DELAWARE WORKERS COMPENSATION
Industrial Accident Board CASELAW Update & Appellate Outcomes

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

DSBA Annual WC Seminar
January 2019

ATTORNEYS FEES

***Jessica Tartt v. State of Delaware*, IAB No.: 1462831 (7/17/18)** **(ORDER).** On a Motion for Re-Argument and Clarification, a $10,000.00 attorneys fee award is reduced to $1,200.00 where the medical bills at issue amounted to $2,514.00. [Schmittinger/Durstein]

***Craig Peed v. Essential Staffing*, IAB No.: 1380940 (4/24/18)** **(ORDER).** On a Motion for Clarification on the issue of an attorneys fee award, the Board reduces its prior $8,000.00 attorneys fee award to $4,000.00 but rejects defense counsel's argument that the attorneys fee award should have been limited to $1262.50 which is 30% of the dental bills which were considered. [Owen/Andrews]

***Michael Sweeny v. Ricola Concrete*, IAB No.: 1444476 (4/16/18).** With regard to a Disfigurement Hearing in which 75 weeks were awarded to the claimant, the Board awards an attorneys fee of $3,000.00. [Boyle/Morgan]

AVERAGE WEEKLY WAGE

***Juan Almazan Ramos v. Carmelo Construction, Marcelo Acosta and Ava Construction*, IAB Nos.: 1463682, 1454297 & 1459687 (4/26/18).** Where there is no actual wage documentation to be considered, the Board will not assume more than a 40 hour work week where there is an average weekly wage dispute or inquiry – in this case the Board accepted that the claimant earned $20.00 an hour and assigned an average weekly wage of $800.00 based on a 40 hour work week. [Legum/Durstein]

***Amanda Dupont v. Maxim Health Care Services*, IAB No.: 1285826 (10/4/18)** **(ORDER).** The Fund has the right to challenge the parties' agreement as to the average weekly wage – "if it has a good faith basis to challenge the average weekly wage calculated by the parties, it is within the Fund's power to challenge that average weekly wage and pay what it deems to be the correct rate. To hold otherwise would deprive the Fund of due process." [Krayer/Durstein/Cleary]

***Dante DePalma v. Tri Supply & Equipment*, IAB No.: 137060 (10/18/18)** **(ORDER).** A Petition for Review is the wrong mechanism to dispute medical treatment where causal relationship is conceded. [Schmittinger/Bittner]

***Salvatore Musemici v. City of Dover*, IAB No.: 1468435 (5/25/18).** The average weekly wage calculations should NOT include personal time, holiday time, vacation time, sick time, or vacation sell-back time, as the wage calculation statute intends that wages be based on the times when the claimant performed actual work. [Laursen/Julian]

CAUSATION

***Alice Worley-Brice v. Five Star Quality Care*, IAB Hearing No.: 1430798 (6/14/18).** Based on the testimony of defense medical expert Dr. Eric Schwartz, the Board adopts the opinion that carpal tunnel syndrome is not unusual for someone claimant's age and due to the natural progression of wear and tear in denying a Petition seeking to add right carpal tunnel syndrome to a compensable right shoulder claim. [Elgart/Baker]

***Otelia Pikin v. Nephrology Associates*, IAB No.: 1450891 (4/23/18).** On a compensable left shoulder injury, the Board grants the claimant's DACD Petition to add the cervical spine and a cervical spine surgery performed by Dr. Bruce Rudin based on the medical proposition that "shoulder and neck problems often overlap, and it can be realized later that what symptoms were thought to be solely related to a shoulder problem are also emanating from the neck." [Hedrick/Bittner]

***Karen Gould v. Delaware Park*, IAB No.: 1458988 (5/7/18).** With regard to a claim in which the Employer had accepted strain injuries to the head, cervical spine and lumbar spine and in considering a Petition seeking to recover for a cervical spine surgery and ongoing total disability, Dr. Crain trumps Dr. Eppley on cervical spine causation and the claimant's pre-existing condition is fatal to the surgery claim. [Pratcher/Newill]

***Brian Gorgoni v. Christiana Care Health Services*, IAB No.: 1457021 (6/21/18).** The claimant prevails on a cumulative detrimental effect claim for the neck and low back due to the awkward posturing involved in his work activities as a surgical physician's assistant. [Tice/Newill]

***Christine Jones v. Keystone Services*, IAB No.: 1350661 (7/11/18).** The IAB denies a DACD Petition seeking to add the left knee to a compensable right knee claim based on the testimony of Dr. Gelman in tandem with the Board's finding that the claimant was not entirely credible. [Hedrick/O'Connor]

***Charles Hodgson v. Keystone Service*, IAB No.: 1410974 (7/9/18).** On a DACD Petition seeking the compensability of a lumbar spine surgery, the Board rejects the opinion of the defense medical expert that an annular tear is degenerative and surgery is awarded (Dr. Eskander v. Dr. Smith). [Carmine/Ralston]

***Gramicelis Cabret v. Adecco*, IAB No.: 1459825 (4/30/18).** The IAB rejects a DCD Petition seeking recognition of carpal tunnel syndrome where the allegedly causative tasks in question were only performed for five days, based on Dr. Gelman's DME and recognition the claimant presented with several risk factors for the development of carpal tunnel to include gender, age and weight. [Castro/Sack]

***Ezequiel Gutierrez v. Jamestowne Painting*, IAB No.: 1466440 (10/3/18).** With regard to claimant's DACD Petition seeking to add a cervical spine surgery to a compensable right upper extremity claim, the Board denies benefits based on the defense medical evaluation of Dr.

