DELAWARE WORKERS COMPENSATION
IAB, APPELLATE & UTILIZATION REVIEW CASELAW UPDATE

By Cassandra F. Roberts, Esquire, John J. Ellis, Esquire, & Michael B. Galbraith, Esquire

May 4, 2016

DSBA Annual Workers Compensation Seminar

AVERAGE WEEKLY WAGE

Richard Ash v. Aquaflow Pump and Supply*, *IAB No. 1427871 (3/8/16). **An average weekly wage calculation using the average of 26 weeks to determine wage for TTD purposes is correct even if some of those weeks taken into account are weeks the claimant only worked on a part time basis.** [Fredricks/Richter]

CAUSATION

Kerry Johnson v. Diamond State Port Corp*, *IAB No. 1393052 (3/8/16). **On claimant's DACD Petition seeking an award of a disputed surgery as being causally related to a 2/4/13 neck injury, Dr. Kalamchi's opinion regarding "progressive adjacent segment disease" offered on behalf of the employer is rejected in favor of an award and based upon the testimony of Dr. Sugarman.** [Gambogi/Durstein]

Sandra Caraballo v. State of Delaware*, *IAB No. 1398405 (2/22/16). **The Board denies a claim for "traumatically induced" carpal tunnel syndrome, rejecting the testimony of family practice physician Dr. Magat in favor of defense medical expert Dr. Emily Hoff-Sullivan.** [Long/Morris]

Jose Feliciano v. Siemens Health Care Diagnostics*, *IAB No. 1419846 (2/16/16). **On a DACD Petition, the Claimant is awarded the neck/cervical spine and related 9/4/15 surgery as being causally connected to an 8/15/14 admitted injury to the right shoulder based upon the testimony of Dr. Zaslavsky, with the Board once again embracing the explanation that shoulder and neck injuries "tend to overlap."** [Castro/Baker]

Lewis Ainsworth v. State of Delaware*, *IAB No. 1259391 (2/25/16). **On a Claimant's DACD Petition seeking to compel a finding that a right carpal tunnel syndrome is causally related to a 6/4/03 work accident, the Claimant's Petition is denied with the Board commenting that EMG evidence of carpal tunnel syndrome is not valid without clinical correlation, noting that Dr. Peter Townsend testified on behalf of the claimant and Dr. Gregory Tadduni testified on behalf of the employer.** [Lewis/Harrison]

Joseph Benett v. University of Delaware*, *IAB No. 1416577 (3/16/16). **On a DACD Petition seeking an award of a total knee replacement relative to a 2014 compensable right knee injury, the Board finds that even with a finding of "bone on bone" dating back to 2007, such is not a bar to compensability for surgery under Blake.** [O'Neill/Durstein]

David Hamilton v. Independent Disposal Service*, *IAB No. 1222906 (1/21/16). **An annular tear appearing in 2012 is held not to be causally related to a 2002 low back injury with Dr. Zaslavsky testifying on behalf of the claimant and Dr. Piccioni testifying on behalf of the employer, with the Board squarely rejecting Dr. Zaslavsky's opinion that this was**

"basically a latent annular tear that was unknown at the time of the earlier MRI and discogram...present all along but not seen on MRI until 12 years later, which even he would consider as a long time for this dormancy...The problem with this theory is first, it is just not believable to the Board and second, Employer's expert successfully refutes it. Dr. Zaslavsky's opinion effectively means that early MRI and discogram testing are meaningless." [Dunkle/Andrews]

Curtis Adkins v. Savage Services, IAB No. 1429198 (2/2/16). **The claimant having sustained a 12/4/14 work injury to the right knee is awarded a proposed arthroscopic surgery under the "but for" theory of causation notwithstanding a prior history of a 2007 ACL reconstruction.** [Bowers/Harrison]

Paula Martin v. Christiana Care, IAB No. 1421358 (1/28/16). **An ultrasound technician is awarded ulnar nerve treatment under a cumulative detrimental effect theory, with Dr. Raisis testifying on behalf of the claimant and Dr. Ger on behalf of the employer and with Dr. Ger opining that it was the Claimant's sleeping position which caused the nerve entrapment.** [O'Neill/Newill]

Ellanor Greene-Randall v. State of Delaware, IAB No. 1414557 & 1414465 (2/23/16). **"Absent either negligent or intentional misconduct on the part of the claimant, a weakened condition from the work accident may be deemed the cause of an unrelated subsequent event" with the Board nonetheless declining to award a proposed lumbar spine surgery, finding the causation opinion of Dr. Hoff-Sullivan for the employer to be more persuasive than the opinions offered on behalf of the claimant from Dr. Kim and Dr. Brady.** [Krayer/Frabizzio]

DISCOVERY

Walter Hall v. Diamond State Port Corp, IAB No. 1426612 (3/4/16). **" In light of claimant's lengthy history of a large number of prior accidents and injuries, claimant's non-disclosure verges on the deceptive" and, as such, the claimant's DCD Petition is denied.** [Warren/Nardo]

