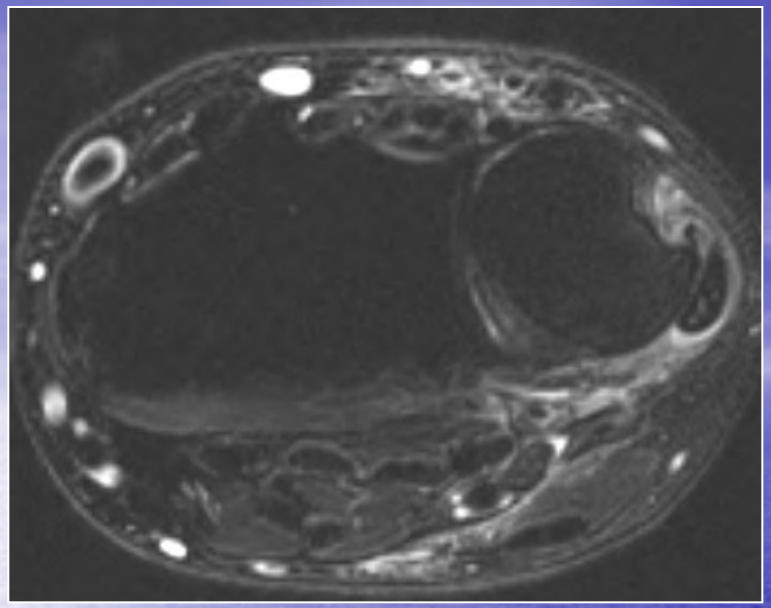
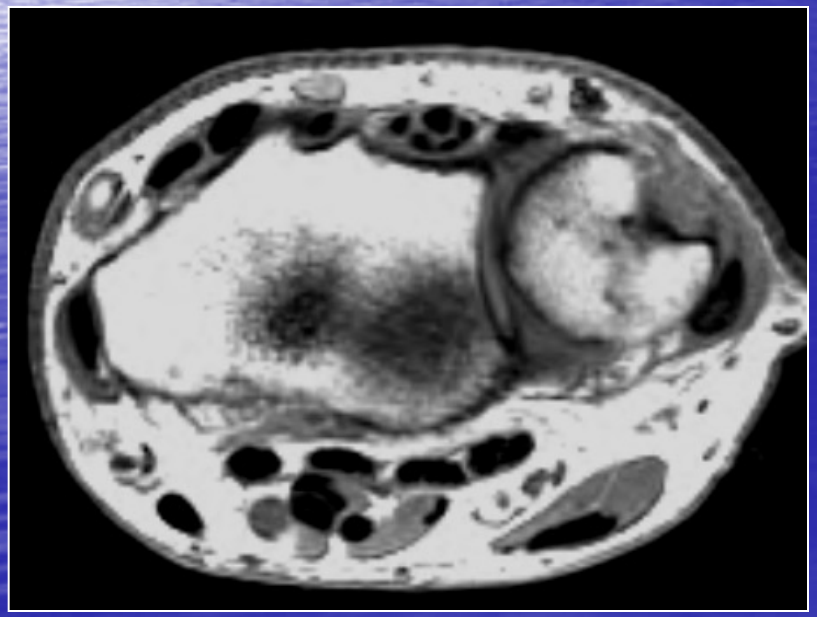

