DELAWARE WORKERS COMPENSATION
Industrial Accident Board
CASELAW Update
& Appellate Outcomes

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DSBA ANNUAL WORKERS COMP BREAKFAST SEMINAR

IAB DECISIONS

BENEFIT INTERPLAY

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

CAUSATION

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

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

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

COVID-19 ROUND UP

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

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

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

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

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

DISFIGUREMENT

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

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

EMPLOYEE V. INDEPENDENT CONTRACTOR

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

JURISDICTION

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

MEDICAL MARIJUANA

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

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

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

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

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

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

MEDICAL TREATMENT ISSUES

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

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

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

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

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

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

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

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

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

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

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

OCCUPATIONAL DISEASE

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

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

PERMANENCY

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

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

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

PARTIAL DISABILITY

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

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

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

PRACTICE AND PROCEDURE

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

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

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

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

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

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

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

STATUTE OF LIMITATIONS

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

SUCCESSIVE INJURIES

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

TOTAL DISABILITY

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

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

UTILIZATION REVIEW APPEALS

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

APPELLATE OUTCOMES

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

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

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

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

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

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

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

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

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

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

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

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

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