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

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**DSBA Workers' Compensation**
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## AVERAGE WEEKLY WAGE

***Ronal Lima-Ordonez v. SM Commercial Roofing, IAB Hearing 1473098 (11/15/19) (ORDER).*** This matter involves how to calculate the claimant's average weekly wage in a Section 2311 case where there is absolutely no wage documentation and where the responsible "employer" is **not** the same entity who actually paid the claimant. [Legum/Morgan]

## CAUSATION

***Candace Dill v. Walmart Distribution Center, IAB Hearing 1476645 (4/25/19).*** There was no legal requirement that the claimant be doing job activity on the day that his/her symptoms first present themselves - - "It is possible to have a condition caused by work activities that just happens to first become symptomatic away from work." [Stewart/Newill]

***Nina Stotts v. Christiana Care Health Services, IAB Hearing 1467513 (7/22/19).*** On a DCD Petition seeking an award of benefits for a lumbar spine injury, a significant pre-existing condition symptomatic immediately prior to an admitted work accident defeats the ***Reese*** "but for" standard of compensability and the Petition is denied, with the limited exception of one month of total disability and a discrete period of medical treatment expense based on a finding of "transient lumbar sprain and strain". [Long/Newill]

***Helen Foraker v. Amazon.com, IAB Hearings 1474522 & 1477994 (7/22/19).*** The Board awards benefits for a left hand/finger injury under a theory of cumulative detrimental effect with a further finding that the injuries in question had "resolved" within roughly three months. [Laursen/Ellis]

***Ronald Thomas Brown v. RCD Timber Products, IAB Hearing 1456231 (7/31/19).*** Dr. Schwartz's DME crushes Dr. Eskander's opinion that a shoulder injury two years earlier produced the need for a cervical spine surgery. [Heesters/Gin]

***Paul Elvey v. General Electric, IAB Hearing 1469440 (10/7/19).*** A Petition for surgery and related benefits is denied based on findings of "resolved" and "back to baseline" with Dr. Rudin testifying on behalf of Claimant and Dr. Kahanovitz testifying on behalf of the Employer. [Lutness/Ellis]

***Kevin Hiller v. YRC Inc., IAB Hearing 1409368 (8/28/19).*** A 2019 right total knee replacement is held to be causally related to a 2013 work injury - - "The Board is persuaded that Claimant likely developed the large flap tear in the accident as Dr. Crain described, and it went undiagnosed for a long period of time due to the severity of the independent but co-existing injury to the patellofemoral area of the knee. The traumatic, interarticular meniscus injury then triggered the progressive degeneration of the medial compartment of the knee joint that

ultimately led to the total knee replacement. Dr. Crain treated claimant for this progressive degenerative condition from 20015 to 2018, when it was decided to proceed with a knee replacement after more conservative care no longer provided sufficient relief". [O'Neill/Gin]

***Anthony Blansfield v. State of Delaware, IAB Hearing 1462135 (12/12/19).*** What is initially recognized as the extent of an accepted injury can change over time and the signing of an Agreement as to Compensation does not alter this, and as such, the Board rules that Claimant developed a pain-producing annular tear as a result of the work accident, commenting that "this conclusion fits the facts of this case and explains why the previous conservative care was ineffective…" [Warren/Klusman]

## COURSE AND SCOPE

***Tiara Jackson v. Open Systems Health Care, IAB Hearing 1469037 (10/25/18).*** An accident on the bus en route to the claimant's first job assignment of the day where travel time is **not** compensated is held to be outside of course and scope. [Legum/Greenberg]

***Alexis Cleveland v. Child Inc. and Britney Foote v. Child Inc., IAB Hearings 1474956 and 147469 (3/13/19).*** Employees who travel to Baltimore for a work-related conference who are in an MVA returning from quick detour for coffee and breakfast food, are held to be in course and scope under the personal comfort doctrine with the following observation: "In the present case, the time and space limits of the travel to the nearby Wawa by both claimants was in direct response to their personal comfort and needs. As their travel time and expenses were fully covered by the Employer, their need to obtain food can be fairly characterized as arising out the employment involving their participation in the seminar conference…the Board finds that the travel to obtain breakfast items immediately prior to the 9:00 a.m. start of the seminar was reasonable given both the timing and the location of the Wawa." [Of note, when they arrived at the conference almost an hour early, they discovered no coffee or breakfast items were provided] [Tice/Wilson/Andrews]

***Michele Cooper v. Murphy Marine Services, IAB Hearing 1472811 (5/10/19).*** An accident which occurs after "badging in" at union hall prior to starting actual assignment is in course and scope. [Hemming/Gin]

***Stephanie Flynn v. Peninsula Home Care, IAB Hearing 1480462 (6/21/19).*** A motor vehicle accident en route to first appointment for a nurse case manager is in course and scope.

***Jeremy Bottomley v. Alside Supply Center, IAB 1475360 (6/19/19).*** An attack on the claimant in the early morning hours by three unknown assailants is in course and scope - - "The Board therefore finds that more likely than not there is a reasonable relation between the attack on Claimant and Claimant's employment such that the injuries Claimant sustained in the attack and are compensable…the conditions of employment at Alside increased the likelihood of an attack by unknown assailants as Claimant arrived for work, and credible evidence exists of work-related tensions that could have led to Claimant being a target for the attack. No similarly credible evidence exists of a personal motivation for the attack." [Krayer/Sack]

***Constance Culver v. Acme, IAB Hearing 1470293 (6/20/19).*** This case raises an idiopathic fall defense, and the Board explains the difference between an "idiopathic fall" and an "unexplained fall" resulting in an award of benefits: "It is not convinced that Claimant's fall is truly unexplained. Admittedly, Claimant is not sure what caused her to fall but she testified to being distracted while walking and her foot slipping like sliding into third base. Making a misstep while distracted is an explainable accident…" [Silverman/Simpson]

***Marvin Johnson v. State of Delaware, IAB Hearing 1470316 (5/20/19).*** The Board awards benefits and finds claimant to be in course and scope of employment as a non-participating victim of an assault. [Green/Bittner]

