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

ADJACENT SEGMENT DISEASE

Eric Starling v. Formosa Plastics, IAB #1471909 (5/5/23). Surgery awarded based on adjacent segment disease with Dr. Zaslavsky as Claimant's expert and Dr. Schwartz testifying as the defense expert. Employer was denying the compensability of a fourth lumbar procedure, having paid for the first three. [O'Neill/Gin]

Natalie Tursi v State, IAB #1329706 (5/3/23). Surgery awarded based on adjacent segment disease with Dr. Zaslavsky as Claimant's expert and Dr. Rushton testifying as the defense expert. Employer had already paid for lumbar spine surgeries in 2009, 2010, 2011, 2013, 2014, and 2017. Dr. Zaslavsky was given deference due to his 9-year relationship with Claimant, having taken over when Dr. Katz passed away, Dr. Katz having performed the initial surgeries. Even allowing for Dr. Rushton's opinion that age played a role in the spinal degeneration, under *Blake* and *Reese*, the surgery would still be compensable. [Morrow/Bittner]

Matthew Bowman v. Trans. Drivers, Inc. IAB #1402293 (12/4/23). Surgery awarded to a 73-year-old claimant, based on adjacent segment disease with Dr. Zaslavsky as Claimant's expert and Dr. Schwartz testifying as the defense expert. Employer was denying the compensability of a May 2023 surgery, noting prior surgeries in 2015 and 2017. Claimant presented highly credibly per the Board and even returned to work promptly following the 2023 surgery. [Welch/Gin]

CAUSATION

David Brooks v. Viking Pest Control, IAB #1532541 (10/19/23). Intervening event lifting weights at the gym does not break chain of causation for 2022 shoulder injury. Dr. Douglas Palma as the treating versus Dr. James Bonner for the DME. This case fits the standard of an injury following "as the direct and natural result of the work-related injury". [O'Neill/Silar]

David Christian v. Delaware Contracting Co., IAB #1536707 (2/8/24). The Claimant's DCD Petition was denied by the Employer arguing that a fall at work was a non-work-related syncopal event with the Board rejecting the idiopathic fall defense. The Claimant was managing and directing trucks to dump loads of fill dirt at a job site when he "stumbled and fell" while walking backwards and executing his job duties. There was a factual issue as to whether the Claimant felt light-headed

prior to losing consciousness, which was resolved in the Claimant's favor. Claimant had worked for Employer for several decades without any prior syncopal history and there was no medical testimony or history to support a pre-existing syncopal or fainting condition. [Freibott/Parker]

Russell Willey v. Wholesale Millwork Inc, IAB #1503457 (12/29/23). On a DACD Petition seeking payment for a cervical spine surgery which occurred in August 2022, the Board awards benefits as causally attributable to an August 2020 work injury based upon the testimony of Dr. James Zaslavsky and rejecting the opinion of Dr. Close, the defense medical expert. [Evans/Bittner]

Patricia Pettit v. OTAC Inc., IAB #1536730, (1/23/24). The Claimant is awarded a total knee replacement surgery in spite of the significant prior history of treatment and complaints with the Board commenting "an Employer takes the Employee as it finds him." Dr. Petrera testified on behalf of the Claimant and Dr. Schwartz testified on behalf of the Employer. It was not disputed that the Claimant had a longstanding preexisting history of right knee issues that included a decades-old arthroscopy, intermittent periods of medication management, and imaging studies evidencing what both physicians agreed was a fairly significant right knee arthritis and degeneration. Dr. Petrera found that temporal relationship of Claimant's work fall and increased symptoms to be quite persuasive, commenting that "it is far more likely than not that the fall in question served to ignite the course of care that was required thereafter to address an admittedly arthritic knee." [Silverman/Gin]

Timothy Hughes v. UPS, IAB #1518517 (3/12/24). On a DACD Petition seeking an award of lumbar spine surgery, the Board is persuaded by the defense medical experts, Dr. Gelman and Dr. Rushton, that the need for surgery was prompted by an unrelated diagnosis of multiple myeloma and osteopenia. [Gambogi/Herling]

COMMUTATION

Jeremiah Wiggins v. State, IAB #1513621 (5/5/23) (ORDER). The Board grants the State's Motion to Enforce a Termination Agreement consisting of consent to the Termination, a global commutation of $10,000 and the execution of a General Release to not seek re-hire. [Elgart/Skolnik]