Eric Schwartz in ruling that in a delay in the onset of cervical myelopathy equates to a lack of causation to the work accident. [Long/Gin]

Raul Segura v. M Cubed Technologies, Inc.*, *IAB No.: 1444300 (10/24/18). A 2018 lumbar spine surgery is awarded by the Board as causally related to a 2016 work accident pursuant to ***Reese v. Home Budget Center***, based upon the opinion of Dr. Yalamanchili and in rejection of the defense medical expert Dr. Fedder. [Minuti/Skolnik]

Colleen Will v. Wilmington University*, *IAB No.: 1438083 (8/6/18). On a DACD Petition, even with significant treatment leading up to the compensable work accident, followed by a significant gap in treatment after the work accident, a left total knee replacement is still compensable pursuant to *Blake*. [Owen/Roberts]

Jane Daubert v. Walmart*, *IAB No.: 1469469 (10/25/18). The Board finds in favor of a work related injury but one which has "resolved" and which is "back to base line" characterizing the injury as a "temporary aggravation of her lumbar spine condition…" The Board specifically awarded three weeks of total disability and three weeks of medical treatment expenses. [Bustard/Newill]

Marvin Brown v. Bayshore Ford Truck Sales*, *IAB No.: 1435802 (10/17/18). Dr. Kates' DME is superb to overcome DACD Petition for total knee replacement and any potential argument under *Blake*. [Weik/Wilson]

Ann Lynch v. Bertucci's Holdings*, *IAB No.: 1442992 (11/7/18). On a DACD Petition seeking to recover a cervical spine surgery in relationship to a compensable injury involving left carpal tunnel, left trigger thumb, right carpal tunnel and right trigger thumb, the Board awards benefits under the "double crush" theory as described by Dr. Zaslavsky. [Morrow/Gilbert]

Kathleen Hellstern v. Culinary Services Group, LLC*, *IAB No.: 1426858 (6/26/18). On a DACD Petition where claimant seeks acknowledgement for additional injury to the L2-3 level of the lumbar spine or an already-compensable claim at L3-4, with a related lumbar spine surgery, Dr.Smith as the defense medical expert trumps Dr. Rudin and the defense prevails in defeating a claim of adjacent segment disease. [Hedrick/Andrews]

COMMUTATIONS AND SETTLEMENTS

***Penna Orthodontics v. Tammy Hevrin*, *IAB No.: 1445836 (6/21/18)* (ORDER).** The IAB grants the Employer's Motion to Enforce a global commutation of benefits but denies defense counsel's request of an attorneys fee award for having to proceed with two Legal Hearings to compel signature on documents. [Lutness/Nardo]

Chanel Tarrant v. Christiana Care Health Services*, *IAB No.: 1456749 (6/6/18). This case is an example of a commutation/settlement which the IAB refuses to enforce based on the absence of a meeting of the minds. [Silverman/Newill]

***R&J Construction, Inc. v. Jesus Vidal-Reyes*, IAB No.: 1448295 (4/27/18).** This is possibly the only IAB decision exists with regard to 19 Del. Code Section 2359 on the Employer's Petition for Commutation for all future installments of compensation, after being discounted to present day value, with regard to a claimant who fell multiple stories to the ground and sustained catastrophic injury and who desired to relocate to Mexico. [Fogg/Andrews]

COURSE AND SCOPE

***Samuel Seymour v. Direct & Correct, Inc.*, IAB No.: 1462688 (5/30/18).** Where the claimant is a "flagger" and is in a motor vehicle accident on the way to use a restroom, the resulting injuries are deemed in course and scope of employment under the "personal comfort doctrine" as an exception to the "going and coming" rule. [Schwartz/Lukashunas]

***Nicholas Gates v. State of Delaware*, IAB No.: 145941 (4/9/18).** An employee in a motor vehicle accident en route back to the work yard to then reply to an overtime call is in course and scope of employment with regard to any injuries sustained – "while claimant was on his way to the yard to pick up equipment after he had finished his shift for the day and was called back, he was involved in a motor vehicle accident … he was clearly furthering Employer's business at the time … and had the claimant not received the call back, he would have not been at that location at the time of the accident … while he is not paid for mileage for transportation involved in overtime call backs, he is compensated for the time involved including a minimum compensation of four hours, even if he actually works at least one hour". [Schmittinger/Klusman]

***Tiara Jackson v. Open Systems Healthcare*, IAB No.: (10/25/18).** An accident on the bus to the claimant's first job assignment of the day where she is not compensated for travel time is not in course and scope, since the claimant was not "on the clock" when the accident occurred. [Legum/Greenberg]

