DELAWARE WORKERS COMPENSATION
Industrial Accident Board CASELAW Update & Appellate Outcomes

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DSBA Workers' Compensation Seminar

CAUSATION

Valerie Brown v. Bank of America, IAB No.: 1473395 (02/22/19). A cervical spine injury is awarded under a cumulative detrimental effect theory where the Claimant does computer work all day with Dr. William Newill testifying on behalf of the Claimant and Dr. Errol Ger testifying on behalf of the employer. This award included a cervical spine surgery proposed by Dr. James Zaslavsky. [Allen/Tatlow]

Susan Godzuk v. Amedisys, IAB No. 1457853 (03/25/19). The Employer prevails in disputing causation of a temporomandibular joint (TMJ) issue based on the defense medical expert testimony of Dr. John Townsend - - "Dr. Townsend noted that Claimant did not present with TMJ symptoms until April, 2018, long after the May, 2017 work accident. In addition, Dr. Townsend explained that he would expect there to have been direct trauma to the TMJ arthritic area at the time of the work accident; complaints of problems chewing or jaw clicking following the accident; and discussion of those complaints during Claimant's visits with various providers following the work accident…Dr. Townsend noted that Claimant's TMJ arthritic condition could have become symptomatic without any triggering event, and determined that it was unlikely that Claimant's TMJ was related to Claimant's work accident." [Amalfitano/Simpson]

COURSE AND SCOPE

Alexis Cleveland and Britney Foote v. Child, Inc., IAB Nos.: 1474956 & 1474693 (03/13/19). A quick trip off premises to seek breakfast in advance of a day-long-out-of-town conference is within course and scope of employment under the personal comfort doctrine. In this case, the claimant and her co-worker left Wilmington at approximately 7:00 a.m. and travelled together in a company van to a conference at a Best Western in Baltimore, Maryland. Upon arriving at the conference location at 8:00 a.m., they discovered there were no coffee or breakfast options available for them there and as such, were directed by conference staff to a nearby Wawa. Their vehicle was rear-ended at a stop light after picking up some light refreshments. The Board ruled that the slight deviation was compensable as an exception to the "going and coming" rule and also under the personal comfort doctrine. As the Board stated: "There is no dispute that the purpose of the 6/20/18 seminar trip to Baltimore was to satisfy the continuing licensing requirements necessitated by the Division of Family Services, which furthered Child Inc.'s business interests. As such, reasonable accommodations for food and personal comfort should have been anticipated by the Employer. As the company van left the Child Inc. premises at 7:00 a.m., their departure from Wilmington was outside of and earlier than the regular hours and beyond the customary work premises for both Claimants. Under the circumstances, the Board finds it reasonable for the employees, after driving from Wilmington to Baltimore, to have also traveled from the seminar site to Wawa to seek breakfast before the seminar actually began at 9:00 a.m., particularly since no food provision for attendees was available at the seminar location." [Tice/Wilson/Andrews]

DME ISSUES

Laura Cooney-Estes v. Amazon.com, IAB No.: 1447920 (02/25/19) (ORDER). In denying the Employer's Motion for a DME Credit, the Board comments that the Employer must show "bad faith" for a DME credit to be awarded, and that the Claimant making a mistake is not bad faith (in this case, the Claimant appeared for the DME on the proper date but at the wrong time). [Welch/Ellis]

Donnell Bynes v. Allen Harim Foods, IAB No.: 1465776 (03/01/19) (ORDER). DME and transportation-related "no-show" fees are awarded as a credit to the carrier where the claimant missed a first DME, requested transportation in connection with a second DME, and then was not home when the transportation arrived for that second DME, causing the Employer to incur a DME no-show fee as well as a transportation expense in the amount of $345.15. [Amalfitano/Baker]

Ashley Folk v. Achieve Logistics Systems Transport, IAB No.: 1467473 (12/19/18). "The Claimant timed the length of her defense medical evaluation [with Dr. Brokaw] on the advice of her attorney." [Wasserman/Morgan]

Susan Dixon v. Interim Healthcare of Delaware, IAB No.: 1469062 (01/07/19) (ORDER). The Board is critical of third-party DME vendors, apparently placing the Board in good company. [Stewart/Harrison]