COURSE & SCOPE

Kimberly Wallace v. Chester Co. Home Assocs., IAB #1535066 (11/14/23). Caregiver who leaves dementia patient home alone during her shift to go out and grab dinner is *not in course and scope* for purposes of an auto accident on the way

back to her patient. Impacting the decision was a Policies and Procedures Handbook that dictated a patient should not be left alone without pre-approval by management and arrangements for a replacement, which claimant clearly violated. Reliance on *Spellman v. CCHS*, 74 A.3d 619 (Del. 2013). [Sharma/ Harrison]

Elvira Jimenez Gonzalez v. Selbyville Food Mart, IAB #1526724 (12/4/23). Assault by co-worker on Claimant, whose shift had ended several minutes prior to the attack *is deemed by be an injury in course and scope*. The argument that Claimant remained past her shift was unpersuasive, noting Claimant had regularly been requested to stay to provide coverage and assistance during transition of shifts. The Board also rejected a horseplay defense noting that it was the co-worker, if anyone, engaging in horseplay. Of note, a video of the assault was entertained by the Board to allow them to view the activities of the parties and any attendant provocation, or lack thereof. Also, Claimant and co-worker had no personal relationship beyond the work environment. [Stanley/Lukashunas]

DISFIGUREMENT

Nicole Curley v. Blue Pearl Veterinary Partners, IAB #1471486 (1/29/24). With regard to the Claimant's Petition for disfigurement benefits and noting that she was a 39 year-old former model, the Board awarded a total of 23 weeks of benefits for five scars appearing on the upper back, low back, and abdomen. [Marston/Wilson]

DISCOVERY

Shawn Reynolds v. DHL Holding USA, IAB #1317151 (ORDER) (11/20/23). The Board grants Employer's Motion to Compel production of credit card and bank statements, along with travel documents, as being relevant to Claimant's activities including travel and recreation. The Board imposed a time limit, however, on the documents, from 1/1/2023 to the date of its 11/20/2023 Order. [Houser/Wilson/Boyle]

FORFEITURE – INTOXICATION

Timothy Willis v. UPS, IAB #1512050 (5/8/23). This was a single vehicle MVA where claimant's truck struck a guardrail, allegedly to avoid hitting a deer. Claimant refused a field sobriety test and medical treatment. Claimant pled not guilty to DUI charges in Maryland and was sentenced to probation before judgment. Employer raised a Section 2353 Intoxication defense. Of note, officers testified that Claimant threw three cold beer cans out of his truck, slurred his speech, and had trouble standing up. The beers in question were Miller Lite. According to the Board, the

video of the event did not depict Claimant as "altered" as the police testimony suggested, nor did the audio. Pivotal to the outcome in Claimant's favor was the fact that there *was* a heavy deer presence in the area of the accident (per the local police), along with witness testimony that to operate a Mack Pinnacle requires great skill and ample concentration. In denying the intoxication defense, the Board also rejected the reckless indifference defense and stated the employer did not meet its burden to establish intoxication as a proximate cause of the accident. [Marston/Herling]

Larry Smith v. New Castle County, IAB #1529319 (8/24/23). Intoxication defense fails and BAC is not controlling. Claimant was killed as a result of catastrophic injuries sustained in an MVA while driving a water jetting truck. The accident occurred with Claimant responding to an "on call" request at 10 p.m. on a Saturday evening, a request he had the option to decline. Claimant's truck was driving in the left lane, was cut off by another vehicle, and swerved sharply to avoid hitting that vehicle. Because Claimant's truck was loaded with water, the weight and shift caused the truck to overturn. A supervisory witness testified on Claimant's behalf that his job is to ensure safe transport of this water-filled vehicle and that before Claimant left with the truck, he did not appear to be impaired. There was also a co-worker passenger who testified similarly, stating "as a passenger in a water jetting truck, a vehicle that is particularly dangerous, she is putting her life in the driver's hands." She verified that they were cut off by another vehicle and she herself was seriously injured, having been ejected from the truck. A physician testified that Claimant's BAC was approximately 0.2, but stated that given the overwhelming inconsistent evidence, he could not deem the BAC obtained at the hospital to be reliable or valid. Benefits were awarded with the Board concluding that even if there were alcohol consumption, it did not play a role in the accident. [Kimmel/Norris]

