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

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DSBA ANNUAL WORKERS' COMP SEMINAR

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IAB DECISIONS

AVERAGE WEEKLY WAGE

Jessica White v. FGG Spa, LLC, DBA Hand & Stone Massage, IAB #1495656, (5/9/22). This case demonstrates how to calculate the average weekly wage for a massage therapist employed for only nine weeks whose income also includes both reported and unreported tips with the Board utilizing 19 Del. Code Section 2302 (B)(b)(2) and arriving at an average weekly wage of $900.00. [Wasserman/Lukashunas]

Joel Welbon v. Baltimore Aircoil, IAB #1501185 & 1515620, (2/6/2023). In calculating the average weekly wage, vacation pay and holiday pay are ***not*** included. [Schmittinger/Wilson]

COLLATERAL ESTOPPEL

John Trincia v. Dick's Sporting Goods, IAB #1505228, (2/10/23). The carrier's payment of four bills and issuance of a letter accepting the claim as "medicals only" is ***not*** an implied Agreement under the facts of this case and based on the carrier's testimony, noting that there were mistakes by the carrier in processing the claim and that payment of the medical bills was careless or negligent but not done under a feeling of compulsion. [Laursen/Newill]

COMMUTATIONS/SETTLEMENTS

Eric Starling v. Formosa Plastics, IAB #1471909, (2/15/23). The Claimant's Petition for Commutation seeking to force a lump-sum commutation of partial disability benefit entitlement is denied and with the Board observing that much of the financial distress to which the Claimant testified could have been avoided had he been motivated to seek sedentary gainful employment. Moreover, the statutory system for workers' compensation intentionally mandates that compensation is to be made in periodic installments replicating the injured worker's wages before the accident. [O'Neill/Gin]

COURSE AND SCOPE

Mary Jo Testa-Carr v. Sallie Mae, IAB #1522185, (3/24/23). An employee injured during a PTO volunteer activity is not eligible for workers' comp and said injury did not occur in the course and scope of employment. Claimant was volunteering for "Meals on Wheels" as part of a PTO program allowing a certain number of hours for volunteer work, noting said program is offered on a non-mandatory basis. Claimant was injured in a fall suffered at a meal recipient's apartment building while delivering dinner. In reviewing existing Delaware case law and the "Larson factors", the Board finds this to be a non-sponsored recreational activity, commenting that the place where the injury occurred was off premises at a location not affiliated with or under the control of Sallie Mae in any way. As for the "time" aspect of this consideration, Claimant was volunteering during regular work hours and was being paid by Sallie Mae at the time. However, even in Sallie Mae's policy manual, this volunteer activity is referred to as "paid leave time". The Board notes that this volunteer time was consistently referred to "time off" or "leave" time within the Sallie Mae policy manual and on the Sallie Mae website. The Board further notes that this policy manual reflects that Sallie Mae employees are also provided with PTO for jury duty, to vote, and to take professional examinations. However, although all of these represent time off with pay, no one would expect accidents and injuries sustained while performing jury service, voting, or taking a professional exam to be considered work-related in nature. [Morrow/Baker]

CREDITS

Jessica Duncan v. New Castle County, IAB #1510553, (9/20/22). Where Claimant has already received her full salary during various periods of total disability in accordance with the terms of a union collective bargaining agreement with the County, the County is not entitled to a credit for "salary in lieu of" payments during periods of time in which it is argued the claimant was capable of full duty work and the Board finds that *Gilliard-Belfast v. Wendy's* is applicable. While the Board notes that it was an issue of total disability versus return to work in the case of *Wendy's*, here, it is an issue of work restrictions versus a non-restricted work, against a treating doctor's orders, as Claimant would plainly have had to disobey the treating physician's orders to begin performing non-restricted work for the County prior to 10/31/21. As already noted, Claimant had long since returned to work for the County per Dr. Mesa in a modified duty capacity but at no lost pay, pursuant to the language of her collective bargaining agreement. [Long/Norris]

William Everett v. Pepsi Bottling Ventures, IAB #1455826, (7/20/22) (ORDER). There is no retroactive overpayment credit where the TPA pays the wrong compensation rate on three different occasions and as such, the Board in its discretion holds that the only way to resolve these repeated inaccuracies and ensure prompt payments timely and correctly made, is to "make the TPA bear the burden of its blunders. The request for retroactive credit is denied." [Silverman/Hunt]

