DELAWARE WORKERS COMPENSATION
Industrial Accident Board
CASELAW Update
& Appellate Outcomes

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IAB DECISIONS

AVERAGE WEEKLY WAGE

Willamina Ushery v. Temporary Staffing LLC, IAB #1495088, (3/30/21). This case discusses how to calculate Claimant's average weekly wage where Claimant is injured on the third day of employment; where the Employer provides no evidence of what the Claimant's work schedule would have been, the Claimant's testimony in that regard prevails and the Board is not convinced that Claimant would have only worked 16 hours weekly as Employer maintains. The Board finds in favor of a 32-hour work week under the facts of this case. [Boyle/Andrews]

CAUSATION

Steven Thurman v. Acosta Sales and Marketing, IAB #1476709, (8/18/20). The Board awards a cervical spine surgery to a compensable left shoulder injury noting that neck and shoulder symptoms frequently overlap. Dr. Evan Crain testified on behalf of the Claimant and Dr. Stuart Gordon testified on behalf of the Employer. Of note, this was a slip and fall on ice involving multiple body parts as referenced in contemporaneous Concentra medical records. The Claimant's initial visit with Dr. Crain two weeks later clearly reflected complaints of both left shoulder and neck with Dr. Crain focused on a " more substantial shoulder problem". [Fredricks/Lockyer]

James Lewis v. State of Delaware, IAB #14816702, (2/5/21). With Dr. Will Spellman serving as the defense medical expert on a carpal tunnel syndrome claim, the Board rules in favor of the Employer that keyboarding is not a causative factor but rather the carpal tunnel syndrome in this individual is "best described as idiopathic." [Schmittinger/Lukashunas]

Paul Tuley v. Primecare Medical Transport, IAB #1488732, (1/19/21). The Board finds in favor of the Claimant of a DCD Petition that the Claimant's pre-existing Charcot Arthropathy was aggravated by the 7/24/19 work event based upon the testimony of Dr. Kupcha. [Donnelly/Logullo]

Earlene Shamburger-Gibbons v. Johnson Controls, IAB #1453984, (6/12/19). The Board rejects Dr. Morgan's theory that carpal tunnel syndrome developed due to swelling following a compensable shoulder injury, noting that Dr. Gelman served as the defense medical expert and Dr. Morgan's own records reflected an uneventful, normal recovery from left shoulder surgery with carpal tunnel symptoms not

manifesting until at least 11 months after a second shoulder surgery. [Gambogi/Nardo]

Jessica Abbott v. Bayhealth Medical Center, IAB #1478374, (6/12/19). The Board awards foot surgery and related benefits on the basis that references to "foot" and "ankle" are used interchangeably in the medical records "to mean the area on the outside of the foot in the ankle area and down the foot about halfway to the toes. With only a 10th grade education, it is understandable that Claimant will not know the exact area defining the foot and ankle or know Bayhealth's desire to have very specific descriptions of the area injured, when it is all the same general area to a lay person." [Lazzeri/Morris-Johnston]

Helenor Ketchum v. Sunrise of Wilmington, IAB #1492269, (9/22/20). The Board finds in favor of "substantial cause" as meeting the burden of proof for a cumulative detrimental effect claim, noting that the defense medical expert, Dr. Ger, equivocated that claimant's work duties as a care manager of the elderly may have played a role in the development of her problems, but such activities did not play any major contributory effect. [Snyder/Morris-Johnston]

Rachel Fitzpatrick-Stauffer v. Walgreens, IAB #1487143, (2/23/21). In a surprising turn of events the Board finds a compensable work-related injury but refuses to adjudicate the surgery causation issue with the observation that the work accident caused a superimposed disc extrusion at L4-5, on top of preexisting changes, but "both Board members in this case could not agree on the compensability of the 9/24/20 lumbar surgery which took place some 15 months after the acknowledged 6/3/19 work event, this present decision makes no determination on that specific medical issue or on any award of total disability benefits ongoing on or after 9/24/20…should Claimant decide to pursue further medical reimbursement, she may file a future Petition seeking such relief…". Of note, the relief declined by the Board was part of the Claimant's Petition and an issue designated for adjudication at ***this*** Hearing. [Freibott/Ellis]

Ashley Goff v. Christiana Care Health Services, IAB #1496752, (1/8/21). On the issue of thoracic outlet causation, Dr. Andrew Gelman's DME trumps the testimony of Dr. Sonia Tuerff. [Silverman/Newill]

Robert Edge v. Enterprise Masonry, IAB #1463402, (2/23/21). The Board finds that a stroke occurring during medical treatment following the Claimant's fall from scaffolding at work is causally related to the workplace trauma, based upon the testimony of Dr. David Smoger, a Board-certified interventional radiologist, "We

have Dr. Smoger's opinion which he cites with more than a possibility, in fact he testified to a certainty that the stroke was caused by the fall aggravating the pre-existing occlusion. While there was no direct evidence of neck trauma, there is evidence that he suffered head and facial trauma which Dr. Smoger felt was sufficient to sustain his medical opinion. In addition, the Board finds Dr. Smoger's testimony credible based on his experience and the detailed nature of his explanation of how the fall led to the stroke." [Lengkeek/Bittner]