DME ISSUES

***Walter Luff v. Tomal LLC*, IAB No. 1387671 (7/17/18) (ORDER).** The Employer is not entitled to a DME no show credit even where the Employer provided transportation. [Heesters/Andrews]

DEATH BENEFITS

***Gerald Fay v. Donald Deaven, Inc.*, IAB No.: 1432671 (6/5/17) (ORDER ON RE-ARGUMENT)** Section 2330 Death/Survivor Entitlement does not extend to a stepchild. [Pro Se/Morgan]

DISCOVERY ISSUES

***Emily Ulich v. Dodd Dental Lab**, IAB No.: 1461187 (5/17/18)* **(ORDER).** The Board limits disclosure of prior mental health records on a Motion to Compel where the nature of the work accident is a closed head injury stating "it is reasonable to inquire as to her mental state…the records would be helpful to the scheduled neuropsychological examination". [Peltz/Skolnik]

DISFIGUREMENT

***Michael Sweeny v. Ricola Concrete**, IAB No.: 1444476 (4/16/18).* The Board awards 75 weeks disfigurement benefits for a partial amputation of the right index finger as well as scarring and a postural deviation to the right middle finger. [Boyle/Morgan]

***Richard Ashley v. Diamond State Corp.**, IAB No.: 1404161 (4/16/18).* The Board awards eight weeks for a lumbar surgical scar with dimensions of 4 inches by a half inch. [Gambogi/Nardo]

***Richard Ashley v. Diamond State Corp.**, IAB No.: 1404161 (4/16/18).* The Board awards four weeks of benefits for a "mild" altered gait. [Gambogi/Nardo]

***Vilma White v. Bank One Corporation**, IAB No.: 1223920 (7/3/18).* Eight weeks of benefits are awarded for a total knee replacement surgical scar which was six inches in length with two inches of keloid formation. [Welch/Samis]

***Joanne Edwards v. Bank of America**, IAB No.: 1437174 (11/28/17).* The Board awards 20 weeks of disfigurement benefits for wrist atrophy. [Bustard/McGarry]

***Ezequiel Gutierrez v. Jamestown Painting**, IAB No.: 1466440 (7/31/18).* The claimant is awarded 14 weeks disfigurement benefits for a right arm crush injury with multiple components to include a five inch visibly raised scar. [Long/Gin]

***Lawrence Hindsley v. Martin Dealership**, IAB No.: 1419213 (10/19/18).* On a claim for disfigurement the Board awards four weeks for a four inch lumbar surgery scar. [Lutness/McGarry]

EMPLOYER/INDEPENDENT CONTRACTOR

***Michael Justice v. JRW Transport**, LLC, IAB No.: 1467304 (4/13/18).* Pursuant to a Hearing on the issue of employment relationship and in considering a defense of "independent contractor" the Board rules that the claimant truck driver is an employee of this transport company. [Holmes/Tice]

***Department of Labor v. Drone Work Force Solutions**, IAB No.: 1474631 (8/27/18)* **(ORDER).** Instructors for Drone training are independent contractors, with the Board cautioning that the "analysis is a very fact-specific one and, if the nature of the relationship

between DWS and its instructors should change in the future, it is possible that [workers comp. coverage] may be required."

FORFEITURE

***Alva Drummond-Emory v. State of Delaware*, IAB Nos.: 1458485 & 1463949 (6/18/18).** The Board rejects a defense of Section 2353 (b) recklessness/forfeiture arising out of a motor vehicle accident commenting that "in a motor vehicle accident a driver may violate a Statute but may have done so only in an accidental manner…she may have violated the Statute but did so only in a careless or negligent manner rather than deliberately." [Gualpa/Klusman]

***Richard Dworsky v. Bausch & Lomb*, IAB No.: 146757, (8/23/18).** Falling asleep at the wheel of a motor vehicle (twice) while driving home from a business trip does not rise to the level of Section 2353 (b) forfeiture – "Board also finds it very significant that the trained police officers at the first accident did not recognize Claimant to be an impaired driver or prevent him from driving, even after noting that the Claimant had fallen asleep before the first accident. Under the circumstances, the Board concludes that while Claimant showed poor judgment and acted carelessly or heedlessly in continuing to drive, he did not exhibit the deliberate and reckless indifference or I don't care attitude required to find the Claimant should forfeit his workers' compensation benefits." [Wolf/Baker]

FRAUD

***Donna Johnson v. Standard Pipe Services*, IAB No.: 1460177 (7/17/18).** In denying a DCD Petition, the IAB rules that the alleged injury to a "flagger" from a motor vehicle accident was feigned, noting that the claimant was already consistently treating for the neck, low back and right shoulder prior to the work accident with a rating of 20% impairment to the neck and 11% to the low back in 2016, with ongoing use of Percocet. [Fredericks/Andrews]

***Carlos Martinez v. Bouden, Inc.*, IAB No.: 1458941 (7/11/18) (ORDER).** In this potential fraud case the Board reviews the five prong burden of proof for a ruling of fraud ab initio and the Employer's Motion to Dismiss and Motion to Void the Agreement based on fraud is denied. [Kimmel/Rimmer]