Christopher Torres v. Port to Port International, IAB No. 1430935 (3/7/16) (ORDER). **Where prior records are produced by the defense prior to the defense medical expert deposition but after the treating doctor's deposition has occurred, a Motion to Strike the defense expert's testimony is denied and noting that there was no argument that said records were available prior to the time they were produced.** [Fredricks/Andrews]

Christopher Torres v. Port to Port International, IAB No. 1430935 (3/7/16) (ORDER). **The Board rules that there is no prejudice to the claimant in prior undisclosed medical records being produced after his expert's deposition and prior to the deposition of the defense**

expert witness, commenting that under the prevailing case law "the claimant and his counsel cannot be surprised by his own records..." and with an admonishment to the claimant's attorney's law firm as a "recurring issue" for claiming ignorance as to prior accidents and litigation. "There is no excuse in this age of electronic records not to have at least some digital evidence of prior representation of a client in an injury case. The Board notes the questions #14 and #19 on the Statement of Facts request information pertaining to prior treating doctors and prior injuries respectively. Claimant only disclosed St. Francis Hospital and that identification of prior injuries was "to be provided." Similarly, Dr. Bandera's office should have been able to search Claimant's name in an electronic data base to at least determine whether he had been a patient there previously. Of note, in reply to a subpoena Dr. Bandera had only produced records to the defense relating to the work injury at issue. [Fredricks/Andrews]

DME ISSUES

***Jose Rivera Chavez v. Creative Solutions*, IAB No. 1430017 (3/17/16) (ORDER).** **Where claimant fails to appear for 2 defense medical evaluations and his attorney is compelled to withdraw as counsel, the Board will still not grant a DME no-show credit nor will it suspend total disability benefits.** [Pro Se/Elgart]

EMPLOYMENT RELATIONSHIP

***Raymond Nowlind v. TNG McCoy Rental Properties*, IAB No. 1426207 (1/14/16).** **The Claimant, a maintenance man working for a property management company is deemed an "employee".** [Kappes/Ippoliti]

THE FUND

***Joseph Genitempo v. Communications Unlimited*, IAB No. 1426927 (3/9/16).** **Where the claimant is underpaid total disability while on the Fund, based on an incorrect average weekly wage and disability benefit rate, the duty to make up the difference rests with the employer and not the Fund.** [Eliassen/Logullo/Cleary]

***Joseph Genitempo v. Communications Unlimited*, IAB No. 1426927 (3/9/16).** **Where there is an error in payment from the Fund that rests with the employer, any shortfall owed to the Claimant is due from the Employer and not the Fund with the Board recognizing case law for the proposition that "the Fund is not obligated to pay benefits when an Employer files an erroneous Petition."** [Eliassen/Logullo/Cleary]

***Jorge Padro v. Forever Inc*, IAB No. 1173922 (3/7/16) (ORDER).** **The Board refuses to reclassify the excess of Fund total disability benefits received by a claimant in connection with a Petition for Review as a temporary partial disability credit choosing not to follow a**

precedent created by a Board decision in Parent Care Solutions v. Damon Jordan. The Board went on to explain that "the legislative policy underlying 19 Del Code Section 2347 is that an injured employee should not lose his or her compensation until there is an adverse decision...stated differently, the legistlative purpose was to assure continued compensation to an injured employee until he or she is found not to be entitled to receive it. There was further observation that there was no provision under the statute that allows the Fund to recapture any excess interim payments from the employee and "under the statutory scheme, such, "excess" interim payments are simply a windfall to the claimant." There is no statutory provision to allow for reclassifying the excess to enable a credit to be granted to employer. Such reclassification requires the injured employee indirectly to repay the Fund- - an action contrary to to the statutory scheme. [Krayer/Andrews/Cleary]

ISSUE OF VOLUNTARY REMOVAL FROM LABOR MARKET

Cathy Ewing v. State of Delaware, IAB No. 1392405 (2/25/16). **Payment of temporary partial disability is implied recognition that the claimant is part of the work-force so as to preclude any argument that Claimant was ineligible for total disability benefits when taken out of work in anticipation of an upcoming surgery.** [Freibott/Durstein]

Cathy Ewing v. State of Delaware, IAB No. 1392405 (2/25/16). **This case contains a beautiful summary and overview of the applicable case law on the issue of "volntary removal from the labor market".** [Freibott/Durstein]

JURISDICTION

Catherine Taylor v. Wilmington Friends School, IAB No. 1417179 (2/12/16) (ORDER). **The Board's rulings are restricted to obligations arising under the Workers' Compensation Act and as such, Claimant's obligations under a Hartford third-party contract regarding LTD benefits are not an issue on which the Board has jurisdiction to render any opinion.** [Pruitt/Andrews]

MEDICAL TREATMENT ISSUES

Stephen Arrants v. Home Depot, IAB No. 12552252 (1/15/16). **On a DACD seeking approval for a trial of a spinal cord stimulator as related to a 2004 work injury the Board finds in the claimant's favor in terms of reasonable, necessary and causally related treatment based on the testimony of Dr. Xing.** [Silverman/Simpson]