Joel Welbon v. Baltimore Aircoil, IAB #1501185 & 1515620, (2/6/23). A retroactive overpayment credit of $16,000 is denied to the carrier based on its culpability in erroneously calculating the average weekly wage although the carrier is entitled to a reformation of the average weekly wage going forward. [Schmittinger/Wilson]

DISCOVERY ISSUES

Annette Davis v. Christiana Care Health System, IAB #1521009, (11/3/22) (ORDER). The Board refuses to limit the Claimant's obligation with regard to social media disclosure. The Board stated the Employer's surveillance provided evidence that "Claimant is not as physically disabled as she has asserted" and that Claimant's active social media postings are reasonably calculated to provide further evidence of Claimant's post-accident activity level in support of employer's arguments. The Board rejected Claimant's argument that any social media disclosure should be limited to the period of total disability. [Long/Newill]

Michelle Ramsdell v. Ward & Taylor, IAB #1511811, (9/13/22) (ORDER). The Claimant's personal journal entries regarding her contact with the carrier for the employer are not protected by privilege. Employer acknowledged that summaries and impressions of Claimant's conversation with her own attorneys are likely privileged and no disclosure of that is sought. However, Employer argued that summaries of conversations with employer representatives and representatives of the insurance company are not protected and that some of these entries might reflect animosity toward the employer. Employer's medical expert had been deposed and rendered an opinion that Claimant may have a "secondary gain" motive in the form of animosity toward the employer. As such, evidence in Claimant's journal of such feelings is important to employer's position and the Board agreed. The Board also rejected the argument that these mental impressions were protected under either the theory of "work product" or "any anticipation of litigation." [Stewart/Greenberg]

Kimberly Scarboro v. Dover Downs, IAB #1340465, (3/22/23) (ORDER). The Board threatens to revoke Dr. Cagampan's status as a workers' compensation certified provider due to his failure to cooperate with discovery and record production allegations. [Carmine/Skolnik]

DISFIGUREMENT

Joseph Corbett v. PVF Holding Co., IAB #1496990, (5/25/22). The Board awards 50 weeks of disfigurement benefits to the face for acne-like scars as the result of burn injuries. There was a separate award of 10 weeks of benefits for neck/throat disfigurement and an award of 2 weeks of benefits for each arm. [Mason/Wilson]

Arthur Washington v. XPO Logistics, IAB #1507875, (10/12/22). The Claimant is awarded 10 weeks for altered gait and 6 weeks for a neck scar on the left side of the throat running to a slight diagonal but generally perpendicular to the normal crease of the neck, two inches long and an eighth of an inch wide. The gait derangement was described as a slight stagger or otherwise a limp "somewhere between mild and moderate." [Gambogi/Starr]

Dwayne Jacobs v. YRC Freight, IAB #1516608, (6/10/22). A surgical seven-inch scar down the center of the leg which is ¼ inch wide is awarded four weeks of benefits. [O'Neill/Davis]

John Boyden v. Aquaflow Pump & Supply Co., IAB #1471019, (6/3/22). The Claimant is awarded 10 weeks of benefits for a lumbar surgical scar which is a two-inch-long white vertical scar in the center of his back extending below the pant line and a ¼ inch wide with the entire top half indented and readily visible. The claimant's children tease him and call "double butt crack". The Claimant is also awarded four weeks of benefits for collective disfigurement on his stomach which include two bumps on either end of a scar on the claimant's underbelly. [Fredricks/McGarry]

Constance Devine v. Christiana Care Health System, IAB #1516418, (3/27/23). The Board awards eight weeks of benefits for a five inch by quarter inch leg scar and zero weeks for an alleged limp where the employer introduces a brief video of the claimant walking at work with no discernible "hitch" in her stride. [Allen/Newill]

JURISDICTION

Norman Davis v. GT USA Wilmington LLC, IAB #not given (11/7/22) (ORDER). There is no concurrent jurisdiction between the Delaware Workers' Compensation Act and the Federal LHWCA where Claimant has been found to be a dock worker/longshoreman and not an employee covered by the Delaware policy. [Tice/Lockyer]

LABOR MARKET SURVEY

James Smith v. Cut 'Em Up Tree Care of Delaware, IAB #1496320, (1/27/23). The carrier's Petition for Review fails in light of a labor market survey for which the overwhelming majority of jobs require a high school diploma in a situation where the claimant has only a 9th grade education. [Warren/Logullo]