LABOR MARKET SURVEY

Valerie Palombi-Ferrell v. Physicians Mobile X-Ray, IAB #1536348 (4/22/24). The IAB strikes jobs in a labor market survey which involves a distance of 40 miles or almost a one-hour commute as being unreasonable and temporary partial disability is awarded based on the remaining jobs. [Minuti/Roberts]

MEDICAL TREATMENT

Demetrias Davis v. JP Morgan Chase, IAB #1462133 (8/7/23). Per Section 2322(f) the Employer must repair or replace a prosthetic device "for life." Claimant sustained a CDE injury to her right upper extremity, in tandem with an unrelated existing congenital injury to the left upper extremity, which ends at the wrist. In a

prior ruling, the Board in December 2019 ordered Employer to pay for a prosthesis to allow more use of the non-injured limb. That prosthesis became damaged and required repair or replacement, denied by the Employer. The device in question provides claimant with a left hand to manipulate items. The defense expert testified that the claimant could experience complete resolution of her deQuervain's symptoms with a minute surgery. He observed that myoelectric prosthetics are expensive, not durable, and require a lot of maintenance. They are also difficult to use as the claimant testified. While suggesting they would have liked to have heard from an expert in prosthetics in addition to Dr. Eichenbaum and Dr. Schwartz, they awarded the repair/replacement, citing Section 2322(f) as controlling. [Schmittinger/Simpson]

Two Farms, Inc. v. Bayhealth Med. Ctr., IAB #1535737 (ORDER) (9/13/23). The Board can enjoin a medical provider from billing private insurance. Despite having received multiple notices from the employer, the claimant and the TPA, Bayhealth continued to bill claimant's private insurance, which was subject to a $10,000 deductible. Claimant's Benefits Account was then depleted when claimant's minor daughter became ill and required treatment. Bayhealth was enjoined from further billing to the private carrier and ordered to reimburse the private insurance and bill Gallagher Bassett. Failure to do so will trigger a Section 2322F(g) fine and Employer's attorney's fees. [Andrews/Capocardo/Morris-Johnston]

John West v. State of Delaware, IAB #1443512 (2/22/24). On a DACD Petition the Board awards orthobiologic treatment as well as a spinal cord stimulator based on the testimony of Dr. Yalamanchili and Dr. Downing and rejecting the DME testimony of Dr. Rushton. [Donovan/Panico]

PARTIAL DISABILITY

Erik Cuevas v. Best Buy, IAB #1501069 (4/26/23). The burden of proof on establishing the *Maxey/Wade* adjustment for temp partial rests with the claimant. Even allowing for a *Maxey/Wade* adjustment, claimant's transferrable skills are such that he could earn the same or more, and no TPD is awarded with regard to the Petition to Review. [Welch/Newill/Kelly]

Blanca Gonzalez v. Amazon.com, IAB #1524776 (11/7/23). Claimant is injured working full-time evenings for Amazon but also holds another full-time day job at Gainwell Technologies. On a Petition to Review, she is seeking partial disability at her TTD rate of $421.73. As of 6/23/23, Dr. Zaslavsky released claimant post-op for fulltime sedentary and the Amazon job exceeds that work tolerance

level. Claimant relies on *Hoey v Chrysler*, arguing she is a displaced worker at Amazon and held a reasonable expectation of returning there. Additionally, she claims ongoing TTD due to the insufficiency of the labor market survey which fails to identify jobs that are full time *and* match her ability to work overnight and on weekends, given that the LMS jobs were admittedly offering an 8 am to 5 pm schedule. The *Hoey* entitlement is rejected due to the specific facts of this case. Looking at the second argument, the Hearing Officer invoked *Warner Corp. v. Slattery, 235 A.2d 633 (Del. Super. Ct. 1967)*, which would require Employer to present a LMS compatible with claimant's "available time and skills". Per the Hearing Officer, the LMS addresses claimant's skills but not her time availability. As such claimant was awarded temp partial at her TTD rate. [Greenberg/Starr/Kelly]

PRACTICE AND PROCEDURE

Donnalee Whitaker v. DART/State, IAB #1363910 (5/5/23) (ORDER). A letter from the treating physician releasing claimant to return to work is not a basis to force a signed Final Receipt. [Schmittinger/Klusman]