C

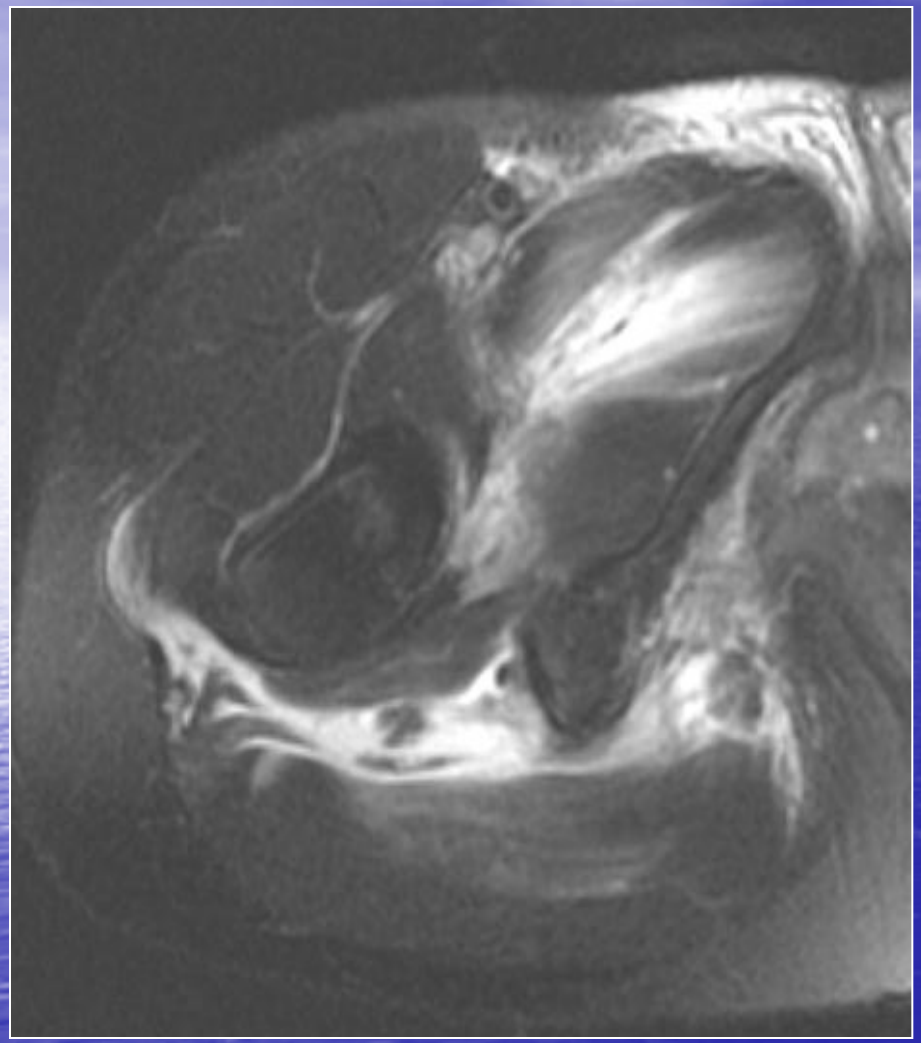
Limestone Open MRI and Imaging Center

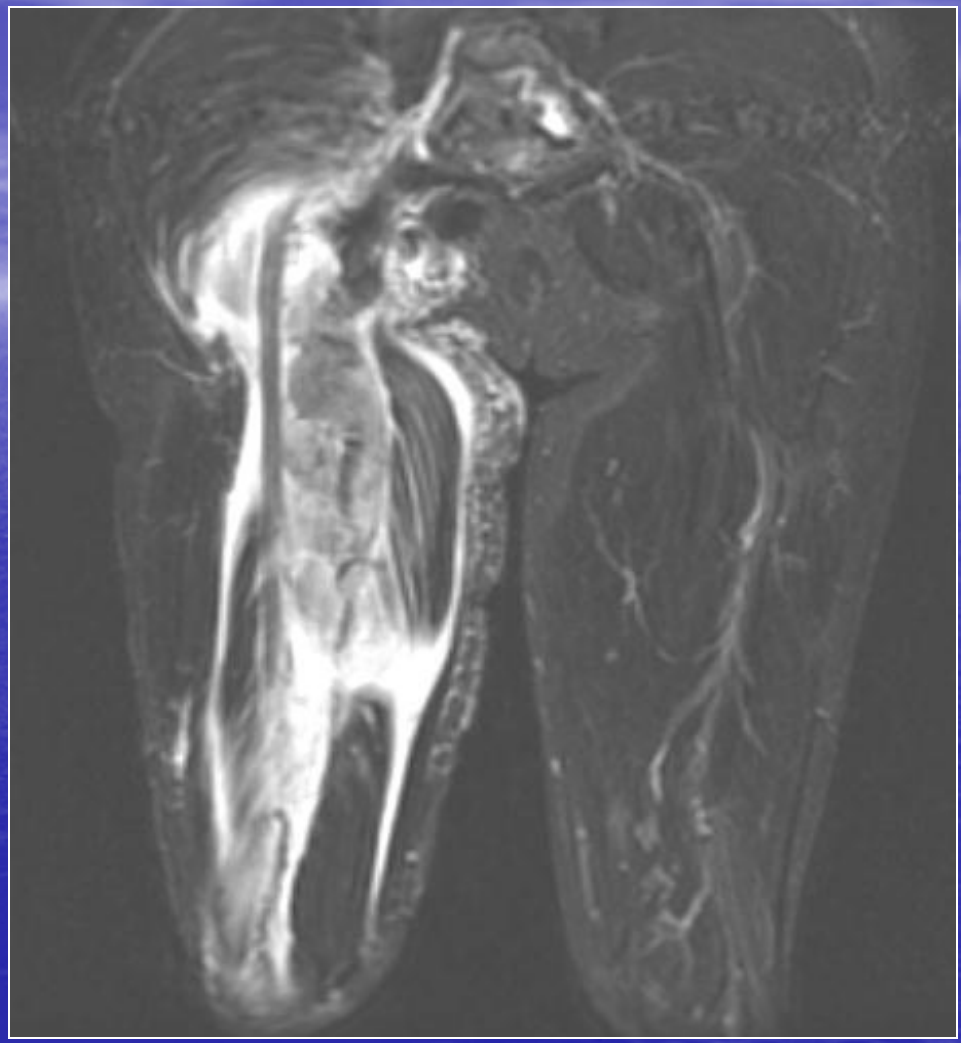




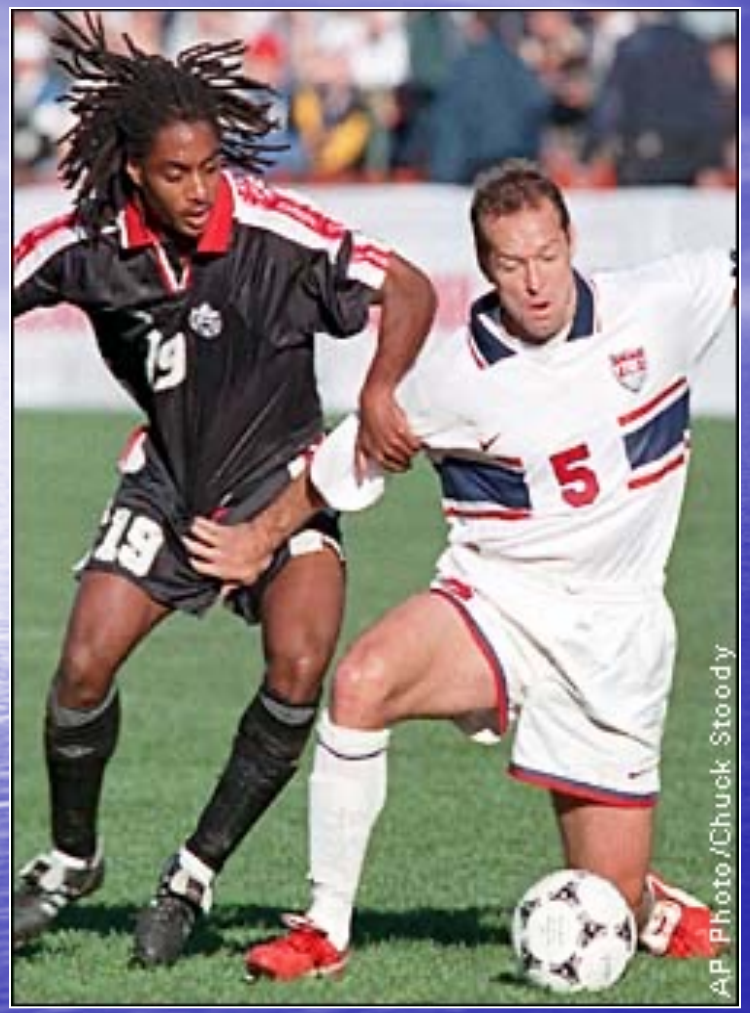



LAUSANNE

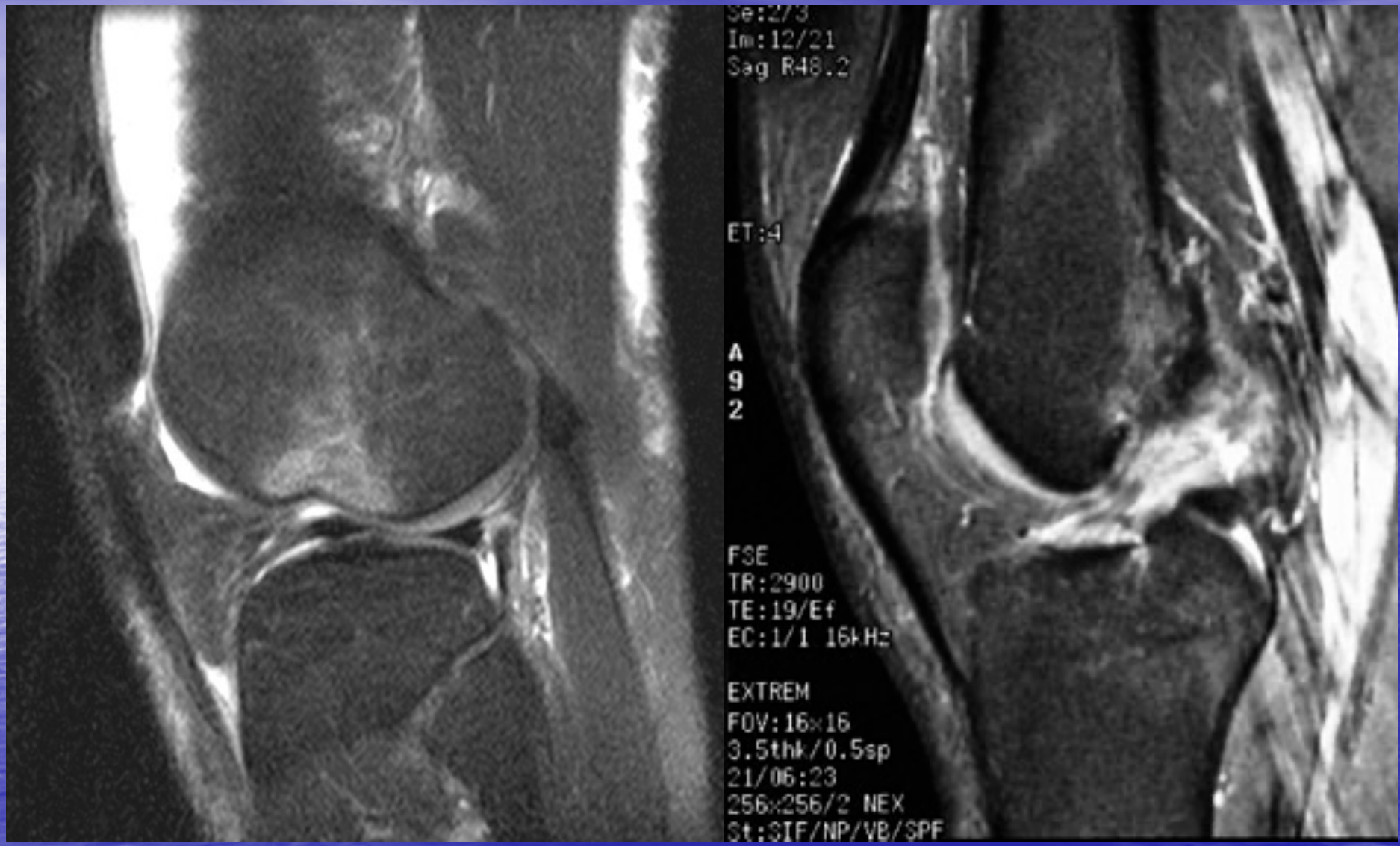




Limestone Open MRI and Imaging Center



Limestone Open MRI and Imaging Center



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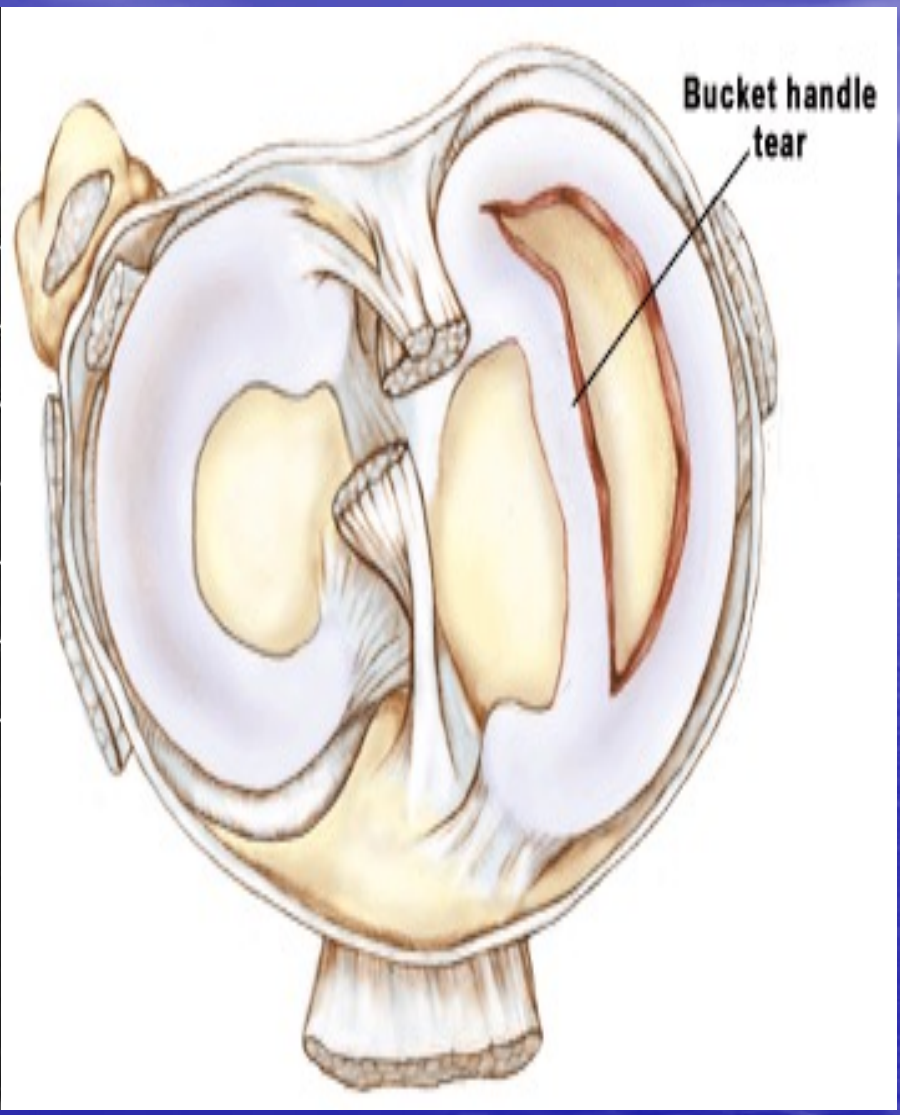
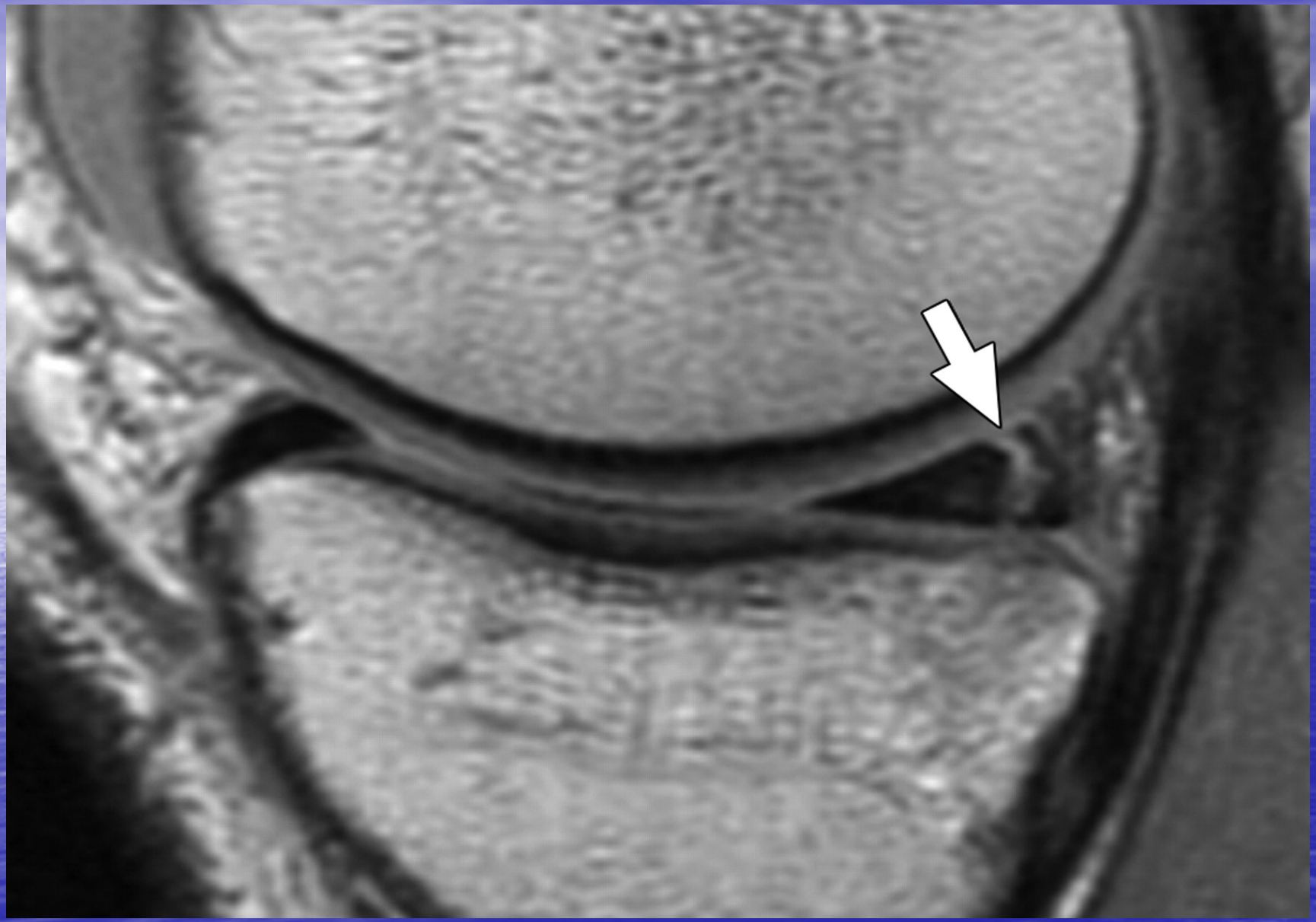
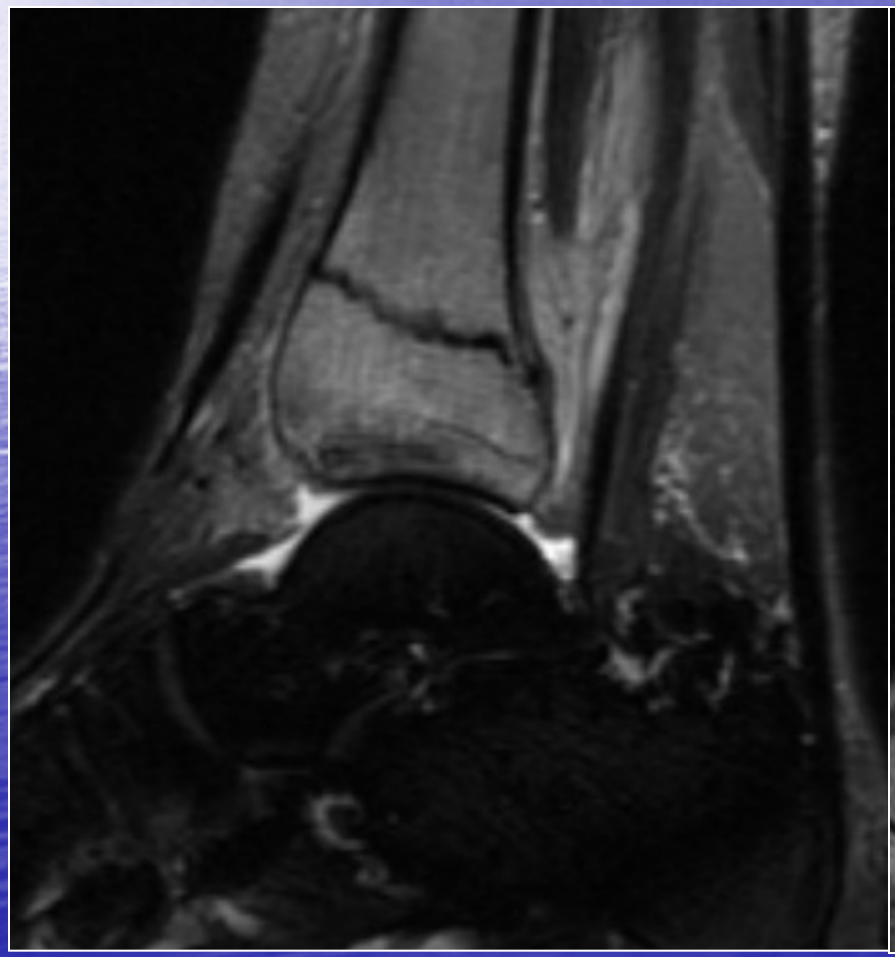


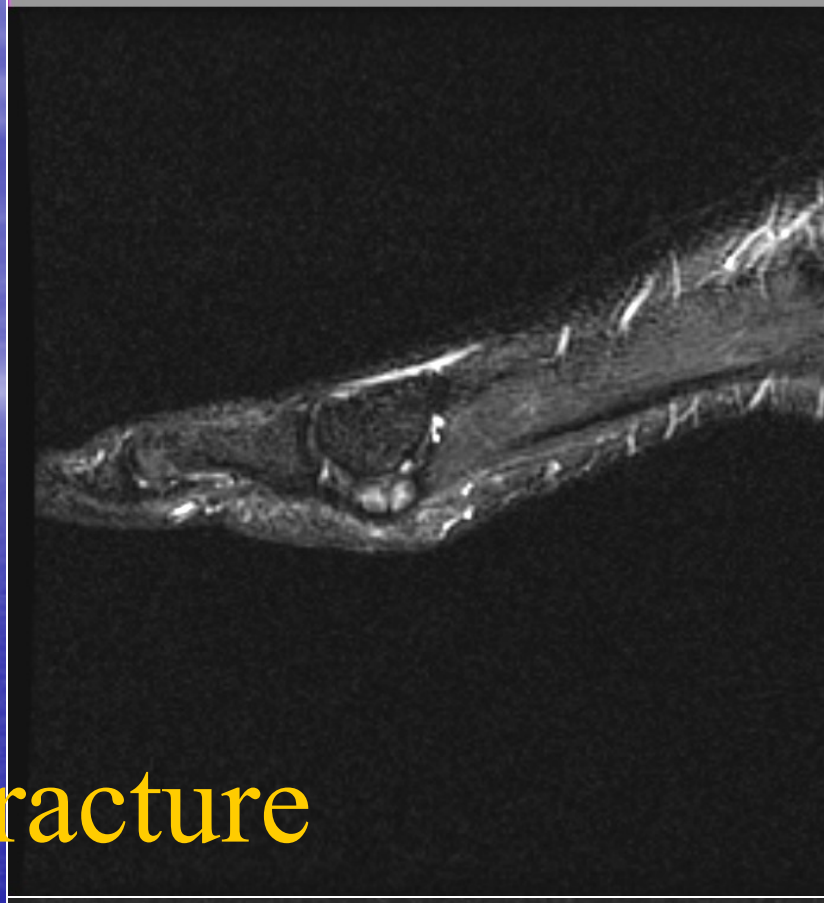
Limestone Open MRI and Imaging Center



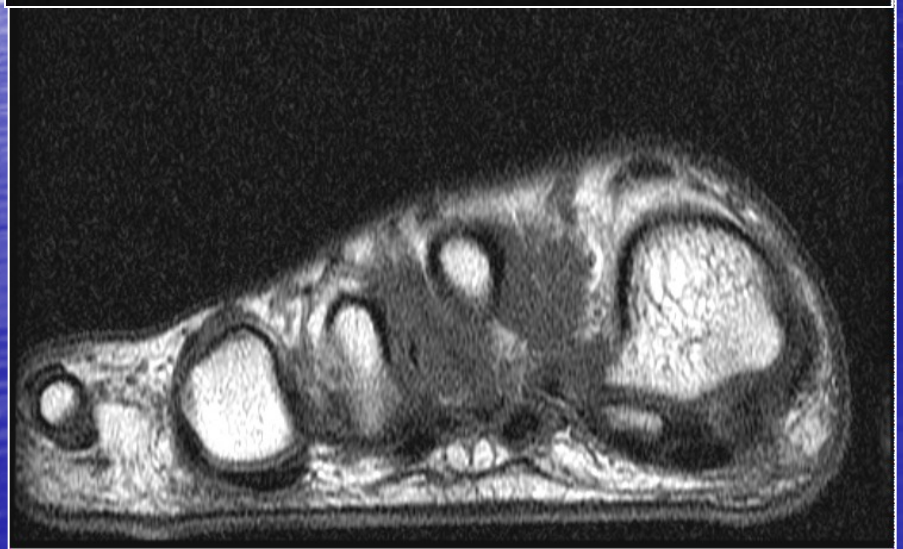
Negative radiographs

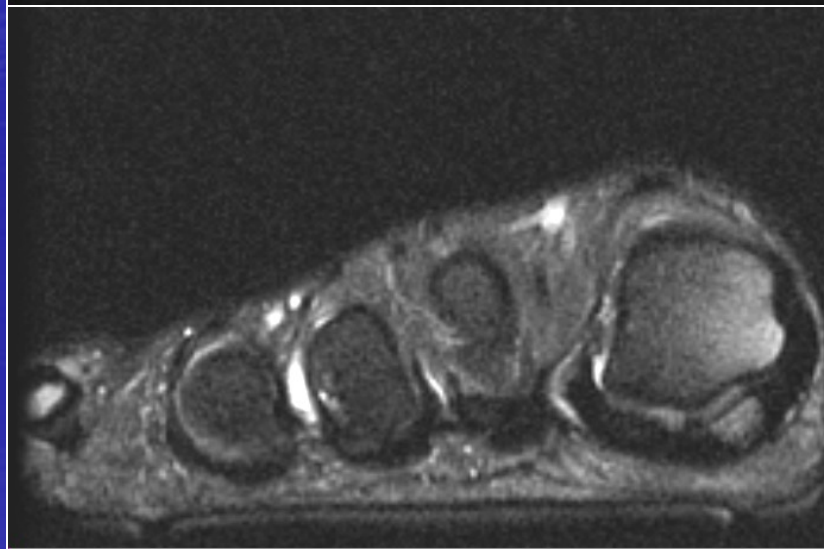
Occult Tibial Fracture





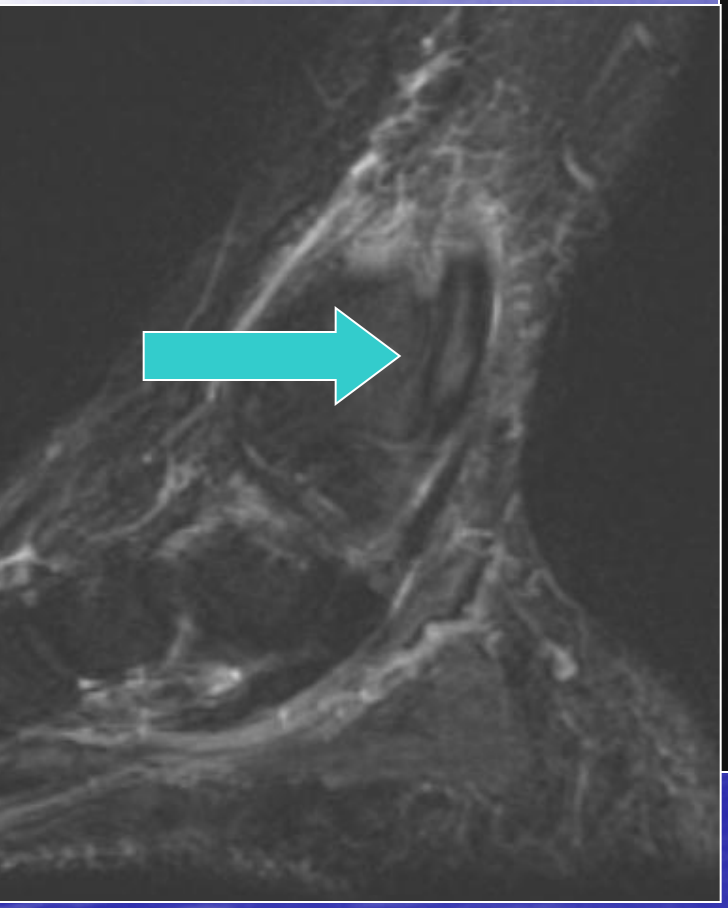
Sesamoid Fracture

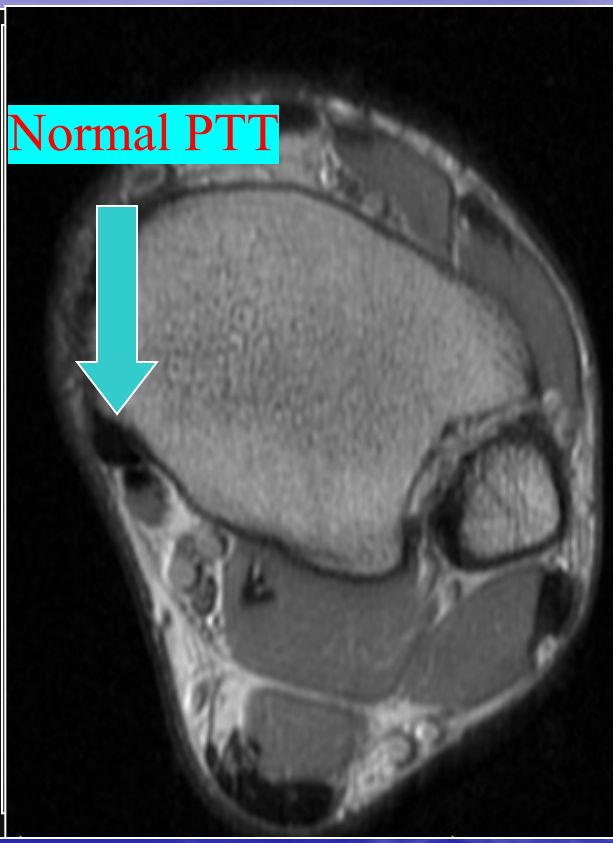




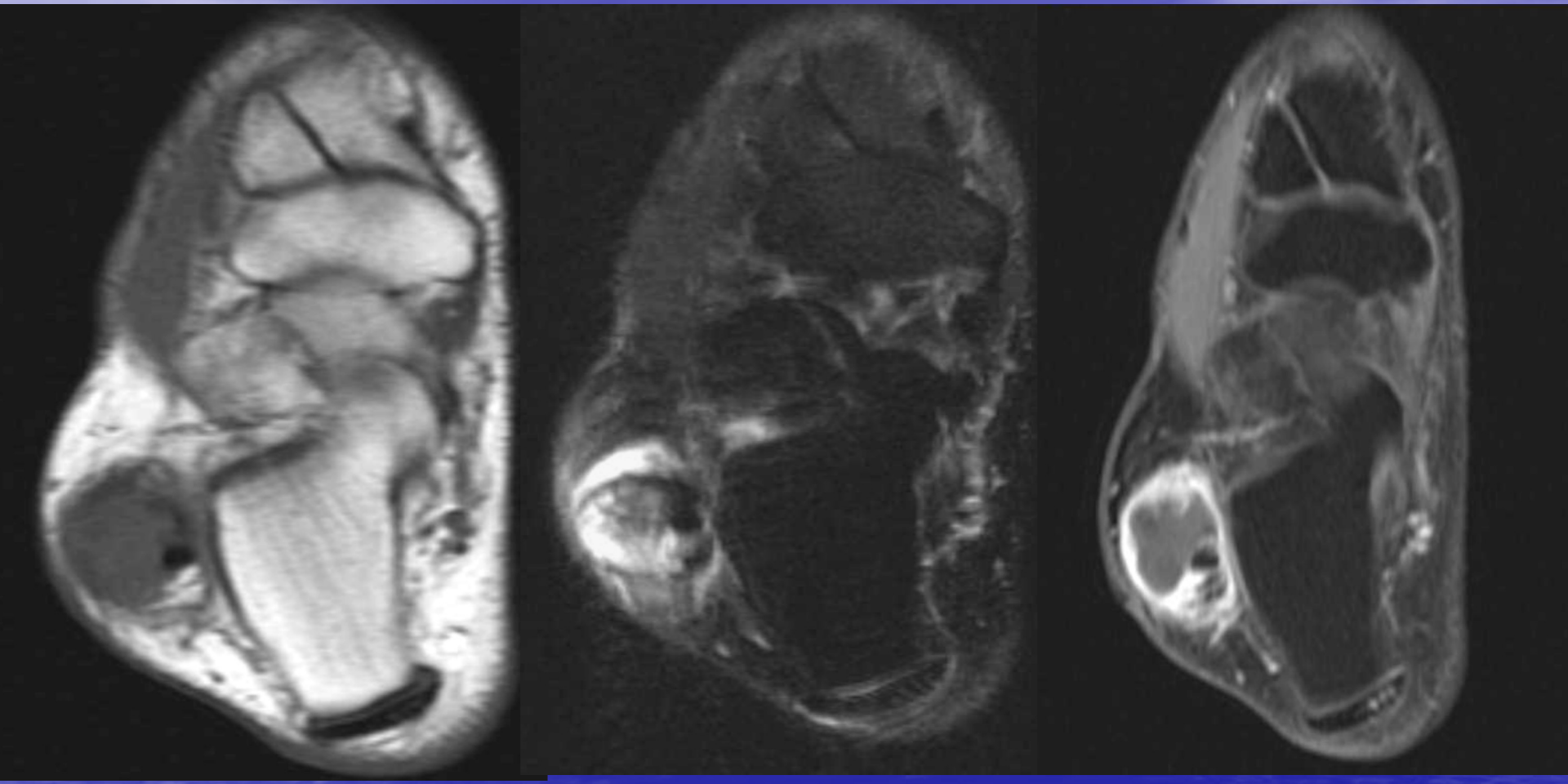
Limestone Open MRI and Imaging Center

Posterior Tibialis Tendon Dysfunction

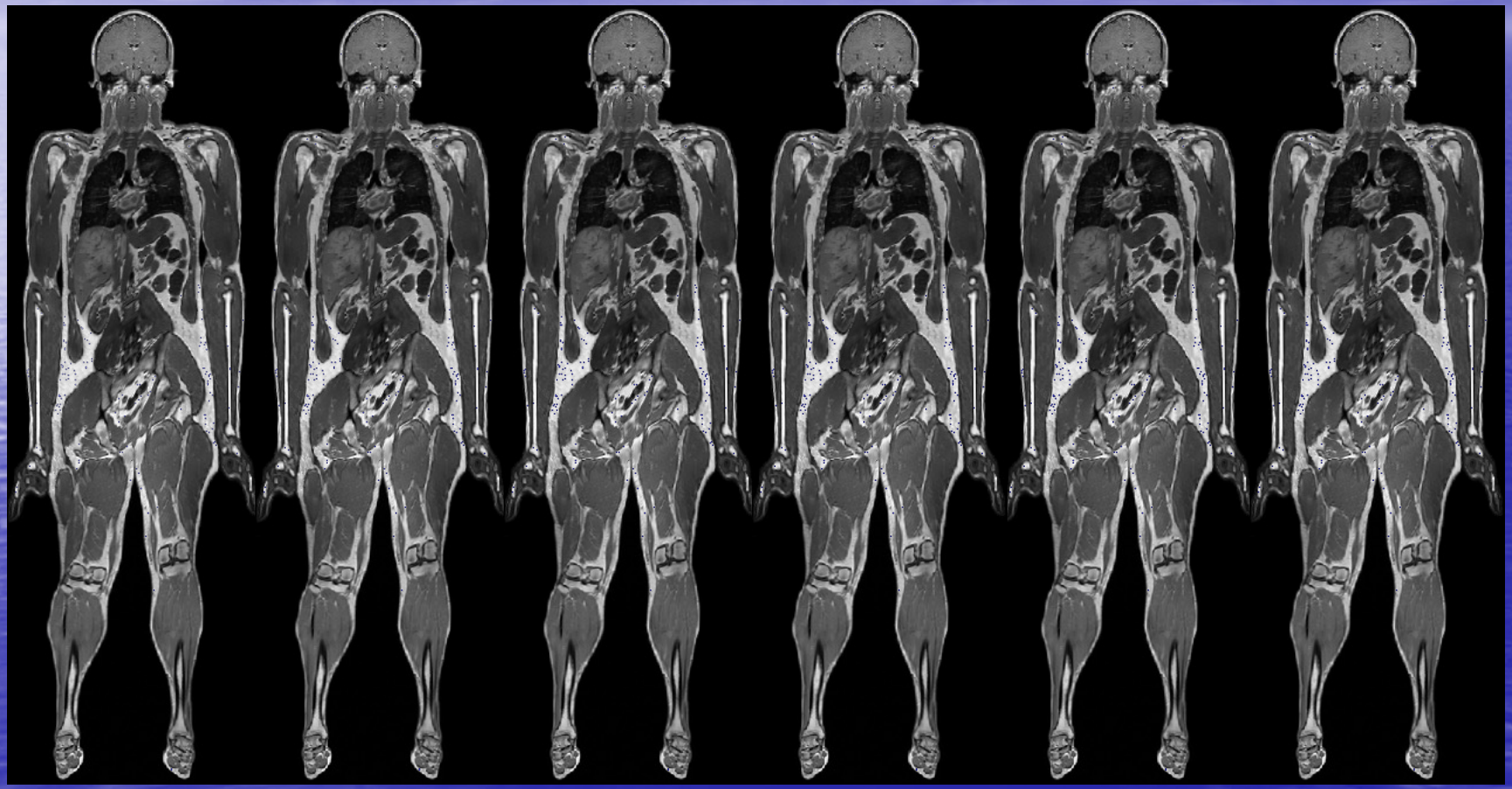




Limestone Open MRI and Imaging Center



Thank You!