MEDICAL TREATMENT ISSUES

Elizabeth Delfi v. State, IAB #1481481, (2/27/23). The Claimant's DACD Petition seeking payment for orthobiologic treatment (stem cell treatment) referable to the lumbar spine is denied. The Board accepts that FDA approval is not required by the Delaware Practice Guidelines for treatment to be deemed as presumptively reasonable. The Board further accepts that off-label uses are a routinely accepted part of medical practice and often compensable in the context of medical treatment. "A thorough review of this Board's body of decisions relating to treatments approved as compensable that might otherwise exceed or deviate from the Practice Guidelines reflect the Board's appreciation for a case-by-case assessment. The Board is not persuaded that Claimant has demonstrated by the standard of more likely than not that it was reasonable to undertake the use of orthobiologics given the lack of authority and acceptance for the treatment in the field of spinal care. Dr. Rudin's experience and the close nature of his relationship, financially and otherwise, to accept this methodology cannot be ignored, particularly given the debate it has spawned among providers in our state involved with creation and amendment of our Practice Guidelines. Accordingly, the Board does not find the use of this treatment to have been reasonable in the context of Claimant's injuries." [Malkin/Baker]

Kevin Kurych v. Idexx-US Virtual, IAB #1504289, (9/23/22). The Claimant's DACD Petition seeking a finding of compensability for his lumbar spine condition as well as payment for stem cell/orthobiologic treatment is denied based on the defense testimony of Dr. Scott Rushton and with FDA concerns referenced. [Stanley/Adams]

Alfredo Ramirez-Rodriguez v. National Paper Recycling of DE, IAB #1397324, (9/29/22). Medical treatment expense benefits are awarded for treatment in Indiana, where Claimant resides, pursuant to 19 *Del. C.* § 2322(B)(1) without precertification. The ongoing conservative medical treatment in Indiana is awarded pursuant to 19 Del Code Section 2322 (B)(7). [Pruitt/Gin]

Richard Mahan v. Stroberg Organization, IAB #1208746, (11/3/22) (ORDER. The Board denies Claimant's Motion to Dismiss a Petition filed by the employer/carrier seeking review of Claimant's opioid medication usage and recommendation for detoxification. The Board did not agree that just because DIGA is not legally responsible for paying Claimant's medical care, it has no standing to challenge the medical care, noting that it is liable for ongoing total disability and has an opinion from a medical provider that detoxification from opioids will reduce Claimant's level of disability. Employer is offering detoxification services to the Claimant under the belief that such treatment will reduce Claimant's incapacity and potentially allow a termination of his total disability. [Bhaya/Wilson]

Teresa Bollinger v. Genesis Health Care Group, IAB #1483393, (2/17/22). On a DACD Petition seeking authority for a trial of a spinal cord stimulator and potential permanent placement of a SCS, the Board rules in favor of the employer based on the testimony of Dr. Brokaw that spinal cord stimulators are most effective for treating neuropathic pain in a distal limb, which is not a symptom that is a significant portion of Claimant's current complaints. Spinal cord stimulators have a very poor track record in controlling musculoskeletal pain and Claimant's symptoms are clearly musculoskeletal in nature, not neuropathic. Unknown pain genesis is a very poor prognosticator for spinal cord stimulator success and even the treating physician agreed that the source of Claimant's pain has not been determined. [Schmittinger/Lockyer]

Jeffrey Curtis v. Intertek, IAB #1467367, (2/7/23). The Board awards a lumbar spine surgery on the basis of adjacent segment disease with Dr. Zaslavsky testifying for the claimant and Dr. Schwartz testifying for the employer. [Silverman/Gin]

George Calder v. State, IAB #1255753, (2/14/23). The IAB awards a cervical spine surgery on the basis of adjacent segment disease with Dr. Eskander testifying on behalf of the claimant and Dr. Rushton testifying on behalf of the employer. [Morrow/O'Connor]

