DELAWARE WORKERS COMPENSATION
Industrial Accident Board
CASELAW Update
& Appellate Outcomes

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DSBA ANNUAL WORKERS COMP SEMINAR

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INDUSTRIAL ACCIDENT BOARD DECISIONS

AVERAGE WEEKLY WAGE

Kenneth Smith v. Quality Heating & Air Conditioning, IAB #1491767, (5/18/21) (ORDER). This case was instructive on the issue of how to calculate the Claimant's average weekly wage where the Claimant's first day of employment is the last day of a prior pay period and with the Board adopting the Claimant's proffer as to the manner of calculation. Notably, Claimant's analysis resulted in an average weekly wage of $608.76 based on 17 weeks, whereas employer argued in favor of an average weekly wage figure of $574.94 based on 18 weeks. [Bartkowski/Bittner]

CAUSATION

Virgilio Cruz-Rodriguez v. B&F Paving Inc., IAB #1511766, (12/22/21). A DCD Petition alleging neck and back injuries with Claimant losing consciousness at the work site, is denied in spite of Claimant's ER history that "he felt like he broke his back after lifting a heavy machine." Dr. Brokaw on behalf of the employer testified that there is no evidence that the syncopal episode, which can be brought about by countless medical and environmental conditions, was at all related to Claimant's work given that Claimant did not exhibit immediate pain or pass out immediately in relation to moving the equipment. According to a coworker witness who was deemed credible, a significant period of time elapsed after the lifting event and the claimant losing consciousness. [Allen/Logullo]

James Sullivan v. Brown and Root, IAB #1467415, (3/23/22). The IAB rejects the theory of a neck injury arising out of a compensable low back claim based on the positioning of the head during a lumbar spine surgery. Dr. Lingenfelter testified on behalf of the claimant and Dr. Gelman testified on behalf of the employer. [Nitsche/O'Connor]

Christopher Buchannan v. Waste Management, IAB #1303631, (3/21/22). The Board rejects the theory that a left total hip replacement was triggered by a multilevel lumbar fusion surgery arising out of a compensable low back claim with Dr. Steven Dellose testifying on behalf of the claimant and Dr. Eric Schwartz testifying on behalf of the employer. Although the claimant provided the testimony of Dr. Dellose, as based on the opinion of Dr. Rubano, as well as a medical journal article supporting a theory that the longer the segment of a lumbar spine fusion, the more stress is placed on the hips, the Board nonetheless accepted DME doctor Schwartz's

opinion that such theory was not applicable to this case. The DACD Petition seeking benefits for the left hip was denied. [Gambogi/Davis]

FINES

Delaware Department of Labor v. Flaming Pizza Inc., IAB #1515407, (4/20/22) (ORDER0. The Board assesses $8750 in penalties against this employer for lack of insurance from 7/17/21 to 8/18/21.

Delaware Department of Labor v. Fat Vinnies, IAB #1522274, (4/20/22) (ORDER). The Board assesses a $7000 penalty against an uninsured employer covering 3/22/21 to 4/19/21.

FORFEITURE

Clare Makowski v. Lisa Broadbent Inc., IAB #1349307, (11/8/21). In considering multiple issues in tandem with the Board's denial of a Petition for Review, where the claimant suffers from "functional movement disorder", the Board denies the Employer's Section 2353(a) forfeiture argument based on an alleged refusal of medical treatment (cognitive behavioral therapy) stating there cannot be a forfeiture of treatment based on refusal if Claimant is left to her own devices to obtain said treatment. [Stewart/Bittner]

Lonny Jameson v. First Group America, IAB 1481756, (11/29/21). In rejecting the Employer's allegation forfeiture under 19 Del. Code Section 2353(b) based on refusal of reasonable medical services offered by the employer, the Board notes that a recommendation in a DME report does not constitute an offer of medical treatment. "The basis for forfeiture is a treatment suggestion made by Dr. Fedder in his report following a DME in June 2021. Both Claimant and Dr. Eskander testified that they were not aware of the treatment suggested by Dr. Fedder until very recently. Employer proffered no evidence that medical treatment was being affirmatively offered, other than by sending the DME report to opposing counsel. It is not reasonable to expect Claimant to react to something recommended in a report from the defense doctor without some affirmative action by the Employer." [Hemming/Skolnik]