Panel 8

Ethics and the Moral Compass of Workers' Compensation

==========

Amanda K. Dobies, Esquire
Kimmel, Carter, Roman, Peltz & O'Neill, P.A.

Andrew M. Lukashunas, Esquire
Tybout, Redfearn & Pell

Keri L. Morris-Johnston, Esquire
Marshall Dennehey

Angela G. Vest, Esquire
Doroshow, Pasquale, Krawitz & Bhaya

Kimmel Carter
Your Delaware Injury Lawyers

Amanda K. Dobies

Associate

CONTACT

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DIRECT (302) 565-6134
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EDUCATION

DOCTOR OF LAW (J.D.)
Widener University Schools of Law
2012-2015

BACHELOR OF ARTS
University of Delaware
Criminal Justice, Spanish
2008-2012

PROFESSIONAL ASSOCIATIONS

American Association for Justice

Delaware Trial Lawyers Association

Delaware State Bar Association

Randy J. Holland Delaware Workers' Compensation Inn of Court

BAR LICENSES

Licensed in Delaware

ABOUT AMANDA

Amanda Dobies is an associate attorney in the Newark office of Kimmel, Carter, Roman, Peltz & O'Neill, P.A. Mrs. Dobies has just under a decade of personal injury experience, focusing her practice on motor vehicle accidents and work-related accidents. Amanda is a lifelong Delawarean, obtaining her undergraduate degree from the University of Delaware and law degree from Delaware Law School, where she graduated Cum Laude.

Amanda is committed to representing individuals and families whose lives have been changed as a result of an injury. Amanda previously worked in house as staff counsel for one of The Country's top insurance companies, representing insureds through the litigation process. This insider's perspective gives Amanda an upper hand when representing clients, as she has firsthand experience working for an insurance company, where she spent years negotiating and fighting for her clients.

Amanda volunteers on a pro bono basis in family court, assisting families with protection from abuse orders, custodial issues and other related matters.

Amanda enjoys spending time with her husband, two children, and pack of rambunctious dogs. In her free time, Amanda cheers for Philly sports and likes to read and be active.

AWARDS

U.S. News: Best Lawyers: Ones to Watch™ (2024)
Delaware Super Lawyers Rising Stars, (2023)

501 Carr Road, Suite 300
Wilmington, Delaware 19809
tel: 302-658-6901 | **fax:** 302-658-4018
Email Us

Andrew M. Lukashunas

Director

PRACTICE FOCUS
defense of employers and insurance carriers involved in workers' compensation litigation

P 302-657-5565

F 302-658-4018

Email Me

Get Vcard

Professional Experience:

Andrew Lukashunas is a director with the firm, focusing primarily on the defense of employers and insurance carriers involved in workers' compensation litigation. Mr. Lukashunas began private practice in 2008 and joined the firm in 2012. He has represented clients at every level of the Delaware court system.

Mr. Lukashunas earned his Bachelor of Arts from Lycoming College in Williamsport, Pennsylvania in 2002 and thereafter relocated to Delaware. Mr. Lukashunas attended law school in Pittsburgh, Pennsylvania, earning his Juris Doctor and a certificate in international and comparative law in 2007 before ultimately returning to Wilmington to commence his legal practice.

Bar Admissions:

- Delaware (2008)
- New Jersey (2007)

Court Admissions:

- United States District Court for The Districts of Delaware and New Jersey

Education:

- J.D., University of Pittsburgh School of Law (2007)
- B.A., Lycoming College (2002)

Memberships:

- American Bar Association
- Delaware State Bar Association Workers' Compensation Section
- Randy J. Holland Delaware Workers' Compensation American Inn of Court.
- Defense Counsel of Delaware
- Delaware Claims Association

MARSHALL DENNEHEY

KERI L. MORRIS-JOHNSTON

SHAREHOLDER

AREAS OF PRACTICE

Workers' Compensation
Employment Law

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Wilmington, DE 19801

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

The Best Lawyers in America®, Workers' Compensation Law - Employers
2023-2024

Top Lawyer, Workers' Compensation Employer Defense, Delaware Today Magazine
November 2022

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.

In addition to managing the Workers' Compensation Department in the Wilmington office, Keri is also a member of the firm's Executive Committee Advisory Council, a distinguished group of firm leaders whose purpose is to enhance the communication between the Executive Committee and younger members of the firm's professional ranks, including associates, special counsel and junior shareholders.

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.

Ethics & the Moral Compass of WC

May 7, 2024 - 3:30 p.m. to 4:30 p.m.
Amanda K. Dobies, Andrew M. Lukashunas, Keri Morris-Johnston, Angela G. Vest

- **Disbarment of Richard Abbott**.
  - Violation of Rules:
    - 3.4(c) (cannot knowingly disobey an obligation under the rules of a tribunal);
    - 3.5(d) (shall not engage in conduct intended to disrupt a tribunal);
    - 8.4(a) (lawyer shall not violate the Rules of Professional Conduct);
    - 8.4(c) (cannot engage in dishonesty, fraud, deceit, or misrepresentation);
    - 8.4(d) (cannot engage in conduct that is prejudicial to the administration of justice).
  - Abbott represented a party who failed to trim her trees and shrubs in compliance w/ a consent order and then instructed her to enter into a sham transaction to frustrate the specific performance of an agreement.
  - He then went on to make accusations of corruption and mental illness against the Vice Chancellor and the Court.
  - IMPORTANTLY: Abbott never showed any remorse or admitted to any wrongdoing whatsoever.

- **Moral Compass and WC**
  - Treatment of newer practitioners in accordance w/ the Delaware Way; You'll never forget when someone either treats you with kindness OR when someone burns you.
    - Examples of how colleagues went out of their way to assist one another.
    - Examples of what NOT to do when dealing with opposing counsel.
    - RULE 3.4: Fairness to opposing party and counsel
      - Lawyer shall not obstruct another party's access to evidence or unlawfully alter, destroy, conceal a document having evidentiary value;

  - Litigation strategy
    - Try not to sit on cases, but understand that both Plaintiff docs and defense docs are few and far between, difficult to schedule with
      - Schedule DME when the petition is filed to avoid delay.
      - **Rule 3.2**: Expediting Litigation; a lawyer shall make reasonable efforts to expedite litigation consistent w/ the interests of the client.
    - Why not sign FR when claimant is released to full duty?

- Avoiding disciplinary complaints
    - Careful selection of cases and clients;
    - Leading complaint is inadequate communication- RULE 1.4
        - Document your file
    - Competency- Rule 1.1
        - Show your work- reflect that you were diligent in researching the matter, considered alternative strategies, sent notices and copies of pleadings and reminders to clients

- Rule 6.1 voluntary pro bono public service
    - A lawyer should render public interest legal service
    - Keep track of services provided
    - Consider helping with PFAs through DVLS, done a little different post-COVID; case reviews are conducted via Zoom, only need to go to Court if the PFA goes forward

- WELLNESS- Take care of yourself
    - Exercise and move your body
    - It can take just one minute of your time to center your breathing and relax yourself
    - Eat nutritious foods
    - SELF CARE!

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF A MEMBER OF THE BAR OF THE SUPREME COURT OF DELAWARE	§	
	§	No. 25, 2023
RICHARD L. ABBOTT, ESQUIRE,	§	Board Case No. 112512-B
Respondent.	§	

Submitted: June 28, 2023
Decided: November 9, 2023

Before **TRAYNOR**, **LEGROW**, and **GRIFFITHS**, Justices.

Upon Review of the Reports of the Board on Professional Responsibility. **DISBARRED**.

David A. White, Esquire, Chief Disciplinary Counsel, and Kathleen M. Vavala, Esquire, Deputy Disciplinary Counsel, Office of Disciplinary Counsel, Wilmington, Delaware.

Richard L. Abbott, Esquire, Hockessin, Delaware.

***PER CURIAM*:**

This lawyer disciplinary proceeding arises from Respondent Richard L. Abbott's conduct in *Seabreeze Homeowners Assoc. v. Jenney*, C.A. No. 8635-VCG (Del. Ch.) ("Seabreeze Litigation")—a dispute over the trimming of trees and shrubbery between a homeowners' association and a property owner—as well as statements he made in filings related to this disciplinary proceeding. We cannot help but lament that a seemingly mundane lawsuit would escalate into a nasty feud and, in turn, prompt Abbott, an experienced litigator, to ignore fundamental ethical constraints, putting his privilege to practice law at risk. The genesis of this disciplinary action was advice Abbott gave to his client to help the client violate an order and bench rulings issued by the Court of Chancery. The advice and the documentation that effectuated it was followed by misrepresentations to the court as to the client's status *vis-à-vis* the court's order and rulings. And when the trial judge who had issued the order and rulings learned of Abbott's dodgy stratagem and reported the matter to the Office of Disciplinary Counsel ("ODC"), Abbott's conduct only got worse. Abbott eschewed a lawyerly defense of his questionable actions and, despite being previously disciplined for similar misconduct, unleashed a persistent flurry of false invective impugning the integrity of the trial judge, ODC, and eventually this Court.

Not surprisingly, Abbott's conduct in the Seabreeze Litigation prompted ODC to open an investigation in 2015, which led to a petition for discipline in 2020. Through a variety of procedural maneuvers, Abbott succeeded in delaying ODC's filing of the petition and the Board on Professional Responsibility's consideration of the petition for years.

In due course, however, a panel of the Board on Professional Responsibility ("Panel") found that ODC established by clear and convincing evidence that Abbott violated Rules 3.5(d),[1] 8.4(c),[2] and 8.4(d)[3] of the Delaware Lawyers' Rules of Professional Conduct ("DLRPC"). The Panel found that ODC did not establish by clear and convincing evidence that Abbott violated Rules 3.4(c)[4] or 8.4(a).[5] A majority of the Panel ("Panel Majority") recommended a two-year suspension for Abbott's disciplinary violations. The chair of the Panel ("Panel Chair") recommended disbarment.

[1] Rule 3.5(d) provides that a lawyer shall not "engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal."
[2] Rule 8.4(c) provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."
[3] Rule 8.4(d) provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."
[4] Rule 3.4(c) provides that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists."
[5] Rule 8.4(a) provides that "[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another."

Both ODC and Abbott have filed objections to the Panel's findings and recommendations. After our independent review of the Panel's recommendations, we conclude that Abbott violated Rules 3.4(c), 3.5(d), 8.4(a), 8.4(c) and 8.4(d) of the DLRPC and that the appropriate sanction is disbarment.

I.

A.

The Seabreeze Litigation arose from a dispute between Marshall Jenney, the owner of two properties at 317 Salisbury Street and 318 Salisbury Street in Rehoboth Beach (collectively, the "Properties"), and the Seabreeze Homeowners' Association, Inc. ("Seabreeze"). In 2011, Seabreeze filed a Court of Chancery action against Jenney for a mandatory injunction requiring Jenney to trim trees and shrubs on the Properties. Jenney and Seabreeze resolved the action in a settlement agreement dated December 21, 2012 ("Settlement Agreement"). Under the Settlement Agreement, Jenney agreed to trim the trees and shrubs on the Properties and Seabreeze agreed to dismiss the action.

After Jenney failed to comply with the Settlement Agreement, Seabreeze instituted the Seabreeze Litigation in June 2013. Seabreeze sought specific performance of the Settlement Agreement. Jenney and Seabreeze

resolved the matter in a stipulation and consent order granted by the Court of Chancery on July 11, 2014 ("Consent Order"). Under the Consent Order, Jenney was required to take steps to ensure that the trees and shrubs on the Properties would be trimmed by October 31, 2014.[6] Time was of the essence.[7] Paragraph 17 of the Consent Order provided that it was "for the benefit of, and shall be binding on, all Parties and their respective successors, heirs, assigns, officers, and directors."[8] After Jenney failed to take the necessary steps for completion of the work by October 31, 2014, Seabreeze filed a motion for a rule to show cause hearing on November 3, 2014. On November 6, 2014, Jenney filed a response stating that he did "not refuse to have the work performed as expeditiously as possible" and requested an extension to have the work completed by November 21, 2014.[9]

B.

On December 5, 2014, Abbott entered his appearance for Jenney in the Seabreeze Litigation. Abbott was Jenney's fourth or fifth attorney since the filing of the original action in 2011. Between December 2014 and March 2015, the parties filed competing motions and appeared before the Vice

[6] Consent Order ¶ 2, Admitted Hearing Exhibit (hereinafter referred to as "Ex. __"), Ex. 196 at Ex. 1 ¶ 2.
[7] *Id.* ¶ 13.
[8] *Id.* ¶ 17.
[9] Respondent's Response to Petitioner's Motion for Rule to Show Cause Hearing for Respondent's Violation of the July 11, 2014 Consent Order, Ex. 197 ¶ 11.

Chancellor multiple times. As described by the Panel, "Seabreeze generally alleged that Jenney failed to comply with the Consent Order by not trimming the trees and shrubs; Jenney generally accused Seabreeze of interfering with Jenney's attempts to comply with the Consent Order."[10] The Vice Chancellor reaffirmed Jenney's obligation to trim the trees and shrubs in bench rulings on January 15, 2015 and February 23, 2015.

At the February 23, 2015 hearing, the Vice Chancellor directed the parties to submit a proposed form of order encompassing how the trees and shrubs were to be trimmed within a reasonable amount of time and the attorneys' fees to be awarded to Seabreeze for Jenney's breach of the Consent Order. Abbott and Seabreeze's counsel exchanged emails regarding the proposed form of order. On February 25, 2015, Seabreeze's counsel submitted a form of order to the Court of Chancery ("February 25, 2015 Order"). The Vice Chancellor granted the order shortly thereafter.

Later that day, Abbott filed a motion for reargument, arguing that Seabreeze's counsel had misrepresented Abbott's agreement to the form of order and included language in the order that was not discussed or contemplated at the February 23, 2015 hearing. On behalf of Jenney, he

[10] July 11, 2022 Recommendation of Panel of Board on Professional Responsibility on the Discipline of Richard L. Abbott, Esquire (hereinafter referred to as "July 11, 2022 Recommendation at __") at 15.

sought attorneys' fees incurred in filing the motion for reargument. Seabreeze's counsel objected to Abbott's statements and filed a counter-motion for Rule 11 sanctions.

After additional submissions by the parties, the Vice Chancellor held a hearing on March 3, 2015, and made several rulings ("March 3, 2015 Bench Rulings"). The Vice Chancellor modified the February 25, 2015 Order to, among other things, remove language finding Jenney in contempt. As a result of the March 3, 2015 Bench Rulings, Jenney had to complete the trimming of the trees and shrubs on 318 Salisbury Street within eight weeks of the February 25, 2015 Order, which was April 22, 2015.

The Vice Chancellor directed the parties to submit additional documents regarding the amount of attorneys' fees sought by Seabreeze. As to Jenney's request for attorneys' fees, the Vice Chancellor described Seabreeze counsel's conduct as possibly "less than precise or best practice legal work," but found no intentional misrepresentation or bad-faith litigation conduct that merited an award of attorneys' fees.[11] Seabreeze withdrew the motion for Rule 11 sanctions. On March 6, 2015, Seabreeze informed the Court of Chancery that more trimming work needed to be performed at 317 Salisbury Street.

[11] Ex. 52 at 21.

C.

On March 7, 2015, Abbott sent Jenney an email outlining a legal strategy to avoid enforcement of the Settlement Agreement, Consent Order, and March 3, 2015 Bench Rulings. Abbott first opined that it was clear Seabreeze would not stop harassing Jenney while he owned the Properties and that the Vice Chancellor did not understand this or care about the amount of harassment over trees and shrubs. He then stated that, as previously discussed, conveying title to another entity controlled by Jenney was not a viable option for circumvention of the Settlement Agreement and Consent Order because the Vice Chancellor would likely exercise his equitable powers to make Jenney personally responsible. Abbott went on to advise:

> So this morning I came up with this theory – CONVEY BOTH PROPERTIES to [Jenney's wife].
>
> No tax consequences will result since she is your wife. And then I can advise the Court and [Seabreeze's counsel] that there is no need for any further activity in the case since it is now moot—i.e.[,] you are no longer the title owner AND the Settlement Agreement and Consent Order are purely personal obligations of yours that it would then be impossible for you to perform.
>
> If Seabreeze and [Seabreeze's counsel] wanted to make the obligation on trees and hedges to be perpetual, then they should have made them run with the land. But they did not—enabling me to happily point out that [Seabreeze's counsel] probably committed malpractice. Indeed, if you sold the properties on the market, then you would be off the hook. The same follows if you convey to [your wife].

> Now Seabreeze might file a new action against [your wife], but then we would have a clean slate to fight against them and get the case tossed out. [Seabreeze's counsel] will kick and scream that the transfer is a sham, but the law is the law. And a wife has not legally been deemed to be a mere legal extension/appendage of her husband since the Married Woman's Property Act passed in Delaware about 140 years ago.
>
> Let me know if you can do this, based on an Pre-Nuptial Agreement, any Trust, and any other financial or legal issues unique to you situation. You can just wait a few years and then have [your wife] convey the parcels back to you, at which time Seabreeze would likely do nothing (and if they did they would probably have to file a new case against you).[12]

Abbott did not mention the language in Paragraph 17 of the Consent Order providing that it was binding on Jenney's successors, heirs, and assigns. Jenney agreed to Abbott's proposed strategy. During the disciplinary proceeding, Jenney testified that Seabreeze had been harassing him and that Abbott advised him transferring the Properties would be a way to end the Seabreeze Litigation. Jenney also testified that at the time of Abbott's advice he "maybe, most likely" would transfer the Properties back to himself within six months.[13] After Jenney agreed to the proposed strategy, Abbott instructed his assistant to prepare the deed transfers and a letter to the Vice Chancellor informing him of the transfer of the Properties.

[12] Mar. 7, 2015 Email, Ex. 236.
[13] Nov. 10, 2021 Tr. at 991–92.

In a March 9, 2015 email, Jenney told Abbott that his wife was amenable to the transfer and asked about establishing a post office box as a legal address "to make it as hard as possible for her to be served."[14] Abbott responded that same day, advising that Abbott's address would appear on the deed and he would not accept service of any new filing.[15] Abbott also acknowledged Paragraph 17 of the Consent Order:

> First we will have to deal with [Seabreeze counsel's] inevitable filing with the Court challenging the effect of the transfer. I am hoping the Court wants to be rid of the matter and shoots him down. I am sure [Seabreeze's counsel] will argue that [your wife] takes title subject to all of the requirements imposed on you, which would be based on some unfortunate language in the Consent Order . . . "binding on heirs, successors, assigns." It is clear that the original Settlement Agreement did not run with the land, and was only binding on you[] personally, but the Order language could give [Seabreeze's counsel] a shot at arguing that it ran with the land.[16]

Based on Abbott's advice and assistance, on March 12, 2015, Jenney executed two deeds transferring the Properties to his wife, each for the nominal amount of $10.00. Abbott's office then recorded the deeds.