DISFIGUREMENT

Janice Colmery v. Select Medical Corporation, IAB No.: 1399964 (01/28/19). On a claim for disfigurement, the Board awards 10 weeks for a cervical spine surgery scar in the middle of the Claimant's neck with the following description: "…scarring at the bottom of the center of the neck to the left. It was about 1.5 inches in length, and about a quarter of an inch in width. As part of the scarring there was a roundish protrusion located at the center of her neck. There was also a surgical scar line visible. The color of the scar was a little lighter than the surrounding skin. The scar was also slightly indented." [Wolf/Chrissinger-Cobb]

Brian Smith v. First Choice Auto Care, IAB No.: 1427506 (03/08/19). The stiffness of a finger is eligible for a disfigurement award as a postural deviation and as such, the Claimant is awarded 4 weeks of benefits. [Bustard/Graney]

Timothy Miller v. State of Delaware, IAB No.: 13404492 (03/08/19). The Board awards 18 weeks of disfigurement benefits for a nine-inch scar running vertically down the center of the stomach. [Bartkowski/Panico]

Timothy Miller v. State of Delaware, IAB No.: 13404492 (03/08/19). The Claimant is awarded 28 weeks of disfigurement for a lumbar surgical scar nine inches in length and a quarter inch in width, with suture marks visible and with the scar being raised. In addition, the claimant

is awarded 4 weeks for a spinal cord stimulator scar and 2 weeks for the battery pack scar. [Bartkowski/Panico]

Timothy Miller v. State of Delaware, IAB No.: 13404492 (03/08/19). The claimant is awarded 4 weeks of disfigurement benefits for a scar located on the throat from a cervical spine surgery which is 2.5 inches long and a half inch wide with suture marks and slight indentation. [Bartkowski/Panico]

Kevin Heller v. YRC Worldwide, IAB No.: 1428937 (12/13/18). The Board awards 6 weeks for a 3-inch by half inch abdominal scar. [O'Neill/Gin]

Kevin Heller v. YRC Worldwide, IAB No.: 1428937 (12/13/18). The Board awards 3 weeks of disfigurement benefits for a lumbar surgical scar which is 2 ¾ inches by ¼ inch. [O'Neill/Gin]

FORFEITURE

Dante DePalma v. Tri Supply & Equipment, IAB No.: 1370660 (02/28/19) (ORDER). The Claimant's refusal to wean from opioids is not a Section 2353(a) forfeiture – "Employer's offer of having Claimant disregard his doctor's orders to continue medication that Claimant's doctor believes is reasonable and necessary and to ultimately stop treating, is not a reasonable alternative to treatment that would rise to a level of forfeiture. Stated more succinctly, an offer to stop treating is not an offer of reasonable alternative medical treatment - - it is an offer of no treatment at all…Forfeiture does not come in to play by Claimant's refusal to stop treating, especially when his doctor believes such treatment is reasonable and necessary." [Schmittinger/Bittner]

MEDICAL TREATMENT ISSUES

Karen Maurer v. State of Delaware, IAB No.: 1429434 (02/14/19). The Board awards the Claimant left ankle Platelet Rich Plasma Injections based on the testimony of Dr. Irene Mavrakakis. [Schmittinger/Bittner]

Karen Maurer v. State of Delaware, IAB No.: 1429434 (02/14/19). The medical provider has a duty to separate billing for compensable v. non-compensable medical treatment. [Schmittinger/Bittner]

James Smith v. Crossmark Holdings, IAB No.: 1374772 (03/14/19). The Board awards a dorsal root ganglion stimulator proposed by Dr. Yalamanchili - - "The goal of the secondary stimulator is to provide Claimant with additional relief, avoid more invasive spinal surgery, and improve claimant's functional capacity. It works differently than the first stimulator, which treats the spinal cord itself. The proposed dorsal root ganglion stimulator treats the nerve roots that come off the spinal cord that extend into the buttocks, hip and groin, where the majority of Claimant's pain is located." [Long/Tatlow]

James Spencer v. Mountaire Farms, IAB No.: 1097898 (01/09/19). The Board grants the Employer's Petition to Terminate the Claimant's pain management treatment with Dr. Achampong based upon the defense medical expert testimony of Dr. Nathan Schwartz. Specifically, Dr. Schwartz concluded that the Claimant's continued narcotic medication treatment to include Oxycodone and OxyContin was not reasonable and necessary treatment because there was no indication that Claimant had experienced a positive response from treatment. Dr. Schwartz explained that there are different areas which can be tested for positive patient response including: Positional tolerances, range of motion, strength, endurance, activities of daily living, cognition, psychiatric behavior and velocity measures, none of which were documented in claimant's treatment records. In granting the Employer's Petition for Review as to the narcotic medication treatment regimen, the Board allowed a weaning period of two months. [Roman/Skolnik]