## DEATH BENEFITS

***Jose Luis Garcia Hernandez (deceased) v. Countrywide Payroll and HR Solutions, Inc., IAB Hearing 1423325 (12/20/18) (ORDER).*** This case is an example of a commutation pleading formatted for a non-resident alien dependent providing for death benefits pursuant to 19 Del. Code Section 2330. [Warren/Morgan]

## DEFENSE MEDICAL EVALUATION

***Carole Streifthau v. Bayhealth Medical Center, IAB Hearing 1432002 (6/27/18) (ORDER).*** The claimant's Motion requesting the Board to impose a fine against Dr. Stephen Fedder for charging the employer $5,000 for his deposition testimony in tandem with a defense medical evaluation is denied. The Board rejects the claimant's theory of why defense doctors should be limited to a $2000 cap for their deposition. [Schmittinger/Morris-Johnston]

***Jeffrey Sprouse v. John L. Briggs & Co., IAB Hearing 1272196 (6/13/19) (ORDER).*** The Claimant does **NOT** have the right to record his defense medical evaluation, noting that the claimant's attempt to record the DME was against Dr. Brokaw's office policy and he refused to allow the recording, whereupon Claimant walked out of the office. While the

Board granted the Employer's Motion to Compel attendance at a future DME, the Board also declined to award a cancellation or no show fee at this time. [Silverman/Baker]

## DISCOVERY

***Candace Dill v. Walmart Distribution Center, IAB Hearing 1476645 (4/25/19).*** A claimant cannot be surprised by her own medical records even if disclosed last minute - - "The Board agrees that the records can be used to challenge claimant's credibility. These are not records of treatment that was far remote in time. Rather, they document treatment received about a year and a half prior to the current complaint arising in August 2018. Considering Claimant's testimony that she seldom goes to a doctor, one would expect that she would remember such a relatively recent visit." [Stewart/Newill]

***Irwin Luebke v. Printpack Enterprises, IAB Hearing 1473336 (8/20/19).*** Medical records withheld by Dr. Cary until his deposition are struck, although the Board did not strike Dr. Cary's opinion altogether. [Gambogi/Adams]

***Marvin Johnson v. State of Delaware, IAB Hearing 1470316 (5/17/19) (ORDER).*** The Board holds that a decision from the Unemployment Insurance Board is inadmissible - - "The decision from the Unemployment Insurance Board is irrelevant to this Board and it is certainly not binding on this Board as the State alleged." [Green/Bittner]

## DISPLACED WORKER

***Maria Heredia v. Zenith Products, IAB Hearing 1413334 (12/6/19).*** In denying the employer's Petition to Terminate total disability, the Board rules that a Hispanic claimant in her early 70's who is unable to drive is prima facie displaced where her dominant upper extremity is injured, and a labor market survey fails to rebut the prima facie displaced status. [Long/Tatlow]

## EMPLOYEE V. INDEPENDENT CONTRACTOR

***Wayne Travis v. Smith Trucking, IAB Hearing 1481825 (8/16/19).*** The Claimant truck driver is held to be an employee of a trucking company at the time of the work accident with the Board applying the litmus test of ***Falconi v. Coombs & Coombs***, as well as the Restatement (Second) of Agency. [Mason/Trapp]

## HOEY DISPLACED WORKER

***Peter Smith v. Sunbelt Holdings, IAB Hearing 1448827 (10/31/19).*** On the Employer's Petition to Terminate, the Board rules that ***Hoey*** does not apply regardless of the employer's lack of a formal termination notice and regardless of a collective bargaining agreement, also noting that for the claimant to maintain his job at Sunbelt, he would be required to pass a CDL, Class A Exam, for which his prescription medication of Oxycodone would be an impediment. [Stewart/Lockyear]

***Daniel Crouser v. Amazon.com. IAB Hearing 1456781 (6/17/19).*** An unpaid medical leave while technically still an employee does not trigger the **Hoey** displaced worker entitlement where the Employer issued a ***Hoey*** notice. The Board observed that the claimant "has been unpaid for the duration of these leave of absence periods and is not receiving any kind of sick leave or disability benefits from Amazon. Moreover, Amazon submitted in a previous letter to claimant's counsel that the employer was unable to accommodate any return to work and that claimant should have no reasonable expectation of returning to work now or in the foreseeable future," with the additional observation that when Amazon filed its Termination Petition, such Petition clearly advised claimant to seek work elsewhere in the open labor market. [Eliassen/Ellis]

## JURISDICTION

***Henry Castillo-Herrera v. Spring & Associates, IAB Hearing 1484954 (7/10/19) (ORDER).*** You cannot force a case with concurrent Delaware jurisdiction to be litigated elsewhere. [Pruitt/Harrison]

***Town of Delmar v. Chesapeake Insurance v. Delea Founders Insurance Trust, IAB Hearing 1462051 (7/26/19).*** A Maryland employee injured in Delaware has the right to choose which jurisdiction to pursue benefits. [Andrews/Klusman/Lockyear/Schmittinger]

***Henry Castillo-Herrera v. Spring & Associates, IAB Hearing 1484954 (7/10/19) (ORDER).*** Where claimant is injured in Delaware, he can file for permanency benefits pursuant to 19 Del. Code Section 2326 in Delaware, and the employer/carrier cannot force jurisdiction to remain in Maryland. [Pruitt/Harrison]

## MEDICAL MARIJUANA

***John Nobles-Roark v. Back Burner, IAB Hearing 1144068 (10/30/19).*** The claimant's Petition for medical marijuana is denied where the claimant has COPD and is bipolar with the Board finding Dr. Jason Brokaw's defense medical testimony far more compelling than the opinion of Dr. Bandera, with the Board making the observation that "while Dr. Bandera is the Claimant's treating doctor, he does not exhibit the general familiarity expected of the treating physician…by his own admission he has not addressed the Claimant's medical history or comorbidities for many years. He was unaware of the Claimant's significant comorbidities of