Patrick Kalix v. Giles & Ransom Inc., IAB #1280555, (1/6/23). This was Employer's Petition to Review seeking to have the Board reduce Claimant's monthly entitlement to medical marijuana from 90 grams to the original 50 grams he was initially awarded. Claimant, who maintains that he requires the dose he is presently receiving, objects to any reduction in his monthly allotment of medication. There was also a Petition filed by Claimant to compel the Board to order the carrier to contract with a third-party online marijuana provider so that pre-payment for medical marijuana could be made for the Claimant. That Petition was denied. The Petition to reduce the marijuana entitlement, however, was also denied. This case provides a very interesting testimony for the basic proposition that "not all marijuana grams are created equal" with the Board commenting that it "feels no more informed as to an appropriate dose than it did at the outset of these proceedings. "Therefore, while the Board is satisfied that something does not seem right in terms of the latitude Claimant has been afforded to self-medicate within the 90 gram per month limit previously established by the Board, particularly without any medical or other oversight, the Board is satisfied that Dr. Townsend's generalized concerns fall short of meeting the burden necessary to bring about a reduction in the ordered amount." [Marston/Baker]

OCCUPATIONAL DISEASE

Barry Mullins (deceased) v. City of Wilmington, IAB #1523018, (12/30/22). The payment of a "line of duty disability pension" under City of Wilmington Code does not preclude the employer/carrier from challenging an occupational disease claim for causal relationship, which in this case involved Claimant's death as a result of ocular melanoma, which had metastasized to the liver. In this case, the benefits are denied and with Dr. John Parkerson the only medical expert testimony offered, who testified on behalf of the employer. Following the decision in ***Armstead v. City of Wilmington, IAB #1485578 (5/6/21)***, the Board agrees that the City pension code is not relevant to a causation decision in a workers' compensation case, which is

governed by State statute. The city official who oversees workers' compensation claims against the City testified that decisions on workers' compesaton claims are made entirely separate from decisions on disability pensions. [Schmittinger/Bittner]

Robert Stant, Jr. v. Evraz, Inc., IAB #1474639, (9/28/22) A DCD Petition seeking death benefits from metastatic invasive adenocarcinoma of the appendix allegedly due to asbestos exposure was denied based on the defense testimony of Dr. Roggli. The pathology records reviewed by Dr. Roggli reveal that the carcinoma was in situ, which means that the cancer most likely started in the appendix. Dr. Roggli knew of no studies linking appendiceal cancer, which is a very rare cancer, to asbestos exposure. It was further his opinion that the studies do not show a strong enough association for one to be able to conclude to a level of medical probability that asbestos exposure was a causative factor for the colon cancer. Dr. Roggli testified there is no good indicator of a causative agent for most colon cancers aside from diet. Moreover, even the Claimant's expert, Dr. Cohen, would split causation evenly between Claimant's history of smoking and asbestos exposure. [Crumplar/Chrissinger-Cobb] **Note: this is on appeal**

PERMANENT IMPAIRMENT

Rita Mobley v. City of Wilmington, IAB #1476680, (7/7/22). On a claim for 20% impairment to the cervical spine and 10% to the lumbar spine, the Board embraces the methodology of the defense medical expert, Dr. Lawrence Piccioni, with regard to reliance on the AMA Guide Sixth Edition and awards 9% cervical and 3% lumbar and rejecting the ratings of Dr. Rodgers as inflated. The fusion surgery performed by Dr. Eppley was deemed highly successful although the claimant was not able to return to work as a police officer. [Stoner/Skolnik]

Leonard Thomas v. City of Wilmington, IAB #1477371, (5/18/22). On a claim for 45% impairment to the left lower extremity, the Board awards a 20% to the left lower extremity, with the Board embracing the methodology of the defense medical expert, Dr. Townsend, that the AMA Guides, Sixth Edition incorporates the medical community's better understanding of CRPS that has developed since the Fifth Edition was published. The Sixth Edition has a rating system specifically designed for CRPS without merging it with other disorders. [Long/Bittner]

PRACTICE AND PROCEDURE

Rudolph Hawkins v. United Parcel Service, IAB #1478596, (6/2/22). The "Two-Dismissal Rule" of Superior Court does not exist in workers' compensation and the Board rejects the employer's challenge to a Petition which the Claimant had voluntarily dismissed on two prior occasions. Superior Court Civil Rule 41(A)(1) does not apply. [Stewart/Herling]

Tyrone Girvin v. Baltimore Aircoil, IAB #1525669, (1/20/23). Where the employer presents a premises video reportedly showing the work accident not happening, the Board finds that the numerous "skips" in employer's video feed are a convenient coincidence at best and rules that the video footage lacks any real evidentiary value and most certainly is not evidence that no work accident occurred. Benefits are awarded. [Kimmel/O'Brien]