D.

In his March 16, 2015 letter to the Vice Chancellor ("March 16, 2015 Letter"), Abbott stated:

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[14] Mar. 9, 2015 emails, Ex. 237.
[15] *Id*.
[16] *Id.*

> I am writing to advise the Court that no further proceedings in this action will be necessary, other than on the pending requests for awards of attorneys' fees. The remainder of the action is now legally moot.
>
> Enclosed please find a copy of the Deeds transferring title from Marshall T. Jenney to Erin C. Jenney, which were recorded on March 13, 2015. As a result, Mr. Jenney no longer has any ownership interest in the properties and is therefore relieved of the purely *in personam* obligations under the Settlement Agreement.
>
> Mr. Jenney and I appreciate the Court's courtesies in this matter.[17]

Abbott did not mention Paragraph 17 of the Consent Order or that Jenney would continue to exercise control over the Properties.

On March 17, 2015, Seabreeze filed a renewed motion for a rule to show cause hearing on Jenney's violation of the Consent Order and a motion to join Jenney's wife as an indispensable party. Jenney opposed the motions and filed a motion to strike statements in Seabreeze's filings and a Rule 60(b) motion to reopen the Consent Order.

On April 13, 2015, the Vice Chancellor granted Seabreeze's motion to join Jenney's wife as an indispensable party. The Vice Chancellor also held an evidentiary hearing on Seabreeze's renewed motion for a rule to show cause that day. At the beginning of the hearing, the Vice Chancellor denied

[17] Ex. 57.

Jenney's motion to strike and Rule 60(b) motion. The Vice Chancellor then heard testimony from several witnesses including Jenney. When Jenney was asked if he ever had any intent of complying with the Consent Order, he testified:

> Well, I was so upset with my neighbors and the way I was treated, considering I was born and raised in this neighborhood that, you know, I figured that I still might sell the property. So I wanted to make sure with my lawyer that there was no language, you know, that would state that it would run with land or pass to the person I sold it to. So that was my thought process.[18]

Jenney initially denied discussing the transfer of the Properties with Abbott, but then admitted otherwise:

> Question: So you did discuss with Mr. Abbott the reasons for transfer from you to Erin Jenney of the two properties?
>
> Answer: Yes. So it was either I take the properties to market and sell them to circumvent, or, you know, my attorney said, "If you want to retain it, stay in the neighborhood and keep your family home, you can transfer it to your wife."
>
> Question: And you had that discussion about transferring it to your wife so that you didn't have to comply with the court order. Correct?
>
> Answer: Can you ask your question again?
>
> Question: Yeah. You had the discussion about transferring the two properties from you to your wife so you did not have to comply with the court order. Correct?

[18] Apr. 13, 2015 Tr. (Del. Ch.) at 56–57, Ex. 64.

Answer: I mean, it was—yeah. Yes.[19]

Jenney testified similarly at the disciplinary hearing, stating that the purpose of the transfer of the Properties was to end the Seabreeze Litigation and to force Seabreeze to start the case over again. Abbott also testified that the purpose of the transfer was to end the Seabreeze Litigation:

> [T]he deed transfer became a necessity, because essentially it was never going to end, otherwise, in my estimation, based on, you know, a few—two, three months of experience in seeing this, and No. 1, [Seabreeze's counsel] was going to continue I think I used at one point, "ad finitum" and "ad nauseam."[20]

After the witnesses testified at the April 13, 2015 hearing, Abbott argued, among other things, that he thought the Vice Chancellor was going to issue another written order after the March 3, 2015 hearing, but also said that he had calculated the eight-week deadline to complete the trimming work from the February 25, 2015 Order. He contended that Jenney was entitled to transfer the Properties and that, in any event, the transfer caused no harm because the Vice Chancellor had granted Seabreeze's motion to join Erin Jenney as a party.

At the conclusion of the hearing, the Vice Chancellor expressed his disbelief at what had transpired:

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[19] *Id.* at 61–62. Abbott did not object to this line of questioning at the hearing.
[20] Nov. 10, 2021 Tr. at 1225–27.

> [D]espite having done many, many, many homeowner cases, I have never had a defendant in one of those cases sit in a witness chair and tell me that he didn't intend to comply with his agreement because he was upset with his neighbors and he might want to sell the property. Nor have I ever had anybody sit in a witness chair and tell me that on advice of counsel, he had entered into a sham transaction to frustrate the specific performance of an agreement.
>
> It is shocking to me. It is unacceptable. It is unacceptable behavior for a litigant in this Court. It is unacceptable behavior for an attorney in this Court.
>
> So it's clear to me there was contempt of my bench order and of the stipulation and order of this Court. But we're not going to end this hearing today with me finding contempt because, like Mr. Abbott, I want to kill this action. I want it over.[21]

The Vice Chancellor suspended the hearing to be reconvened at the Properties to determine what needed to be trimmed and the proper remedy for contempt. The reconvened hearing at the Properties was scheduled for May 21, 2015.

On May 8, 2015, the Jenneys filed a notice of appeal in this Court. The Court dismissed the appeal because it was interlocutory and the Jenneys had not complied with Rule 42.[22]

E.

On May 21, 2015, the Vice Chancellor conducted a hearing at the Properties to determine the necessary trimming and then reconvened the

[21] Ex. 64 at 112–13.
[22] *Jenney v. Seabreeze Homeowners Ass'n, Inc.*, 116 A.3d 1244, 2015 WL 3824867, at *2 (Del. June 18, 2015) (TABLE).

hearing at the courthouse. At the courthouse, the Vice Chancellor confirmed his previous finding of contempt based on a sham transfer intended solely to avoid enforcement of a court order. The Vice Chancellor awarded Seabreeze its costs and attorneys' fees in responding to the transfer of the Properties and left it to Abbott and Jenney to determine who would pay. Recognizing this Court's exclusive role in addressing ethical violations, the Vice Chancellor stated that he would refer the matter to ODC.

On June 1, 2015, the Court of Chancery entered an order ruling that the necessary work had been completed at 317 Salisbury Street and setting forth the work on 318 Salisbury Street to be completed by June 30, 2015. On June 10, 2015, a Court of Chancery employee sent a letter to the then-Chief Disciplinary Counsel informing her of the Vice Chancellor's May 21, 2015 bench ruling and providing the docket entries and transcripts in the Seabreeze Litigation for a review of Abbott's conduct. On June 11, 2015, the Vice Chancellor reconfirmed his previous contempt findings and awarded Seabreeze fees and costs. The required work was completed and the case was dismissed on August 21, 2015.

Eight months after the transfer, Jenney reconveyed the Properties back to himself because he wanted to refinance loans that had remained in his name. During the disciplinary hearing, Jenney testified that he had just as much

control over the Properties after the transfer to his wife as he did before. As to 317 Salisbury Street, Jenney paid the taxes, bills, and maintenance, hired contractors as necessary, and collected rent. As to 318 Salisbury Street, he paid all the property taxes, bills, and maintenance costs. No one else undertook these responsibilities for either property.

II.

Since his referral to ODC in June 2015, Abbott has challenged or litigated aspects of this disciplinary proceeding in multiple venues. Some of his statements in this proceeding and other proceedings gave rise to additional disciplinary violations.

A.

In June 2015, Abbott filed a complaint against the Vice Chancellor in the Court on the Judiciary.[23] He alleged that the Vice Chancellor acted with bias against him in the Seabreeze Litigation. The former Chief Justice

[23] Court on the Judiciary proceedings are normally confidential. Ct. Jud. R. 17. But as discussed in then-Chief Justice Strine's denial of Abbott's motion for recusal in *Abbott v. Del. State Pub. Integrity Comm'n*, it could be fairly inferred from Abbott's filings in the Public Integrity Commission ("PIC"), discussed in more detail herein, that he had filed a complaint against the Vice Chancellor in the Court on the Judiciary. No. 155, 2018, Order (Del. Feb. 25, 2019). After learning of Abbott's complaint, ODC contacted the Clerk of the Court on the Judiciary for access to the Court on the Judiciary records. *Id.* at 6. *See also Abbott v. Del. State Pub. Integrity Comm'n*, 206 A.3d 260, 2019 WL 937184, at *6-7 (Del. Feb. 25, 2019) (TABLE). The Vice Chancellor consented to waive the confidentiality of the Court on the Judiciary records for the limited purpose of *In re Abbott*, ODC File No. 112512B. *Id.*

dismissed the complaint, concluding that the record was devoid of any facts or reason showing why the Vice Chancellor would be biased against Abbott.

On July 23, 2015, ODC advised Abbott that it had opened a file following the Vice Chancellor's referral. ODC asked Abbott to provide any documents he thought would be relevant to ODC's investigation. Abbott objected to the Vice Chancellor's referral, but indicated that he would provide documents.

In April 2016, ODC advised Abbott that ODC intended to proceed with a formal investigation because there was a reasonable inference that he had violated Rules 3.5(d), 4.4(a), and 8.4(d) of the DLRPC. As part of this investigation, ODC would determine whether to present the matter to a panel of the Preliminary Review Committee ("PRC").[24] The PRC could dismiss the matter, offer a sanction of a private admonition, or approve the filing of a petition for discipline with the Board.[25] Between May and September 2016, ODC and Abbott engaged in frequent communications and motion practice regarding various issues. These issues included ODC's efforts to obtain documents relating to Abbott's advice to Jenney about the transfer of the Properties, Abbott's requests that the then-Chief Disciplinary Counsel and the

[24] Delaware Lawyers' Rules of Disciplinary Procedure ("DLRDP") 9(b).
[25] *Id.*

then-Board Chair recuse themselves, and Abbott's requests for a stay pending resolution of his recusal requests.

On July 13, 2016, ODC filed a motion to compel the production of documents from Abbott concerning his advice about the transfer of the Properties. ODC also informed Abbott that it would present a disciplinary petition to the PRC on August 3, 2016, and that Abbott could submit written materials for the PRC to consider by July 26, 2016. ODC agreed later to defer presentation of the petition to the PRC until October.

On July 22, 2016, Abbott filed a complaint against then-Chief Disciplinary Counsel with the Public Integrity Commission ("PIC"). He alleged that there was an appearance of impropriety because she was pursuing the investigation to advance her own judicial ambitions and improperly seeking privileged documents. On August 24, 2016, the PIC dismissed the complaint for lack of jurisdiction.

On September 13, 2016, ODC informed Abbott that it would present a petition for discipline to the PRC on October 5, 2016. ODC also advised Abbott that he had to provide any materials he wished the PRC to consider by September 29, 2016.

On September 16, 2016, Abbott filed three motions with the Board that inappropriately attacked the Vice Chancellor. Abbott alleged, among other things, that:

> - Obviously, the Vice Chancellor wanted to mete out his anger all the more by attempting to harm me as a punishment for daring to do my job in furtherance of his own personal and emotional issues.[26]
>
> - The Court conducted a last minute, surprise "Star Chamber" proceeding, first announced at the end of the site visit, in order to tongue lash me and doctor up the record with conclusory, unsupported, and false *ad hominem* attacks on me.[27]
>
> - The allegation of "vexatious" transfer of title is also a figment of the Vice Chancellor's very active imagination.[28]
>
> - Rather than congratulating and applauding the undersigned counsel for his zealous representation through appropriate and permissible means, the Vice Chancellor's frustration, aggravation, and anger literally caused his emotions to get him carried away. He lashed out at the undersigned counsel and spouted out wildly unsupported and false statements in an effort to gin-up a record for purposes of this personal retribution proceeding.[29]
>
> - The fact that Vice Chancellor went to the lengths he did in attempting to besmirch the reputation of the undersigned counsel through false attack commentary constitutes clear evidence of his ill-intent and bad faith. He concocted a

[26] Sept. 16, 2016 Response in Opposition to Motion to Compel ¶ 9, Ex. 105.
[27] *Id.* ¶ 14(f) (emphasis in original).
[28] *Id.* ¶ 30.
[29] Sept. 16, 2016 Motion for Stay and Recusal of Board Chair ¶ 12, Ex. 240.

> fairytale story in the hopes that he could sell it to someone who would buy his spin and abuse the system by meting out his revenge on undersigned counsel despite the fact that no misconduct of any sort had occurred.[30]

That same day Abbott filed a complaint against the then-Board Chair with the PIC. With the complaint, he included two of the Board filings in which he made numerous inappropriate attacks on the Vice Chancellor.[31] The PIC dismissed the complaint.

On September 20, 2016, the then-Board Chair stayed ODC's motion to compel pending resolution of Abbott's motion to recuse. On September 21, 2016, Abbott filed a complaint for a writ of *certiorari* in the Superior Court, challenging the PIC's dismissal of his complaint against then-Chief Disciplinary Counsel. On September 23, 2016, the Jenneys filed a complaint against then-Chief Disciplinary Counsel with ODC. The Court appointed outside counsel to act as Special Disciplinary Counsel and to investigate the matter.[32]

On September 29, 2016, in anticipation of the October 5, 2016 PRC hearing, Abbott submitted information for the PRC to consider. He also

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[30] *Id.* ¶ 14. *See also* Sept. 16, 2016 Motion for Stay and Disqualification of ODC Counsel ¶ 15, Ex. 239 (describing the Vice Chancellor's referral of Abbott to ODC as a "bogus, unfounded, and ill-intended Complaint").

[31] Ex. 241 (enclosing copy of Motion for Stay and Recusal of Board Chair, Ex. 240 and Sept. 16, 2016 Response in Opposition to Motion to Compel, Ex. 105). *See also supra* nn. 26–29.

[32] This attorney later became Chief Disciplinary Counsel in 2021.

requested a stay of the matter. On September 30, 2016, ODC informed Abbott that it would withdraw its intended presentation to the PRC in light of his pending motion to stay and his request that the PRC stay its consideration of the matter.

On November 29, 2016, Special Disciplinary Counsel recommended that this Court dismiss the Jenneys' complaint based on his opinion that then-Chief Disciplinary Counsel did not violate the ethical rules by seeking discovery of Abbott's advice to the Jenneys regarding transfer of the Properties. This Court accepted the recommendation and dismissed the complaint.

On February 28, 2018, the Superior Court affirmed the PIC's dismissal of Abbott's complaint against then-Chief Disciplinary Counsel.[33] Abbott appealed the Superior Court's decision to this Court.

B.

On March 12, 2018, ODC filed a petition for Abbott's immediate interim suspension pending final disposition of the disciplinary proceeding. ODC alleged that Abbott's false and frivolous filings in this proceeding and other venues had interfered with ODC's disciplinary efforts and caused ODC

[33] *Abbott v. Del. State Pub. Integrity Comm'n*, 2018 WL 1110852, at *1 (Del. Super. Ct. Feb. 28, 2018).

to stay the disciplinary proceeding. On April 13, 2018, this Court held that consideration of the petition for interim suspension should be stayed while the matters forming the basis for the petition remained pending in the Delaware courts.

On February 25, 2019, this Court affirmed the Superior Court's decision in *Abbott v. Del. State Pub. Integrity Comm'n*.[34] On April 11, 2019, ODC, which had new Chief Disciplinary Counsel, moved to withdraw the petition for Abbott's interim suspension. Instead of moving to lift the stay of the petition, ODC had determined to proceed with investigation and, as warranted, proceedings before the PRC and Board. Abbott objected, arguing that the petition should be dismissed. The Court granted the motion to withdraw the petition.

In September 2019, the new Board Chair held a status conference and set a schedule to complete briefing on ODC's July 2016 motion to compel production of Abbott's advice to Jenney regarding the transfer. In his filings with the Board, which included a motion to dismiss, Abbott continued his inappropriate attacks on the Vice Chancellor and mounted one on this Court. For example, Abbott alleged that:

- ODC was acting in bad faith upon "the vindictive urging of the emotionally unhinged Vice Chancellor," the "wild

[34] 206 A.3d 260, 2019 WL 937184, at *1 (Del. Feb. 25, 2019) (TABLE).

ravings of the Angry Vice Chancellor," and the "ravings of an unhinged personality (the 'Maniacal Rant')."[35]

- The Maniacal Rant is unsupported by any evidence or legal analysis. It was simply a conclusory harangue of inflammatory buzzwords, which were carefully selected by the Angry Vice Chancellor to manufacture a record to further his diabolical plot to destroy Abbott for purely personal reasons.[36]

- The ODC foolishly relies upon the absurd and completely unfounded assertions of the Angry Vice Chancellor, whose every statement in this matter is inherently unreliable and non-credible based upon his obviously disturbed state of mind and ulterior motive to harm Abbott.[37]

- The Angry Vice Chancellor's extremely poor attitude and inability to think clearly and cogently is evident.[38]

- The Angry Vice Chancellor hoped to ruin Abbott's legal career based on a doctored up record and referral to the ODC.[39]

- If the ODC were to proceed against Abbott, he needs to take discovery from the Angry Vice Chancellor, including: (1) a deposition *ad testificandum* and *duces tecum*; (2) a physical examination through a psychiatrist and/or medical doctor; (3) document production regarding medications and records regarding any medical and/or any psychiatric condition(s).[40]

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[35] Oct. 4, 2019 Sur-Reply in Opposition to Motion to Compel Lawyer-Client Privileged Documents ¶¶ 1, 5, 14, Ex. 242.
[36] *Id.* ¶ 18 n.9.
[37] *Id.* ¶ 25.
[38] *Id.*
[39] Oct. 4, 2019 Motion to Dismiss ¶ 1, Ex. 243.
[40] Nov. 12, 2019 Reply in Support of Motion to Dismiss ¶ 48, Ex. 122.

- Psychological conditions such as mental transference, delusional episodes, memory lapses, or other disorders that the Angry Vice Chancellor may have suffered in 2015 must be discovered so as to explain why he was unable to competently assess and comment upon Abbott's (appropriate) conduct.[41]

- Disappointingly, the Delaware Supreme Court failed to intervene and promptly discipline the Disgraced Past CDC for her misconduct in that regard [the petition for interim suspension], instead looking a blind eye to corruption that has infected the ODC's dealings in this matter.[42]

- The Supreme Court is simply out to lunch and cannot be expected to exercise any legitimate supervision of the ODC….[43]

On November 14, 2019, the Board Chair granted ODC's motion to compel and denied Abbott's motion to dismiss. On December 9, 2019, the Board Chair denied Abbott's motion for reargument.

On December 16, 2019, ODC notified Abbott that it planned to present a petition for discipline to the PRC on January 8, 2020 for Abbott's violation of Rules 3.4(c), 3.5(d), 8.4(a), and 8.4(d). Abbott requested a postponement of the presentation, to which ODC agreed.

[41] *Id.*
[42] Oct. 4, 2019 Motion to Dismiss ¶ 16, Ex. 243.
[43] *Id.* ¶ 17.

On January 2, 2020, Abbott sent a motion to dismiss the disciplinary proceeding to the Justices by Federal Express. Abbott continued to attack the Vice Chancellor and the Court, alleging, among other things:

> - The Vice Chancellor hoped to harm Abbott based on a doctored up record and referral to the ODC.[44]
>
> - Disappointingly, the Delaware Supreme Court failed to intervene and promptly discipline the Disgraced Past CDC for her misconduct in that regard [the petition for interim suspension], instead looking a blind eye to the corruption that has infected the ODC's dealings *vis-à-vis* Abbott for lo these many years now.[45]

On January 2, 2020, Abbott also sent PRC members a motion for recusal of any lawyer members who regularly practiced in the Court of Chancery. The motion contained many of the same inappropriate attacks Abbott had made in previous motions.[46] On January 7, 2020, Abbott filed a motion to recuse the Board Chair. On January 14, 2020, ODC notified Abbott that it planned to present a petition for discipline to the PRC on February 5, 2020 for Abbott's violations of Rules 3.4(c), 3.5(d), 8.4(a), 8.4(c), and 8.4(d).

[44] Jan. 2, 2020 Motion to Dismiss ¶ 1, Ex. 244.
[45] *Id.* ¶ 26.
[46] *See, e.g.*, Jan. 2, 2020 Motion for Recusal of Certain Members ¶ 12, Ex. 129 ("Rather than congratulating and applauding Abbott for his zealous representation through appropriate and permissible means, the Vice Chancellor's frustration, aggravation, and anger caused him to lose touch with reality. He lashed out at the undersigned counsel and spouted out wildly unsupported statements in an effort to gin-up a record for purposes of this bad faith, personal retribution proceeding.").