COPD and bipolarism and therefore does not account for these conditions in his opinion…for most of the time that the Claimant was on medical marijuana, Dr. Bandera was seeing him annually and was unaware of Claimant's medical marijuana usage or THC level and he did not provide any certification for medical marijuana treatment after 2014." [Weik/Menton]

***Victor Mazzio v. YMCA of Delaware, IAB Hearing 1447987 (5/3/19).*** The Board awards medical marijuana to the claimant as reasonable and necessary medical treatment where such treatment allows the claimant to avoid opioid pain management and with the further observation that the claimant is taking oral medical marijuana at a cost of $45.00 per jar and utilizing 2-3 jars per month. Dr. Sundarajan testified on behalf of the claimant and Dr. Sommers testified on behalf of the employer. [Bustard/Brooks]

***Kirt Shively v. Allied Systems, IAB Hearing 1176837 (10/23/19).*** This matter was considered by the Board on a Petition for Review seeking to force the claimant to execute a Final Receipt with regard to receipt of 300 weeks of partial disability and with regard to the claimant's Petition seeking an award of a medical marijuana card. The claimant in this matter was a pro se litigant and did not present a medical expert on behalf in support of medical marijuana - - "First and foremost, no doctor testified that Claimant needs medical marijuana at all. Secondly, the Board has no authority to grant any Claimant a medical marijuana card; all the Board can do is find treatments and medications to be compensable or not, based on the medical testimony and evidence presented. There was no evidence presented in this case that Claimant has even been prescribed medical marijuana; therefore, the Board cannot make such an award." [pro se/Menton]

## MEDICAL TREATMENT ISSUES

***Isaac Prince v. Pittsburgh Glass Works, IAB Hearing 1443211 (4/22/19).*** The Board will not make a blanket assumption that an in-house EMG is not valid - - "Dr. Sommers simply refuses to accept those test results because the EMGs were done by claimant's treating doctor rather an independent facility. The Board cannot accept the blanket proposition that EMG testing by a treatment provider is of no evidentiary value. If there were conflicting EMG results, one done by a treatment provider and the other done by an independent source, then perhaps some weight might be given to the criticism. In this case, though, there is no contrary diagnostic findings and the EMG results are consistent with the objective MRI findings." [Warren/Morgan]

***Christianne Haggerty v. New Castle County, IAB Hearing 1335730 (12/5/18).*** Quarterly, not monthly, office visits are appropriate where the treatment in question is non-narcotic - - "Claimant maintains that Dr. Xing is managing her medically and thus, the monthly visits are necessary. The Board does not agree. Not only are the Guidelines clear that four times annually is sufficient when the patient is not on narcotics, Dr. Townsend testified credibly that the monthly office visits are not reasonable or necessary." [Freebery/Perry]

***Lawrence Evans v. JF Sobieski Mechanical Contractors, IAB Hearing 142248 (10/22/18).*** The Board declines to award a fourth cervical spine surgery where the first three surgeries had poor outcomes, with Dr. Kalamchi testifying on behalf of the claimant and Dr. Kahanovitz testifying on behalf of the employer - - "Dr. Kalamchi admitted the Claimant would be more limited in activity following an additional level fusion surgery…and acknowledged the claimant would not be able to work as a laborer following the recommended surgery. Claimant confirmed he would be less functional and unable to perform his current job following the recommended surgery. Furthermore, Dr. Kahanovitz reported Claimant was not an appropriate surgical candidate because he had three prior surgeries and his chances of improvement decreased with each surgery, but his risk of multi-level degenerative disease and adjacent segment disease issues increased with each procedure…the Board finds the recommended surgery to be unreasonable and unnecessary based on the fact that experts agree that Claimant will likely be in a worse condition following the surgery than he is currently." [Donovan/Skolnik]

***Virgil Pugh v. New Castle County, IAB Hearing 1354747 (8/16/19) (ORDER).*** This Case came to the Board on the issue of the use of generic v. name brand Oxycodone with regard to the Employer's request for an order to the effect that "in the future, if the issue with the manufacturer is resolved and a generic version becomes available, Claimant should be required to fill the prescription in the generic form." The parties sought guidance from the Board as to what sort of boundaries should be placed on the order and what would constitute appropriate efforts on the claimant's part to locate generic. The Board ruled that a "good faith effort would consist of checking pharmacies within 15 miles of Claimant's home and calling pharmacies before trying to fill the order to determine if a generic version is available. In other words, Claimant should not wait until he is almost out of pills and need to have the prescription filled immediately. He should check a week or so before needing the prescription. Claimant should maintain documentation of his efforts to call these pharmacies and the response received." [Mason/Norris]

***Carlene Torrance v. OPT Therapy Services, IAB Hearing 1462172 (7/31/19) (ORDER).*** MRI findings appearing in 2017 bear no causal relationship to a 2015 work accident based on a Dr. Kalamchi DME and, as such, a Petition for surgery is denied, further noting that the claimant had a longstanding history of back pain going back to 1997. [Silverman/Nardo]

***Fame Smith-Edwards v. State of Delaware, IAB Hearing 1160711 (5/13/19).*** A defense medical evaluation with Dr. Rushton permits the defeat of a Petition seeking a sixth spinal surgery - - "The Board finds Dr. Rushton credible that given Claimant's extensive history with little to no improvement in her pain levels or functionality, the sixth lumbar spine surgery is not reasonable or necessary." And noting that Dr. Rushton had performed multiple DMEs over the course of the litigation and had conducted a thorough medical record review, such that he "has a much more realistic view of Claimant's actual condition, which is pertinent to the surgical opinion." [Gambogi/Panico]

***Demetrius Davis v. JP Morgan Chase, IAB Hearing 1462133 (12/17/19).*** A claimant with a right upper extremity work injury is awarded a left upper extremity prosthesis, with the Board rejecting the employer's argument that claimant's refusal of a wrist injection or wrist surgery amounts to a forfeiture of reasonable and necessary medical treatment - - "Dr. Eichenbaum's credible testimony is convincing to the Board that in this unique situation it is appropriate. Due to the maternal use of thalidomide, Claimant has left-sided phocomelia. She finds herself suffering from a right-sided work injury that requires either surgery or injections, neither which are viable options to Claimant because of her inability to use the non-affected limb. Thus, the Board finds that the most reasonable and necessary treatment for Claimant is the left upper extremity prosthesis…" [Schmittinger/Simpson]