FRAUD

Santiago Mendoza v. Service Master Cleaning, IAB #1476099, (4/1/22). The IAB grants the Employer's Motion to Strike an original compensability Agreement based on fraud arising out of extensive misrepresentation and non-disclosure as to the nature and extent of the claimant's prior level of injury to the spine. The fact that the claimant was non-English speaking did not gain him any ground in attempting to overcome allegations of fraud. "The Board is troubled by the suggestion that Claimant even when assisted by an interpreter or others speaking in his native Spanish can be excused from recalling and responding honestly to questions about his own health. Claimant was dishonest in his representation related to past medical history, to Employer during the hiring process and to every medical provider with whom he met following the July 20, 2018 slip and fall. Given the clear evidence that Claimant has been treating with severe neck complaints for the better part of 20 years, it seems incredible to suggest, no matter his level of formal education, that he could not recall years upon years of treatment to address years of pain and suffering relative to his neck…the one universal truth seems to be that Claimant was intent by not providing the details of his ongoing cervical condition to anyone. He continued this pattern of omission and explicit deceit in his specific report to the insurance adjuster and even refused to provide the name of his primary care physician…In short, the Board finds it difficult to reconcile or find credible almost anything that Claimant said." Accordingly, the Board deemed the available evidence more than sufficient to justify intervention on the basis of fraud and to strike the underlying Agreement accepting compensability of a lumbar and cervical spine strain and sprain, but further would allow Claimant a period of up to 60 days to file a new DCD to establish compensability for separate issues if he so desires. As such and until another award would be made, the Employer was allowed a credit for any monies expended to date arising out of the earlier compensability decision. [Stewart/Newill]

MEDICAL TREATMENT ISSUES

Teresa Bollinger v. Genesis Healthcare Group, IAB #1483393, (2/17/22). In denying a DACD Petition seeking approval to proceed with a trial of a spinal cord stimulator, the Board adopts the medical opinion of defense medical expert Dr. Brokaw which includes the observation that "unknown pain genesis is a poor prognosticator for a spinal cord stimulator and that spinal cord stimulators are most effective for treating neuropathic pain in the distal limb, which is not a symptom that is a significant portion of claimant's current complaint since her primary areas of pain involved the groin, buttock and right hip. Spinal cord stimulators have a very poor track record in controlling musculoskeletal pain." [Schmittinger/Lockyer]

Michael Jones v. Johnny Nichols Landscaping, IAB #1276947, (4/12/22). On a DACD Petition seeking an award of medical marijuana for pain management, the Board denies the request based on the proposition that "Claimant's use of marijuana appears to be for recreation, not pain control. Claimant used marijuana illegally for more than 20 years until he obtained a medical marijuana card approximately six to seven years ago. Once he obtained marijuana legally, he continued to take opioids concurrently for many years…there is no time when Dr. Balu could say he substituted opioids for marijuana or vice-versa. Claimant only stopped opioids because he was afraid to go to Dr. Balu's office during the Covid-19 pandemic and he was uncomfortable using technology for Telehealth visits during the pandemic, so he unable to obtain refills from Dr. Balu." Also noteworthy was the testimony of the defense medical expert Dr. Schwartz that the type of marijuana that the claimant used was the euphoric THC-based products, not medicinal analgesic CBD-based products. [Donovan/Baker]

Timothy Miller v. State of Delaware, IAB#1340492, (3/15/22). A proposed fusion surgery at L2-3 which would be surgery #6 is not reasonable or necessary based on the testimony of the defense medical expert, Dr. Scott Rushton and also rejecting any argument in favor of adjacent segment disease. The surgery in question was being endorsed by Dr. James Zaslavsky. [Bartkowski/Klusman]

Robert Dobie v. WK Smith & Sons, Company, IAB #1513845, (4/21/22). The Claimant's DACD Petition is denied where the cause of his bilateral foot numbness is unknown, with the Board ruling that Dr. Ligenfelter's proposal of an L4-S1 fusion is premature. "It is undisputed that Claimant's primary complaint is his bilateral foot numbness. Claimant testified he wants surgery to address his bilateral foot numbness. According to the evidence, the cause of the bilateral foot numbness is uncertain. Dr. Schwartz testified he would defer to a neurologist's opinion of the cause of the bilateral foot numbness which could be neuropathic in origin. Both Dr. Yalamanchili and Dr. Handler indicated in their notes that they were uncertain of the cause and wanted more medical workup to rule out a neuropathic origin…Two EMGs by the same doctor had contrasting findings." [Wilson/Greenberg]

OCCUPATIONAL DISEASE

Kirk Anderson v. American Seaboard Exteriors, IAB #1449333, (1/31/22). A DCD Petition seeking death benefits arising out of the claimant's peritoneal mesothelioma fails where the nature of the claimant's job is commercial window cleaner with the Board not impressed as to the nature and extent of claimed exposure. Dr. Tsai and