Margina Taylor v. Mountaire Corp, IAB No.: 1475957 (04/04/19) (ORDER). The Employer's Motion to Compel the Claimant's participation in an EMG/nerve conduction study is denied taking into account that the claimant submitted to an EMG within the past year. [McDonald/Torrice]

Isaac Prince v. Pittsburgh Glass Works, IAB# 1443211 (4/22/19). The IAB will not make a blanket assumption that all EMGs or diagnostics done in-house (in this case, by Dr. Falco) are of no evidentiary value. [Warren/Morgan]

Jeannie Lawhorne v. State of Delaware, IAB No.: 1441788 (12/06/18). On a DACD Petition seeking benefits for recurrence of total disability, and where the employer disputes both the total disability and the reasonableness/necessity of pain management, the Board both denies the claim for total disability and also denies continued use of narcotic medications, allowing a period of 6 weeks to be weaned off the narcotics. [Gambogi/Skolnik]

Christian Stamm v. New Castle County, IAB No.: 1347727 (10/25/18). In spite of the Employer paying roughly $16,000 for lumbar spine treatment, the Board refuses to find an "implied agreement" for the lumbar spine, accepting the Employer's testimony that the payments were made by mistake rather than under a feeling of compulsion. [Freebery/Norris]

Sarah Saunders v. Sunrise Senior Living, IAB No.: 1259942 03/08/19). In this case, the Employer filed a Petition for Review seeking to challenge reasonableness, necessity and causality of Claimant's medical treatment expenses associated with continuing narcotic medication and injections in a matter in which the indemnity was already commuted. The Board granted the Employer's Petition seeking termination of pain management with Dr. Xing consisting of monthly Percocet prescriptions and specifically provided that the treatment would not be compensable after a three-month weaning period; Dr. Nathan Schwartz testified on the Employer's behalf noting that the Claimant tested positive for illegal drugs on numerous occasions between 2011 and 2018 including THC, marijuana, cocaine, and benzodiazepines. [Allen/Skolnik]

MISCELLANEOUS COMP ISSUES

Wendover Inc. and Shivani Inc. v. Global Financial Credit, LLC, IAB Nos.: 1462198 & 1442616 (03/14/19) (ORDER). Pursuant to this IAB decision involving Global Financial Credit and the practice of advancing monies to desperate injured workers in exchange for deferred repayment at astronomical interest rates, the Board rules that Global and other workers' comp moneylenders are enjoined from collecting and that the practice of advancing such funds is in violation of 19 Del. Code Section 2355's strict prohibition against debt collection on compensation payments. [Andrews/Cleary/Herr]

PARTIAL DISABILITY

Heather Dewey v. Genesis Health Care, IAB No.: 1411730 (03/08/19). The Board rules that the Claimant's potential "tip income" as a server and bartender does not negate her partial disability benefit entitlement with the further comment that "Claimant cannot depend on a certain amount of tips, because the tips vary due to numerous circumstances…" [Marston/Harrison]

Heather Dewey v. Genesis Health Care, IAB No.: 1411730 (03/08/19). The Employer's Termination Petition to Terminate Partial Disability is denied where claimant is working six hours daily in a modified duty capacity and where the claimant is post-operative relative to two fusions to the cervical and one fusion to the lumbar, and with the Board rejecting the employer's argument that "even if Claimant continues to have light duty restrictions, her wages vary depending on her tips and she has the ability to earn more than she earned at Genesis, despite restrictions..." [Marston/Harrison]

PERMANENT IMPAIRMENT

Sean Nicol v. General Electric, IAB No.: 1447159 (02/12/19). On a claim for 9% permanent impairment to the lumbar spine, Dr. Piccioni and the AMA Guide, Sixth Edition, overcome the opinion of Dr. Rodgers, and, as such, the Claimant is awarded a 4% impairment to the lumbar spine. [Long/Ellis]

Dawn Frank v. State of Delaware, IAB No.: 1452239 (01/31/19). On a claim for 8% impairment to the lumbar spine, the Board awards no permanency based on the defense testimony of Dr. Gelman and further slams the treating physician's permanency rating due to the lack of a specific dedicated permanency evaluation commenting that the permanency rating of such physician "should not simply be based on a chart review…" [Hemming/Klusman]

Isaac Prince v. Pittsburgh Glass Works, IAB# 1443211 (4/22/19). Claim for permanency for post-concussion headache fails based on inconsistency of the evidence as to frequency of headaches in tandem with the lack of any apparent medical treatment (or use of prescription medications) for same. [Warren/Morgan]