Marcus Denton v. Qdoba Restaurant, IAB #1532804 (1/4/24) (ORDER). This is an example of a Motion to Dismiss for failure to prosecute relying on 19 *Del. C.* § 2348(h)(2)(c) where the pro se claimant repeatedly ignored the Employer's Request for Production and also missed multiple defense medical evaluations. The Motion was granted and the Claimant was assessed costs of $1,300.00 for missed DMEs. [Pro se/Andrews]

Sandra Galloway v. Perdue Foods LLC, IAB #1485128 (1/26/24) (Order). The IAB grants Claimant's Motion to Vacate Decision, where the IAB denied Claimant's DCD Petition as it found that Claimant's vicious assault occurred due to purely personal reasons that were completely unrelated to her work. Claimant argued that a new hearing was required in light of evidence and information that was withheld and/or misrepresented to the Board by Employer during the original DCD hearing which was critical to the Board's decision. The IAB held that there was a *material misrepresentation and omission of facts* during the original hearing with respect to the sticky note with the assailant's name on it and the reason for the assailant's termination from Employer's employment that were consequential to the IAB's decision. In vacating its decision, the IAB explained that Employer had a duty to provide accurate information, but the information presented was incorrect, and Employer had within its possession the documents that contained the correct

information, and the Board relied upon the incorrect information provided during the hearing. [Nitsche/Panico]

TERMINATION

Juan Sanchez v. Old Jersey Janitorial, IAB #1478005 (3/18/24). On a Petition to Terminate, the Board awards partial disability benefits and rejects the Employer's argument that Claimant has adopted a retirement lifestyle and withdrawn from the workforce. Curiously, the Board recognized that Claimant obtained three job offers in 2022 and when the job at Western Express fell through, he did not pursue the other two options or seek alternate employment. He also failed to follow up on earlier job offers and had been released for work four years prior to the Hearing. However, the Board stated that a secondary element of the Employer's burden of proof is to establish that the Claimant is "content with the retirement lifestyle" and that the Employer did not introduce any evidence on that issue (and apparently they were unwilling to infer the Claimant's state of mind from his apparent disinterest in obtaining employment). [Schmittinger/Morgan]

TOTAL DISABILITY

Tabre Nelson v. Prof'l Realty Mgmt., IAB#1520650 (5/4/23). On a Petition to Review, treating physician Dr. Grossinger is slammed for his bogus TTD testimony and PTR is granted. IAB does not buy Dr. Grossinger's explanation for a gap in treatment due to his own extended vacation in Florida, stating "Good for him; he could have easily referred claimant to another practitioner in his office." Additionally, given Dr. Grossinger's testimony as to claimant's severe-- but non-existent-- head injury, the Board adopted the RTW opinion of Dr. Matz and granted the Term. [Minuti/Bittner]

Erik Cuevas v. Best Buy, IAB #1501069 (4/26/23). The Board rules that reaching MMI is not a precondition to a return to work, commenting that Dr. Eskander has conflated return to work status with MMI in testifying that he wanted claimant to reach MMI, then be referred for an FCE, and then he would contemplate a RTW release. The Termination was granted per the DME testimony of Dr. Gelman. [Welch/Newill/Kelly]

APPELLATE OUTCOMES

Quality Assured Inc. v. David, N22A-05-012 SKR (Del. Super. Ct. Dec. 6, 2022), aff'd, No. 86, 2023 (Del. 2023). 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].

Hawkins v. United Parcel Service, N22A-07-002 CLS (Del. Super. Ct. May 30, 2023). The employer contended that collateral estoppel and res judicata should have applied to support dismissal of a claimant's DACD petition. Similar petitions had been filed previously. The first was filed by Claimant in 2019 seeking total disability benefits and payment for two surgeries. After consolidation with a termination petition, the parties settled the petitions by agreeing to termination of total disability and initiation of partial disability benefits. As part of settlement, the claimant

withdrew his petition. In 2021, the claimant filed a similar petition seeking total disability benefits dating back to date of surgery plus payment for two surgeries. That petition was withdrawn and refiled. The employer filed a motion to dismiss on the grounds that: the 2021 petition was dismissed with prejudice under the 'two dismissal' rule; the newest petition was barred by res judicata due to the prior dismissal with prejudice; and 3) the total disability claim was barred by collateral estoppel due to the termination stipulation and order signed in 2019. The Board denied the motion and the employer appealed. The court affirmed the order. Collateral estoppel did not apply since the prior stipulation and order did not address whether the claimant could have a change of condition supporting recurrence of total disability. Res judicata did not apply since none of the claimant's prior petitions were dismissed by the Board, let alone with prejudice. Finally, the 'two dismissal' rule did not apply as the Board was not required to apply that Superior Court rule. [Stewart/Herling]