***Eileen Mohr v. Shivani, Inc.*, IAB No.: 1442616 (7/9/18) (ORDER).** The Board rules that the Agreement as to Compensation should be deemed void ab anitio due to fraud and refers this matter to the State Fraud Prevention Bureau for further proceedings in accordance with Title 19, Section 2344 (b)(4). [Pro Se/Andrews]

***James Maggio v. Robbin Drive Auto*, IAB No.: 1445756 (5/3/18) (ORDER).** Where claimant has a public Facebook Account, is seeking ongoing total disability, but further comments on Facebook that he is "so tired of working like a dog", the Employer is entitled to information relative to the claimant's employment. [Heesters/Andrews]

MEDICAL TREATMENT ISSUES

***Donna Goff v. Barrett Business Services*, IAB No.: 1445036 (10/26/17) (ORDER).** The Board rules that the Employer cannot compel the claimant to submit to a Triple Phase Bone Scan. [Fredericks/Greenberg]

***Carl Lebo v. Kings Creek Country Club*, IAB No.: 1432414 (3/13/18).** With regard to a work related fall producing injuries to the head, eyes, teeth and other assorted body parts, the Board awards a set of Botox injections for headache based on the testimony of Dr. Jay Dave who is board-certified in neurology and psychiatry who testified that the claimant is not currently capable of working in any capacity and remains totally disabled due to post-concussion syndrome to include migraine headaches as well as ice pick headaches along with light sensitivity, dizziness, and other symptoms which impact his cognitive abilities and ability to sustain a job. [Donovan/Bittner]

***Lawrence Evans v. JF Sobieski Mechanical Contractors*, IAB No.: 1422481 (10/22/18).** The Board declines to award a fourth cervical spine surgery where the first three surgeries had poor outcomes – "Dr. Kalamchi admitted that claimant would be more limited in his activity following an additional level fusion surgery and would likely be restricted to light duty for the remainder of his life…and acknowledge that Claimant would not be able to work as a laborer following the recommended surgery. Claimant confirmed that he would be less functional and unable to perform his current job following the recommended surgery." [Donovan/Skolnick]

***Joy Melcher v. BB Medical Center*, IAB No.: 1191040 (7/24/18).** Urine Drug Screens need to be random, unannounced, and not performed on a monthly basis with the Board commenting that the 8 UDS per year obtained by Dr. Falco were excessive. [Morrow/Lukashunas]

PARTIAL DISABILITY

***Theresa Holben v. Pepsi Bottling Ventures*, LLC, IAB No.: 1449337 (5/18/18).** On this Petition for Review, the Board rules that the claimant's temporary partial disability entitlement should be based on the labor market survey and not the claimant's actual employment. [Schmittinger/Hunt]

PERMANENT IMPAIRMENT

***William Alexander Wells v. State of Delaware*, IAB No.: 1438345 (7/2/18).** Where the claimant correctional officer is beaten about the head by an inmate, he is awarded 10% to the head/brain for post-concussion headache and 15% to the "face" where he sustained multiple facial fractures based upon the testimony of claimant's expert Dr. Jeff Meyers. [Sharma/Bittner]

***William Alexander Wells v. State of Delaware*, IAB No.: 1438345 (7/2/18).** In a detailed discussion of unscheduled losses and with a comprehensive analysis of the case law involving the trigeminal nerve, the Board assigns a total value of 250 weeks to the "face". [Sharma/Bittner]

***Clyde Workman v. James Carpenter*, IAB No.: 1385136 (4/16/18).** The Board adopts Dr. Gelman and the Sixth Edition of the AMA Guides to defeat a claim for 35% impairment to the lumbar spine, in favor of an award of 15% with the Board rejecting Dr. Rodgers' permanency philosophy that "lumbar spine surgery tends to make you worse…" [Green/Klausman]

***Thomas Tyree v. JP Morgan Chase,* IAB No.: 1459674 (6/7/18).** On a claim for permanent impairment to the brain following a concussion, the Board awards 10% for post concussion headache but denies any impairment to the brain noting that the doctors testifying were Dr. Meyers, Dr. Townsend and Dr. Langan. [Kimmel/Richter]

PRACTICE AND PROCEDURE

***Juan Almazan Ramos v. Carmelo Construction, Marcelo Acosta and Ava Construction*, IAB Nos.: 1463682, 1454297 & 1459687 (4/26/18).** The Board permits the testimony of a medical expert identified inside the "30-day" based on the recognition that there was no prejudice to the defendant in that the additional doctor was effectively cross-examined and that the defense medical expert, deposed 13 days after this expert, had plenty of time to address any positions put forth by that doctor. [Legum/Durstein]

***Emily Ulich v. Dodd Dental Lab*, IAB No.: 1461187 (5/17/18) (ORDER).** The pendency of a Petition is not an absolute requirement to a production obligation. [Peltz/Skolnick]

***Louise Learish v. Christiana Care Health Services*, IAB No.: 132529 (7/16/18) (ORDER).** The 10 day Motion for Re-Argument deadline does not include holidays or weekends. [Bayha/Newil]