***Betty Steller v. HRK Group Inc., IAB Hearing 1396902 (12/13/19).*** A proposed fusion L1to T10 is rejected by the Board based upon the defense medical evaluation of Dr. Rushton - - "Dr. Rushton explained that the proposed surgery will not treat the thoracic or scapular area. The type of surgery Dr. Rastogi proposed is only anchoring the T10 level and it is typically performed as a spinal deformity surgery or a surgery for treating neurologic symptoms, none of which claimant complained about; therefore, the chance of thoracic spine pain and shoulder blade pain improving with a T10 to L1 fusion is virtually nonexistent." [Schmittinger/O'Connor]

***Daniel White v. Perdue, IAB Hearing 1444919 (9/12/19)*** The Board awards an above-knee amputee extensive home modifications for the entire home based on the following: "The Board believes it is only reasonable for Claimant to be able to access all rooms in his house while in his wheelchair. He is unable to use the prosthesis very often and therefore, uses the wheel chair most of the time. Claimant's ability to drive his pickup truck, ATV, and tractor does not change the fact that he cannot use the prosthesis often and needs the wheelchair to get around inside his home. However, the Board finds Claimant's request for Perdue to pay for an entirely new stick-built home or even a new modular homes as excessive and could be viewed as an attempt to abuse the workers compensation system. The Board, however, finds it reasonable and necessary for Perdue to modify Claimant's current house to make it entirely wheel chair accessible…" [Lutness/Nardo]

***Gail Bond v. Generations Home Care, IAB Hearing 1451990 (12/9/19).*** In tandem with denying a Petition for Review in a concussion case, the Board also awards a powered mobility scooter and a lift assist device. [Silverman/Carmine]

## PERMANENT IMPAIRMENT

***Ferkyn Baez v. Magco Inc., IAB Hearing 1420574 (12/20/18).*** On a claim of 10% to the abdominal wall, the Board rules in favor of the employer based on a Dr. Gelman DME that the claimant demonstrates a 6% impairment, noting that the abdominal wall is based on 300

weeks and further noting that "where there is no protrusion or palpable defect, the claimant belongs on the low end of Class I." [Stewart/Wan]

***Isaac Prince v. Pittsburgh Glass Works, IAB Hearing 1443211 (4/22/19).*** On a Petition seeking an award of 10% impairment to the head, the Board declines to award any PPD benefits for post-concussion headache where there is no formal treatment for such. [Warren/Morgan]

***Jonathan McCole v. Baltimore Aircoil, IAB Hearing 1463133 (8/30/19).*** Dr. DuShuttle's 60% impairment rating to the hand overcomes Dr. Ger's rating to the individual fingers - - "The Board finds persuasive Dr. DuShuttle's testimony that it was appropriate to rate claimant's entire hand loss instead of individual fingers because Claimant's multiple injuries to three of his fingers created a more significant injury that should be characterized as an exception to normal findings. Furthermore, Dr. DuShuttle reported that Claimant's work injury impacted his daily activities more than the average patient because Claimant's job and active lifestyle required frequent right hand use, as Claimant was right hand dominant. Even Dr. Ger found Claimant's right sided pinch strength to be significantly less than normal strength...Dr. Ger admitted that Claimant's amputations caused his diminished grip strength and his right hand grip strength was "far weaker" because of the amputations...Thus, Claimant's loss of use of three of the fingers on the right hand severely diminishes the use of the entire right hand." [Donovan/Wilson]

***David Bender v. New Castle County, IAB Hearing 1418549 (8/27/19).*** On a claim for 15% permanent impairment to each lung, the Board rejects the opinion of Dr. Meyers, embraces the opinion of Dr. DuPont, and rules that to the extent that the Claimant has any lung restriction, it is based on his body habitus - - "In this case, the Board found Dr. DuPont to be very persuasive and did not find Dr. Meyers' opinion to be as convincing. The Board first notes that Dr. DuPont is a physician specifically Board-certified in pulmonary disease, with causation of certain lung conditions squarely at issue here. In this case, Dr. DuPont really impressed the Board as having great knowledge regarding conditions affecting the lungs." [Weik/Norris]

***Kathy Thomas v. City of Wilmington, IAB Hearing 1417741 (7/29/19).*** On a claim for 30% increase in permanent impairment to the left lower extremity as the result of a knee replacement surgery, the Board rules based on the defense medical evaluation of Dr. Piccioni, noting that both experts (Rodgers and Piccioni) would agree as to the permanency rating if the Fifth Edition of the Guide was utilized, with Dr. Piccioni, however, endorsing the Sixth Edition of the Guide. In adopting Dr. Piccioni's opinion that the Sixth Edition of the Guide is the better indicator in that it "more accurately reflects the advances in joint replacement", the Board further comments that it "is well aware that the Claimant's Bar does not favor the Sixth Edition solely for the reason that impairment ratings are lower which in turn translates into a lower financial recovery for claimants." [Long/Skolnik]

***Virgil Pugh v. New Castle County, IAB Hearing 1354747 (4/29/19).*** On a claim for 100% impairment for loss of teeth, where claimant has previously been awarded a full set of prosthetic dental implants, the Board adopts the opinion of Dr. Fink and Dr. Meyers and awards the 100% permanency (80 weeks) for having no natural teeth remaining and rejecting the employer's argument that the claimant is at the same or even better dental condition following the receipt of the dental implants and with a further award of 8% impairment to the jaw as the result of the same condition and noting that a total loss of the jaw equates to 100 weeks of benefits. [Freibott/Perry]

***Samuel Marin v. State of Delaware, IAB Hearing 1451325 (8/13/19).*** On a Petition seeking an award of 28% impairment to the low back, the Board awards 16% based on the Dr. Rushton DME, with the Board convinced by Dr. Rushton that Claimant fits well into the DRE Lumbar Category III, in recognition of a history of a single-level herniated disc and operative intervention at one level, with no sign of radiculopathy on clinical exam. [Bustard/Wan]