Dr. Bruce testified on behalf of the claimant and Dr. Roggli and Dr. Bernard Silverstein (industrial hygienist) testified on behalf of the Employer. [Ellis/Roberts/Segletes/Crumplar]

***Charles Cacchioli (deceased) v. Infinity Consult. Sols.*, IAB #1501061 (3/9/2022).** Claimant alleged he contracted COVID at work. He claimed that he was in close contact with another employee (not wearing a mask) who then tested positive 2 days later on June 17, 2020. Claimant then tested positive on June 19, 2020 – 2 days later – and hospitalized on June 23, 2020. Petition was initially filed by Claimant to protect statute of limitations and stayed pending a resolution in the Superior Court. The Superior Court issued an Order ruling that the Board is vested with jurisdiction to hear all cases arising under the Workers' Compensation Act and the issue of whether the Board has jurisdiction over the matter should be decided by the Board. Claimant filed a Motion to Dismiss before the Board for lack of jurisdiction as to COVID, arguing that he was just an administrative office worker and there was nothing natural or inherent in that workplace to produce a high risk of contracting COVID, and therefore, COVID was not an occupational disease. In response, Employer argued that Claimant's exposure to COVID was in the workplace where proper safety precautions were not taken, and therefore, the condition arose from and was causally related to the employment and workplace. **NOTE** – the comp carrier & liability carrier were the same! The Board concluded that, while COVID exposure can certainly be a compensable occupational disease in a proper situation, in the limited office setting described under these facts, there is no assertion that Claimant's occupation produced a hazard of contracting COVID distinct from and greater than the hazard of attending employment in general. Claimant's Motion to Dismiss was granted. [Warner/Baker]

William McLaughlin, Jr. v. C&D Contractors, IAB #1478363 (3/14/22). This case includes a discussion of what rate is used for death benefits pursuant to 19 Del. Code Section 2330 where the claimant's employment of mesothelioma exposure ended in 1989 with the claimant being diagnosed in 2017. "The Board found Claimant was exposed to asbestos during his employment with C&D Contractors in the 1980's, but his occupational disease did not manifest until 2017. Under the circumstances, the diagnosis date of November 20, 2017 serves as a reasonable date of injury in this case. The minimum and maximum compensation rates in effect on the date of injury would apply. The calculated compensation rate of two thirds of Claimant's wages does not exceed the maximum compensation rate of $686.99, so the calculated rate of $600.39 is the appropriate compensation rate to use for the award of benefits."

The Employer was arguing in favor of a max rate as it existed in 1989, which was $280.64 weekly. [Crumplar/Wilson]

PARTIAL DISABILITY

Patricia Ferguson v. State of Delaware, IAB #1431459, (4/12/22). The Board rules that Federal Payroll Protection Program benefits ("PPP") paid during Covid constitute "wages" for purposes of evaluating the claimant's entitlement to ongoing partial disability entitlement. [Schmittinger/Klusman]

Patricia Ferguson v. State of Delaware, IAB #1431459, (4/12/22). The Board doesn't permit a *Maxey-Wade* adjustment on temp partial after the fact. In this case the claimant had already agreed to a partial disability calculation based on actual employment in 2018 relative to a 2015 work injury, without raising any claim for a *Maxey-Wade* calculation. She then obtained new employment at a significantly higher wage in addition to collecting Federal PPP benefits during Covid. It was only after there was an allegation by the Employer of a large overpayment that claimant attempted to raise *Maxey-Wade* to mitigate. The Board did not permit the after-the-fact adjustment. [Schmittinger/Klusman]

PRACTICE AND PROCEDURE

Raymond Thompkins, Jr. v. Reynolds Transportation, IAB #1482461, (12/30/21). On a remand from the Superior Court, the IAB can consider medical evidence which has evolved since the prior Hearing if related to the remand issue. [Bhaya/Bittner]

Andrew Brough v. Delmarva Pole Building Supply LLC, IAB #1506131, (3/22/22) (ORDER). A Termination Order signed by the claimant's counsel will not be vacated even when authority to sign was shortly thereafter withdrawn by a Claimant with dementia, mental health issues, and congestive heart failure. "Although the Board certainly recognizes Claimant's serious industrial accident, severe injuries and current significant health problems, the Board finds that Claimant gave Mr. Lazzeri permission to enter into the Stipulation and withdraw that authorization after the Order was already signed by the Board. The Board cannot simply vacate every Order simply because a party changes its mind, no matter how sympathetic the party is. Furthermore, as of the day of the Motion Hearing, Claimant could not have shown that his medical condition was work-related if the Hearing on the merits had been continued from January." [Lazzeri/Andrews/Kelly]