TOTAL DISABILITY

Daphne Davis v. Johnson Controls, IAB #1287814, (8/11/22). This case includes a lovely tutorial on *Hoey* and its distinctions with specific discussion of the interplay between *Hoey* and union membership/collective bargaining agreements. [Freebery/Hunt]

Jose Marcano v. RCS Car Care Newark, Inc., IAB #1495531, (3/22/23). In granting the Employer's Petition to Review, the Board is highly critical of Dr. Lingenfelter's TTD testimony commenting as follows: "It is troubling Dr. Lingenfelter rendered this opinion without ever examining Claimant or communicating with Claimant after the hardware removal surgery. He did not have first-hand knowledge of how Claimant had been doing. The Board acknowledges that the Claimant did see Ms. Hughes on January 23, 2023. However, there was no evidence that Ms. Hughes examined Claimant for purposes of determining work capability. There was no evidence Ms. Hughes documented any exam findings that would suggest Claimant remained totally disabled. Claimant's next visit was scheduled for February 23, 2023. Dr. Lingenfelter acknowledged there was no attempt by he or Ms. Hughes to order a Functional Capacity Evaluation at any point leading up to his testimony or otherwise explore Claimant's work capability." Dr. Gelman as the defense medical expert and having examined the Claimant on 1/5/23 was deemed more credible on the issue of work ability. "The Board disapproves of the lackadaisical approach of Dr. Lingenfelter took in rendering a medical expert opinion on Claimant's total disability status without ever seeing or examining Claimant post-surgery and in not exerting more effort to try to release Claimant to return to work. The Board accepts Dr. Gelman's opinion that Claimant is no longer

totally disabled and can return to full time sedentary work with the stated restrictions as of the date of Dr. Gelman's defense medical exam, January 5, 2023." [Minuti/Bittner]

UTILIZATION REVIEW APPEALS

Tracy Wall v. State, IAB #1351676, (1/19/23). The IAB affirms a UR non-certification of physical therapy occurring 10 years post-accident with Dr. Eric Schwartz deemed persuasive as the defense medical expert. [Componovo/Greenberg]

VOLUNTARY REMOVAL FROM LABOR MARKET

John Wesesky v. Amazon.com, IAB #1420247, (3/7/23). An application for Social Security Disability income prior to the work accident in question for an unrelated condition equals a voluntary withdrawal from the labor market and as such, Claimant is deemed ineligible for total disability benefits related to the left shoulder or injury. [Gambogi/Starr]

Diana Dickerson v. Lowe's Companies, Inc., IAB #1481942, (1/19/23). On a Utilization Review Appeal by the claimant with regard to non-certification of treatment rendered by Dr. Mavrakakis, the Board holds that Dr. Mavrakakis' oversight of care rendered by others is superfluous and not compensable. "To the extent that claimant requires services that can be provided by her longtime physician Dr. Irene Mavrakakis, that provider is appropriate, however to the extent that Dr. Mavrakakis sees Claimant simply for the benefit of keeping up with care provided by others or under circumstances where it is evident she cannot provide the care herself, such visits are not reasonable or necessary and will not be found compensable". Treatment with Dr. Mavrakakis is only approved to the extent that Dr. Mavrakakis *actually provides services* the Claimant requires as opposed to the role of facilitator that she seemingly has filled in the Claimant's most recent care. [Schmittinger/Davis]

APPELLATE OUTCOMES

***Buchanan v. Waste Mgmt.*, N22A-04-001 CLS (Del. Super. Ct. Nov. 9, 2022).** Claimant sustained a compensable work injury to his back which required a fusion from S1 to L2, then L5-S1, then L4-L5, then L3-L4, and eventually L2-L3 over the course of seventeen years. Claimant asserted that he developed left hip following the last fusion and sought compensation for his treatment relating to his left hip, arguing the fusion aggravated his left hip and caused it to become symptomatic. Employer's physician agreed that a fusion of the lumbar spine can place more strain on an individual's hips and increase the risk of hip degeneration, however, Claimant's MRI showed evidence of a labrum tear, which presents an acute injury, rather than a slow progression of symptoms overtime. According to Claimant's medical records, he did not complain of hip pain until fifteen months after his last fusion in September 2019. The Board found Employer's physician more persuasive, finding that Claimant's hip injury was unrelated to the work accident. Claimant appealed the Board's decision, arguing there was not substantial evidence to support the Board's acceptance of the opinion of Employer's physician over Claimant's physician. The Superior Court affirmed the Board's decision, holding there was substantial evidence for the Board to choose Employer's physician's testimony over Claimant's because the opinions of Claimant's physician were inconsistent with Claimant's medical history and the presentation of Claimant's complaints and MRI imaging was more consistent with an acute injury rather than a correlation between the spinal fusions and Claimant's hip pain. [Gamboji/Davis].