Elizabeth Alvarez Torres v. ServePro, IAB #1501901, (3/15/21). The Claimant's DCD seeking benefits for pain in the back and right upper extremity allegedly attributable to moving heavy box for the Employer is denied with the Board ruling that the Claimant's disability is a progression of various comorbidities including lupus, rheumatoid arthritis, osteoarthritis, carpal tunnel syndrome and cervical degeneration. Dr. James Zaslavsky testified on behalf of the Claimant and Dr. Eric Schwartz testified on behalf of the Employer. Dr. Schwartz testified that Claimant's history is particularly compelling, having been diagnosed with rheumatoid arthritis, inflammatory arthropathy, lupus and fibromyalgia and with a history of treatment for back pain, hip pain, knee pain, as well as shoulder and hand issues dating back to at least 2016 and continuing right up to the time of the alleged work injury. On top of the significant carpal tunnel syndrome, the Claimant is subject to a variety of multi musculoskeletal pain associated with inflammatory arthropathy and fibromyalgia - - "Claimant's condition affects the body's immune system, attacking the lining of the joints and causing an inflammatory response that produces pain, swelling and stiffness." The Claimant's regimen of medications did not change following the work accident and included Anadrol, Duloxetine, Cymbalta, Singulair, Meloxicam, and Pregabalin, which are all meds for the treatment of inflammatory arthopathy and fibromyalgia. [Long/Greenberg]

Michael Poley v. Service Trucking Inc., IAB #1470467, (4/8/21). The Board awards benefits for the left knee as an adjunct to a compensable right knee injury, based on a theory of overcompensation. Dr. Evan Crain testified on behalf of the Claimant attributing the development of left knee pain to overuse. Dr. Eric Schwartz served as the defense medical expert as to the observation the Claimant had been working full time without restriction, was not taking medication or using an assistive device for mobility, and did not have any significant limitations in association with the right knee to suggest overuse of the left knee. That testimony notwithstanding, the Board was impressed with the Claimant as credible in his testimony and acknowledged an admitted 21.5% impairment to the right knee. "While such permanent impairment rating does not necessarily indicate Claimant's left knee would have to overcompensate for such loss of use, such loss of use of the right knee

as one factor to consider." In awarding in Claimant's favor, the Hearing Officer also remarked that Claimant's burden of proof is not considerably high. [Silverman/Lukashunas]

COMMUTATIONS & SETTLEMENTS

Kari-Ann Jones v. Universal Health Services, IAB #1412276, (8/24/20, ORDER). A commutation is enforceable even where the Claimant dies before signature. [Nitsche/Tatlow]

COURSE AND SCOPE

Sandra Galloway v. Perdue Farms, IAB #1485128, (10/1/20). An assault due to a "drug deal gone wrong" is not compensable as an injury occurring in course and scope of employment with the Board finding that "Claimant was viciously assaulted for purely personal reasons that were completely unrelated to her work at Perdue." [Friedman/Nardo]

Quentin Floyd v. David G. Horsey & Sons Inc., IAB # not given. The Claimant died in a retention pond situated on a property where Claimant was working. For reasons unclear, the Claimant voluntarily announced his intention to swim across the pond before jumping in and drowning. The Hearing Officer rules as follows: "While seemingly inexplicable for someone who appreciates his own inability to swim, Claimant voluntarily departed from the course and scope of his employment with Employer to attempt to swim across the pond, but was unsuccessful and very tragically died as a result. This behavior is entirely outside of Claimant's work duties and there is no evidence that anyone or anything associated with the job even influenced his decision." [Pro Se/Adams]

DISCOVERY ISSUES

Kennedy Brown v. Christiana Care Health Services, IAB #1494722, (6/22/20, ORDER). Information regarding a Claimant's prior incarceration is discoverable: "Employer points out that this is just a discovery request, so the issue of admissibility of the information sought is not in issue. The only question is whether it may lead to relevant evidence…there may reasonably be prison medical records that document physical complaints he may have had in prison (prior medical condition) that would be relevant to his claim of being injured at work. Employer has tried unsuccessfully to find out this information on its own." [Tice/Eastes]

Andrew George Higgins v. State of Delaware, IAB #1429097, (2/2/20). The IAB rules that privilege protects the Carrier's DME letter to Dr. Gelman in a ***prior*** workers compensation case – "The Board agrees with Employer that the letter

written to Employer's expert in 2014 for an earlier case involving Claimant's cervical and lumbar spine injuries is unrelated to the current issue before the Board, whether the thoracic spine is related, and if so what permanency is attributable to that injury, and does not warrant production, or outweigh privilege". [Kimmel/Nardo]