***Claire Murphy v. Delaware Supermakets, IAB Hearing 1427678 (12/3/19) (ORDER).*** The Board grants the Employer's Motion to Dismiss a Permanency DACD where a prior Hearing found only a temporary exacerbation of a pre-existing condition - - "The Board also affirmatively found that the exacerbation had ended. The Board affirmatively found that the work accident led to no objective anatomical change in Claimant. In short, Claimant at the 2018 Hearing was arguing that the work injury led to ongoing problems in her cervical and lumbar spine and that position was rejected by the Board. Claimant cannot now be held to argue that the work accident resulted in a permanent injury. Such a finding would be directly contrary to the unambiguous holding in Board's 2018 decision." [Minuti/Bittner]

## PRACTICE AND PROCEDURE

***Patricia Wesley v. State of Delaware, IAB Hearing 1475026 (12/3/19).*** Where a prior Hearing yields no specific ruling as to a lumbar injury, the Claimant is not precluded from filing a DACD seeking payment of lumbar medical bills. [Minuti/Bittner]

***Leigh Stewart v. Delaware Supermarkets, Inc., IAB Hearing 1322914 (4/25/19) (ORDER).*** The Board rules that the production at the 11th hour of a job search log means that the claimant cannot testify as to his prior job seeking efforts. [Ippoliti/Morgan]

***Roland Anderson v. General Motors, IAB Hearing 111235 (10/31/18).*** Medicare has no power to declare that an injury is workers compensation in a case in which the Board also ruled that the applicable statute of limitations had run. [Anderson/Mosley]

***Lisa Tenaglia-Evans v. St. Francis Hospital, IAB Hearing 1020433 (7/22/19) (ORDER).*** It is improper to expect a Claimant to sign a Final Receipt upon the tender of a "medicals only" Agreement. [Marston/Betts]

***Kathleen Aufiero v. Christiana Care Health System, IAB Hearing 148129 (8/30/19) (ORDER).*** The Claimant is ordered to execute an authorization for release of her mental health records. [Allen/Bittner]

***Allan Paulley v. Second String LLC, IAB Hearing 147872 (10/9/19) (ORDER).*** The Claimant's Motion in Limine is denied as to his attempt to preclude consideration of a medical record comment that Claimant is selling his pills - - "Claimant's Motion is denied. First, the topic is certainly relevant to the pending Petitions. There is evidence that Claimant was significantly short on a pill count just three days after receiving the prescription. This does raise questions concerning the severity of his subjective complaints. The allegation also provides explanation as to why Claimant parted ways with the pain management provider, which again is an issue for the Board to consider when determining the validity of his subjective complaints. Employer's Termination Petition is specifically focused on what Claimant is able to do and credibility of subjective complaints is an important part of that analysis. In addition, as Employer observes, the allegation forms at least part of the basis for Employer's medical expert opinion. The Board needs to hear evidence on this allegation in order to fairly evaluate what weight to give the experts' opinion. Trying to evaluate the weight to give an expert's opinion while, at the same time, excluding any reference to the evidence the expert relied upon, is not a procedure reasonably calculated to produce a fair result." [Kimmel/McGarry]

***Wesley Delligatti v. Johnson Controls, IAB Hearing 1450971 (5/6/19) (ORDER).*** Where there is a unilateral withdrawal of a Petition for Review, the employer is required to pay an attorney's fee and a medical witness fee reimbursement. [Eliassen/Nardo]

***Teresa Holben v. Pepsi Bottling Ventures, IAB Hearing 1449337 (5/1/19) (ORDER FOLLOWING REMAND).*** An attorney's fee is required following a Hearing even if the Board's award of partial disability is less than a prior "30 day" offer, if that prior offer did not include a medical witness fee, noting that a medical witness fee ***was*** awarded by the Board in its decision. Curiously, if Claimant had accepted the settlement offer from Pepsi, at a rate of $146.42 weekly, she would have been paid a total of $43,926.00, which is still greater than the Board's award including the medical witness fee. However, after considering the Superior Court's decision on appeal and additional arguments from the parties, the Board finds that it has no choice but to award an attorney's fee for the Claimant's successful claim for a medical witness fee. As such, the Board on remand awarded counsel an attorney's fee of $500.00. [Holmes/Hunt]

***Joseph Frederick v. A-Del Construction, IAB Hearing 1440955 (1/6/20).*** Where the defense medical expert is asked to offer a permanency rating based on both the Fifth and the Sixth Edition of the AMA Guides, but is ***not*** asked to choose his preference by the employer, that detracts from the employer's argument in favor of a lower rating and the Board awards permanency based on the claimant's expert at 37% to the cervical spine. [O'Neill/Morgan]

***Justin Pearson v. Michael W. Fogarty General Contractor, IAB Hearing 1479766 (12/31/19).*** The claimant who was stranded in South Carolina and not present to testify at his Hearing on a Petition for Review is not permitted to testify by telephone. [Stewart/Andrews]

***Stephen Casella, Jr., v. Samuel Coraluzzo Company, IAB Hearing 1453963 (10/23/19) (ORDER).*** This case creates a precedent for imposing a fine against a carrier for late disability check issuance. [Nitsche/Sack]

***Dawn Lawson v. Amazon.com, IAB Hearing 1473748 (11/25/19).*** This case includes a detailed analysis of the burden of proof to have an Agreement as to Compensation set aside for fraud with the Board observing that the carrier should have denied the claim pending receipt of all records so an informed decision could be made on the compensability issue. [Silverman/Ellis]

***Terry Comegys v. Royal Farms, IAB Hearing 1487076 (11/22/19) (ORDER).*** The Claimant can be compelled to complete and sign a Statement of Facts on a DACD Petition. [Heesters/Skolnik]

***Thomas Stevenson v. Pepsi Cola, IAB Hearing 1419904 (11/22/19) (ORDER).*** Where a prior IAB decision awards a future surgery, the carrier does not automatically have to pay total disability in connection with the surgery based on such ruling if it has a viable defense such as "voluntary removal" from the established labor market in light of which, the Board denied the claimant's Motion to Compel payment of TTD in favor of a merits Hearing. [Mason/Reale]