Farkyn Baez v. Magco, Inc., IAB No.: 1420574 (12/24/18). In awarding benefits for a permanent impairment to the abdominal wall, based on a left inguinal hernia repair, the Board

recognizes that the abdominal wall is based on a total of 300 weeks and awards a 6% impairment with the further observation that where there is no protrusion or palpable defect but only residual discomfort, the Claimant belongs in the lower end of a Class I impairment. [Stewart/Wan]

PRACTICE AND PROCEDURE

Karen Maurer v. State of Delaware, IAB No.: 1429434 (02/14/19). The Employer's Motion to Deny the Claimant two medical expert fees is denied - - "In this case, I find the Claimant's two medical witnesses were not unreasonably cumulative or redundant, as both medical witnesses are Claimant's treating physicians and testified as to two different aspects of Claimant's treatment." [Schmittinger/Bittner]

Karen Maurer v. State of Delaware, IAB No.: 1429434 (02/14/19). The Board denied Employer's Motion to Exclude Dr. Mavrakakis' testimony, the basis of which was that the deposition occurred telephonically and that the doctor's medical assistant had stepped in to show her a medical note. "While witness 'assistance' or 'commingling' with dates or any information during her testimony should not be condoned, I do not find that the interjected 'assistance' or 'commingling' in this case rises to the level of actual prejudice to Employer." [Schmittinger/Bittner]

Christopher Moore v. Amazon.com, IAB No.: 1432270 (02/08/19) (ORDER). A Claimant is not required to provide independent corroboration of his testimony – "Employer had every opportunity to cross-examine claimant as to his disability status and to challenge his assertion with the medical records. Employer's counsel did not do so. As such, Claimant's testimony as to his own period of total disability is uncontradicted and unrebutted." [Donovan/Ellis}

Maynor Ramirez-Lopez v. EPN Construction LLC, Demiranda Construction, and Ryan Homes Inc., IAB No.: 1471435, 1473789 & 1473790 (04/16/19) (ORDER). The Board refuses to allow discovery depositions even in an unduly complicated Section 2311 contractor case and instead refers the matter for a "preliminary evidentiary hearing on the threshold issue of insurance coverage." [Welch/Logullo/Carmine/Adams]

Wilfred Ainsworth v. Lowe's, IAB No.: 1453715 (03/07/19) (ORDER). The Claimant's Motion seeking to consolidate a pending Petition for Review with a newly filed DACD seeking compensability of a new body part is denied. [Long/Durstein]

Martoryo Cannon v. Purdue Farms, Inc., IAB No.: 1443281 (01/08/19) (ORDER). This case contains a discussion of the applicability of the "saving" statute located at 10 Del. Code Section 8118(a) and the issue of whether the "saving" statute operates in this case to bar a defense of expiration of the statute of limitations, 19 Del. Code Section 2361.

Anthony Carl Wolford v. Cape Environmental Management, IAB No.: 1465632 (01/09/19). The Board grants the Employer's Motion to Preclude a nurse practitioner's testimony as a medical expert, noting that the witness in question did not seem to understand the

meaning of the term "diagnosis" or the meaning of the term "reasonable medical probability". The nurse was allowed to testify as a fact witness but not a medical expert. [Long/Gilbert]

Yanitza Figueroa v. DE Psychiatric Center and Genesis Healthcare, IAB#s 1412501 & 1449193 (4/25/19) (ORDER). Motion to Consolidate DACD petition with already-pending Petition for Review is denied. [Hemming/Baker/Skolnik]

Candice Dill v. Walmart Distribution Center, IAB# 1476645 (4/25/19). The Board overrules Claimant's objection to the introduction of recently discovered medical records documenting prior treatment to the neck which were not available prior to either medical expert deposition. Heretofore, Claimant had denied such prior neck complaints. In ruling in favor of the Employer, the Board reiterated that the Claimant cannot be surprised by her own medical records and the records can come in for impeachment. [Stewart/Newill]

Leigh Stewart v. DE Supermarkets Inc., IAB# 1322914 (4/25/19) (ORDER). Where Claimant has repeatedly disregarded a request for production of her job search log, she is prohibited from testifying at Hearing as to her job search efforts. [Ippoliti/Morgan]

Christopher Moore v. Amazon.com, IAB No.: 1432270 (02/08/19) (ORDER). The Board prohibits the use of a premises video produced inside the 30-day. [Donovan/Ellis]