DME ISSUES

Benjamin Curtis v. Town of Laurel, IAB #1223271, (6/15/20, ORDER). The IAB denies a request for DME transportation which was based on the allegation that Claimant's vehicle is unreliable. Employer had previously provided transportation at a cost of $682.65hashen Claimant's vehicle was actually inoperable. "In this case, while Claimant has expressed concerns about the reliability of his vehicle, he has failed to submit evidence to warrant Employer providing transportation as he has only alleged ***concern*** regarding the vehicle's reliability, but not actual, current unreliability. The Board notes that Claimant is able to attend his monthly pain management appointments which are in Dover, Delaware. While the Board is aware that the DME is scheduled to occur in Wilmington which is farther away, it nonetheless finds insufficient evidence to warrant Employer providing transportation." The Board granted Employer's Motion to Compel Defense Medical Examination. [Aldrich/Ellis]

IDIOPATHIC FALL

Deborah Davis v. Tybout, Redfearn & Pell, IAB #1489367, (9/25/20). The Board finds in favor of Claimant's DCD Petition alleging a trip and fall over a flooring transition strip or "threshold" and rejects the defense proposition that this was instead an idiopathic fall, with the case offering a comprehensive discussion of what is ***not*** an idiopathic fall. [Silverman/Lockyer]

Joe Yeatman v. Ahold Americas Holding, IAB #1486384, (2/17/20). The Claimant's DCD Petition is denied based on the Idiopathic Fall Doctrine and deemed to be the result of a syncopal episode with Dr. Patil testifying on behalf of the Claimant and Dr. Gelman testifying on behalf of the Employer. [Ji/Panico]

IMPLIED AGREEMENT/COLLATERAL ESTOPPEL

Joseph Kraft v. Arbor Management LLC, IAB #1426020, 3/19/21. Claimant filed a DACD Petition seeking compensability of a left shoulder surgery and related

medical expenses which was disputed by the Employer. In a most remarkable outcome for the Claimant, although the Board deemed the evidence insufficient for a finding that the proposed surgery was reasonable, necessary and related, the Board nonetheless ruled that "Carrier's numerous payment of Claimant's claims over the course of several years was not merely a gift flowing from Carrier's generosity, but created an implied Agreement as to Compensability. Therefore Claimant's Petition is granted." Claimant's counsel was also awarded a max attorney's fee. [Karsnitz/Panico]

Fernando Secundino v. James Francisco Milan Acosta, IAB #1481298, (3/18/21). Where the Employer voluntarily pays the Claimant's medical bills and lost wages, a "implied Agreement" is created; "while the Employer paid Claimant his full wages instead of the statutory compensation rate per week, this does not change the underlying fact that Claimant was on a "open Agreement" for benefits under the Act. As such, Claimant is entitled to the protections provided by Section 2347 and the Employer was not permitted to unilaterally terminate disability payments". The Employer was permitted a credit for the amount he paid in full wages to be applied against the total disability benefit obligation. [Fornias/Castro]

LABOR MARKET SURVEY ISSUES

Sandra Oddo v. Dutton Bus Service, IAB #1494359, (12/7/20). A labor market survey job that requires a 45-mile commute is deemed unreasonable. [Aldrich/Baker]

MEDICAL MARIJUANA

Samuel Birney v. George H. Burns Inc., IAB #1258420, (6/26/20). The Board awards medical marijuana for management of neurogenic pain in a wheelchair-bound individual where Dr. Brokaw served as the defense medical expert who conceded that he "would not object to a pure CBD preparation for Claimant, whether that was an over-the-counter herbal preparation or the prescription version of it, as compared to something derived from the plant of marijuana." The marijuana in dispute was 90% CBD and 10% THC. [Cline/Roberts]

MEDICAL TREATMENT ISSUES

Kaeisha Righter v. Five Star Quality Care, IAB #1463251, (8/25/20). Where a provider is ordered to allocate between compensable and disputed charges, it is not acceptable to simply delete the non-compensable diagnoses codes and resubmit essentially the same bill. [Gambogi/Baker]

Kimberly Graham v. Smoking Joe's Tobacco Shop, IAB #1496173, (10/19/20, ORDER). Payment without prejudice only applies to those payments where the statute is followed. It is undisputed that the first payment of total disability for two weeks was clearly done "without prejudice". Employer argues that clear indication of a claim in dispute should bind future payments. Claimant argues that each payment of benefits needs to follow the statutory procedure to be a proper payment without prejudice and the Board agrees. [Fredricks/Dolan]