## RECURRENCE V. NEW INJURY

***Cathy Moorefield v. ACTS Retirement and Delmar Nursing and Rehab, IAB Hearings 1467161 and 1477036 (10/25/19).*** On the issue of recurrence v. new injury involving two successive work accidents, the Board rules in favor of a ***Nally*** shift to the second employer based on a finding that the claimant did not continue to be symptomatic following resolution of treatment after work injury #1 and taking into account that the mechanism of injury

involved with work accident #2 was not the performance of routine work activities but an "untoward event" consisting of a slip and fall. [Laursen/Greenberg/Kane]

## "RESOLVED"/"BACK TO BASELINE"

***Ernest Plummer v. DART, IAB Hearing 1463680 (1/31/19).*** Where a prior IAB Order finds that the work injury has resolved, it is appropriate to dismiss a later-filed DACD Petition seeking benefits for permanent impairment. [Sharma/Klusman]

## SECTION 2311 CONTRACTOR ISSUES

***Pablo Lopez Ramos v. WM Company, Inc. & William Hidalgo & Station Builders, Inc. & Delframing, Inc., IAB Hearings 1464792, 1465498, 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]

***Maynor Ramirez-Lopez v. EPN Construction LLC, Demiranda Construction & Ryan Homes, IAB Hearings 1471435, 1473789, 1473790 (8/28/19) (ORDER).*** This is a Section 2311 case which contains a detailed discussion of "Other States' Endorsement" as well as a statutory and case law overview of issues as to what constitutes a "facially valid" certificate of insurance and when the "safe harbor" provision of Section 2311 (a)(5) is triggered. [Welch/Logullo/Carmine/Adams]

## SECTION 2324 JOINT EMPLOYMENT

***Eduardo Hernandez-Escobar v. JT Hoover Concrete and DSH Enterprises, IAB Hearings 1486700 and 1486120 (9/25/19) (ORDER).*** This case involves the rare instance in which the Board finds factually that the Claimant was in a joint employment relationship with DSH and Hoover and as such, denies DSH's Motion to Dismiss Claimant's Petition against it with a detailed analysis of Section 2354 and the case of ***Mazzetti & Sons, Inc. v. Ruffin***. [Panico/Andrews/Bittner]

## *SECTION 2363 LIEN ISSUES*

***Kim Johnston v State of Delaware, IAB# 1465010 (12/19/19) (ORDER).*** The facts of this case were pretty clean in that the claimant was able to obtain a policy limits settlement of $100,000. There was no relevant PIP issue and the comp carrier did *not* agree to reduce its lien. The issue- when the comp carrier has *a lien that exceeds the 3rd party settlement*,

how are the proceeds distributed? The Board ruled that first the claimant's attorney fee is paid, then the Costs of litigation are paid, and then the workers comp carrier gets paid, and finally the claimant. Mathematically, there was simply nothing left for the claimant and she did not recover anything out of the 3rd party settlement. The comp carrier did not achieve full lien reimbursement, but it got as much as possible. The Board found this result equitable because it accomplished the purpose of the statute which is to prevent a double recovery by the employee. [Bartkowski/Klusman]

## TERMINATIONS

***Rocio Espinoza v. Elite Cleaning Company, IAB Hearing 1423183 (7/19/19).*** The employer prevails on a Petition for Review involving a 65 year-old undocumented worker limited to sedentary gainful employment with Dr. Desmond Toohey testifying regarding the available labor market for undocumented workers and with Dr. Barbara Riley testifying as to a labor market survey. [Heesters/Andrews]

***Cynthia Knight v. Nordstrom Rack, IAB Hearing 1461304 (7/3/19).*** A Petition to Terminate TTD is denied where complex regional pain syndrome is a significant pain generator and where a spinal cord stimulator implant appears to have provided no benefit, and, if anything, claimant's pain complaints have increased since the implant and with the further observation that claimant is credible, claimant has a debilitating condition, and there has been no FCE to suggest that the claimant is more functional than what she describes. [Krayer/Gin]

## TOTAL DISABILITY

***William Sheehan v. Harvey Hannah Associates, IAB Hearing 1407592 (7/1/19).*** This case discussed the quirky situation where the claimant consented previously to a Termination of total disability while on a total disability status medically and what impact that prior consent has on a future total disability claim. [Freibott/Carmine]

## UTILIZATION REVIEW

***Randall Wooters v. Carl King Tire, IAB Hearing 888748 (4/22/19).*** The Board reverses a UR Certification of Oxycodone, Percocet and Soma with the observation that this case is a flagrant example of Dr. Balu not being aware of the claimant's history of medication non-compliance. [Lazzeri/Wilson]

***Nathaniel Hackney v. Master Acoustical, IAB Hearing 1438400.*** This case represents an employer's successful appeal of a UR Certification of chiropractic treatment rendered by Dr. Kevin Murray. [Legum/Baker]

***Nina Baen v. Culver & Pearson, LLC, IAB Hearing 1456738 (11/30/18).*** The Board affirms a UR non-certification of Oxycodone, Gabapentin, and Metaxalone prescribed by Dr. Rafique. [Long/Carmine]

***Deborah Holley v. Macy's, IAB Hearing 1326410 (7/26/19).*** The Board reverses a UR non-certification of a revision spinal cord stimulator with Dr. Yalamanchili testifying on behalf of the claimant and Dr. Brokaw performing the defense medical evaluation. [Gambogi/Morgan]

***William Thompson v. Sherman Heating, IAB Hearing 11469728, (10/9/19).*** A UR certification of compound cream is reversed by the Board on employer's appeal noting the lack of any follow up evaluation with the prescribing physician to assess the cream's effectiveness and the lack of any documentation in the claimant's medical records to indicate that the compound cream was effective or resulting in any functional benefit to the claimant. Dr. Piccioni served as the defense medical expert. [Green/Bittner]