Christopher Moore v. Amazon.com, IAB No.: 1432270 (02/08/19) (ORDER). The Board's decision contains a detailed discussion of Spayd and Clausen and when a letter to the defense medical expert is discoverable. [Donovan/Ellis]

Jose Luis Garcia Hernandez (deceased) v. Countrywide Payroll, IAB No.: 1423325 (12/20/18) (ORDER). This is an example of a commutation pleading for a non-resident alien dependent in a death benefit case. [Warren/Morgan]

"RESOLVED/BACK TO BASELINE"

Benjamin Farrar v. JEM Enterprises/Service Master, IAB Nos.: 1420157 & 1420002 (01/30/19). The Board finds that the work-related injury has "resolved" such that a claim for permanent impairment and medical bills is denied with the opinion of Dr. Gelman overcoming that of Dr. Bandera. [Snyder/Wilson]

Christine Davies v. State of Delaware, IAB No.: 1442025 (01/09/19). The Board denies a DACD Petition seeking compensation for a posterior cervical laminectomy and fusion based on the defense medical expert opinion of Dr. Rushton and specifically rules that the claimant is "back to baseline" as to her prior condition - - "The approximate one-year gap in treatment after the work accident, coupled with her return to full-duty work just as she had been doing at the time of the work accident supports Dr. Rushton's credible opinion that the surgery is not related to the work accident." [Morrow/Klusman]

Carina Vayo v. Pivot Physical Therapy, IAB No.: 1474619 (04/11/19). With regard to a March 6, 2018 work injury to the low back, the Board awards the medical treatment in question but further rules by that November 1, 2018, the claimant had "returned to baseline and no further treatment was required." [Hedrick/Julian]

SECTION 2311 CONTRACTOR ISSUES

Ronal Lima Ordonez v. SM Commercial Roofing, Inc., IAB No.: 1473098 (02/06/19). The Board's consideration of this case involving 19 Del. Code Section 2311 holds that the tender of a certificate of insurance that is about to expire may be a valid tender for the current job but is not a valid tender of a "facially valid" certificate for purposes of subsequent jobs. As stated by the Board, "we conclude under the totality of circumstances that the contracting entity, SM Commercial Roofing knew or should have known the COI submitted by Greenwood in late January, 2018 would expire after March 9, 2018 as that fact was evident on its face. Given the date of the subsequent May 10, 2018 work accident involving Claimant, the COI was no longer facially valid and no worker's compensation coverage was in effect through the subcontractor, Greenwood. Thus, applying Section 2311(a)(5), the contracting entity, SM Commercial Roofing is deemed to insure the present worker's compensation claim." [Legum/Morgan]

Pablo Lopez-Ramos v. WM Company, William Hidalgo, Station Builders, and Delframing, Inc., IAB Nos.: 1464792, 1465418, 1467400 & 1467401 (12/11/18) (ORDER). A finding of reliance on a facially valid certificate of insurance is a separate issue from whether the certificate of insurance is accurate and provides coverage. [Boswell/Panico/Brooks/Mones]

SETTLEMENTS & COMMUTATIONS

Marcie Pusey v. State of DE, IAB#1425549 (4/23/19). The Claimant's $100,000 commutation fails due to dispute over paying separate mileage reimbursement. There is no meeting of the minds as to a settlement and mileage reimbursement, which was a material term to the commutation from claimant's vantage point, was not a component of the settlement. [Castro/Rimmer/Bittner]

TERMINATIONS

Wesley Barnes v. Lowes, IAB No.: 1258926 (02/26/19). A Petition to Terminate is denied where the Claimant submits to Functional Capacity Evaluation, which concludes that the Claimant can perform work activity only four hours a day ***on non-consecutive days***, with Dr. DuShuttle testifying on behalf of the Employer, and Dr. Rudin testifying on behalf of the Claimant. [Aldrich/Tatlow]

Kyle Trivits v. New Process Fibre Co., Inc. IAB No.: 1392082 (02/08/19). The Employer's Petition to Terminate is denied even where a Functional Capacity Evaluation suggests that the Claimant is at least capable of sedentary duty and even where the Claimant is the daytime

caregiver of his toddler son, noting, however, that the Claimant had undergone six surgeries related to the industrial accident. [Schmittinger/Roberts]