TERMINATIONS

Kangi Crews v. Bancroft Neurohealth, IAB #1504234, (1/21/22). On a Petition for Review, the Board enters its Order effective the day of filing and further comments the claimant cannot rely on *Gilliard-Belfast* and her doctor's "no work" recommendation when she engages in conduct which is dishonest. "Claimant's own conduct undermines and renders irreconcilable reliance on *Gilliard*. While Claimant has denied it, the evidence seems overwhelming that she has engaged in the act of work in some capacity for months. She took out an emergency Covid-19 loan to rescue a business that she now claims she never started, but then shortly thereafter began appearing online and at events advertising herself as an active financial consultant, working with a team of other consultants. She spoke of business partners and solicited business on the internet, all acts entirely inconsistent with Claimant's testimony that she was in 10 out of 10 pain, 24 hours a day, seven days a week…While the Board ultimately ruled that the doctor imposing the "totally disabled" status did not rise to the level of bad faith, the claimant's "own dishonest conduct" did and rendered any reliance on *Hillyard-Belfast* insupportable. [Carmine/Harrison]

UTILIZATION REVIEW APPEALS

Steven Eskridge v. FedEx Ground Package Systems, IAB #1448989, (10/21/21). A Utilization Review non-certification of a spinal cord stimulator is affirmed based on the DME testimony of Dr. Brokaw who explained "that spinal cord stimulators have a relatively good track record for treating distal leg neuropathic pain, but the claimant is not a good candidate for the SCS because his presentation does not fit the typical picture for what a spinal cord stimulator helps…his pain is primarily axial in nature." [Donovan/Hunt]

Julia Davis v. RRW Inc., IAB #1481986, (12/27/21). A Utilization Review certification of a hardware removal surgery is reversed where according to the DME, there is inadequate documentation that the hardware was the Claimant's pain generator and in the absence of a discogram and CT. [Tice/Carmine]

Sarah Johnson v. J & J Staffing, IAB#1467789, (11/9/21). The Board affirms a Utilization Review certification of a spinal cord stimulator implant performed by Dr. Mark Eskander which reportedly afforded an 85% improvement in symptoms noting that Dr. Schwartz, who does not perform spinal cord stimulator implants, was the defense medical expert. [Bustard/Carmine]

Susannah Baker v. State of Delaware, IAB#1339808, (1/28/22). The Board reverses a Utilization Review non-certification of pain meds with the observation that where the medication only yields tolerance to pain as benefits, as opposed to "overall functional improvement", they are nonetheless compensable with Dr. Mavrakakis testifying on behalf of the claimant without charge and with the observation that "absent this medication and her other modalities of treatment, Claimant would live a tortured existence." Claimant was a former Delaware State Police Trooper prior to her injury in 2009. [Malkin/Harrison]

Carol Clay v. Kohl's Department Stores, IAB# 1460702, (2/16/22). The Board affirms a Utilization Review certification of plasma-rich protein injections and other treatment with Dr. Balu where such treatment allows the claimant to avoid opioids – "Claimant explained she does not wish to take opiate medications and the other pain modalities she receives allow her to avoid opiate medications. Dr. Balu confirmed he treats Claimant with alternative treatment modalities including PT and injections and the Board finds Claimant's and Dr. Balu's attempt to avoid narcotic pain medication to be commendable." [Schmittinger/McGarry]

APPELLATE OUTCOMES

Superior Court Decisions

***Fowler v. Perdue Farms, Inc.*, K21A-01-002 NEP (Del. Super. Ct. Mar. 16, 2022) (Primos, J.)**

The Superior Court held that the Board (1) improperly considered extrajudicial sources, (2) rejected unrebutted testimony of both experts and the claimant when it rejected claimant's claim that he contracted COVID-19 at his workplace, and (3) imposed a higher burden on claimant and essentially charged him with proving his claim beyond a reasonable doubt, rather than the appropriate "more likely than not" standard. Accordingly, the Superior Court reversed and remanded the Board's decision for further proceedings instructing the Board to not speculate about facts not in the record concerning the claimant's contraction of COVID-19. (Schmittinger/Panico).