***Quality Assured Inc., T/A ServiceMaster of Brandywine v. David*, N22A-05-012 SKR (Del. Super. Ct. Dec. 6, 2022**). Claimant sustained a neck and low back injury as a result of a 2009 compensable work accident. Since then, Claimant had been engaged in active treatment for his low back, which included consistent epidural injections. In November 2021, Claimant sought payment of medical expenses for his treatment from September 2020 and ongoing, which consisted entirely of injections directed to his low back. Claimant's physician, who began treating Claimant a couple months after the work accident and continues to treat him, testified that Claimant's treatment of his lumbar spine has not changed since 2009 which consists of typically one to three epidural injections per year. Claimant had one injection in 2019, three in 2020, and three in 2021. Claimant's physician opined that the injections were causally related to the 2008 work accident because Claimant has not had any lumbar injections before then and has been consistently receiving them at relatively the same frequency since the accident. Conversely, Employer's

physician testified that the injections are not causally related but rather attributed to Claimant's pre-existing degenerative conditions. The Board found that the injections were causally related to the work accident, relying upon Claimant's physician's opinion who had been overseeing his care and administering the injections since 2009. The Board also cited that Employer had paid for injections administered prior to those at issue. On appeal, Employer argued that the Board applied a less stringent legal standard to Claimant's burden of proof; the Board should not have considered past payments of medical expenses; and the Board's decision to accept the testimony of Claimant's treating physician over Employer's physician was not supported by substantial evidence. While the Superior Court agreed that the Board's consideration of payments for previous injections in determining causation or compensability of present, disputed medical expenses improper, the Court did not find that, standing alone, rendered the Board's whole decision reversible and affirmed it. [Bittner/Crumplar].

***Hooten v. Blue Hen Disposal*, K22A-05-001 JJC (Del. Super. Ct. Feb. 1, 2023).** This claimant sustained acknowledged work injuries and the employer filed a termination petition. Prior to hearing, the claimant sustained further injuries in a non-work-related car accident. The Board granted the petition, awarded partial disability benefits, and an appeal followed. The claimant contended that the Board erred as a matter of law by accepting the testimony of the defense expert when that expert had not examined the claimant after the second accident. The Court affirmed the decision. The Board was entitled to accept the opinion of the defense expert even though he did not examine the claimant after the non-work-related accident. Delaware law does not require an expert to physically examine a claimant to offer a medical opinion. Further, the defense expert's opinion was also based on his review of records following the second accident. The Court concluded by faulting the claimant with failing to notify the employer about the second accident. Notice was required under Board Rule 9(c). This prevented the employer from being able to timely schedule a new DME prior to the hearing. [Schmittinger/Bittner].

***Copes v. Delaware Transit Authority,* N22A-05-001 FWW (Del. Super. Ct. Feb. 2, 2023).** The issue before the Court was whether the Board's denial of a second request for continuance was an abuse of discretion. The claimant filed a DCD petition alleging various injuries. After withdrawing and refiling her petition once, the claimant requested and the employer consented to a continuance due to a recommendation for surgery. The claimant then sought a second continuance so her expert could testify on her condition post-surgery. The Board denied the request, noting that the claimant could withdraw the petition and refile if she chose. She chose to proceed to the hearing, and appealed after the petition was denied. The Court affirmed the Board decision. The claimant had adequate time and opportunity to prepare for the hearing. A claimant's failure to secure their own treating physician's opinions on causation does not good cause under Board Rule 12. [Haley/Klusman].

***Del. Dept. Labor v. Drew's Tree Serv., LLC*, 2022-0081-SG (Del. Ch. Mar. 2, 2023).** The Court of Chancery ordered that the Department of Labor was entitled to an assessment of $52,250.00 and an injunction prohibiting Employer from operating its business in Delaware pursuant to 19 *Del. C.* § 2374(f) while it was out of compliance. The assessment amounted to $250 per day for 209 days of non-compliance between the Department's notification of Employer's obligation to comply with Order and the filing of the Department's motion for default judgment. The Board found that the Employer was in violation of 19 *Del. C.* § 2374(a), which requires compliance with 19 *Del. C.* §§ 2372–73, and ordered the Employer to immediately obtain workers' compensation insurance and submit proof of such insurance by September 4, 2021. The Order provided that non-compliance would result in referral "back to the Industrial Accident Board for civil penalties per § 2374(e)." The Employer did not provide proof of insurance, so the matter was referred to the Department of Justice to file this Petition. [Kelly/?].