Kevin Hutchinson v. PBF Energy Partner, IAB No.: 1424593 (03/05/19). The Employer's Petition to Terminate is denied in spite of an FCE which would allow full time sedentary work and with the Board expressing concern with the reliability of the testing; "The Board also accepts Dr. DiGregorio's criticism that the FCE is, at best, a snapshot of one day. Her opinion as to Claimant's work capability is based on seeing him on a regular long-term basis. The Board gives her long-term perspective greater weight than a single-day snapshot of a questionable FCE." [Morrow/Carmine]

Richard Mutter v. Carr Management Holdings, LLC, IAB No.: 1443126 (12/13/18). The Carrier's Petition to Terminate total disability is denied even where the treating orthopedic surgeon does not testify - - "the Board would have preferred to hear testimony as to work capacity from one of the treating orthopedic surgeons in this case to support the continuation of total disability rather than simply hearing from the neurologist handling his pain management…based on the extensive medical history as to extent of the right hand injury, it ultimately accepts the current opinion of Dr. Grossinger that Claimant remains disabled from all work at this time." [Ippoliti/Lukashunas]

UTILIZATION REVIEW

Dante DePalma v. Tri Supply & Equipment, IAB No.: 1370660 (02/28/19) (ORDER). Where there is no good faith causation challenge as to medical treatment, the carrier must submit the bills to Utilization Review in order to deny. The defense medical expert had already presented his deposition testimony during which it became clear causation was not an issue. Stated differently, once Dr. Schwartz testified, Employer no longer had a good faith base to dispute causation. For Employer to attempt to bring the Petition to a Hearing, lacks candor to the tribunal and circumvents the UR process. Contrary to Employer's contention, the Hearing is not the form to go on a fishing expedition challenge to Claimant's credibility with the hope that a bona fide causation issue arises. [Schmittinger/Bittner]

Gemille Elysee v. Excel Holdings, Inc., IAB No.: 1411512 (02/26/19). A Utilization Review non-certification of caudal epidural injections is affirmed based on a defense medical evaluation performed by Dr. Brokaw. [Holmes/Tatlow]

Karen Maurer v. State of Delaware, IAB No.: 1429434 (02/14/19). Utilization Review is not available for billing or Fee Schedule disputes. [Schmittinger/Bittner]

Paula Bawiec v. State of Delaware, IAB No.: 1440870 (01/31/19). The Board affirms a Utilization Review non-certification of medial branch blocks based upon the defense medical expert testimony of Dr. Jeff Meyers. [Morrow/Bittner]

Barbara Zill v. HSBC, IAB No.: 1366872 (04/10/19). The Board awards Botox injections for thoracic outlet syndrome based on the testimony of Dr. Falco that Botox injections are included in the Guidelines under chronic pain, with the exception of her request to undergo the Botox injection treatment at Johns Hopkins - - "Given Dr. Falco's testimony that he can do the exact same thing that would be performed at Johns Hopkins, and that he does this for other patients with thoracic outlet syndrome in his practice, the Board finds that Claimant's Botox injections should be performed by Dr. Falco." [O'Neill/Morgan]

Linda Cochran v. Curtis Industries, IAB# 1008975 (4/22/19). The Board affirms a UR non-cert of Oxycodone and Butrans patches with a detailed discussion of the interplay between Butrans and opioids, along with a discussion of Dr. Nihar Gala's credentials (noting that Dr. Gala took over Dr. Dickinson's practice due to a revocation of her medical license). [Gambogi/Logullo]

Randall Wooters v. Carl King Tire Co., IAB# 888748 (4/22/19). The Board reverses a UR certification of Oxycodone, Percocet and Soma. With this case presenting an extreme example of the prescribing doctor not having an awareness of the extent of claimant's UDS non-compliance including multiple episodes of testing positive for Fentanyl, which was not prescribed (and he in fact increased opioid dosage instead of discontinuing such meds). [Lazzeri/Wilson]

Cheryl Brown v. EDS Transportation Systems, IAB No.: 1460428 (10/11/18). The Employer successfully appeals a Utilization Review certification of treatment with Dr. Cary and an ongoing prescription for Percocet with Dr. Eric Schwartz testifying as the defense medical expert. [Allen/Carmine]

Nina Baen v. Culver & Pierson, IAB No.: 1456738 (11/30/18). The Employer is successful and the Board affirms a UR non-certification of Oxycodone, Gabapentin and Metaxlone based on the defense medical expert testimony of Dr. Eric Schwartz as follows: "Dr. Schwartz based his opinion on recent studies by the CDC that reveal not only the lack of long-term benefit but also the downsides, such as addiction, that long term use of opioids brings to a patient…Claimant has been at a consistently high pain level except for the first 2 months following the surgery. The pain medication has not had much effect…The Board also finds there was something to Dr. Schwartz's opinion that the chronic use of opioids pain medication affects coping skills, and that is evident in this case." [Long/Carmine]

