DELAWARE WORKERS COMPENSATION
Industrial Accident Board
CASELAW Update
& Appellate Outcomes

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IAB DECISIONS

CAUSATION

Helenor Ketcham v. Sunrise of Wilmington, IAB # 1492269, (9/22/20). With regard to a DCD Petition alleging injuries to the right shoulder and cervical spine arising out of the cumulative detrimental effect of working as a care manager for Sunrise, the Board rules in Claimant's favor that "substantial cause" is met and that the work contribution to the condition is more than trivial or insubstantial, rejecting the opinion of the defense medical expert that Claimant's cervical spine condition is simply related to normal aging or the cumulative detrimental effect of everyday living. [Snyder/Morris-Johnston]

Denise Pearl v. State of Delaware, IAB # 1441323, (10/5/20). On a DACD Petition seeking permanency benefits for the right upper extremity and cervical spine, the Board awarded the 14% impairment to the right upper extremity with no award for the cervical. Noting that the claimant has a long history of fibromyalgia with symptoms overlapping with injuries from the work incident, the Board observed that a symptomatic chronic condition does not preclude Claimant from recovery and that in this case, the Claimant "is the archetypical eggshell plaintiff and as such Employer must take Claimant as it finds her to the extent that this preexisting condition could be aggravated or make her more vulnerable to injury." [Weik/Menton]

Earlene Shamburger-Gibbons v. Johnson Controls, IAB # 1453984, (6/12/19). On a claim seeking benefits for carpal tunnel syndrome to include total disability and a proposed surgery, the Board rejects Dr. Morgan's theory that carpal tunnel syndrome developed due to swelling which followed a compensable shoulder injury in favor of the defense medical opinion of Dr. Gelman. [Gambogi/Nardo]

COURSE AND SCOPE

Brenda Tomme v. Kinder Care Education, IAB # 1475134, (6/12/19). Returning to the work premises for personal reasons after clocking out is ***not*** in course and scope. [Cline/Simpson]

Sandra Galloway v. Perdue Farms Inc., IAB #1485128, (10/1/20). An assault on the Claimant due to a "drug deal gone wrong" is not compensable. "Based on the evidence presented, the Board finds that the 4/17/19 assault occurred outside of the course and scope of Claimant's employment with Perdue, as it occurred for purely personal reasons, namely retribution for a drug deal gone wrong. The Board finds that the location of the assault in the Perdue parking lot while Claimant was on a break was simply a coincidence and it was completely unrelated to work. Sergeant Horseman testified that it is not unusual for a drug dealer who is robbed to seek revenge. He also testified that "based on his training and experience, an incident with multiple stabbings is usually a crime of passion or personal between assailant and victim…The Board finds that Claimant's testimony regarding the cause and impetus for the assault is not credible." [Friedman/Nardo]

DISCOVERY ISSUES

Andrew George Higgins v. State of Delaware, IAB # 1429097, (2/2/20). In ruling on a preliminary matter in the context of a DACD Hearing on the issue of permanency, the Board denied Claimant's Motion requesting that the employer produce a letter sent to its expert, Dr. Gelman, in Claimant's prior workers compensation cases in which permanencies of the cervical and lumbar spine were at issue. The Board agrees with Employer that the letter written to the expert in 2014 for an earlier case involving Claimant's spine injuries is unrelated to the current issue before the Board, whether the thoracic spine is related and if so, what permanency is attributable to that injury, and does not warrant production or outweigh privilege. [Kimmel/Nardo]

DISFIGUREMENT

Jesse Woody, Jr. v. West End Neighborhood House, IAB # 1467451, (11/2/20). On a claim for disfigurement the Board awards one week total for the aggregate of three shoulder "portal" scars. [Bartkowski/Andrews]

DME ISSUES

Edward Anderson v. Cooper-Wilburt Vault, IAB # 1333578, (6/13/19) (ORDER). Where the claimant objects to another DME with Dr. Kalamchi and is able to produce a note from his treating psychologist that the prior DME with Dr. Kalamchi negatively impacted his PTSD, the Board orders the Carrier to reschedule the DME with a different physician and denies the Carrier's request for forfeiture. [O'Neill/Andrews]

IDIOPATHIC FALL

Debra Davis v. Tybout Redfearn & Pell, IAB # 1489367, (9/25/20). In awarding benefits to the Claimant for a trip over a flooring transitioning strip, the Board rejects the Employer's idiopathic fall defense as well as the defense of willful disregard of a safety appliance triggering forfeiture, based on the proposition that the Claimant's failure to use her walker at the time of the work accident amounted to a "willful failure/refusal to use a reasonable safety appliance…" This case is a gem in that it includes a comprehensive discussion of what is ***not*** an idiopathic fall. [Silverman/Lockyer]