***Jeffrey Sprouse v. John L. Briggs & Co, IAB Hearing 1272196 (9/27/19).*** A UR certification of pain management treatment with Dr. Balu is affirmed, with the Board specifically noting that such treatment enables the claimant to continue in gainful employment in a full duty capacity as a union carpenter. [Silverman/Baker]

***Patricia Plaster v. State of Delaware, IAB Hearing 1422147 (7/31/19).*** A Utilization Review certification of treatment with The Back Clinic is affirmed with Dr. Uffberg testifying on behalf of the claimant and Dr. Gelman testifying as the defense medical expert, with the Hearing Officer endorsing Dr. Uffberg's opinion that Claimant demonstrated a "positive patient response" during the six month period that physical therapy was contested. And with the further observation that "although Dr. Zaslavsky has recommended lumbar fusion surgery for her, Claimant has instead elected to manage her condition with conservative care." [Donnelly/Skolnik]

***Charles Walls v. David Horsey & Sons, IAB Hearing 1289219 (5/10/19).*** The Board affirms a UR certification of OxyContin and OxyIR where the claimant is maintaining full time gainful employment and is compliant with his dosages. [Green/Wilson]

***Michael Roussell v. Fletcher's Plumbing, IAB Hearing 1427833 (5/15/19).*** The Board affirms a UR non-certification of a proposed total hip replacement accepting the defense medical expert opinion of Dr. Schwartz that it is "too dangerous to perform a hip replacement surgery when there is nothing to be fixed. Despite Claimant's subjective pain, the proposed surgery will not help him, it could make him worse. Even some of the Claimant's treating

physicians, including Dr. Rasis, recommended against a hip replacement surgery based on the completely normal x-rays and MRIs, which showed only mild degenerative changes in both hips." [Silverman/McGarry]

***Randall Wooters v. Carl King Tire, IAB Hearing 888748 (5/16/19).*** The Board reverses a UR certification of opioid treatment with Dr. Balu based on the defense medical opinion of Dr. Jason Brokaw with the following comment: "Also concerning is the fact that despite having been claimant's treating physician for a decade, Dr. Balu appears less informed of Claimant's history, or more importantly, of Claimant's multiple episodes of non-compliance than Dr. Brokaw. Specifically, Dr. Brokaw pointed out that Claimant has had problems with compliance in escalating severity and frequency historically, including running out of medications prematurely on multiple occasions. In addition, Claimant was not taking his medications as prescribed and had tested positive for codeine, morphine, hydromorphone and fentanyl (none of which were prescribed to him) in different urine drug screen tests, which was indicative of severe non-compliance…" [Lazzeri/Wilson]

***Michelle Curtis-Howett v. Tecot Electric, IAB Hearing 1072218 (11/8/19).*** The IAB affirms a UR non-certification of a proposed S1 joint fusion surgery based on the defense medical expert testimony of Dr. Rushton - - "The Board shares Dr. Rushton's concerns about the prospects for any significant or lasting benefit from the S1 joint fusion given Claimant's lack of any long-term improvement from numerous previous invasive procedures. This is particularly true where the proposed surgery is one that is considered investigational by the Low Back Pain Treatment Guidelines adopted pursuant to the Delaware Workers Compensation Act." [Stewart/Klusman]

***Nina Baen v. Urgent Ambulance Services, IAB Hearing 1456738 (12/16/19).*** The Board affirms a UR non-certification of a Dr. Zaslavsky surgery with the comment that Dr. Zaslavsky "acted too hastily" and also "rushed to judgement" noting that Dr. Schwartz served as the defense medical expert. [Long/Carmine]

***Dean Swenson v. Bear Trap Dune Golf Club, IAB Hearing 1381338 (12/12/19).*** A UR certification of opioids is reversed based upon the defense medical expert testimony of Dr. Schwartz - - "Dr. Sundarajan testified that he starts out prescribing low-dose narcotics and slowly increases them to the correct dosage; however, in this case, Claimant was almost seven years post-accident when Dr. Sundarajan suddenly increased Claimant's narcotics significantly by prescribing nucynta at his initial visit in December 2017 and the dosage was tripled within two months without any increased symptoms or clinical findings. Claimant takes 140-MME, which is well beyond the recommended limit of 90-MME by the CDC, which means the risks are even greater for Claimant." [Mason/Gin]

***Kim Blumenschein-Reeves v. State of Delaware, IAB Hearing 1320854 (12/6/19).*** The Board affirms a UR certification of pain management treatment with opioids - -

"The Board found Dr. Xing persuasive that the treatment she has provided has been reasonable and necessary. The Board accepts that Claimant is not the average patient. She has had four lumbar surgeries, the last three in relation to the work accident. Her last surgery was in 2010. These surgeries were unsuccessful, and Claimant is left with a failed back syndrome diagnosis. Claimant is not a surgical candidate. She continues with chronic low back pain and radiculopathy, weakness and other symptomatology into the legs…" [Freibott/Julian]

## VOLUNTARY REMOVAL

***Gary Anderson v. Harper Seafood House, IAB Hearing 1249425 (10/31/19).*** Where the claimant makes no good faith job search for years following a 2012 Functional Capacity Evaluation and exhausts 300 weeks of partial disability with still no return to work, the Board rules that he has voluntarily withdrawn from the labor market and reject his claim for total disability benefits to coincide with an agreed-upon surgery. [Friedman/Andrews]

***Linda Holloway v. State of Delaware, IAB Hearing 1462123 (1/24/19).*** The claimant's ongoing partial disability benefits are terminated based on a finding of voluntary removal from the labor market. "The Board notes that in addition to the failure to adequately search for a job, there are other factors which could lead to the conclusion that Claimant has withdrawn from the labor market including her age (68) and comorbid health conditions, chronic knee problems, diabetes, and gout. Given the totality of circumstances in this case, the Board believes Claimant withdrew from the job market and that withdrawal was not based on her accident-related physical restrictions." [Bustard/Bittner]

***Timothy Massey v. Rimsi Corporation, IAB Hearing 1383032 (11/22/19).*** The Board declines to find a voluntary removal from the established labor market where Claimant has been totally disabled the last few years. [Freibott/Andrews]