Nathaniel Hackney v. Master Acoustical, IAB No.: 1438400 (11/27/18). Employer is successful in appealing a Utilization Review certification of chiropractic treatment rendered by Dr. Kevin Murray based on the defense medical expert testimony of Dr. Schwartz. Taking into account that there were over 150 chiropractic treatment sessions with Dr. Murray which did not result in any functional gain or reasonable benefit the Board also characterized Dr. Murray's testimony as "self-serving". [Legum/Baker]

APPELLATE OUTCOMES

Atlantic Building Associates v Trujillo, C.A. No. N18A-08-006 SKR (4/3/19). The Superior Court has issued a second remand in this matter that was discussed in the Fall 2017 Case Law Update. This case addressed the statutory requirement under 19 Del. C. 2311 for general contractors (GC) in the construction trade to "obtain and retain" a certificate from their subcontractors confirming the subcontractors have worker's compensation insurance for their employees. If the GC fails in this responsibility, it can be held to insure the worker's compensation injury of the subcontractor's employee. In this case, the GC obtained a facially valid certificate of insurance from the subcontractor. However, the insurance only applied to employees of the subcontractor working in New Jersey. The Superior Court previously remanded the matter, finding that GC's have a responsibility to obtain a facially valid certificate and also confirm that the insurance applies to the State of Delaware. The Board on remand found that the employer failed to verify that the insurance certificate was actually in force in Delaware. The employer then appealed, claiming that the Board held the employer to a 'strict liability' standard and not the 'due diligence' standard specified in the first remand order. The court agreed and remanded back to the Board for a second time as the standard the Board employed was unclear. The Board was instructed to consider whether the employer's exercised 'due diligence' to verify insurance coverage applied in the State. [Carmine/Bustard].

Warren v Amstead Industries Inc., C.A. No. S18A-08-002 CAK (4/23/19). The primary issue in this appeal was review of the Board's Rule 9 concerning proper notice. After a hearing upon a termination petition, the Board found that the claimant had removed herself from the workforce via retirement and thereafter was not entitled to disability benefits. The claimant alleged that the argument that the claimant retired had not been properly raised. The Superior Court agreed and sent the matter back to the Board. The court noted that IAB Rule 9 requires the petitioner to specify in the pleadings all primary issues to be litigated at hearing. The pleadings in this matter did not specify that the employer would be arguing the claimant had withdrawn from the workforce. The matter was remanded back to the Board, but the court declined the claimant's request for the retirement issue to be barred from consideration as the parties were on sufficient notice at this point. [Wasserman/Wilson].

Barrett Business Svcs v Edge., C.A. No. N18A-05-005 CEB (5/1/19). The claimant in this matter sustained a fall at work. He was subsequently taken to the hospital and hours later had a stroke due to blood pressure complications. The parties were in dispute as to whether the stroke was work-related given there was a significant past medical history of high blood pressure and potential 'mini-strokes.' The employer argued that treatment for hypertension was incidental to treatment for the work-related injuries. The Board found the stroke work-related but did not address the specific theories laid out by the medical experts. The Board instead held that but for the fall at work, the claimant would not have been at the hospital to treat for hypertension. The decision was reversed and remanded on appeal. The Board's rationale was so overly broad it made the employer the general health insurer of the claimant. The mere fact that a condition is discovered while a claimant is treating for a work injury does not make that condition compensable. On remand, the Board was to consider the specific theories on causation that were raised by the competing medical experts. [Rimmer/Lengkeek].

Failing v State, C.A. K18A-07-002 WLW (2/25/19). The sole issue on appeal was whether claimants are entitled to reimbursement for travel costs in addition to mileage reimbursement. Under 19 Del. C. 2322g, employees are entitled to mileage reimbursement for travel to seek reasonable medical treatment. The claimant sought reimbursement for parking expenses and tolls after the employer paid for mileage reimbursement relating to the same treatment. The Board denied the request and the court affirmed. The language of Section 2322g was clear on its face and no interpretation was permitted. The court stated that the proposed changes could only be made by the legislature and not by "judicial fiat." [Schmittinger/Durstein].