***Foraker v. Amazon.com, Inc.*, N21A-07-002 JRJ (Del. Super. Ct. Feb. 9, 2022) (Jurden, P.J.)**

The was a second appeal to the Superior Court and follows a remand hearing. Following both the original and remand hearing, the Board denied the clamiant's petition that sought benefits due to an ongoing low back injury. The Board accepted the opinions of the defense expert that the work injury was soft-tissue in nature and limited in duration. The Superior Court following the first appeal remanded the case back to the Board as the court did not believe the rationale in the decision was sufficient to support denying the petition. The Superior Court this time affimed the denial of the petition. Although the Board reached the same conclusion it did in its original decision, there was suffficient explanation in the remand order to explain why the Board accepted the testimony of Employer's medical expert and found the claimant incredible. (Eliasson/Ellis).

***Gonzalez v. Perdue Farms, Inc.*, K21A-01-001 RLG (Del. Super. Ct. Jan. 14, 2022) (Green-Streett, J.)**

Claimant was involved in two separate work injuries, injuring her right knee. The claimant's medical expert testified that she sustained permanent impairment to the knee. The employer's medical expert testified that the claimant's injuries had resolved. The Board found the employer's medical expert more credible. The claimant appealed and argued: (1) the Board mischaracterized Dr. Crain's previous medical examinations and misconstrued Dr. DuShuttle's testimony; (2) the mischaracterization of the medical evidence led the Board to conclude incorrectly

that Claimant lacked credibility; (3) the Board misconstrued Claimant's work capabilities; and (4) the Board ignored the possibility of a interpretation error during Dr. Crain's final examination of Claimant. Superior Court affirmed the IAB's decision, finding the decision was supported by substantial evidence because: (1) The Board's reliance on Dr. Crain's medical opinion was supported by substantial evidence; (2) Given the inconsistencies between the symptoms Claimant reported to Dr. Crain and the symptoms she testified about during the Hearing, the Board's determination that Claimant was not credible was supported by substantial evidence; (3)The Board determined from a functional standpoint that Claimant was capable of returning to work, and the record indicates that Claimant's accidents did not impair her ability to return to work; (4) The Board considered the potential interpretation error of the claimant, factored it into its determination of credibility, and ultimately afforded it no weight. (Donovan/Panico).

***Sheingold v. C & S Enters.*, N21A-08-004 DCS (Del. Super. Ct. Mar. 7, 2022) (Streett, J.)**

The Superior Court affirmed a Board decision that found that there was no work accident or injury as alleged. Although the Board found the claimant's three medical experts credible generally, the Board did not have to accept their opinions given that they relied on a claimant who the Board did not find reliable. The court declined to make credibility determinations or reweigh the evidence as those powers lie exclusively with the Board. (Long/Skolnick).

***Wilson v. Gingerich Concrete & Masonry*, N21A-08-004 DCS (Del. Super. Ct. Mar. 9, 2022) (Clark, J.)**

The Superior Court upheld the Board's denial of payment to the claimant's treating physician due to a lapse in his workers' compensation provider certification. The Court, relying on the plain language of 9 *Del. C.* §2322D, held that the physician was required to be certified at the time of the procedure or, in the alternative, to obtain pre-authorization for the treatment - neither of which occurred. Accordingly, the Superior Court determined the Board did not err and its decision that the physician's surgery bills were not compensable was affirmed. (Schmittinger/Baker).

Supreme Court Decisions

***Shipmon v. State*, No. 261, 2021 (Del. 2022)**

The claimant challenged a Board decision that denied his permanency petition after the opinions of both medical experts were found unconvincing. Even though the Board felt there was likely some level of permanent impairment attributable to the work accident, the claimant did not meet his burden of proof to permit an award of

any kind. The Court concluded that the Board is not required to, and should not, find the existence of permanency to a specific degree when there is no evidence in the record to support that finding. Awards based on institutional experience alone are not permissible. The Board decision denying the petition was affirmed. (Legum/Bittner).

***Zayas v. State*, No. 232, 2021 (Del. 2022)**

The Supreme Court held that the Board erred in accepting the employer's medical expert testimony after he refused to testify about the claimant's treatment by a physician under unrelated disciplinary investigation, and also erred in refusing to admit that provider's medical records into evidence. The Court held that the Board's errors precluded the claimant from adequately presenting her case and violated fundamental fairness. It was improper for the employer's medical expert to unilaterally decide that he did not have to answer any questions regarding the claimant's physician because it precluded the claimant from effectively cross-examining the employer's medical expert on his expert opinion. (Nitsche&Fredericks/Klusman).