***Jason v. State*, N22A-06-004 VLM (Del. Super. Ct. Mar. 13, 2023).** The claimant challenged part of a Board decision that denied claims for bilateral wrist and right shoulder injuries and found that a neck injury had resolved. The primary contention on appeal was that the defense expert's opinion was based in part on the lack of medical treatment. The claimant argued that any lack of medical treatment was the employer's fault due to failing to report the accident to the carrier which prevented access. After considering the argument, the Court affirmed the decision. While the claimant focused attention on the delay in reporting the injuries by the employer, the Court found this was really a battle of the medical experts. The Board was entitled to find the defense expert most credible concerning these body parts. Further, the Board rejected the claimant's contention that he did not treat due to insurance issues

as the PCP records over the course of years indicated he did not complain of symptoms to the body parts in question. [A.Carmine/Morris].

***Cantoni v. Del. Park Racetrack & Slots*, N22A-06-002 FJJ (Del. Super. Ct. Mar. 16, 2023).** The Court reversed a Board decision that in part ordered weaning entirely from prescribed narcotic medication within a six month timeframe. This followed a prior Board decision which ordered a reduction which the claimant did not comply with. Following the filing of a new petition, the treating physician apparently did reduce the dosage. The court did not find evidence in the record to support weaning entirely from the narcotic medication. The only testifying witness was the defense expert. The expert at time of deposition testified that maintaining the current dosage would be reasonable if further weaning caused increased pain. Further weaning would be at the discretion of the treating physician. As there was no medical testimony to support weaning the claimant entirely off the medication, the decision could not be upheld. [Ippoliti/Morgan].

***Mendoza v. Talarico Bldg. Sevs., Inc.*, N22A-05-003 VLM (Del. Super. Ct. Mar. 30, 2023).** Claimant sought compensability of his cervical surgery which he argued was the result of a slip and fall at work in July 2018. However, due to the claimant's failure to disclose his significant medical history and his denial of prior/subsequent incidents to his treating surgeon, the employer's doctor, and the Board, the Board found the claimant not credible and his surgeon's opinion unreliable. Accordingly, the Board denied Claimant's Petition for Additional Compensation Due. Further, the Board granted Employer's Termination Petition to set aside the parties' original agreement for workers' compensation benefits upon a finding that Claimant engaged in fraud in pursuit of benefits. Claimant appealed the Board's Decision to the Superior Court, arguing (1) the Board erred in finding Employer's expert more credible; and (2) the Board failed to properly consider the elements of reliance and damages in finding fraud. First, the Superior Court found that there was substantial evidence to support the Board's finding that Employer's doctor was more credible than Claimant's doctor. Second, with respect to the Board's finding of fraud, the Superior Court found there was justifiable reliance on Claimant's misrepresentation. Then, the Superior Court found that the Board did consider that Employer suffered damages as a result of its reliance on the misrepresentation because the Board credits Employer for all monies expended on benefits to Claimant based on the prior agreement. [Stewart/Newill].

***Spera v. Mid-Atlantic Dental Servs. Holdings*, N22A-08-001 FWW (Del. Super. Ct. Apr. 20, 2023).** The claimant appealed a Board decision that found that his post-accident wage loss was not the result of the work injury. In the decision, the Board accepted the opinions of the defense expert on the proper diagnosis for the neck injury and ability to work without restrictions. Any wage loss to that date was due to non-work factors such the claimant's planned career-shift, staffing issues, administrative complaints, post-COVID reduction surgeries, and failure to employ accommodations to continue his normal work. On appeal, the claimant contended the Board disregarded objective findings on the diagnostic studies and challenged the defense expert's qualifications to render opinions in this case. The Court disagreed and affirmed the decision. The defense expert's opinions following review of the diagnostic studies constituted substantial evidence on appeal. The fact that the defense expert was not a neck surgeon did not change the standard for review on appeal. The Board was also entitled to find the claimant incredible as to why he was unable to continue his normal job without wage loss. [Peltz/Andrews].