Hunsucker v. Scott Paper Co., K22A-11-001 RLG (Del. Super. Ct. June 16, 2023). The claimant in this matter filed an appeal challenging the Board's decision to reduce his opioid intake following a six-month weaning program. The defense expert was deemed most credible. The OxyContin medication was not just unreasonable but the dosage was dangerously high. The claimant contended that the Board decision was not supported by substantial evidence as it mischaracterized the evidence which led to a faulty analysis. The Superior Court affirmed. The Board was entitled to choose between the competing expert opinions, and the relied-on testimony constitutes substantial evidence for purpose of appeal. [Pro Se/Morgan]

This & That Service Co. Inc. v. Nieves, No. 441, 2022 (Del. 2023). The Supreme Court reversed a Superior Court opinion and reinstated a Board decision that granted Employer's UR appeal petition on narcotic medication. The Supreme Court first found that the employer timely filed an appeal directly from the Superior Court to the Supreme Court. It was not an interlocutory appeal as the Superior Court reversed the Board decision and its remand was only ministerial in nature. The Court then found that the Superior Court erred as a matter of law by determining that the employer's petition did not raise any justiciable issues. The Superior Court had found that unless the claimant submits bills to the employer for payment, the underlying treatment is not "at issue" and cannot be the subject of a UR challenge. The Supreme Court relied on statutory language to support that both 'provided' and 'proposed' treatment can be challenged via UR. The Superior Court also erred by finding the Board lacked jurisdiction because the employer did not file multiple applications for Utilization Review concerning narcotic medication. That conclusion

was found inconsistent with the facts of the case, the purpose of UR to achieve prompt resolution of issues and a prior holding from the Superior Court in this case. The employer was entitled to challenge ongoing treatment as it did in its UR application. [Ellis/Schmittinger]

Ranstad Staffing v. Stansbury, N22A-06-001 CLS (Del. Super. Ct. July 14, 2023). The Superior Court addressed a challenge to the Board's decision to decline to enforce a commutation settlement. The claimant authorized her attorney to agree to a commutation for $22,000.00 and the parties reached settlement. The claimant then contacted her attorney to advise she did not want to move forward with the commutation. Her attorney responded that he would withdraw if she backed out from settlement. The attorney stated that the claimant then wished to move forward with the commutation while the claimant claimed this was not accurate. The attorney withdrew as counsel. The employer filed a motion to enforce the commutation. The Board denied the motion. While there was a settlement between the parties, the Board declined to enforce the settlement as being in the claimant's best interest. The employer appealed and contended that the 'best interest' standard was impermissibly vague. The Court disagreed. Section 2358(a) does not require the Board to concretely determine whether a commutation is in a claimant's best interest. It instead requires the Board focus on the appearance of the settlement. The Board was entitled to find the claimant's testimony credible as to why she did not believe the settlement to be in her best interest. In contrasting this case with a similar case where the Board approved such a commutation, the Court suggested in the former case the claimant did not present evidence that there may have been an issue of inadequate representation. The Board's order was affirmed. [O'Brien/Greenberg]

State v. Williams, N22A-06-003 CEB (Del. Super. Ct. July 26, 2023). The State filed an appeal challenging a Board decision in claimant's favor that awarded permanency benefits. The claimant sustained a work injury to his head. The Board accepted the testimony of the claimant's expert over the defense expert and awarded benefits for permanency to four areas affected by the injury. The Board also found the claimant's ongoing condition work-related despite the defense expert testifying that psychiatric and pre-existing issues were responsible for the ongoing condition. The State appealed, contending that the Board failed to set forth the proper causation standard and that its finding that symptoms worsened after the work injury was unsupported by the record. The Superior Court affirmed. The Court was able to infer the Board's findings on causation from review of the facts section of the Decision. A remand was not appropriate just to ensure a more technically precise opinion. Next, the Board found there was sufficient evidence from medical expert testimony,

on which the Board relied, to support that symptoms increased after the work injury. Finally, the Court found the Board did not need to address the Claimant's pre-existing condition in greater detail. A Decision does not need to address every shred of evidence or argument presented. Since both experts addressed the pre-existing condition, that was sufficient to support the Decision. [Klusman/Owen, Weeks]