MEDICAL TREATMENT ISSUES

Bernard David v. Quality Assured Inc., IAB #1332427, (9/3/20). A Dr. Rushton defense medical evaluation overcomes a DACD Petition seeking an award of a 5- level fusion of the cervical spine proposed by Dr. Fisher with the Board declining to rule that but for the work accident, the Claimant would have needed a 5-level cervical spine surgery or that the accident accelerated the need for that surgery. Dr. Fisher acknowledge that what we see in Claimant's cervical spine is typical for someone in his sixties and that the MRI scan show normal age-related progression of advanced multi-level degenerative disc disease, and noting at the time of the Hearing the Claimant was in his seventies. Additionally, Dr. Rushton in tandem with his DME noted that the Claimant's reason for moving forward was due to neck pain and headache,

and that he would not have recommended such an extensive invasive procedure for those symptoms. The procedure itself is not compliant with the Health Care Practice Guidelines whereas as the Guidelines would allow at most a 3-level fusion. "Dr. Fisher's justification for this extensive procedure is flimsy at best. Ultimately though, the Board finds, consistent with Dr. Rushton's opinion, that he was operating on claimant's longstanding degenerative disc disease." [Crumplar/Bittner]

Cheryl English v. Fox Rothschild, LLP, IAB # 1355961, (6/10/19). The Board awards medical marijuana for chronic pain based on the testimony of Dr. Cary but in so doing observes that the Employer did not offer any defense medical expert or rebuttal testimony. [Allen/Tatlow]

PARTIAL DISABILITY

Juan Torres v. Reybold Homes, IAB # 1289204, (6/13/19). The unrepresented Claimant's Petition seeking to recover partial disability beyond 300 weeks is dismissed in reliance of Section 2325. [Pro Se/Andrews]

PRACTICE AND PROCEDURE

Khadijah Zakaria v. Christiana Care Health Services, IAB #s 1473835 & 1490375, (6/29/20) (ORDER). On a Motion to Strike witnesses that may be called by the Employer at an upcoming Merits Hearing, the Board denies the request to limit the 26 witnesses identified by the Employer. [Long/Newill]

Elmo Sessoms v. State of Delaware, IAB # 1385782, (4/30/19) (ORDER). The Board rejects the Employer's Motion to Compel the Claimant to sign an Agreement for Partial Disability and a Final Receipt for total disability where the treating physician has issued a full duty release. In so doing, the Board reminds the Employer that to achieve such an outcome it is required to file a formal Petition for Review based on "failure to sign". [Welch/Betts]

SECTION 2353 FORFEITURE

Vauguel Pierre v. Perdue Farms, IAB # 1486398, (11/2/20). The Board finds in favor of the forfeiture provision of 19 Del. Code Section 2353(b) based on the conduct of the Claimant "running" through the plant at the time of the accident and noting the Claimant had been disciplined for a similar infraction, running, in 2012. [Donovan/Nardo]

STATUTE OF LIMITATIONS

Debra Taylor v. State of Delaware, IAB #1451544, (11/4/20). The Board grants the State's Motion to Dismiss the DCD Petition as being time-barred under the applicable statute of limitations and finding that the "saving statute" of 10 Del. Code Section 8118 does not apply. [Hedrick/Cecil]

UTILIZATION REVIEW

Robert J. Robinson, Jr. v. AAA Mid-Atlantic, IAB #1411928, (11/20/20). This is a Utilization Review appeal of the Claimant's pain management treatment with Dr. Wu, which included Percocet, Oxycodone, Lidocaine, and topical Diclofenac with the Board affirming the UR decision, noting that the Claimant's medication regimen has been stable, the Claimant has been compliant, proper safeguards have been administered by the prescribing physician, and the protocol has provided good palliative relief. [Morrow/Lukashunas]

VOLUNTARY REMOVAL FROM THE WORKFORCE

Leigh Stewart v. De Supermarkets Inc., IAB #1322914, (12/14/20). Where the Claimant is unable to work due to medical factors unrelated to the work injury residuals, the IAB in this case finds a voluntary removal from the workforce and declines to award partial disability. [Ippoliti/Morgan]

APPELLATE OUTCOMES

ACW Corp. v Maxwell No. 302, 2019 (Del. 2020). **The Supreme Court determined that the worker's compensation carrier could not under 19 Del. C. 2363 recover from an auto insurer the sums it paid the claimant in a global commutation settlement. The claimant had been involved in a work-related motor vehicle accident where the other driver was at-fault. The auto carrier for the other driver argued that the commutation was a settlement of only potential future worker's compensation claims and did not include damages the claimant would have been entitled to recover in a tort action. The Court held that summary judgment was appropriate as the worker's compensation carrier failed to offer the trial court evidence of injuries suffered by the claimant that could be presented in a trial against the auto carrier. [**Shalk/Mondell&Carmine]