Carole Streifthau v. Bayhealth Medical Center, IAB #1432002, (12/28/20). Dr. Rushton's DME overcomes testimony of Dr. Yalamanchili on a claim for thoracic myelopathy and related surgery. Dr. Rushton believed that a thoracic laminectomy and bone fusion for diagnosis of thoracic myelopathy related to thoracic stenosis and a diagnosis of thoracic radiculopathy was inconsistent with records he reviewed post-injury, inconsistent with Claimant's physical exam, and inconsistent and unrelated to her industrial accident. A host of physicians evaluated and treated Claimant for diagnoses related primarily and principally to cervical spine and no surgeon including Drs. Fisher, Gelman or Fetter diagnosed a thoracic radiculopathy or myelopathy related to this industrial injury. [Schmittinger/Wilson]

Janice Kavanaugh v. Compass Group, IAB (number not given), (5/14/20). It is reasonable to include the C4-5 spine level in a C5-6 and C6-7 fusion due to adjacent segment disease concerns. Dr. Eskander explained that the C4-7 levels are the most likely levels to deteriorate and break down as opposed to C2-3, C3-4 and C7-T1 levels that are more resilient. The highest rate of adjacent segment is seen after a C5-6 ACDF because of higher likelihood of progression at C4-5 and C6-7, which would cause a greater and more rapid slippage at C4-5. It is better to treat the problem of slippage up front than place Claimant in a situation where she would likely have a second surgery months later. The DME doctor (Kalamchi) ultimately agreed that including C4-5 was a reasonable approach although it was not an approach he would have pursued. [Fredricks/Gin]

Faith Allen v. Ceramic Protection Corporation of America, IAB #1289503, (8/27/20). Dr. Brokaw DME prevails to defeat a claim for a permanent spinal cord stimulator. Dr. Brokaw enumerated a 6-point assessment to include factors of undergoing multiple cervical surgeries, history of chronic pain management treatment including high dose opioids, history of tobacco abuse, high body mass index, and psychiatric overlay. "While she continues with diagnoses for neck pain, cervical radiculopathy, post-laminectomy syndrome, muscle spasm and

musculoskeletal chronic pain, the placement of a permanent spinal cord stimulator represents a high risk-low benefit scenario for her." [Marston/Harrison]

Pablo Alanis-Federick v. Asplundh Tree Expert Co., IAB #1439328, (12/4/20). The Board rules that stem cell injections for the lumbar spine provided by Dr. Bruce Rudin are not reasonable or necessary medical treatment. The Hearing Officer found defense medical expert Dr. Rushton convincing as to why stem cell treatment administered for lumbar spine issues is not reasonable. There has been no FDA approval regarding application of this treatment to the spine and Dr. Rushton himself, who has treated thousands of spine patients over the years, has never referred a single patient for lumbar stem cell injections in his practice. Stem cell treatment is intended to address soft tissue issues in the joints, elbows, shoulder and knees. Dr. Rushton was convincing that there is no significant statistical data to support the use of stem cell injections in the lumbar spine which does not have the soft tissue elements within a joint to benefit from a regenerative-type approach. The biomechanical loading and normal stress and strain on the lumbar spine limits the role of this treatment because the treatment is ***not*** designed to restore biomechanics. Spines will fail because of biomechanical and degenerative forces over time, and such a regenerative technology will not provide any improvement to the spine's actual architecture. [Legum/Logullo]

Monzeil Flemming v. Leonard's Express, IAB #1493498, (2/28/21). The Board comments that performing an EMG on one's own patient is "conclusory and unreliable." [Heesters/Lockyer]

Monzeil Flemming v. Leonard's Express, IAB #1493498, (2/28/21). Dr. Grossinger (in a footnote) is slammed for disparaging a nurse practitioner as "wholly inappropriate and unnecessary" with the further observation that "it is rather common to see treatment in primary care or specialty care offices rendered by nurse practitioners or physician's assistants." [Heesters/Lockyer]

Bernard David v. Quality Assured Inc., IAB #1332427, (9/3/20). Dr. Rushton's defense medical evaluation opinion overcomes a DACD Petition seeking an award of a 5-level fusion and with the Board observing that "Dr. Fisher's justification for this extensive procedure is flimsy at best." [Crumplar/Bittner]

OVERPAYMENTS & CREDITS

Mary Rehill v. Delaware River and Bay Authority, IAB #1415717, (2/12/21). In what may be an absolutely novel issue, the Board rules that payment or wage continuation received by a Claimant under a co-worker "donated leave program" is ***not*** subject to a credit in favor of the Employer for total disability ultimately awarded. [McDonald/Julian]