On January 27, 2020, Abbott filed an action against all of the then-current Justices,[47] then-Chief Disciplinary Counsel, and Deputy Disciplinary Counsel in the United States District Court for the District of Delaware. Abbott asserted federal RICO and 42 U.S.C. § 1983 claims as well as state law claims based on the disciplinary proceeding. He also filed a motion for a temporary restraining order of the disciplinary proceedings, which the District Court denied. Abbott's complaint and exhibits included allegations about the Vice Chancellor that were similar to the inappropriate attacks in Abbott's filings with the Board and PIC.[48] The District Court ultimately dismissed the federal action based on the *Younger* abstention doctrine.[49] The United States Court of Appeals for the Third Circuit affirmed the District Court's decision.[50]

On January 30, 2020, Abbott asked PRC members to stay their consideration of ODC's petition pending resolution of his recusal motions and federal lawsuit. Abbott also submitted materials, including the January 2,

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[47] At that time, the Justices were Chief Justice Seitz, Justice Valihura, Justice Vaughn, Justice Traynor, and Justice Montgomery-Reeves.

[48] *See, e.g., Abbott v. Mette*, C.A. No. 1:20-cv-131, Am. Compl. ¶¶ 21–22, 50 (D. Del. Mar. 9, 2020), 2020 WL 3604108 (alleging that the Vice Chancellor "arranged to trump up defamatory and disparaging remarks about Abbott" and had a "purposeful desire to harm Abbott without any factual or legal basis"); Am. Compl. Ex. D at 1, 6 (a letter Abbott submitted to the PRC that referred to an "utterly frivolous complaint by a Vice Chancellor who let his emotions get carried away," "[t]he subjective personal opinion of a Vice Chancellor stated in conclusory hyperbole is nothing more than a judicial rant," and the Vice Chancellor "hijack[ing] the lawyer disciplinary system to mete out his personal dislike of my litigation approach.").

[49] *Abbott v. Mette*, 2021 WL 1168958, at *4–5 (D. Del. Mar. 26, 2021).

[50] *Abbott v. Mette*, 2021 WL 5906146, at *1 (3d Cir. Dec. 14, 2021).

2020 Motion to Dismiss that attacked the Vice Chancellor and this Court, for the February 5, 2020 PRC hearing that were provided to the PRC panel.

C.

After the filing of the disciplinary petition, Abbott sought discovery and continued to assert claims relating to the disciplinary proceeding in other venues.

1.

On February 5, 2020, the PRC panel determined that there was probable cause that Abbott engaged in professional misconduct and recommended the filing of ODC's petition for discipline ("Petition"). The Petition asserted the following counts:

> Count I—violation of Rule 3.4(c) based on Abbott knowingly advising and assisting Jenney to disobey the Consent Order;
>
> Count II—violation of Rule 8.4(a) based on Abbott's violation or attempted violation of Rule 3.4(c) and/or doing so through the acts of another;
>
> Count III—violation of Rule 8.4(c) based on Abbott making affirmative statements to the Court of Chancery and Seabreeze's counsel, including but not limited to statements in his March 16, 2015 Letter, that were contrary to his legal strategy, advice to Jenney, and understanding of the facts and law;
>
> Count IV—violation of Rule 3.5(d) based on Abbott making degrading statements about the Vice Chancellor and this Court in submissions to the Board, the PIC, and/or this Court; and

> Count V—violation of Rule 8.4(d) based on the misconduct alleged in Counts I-IV.

On July 1, 2020, Abbott filed an Answer to the Petition and asserted 96 affirmative defenses. Later that month, he obtained subpoenas for depositions of the Justices, then-Chief Disciplinary Counsel, Deputy Disciplinary Counsel, and former Chief Disciplinary Counsel. He also obtained subpoenas for a deposition of the Vice Chancellor and production of his medical records as well as a deposition of the former Chief Justice and production of his records concerning Abbott's Court on the Judiciary complaint. The recipients moved to quash the subpoenas. Abbott withdrew the subpoenas before the Board Chair could resolve the motions to quash.

On September 14, 2020, the Board Administrative Assistant appointed the Panel and issued a notice of hearing for December 10, 2020. On September 18, 2020, Abbott moved to recuse the Panel Chair based on his legal practice in the Court of Chancery. He also advocated for holding the schedule in abeyance until the motion for recusal was decided.

At an October 5, 2020 status conference and in a subsequent written decision, the Panel Chair denied the motion for recusal, stating that he had retired in March 2018 and had not appeared in the Court of Chancery since then. As to scheduling, Abbott sought a year to take discovery and to litigate the matter while ODC sought to maintain the December 10, 2020 hearing date.

The Panel Chair rejected ODC's position and ultimately set a schedule for Abbott to seek discovery subpoenas and for briefing on expected motions to quash.

In October 2020, Abbott again obtained subpoenas for depositions of the Justices, then-Chief Disciplinary counsel, Deputy Disciplinary Counsel, and former Chief Disciplinary Counsel. He again obtained subpoenas for a deposition of the Vice Chancellor and production of his medical records and a deposition of the former Chief Justice and production of his records concerning Abbott's Court on the Judiciary complaint. He also obtained a subpoena for a deposition and documents of ODC's records custodian and the Board Administrative Assistant. The subpoena recipients filed motions to quash, which the Panel Chair granted in a 118-page decision in February 2021. Abbott filed that decision in the District Court litigation.

On January 18, 2021, Abbott filed another motion for recusal of the Panel Chair. The Panel Chair denied the motion. Abbott filed motions for reargument of the Panel Chair's decisions on the motions to quash and motion for recusal, which the Panel Chair denied.

On May 10, 2021, the Panel Chair entered an order scheduling the portion of the disciplinary hearing on whether Abbott violated the DLRPC for November 8, 2021 to November 12, 2021. The scheduling order also

established deadlines for expert reports, discovery, and motions *in limine*. The Panel Chair denied Abbott's subsequent request to extend the dates and later motion to postpone the November 8, 2021 hearing.

2.

On May 10, 2021, Abbott filed an action in the Court of Chancery against the Justices and ODC counsel. Abbott asserted claims similar to the claims he had asserted in his federal action. At the Court of Chancery's request, the Chief Justice designated a Superior Court judge to sit as Vice Chancellor under Article IV, §13(2) of the Delaware Constitution. The Court of Chancery denied Abbott's motions for a temporary restraining order and expedition, and ultimately dismissed Abbott's complaint based on this Court's exclusive authority in disciplinary proceedings.[51] A panel of Justices designated under Article IV, §§ 12 and 38 of the Delaware Constitution affirmed the Court of Chancery's decisions.[52]

On May 11, 2021, Abbott obtained interrogatory subpoenas for the Justices, the Vice Chancellor, the Board Administrative Assistant, the Clerk of this Court, ODC, and former Chief Disciplinary Counsel. The recipients

[51] *Abbott v. Vavala*, 2022 WL 453609, at *3, 13 (Del. Ch. Feb. 15, 2022).
[52] *Abbott v. Vavala*, 284 A.3d 77, 2022 WL 3642947, at *7 (Del. Aug. 22, 2022) (TABLE).

filed motions to quash the interrogatory subpoenas, which the Panel Chair granted.

To protect the effective functioning of the disciplinary process, this Court enjoined Abbott, on May 18, 2021, from serving or filing any new complaints or actions in State courts or with the Court on the Judiciary, ODC, or any State administrative board arising out of or relating to this disciplinary proceeding ("May 18, 2021 Order").[53] The Court also stayed any pending complaints Abbott had filed against present or former ODC attorneys and stated that any objections to the conduct of the ODC attorneys or the Panel would be considered when the Court reviewed the Panel's report and recommendations. In late 2021, Abbott sought partial relief from the May 18, 2021 Order, stating that he wished to pursue disqualification and discipline against the Panel Chair. On January 19, 2022, the Court denied the motion, noting that it had already ruled it would consider any objections concerning the Panel, which included the Panel Chair, when it reviewed the Panel's final report and recommendations.

Throughout the summer and fall of 2021, ODC and Abbott litigated motions *in limine* and Abbott's motion to quash ODC's second subpoena directed to him. In October 2021, Abbott obtained subpoenas for the

[53] *In re Abbott*, 267 A.3d 995, 2021 WL 1996927 (Del. May 18, 2021) (TABLE).

appearances of the Justices, the former Chief Justice, the Vice Chancellor, former Chief Disciplinary Counsel, Deputy Disciplinary Counsel, the Board Chair, the Board Administrative Assistant, the ODC records custodian, and three Court of Chancery employees at the November 2021 hearing. The recipients moved to quash the subpoenas.

On October 25, 2021, Abbott moved to postpone the November hearing. He argued, among other things, that the Panel Chair lacked authority to resolve the motions to quash. ODC opposed the motion. On October 28, 2021, Abbott filed an emergency petition with this Court for enforcement of his subpoenas. On November 1, 2021, the Panel Chair denied Abbott's motion for postponement. Abbott filed a motion for reargument, which the Panel Chair denied. On November 2, 2021, the Court denied Abbott's emergency petition.[54]

3.

At the November 2021 hearing, which stretched from the originally scheduled five days to seven days, the Panel heard testimony from Seabreeze's counsel, Jenney, and Abbott, as a fact witness and an expert witness. After the hearing, ODC and Abbott submitted briefing and exhibits in support of their positions.

[54] The Court issued a lengthier decision with its reasoning on January 19, 2022.

On July 11, 2022, the Panel issued its report and recommendations regarding whether Abbott had violated the DLRPC. As to Rule 3.4(c), the Panel concluded that ODC did not establish by clear and convincing evidence that Abbott had caused the violation of a court order issued under the Court of Chancery Rules. Although the Panel described this as a "close issue" and Abbott's advice to Jenney as "contrary to the spirit of Rule 3.4(c),"[55] the Panel found that, as of March 16, 2015, there was no violation of a court order because the then-current March 3, 2015 Bench Rulings did not require Jenney to complete trimming of the trees and shrubs until April 22, 2015.

Turning to Rule 8.4(a), the Panel found that ODC satisfied its burden of showing that Abbott attempted to cause Jenney to disobey the terms of the Consent Order and March 3, 2015 Bench Rulings by executing the transfer of the Properties. The Panel also found, however, that the Rule 3.4(c) "open refusal" exception applied to Rule 8.4(a) and the March 16, 2015 Letter satisfied this exception, notwithstanding certain misrepresentations in that letter. As a result, the Panel concluded that ODC had not established a violation of Rule 8.4(a) by clear and convincing evidence.

The Panel next determined that there was clear and convincing evidence that Abbott had violated Rule 8.4(c) by making misrepresentations

[55] July 11, 2022 Panel Recommendation at 91.

in the March 16, 2015 Letter. Specifically, Abbott misrepresented that Jenney no longer had any ownership interest in the Properties and that Jenney's obligations under the Settlement Agreement were purely *in personam* without mentioning the expansion of Jenney's obligations to his successors and assigns under the Consent Order.

The Panel also held that there was clear and convincing evidence that Abbott violated Rule 3.5(d) by making improper statements about the Vice Chancellor in submissions to the Board, PIC, and this Court and by making improper statements about the Court in filings with the Board and the Court.

As to Rule 8.4(d), the Panel concluded that there was clear and convincing evidence that Abbott engaged in conduct prejudicial to the administration of justice by making misrepresentations in the March 16, 2015 Letter and by repeatedly making statements that were degrading to a tribunal.

Finally, the Panel addressed and rejected Abbott's arguments concerning subject matter jurisdiction, the statute of limitations, laches, attorney-client privilege, Due Process, the Confrontation Clause, Equal Protection, prosecutorial misconduct, and RICO.

4.

The Panel Chair set the sanctions hearing for August 24, 2022, scheduled a pre-hearing conference for August 17, 2022, and directed the

parties to submit pre-hearing submissions by August 11, 2022. The Panel Chair denied Abbott's motions for an extension of the time to file a motion for partial reargument of the Panel's report and recommendations, partial reargument, and an extension of the sanctions hearing.

In August, Abbott obtained subpoenas for the appearances of the Justices, three former Justices who were members of the Court that imposed discipline upon him in 2007,[56] the Vice Chancellor, current and former ODC counsel, current and former Board Chairs, and the Board Administrative Assistant at the August 24, 2022 hearing. The recipients moved to quash those subpoenas. The Panel Chair granted the motions to quash. Abbott also obtained a subpoena for the Panel Chair to testify at the August 24, 2022 hearing. ODC objected and the Panel Chair concluded that he would not be called to testify.

The Panel held the sanctions hearing on August 24, 2022. The Panel heard testimony from Abbott, his wife, two of Abbott's clients, and a Delaware lawyer who had positive working experiences with Abbott. Abbott argued for a minor sanction such as a private admonition, while ODC sought, at a minimum, a three-year suspension with conditions. The parties engaged in post-hearing briefing and motion practice.

[56] *In re Abbott*, 925 A.2d 482, 489 (Del. 2007).

On January 23, 2023, the Panel issued its report and recommendations on sanctions. The Panel issued a revised report on January 25, 2023. The Panel Majority recommended a two-year suspension. The Panel Chair recommended disbarment.

Applying the factors set forth in the ABA Standards for Imposing Lawyer Sanctions ("ABA Standards"), as approved in February 1986 and as amended in February 1992, the Panel found that Abbott's misrepresentations in his March 16, 2015 Letter violated Rules 8.4(c) and (d), which constituted breaches of a lawyer's duty to the public (ABA Standard 5.0) and the legal system (ABA Standard 6.0). The Panel further found that Abbott's mental state was intentional and knowing. The Panel Majority concluded that Abbott's knowing misconduct caused actual and potential injury to the public, the legal system, and the profession. The Panel Chair concluded that Abbott's misrepresentations caused serious and potentially even greater serious injury to Seabreeze and a significant adverse impact and potentially even more serious adverse impact on the Seabreeze Litigation. The Panel Majority found that Abbott's misrepresentations adversely reflected on his fitness to practice while the Panel Chair found that Abbott's misrepresentations seriously adversely reflected on his fitness to practice.

The Panel determined that the degrading statements, which violated Rules 3.5(d) and 8.4(d), constituted breaches of a lawyer's duty to the public (ABA Standard 6.0) and legal profession (ABA Standard 7.0). The Panel also found that the statements caused potential injury to the public, to the legal system, and to the profession.

The Panel next considered the presumptive sanction. For the misrepresentations in the March 16, 2015 Letter, the Panel Majority found that Standards 5.13 and 6.12 were most applicable and provided collectively for a presumptive sanction of suspension. The Panel Chair found that Standards 5.11(b) and 6.11 were most applicable and provided for a presumptive sanction of disbarment. For the degrading statements, the Panel agreed that Standard 8.2 was most applicable and provided for a presumptive sanction of suspension.

Finally, the Panel considered the aggravating and mitigating factors to determine the appropriate sanction. The Panel Majority found that the aggravating factors outweighed the mitigating factors, but did not warrant enhanced sanctions in a matter that ultimately arose from a dispute over trees and shrubs and was similar to matters where attorneys were suspended. The Panel Chair found that the aggravating factors and lack of mitigating factors provided for enhanced sanctions, but it was not possible to increase the

presumptive sanction of disbarment. If disbarment was not already a presumptive sanction for the Properties transfer misrepresentations, the Panel Chair stated that he would likely recommend a three-year suspension for the degrading statements.

III.

A.

On January 24, 2023, the Supreme Court Clerk docketed the Panel's reports and recommendations in *In re Abbott*, No. 25, 2023. Abbott sought an extension of the 20-day deadline for the parties to file objections. Noting that this matter had been pending for eight years and stating that there was no hurry, Abbott proposed having 60 days to file objections to the Panel's first report and then another 60 days to file objections to the Panel's second report. He also lodged a motion for recusal of all of the Justices. ODC objected to the schedule proposed by Abbott.

On February 9, 2023, the Court granted in part and denied in part Abbott's motion for an extension. The Court ordered the parties to submit objections of no more than 15,000 words to both reports by March 15, 2023, responses of no more than 15,000 words to the other party's objections by April 14, 2023, and replies of no more than 8,000 words by May 1, 2023. Abbott filed a motion for reargument, which the Court denied.

Abbott purported to serve subpoenas on the Court Clerk, the Board Administrative Assistant, ODC, and current and former ODC counsel for documents he had sought in the Board proceedings. This Court struck the subpoenas as unauthorized by the DLRDP and the Supreme Court Rules and directed that Abbott not serve or file any additional discovery requests in No. 25, 2023.

On March 15, 2023, ODC and Abbott filed objections to the Panel's reports. Abbott's objections were 229 pages long, significantly exceeding the 15,000 word-count limit ordered by the Court. The Court struck the objections and directed Abbott to file objections of no more than 15,000 words, along with a Rule 13(a) certificate of compliance, by March 17, 2023. Abbott, who said he was on vacation March 16 and March 17, 2023, informed the Clerk on March 20th that if the Court did not identify which objections to shorten or delete by March 22nd, he would involuntarily decide what to cut. On March 22, 2023, Abbott filed 72 pages of objections, or 14,978 words according to his certificate of compliance.

On April 12, 2023, Chief Justice Seitz, Justice Vaughn, and Justice Traynor denied the motion for their recusals. Justice Valihura recused herself. Abbott filed a motion for reargument, which the Court denied. This matter was submitted for decision on June 28, 2023.

B.

ODC's objections may be summarized as follows: (i) the Panel erred as a matter of law by not finding clear and convincing evidence that Abbott violated Rules 3.4(c), 8.4(a), and 8.4(d) when he counseled and assisted Jenney to disobey a court order and bench ruling; (ii) the Panel abused its discretion in qualifying Abbott as an expert witness; and (iii) the Panel erred as a matter of law when it misapplied the aggravating factors to the presumptive sanction.

Without considering the objections Abbott improperly incorporated by reference,[57] Abbott's objections may be summarized as follows: (i) ODC failed to prove by clear and convincing evidence that he violated Rules 3.4(c), 3.5(d), 8.4(a), 8.4(c), and 8.4(d); (ii) the Vice Chancellor, the Panel Chair, and ODC attorneys committed misconduct; (iii) the statute of limitations and laches barred ODC's claims; (iv) there were violations of Abbott's rights

[57] Supr. Ct. R. 14; *Ploof v. State*, 75 A.3d 811, 822–23 (Del. 2013). These objections may include claims for violations of federal civil and Delaware RICO statutes that Abbott raised in his federal and Court of Chancery complaints. Both this Court and the District Court held that Abbott could raise the substance of these claims in the disciplinary proceeding. *Abbott*, 2022 WL 3642947, at *3; *Abbott*, 2021 WL 1168958, at *2. The Panel considered the facts underlying Abbott's RICO claims, which were based on essentially the same factual allegations and defenses as in the disciplinary proceeding, and concluded that Abbott had not shown any professional or judicial misconduct or constitutional violations. Abbott has not properly asserted any objections to the Panel's handling of his RICO claims and has therefore waived those claims.

under the First, Sixth, and Fourteenth Amendments of the United States Constitution; and (v) the Panel misapplied the ABA Standards and Delaware disciplinary cases in recommending a sanction.[58]

IV.

This Court has the "'inherent and exclusive authority' to discipline members of the Delaware Bar."[59] Although the Panel's recommendations are helpful, the Court is not bound by them.[60] The Court has an obligation to review the record independently and to determine whether there is substantial evidence to support the Panel's factual findings.[61] The Court reviews the Panel's conclusions of law *de novo*.[62]

A.

1.

ODC contends that the Panel erred in failing to find that Abbott violated Rule 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal) by advising and assisting Jenney to disobey the Consent Order and March 3, 2015 Bench Rulings. The source of this error, according to ODC, was the

[58] The Court has considered these objections notwithstanding Abbott's flagrant violation of its Feb. 9, 2023 order establishing the word count limits and deadlines for the objections.
[59] *In re Froelich*, 838 A.2d 1117, 1120 (Del. 2003) (citing *In re Benson*, 774 A.2d 258, 262 (Del. 2001)).
[60] *In re Nadel*, 82 A.3d 716, 720 (Del. 2013).
[61] *Abbott*, 925 A.2d at 484.
[62] *Id*.

Panel's reliance on the April 22, 2015 deadline established in the March 3, 2015 Bench Rulings for the trimming of the trees and shrubs. The Panel reasoned that there was no violation of Rule 3.4(c) because, as of March 16, 2015 the deadline for Jenney to trim the trees and shrubs had not yet passed and thus there was no disobedience of a court order. Abbott argues that ODC failed to prove by clear and convincing evidence that he violated Rule 3.4(c).