Peer v. State C.A. K20A-02-001 WLW (10/29/20). **The issue in this case was whether a claimant can be compelled to sign a Final Receipt that includes language confirming the date the work injury resolved. The Board previously issued a Decision finding a compensable work injury but also that the injury had fully resolved by a specific date. Following a dispute between the parties, the Board then ordered the claimant to sign the Final Receipt over objection. The Board's Order was affirmed. Signing a Final Receipt was required by statute and the injury 'resolved' language engrafted in the receipt simply mirrored what the Board held in the Decision. [**Schmittinger/Klusman]

Quaile v TBC Corp. C.A. N20A-05-003 JRJ (11/10/20). **The Court remanded in part a Board Decision that denied the claimant permanency benefits. The Board found the work accident caused the claimant to have rectal problems that required surgery. However, the Board agreed with the defense expert work-related problems resolved thereafter, and therefore, there was no entitlement to permanency benefits. The Court found that the Board was within its discretion to find no benefits were owed for loss of use based on the AMA Guides. However, since 2326(g) allows compensation based on either 'loss of use' or 'loss of a member of the body', the Board incorrectly found that benefits were not owed just because there were no ongoing work-related problems. The Court analogized to a 1972 court opinion holding that a claimant with one missing testicle was entitled to benefits under 2326(g) even though there was no loss of sexual function. [**Wasserman/Tatlow]

Barrett Business Svc v. Edge C.A. K19A-11-011 DCS (10/29/20). **After the court first remanded the case, the employer should have been permitted by the Board to present the testimony of a new medical expert on the issue that the court found problematic. The matter was remanded for a second time to permit the employer to present this additional evidence. [**Lengkeek/Bittner]

Frederick v A-DEL Construction Co. C.A. N19A-07-009 CLS (11/30/20). **This appeal concerned a Board decision finding that a 'joint employment' relationship existed in relation to a compensable work injury. The claimant appealed this decision and contended that the A. Mazzetti & Sons v Ruffin 4-part test was not properly applied. The Court agreed and remanded the matter. While the Board had found three factors of the test favored a joint employment relationship, it did not sufficiently address the final factor as to whether the claimant was under contract with both employers. [**O'Neill/Morgan/Burleigh]

Foraker v. Amazon.com, C.A. N19A-12-001 ALR (11/5/20). **This concerned an appeal of a Board decision finding that a work-related low back strain injury had resolved in full. The claimant had two prior low back injuries in the 1990's resulting in surgery and received permanent impairment benefits for a 17.5% rating to the low back and 35% to the left lower extremity. The claimant testified that he was fully healed from those injuries the same year he accepted permanency benefits and had no symptoms or treatment until the present work injury. The Board did not find the claimant credible but the court reversed and remanded the decision. The court concluded that the Board failed to provide sufficient reasoning for rejecting the claimant's testimony that he had no back problems since the year he accepted permanency benefits for the prior injuries. Even if the Board had provided its reasoning in greater detail, the Court stated there was not substantial evidence in record to allow a contrary inference to this testimony. [**Eliassen/Ellis]

Thompkins v Reynolds Transportation C.A. N20A-04-002 ALR (1/11/21). **The claimant appealed a decision denying his DACD petition that sought authorization for low back surgery. The Board had accepted the testimony of the defense expert who concluded that there was insufficient evidence of neurological compromise and significant risk from the surgery. The Court reversed the decision. There was not substantial evidence in the record to find the surgery unreasonable and unnecessary. The court took issue with the defense expert providing seemingly conflicting opinions on the issue of lumbar injections and his willingness to reconsider his causation opinion if a different surgeon offered a second opinion recommending surgery. [**Bhaya/Bittner]

Cahall v Walmart, C.A. N20A-01-004 ALR (12/15/20). **The issue on appeal was whether there was substantial evidence to support the Board's decision denying a DCD petition after finding the claimant's story of a work accident incredible. The claimant on appeal relied upon materials from a 2018 lawsuit in South Carolina where an employee in that state alleged an injury occurring in a similar fashion. Before the filing of its answering brief, the employer in this case filed a motion to strike. This evidence had not been presented before the Board and Employer contended it should not be considered for the first time on appeal. Citing the policy preference for cases being decided on the merits, the Court remanded the case back to the Board for rehearing to include this new evidence. [**Stanley/Newell]

RIMSI Corp. v Massey C.A. N19A-12-006 DCS (11/10/20). **The employer in this case challenged the Board's denial of a termination petition. On appeal the employer first claimed that the Board failed to address the significant evidence it presented in favor of termination of total disability benefits. The Court rejected this argument, noting that the Supreme Court has held that the Board can adopt the opinion of either expert, and if adopted, that shall constitute substantial evidence for purposes of appellate review. The court also rejected a second argument that the Board ignored the evidence that the claimant had voluntarily retired from the workforce. There was substantial evidence in the record to find the claimant's statement about retirement was motivated by pain and limitations from his work injuries. [**Freibott/Andrews&Trapp]