Mullins (Deceased) v. City of Wilmington, N23A-01-004 CLS (Del. Super. Ct. Aug. 18, 2023). The issue before the Court was whether the Board erred by failing to give any weight to City determination to award a disability pension to the claimant. The claimant's widow had filed a petition alleging work-related ocular melanoma and entitlement to survivor benefits. The employer presented a medical expert in support of its causation defense. The claimant did not call a medical expert, but contended that the City was estopped from making any causation defense due to its decision to award a pension under the City Pension Code. The petition was denied as the claimant did not meet their burden of proof. The determination concerning the pension did not impact any defense as it was a distinct proceeding from worker's compensation and the City had legitimate reasons for paying the disability pension. On appeal, the claimant contended the Board erred by not giving any weight to the determination to pay the disability pension. This should have created an unrebutted presumption that the condition was work-related. The Superior Court disagreed. The standard and considerations for deciding entitlement to a disability pension differs from the causation standard before the IAB for worker's compensation benefits. The court indicated that the burden of proof was higher before the IAB. [Schmittinger/Bittner]

Shaffer v. Allen Harim Foods, LLC, S23A-03-003 MHC (Del. Super. Ct. Aug. 29, 2023). Claimant sustained injuries to her left thumb and both wrists in September 2018. Over the course of the next four years, Claimant underwent four surgeries and was receiving total disability benefits. Employer then filed a Petition for Review, alleging that Claimant was released to work and could work with some restrictions. The Board granted the Employer's Petition and terminated Claimant's total disability benefits. Claimant appealed the Board's decision, arguing that she remained totally disabled because she was a *prima facie* displaced worker. Claimant argued: (1) the Board's decision that she was no longer medically disabled was not supported by substantial evidence; (2) the Board's finding that she was not a *prima facie* displaced worker was an error of law and not supported by substantial evidence; and (3) the Board's decision that Employer met its burden of proof in proving available jobs is not based on substantial evidence. First, the Court held that it was "extremely clear" that the Board's finding that Claimant to be no longer

medically disabled was supported by *all* the evidence as all three medical experts examined and/or worked with Claimant found her to be able to physically work full-time in at least a medium-duty capacity. Second, the Court's reliance on Employer's vocational expert was supported by substantial evidence as the labor market survey identified entry-level customer service jobs that Claimant was capable of working. Last, "Claimant's preference to work with her hands and testimony that she is quick to argue with people does not preclude her from working customer service-based positions." The Court held that the jobs listed on the LMS were appropriate and therefore, there was substantial evidence that Employer met its burden of showing the required job availability establishing that she was not a displaced worker. [Morrow/Baker]

Hudson v. Beebe Med. Ctr., K22A-11-022 NEP (Del. Super. Ct. Sept. 19, 2023). The Superior Court of Kent County, *sua sponte*, denied jurisdiction of Claimant/Appellant's IAB appeal. 19 Del. C. 2349 provides that appeals must be filed in "the Superior Court for the county in which the injury occurred…" Here, the alleged injury occurred in Sussex County, but the appeal was filed in Kent County. Therefore, the Superior Court of Kent County held it lacked jurisdiction to decide this appeal. [Donovan/Morris-Johnston]

Mabrey v. State, K22A-06-001 JJC (Del. Super. Ct. Sept. 21, 2023). Claimant sought compensation for permanent impairment to his cervical spine arising from a February 27, 2019 work incident. The parties stipulated that their competing experts had contrary opinions regarding the permanency: twenty percent (20%) impairment to the cervical spine versus zero percent (0%). At the hearing, the evidence disclosed that Claimant had a prior work accident in 2014, where he suffered injuries to his right upper extremity. And, while no medical provider or retained expert diagnosed him with a cervical spine injury related to the 2014 work incident, his medical records referenced neck pain and radiculopathy dating back to 2014. In its decision, the Board found that Claimant's expert's testimony regarding causation of permanency unpersuasive. First, it discredited his opinion because it relied on the fact that Claimant had only a single positive Spurling's test finding in September 2019 when his treating physician performed seven Spurling's tests over the course of his treatment which produced all *negative* results. Second, the Board found that Claimant's expert assigned too little weight to the chiropractic reports that described the prior neck pain. Third, the Board took issue with the expert's "blanket discounting" of other cervical related entries in Claimant's early 2019 and 2018 medical records that predated the accident. On appeal, Claimant argued the Board committed legal error because it did not conclude that the 2019 accident aggravated