***Joseph Gonzon v. BP Amoco Chemical and Kraft Food*, IAB Nos.: 1456181 & 1456182 (5/24/18).** A Release of all future claims executed in 1982 bars a workers' compensation claim from mesothelioma which was diagnosed in 2016 – "in the present case although mesothelioma was not diagnosed until 2016, Claimant was fully aware in 1982 that he had been exposed to asbestos while at BP Amoco and was fully aware that exposure could result in asbestos-related diseases. In this context, Claimant agreed to the dismissal of his workers' compensation claims against BP Amoco, even for unknown diseases that they later develop, and that dismissal was reviewed and approved by the Board in 1982." As such the current Petition against BP Amoco was dismissed. [Lewis/Hubbard/Menton]

***Albert Kott v. Concrete Walls, Inc.*, IAB No.: 1369712 (7/6/18) (ORDER).** Once the claimant rejects a commutation offer, there is no settlement to try to enforce. [Gibson/Baker]

***Pricilla Boles v. City of Wilmington*, IAB No.: 1138676 (8/17/18).** There is no Statute of Limitations "Notice" argument if the claimant has signed final Receipts which contain such notice. [Silverman/Rimmer]

***Abdou Sanoe v. Minks Express*, IAB No.: 1456525 (10/17/18).** The Board grants the claimant's Motion for a Directed Verdict and awards 7% impairment to the thoracic spine and 15% impairment to the lumbar spine where there is no rebuttal testimony presented by the absent Employer. [Heesters]

***Kelly Chytrenko v. State of Delaware*, IAB No.: 1322655 (10/16/18) (ORDER).** The Board will not allow interrogatories as a means of updating information regarding the claimant's ongoing partial disability benefit entitlement with the Board further observing that the Board could have obtained the necessary information by way of an updated defense medical evaluation or by serving a Rule 11 (A) Request for Production of documents to include paystubs. [Peltz/Swift]

***Michael Dugan v. Delaware Supermarkets, Inc.*, IAB No.: 1458690 (5/8/18).** There is no prejudice to the Employer where the claimant changes his theory of causation from cumulative detrimental effect to specific accident prior to the 30-day and prior to the Employer's medical expert's deposition. [Fredericks/Bittner]

***James Joseph Bradford v. High Point Dairy Farms*, IAB No.: 1468181 (11/15/18).** The disclosure of the use of Facebook photos is subject to the "30-day" Rule of production and, as such, the Board sustained the claimant's objection to the Employer's attempt to enter Facebook photographs into evidence. [Minuti/Gin]

***Christopher Ulrich v. CFT Ambulance*, IAB No.; 1442567 (4/27/18) (ORDER).** The Fund's attempt to exclude DIGA cases from Fund reimbursement during the pendency of a Petition for Review fails based on the "specific and very clear wording of Section 2347" with the Board commenting as follows: "Employer was not self-insured, so the exclusion for self-insured employers does not apply. Employer was also not uninsured for this claim. It had insurance. That Employer's insurer became insolvent does not make Employer uninsured for this claim. Indeed the very function of DIGA is to step in for the insolvent insurer so that the insured is protected from harm by the insolvency." [Amalifatano/Gin/Cleary]

***Corey Smith v. Ram Construction*, IAB No.: 1111406 (4/20/18).** The claimant's job search produced inside the "30-day" but prior to the Hearing is permitted "as a follow-up to the labor market survey…" Welsh/Baker]

***Anthony Lewis v. Allen Harim Foods*, LLC, IAB No.: 1456245 (6/12/18) (ORDER).** The Board has the discretion as to whether to allow witnesses named inside the "30-day". [Houser/Baker]

***Rhonda Taylor v. Westin Wilmington Hotel*, IAB No.: 1466259 (6/5/18) (ORDER).** This case contains a discussion of the importance of accuracy and clarity in completing the DCD Petition and the Pre-Trial. [Fredericks/Bittner]

SECTION 2311 CONTRACTOR ISSUES

***Fetima Herrera-Castro v. Fabian Carreon and Burton Construction, LLC*, IAB No.: 1460532 & 1460538 (10/25/17).** Where the sub-contractor tenders a certification for Maryland and the general contractor does not investigate the existence of Delaware coverage, Section 2311 liability attaches. [Schmittinger/Swift]

SECTION 2363 CREDIT

***Louise Learish v. Christiana Care Health Services*, IAB No.: 132529 (7/16/18) (ORDER).** This Order on Motion for Re-Argument considers the novel legal issue of whether a Section 2363 (e) Credit applies to a third party settlement from a non-work related, subsequent accident, "an issue which appears to be novel in Delaware case law." In this case the Board made no specific ruling on the issue stating that "the credit issue is not yet ripe for consideration by the Board" knowing that the claimant had received a significant financial settlement for injury to the same body part in connection with the "intervening" motor vehicle from a third party defendant and/or automobile insurance carrier. [Bhaya/Newil]