Lynne Daniel v. State of Delaware, IAB #1486846, (3/31/21). When the Claimant enters into an overpayment Agreement with the Employer to repay $7912.32 at a rate of $50.00 per month with the additional language that the Claimant "is obligated to repay this amount to the State of Delaware in the shortest time possible", the IAB has the power to order that the remaining balance of any overpayment obligation be deducted from the Claimant's permanency award. In this case the Claimant apparently received duplication of benefits occasioned by short-term disability creating this $7912.32 credit back to the Employer. In tandem with entering into a contract to address repayment of overpaid funds at a rate of $50.00 monthly, the Claimant advanced a permanency Petition which warranted an award of approximately $35,000 minus attorneys fees. Despite this language of the Agreement that the overpayment be repaid in "the shortest time possible", Claimant maintained she cannot afford to repay the monies owing off the top of the PPD award "as she will continue to have accumulated debts even after receiving the permanency award for which she needs the funds." To date, the State had received four $50.00 payments from Claimant under the separate Agreement. As noted by the Board in awarding the Employer the expedited repayment, "the now less than $8,000.00 owing as repayment of her admitted overpayment constitutes only approximately a third of the Claimant's remaining award, a circumstance that goes some distance towards demonstrating that Claimant's repayment time could be reasonably shortened by affording Employer the credit owing." [Schmittinger/Durstein]

PERMANENCY

Darrick Williamson v. Red Clay Consolidated School District, IAB #1451862, (5/21/20). On a claim for 37% impairment to each of the knees as rated by Dr. Rodgers, and noting that Dr. Piccioni served as the defense medical expert, rating 7% to each knee, the Board awarded 7% to each knee with the observation that it is not appropriate to base a PPD rating on a total knee replacement which ***has not yet occurred***. [Rahaim/Bittner]

Luis Hernandez-Fallis v. SM Contractors, IAB #1445259, (2/5/21). On a claim for multiple body part permanent impairment, the Board awards in favor of the

Claimant, including an award for "dysthesias" and "trunk weakness" but unfortunately does not comment on a specific value for these body parts. [Legum/Trapp]

Lashawn Washington v. State of Delaware, IAB #1445377, (1/18/21). On a Petition seeking an award of 16% impairment to the left shoulder based upon the rating of Dr. Bandera, the Board awards 3% based on Dr. Gelman's defense medical rating. "In the instant matter, Dr. Bandera acknowledges that post-surgically, by all accounts, Claimant recovered fully…he had discontinued care for his left shoulder and been released by both of his treating physicians, Dr. Palma and Dr. Thomas, to return to work on a full time, full duty basis without restrictions." [McDonald/Klusman]

Jennifer DeBenedictis Bayne v. State of Delaware, IAB #1482162, (4/13/21). On a Petition seeking recovery for 20% impairment to the cervical spine as rated by Dr. Rodgers, the Board rules in favor of the Employer noting that Cervical DRE Category III requires significant radiculopathy and dermatomal distribution. The defense medical expert, Dr. Fedder, assessed a 0 impairment rating which the Board also did not find convincing. As such, the Board limited its adjudication to a ruling that Claimant failed in her burden to demonstrate a 20% impairment to the cervical spine. It did not go so far as to rule there was no permanency. [Schmittinger/Skolnik]

PRACTICE AND PROCEDURE

Maikeysha Bratcher v. Integrity Staffing Solutions, IAB #1496866, (8/6/20, ORDER). The tender of an Agreement ***and*** contemporaneous Final Receipt with a TTD check does not create an implied ***Open*** Agreement. [Holmes/Bittner/Slattery]

Christina Amrhein v. Baxter Enterprises, IAB #1477037, (5/20/20, ORDER). The proper vehicle to challenge the average weekly wage on an approved Agreement is with a Petition for Review if the attorneys cannot reach agreement regarding an amendment between themselves. [Trapp/Davis]

Corey Berry v. Kentucky Fried Chicken, IAB #1485440, (7/9/20). This case is an example of the Employer filing a DCD Petition to force adjudication and to limit the work injury. Of note, the Board adjudicated this matter by concluding that the 4/24/19 work accident involved sprain and strain injuries to the neck and right shoulder only, with Claimant entitled to medical treatment and total disability for

the period 4/24/19 through 5/7/19. There does not, however, appear to be a formal adjudication that the work injury in question had "resolved". [Donovan/Andrews]

Denise McNair v. State of Delaware, IAB #1484456, (2/18/21). In what appears to be something of an evidentiary trend, a workplace premises video establishes evidence of a work injury and persuades the Hearing Officer that Claimant was involved in a slipping incident at work as she stepped from a carpeted office area into a hallway with tiled floor. While the Employer relied on security videos from the day of incident to argue that Claimant ***did not*** slip on the floor as alleged, the Hearing Officer found them instead ***corroborative*** of an event - - "I observed that the Claimant's right foot does move outward a short distance to the right in her second step forward out of the door. Claimant also looks down slightly at the same time, and a young woman passing by her does the same. This suggests that something on the floor caught their attention. In addition, almost immediately after Claimant walked by the custodian, he walked toward the doorway and appeared to inspect several places on the tile floor where Claimant had just been walking. The video does not have sound so it is not possible to verify what the individuals in the video were saying to each other. While the videos by themselves are not conclusive as to what occurred on 3/26/19, they provide some corroboration for claimant's testimony and statements to the Employer and to medical providers that she slipped on a wet floor that day." [Bustard/Lukashunas]