Weddle v BP Amaco Chem. Co.,C.A. N18A-06-004 ALR (4/26/19). The Superior Court addressed a situation involving a global settlement agreement of a worker's compensation claim outside the normal worker's compensation process. The parties in 1982 settled all potential claims relating to work-related asbestosis. In 2016 the claimant developed mesothelioma and passed away. The spouse filed a petition for benefits. The Board dismissed her petition on the basis that the 1982 agreement prohibited such a claim given that development of mesothelioma was merely a change in condition of the same occupational disease. The court disagreed and reversed the decision. Despite both asbestosis and mesothelioma arising from exposure from asbestos, they are considered distinct diseases as Delaware is a 'multi-disease jurisdiction.' Therefore they should be treated as separate accidents with their own statute of limitations. The court then moved to the language of the 1982 settlement agreement. Even if the language of the 1982 agreement was inclusive of a future diagnosis of mesothelioma, the court declined to recognize the validity of the agreement based on public policy preventing parties from settlements that waive liability for future unknown accidents. [Crumplar/Bradley]

Hellstern v Culinary Svcs Grp., C.A. N18A-07-008 JRJ (1/31/19). The Superior Court addressed the claimant's challenge of the Board's evidentiary ruling to permit defense counsel to use and admit into evidence a demonstrative exhibit at the hearing on the merits. The exhibit contained a summary of pain scores reported by the claimant to her treating physician over a period of years. The claimant argued that use of the exhibit was an abuse of discretion as it was irrelevant, unduly cumulative and unfairly prejudicial. The court held that the Board's consideration of the exhibit was proper. The Board may use the Superior Court rules as a guide, however, the Board's rules of evidence are significantly more relaxed. The employer exhibit was admissible under Board Rule 14(b) and would even have been admissible under the stricter Superior Court rules. The document was not prejudicial as it included information already in the record and conserved time at hearing as the alternative would have been the attorney going through the medical records one by one. [Hedrick/Andrews].

Streifthau v Bayhealth Med. Ctr., C.A. No. K18A-07-005 (3/21/19). This appeal concerned the novel argument from claimant's counsel that defense expert fees should be capped at the same maximum charge applicable to claimant experts for depositions under the administrative code. In the case before the Board, the total defense expert charges were higher than the administrative deposition cost cap. The claimant argued that the code should be interpreted to limit defense expert deposition costs given that the defense expert was a certified provider under the statute and raised public policy grounds to ensure a level playing field. The Board ultimately found that the deposition fee of the expert was under the administrative cap of $2,000.00 and that his additional charges related to work on aspects of the case other than the deposition. The Superior

Court remanded the case as the court wanted the Board to address the threshold issue of whether the claimant had standing to challenge the amount the carrier was charged by the defense expert. [Schmittinger/Morris-Johnson].

Powell v Hardee's, C.A. K18A-06-0001 WLW. The claimant in this case challenged a Board decision finding that he did not meet his burden of proof as to occurrence of an injury within the course and scope of employment. A central issue on appeal was whether the Board gave too much weight to the fact that the claimant could not remember whether the accident occurred in November or December of 2016 and did not treat soon after the alleged accident. The claimant cited to the case of Playtex Prods v Leonard to support his argument that confusion about the date of injury does not preclude him from compensation. In Leonard, the claimant's petition was granted as the Board accepted the claimant as credible despite his confusion as to the exact date of injury. The court in this case found that Leonard was distinguishable. There were multiple examples of credibility concerns for this claimant that supported the Board's decision. The Board was also entitled to give weight to the claimant's delay in seeking treatment. Even without the credibility concerns, the court would still agree with the Board that there was insufficient medical evidence tying the injury to the alleged work accident.[Schmittinger/Lukashunas].

Blair v Smyrna School District, C.A. No. K18A-08-001 WLW (4/5/19). The case addressed the issue of an employer's entitlement to a credit set-off against overlapping sick time pay the claimant received. The claimant's petition sought payment of total disability benefits for 14 days. He had received sick pay for those days and accordingly the employer disputed the claimant's entitlement to disability benefits. The Board found that total disability was appropriate for those 14 days, that the employer was entitled to a credit and in effect also found that the claimant was entitled to have his sick time credited back. A credit was found appropriate as sick pay was a benefit fully funded by the employer. The claimant contended on appeal that sick leave was not intended to be subject to a set-off, that sick leave was a contractual arrangement and that the Board exceeded its authority by ordering the State to return sick days to the claimant. The case was remanded back for rehearing on the basis that the Board did not have authority to provide a remedy on a total disability claim for anything other than monetary compensation. The court noted that it did not reach the other issues raised in appeal. [Schmittinger& Holmes/Rimmer&Bittner].