We must independently review the record to determine if there is clear and convincing evidence to support a finding of knowing misconduct.[63] "Clear and convincing evidence is evidence that produces an abiding conviction that the truth of the contention is 'highly probable.'"[64]

Having considered the evidence presented, the Panel's report and recommendations, and the parties' positions, we conclude that ODC established, by clear and convincing evidence, that Abbott violated Rule 3.4(c) when he advised and assisted Jenney to disobey the Consent Order and March 3, 2015 Bench Rulings by transferring the Properties to his wife for nominal consideration while maintaining his control of the Properties. The Panel's reliance on the April 22, 2015 deadline established in the March 3, 2015 Bench Rulings to find otherwise was misplaced. Although the April 22,

[63] *In re Koyste*, 111 A.3d 581, 588 (Del. 2015).
[64] *In re Bailey*, 821 A.2d 851, 863 (Del. 2003).

2015 deadline had not passed at the time of Abbott's March 16, 2015 Letter, Jenney was obligated under the Consent Order and March 3, 2015 Bench Rulings to trim the trees and shrubs on the Properties. Contrary to Abbott's suggestion, the passing of the October 31, 2014 deadline for Jenney's completion of the trimming work under the Consent Order did not mean that Jenney was no longer obligated to perform that work. The Consent Order still contained a time-is-of-the-essence provision. The March 3, 2015 Bench Rulings also required Jenney to trim the trees and shrubs on the Properties.

Through the transfer of the Properties, Abbott intended to make Jenney's compliance with his obligations under the Consent Order and the March 3, 2015 Bench Rulings impossible, even though the April 22, 2015 deadline had not yet passed. The evidence clearly establishes that this was the intended purpose of the transfer. As Abbott advised Jenney, "you are no longer the title owner AND the Settlement Agreement and Consent Order are purely personal obligations of yours that it would then be impossible for you to perform."[65] Jenney admitted that he transferred the Properties as advised by Abbott so that he would not have to comply with the court orders.[66] Abbott intentionally designed the transfer to end the Seabreeze Litigation and to force

[65] Mar. 7, 2015 Email, Ex. 236.
[66] *See supra* Section I.D.

Seabreeze to start over, thereby depriving Seabreeze of its rights under the Consent Order and March 3, 2015 Bench Rulings.[67] The Court of Chancery's prompt action to ensure that this did not happen as Abbott intended does not erase Abbott's violation of Rule 3.4(c).

It is also clear that Abbott acted knowingly. Under the DLRPC, an attorney acts "knowingly" when he has "actual knowledge of the fact in question."[68] An attorney's "knowledge may be inferred from circumstances."[69] Abbott was well-aware of Jenney's obligation to the trim the trees and shrubs on the Properties under the Consent Order and March 3, 2015 Bench Rulings.[70] He knew that Jenney did not want to comply with those obligations and that Seabreeze was insistent that those obligations be performed soon.[71] Abbott knowingly devised and executed the plan for Jenney to disobey his obligations under the Consent Order and March 3, 2015 Bench Rulings by transferring the Properties to his wife for nominal consideration.[72]

Abbott contends that Rule 3.4(c) applies only to "an obligation under the rules of a tribunal," not a court ruling like the Consent Order or March 3,

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[67] *See supra* Sections I.C., I.D.
[68] DLRPC R. 1.0(f).
[69] *Id*.
[70] *See supra* Sections I.B., I.C., I.D.
[71] *See id.*
[72] *See supra* Sections I.C., I.D.

2015 Bench Rulings, and that he did not disobey any obligations he had under the Court of Chancery Rules. In making this argument, Abbott points out that the predecessor to Rule 3.4(c) in Delaware included the word "ruling" and that other States' ethical rules expressly provide that a lawyer may not disobey a ruling. This interpretation of Rule 3.4(c) is contrary to our disciplinary cases, disciplinary cases in other jurisdictions, and the ABA Standards.[73]

Abbott also argues that he could not have violated Rule 3.4(c) because he was not subject to the Consent Order or the March 3, 2015 Bench Rulings. We reject this argument. An attorney may object to a court's ruling and preserve a claim of error, but may not "advise a client not to comply" with the court's ruling.[74] This Court has previously found attorneys violated Rule 3.4(c) when they assisted someone other than themselves subject to a court

[73] *See, e.g.*, *In re Woods*, 143 A.3d 1223, 1226 (Del. 2016) (describing failure to comply with the terms of a court order as a violation of Rule 3.4(c)); *In re Tonwe*, 929 A.2d 774, 778 (Del. 2007) (lawyer knowingly violated Rule 3.4(c) by flouting an order to cease and desist unauthorized practice); *In re Shearin*, 765 A.2d 930, 937 (Del. 2000) (holding that an attorney violated Rule 3.4(c) when she disobeyed a court order that enjoined her and her client from interfering with another party's title to certain property and from holding themselves out as having an ownership interest in the properties); *Iowa Sup. Ct. Att'y Disciplinary Bd. v. Baldwin*, 857 N.W.2d 195, 211 (Iowa 2014) (recognizing that this rule applies to court orders and rules); ABA Standards 6.2 (including court orders in discussing sanctions for failure to obey any obligation under the rules of the tribunal).

[74] *Maness v. Meyers*, 419 U.S. 449, 458 (1975). *See also In re Ford*, 128 P.3d 178, 182 (Alaska 2006) ("An attorney may challenge a court order by motion, appeal, or other legal means, but may not simply disregard it."); Restatement (Third) of the Law Governing Lawyers § 94(2) (Am. Law Inst. 2000) (providing that lawyer may not assist a client in conduct that violates a court order unless the lawyer reasonably believes the conduct constitutes a good faith effort to determine the scope of a court order or that the client can assert a non-frivolous argument that the conduct will not violate a court order).

order to disobey that court order.[75] Other courts have also found Rule 3.4(c) violations when a lawyer knowingly advised or assisted a client to disobey a court order.[76]

Although Abbott correctly points out that neither the Consent Order nor the March 3, 2015 Bench Rulings prohibited Jenney from transferring the Properties, he ignores that those orders required Jenney to trim the trees and shrubs on the Properties. So while Jenney did not disobey a court order prohibiting transfer of the Properties, he did disobey a court order requiring him to trim the trees and shrubs on the Properties.

Finally, Rule 3.4(c) makes an exception for "open refusal based on an assertion that no valid obligation exists." This exception is inapplicable here because there was no open refusal before the transfer of the Properties. Although Abbott stated that he had considered whether there was a viable

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[75] *In re Martin*, 105 A.3d 967, 971–72, 975 (Del. 2014) (concluding that there was clear and convincing evidence that attorney violated Rule 3.4(c) by assisting suspended attorney in his practice of law in violation of the order suspending the attorney); *In re Kingsley*, 950 A.2d 659, 2008 WL 2310289, at *4-5 (Del. June 4, 2008) (TABLE) (disbarring non-Delaware attorney whose failure to respond to ODC's petition was deemed an admission of, among other things, the allegation that he violated Rule 3.4(c) by performing legal work for an accountant after the accountant was subject to a cease and desist order not to engage in the unauthorized practice of law).

[76] *See, e.g.*, *In re McCarthy*, 668 N.E.2d 256, 258 (Ind. 1996) (holding that attorney violated Rule 3.4(c) by preparing a quitclaim deed conveying marital property in violation of a restraining order against his client); *Iowa Sup. Ct. Att'y Disciplinary Bd. v. Vandel*, 889 N.W.2d 659, 666–67 (Iowa 2017) (concluding that there was Rule 3.4(c) violation where attorney failed to answer disciplinary petition and therefore admitted allegation that she advised her client to deny visitation to her ex-husband despite visitation schedule in dissolution decree).

Court of Chancery Rule 60(b) motion in the January 8, 2015 response to Seabreeze's notice to show cause, he went on to state that Jenney would have the trimming work performed. At the January 15, February 23, and March 3, 2015 hearings, Abbott continued to represent that Jenney was taking the necessary steps to complete the trimming work, not that Jenney had no obligation or intention to do so.

2.

ODC also objects to the Panel's failure to find that Abbott violated Rule 8.4(a) (violating or attempting to violate the Rules of Professional Conduct or knowingly assisting another to do so) by violating the Consent Order and March 3, 2015 Bench Rulings directly, inducing Jenney to violate those orders, and directing his non-lawyer assistant to assist in violating the orders by drafting, notarizing, and recording the deeds. The Panel, again relying on the April 22, 2015 trimming deadline, concluded that ODC had not shown that Abbott violated Rule 8.4(a) by procuring violation of the Consent Order. As previously discussed, the Panel's reliance on the April 22, 20215 deadline was misplaced.

ODC also argued that Abbott attempted to cause Jenney to disobey the Consent Order and March 3, 2015 Bench Rulings by transferring the Properties to his wife. The Panel agreed, but found that the "open refusal"

exception of Rule 3.4(c) applies to Rule 8.4(a) and that Abbott's March 16, 2015 Letter constituted an "open refusal" because the April 22, 2015 trimming deadline had not passed. Again, the Panel's reliance on the April 22, 2015 deadline was misplaced.

Abbott argues that Rule 8.4(a) only applies to attorneys who assist or induce other attorneys to violate the DLRPC, but this interpretation of Rule 8.4(a) is incorrect.[77] ODC has shown by clear and convincing evidence that Abbott violated Rule 8.4(a).

3.

Abbott objects to the Panel's conclusion that there was clear and convincing evidence he violated Rule 8.4(c) (engaging in conduct involving dishonest, fraud, deceit or misrepresentation) by making two material misrepresentations in his March 16, 2015 Letter. The Panel found that Abbott violated Rule 8.4(c) by misrepresenting to the Court of Chancery that: (i) Jenney no longer had any ownership interest in the Properties, even though Jenney continued to hold *de facto* ownership rights in the Properties and intended to reconvey title back to himself; and (ii) stating that Jenney's

[77] *In re Davis*, 974 A.2d 170, 175 (Del. 2009) (holding lawyer violated Rule 8.4(a) by causing staff members to notarize documents when the lawyer did not sign the documents in the notary's presence); *State v. Grossberg*, 705 A.2d 608, 612–13 (Del. Super. Ct. 1997) (revoking attorney's *pro hac* admission after he gave statements violating court order and Rule 3.6 and arranged for his client and parents to do interviews during which they made statements that he could not have made under Rule 3.6).

obligations under the Settlement Agreement were purely *in personam* without disclosing the provisions of Paragraph 17 in the Consent Order.

Abbott contends that these statements were omissions, not affirmative statements as required for violation of Rule 8.4(c). This Court, however, has found that a lawyer's incomplete or misleading statements to a court violate Rule 8.4(c).[78] In addition, Abbott contends that the Petition pleaded affirmative misrepresentations, not misrepresentations by omission. Count III of the Petition alleged that "[b]y making affirmative statements to the Court and opposing counsel, including but not limited to statements [in the March 16, 2015 Letter] . . . that were contrary to Respondent's legal strategy, Respondent's advice to his client and/or Respondent's understanding of the facts and law, Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of Rule 8.4(c))." The Petition sufficiently pleaded, and put Abbott on notice of, the basis for the alleged Rule 8.4(c) violation.

[78] *See, e.g.*, *In re Favata*, 119 A.3d 1283, 1287-90 (Del. 2015) (finding Rule 8.4(c) violations where lawyer made statements that he intended the defendant to overhear, told the trial judge that he was not communicating with the defendant, and failed to correct those false statements); *In re Poliquin*, 49 A.3d 1115, 1133 (Del. 2012) (finding Rule 8.4(c) violations where lawyer failed to disclose a previous admonition and failed to correct his counsel's statements that he had performed within expectations of the judicial system since admission to the Bar at a rule to show cause hearing).

Abbott also argues that his statements in the March 16, 2015 Letter were factually and legally accurate. This argument is without merit. Abbott advised the Court that Jenney no longer had any ownership interest in the Properties, even though he knew that the only purpose of the transfer was for Jenney to avoid his trimming obligations and he had advised Jenney that he could have his wife transfer the Properties back to him in the future. Abbott claims that he did not know who would control the Properties after the transfer, but again, he had advised Jenney that he could transfer the Properties back to himself in the future. This advice reflects that Abbott knew Jenney, not his wife, would control what happened to the Properties after the transfer. Even if we accepted Abbott's claim that he did not know Jenney would continue to exercise ownership rights over the Properties after the transfer, he made no effort to determine who would actually be in control of the Properties after the transfer. Other than a March 9, 2015 email in which Jenney's wife authorized transfer of the Properties to her, Abbott had no communications with her about what she knew or had in mind regarding the transfer or plans for the Properties after the transfer. As the Panel recognized, "[o]nce a plan is provided and initiated, a lawyer cannot then stick his head in the sand like an ostrich and claim that he was unaware of the exact methods of his client's

execution of the plan."[79] Nor may lawyers "stick their heads in the sand and blind themselves to their professional obligations."[80]

Abbott further contends that he was not required to mention the Consent Order in the March 16, 2015 Letter because he did not believe it remained in effect. Abbott, however, had advised Jenney that Paragraph 17 of the Consent Order expanded his obligation to trim the trees and shrubs to his successors, heirs, and assigns and that Seabreeze would rely on that language to challenge the transfer. As discussed by the Panel, Abbott referred to the Consent Order in an earlier draft of the March 16, 2015 Letter, but removed that reference from the final version submitted to the Court of Chancery. It is clear that Abbott deliberately and strategically chose not to mention the Consent Order in the March 16, 2015 Letter.

Finally, Abbott contends that ODC failed to prove the fourth and fifth elements of common law fraud (reliance upon and damage from the misrepresentations) as required by this Court in *In re Lyle*[81] for a violation of Rule 8.4(c). Abbott misreads *Lyle*. In that case, the Court concluded that a public defender who shared a co-defendant's privileged statement with his client did not violate Rule 8.4(c). The Court found that the attorney's conduct

[79] July 11, 2022 Panel Recommendation at 28 n.79.
[80] *In re Beauregard*, 189 A.3d 1236, 1251 (Del. 2018).
[81] 74 A.3d 654, 2013 WL 4543284, at *8 (Del. Aug. 23, 2013) (TABLE).

was "qualitatively distinguishable" from the conduct of attorneys in cases where it found Rule 8.4(c) violations.[82] The Court approved the Panel's report, which reviewed the elements of common law fraud before finding that the attorney had not deceived anyone or made any false representations, but neither the Court nor the Board held that a Rule 8.4(c) violation requires proof of reliance and damages. ODC proved by clear and convincing evidence that Abbott violated Rule 8.4(c) by making misrepresentations in his March 16, 2015 Letter.

4.

Abbott asserts several objections to the Panel's finding that he violated Rule 3.5(d) (conduct degrading to a tribunal) by making statements degrading to the Vice Chancellor and the Court in submissions to the Board, PIC, and the Court. As discussed by the Panel, this Court has found violations of Rule 3.5(d) (or its predecessor, 3.5(c)) where attorneys: (i) accused a tribunal of reaching decisions based on bias, prejudice, or improper motivations, rather than on the merits;[83] and (ii) used personal and inflammatory language to

[82] *Id.* at *2.
[83] *Abbott*, 925 A.2d at 486 (holding that attorney violated Rule 3.5(d) by suggesting in a reply brief that the judge would rule on a basis other than the merits of the case); *In re Ramunno*, 625 A.2d 248, 250 (Del. 1993) (finding that attorney violated Rule 3.5(c) when he "engaged in an insolent colloquy with the trial judge . . . which, implicitly if not explicitly challenged the court's integrity" and stating that disparagement of a court's integrity is "unacceptable by any standard").

attack opposing counsel or the tribunal.[84] Consistent with this precedent, the Panel found that there was clear and convincing evidence that Abbott had violated Rule 3.5(d) by making statements in submissions to the Board, PIC, and this Court that the Vice Chancellor fabricated the record and reached decisions based on mental instability or personal dislike of Abbott instead of the merits. The Panel also found that there was clear and convincing evidence that Abbott violated Rule 3.5(d) by making statements in submissions to the Board and this Court that this Court was turning a blind eye to corruption in the ODC.

Abbott does not dispute that he made the statements, but contends that he did not violate Rule 3.5(d) because: (i) he was acting as a *pro se* litigant, not a lawyer, when he made the statements; (ii) the Board and PIC are not tribunals under Rule 3.5(d); (iii) his statements could not be degrading to a tribunal because the Vice Chancellor and this Court were unaware of the

[84] *Abbott*, 925 A.2d at 484-85 (concluding that attorney's statements in Superior Court briefs referring, among other things, to opposing counsel's "fictionalized" account of a hearing, the tribunal's "imaginary, make-believe set of reasons" for its findings, and appointment of "a group of monkeys" to the tribunal violated Rule 3.5(d)); *In re Shearin*, 721 A.2d 157, 162, 165 (Del. 1998) (finding Rule 3.5(c) violation where the attorney suggested in appellate reply brief that there were rumors the Vice Chancellor had been bribed by the opposing party). *See also In re Johnston*, 520 P.3d 737, 779, 792 (Kan. 2022) (finding attorney violated Rule 3.5(d) where she, among other things, accused court, bar, and others of engaging in collusion and racketeering without providing any evidence and accused judge who directed her to self-report to disciplinary authority as acting so contrary to the record that the allegations had appearance of retaliatory harassment).

statements; (iv) he made the statements in confidential proceedings and his statements should be immune from discipline; and (v) his statements are protected by the First Amendment. These objections are without merit.

Acting *pro se* does not exempt an attorney from the DLRPC. DLRDP 7(a) provides that "[i]t shall be grounds for disciplinary action for a lawyer to . . . [v]iolate any of the Delaware Lawyers' Rules of Professional Conduct . . . whether or not the violation occurred in the course of a lawyer-client relationship." This Court has held that lawyers representing themselves in disciplinary proceedings remain subject to the DLRPC.[85] As the Panel also highlighted, Abbott presented himself as an attorney in many of the submissions containing the degrading statements by including his law firm letterhead, referring to himself as "undersigned counsel," or including his law firm or Esquire signature designations.[86]

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[85] *In re Hurley*, 183 A.3d 703, 2018 WL 1319010, at *3–5 (Del. Mar. 14, 2018) (TABLE) (accepting Board panel's finding that an attorney violated Rule 4.4(a) (respect for third persons) in his response on behalf of himself to disciplinary complaint); *In re Lankenau*, 158 A.3d 451, 2017 WL 934709, at *1 (Del. Mar. 9, 2017) (TABLE) (accepting Board panel's finding that attorney violated Rule 3.3(a)(1) (candor to tribunal) when he failed to disclose he did not give complete and accurate testimony in previous disciplinary proceeding); *In re Kennedy*, 503 A.2d 1198, 1202, 1208–09 (Del. 1985) (affirming Board panel's finding that attorney who was representing himself in a disciplinary proceeding violated the predecessor to Rule 4.4(a) by threatening the attorney who referred him during the disciplinary proceeding). *See also Barrett v. Va. State Bar ex rel. Second Dist. Comm*. 634 S.E.2d 341, 345 (Va. 2006) ("It would be a manifest absurdity and a distortion of these Rules [of Professional Conduct] if a lawyer representing himself commits an act that violates the Rules but is able to escape accountability for such violation solely because the lawyer is representing himself.").

[86] *See, e.g.,* Exs. 105 at 19–20, 243 at 12, 244 at 17.