TERMINATIONS

***Keith Beaudean v. Pleasant Hills Lanes*, IAB No. 1446302 (7/19/18).** The Employer's Termination Petition is granted in the case of a 61 year old claimant in light of a Functional Capacity Evaluation which would allow the claimant to return to full time light duty work which was identical to his work status prior to a lumbar spine surgery with the Board rejecting the testimony of the treating physician that the FCE is "simply a guide." Dr. Zaslavsky was the treating physician and Dr. Eric Schwartz was the defense medical expert. [Freibott/Richter]

***Bobby Sweetman v. Willis Chevrolet*, IAB No.: 1436026 (4/13/18).** In granting the employer's Petition for Review, the Board rules that nothing in the law requires a claimant to be pain free prior to a return to work nor does the need to wean from Dilaudid preclude a return to work based on the defense medical expert testimony of Dr. Robert Smith. [Wilson/Andrews]

***Kalimah Goldman v. Delaware Valley Remediation*, IAB No.: 1467604 (10/3/18).** In granting the Employer's Petition to Terminate, the Board chronicles an inadequate job search and embraces the labor market survey. [Gambogi/Hunt]

TOTAL DISABILITY

***Kenna Harrigan v. Delaware Transit Corp.*, IAB Hearing No.: 1449899 (7/17/18).** The Employer cannot engage in self-help by unilaterally stopping total disability absent a signed Final Receipt, the claimant's consent, or a Board Order. [Bowers/Galbraith/Klusman]

***James Stephenson v. Unisource*, IAB No.: 1180412 (10/1/18) (ORDER).** The IAB finds that the carrier has no control over the US Postal Service as to the arrival of total disability

checks in considering the claimant's allegation that the carrier has failed to pay total disability in a consistent manner – "the Board does not find it detrimental that at times a check might be four days early or one or two days late. The claimant continues to receive total disability payments bi-weekly. If Claimant desires more consistency, then, as Employer argues, he should consider direct deposit. Neither the Board nor the carrier are able to control the timing of the postal service … [O'Neill/Tatlow]

UTILIZATION REVIEW

***Kirby v. Comfort Suites*, IAB No.: 1262903 (4/13/18).** On a Utilization Review Appeal of treatment including a 5-level provocative diskogram as well as the medications Duloxetine, Tizanidine, Gabapentin, Senxon, Omeprazole, Methadone, Percocet, Soma and Meloxicam the Board rules that the claimant's non-opioid medications are reasonable and necessary but that her opioid usage should be reduced at a rate of 10% per month until she achieves a 90 mg. morphine equivalent level with Dr. Balu testifying on behalf of the claimant and Dr. Brokaw testifying as defense medical expert. [Schmittinger/Tatlow]

***Cheryl West v. Decrane Aerospace, Inc.*, IAB No.: 1337488 (5/14/18).** The Board reverses a Utilization Review certification of pain medications prescribed by Dr. Balu, orders a program of "weaning" and calls out Dr. Balu for "prescribing medication that the claimant no longer requires or uses" further commenting that per the claimant, Dr. Balu had never informed her of the dangers of combining opiates and Benzodiazapines. [Evans/Cobb]

***Charlotte Crossman v. State of Delaware*, IAB No.: 1376583 (5/17/18).** The Board reverses a Utilization Review certification of Dr. Balu treatment and medications, orders "weaning", and calls out Dr. Balu for using boilerplate forms to adhere to the Health Care Practice Guidelines. [Carmine/Skolnik]

***Hina Modi v. JP Morgan Chase*, IAB No.: 1281668 (5/31/18).** The Board affirms a Utilization Review non-certification of massage therapy based on the testimony of defense medical expert Dr. Nathan Schwartz based on a perceived lack of objectively measurable functional gains. [Long/Cave]

***Georgia Redmon v. Wilgus Associates*, IAB No.: 1400998 (6/27/18).** The Board affirms a Utilization Review non-certification of Oxycodone and Oxycontin and orders "weaning" based on the defense medical expert testimony of Dr. Brokaw – "it is rare for Dr. Antony to prescribe Xanax along with Oxycodone and Oxycontin, but she has being doing so for claimant since 2014 with no attempt to wean her from the medications until April 2018, after the Utilization Review determination indicated that the medications are non-compliant with the Guidelines". [Lazzeri/Ellis]

***Krystle Morton v. Delhaize America*, IAB No.: 1459979 (4/18/18).** The Board reverses a Utilization Review certification of treatment with Dr. Balu – "Despite the fact that claimant: missed months of treatment, had no new objective signs of symptom worsening, and failed several drug tests for prescription medications, Dr. Balu continued to supply Claimant with

additional prescription narcotic pain medications and "treat" symptoms for which there were no objective findings to substantiate. The Board finds Dr. Balu's pattern of unsubstantiated treatment to be "unreasonable" (and the Board further noted that Dr. Balu misread an MRI due to a "hole in the page"). [Owen/Hunt]

***Joy Melcher v. BB Medical Center*, IAB No.: 1191040 (7/24/18).** The Board affirms a Utilization Review non-certification of Dilaudid and Benzodiazepines based on the defense medical testimony of Dr. Brokaw. [Morrow/Lukashunas]