# APPELLATE OUTCOMES

***Bank of America v Brown, C.A. No. N19A-03-007 SKR (10/10/19).*** The Superior Court reversed and remanded the Board decision due to potential confusion as to which causation standard was applied. The Board had sided with the claimant that she sustained a work injury to the neck. In the conclusions section, the Board referenced the separate "but-for" causation standard for acute injuries/accidents and the "substantial cause" causation standard for repetitive strain injuries (usual exertion) and confirmed that the usual exertion standard applied here. However, the Court was troubled by subsequent language in the Decision where the Board indicated it was not convinced that the work duties were the substantial cause of the disc herniation but felt the duties aggravated the claimant's pre-existing degenerative disease. Use of the term 'aggravation' was not supportive of the 'substantial cause' standard. Further, the Board did not sufficiently explain why the herniation did not meet the appropriate causation standard while the remaining degenerative disease did. [Tatlow/Nitsche]

***Goodchild v R.E. Excavation, LLC C.A. No. N19A-02-008 CLS (10/31/19).*** The Board Decision in this matter was affirmed in part and remanded in part. The primary issue before the Board was whether a proposed lumbar surgery was causally related to the work injury, or whether it was solely related to a prior injury that included fusion surgery. The Board found the work injury did not aggravate the underlying fusion nor impact the need for surgery. Instead, the work injury resolved and returned to chronic baseline condition. The Court affirmed this finding, and was not impressed with the claimant's contention that the Board applied a heightened causation standard just because the Board stated in part that the work injury did not cause any "long term significant change." However, the Court did remand based on Claimant's argument that the Board failed to make a ruling on the compensability of other medical bills that were properly noticed pre-hearing. [Lengkeek/Andrews]

***This & That Servs Co. v Nieves., C.A. No. S18A-10-003 CAK (6/7/19).*** The Superior Court reversed the Board's dismissal of a 'U.R. Appeal' petition and remanded the matter for a hearing on the merits. Following a Utilization Review determination in the claimant's favor, Employer filed a petition to challenge the reasonableness of narcotic medications prescribed by Dr. Balu. The claimant filed joint motions to limit and then dismiss the petition. The Board granted both motions on the basis that all treatment had been paid and petition therefore moot per the representation of Claimant's counsel and submission of a provider bill ledger over objection. The Court disagreed as there was an actual controversy on whether narcotics was reasonable and necessary. The Court further questioned the submission into evidence of the provider medical ledger without authentication. [Ellis/Schmittinger]

***Perdue Farms v Atkinson, C.A. No. S19A-07-003 RRS (12/30/19).*** At issue before the Superior Court was whether the Board erred by finding the claimant's expert most credible when the expert was not aware the claimant sustained a subsequent injury to the same body part. The parties had agreed the claimant sustained a neck injury, but differed as to the extent of that injury and causal relationship of a later surgery. The Court concluded that the Board was free to rely on the either expert, and the absence of evidence, as long as the Board considers it, is not necessarily dispositive of a particular issue. [Swift&Nardo/Green]

***Freebery v. Law Office of Michael Freebery, No. S18A-10-001 ESB (6/26/19).*** The Board denied Claimant's petition alleging a work-related back injury after making a credibility determination. On appeal, the claimant contended that: the employer procedurally waived its right to contest compensability; the Board erred by declining to consider an 'implied agreement' argument; and the Board should have accepted certain witness statements as 'judicial admissions' when considering compensability. The Court affirmed the Board's decision. Employer did not waive the issue of compensability as Employer sufficiently raised the issue on the Pretrial Memorandum and Parties' Stipulation of Facts. The Board was within its discretion to decline to consider any 'implied agreement' issue as it was only noticed the day before hearing and not substantially argued at hearing. Finally the Court did not agree that testimony from the owner of the company should be considered 'judicial admissions' in this unique case as he was both company owner and the claimant's husband. [Owen/Ellis]

***The Rock Pile v Rischitelli, C.A. No. N18A-10-005 RRC (6/14/19).*** The issue on appeal was whether the employer was entitled to a credit against worker's compensation benefits due to Underinsured Motorist ("UIM") coverage payments to the claimant. The Board and Superior Court found for the claimant and denied the request for a credit. Although the Court agreed that Delaware law generally disfavors double recovery, the explicit language of 19 Del. C. 2304 and 2363(e) provides an exception for UIM benefits even if the employer fully funded them. [Bittner/Schmittinger]

***State of Delaware v Calder, C.A. No. N19A-02-003 FWW (10/16/19).*** The legal issue before the Superior Court was whether a claim for surgery should have been barred pursuant to the doctrines of *res judicata* and/or collateral estoppel. In 2005, the Board in a decision on a termination petition found in part that the claimant sustained a soft tissue injury and did not aggravate her cervical degenerative disease. This supported the Board's ultimate conclusion that the claimant could return to work. In 2018, the Board found for the claimant that a neck surgery was related, in part, as the work injury aggravated the cervical degenerative disease. The Court affirmed the Decision on appeal and rejected that *res judicata* or collateral estoppel applied. Since the Board heard different claims at each hearing, *res judicata* did not apply. Collateral estoppel also did not apply as the issues addressed by the Board were not similar and the claimant did not have a full opportunity to develop that argument in 2005. [Hauske&Wan/Rhoades&Morrow]

***PC Metro Bottling v Ringgold, C.A. N18A-11-001 ALR (6/13/19).*** The sole issue before the Court was whether the Board erred in a Motion for Clarification by not reducing an attorney's fee on a Termination petition when the claimant returned to work two days before the decision was issued and conceded he was not entitled to partial disability benefits. Without knowledge of the return to work, the Board had issued a decision terminating entitlement to total disability benefits and awarding partial disability benefits. The employer sought for a reduction of the attorney's fee due to the change in circumstances before the Decision was issued. The Board denied the motion, finding the attorney's fee appropriate as **subsequent changes to disability** status have no bearing on a fee already earned. The Court found there was substantial evidence for the Board's order. [Malatesta/Amalfitano]