James Santiago-King v. Floyd Megee Motor Company, IAB #1477900, (2/26/21). In considering a DCD Petition the Board suggests that TTD notes are not necessarily crucial to meet the "3-day Rule." "While again Claimant did not have a 'no-work' note at the outset of the day, he treated at the hospital rather than working and was issued a second note that called for yet another day out. As Mr. Megee admits, one would not expect the Claimant to work on a day that required medical assessment at the ER. As such, the Board is persuaded that Monday, 9/24/18 counts toward the Claimant's total days missed as well." Thus the Employer's defense based on the "3-day Rule" of Section 2321 failed. [Welsh/Trapp]

Scott Henry v. Lowe's, IAB #1483111, (1/27/21). The Board rules that ***Gilliard-Belfast*** applies to both total disability and partial disability. "There is no indication that a Claimant's right to rely on this physician's opinion is limited to a total disability award determination. Therefore, Claimant may rely on his provider's work restrictions." [Trapp/Durstein]

Kirk Anderson v. American Seaboard Exteriors, IAB #1449333, (2/2/21, ORDER). The Claimant's Motion to Preclude the defense medical expert is denied where

Claimant changes his theory of recovery mid-litigation. [Crumplar/Segletes/Ellis/Roberts]

Teresa Vazquez v. DPNL, LLC, IAB #1501813, (1/21/21). In denying the Claimant's DCD Petition as to an injury to the left foot and ankle, a workplace premises surveillance video was successfully used to undermine the proposition of a work accident. [Fornias/Carmine]

RESOLVED/BACK TO BASELINE

Rebecca Clark v. State of Delaware, IAB #1393189, (7/30/20, ORDER). A Permanency DACD Petition is dismissed where there is a prior adjudication of "resolved" and otherwise not compensable. According to the Board, "it would be completely inconsistent and contradictory for the Board to affirmatively find in one decision that Claimant has no ongoing compensable injury, but then, in a later decision, find that Claimant has a permanent impairment due to that no longer existing injury." This case was distinguished from ***Washington vs. Delaware Transit Corp., 226A.3d 202(Del. 2020)*** upon which the Claimant relied. In ***Washington***, it was completely consistent to find in one decision that Claimant was capable of working while finding in another that the claimant had sustained a loss of use of a body part (permanent impairment). Work capacity is not the same as loss of use of a body part." [Hendee/Bittner]

Brian Persaud v. Colonial Electric Supply, IAB #1479794, (5/20/20). The Board limits a compensable bilateral knee injury to a diagnosis of "contusions" and finds that the injuries had "resolved" based on the testimony of Dr. Gelman and taking into account that the Claimant had a pre-existing Osgood Schlatter Disease. Dr. Jeremy Axe testified on behalf of the Claimant. [Heesters/Roberts]

Michelle Westbrook v. Walgreens, IAB #1432077, (5/11/20). The IAB finds a lumbar spine injury is resolved and "back to baseline" rejecting the testimony of Dr. Barry Bakst and embracing the opinion of Dr. Gelman, taking into account that the Claimant had a preexisting chronic low back condition with left lower extremity symptoms prior to the work event and noting that subsequent to the work event there was a 15-month gap in treatment. [Morrow/Ellis]

Jorge Zuniga v. First State Insulation LLC, IAB #1489302, (4/1/21). The Board will not adjudicate an injury as "resolved" where no additional treatment is at issue. "At this point, the Board is not able to determine if any additional treatment would be reasonable, necessary or causally related to the industrial accident. The Board

will not make such a blanket statement when no additional treatment has been ordered or is specifically at issue, so such a ruling would be speculative at this time. Likewise, the Board is not going to rule on any potential for permanent impairment, as First State has requested, since Claimant has not yet been evaluated for any permanent impairment." [Vest/Trapp]

SECTION 2353 FORFEITURE

Vauguel Pierre v. Purdue Farms, IAB #1486398, (11/2/20). Under the facts of this case, running through the plant is deemed "recklessness" so as to trigger the forfeiture provisions of Section 2353(b) involving "recklessness" and willful disregard of danger. [Donovan/Nardo]

TERMINATIONS

Sarah Okoth v. Hoosier Care/Parkview Nursing, IAB #1475486 & 1485366, (7/20/20). The Board finds that the Hoey doctrine does not apply where the Claimant cannot return to work as a CNA, allowing for permanent sedentary restrictions, and as such, creating no reasonable expectation of continued employment with the Employer. [Marston/Reale]

Ida Warren v. Amsted Industries, IAB #1360974, 7/23/18. The Board awards the Carrier's Termination of total disability and finds the Claimant has voluntarily retired and removed herself from the established labor market for reasons unrelated to the work injury. (This case was appealed and affirmed on appeal) [Wasserman/Wilson]