***Eric Hiller v. Newark Concrete, LLC,* IAB No.: 1306409 (8/10/18).** The Board affirms a Utilization Review non-certification of opioid treatment with Dr. Cary to include Oxycontin and Oxycodone but awards a treatment plan for the use of medical marijuana for a period of six months noting that Dr. Cary testified on behalf of the claimant and Dr. Coveleski testified as the defense medical expert. [Hemming/Durstein]

***Laurie Reynolds v. Kencrest Services*, IAB No.: 1447663 (10/23/18).** The Board affirms a Utilization Review non-certification of Percocet but reverses a Utilization Review non-certification as to Tramadol, Lidocaine, Topomax, Diclofemoc Sodium and Metaxlone with Dr. Sundarajan testifying on behalf of the claimant and Dr. Schwartz testifying on behalf of the Employer. [Laursen/Carmine]

***Elizabeth Williams v. Bayhealth Medical Center*, IAB No.: 1349956 (6/7/18). (ORDER ON MOTION FOR RE-ARGUMENT).** If there is no causation defense, any disputed medical bills must be submitted to Utilization Review or the carrier owes on those bills. [Schmittinger/Durstein]

VOLUNTARY WITHDRAWAL FROM THE WORK FORCE

***Carl Lebo v. Kings Creek Country Club*, IAB No.: 1432414 (3/13/18).** The Board rules that the claimant's receipt of Social Security disability benefits does not mean that he is voluntarily withdrawing from the work force, noting that at the time of his testimony, the claimant had not sought a job because he had not yet been released to return to work in any capacity. [Donovan/Bittner]

***Ida Warren v. Amstead Industries*, IAB No.: 1360974 (7/23/18).** The Board finds that claimant is voluntarily retired for reasons unrelated to the work injury and is therefore removed from the workforce as she enjoys a retirement lifestyle. [Wasserman/Wilson]

APPELLATE OUTCOMES

***Weller v Morris James LLP*, No. 200, 2018 (11/1/18)** **(ORDER).** *The Supreme Court has affirmed the judgement of the Superior Court opinion that was addressed in the last Case Law Update.* The primary issue in this case was whether an employee injured while playing on his employer's softball team was within the course and scope of employment. The Board twice following remand found that the injuries were within the course and scope of employment. The Board found that the employer took action to bring softball within the "sphere of employment-related activity." Those actions were: 1) an employer representative told him to submit a workers' compensation claim; 2) prior softball injuries had been covered under worker's compensation; and 3) employees were pressured to play softball. The Court found those actions insufficient based on Dalton factors issued by Supreme Court in State v Dalton, 878 A.2d 451 (Del. 2005). There was no substantial direct benefit to the employer relating to the firm's business itself. Dalton specifically excludes mere intangible benefits as insufficient to make a recreational activity work-related. As softball had no monetary impact and did not bring in new business, it was not within the course and scope of employment. The Court further held that the Board improperly added a factor by considering whether softball was an "employment-related activity." This factor was not consistent with the Dalton factors, was too elastic to be consistently applied and therefore constituted legal error. [Mondell & Greenberg/Nitsche & Stewart].

***Boller v Tip Top Trim Shop*, C.A. K17A-09-002 WLW (6/6/18).** This claimant appealed from a decision of the Board denying his petition on the basis that it was untimely filed outside of the two year statute of limitations. He had alleged a cumulative trauma injury but the evidence indicated that his symptoms had started many years before the filing of his petition. The Court remanded the case back to the Board to make an additional finding. According to the Supreme Court in Geroski v Playtex Family Products, the Board must analyze when a reasonable claimant should have recognized 1) the nature, 2) seriousness and 3) probably compensable nature of the injury. Although the Board in this case cited all three factors and provided rationale under two, the court found that the Board did not explain in sufficient detail why the claimant should have realized the seriousness of the thumb problem more than two years before the filing of the petition. [Schmittinger&Holmes/Baker].

***Holben v. Pepsi Bottling Ventures, LLC*, (12/13/18).** Two issues were raised before the Superior Court following a decision granting the employer's termination petition. Claimant first challenged the Board's finding that higher wages on a labor market survey were more representative of earning capacity that the claimant's actual post-injury wages. It was argued that there should be a bright-line rule or presumption that post-injury wages are the best evidence of earning capacity. The court affirmed this portion of the Board's decision. Claimant's argument was not supported by the language of the statute. The Board has discretion in each case to determine whether actual wages or a labor market survey best represents post-injury wage capacity. Next, Claimant contended that the Board erred by not awarding a separate attorney's fee along with its award of partial disability benefits. The Board declined to award an attorney's fee as the employer's 30 day rule offer for partial disability benefits was greater than the amount awarded for partial disability. The Court reversed and ordered the Board to award a separate attorney's fee. It was determined that the failure to offer to pay the deposition cancellation fee of

claimant's expert, even though such a fee did not exist at the time of the offer, made it less than the Board's award including deposition expenses. [Schmittinger/Hunt].