his pre-existing injuries, and that the record required the Board to award at least a lower permanent impairment percentage even if Claimant failed to prove a 20% impairment. The Court first held that while there was evidence to support a finding of an aggravation of a pre-existing cervical condition, the record *also* contained substantial evidence to support the contrary - Claimant's medical history, Employer's expert's opinion that the accident caused no permanent impairment, and Claimant's recent chiropractic treatment immediately before the 2019 work incident. Second, the Court held that the Board did not commit legal error by not awarding some lesser percentage of permanent impairment. "[H]ad the record contained uncontroverted expert testimony that the accident had contributed (in a but for sense) to an increase in permanency, then the Board would have been required to either (1) determine the exact percentage of permanency to award by keeping within the expert's ranges, or (2) independently and clearly articulate the facts upon which it based a different conclusion." In this case, however, Employer's expert's opinion and the evidence regarding the pre-existing cervical complaints and limitations freed the Board to apply its judgment in favor of assigning weight to only Employer's expert. [Schmittinger/Lukashunas, Trayner]

Cline v. Nemours Foundation, N23A-11-003 FWW (Del. Super. Ct. Oct. 11, 2023)
The Board denied payment of Claimant's total knee replacement surgery based on the Health Care Practice Guidelines requiring *exhaustion of conservative treatment* as a precursor to surgical intervention, and Claimant "should have pursued some type of conservative treatment first… it may have helped." On appeal, Claimant argued: (1) the Board failed to consider the *Brittingham* factors and determine whether the total knee replacement was reasonable specifically for Ms. Cline – not generally for someone with the same condition; (2) the Board incorrectly applied the Guidelines in its application of review of Claimant's Petition when it held that "proceeding to a total knee replacement surgery without exhausting conservative care was not reasonable or necessary," and disregarded that the Guidelines specifically identify that a knee replacement is reasonable when there is "severe osteoarthritis and all *reasonable* conservative measures have been exhausted and other reasonable surgical options have been considered;" and (3) the Board's finding of Dr. Schwartz's medical testimony more credible than Dr. Rubano was not supported by substantial evidence because (1) Dr. Schwartz's opinion lacked a factual foundation as he never reviewed the diagnostic films; (2) Dr. Schwartz offered contradictory and inconsistent opinions regarding Ms. Cline's diagnosis and treatment; and (3) Dr. Rubano's opinions regarding the diagnostic films were uncontradicted. On appeal, the Superior Court that the held Board failed to expressly apply the *Brittingham* standard that the necessity and reasonableness of a

claimant's surgery is specific to that claimant. Specifically, the Court held that the Board failed to consider whether all reasonable conservative measures had been exhausted to that Claimant's treatment specifically; it failed to explain why it was willing to discount Dr. Rubano's testimony about what the actual films showed without having its stated interest in Dr. Schwartz's interpretation of the actual films satisfied; and it failed to explain how or even if it considered Claimant's pressing need to return to full-duty in its evaluation of the reasonableness of her surgery. Then, the Court held that the Board did not correctly apply the Guidelines when it stated that the Guidelines call for the "exhaustion of conservative treatment" – not *reasonable* conservative treatment. And, last, the Court held the Board's decision was not supported by substantial evidence as the Board "couched its decision in such a conclusory fashion" that the Court was unable to identify specific facts it relied upon in determining that Claimant's surgery was not reasonable or necessary. Moreover, the Board failed to explain why Dr. Rubano's medical opinion was discredited when he reviewed the diagnostic films and confirmed his readings of the films when he performed the TKR. [Welch/Morris-Johnston]

Fowler v. Perdue Farms, Inc., K23A-01-001 NEP (Del. Super. Ct. Oct. 18, 2023)
In this case's first appeal, the Superior Court reversed and remanded the Board's decision, holding 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. On remand, the Board found (1) Claimant had proven by a preponderance of the evidence that he had contracted COVID-19 at the Perdue plant, but (2) that it was not an occupational disease in the context of his employment. On its second appeal, Claimant argued that because he contracted COVID-19 in the cafeteria at the Perdue Plant, where he faced a "heightened risk" of contracting the disease, his illness is an occupational disease. In response, Employer argued that the illness was not an occupational disease because it is not a natural incident of his particular occupation in such a way that it "attaches to his occupation a hazard distinct from and greater than the hazard attending employment in general." The Court held that while Claimant did face a "heightened risk" of contracting COVID-19 in the cafeteria, his COVID-19 *did not result from the peculiar nature of his employment*, and for that reason the Board correctly determined that his COVID-19 did not qualify as an occupational disease. The Court explained that a finding of a compensable occupational disease requires the presence of a hazard not only "greater than" but also "distinct from" that attending employment in general. Citing *Air Mod Corp. v.*