Abbott argues that the Board and PIC are not tribunals because they do not fall within the definition of a tribunal under the DLRPC. The DLRPC define a tribunal as:

> [A] court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.[87]

Although the Board's findings are not binding upon this Court, the Board is authorized to make numerous decisions throughout the disciplinary proceedings that bind the parties during those proceedings.[88] For example, "[a]ll discovery orders by the Chair or Vice Chair of the Board or the chair of a Hearing Panel are interlocutory and may not be appealed prior to the Board's submission to the Court of the final report."[89] Like judges of tribunals, Board members do not participate in proceedings "in which a judge, similarly situated, would be required to abstain" under the Delaware Judges' Code of Judicial Conduct.[90] Finally, this Court has treated the Board like a tribunal in

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[87] DLRPC 1(m).
[88] DLRDP 2(c) (describing the Board's power to conduct hearings and issue orders and the Panel chair's power to decide scheduling, evidentiary, and procedural matters); DLRDP 12(g) (describing powers of Board Chair, Board Vice Chair, and Panel Chair to decide discovery disputes).
[89] DLRDP 12(g).
[90] DLRDP 2(d).

accepting recommendations that a lawyer who made false statements to the Board violated Rule 3.3(a)(1), which prohibits a lawyer from making false statements of fact or law to a tribunal.[91]

Contrary to Abbott's contentions, the PIC is also a tribunal. The PIC's decisions are binding and are subject to limited judicial review.[92]

Abbott next argues that there was no violation of Rule 3.5(d) because the Vice Chancellor and the Court were unaware of his derogatory statements. His understanding of Rule 3.5(d) is flawed. As the Panel stated:

> The text of Rule 3.5(d) does not limit this prohibition of a lawyer's degrading conduct that is aimed only to the tribunal before which the lawyer is then appearing. The underlying policy for Rule 3.5(d) is not to protect the subjective feelings of judiciary members made to them during a proceeding, but to protect the trust and confidence of the judicial system by barring a lawyer's undignified, and discourteous statements about the judiciary.[93]

This Court has affirmed the Board's finding that a lawyer violated the predecessor to Rule 3.5(d) by making "castigating" statements about a Vice Chancellor in her appellate reply brief.[94] Similarly, in *In re Abbott*, this Court discussed and relied upon cases in other jurisdictions where courts found

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[91] *In re Lankenau*, 2017 WL 934709, at *1; *In re Vanderslice*, 116 A.3d 1244, 2015 WL 3858865, at *1, 9 (Del. June 19, 2015) (TABLE).
[92] 29 *Del. C.* § 5810; 29 *Del. C.* § 5810A.
[93] July 11, 2022 Panel Recommendation at 121.
[94] *In re Shearin*, 721 A.2d at 162.

attorneys violated Rule 3.5(d) by making disparaging statements about a lower court's decision.[95]

In addition, Abbott made some of the statements concerning this Court in a motion to dismiss he sent by Federal Express to each of the Justices in January 2020. He claims that there was no violation of Rule 3.5(d) in the absence of proof that the Justices read the motion, but cites no authority in support of the proposition that a document submitted to a tribunal is not degrading unless there is proof that the judicial officer read the degrading statement. Abbott also does not claim that any of the motions were returned to him or otherwise not delivered.

Abbott contends that his statements are protected by confidentiality and immunity provisions in the DLRDP and PIC statute and therefore cannot violate Rule 3.5(d). This contention is unpersuasive. DLRDP 10 provides that all communications to and from the Board, the PRC, or ODC are "absolutely privileged, and no civil suit predicated on these proceedings may be instituted against any complainant, witness or lawyer."[96] This language provides immunity from civil lawsuits, not disciplinary proceedings for ethical violations. "Disciplinary proceedings are neither civil nor criminal,

[95] 925 A.2d at 485–87.
[96] DLRDP 10.

but are *sui generis*."[97] DLRDP 13 provides for confidentiality of certain disciplinary information, but again, does not immunize a lawyer for ethical violations he commits during his disciplinary proceeding. In fact, this Court has imposed discipline upon attorneys who committed ethical violations during their disciplinary proceedings.[98] Under Abbott's interpretation of Rule 13, a lawyer could engage in professional misconduct during a disciplinary proceeding by destroying evidence or threatening opposing counsel without suffering any professional consequences. Such an interpretation is illogical and unreasonable.

As to the PIC statute, § 5810(h)(1) provides that all proceedings relating to a charged violation remain confidential unless the person charged requests public disclosure or the PIC determines after a hearing that a violation occurred. Section 5810 does not immunize Abbott from any ethical violations he committed in his PIC filings.

Abbott also argues that the absolute litigation privilege protects his statements. The absolute litigation privilege "is a common law rule, long recognized in Delaware, that protects from actions for defamation statements

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[97] DLRDP 15(a).

[98] *See, e.g.*, *Hurley*, 2018 WL 1319010, at *3–5 (accepting Board panel's finding that an attorney violated Rule 4.4(a) (respect for third persons) in his response on behalf of himself to disciplinary complaint); *Lankenau*, 2017 WL 934709, at *1 (accepting Board panel's finding that attorney violated Rule 3.3(a)(1) (candor to tribunal) when he failed to disclose he did not give complete and accurate testimony in previous disciplinary proceeding).

of judges, parties, witnesses and attorneys offered in the course of judicial proceedings so long as the party claiming the privilege shows that the statements issued as part of a judicial proceeding and were relevant to a matter at issue in the case."[99] Statements falling under the absolute litigation privilege are privileged "regardless of the tort theory by which the plaintiff seeks to impose liability."[100]

This Court has not extended the absolute litigation privilege to attorney disciplinary proceedings. Other courts have held that the litigation privilege does not insulate an attorney from discipline for unethical conduct.[101]

Abbott relies on *Cohen v. King*[102] to argue that the absolute litigation privilege precludes professional discipline for his statements, but this reliance is misplaced. In *Cohen*, the plaintiff was an attorney who had been the subject of disciplinary proceedings. During the disciplinary proceedings, the plaintiff filed a grievance complaint against the Chief Disciplinary Counsel, who asserted that the complaint was without merit. The complaint was dismissed.

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[99] *Barker v. Huang*, 610 A.2d 1341, 1345 (Del. 1992).
[100] *Id.* at 1349.
[101] *See, e.g.*, *Hawkins v. Harris*, 661 A.2d 284, 288 (N.J. 1995) (recognizing that the absolute litigation privilege "does not protect against professional discipline for an attorney's unethical conduct"); *Ruberton v. Gabage*, 654 A.2d 1002, 1007 (N.J. Super. Ct. App. Div. 1995) ("It must be emphasized that the absolute privilege . . . applies to claims of tortious conduct; it does not apply to a claim of unprofessional conduct, or to summary contempt proceedings against the offending attorney.").
[102] 206 A.3d 188 (Conn. App. Ct. 2019).

The plaintiff then filed a lawsuit against the Chief Disciplinary Counsel, alleging that her answer in the disciplinary proceedings contained defamatory statements. The Connecticut court held that the litigation privilege extended absolute immunity to statements made by the respondent to the disciplinary authority and dismissed the complaint. *Cohen* does not stand for the proposition that the litigation privilege insulates Abbott from attorney discipline for his statements.

Finally, Abbott argues that his statements are protected by the First Amendment. The Panel correctly determined that the First Amendment did not protect Abbott's degrading statements. A lawyer's right to free speech is not unlimited. As this Court has observed:

> Based upon the United States Supreme Court's decision in *Gentile*, this Court has held that there are ethical obligations imposed upon a Delaware lawyer, which qualify the lawyer's constitutional right to freedom of speech. Accordingly, members of the Delaware Bar are subject to disciplinary sanctions for speech consisting of intemperate and reckless personal attacks on the integrity of judicial officers.[103]

[103] *Shearin*, 765 A.2d at 938 (citations omitted). *See also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1081-82 (1991) (O'Connor, J., concurring) ("Lawyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech."); *In re Guy*, 756 A.2d 875, 877-79 (Del. 2000) (affirming the Board's conclusion that attorney had violated Rule 8.2, in the course of representing a criminal defendant, based upon his written assertions in a letter to a Superior Court Judge that the Judge acted with racial bias against him).

Abbott relies on cases like *Standing Comm. on Discipline of U.S. Dist. Ct. for Cent. Dist. of Cal. v. Yagman*[104] to argue that he expressed personal opinions or true statements protected by the First Amendment. But this Court has rejected *Yagman* as inconsistent "with the holdings of the Court on the issue of constitutionally protected speech as applied to lawyers."[105] Instead, this Court has approvingly cited *In re Palmisano*, in which the United States Court of Appeals for the Seventh Circuit held that there must be some factual basis for a lawyer's accusations against a judge before First Amendment protections will apply.[106] There was no factual basis for Abbott's statements that the Vice Chancellor fabricated the basis for Abbott's referral to ODC or acted out of spite or mental instability. Nor is there any factual basis for Abbott's claim that this Court has ignored corruption in the ODC.

Abbott also invokes the *Noerr-Pennington* doctrine, which "provides broad immunity from liability to those who petition the government, including administrative agencies and courts, for redress of their grievances."[107] Because this is not a civil proceeding and Abbott is not being held liable for

[104] 55 F.3d 1430 (9th Cir. 1995).
[105] *Shearin*, 765 A.2d at 938.
[106] *Id.* (citing *In re Palmisano*, 70 F.3d 483 (7th Cir. 1995)).
[107] *Hanover 3201 Realty, LLC v. Village Supermarkets, Inc.*, 806 F.3d 162, 178 (3d Cir. 2015).

his statements, *Noerr-Pennington* does not apply here. ODC has shown by clear and convincing evidence that Abbott violated Rule 3.5(d).

5.

ODC has also shown by clear and convincing evidence that Abbott's conduct in connection with the transfer of the Properties and his degrading statements violated Rule 8.4(d) (conduct prejudicial to the administration of justice).[108]

6.

In addition to his objections to specific findings of the Panel as discussed above, Abbott has asserted other objections to the disciplinary proceedings.

Abbott claims, and has claimed throughout the various proceedings, that ODC engaged in a "fishing expedition" against him because the Court of Chancery sent the Seabreeze Litigation record to ODC without any explanation. This claim is unfounded. In the June 10, 2015 letter referring Abbott to ODC and enclosing the record in the Seabreeze Litigation, the first sentence states the "Vice Chancellor issued a bench ruling on May 21,

[108] *See, e.g.*, *In re Koyste*, 111 A.3d 581, 588-89 (Del. 2015) (lawyer's knowing disobedience of court order and directing his non-lawyer assistant to violate the order violated both Rule 3.4(c) and 8.4(d)); *Abbott*, 925 A.2d at 486–87 (lawyer's degrading statements violated Rules 3.5(d) and 8.4(d)); *Shearin*, 765 A.2d at 939 ("Violations of court orders constitute conduct prejudicial to the administration of justice.").

2015."[109] The transcript of the May 21, 2015 hearing is less than 35 pages, with discussion of Abbott's role in the sham transfer of the Properties starting on page 20. No "fishing expedition" was necessary.

Abbott also argues that ODC failed to prove that the PRC approved the Petition, thus rendering this entire proceeding "infirm."[110] The Panel correctly rejected this argument. As required by DLRDP 9(b), ODC notified Abbott of the PRC meeting and informed him that he could submit materials to ODC that ODC would provide to the PRC. After approval of the Petition, ODC, as required by DLRDP 9(d)(1), filed the Petition with the Board Administrative Assistant and served it upon Abbott. Nothing more is required by ODC as far as the PRC's approval of the Petition.

Abbott next accuses the Vice Chancellor, Panel Chair, and ODC of misconduct. The record does not reflect any such misconduct. The Court on the Judiciary previously dismissed Abbott's complaint alleging judicial misconduct by the Vice Chancellor in the Seabreeze Litigation. As a judicial officer, the Vice Chancellor was supposed to take action when he became aware of reliable evidence indicating the likelihood of unprofessional conduct

[109] Ex. 73.
[110] Mar. 22, 2023 Pro Se Respondent/Third Party Petitioner's Objections to the Proceedings, Recommendations, & Misconduct of ODC Counsel and Board Panel Chair at 24.

by Abbott.[111] The Vice Chancellor's compliance with his ethical obligations does not, as Abbott insists, constitute misconduct.

Abbott's claims of misconduct by the Panel Chair, including denial of his motions for recusal, also fail. These claims are based primarily on Abbott's disagreement with the Panel Chair's rulings, but ruling against a party does not mean a hearing officer is biased or otherwise engaging in misconduct as Abbott believes.[112] Abbott's contention, without any factual basis, that former Chief Disciplinary Counsel arranged for the appointment of the Panel Chair to rig the proceeding against Abbott is also meritless. Nor is there anything sinister in the Panel Chair, a former member of the Board of Bar Examiners, serving as the chair of a panel for a matter before the Board of Bar Examiners while this matter, in a different tribunal, was proceeding. The record reflects that the Panel Chair exercised commendable diligence and patience in resolving the multitude of arguments and attacks made by Abbott.

Abbott also asserts multiple ethical violations and instances of prosecutorial misconduct by ODC attorneys. Underlying most, if not all, of these claims is Abbott's "belief that he should not be under disciplinary

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[111] Judges' Code of Jud. Conduct R. 2.15 ("A judge should initiate appropriate action when the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by a judge or lawyer.").

[112] *See, e.g.*, *Gattis v. State*, 955 A.2d 1276, 1284 (Del. 2008) (recognizing that a judge's adverse rulings or critical remarks do not ordinarily support a bias or appearance of impropriety claim).

investigation, and that the person charged with that task should be disqualified for performing it."[113] This misguided belief is not a legitimate basis for the disqualification of every ODC attorney who ever worked on this case or for a mistrial as Abbott has contended.

As to the attorney-client privilege issues Abbott raises, ODC did not act improperly in seeking his privileged communications with Jenney regarding the transfer of the Properties. The Board Chair and Panel Chair correctly determined that these communications were discoverable under *In re Kennedy*.[114] As the Board Chair and Panel also recognized, Jenney waived the attorney-client privilege for these communications at the April 13, 2015 hearing in the Court of Chancery by voluntarily testifying that Abbott advised him to transfer the Properties so he would not have to comply with the court order.[115]

Contrary to Abbott's contentions, Chief Disciplinary Counsel's reference to other communications between Abbott and Jenney, which the Panel later found to be privileged and inadmissible, in his opening statement

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[113] *Abbott*, 2019 WL 937184, at *8.
[114] 442 A.2d 79, 92–93 (Del. 1982) (holding attorney could not invoke the attorney-client privilege to prevent this Court's Censor Committee from conducting an audit of the attorney's financial records for compliance with guidelines on retention of client funds).
[115] DRE 510(a) ("A person waives a privilege conferred by these rules . . . if such person . . . intentionally discloses or consents to disclosure of any significant part of the privileged or protected communication or information.").

did not require a mistrial. Abbott objected to ODC counsel raising matters he claimed were outside the scope of the disciplinary petition, but did not object on the basis of attorney-client privilege. The Panel Chair ruled that Abbott could raise the objection when a witness was testifying, which is what occurred. Abbott has not shown any "manifest necessity" or other basis for a mistrial.[116]

Abbott also asserts statute of limitations and laches defenses. The Panel correctly concluded that these defenses were without merit. Under the DLRDP, there is "no statute of limitations with respect to any proceedings under these Rules."[117] As to his laches defense, Abbott had the burden of proving the delay was unreasonable and prejudice resulted from the delay.[118] Abbott has not satisfied this burden. Abbott repeatedly sought and obtained postponements, stays, and extensions throughout the proceedings. Most, if not all, of the delay is attributable to Abbott's actions. He has also failed to show prejudice to him from the delay for which he is primarily responsible.

Finally, Abbott asserts multiple violations of his constitutional rights, including his right to confront his accuser (the Vice Chancellor) under the Sixth Amendment, his right to due process under the Fifth and Fourteenth

[116] *Banther v. State*, 977 A.2d 870, 890 (Del. 2009).
[117] DLRDP 26.
[118] *In re Tenenbaum*, 918 A.2d 1109, 1111–12, 1127 (Del. 2007).

Amendments, and his right to equal protection under the Fifth and Fourteenth Amendments.

There was no violation of Abbott's right to confront his accuser. The Sixth Amendment protects an accused's right to confront witnesses against him in a criminal prosecution. This proceeding was not a criminal prosecution.[119] In addition, the Vice Chancellor explained the reasons for his rulings, as well as why he was referring Abbott to ODC, on the record in the Seabreeze Litigation.

As to Abbott's due process claims, disciplinary proceedings contain "extensive procedural due process protections" for respondents.[120] These protections include: (i) notice of ODC's intent to present a matter to the PRC and the opportunity to submit a written statement for the PRC to consider;[121] (ii) the PRC's determination of whether there is probable cause to support the petition;[122] (iii) if the petition is approved by the PRC, the opportunity to file an answer to the petition;[123] (iv) the ability to compel by subpoena the production of documents or witness testimony;[124] (v) a hearing that is

[119] *See supra* n.97 and accompanying text.
[120] *Abbott*, 2019 WL 937184, at *5.
[121] DLRDP 9(b)(1).
[122] *Id.* 9(b)(3).
[123] *Id.* 9(d).
[124] *Id.* 12(a)(2).

recorded;[125] and (vi) the opportunity to submit objections to the Panel's report and *de novo* review of the Panel's report and recommendations by this Court.[126]

Abbott argues that he was deprived of due process because the Panel Chair quashed his interrogatory subpoenas, deposition and document subpoenas, and trial subpoenas. Denying a party discovery that they cannot establish any entitlement to is not a due process violation. First, the Panel Chair correctly concluded that the DLRDP do not authorize interrogatories.[127] Second, the DLRDP permit parties to subpoena the testimony of witnesses and the production of "pertinent" documents at a deposition or hearing, not to compel the disclosure of irrelevant, privileged, or otherwise protected information.[128]

Despite the strong policy against discovery of judicial officers, Abbott chose to direct the majority of his subpoenas to current and former judicial officers and to seek disclosure of their mental processes in making or not making certain rulings. As the Panel Chair correctly concluded in his February 22, 2021 decision granting the judicial officers' motions to quash,

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[125] *Id.* 9(d)(4).
[126] *Id.* 9(e); *In re Martin*, 105 A.3d 967, 974 (Del. 2014) (*de novo* review).
[127] DLRDP 12 cmt. ("Former section (c) concerning interrogatories has been eliminated."); DLRDP 15(b) (providing "that discovery procedures shall not be expanded beyond those provided in Rule 12").
[128] DLRDP 12(a)(2).

such discovery is not permitted.[129] The Panel Chair also did not err in finding that Abbott could not compel the production of privileged information in the possession of the Board's Administrative Assistant and current and former Board Chairs.

As to Abbott's subpoenas directed to opposing counsel and ODC, the Panel Chair correctly determined that Abbott could not obtain disclosure of privileged information and had not overcome the prosecutorial privilege by asserting a colorable claim of vindictive prosecution (a violation of due process) or selective prosecution (a violation of equal protection). "[V]indictive prosecution arises from 'specific animus or ill will.'"[130] "There is no vindictiveness as long as the prosecutor's decision is based upon the normal factors ordinarily considered in determining what course to pursue, rather than upon genuine animus against the defendant for an improper reason

[129] *See, e.g.*, *Evans v. J.P. No. 19*, 652 A.2d 574, 577 (Del. 1995) ("[E]xamination of a judge's mental process would be destructive of judicial responsibility and undermine the integrity of the judicial process."); *Brooks v. Johnson*, 560 A.2d 1001, 1002 (Del. 1989) ("Persons performing adjudicatory functions are not subject to examination in furtherance of the litigation objectives of the parties."); *United States v. Roth*, 332 F. Supp.2d 565, 567 (S.D.N.Y. 2004) (recognizing that "the overwhelming authority from the federal courts in this country, including the United States Supreme Court, makes it clear that a judge may not be compelled to testify concerning the mental processes used in formulating official judgments or the reasons that motivated him in the performance of his official duties."); *State ex rel. Kaufman v. Zakaib*, 535 S.E.2d 727, 735 (W.Va. 2000) (holding "judicial officers may not be compelled to testify concerning their mental processes employed in formulating official judgments or the reasons that motivated them in their official acts.").

[130] *In re Kelly*, 283 A.3d 580, 2022 WL 32070230, at *9 (Del. Aug. 10, 2022) (TABLE) (quoting *State v. Wharton*, 1991 WL 138417, at *10–11 (Del. Super. Ct. June 3, 1991)).

or in retaliation for exercise of legal or constitutional rights."[131] ODC began investigating Abbott after the Vice Chancellor referred him to ODC for his conduct in the Seabreeze Litigation. ODC investigated Abbott's conduct in the Seabreeze Litigation and prepared a disciplinary petition that the PRC approved for filing. The record is devoid of any credible evidence that ODC's investigation and filing of the disciplinary petition is based upon animus of ODC counsel toward Abbott or retaliation for his exercise of constitutional rights.