Monzeil Flemming v. Leonard's Express, IAB #1493498, (2/28/21). A Claimant's job search is not credible where it is limited to "going online to use 'Indeed' because his counsel advised him to do that." [Heesters/Lockyer]

Frederick Beffer v. Bimbo Bakeries, IAB #1449412, (1/25/21). The Board denies the Employer's Petition to Terminate and awards a proposed third lumbar surgery as well as mental health treatment, with Dr. William Murphy testifying on behalf of the employer along with Dr. Gladys Fenichel (psychiatrist) and with Dr. Kenneth Lingenfelter testifying on behalf of the Claimant accompanied by Dr. John Dettwyler. [Bustard/Lockyer]

UTILIZATION REVIEW APPEALS

David DeVincentis v. Delmarva Electric & Technology, IAB #1425710 (6/15/20).

The Board affirms a UR certification of chiropractic treatment, pain management, and a proposed spinal cord stimulator with Dr. Brokaw testifying on behalf of the Carrier and Dr. Balu testifying on behalf of the Claimant. The Board embraced the Claimant's testimony that his level of function has improved "drastically" as a result of the pain management treatment and Dr. Balu's continued reduction of his opioid prescription dosage. Claimant was a former illegal drug user and his periodic random drug testing showed no evidence of illicit drug use. [Jaworski/Lukashunas]

William O'Neal v. Ruan Transportation, IAB #1459227, (8/13/20). The Board affirms a Utilization Review certification of pain management treatment with Dr. Xing. The appeal focused on the use of injections. Dr. Schwartz, the defense medical expert, based his conclusion that no more injections were warranted on the failure of the first three injections to provide relief. As Dr. Xing explained in careful details, these injections were ***not*** repeated and later injections either offered the potential for more broad-based symptom relief or helped determine whether ablation might be an effective treatment instead of surgery. The Board finds it appropriate for Dr. Xing to proceed with the injections ordered by Dr. Eskander in an attempt to avoid surgery or provide Dr. Eskander with additional information before deciding to proceed with surgery. [Carmine/Gin]

Robert Gibbons v. Hearland Industries, IAB #1012995, (1/4/21). The Board affirms a Utilization Review non-certification of opioids and calls out Dr. Ufberg for lack of vigilance with his pain management treatment of this individual who had both pulmonary and cardiac co-morbidities. The Board also requested this case to be referred to the Board of Medical Licensure. [Morrow/Carmine]

Shawn Levering v. Elwyn Inc., IAB #1297851, (1/4/21). A Utilization Review certification of Belbuca medication is affirmed although Dr. Ivins is admonished again for lack of pain management documentation. Although finding in favor of the claimant, the Board wished to emphasize the following: "Claimant presented highly credibly and his credibility tipped the scales in his favor. Dr. Ivins has an obligation to his patients. His lack of documentation is problematic. He admitted recognition of the importance of documentation to justify his treatment yet he failed to do so. His poor documentation was recognized in the previous IAB decision. Just because the IAB has ruled in favor of supporting his treatment to date does not mean that it will do so in the future…these comments are intended to admonish Dr. Ivins for his lack of documentation." [Tice/Ellis]

Darius Henry v. Kayfield Automotive Paints, IAB #1416871, (3/5/21). The Board reverses the UR non-certification of a spinal cord stimulator trial and affirms a UR

certification approving Dr. Xing's ongoing pain management visits. Dr. Xing testified on behalf of the Claimant and Dr. Gelman testified on behalf of the Employer with both doctors agreeing that Claimant has a chronic pain condition and clinical evidence of likely L5 nerve irritability. [O'Neill/McGarry]

Victor Mazzio v. YMCA of Delaware, IAB #1447987, (3/17/21). The Board affirms a UR certification of a spinal cord stimulator trial with Dr. Brokaw testifying on behalf of the Employer and Dr. Venk testifying on behalf of the Claimant. [Bustard/Morgan]

Danielle Starkey v. Utz Quality Foods, IAB #1466327, (2/26/21). A UR non-cert of a lumbar fusion surgery is reversed based on the testimony of Dr. Kenneth Ligenfelter and with Dr. Ger serving as the defense medical expert. The Board noted that Dr. Ger has not performed spinal surgery since the 1980's and he recommended another spine surgeon evaluate Claimant to affirm his own opinion regarding surgery. [Kappes/Davis]

Debbie Williams v. Delhaize America LLC, IAB #1411886, (3/5/21). A Utilization Review certification of Dr. Balu's opioid treatment is reversed on the Employer's appeal with the Board ruling that opioid medications and future injections are unreasonable and unnecessary, as was an intrathecal morphine pump. Of note, Dr. Jason Brokaw testified as the defense medical expert. [Wolf/Hunt]