Grabowski v. J.J. White Inc., C.A. N18A-02-005 CEB (11/28/18). The primary issue before the court was whether an evidentiary ruling by the Board warranted reversal of the decision granting the employer's UR appeal petition. At time of hearing, the employer sought to introduce into evidence a deposition transcript of claimant's expert from a different case concerning the expert's use of boilerplate language in his records. The Board permitted the submission but did not rely on it in the decision. Claimant argued on appeal that such evidence created prejudice, was irrelevant and contrary to IAB rules. The Board's decision was affirmed. The court did not need to reach the merits of whether the submission was proper as it had no bearing on the outcome of the decision. All other arguments raised were waived as they were not properly presented to the Board for consideration. [Nitsche&Hemming/Ellis].

Giles & Ransome v Kalix., C.A. N17A-10-001 CEB (10/19/18). This case dealt with the novel issue of medical marijuana in the worker's compensation system. The Board had awarded the claimant a significant reimbursement for payments of medical marijuana used to treat a compensable work injury. Employer appealed that decision due to the large consumption and resulting cost of medical marijuana. The court affirmed, in part, as the fact findings of the Board were entitled to deference. The court stated in dicta that limiting dosages of medical marijuana right now would be unrealistic due to normal experimentation for pain relief and because the science of medical marijuana was at an early stage. [Baker/Marston&Donovan].

State v. Gates, C.A. K18A-04-002 JJC (11/16/18). This appeal concerned the issue of course and scope of employment post Spellman v Christiana Care. The Supreme Court in Spellman held that the Board should first look to the employment contract to determine whether a claimant was or was not within the course and scope of employment when injured. In Gates, the Board found the claimant within the course and scope of employment when he was injured in a car accident while driving in response to an emergency overtime call. The State challenged that ruling based on a "merit rule" applicable to the claimant that placed his driving to and from work as a non-work related activity. The court held however that the merit rule was not an enforceable part of the employment contract because there was no evidence that the rule was known to the claimant, it was unclear whether merits rules were binding or simply recommendations and the parties conduct over time being inconsistent with the language of the rule. The court also addressed public policy by ruling that Spellman should not permit an employer to limit what constitutes the course and scope of employment beyond what is normally a "common part" of employment. [Klusman/Schmittinger].

Gaskill v State, C.A. K18A-04-002 JJC (11/16/18). The court addressed the Board's denial in this case of permanency benefits for the left leg. The claimant injured several body parts at work including to his low back. The parties previously had settled permanency to the low back. The Board declined to award permanency benefits to the left leg as there was no independent injury to that body part. The Board relied on a provision in the AMA Guides indicating that if lower extremity impairment is due to a back injury, a separate permanency rating to the leg is generally unavailable. The claimant contended on appeal that the Board was adopting a blanket rule prohibiting entitlement to the lower extremity when there was no direct injury. The Court disagreed

and affirmed the Board's decision. The ruling applied to the facts of this case and the Board's reliance on the language on the language of the AMA Guides, plus ample other support in the record, constituted substantial evidence. [Marston/Lukashunas].

<u>Tri-State Roofers v. Gonzalez-Rodriguez</u>, C.A. N18A-05-004 RRC (12/31/18). This employer contended that the Board erred by failing to make specific findings as to the nature and extent of the claimant's injuries found to be compensable in the decision. The court however held that the findings in the decision met the bare minimum to survive judicial review and therefore affirmed. Even when the Board decides not to expressly state certain findings, a remand will not be necessary when the court can infer what they are from reading the decision as a whole including the "summary of facts" section. [Rimmer&Bittner/Nitsche&Fredericks].

<u>Garrett v Amazon.com</u>, C.A. N17A-06-007 JAP (6/1/18). The issue in this appeal was whether the Board's evidentiary ruling declining to strike witness testimony justified remand or reversal of the decision. The Board had denied the claimant's DCD petition after determining that it did not find credible the alleged occurrence of a work accident. An employer representative testified as to the results of an accident reconstruction that he did not observe but which was reported to him and included in a safety report he drafted. After the testimony was complete, the claimant sought to strike it in its entirety on the basis that it was hearsay. The court affirmed the Board decision. The Board may disregard the strict application of evidentiary rules and entertain hearsay evidence. It appeared little weight was placed on that evidence in the decision. There was no error of law as the Board did not rely entirely on hearsay evidence to reach its decision. [Decision affirmed by Supreme Court on 12/28/18]. [Wolf/Ellis].

<u>Davis v. Healthsouth</u>, C.A. N17A-11-005 RRC (6/6/18). A challenge to the Board decision solely on the basis that it lacked substantial evidence was rejected by the court. The Board denied in part the claimant's petition by accepting the zero percent permanency rating of Dr. Robert Smith over the 16 percent rating of Dr. James Zaslavsky. Dr. Zaslavsky was not found credible as he did not accurately follow the AMA Guides, based his opinion upon exams occurring prior to MMI and relied on diagnostic studies that were inconsistent with claimant's subjective complaints. The Board was entitled to rely on Dr. Smith's testimony and the court would not reconsider the evidence. [Long/Sack]