Abbott also contends that he was entitled to discovery regarding ODC's selective prosecution of sole practitioners like himself in violation of the Equal Protection Clause. "The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution protects against arbitrary and capricious classifications, and requires that similarly situated persons be treated equally."[132] A *prima facie* case of selective prosecution requires showing: (i) a policy to prosecute that had a discriminatory effect on a protected class; and (ii) was motivated by a discriminatory purpose.[133] To obtain discovery for a selective prosecution defense as Abbott does here, he

[131] *United States v. DeMichael*, 692 F.2d 1059, 1061 (7th Cir. 1982).
[132] *Sisson v. State*, 903 A.2d 288, 314 (Del. 2006).
[133] *Drummond v. State*, 909 A.2d 594, 2006 WL 2842732, at *2 (Del. Oct. 5, 2006) (TABLE).

is not required to make a *prima facie* case, but must present some evidence tending to show the essential elements of selective prosecution.[134]

The Panel Chair correctly concluded that Abbott failed to make a threshold showing of the essential elements of selective prosecution. Abbott has not shown that sole practitioners are members of a protected class. Nor has he shown ODC had a policy to prosecute having a discriminatory effect on sole practitioners or was motivated to discriminate against sole practitioners. To support his selective prosecution claim, Abbott relies on ODC's dismissal of five disciplinary complaints he filed against opposing counsel who were not sole practitioners. But as the Panel Chair recognized, none of those complaints involved a lawyer found to have committed wrongdoing or referred to ODC by the trial judge like Abbott was. Abbott has not shown selective prosecution by ODC.

7.

Finally, the Panel erred in qualifying Abbott as an expert witness on Rule 3.4(c), Rule 3.5(d), and the First Amendment. Abbott did not have the knowledge, skill, experience, training, or education to qualify as an expert witness on these subjects under D.R.E. 702. The Panel's reasoning that Abbott qualified as an expert because he satisfied the low threshold for expert

[134] *Wharton*, 1991 WL 138417, at *5.

qualification under D.R.E. 702 and had more knowledge as a lawyer than the lay member of the Panel would make any respondent lawyer an expert witness in a case with a hearing before a Board panel. Abbott could make his arguments concerning the meaning and history of the DLRPC and the First Amendment without being qualified as an expert. Although the Court rejects the Panel's qualification of Abbott as an expert witness, the Court has nonetheless considered the arguments Abbott made as an expert witness.

B.

We next determine the appropriate sanction for Abbott's violations of Rules 3.4(c), 3.5(d), 8.4(a), 8.4(c), and 8.4(d). "The objectives of the lawyer disciplinary system [in Delaware] are to protect the public, to protect the administration of justice, to preserve confidence in the legal profession, and to deter other lawyers from similar misconduct."[135] Lawyer disciplinary sanctions "are 'not designed to be either punitive or penal.'"[136] "The focus of the lawyer disciplinary system in Delaware is not on the lawyer, but rather on the danger to the public that is ascertainable from the lawyer's record of professional misconduct."[137]

[135] *In re Bailey*, 821 A.2d 851, 866 (Del. 2003).
[136] *In re Landis*, 850 A.2d 291, 293 (Del. 2004) (quoting *In re Garrett*, 835 A.2d 514, 515 (Del. 2003)).
[137] *In re Fountain*, 878 A.2d 1167, 1173 (Del. 2005).

In determining the appropriate sanction, the Court considers the four factors set forth in the ABA Standards and Delaware precedent.[138] The ABA factors are: (i) the ethical duty violated; (ii) the attorney's mental state; (iii) the extent of the actual or potential injury caused by the attorney's misconduct; and (iv) aggravating factors[139] and mitigating factors.[140] Based on the first three factors, the Court makes an initial determination of the presumptive sanction.[141] The Court then considers the fourth factor to determine whether the presumptive sanction should be increased or decreased.[142] The ABA Standards do not account for multiple charges of misconduct, but provide that the "ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct

[138] *Beauregard*, 189 A.3d at 1251; *In re Steiner,* 817 A.2d 793, 796 (Del. 2003).
[139] Aggravating factors include prior disciplinary offenses, dishonest or selfish motive, a pattern of misconduct, multiple offenses, bad faith obstruction of the disciplinary proceeding, submission of false evidence or false statements during the disciplinary process, refusal to acknowledge wrongful nature of conduct, vulnerability of victim, substantial experience in the practice of law, indifference to making restitution, and illegal conduct, including the use of controlled substances. ABA Standards 9.22.
[140] Mitigating factors include absence of a prior disciplinary record, absence of a dishonest or selfish motive, personal or emotional problems, timely good faith effort to make restitution or to rectify consequences of misconduct, full and free disclosure to disciplinary board or cooperative attitude toward proceedings, inexperience in the practice of law, character or reputation, physical disability, mental disability or chemical dependence, delay in disciplinary proceedings, imposition of other penalties or sanctions, remorse, and remoteness of prior offenses. ABA Standards 9.32.
[141] *Steiner*, 817 A.2d at 796.
[142] *Id.*

among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct."[143]

Abbott objects to what he sees as the Panel's undue reliance on the ABA Standards, but this Court has consistently looked to the ABA Standards for guidance in determining the appropriate sanction for a disciplinary violation.[144] Abbott also argues that the Panel deviated from the four-step framework by adding consideration of the presumptive sanction as an improper, fifth step. He is mistaken. The Panel considered the first three steps to make an initial determination of the presumptive sanction and then considered the aggravating and mitigating factors as set forth in the ABA Standards and Delaware disciplinary cases.

ODC objects that the Panel erred in its application of the aggravating factors to the presumptive sanction and should have recommended disbarment as the appropriate sanction. We address these objections (to the extent necessary) and Abbott's remaining objections (to the extent they are not simply a rehash of his arguments that he committed no violations of the DLRPC) below.

[143] ABA Standards, II.
[144] *Fountain*, 878 A.2d at 1173.

1.

Applying the ABA Standards, Abbott's violations of Rules 3.4(c), 8.4(a), 8.4(c), and 8.4(d) in connection with the transfer of the Properties constitute a breach of his duties owed to the public (ABA Standard 5.0) and the legal system (ABA Standard 6.0), including abuse of the legal process (ABA Standard 6.2). His mental state was intentional and knowing because he purposefully advised Jenney to transfer the Properties so that Jenney would not have to comply with his obligation under the Consent Order and March 3, 2015 Bench Rulings to trim the trees and shrubs on the Properties.[145] Abbott also advised Jenney that he could transfer the Properties back to himself.[146] Abbott's strategy was designed to benefit Jenney by allowing him to escape obligations he did not want to perform under the Consent Order while staying in the neighborhood and maintaining control of the Properties at a minimal cost.[147] Abbott also intentionally misrepresented the nature and effect of the transfer of the Properties in his March 16, 2015 Letter to the Court of Chancery.[148]

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[145] The ABA Standards define "intent" as "the conscious objective or purpose to accomplish a particular result" and "knowledge" as 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, III Definitions. *See also supra* Sections I.C., I.D.

[146] *See supra* Section I.C.

[147] *See supra* Sections I.C., I.D.

[148] *See supra* Section IV.A.3.

Abbott's violations caused Seabreeze injury[149] and, contrary to the Panel Majority's findings, potentially serious injury.[150] As a result of Abbott's actions, Seabreeze had to spend additional time and incur additional legal fees to enforce rights it had previously bargained for under the 2012 Settlement Agreement and 2014 Consent Order.[151] If Abbott's tactics had worked as he intended, the Court of Chancery would have dismissed the Seabreeze Litigation for mootness and Seabreeze would have been forced to initiate and pursue another legal action against Mrs. Jenney for trimming of trees and shrubs on the Properties.[152]

Abbott's violations also caused significant and potentially serious adverse effects on the Seabreeze Litigation as well as serious interference and potentially serious interference with the Seabreeze Litigation. Disregard of a court order "seriously undermines the legal system."[153] As a result of Abbott's actions, the Court of Chancery had to expend scarce judicial resources

[149] The ABA Standards define "injury" as "harm to a client, the public, the legal system or the profession which results from a lawyer's misconduct." ABA Standards, III Definitions. ABA Standards 6.11 and 6.21 include serious injury to a party.
[150] The ABA Standards define "potential injury" as the "harm to a 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, III Definitions. ABA Standards 6.11 and 6.21 include potentially serious injury to a party.
[151] *See supra* Section I.D.
[152] This would have included serving Mrs. Jenney, which Abbott and Jenney discussed how to make difficult. *See supra* Section I.C.
[153] *Tonwe*, 929 A.2d at 780.

resolving multiple motions and holding multiple hearings relating to the Properties Transfer.[154] If Abbott's tactics had worked as intended, the Court of Chancery would have been burdened with yet another case arising from Jenney's unwillingness to trim trees and shrubs on the Properties.

Under our precedent, Abbott's misrepresentations in the March 16, 2015 Letter to the Court of Chancery concerning a scheme he devised for his client not to comply with a court order adversely reflected—to a significant extent—on his fitness to practice law.[155] Based on the analysis set forth above, the presumptive sanction for Abbott's violation of Rules 3.4(c), 8.4(a), 8.4(c), and 8.4(d) in connection with the transfer of the Properties is disbarment under ABA Standards 5.11,[156] 6.11,[157] and 6.21.[158]

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[154] *See supra* Section I.D.

[155] *In re McCarthy*, 173 A.3d 536, 2017 WL 4810769, at *2, 7 (Del. Oct. 23, 2017) (TABLE) (approving Board panel's recommendation of disbarment where attorney failed to disclose to the court that his client had altered medical records); *Vanderslice*, 2015 WL 3858865, at *14 (approving Board panel's recommendation of disbarment where attorney misappropriated client fees and failed to disclose the full extent of his misappropriation during disciplinary proceedings).

[156] ABA Standard 5.11(b) provides that "[d]isbarment 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."

[157] ABA Standard 6.11 provides that "[d]isbarment 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 or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding."

[158] ABA Standard 6.21 provides that "[d]isbarment 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 serious or potentially serious interference with a legal proceeding."

We agree with the Panel that Abbott's degrading statements in violation of Rules 3.5(d) and 8.4(d) involve breaches of duties owed to the legal system (ABA Standard 6.0) and legal profession (ABA Standard 7.0). The Panel did not address Abbott's mental state, but we find that he intentionally and knowingly made the degrading statements.[159] The record in the Seabreeze Litigation clearly demonstrates why the Vice Chancellor referred Abbott to ODC yet Abbott persistently—and baselessly—stated that the Vice Chancellor fabricated the record, the Vice Chancellor acted out of spite or mental disability, and this Court ignored ODC's misconduct in pursuing the matter. He made these statements despite being publicly reprimanded in 2007 for making similarly improper statements.[160] At that time, the Court warned Abbott:

> Zealous advocacy never requires disruptive, disrespectful, degrading or disparaging rhetoric. The use of such rhetoric crosses the line from acceptable forceful advocacy into unethical

[159] A violation of Rule 3.5(d) does not require intent. *Ramunno*, 625 A.2d at 250 ("[I]t is irrelevant whether Mr. Ramunno intended to cause disruptive effect. Instead, the sole question before the Court is whether Mr. Ramunno's rude and uncivil behavior was degrading to the court below.").

[160] *Abbott*, 925 A.2d at 485–86 (holding Abbott violated Rule 3.5(d) and 8.4(d) when he made statements about opposing counsel fabricating legal grounds and implying the trial court might rule on a basis other than the merits of the case). In August 2022, Abbott moved to vacate the sanction—public reprimand—imposed in this 2007 case. The Court denied the motion, concluding that even if Superior Court Civil Rule 60(b) applied as Abbott contended, he had not shown a basis for relief under Rule 60(b)(1), (b)(4), and (b)(6). Abbott also rehashed many of the same arguments that he had raised in his 2007 motion for reargument, which the Court had denied.

> conduct that violates the Delaware Lawyers' Rules of Professional Conduct.[161]

Abbott, however, chose to deploy such degrading rhetoric again.

We also agree with the Panel that Abbott's degrading statements caused potential injury to the legal system and the legal profession. Public trust in the legal system may be undermined if an attorney makes unsupported statements that a judge ruled against him or his client for reasons other than the merits of the case, such as personal dislike or emotional instability. Abbott argues that there can be no injury because his statements were confidential, but he made the degrading statements in multiple venues to be viewed by multiple people. Based on the Court's previous imposition of a public reprimand in 2007 for Abbott's violation of Rules 3.5(d) and 8.4(d), the Panel correctly determined that Standard 8.2 applied. Standard 8.2 provides that suspension is generally appropriate when a lawyer has been reprimanded for similar misconduct and engages in similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

2.

We agree with the Panel's conclusion that the aggravating factors outweigh the mitigating factors. Assuming without deciding that the Panel

[161] *Id.* at 489.

correctly found that the aggravating factor of prior disciplinary history should not apply here, we note the existence of numerous other aggravating factors, including multiple offenses in a disciplinary proceeding, refusal to acknowledge the wrongful nature of the conduct, and substantial experience in the practice of law. The aggravating factors of vulnerability of the victim, indifference to making restitution, and illegal conduct, including the use of controlled substances, are not relevant here.

Contrary to Abbott's contentions, his actions in connection with the transfer of the Properties were dishonest. He assisted Jenney's disobedience of his obligations under the Consent Order and March 3, 2015 Bench Rulings while still maintaining control of the Properties and misrepresented Jenney's control over the Properties after the transfer to the Court. He made degrading statements and threatened to create a public spectacle with the selfish motive of pressuring ODC to drop this matter.

We reject Abbott's objection that his degrading statements about the Vice Chancellor and this Court between 2016 and 2019 did not constitute a pattern of misconduct. We also reject Abbott's contention that his offenses were not multiplicitous because he did not violate any of the DLRPC. As previously discussed, Abbott did violate the DLRPC in connection with both the transfer of the Properties and the degrading statements.

Whether Abbott's filing of multiple motions for recusal of Board Chairs and the Panel Chair and service of repetitive subpoenas constitute bad faith obstruction of the disciplinary proceeding is a close question, but ultimately we cannot find that Abbott violated the DLRDP or orders of the Board in this respect.[162] Nor does the aggravating factor relating to deceptive practices apply here. Although Abbott argues that ODC engaged in deceptive practices, this is based on his incorrect position that there was no basis for the disciplinary proceedings.

And it is beyond dispute that Abbott refuses to acknowledge the wrongful nature of the conduct. Indeed, Abbott still insists, despite all evidence to the contrary, that his legal work for Jenney was "Good Lawyering."[163] He also continues to make spurious and unfounded statements about the Vice Chancellor, ODC counsel, and the Panel Chair. Abbott objects that this factor should receive little weight because he is entitled to defend himself, but he could have defended himself without hurling unfounded accusations of corruption and mental illness. As the Court previously warned him, zealous advocacy does not encompass degrading or disrespectful

[162] To ensure the effective functioning of the disciplinary process, the Court had to enjoin Abbott from filing additional complaints against disciplinary counsel and initiating new actions in State court related to these proceedings in 2021. *Abbott*, 2021 WL 1996927, at *1–2.

[163] March 22, 2022 Pro se Respondent/Third Party Petitioner's Objections to Proceedings, Recommendations & Misconduct of ODC Counsel and Board Panel Chair at 32, 57.

language.[164] Finally, Abbott's substantial experience in the practice of law—twenty-five years of experience as a Delaware lawyer when he was referred to ODC in 2015—is an aggravating factor.

As to the mitigating factors, Abbott cannot rely on the absence of a prior disciplinary record because he was publicly reprimanded for making statements degrading to a tribunal in 2007. Nor was there the absence of a dishonest or selfish motive.[165] As to personal or emotional problems as a mitigating factor, Abbott objects that the Panel ignored his testimony and his wife's testimony concerning psychological trauma he has suffered as a result of ODC bringing and pursuing these proceedings. We disagree. The Panel correctly recognized that this alleged trauma did not contribute to Abbott's sanctionable misconduct. This objection also rests upon the faulty premise that everyone but Abbott himself is responsible for what has transpired since his actions in the Seabreeze Litigation.

Timely restitution is not relevant here and thus cannot be counted as a mitigating factor. And Abbott has not attempted to rectify the consequences of his misconduct. Again, Abbott has been uncooperative throughout the proceedings and has continued to make degrading statements. Thus, the

[164] *Abbott*, 925 A.2d at 488.
[165] *See supra* Section IV.B.2.

mitigating factor relating to a lawyer's cooperative attitude has no application here. Abbott objects that he was entitled to defend himself and pursue independent litigation to protect his rights, but fails to acknowledge that it was unnecessary for him to degrade others and waste Board resources with repetitive motions while doing so.

As previously mentioned, Abbott is an experienced Delaware litigator. Consequently, he cannot claim that inexperience mitigates the seriousness of his offenses. Abbott submitted evidence of good character and reputation, but we agree with the Panel that this evidence was insufficient to constitute a mitigating factor. Abbott has not performed the amount of public service found to constitute a mitigating factor in other disciplinary cases.[166] Like the Panel, we acknowledge that Abbott is an experienced and successful litigator in real estate and land use matters. We also agree with the Panel that this only makes Abbott's misconduct in the Seabreeze Litigation and these proceedings even more unnecessary and senseless.

The mitigating factors relating to physical disability, mental disability, or chemical dependency are not relevant here. The mitigating factor of delay

[166] *See, e.g.*, *In re Tenenbaum*, 918 A.2d 1109, 1115, 1137 (Del. 2007) (accepting Board panel's recommended sanction of disbarment, which included finding that the lawyer's record of substantial public and community service, including significant work with Community Legal Aid Society and participation in national and State bar association sections and committees, was a mitigating factor).

in disciplinary proceedings does not apply because Abbott was primarily responsible for any delays.[167] Imposition of other penalties or sanctions also does not apply. Abbott objects that the psychological trauma he has suffered from these proceedings is more than sufficient punishment, but fails to acknowledge his own personal responsibility for what has occurred. Abbott refuses to acknowledge that he committed any wrongdoing, so remorse is not a mitigating factor. Finally, we reject Abbott's contention that his degrading statements in this proceeding are remote from the degrading statements for which he was disciplined in 2007.

Having considered the aggravating and mitigating factors, the Court concludes that the aggravating factors outweigh the mitigating factors. There is no basis for reducing the presumptive sanction of disbarment. Disbarment is also consistent with Delaware authority. In *McCarthy*, the Court accepted a Board panel's recommended sanction of disbarment for a non-Delaware attorney who failed to inform the court that his client had altered medical records and failed to take remedial measures after his client's false deposition and trial testimony in a medical malpractice action.[168] As in this case, ABA

[167] *See supra* Section IV.A.6.
[168] 2017 WL 4810769, at *2–5. By devising the scheme for his client to escape his court-ordered obligations, Abbott actually played a more active role than the disbarred attorney in *McCarthy*.

Standards 5.11(b), 6.11, and 6.21 provided for a presumptive sanction of disbarment and the aggravating factors outweighed the mitigating factors.[169] In fact, there were fewer aggravating and more mitigating factors present in *McCarthy* than here.

VI.

For the reasons set forth above, Richard Abbott is DISBARRED effective immediately. Abbott shall pay the costs of the disciplinary proceeding. ODC is directed to file a petition in the Court of Chancery for the appointment of a receiver for Abbott's law practice and to disseminate this opinion in accordance with Rule 14 of the DLRDP.

IT IS SO ORDERED.

[169] Neither ABA Standard 6.11 nor 6.21 applied in the *Shearin* cases that the Panel Majority relied upon to recommend suspension.

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~~s~~ or fail to make reasonably diligent efforts to comply with a legally proper discovery request~~s~~ by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending

proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate or cause another to communicate ex parte with such a person or members of such person's family during the proceeding unless authorized to do so by law or court order; or

(c) communicate with a juror or prospective juror after discharge of the jury unless the communication is permitted by court rule; or

(d) engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate or cause another to communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, or with members of such person's family, unless authorized to do so by law or court order. Furthermore, a lawyer shall not conduct or cause another to conduct a vexatious or harassing investigation of such persons or their family members.

[3] A lawyer may not communicate with a juror or prospective juror after the jury has been discharged unless permitted by court rule. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive, undignified or discourteous conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, which have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy

respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

INTERPRETIVE GUIDELINE. LAWYER'S INCOME TAXES

The following statements of principles are promulgated as Interpretive Guidelines in the application of the Delaware Lawyers' Rules of Professional Conduct:

Criminal acts that reflect adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, as construed under these Rules, shall be deemed to include, but not limited to, the following:

(1) Willful failure to make and file federal, state, or city income tax returns or estimated income tax returns, or to pay such estimated tax or taxes, or to supply information in connection therewith at the time or times required by law or regulation;

(2) Willful attempt in any manner to evade any federal, state, or city income tax.

RULE 3.2 EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Comment

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

RULE 1.4 COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations - depending on both the importance of the action under consideration and the feasibility of consulting with the client - this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the

lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may

provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

RULE 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate

preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

RULE 6.1 VOLUNTARY PRO BONO PUBLICO SERVICE

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

Comment

[1] The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice. This Rule expresses that policy but is not intended to be enforced through the disciplinary process.

[2] The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.

[3] The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.