APPELLATE OUTCOMES

Genesis Healthcare Svcs. V Cephas C.A. K20A-04-003 JJC (3/12/21). **The issue before the Court was whether the Board articulated and applied the proper standard when finding an implied agreement. In this case, the Claimant sustained a compensable back injury that resulted in surgery. The claimant thereafter began treating for pain emanating from a different lumbar level and the employer disputed such that such treatment was compensable. The Claimant's expert testified that he could not say that such treatment was work-related. However, the employer did pay for some of the medical bills relating to such treatment. The Board found the treatment compensable due to the payments, noting there was no evidence that such payments were made inadvertently or as a gift. In a separate section, however, the Board stated that there was no evidence that the payments were made under a feeling of**

compulsion. The Court held that the rationale was unclear to the point that it could not determine if the Board misunderstood the applicable standard, contradicted itself or if the decision inadvertently omitted additional language. Without evidence of a feeling of compulsion, there could be no implied agreement. On remand, the Board was to issue a supplemental order clarifying its findings as to whether the employer felt legally compelled to pay for the bills in question to create an implied agreement. [Schmittinger/Chrissinger Cobb].

Alside Supply Center v. Bottomley, C.A. N20A-07-002 JRJ (3/29/21). **This opinion considered an employer's challenge of the Board's finding that a work-place assault was compensable. In the work parking lot, the Claimant was attacked by three unknown assailants resulting in injuries. The police never identified the assailants, but it was suspected by the police that the claimant's supervisor orchestrated the attack. Fact witnesses testified that they also suspected the supervisor and noted that the two got into an argument at work two weeks before the incident. The Court affirmed the decision. The occurrence of that argument suggested that there was work-related tension that could have rendered the Claimant a target, and there was no evidence presented to indicate the claimant's personal life put him at additional risk. [**Krayer/Sack]

Berry v. Mitra QSR KNE LLC, C.A. K20A-08-002 JJC (2/16/21). **The Court rejected the Claimant's argument that no deference should be applied to the Board's credibility findings when the hearing was conducted via WebEx. Emergency circumstances due to the pandemic required balancing important interests, such as protecting the safety of the participants. The parties had no difficulty using the platform. There was no evidence to support that the Board being unable to appropriately assess credibility. The Court reinforced that the Board has broad authority to control the nature of its proceedings. [**Donovan/Andrews]

Warren v Amsted Industries, No. S19A-09-001 (3/29/21). **The Supreme Court affirmed a Board Decision finding that the Claimant had withdrawn from the labor market for reasons unrelated to her injury. Even though the Claimant testified that she did not consider herself retired, her prior statements and lifestyle suggest otherwise. She had told multiple doctors that she considered herself retired and was already planning on retirement before the work injury. The Claimant had not looked for work for years. She had also downsized her home and was regularly going the local senior center. [**Wasserman/Wilson].

State v. Anderson, No. K20A-09-002 JJC (3/21/21). **The Court affirmed a Board Decision finding treatment compensable, even when the Claimant's expert**

vacillated as to his causation opinion during the deposition. The claimant sustained an acknowledged back injury that resulted in a limited period of treatment and disability. After a lull in treatment, the claimant began treating more extensively. The employer disputed that the more recent treatment was work related. At deposition, the Claimant's expert testified on direct exam that the treatment was all work-related. On cross-exam, he rescinded that opinion after being confronted with pre-work injury medical records that he was not aware. On re-direct, the doctor stated it was 'possible' that the work injury had aggravated the pre-existing condition. Despite the seemingly weak opinion on causation, the Court held the Board was within its discretion to find the ongoing treatment work-related. Even though the expert rescinded his opinion on cross-exam, his opinion was "somewhat" rehabilitated on re-direct. Medical experts do not have to utter 'magic words' in order for the Board to accept their opinions. Even if the causation opinion had not been sufficient on its own, there was enough additional favorable evidence in the record to permit the Board to find in the Claimant's favor. [Schmittinger/Klusman&Pugh].

Justice v State, No. K21A-03-001 NEP (4/16/21). **The Claimant in this case filed her appeal to the Superior Court one day late. The Court granted the State's motion to dismiss despite the Claimant blaming the mail service and COVID for the delay. Without a timely filing, the court did not have jurisdiction to hear the appeal and alleged extenuating circumstances could overcome this. [***Pro se***/Ellis].

Davalos v Allan Industries, No. N19A-10-006 CEB (3/31/21). **The Claimant contended that the Board erred by accepting the defense expert most credible as to the extent of the work injury. According to the Claimant, the Board did not address that Dr. Kates testified that the work injury resolved by a particular date, while also testifying that the Claimant was at "MMI." The Court affirmed the Board's decision, reaffirming that the Board is free to accept either medical expert and that acceptance constitutes substantial evidence. Even if an expert provides testimony that is not perfectly consistent, the Board is still within its right to accept that expert as more credible than the other. The Court also noted that the Claimant exhibited evidence of symptom magnification on exam and both experts had agreed there were no objective findings to support the subjective pain complaints. [**Pruitt/Lukashunas].