Newton, "[t]here must have been a recognizable link between COVID-19 and some distinctive feature of Claimant's job as a boxer at Perdue." Accordingly, the Court found that the hazard of contracting COVID-19 in the cafeteria was greater than that attending employment in general; *however*, Claimant's illness did not result from the peculiar nature of his employment. Therefore, under Claimant's circumstances, COVID-19 is not an occupational disease. [Schmittinger/Panico]

Hudson v. Beebe Med. Ctr., S23A-10-002 NEP (Del. Super. Ct. Jan. 3, 2024). Claimant appealed the Board's decision that Claimant failed to prove by a preponderance of the evidence that (1) she contracted COVID-19 at the workplace of her employer and (2) COVID-19 was an occupational disease in the context of her employment at Beebe. On appeal, Claimant argued (1) the Board applied a higher burden of proof and required her to prove the exact date of infection; and (2) the Board's decision was not supported by substantial evidence. First, the Court held that the Board's analysis addressed more than the alleged date of contraction but also the possible timeline of exposure and symptom onset. The Board did not require Claimant to prove that any one specific exposure at work caused her illness - it required her only to prove that the COVID-19 exposure leading to her illness more likely than not, occurred at work. In addition, the Court held that there was substantial evidence to support the Board's decision. The Board considered the competing experts' opinions and data submitted, and adopted Employer's expert's conclusion that it was more likely that Claimant acquired COVID-19 from her son, rather than while working at Beebe. [Donovan/Morris-Johnston]

Mid-Sussex Rescue Squad v. Hearne, S23A-06-002 RHR (Del. Super. Ct. Feb. 15, 2024). The issue on appeal was whether the IAB correctly excluded sick and vacation time from average weekly wage calculation and used a reduced divisor to reflect the exclusion. Relying on *Taylor* and Section 2302, the IAB calculated AWW of the claimant, who was a paramedic and worked a "sporadic" schedule as follows:

> Claimant worked for 26 weeks prior to his injury. He was out of work (and thus not performing actual work) for a total of 3.6 weeks (24 hours sick leave + 12 hour holiday not worked + 108 hours vacation = 144 hours or 3.6 weeks). His proper gross amount of wages is $19,984.61, as the vacation, sick, and unworked holiday leave paid should not be added to his gross wages because it would artificially inflate his wages for those weeks. The IAB reduced the 26-weel period by 3.6 weeks, which created the 22.4-week divisor.

The Court held that the IAB thoughtfully considered *Taylor* and reasonably concluded that the phrase "actually worked" in Section 2302 means work "actually performed;" and therefore, the IAB correctly interpreted Section 2302 and *Taylor*

when it subtracted holiday, sick, and vacation pay from the total amount earned during the 26-week period and also reduced the divisor to reflect the work actually performed. [Harrison/Karsnitz]

Amazon.com v Rook, N23A-04-003 KMM (Del. Super. Ct. April 25, 2024). The Board in this case found the claimant sustained a work injury and that treatment, including surgery, was reasonable and related. The employer appealed the decision, contending that the Board failed to take judicial notice of the Delaware Treatment Guidelines when considering whether surgery was reasonable and necessary. The decision was affirmed. The court agreed in general that the Board could take judicial notice of the Guidelines. However, the employer was improperly seeking to have the Guidelines weighed by the Board without any supporting medical expert testimony. The defense medical expert testified that he could not opine on the reasonableness of surgery as that was outside his specialty. The employer was not entitled to use the Guidelines as affirmative expert testimony. Even though the Board is not required to accept unrebutted medical testimony by the claimant's expert, they chose to in this case, and that determination was supported by substantial evidence. The court also held that judicial notice can only be applied to undisputed facts, such as the parameters of the Guidelines. It could not be used when there is a disputed fact, such as whether the surgery was reasonable and necessary. Finally, the statute does not allow for a presumption that treatment was unreasonable based on argument that is does not comply with the Guidelines. [Starr/Gambogi]