PARTIAL DISABILITY

Nickeya Harris v. Food Liner, IAB No. 1414551 (1/28/16). **Where claimant has not sought employment, partial disability benefits are awarded based on the low end of a labor market survey prepared by Shelli Palmer.** [Silverman/Ward]

***William Holick v. Urgent Ambulance Service*, *IAB No. **not given** (2/9/16).* On a Petition for Review the Claimant's job search effectively counters the labor market survey and he is awarded temporary partial disability based on his "successful job search".** [Gambogi/Sharma]

PERMANENT IMPAIRMENT

***Brian Fox v. New Castle County*, *IAB No. 1366565 (2/22/16).* The Board awards a 38% impairment to the cervical spine based upon the testimony of Dr. Jeffrey Meyers and rejecting the 14% impairment rating offered by defense medical expert Dr. Brian Shinkle.** [Kimmel/Tickle]

***Bernadette Johns v. State of Delaware*, *IAB No. 1414414 (3/17/16).* Where the claimant is able to return to work full duty back to a heavy job, a claim for 7% impairment to the lumbar spine rated by Dr. Conrad King is denied with the Board commenting that it did not find the claimant's testimony "compelling or credible" with the further observation that "this was a minor injury, a sprain/strain that resolved."** [O'Neill/Nardo]

***Michael Henderson v. New Castle County*, *IAB No. 1366297 (3/17/16).* On a DACD seeking permanency, Dr. Shinkle's 13% lumbar rating trumps Dr. Rodgers' 21% with the Board also commenting that there is no permanency apportionment for a pre-existing asymptomatic degenerative disc disease.** [Pratcher/Tickle]

***Amer Bhatti v. State of Delaware*, *IAB No. 1387532 (1/27/16).* Dr. Grossinger's 20% impairment rating to the head and central nervous system combined resulting from a post-concussion syndrome is flatly rejected by the Board with the Board commenting as follows: "Dr. Townsend's account of claimant's medical history, Dr. Townsend's opinions regarding the impact of claimant's retinitis pigmentosa diagnosis and Dr. Townsend's opinions citing the reasons why Dr. Grossinger's permanent impairment rating is flawed were highly convincing...the Board accepts Dr. Townsend's representation that Claimant did not have a proven cognitive deficit, nor would Claimant's complaints relate to the work accident." The Board also agreed that Dr. Grossinger misapplied the AMA Guides.** [Gambogi/Julian]

***Wanda Beardsley v. Lowe's*, *IAB No. 1379744 (1/28/16).* The Board awards a 23% impairment to the cervical spine embracing the opinion of the defense medical expert Dr. Townsend over the opinion of Dr. Bandera and specifically stating that the DRE model for impairment should be used for a fusion and the Range of Motion model for a discectomy, noting that with a relatively mild residual neck complaint and neck function, the application of the DRE produces an inflated result.** [Silverman/Harrison]

***Cynthia Boone v. PHC Meadowwood*, IAB No. 1404996 (1/19/16).** **The Board denies a claim of 20% impairment to the head based on alleged cognitive impairment and instead awards 10% for headache with Dr. Steven Grossinger testifying on behalf of the claimant and Dr. John Townsend testifiying on behalf of the employer.** [Carmine/Harrison]

PRACTICE AND PROCEDURE

***Josue Polanco v. Port to Port International*, IAB No. 1431892 (3/8/16) (ORDER).** **IAB refuses to issue a pre-Hearing ruling granting the claimant's Motion to Preclude assertion of a forfeiture defense, stating that "whether Employer will be able to establish the factual support for the defense is a factual issue for the Hearing on the merits."**
[Pruitt/Andrews]

***Josue Polanco v. Port to Port International*, IAB No. 1431892 (3/8/16) (ORDER).** **Evidence of prior citation or warnings given to Claimant for speeding or engaging in reckless driving are admissible, not to show that Claimant *was* speeding but that he knew he was not supposed to be traveling at such speed, as relevant evidence to the determine of whether Claimant's action on the date in question were done with deliberate and reckless indifference.** [Pruitt/Andrews]

***Josue Polanco v. Port to Port International*, IAB No. 1431892 (3/8/16) (ORDER).** **The claimant's driving record does not equate to evidence of speed at the time of the work accident.** [Pruitt/Andrews]

***Josue Polanco v. Port to Port International*, IAB No. 1431892 (3/8/16) (ORDER).** **Accident reconstruction expert is precluded from offering testimony regarding whether or not claimant's actions or conduct were reckless in nature; Dr. Andrews may offer a scientific opinion concerning the physical details of the 8/24 work accident, including the speed of the vehicle and the effect of other physical factors in causing the accident but not on the issue of "deliberate and reckless", with the Board commenting that "it is beyond the scope of a truly scientific opinion to render such a value judgment as to Claimant's actions."**
[Pruitt/Andrews]

***Josue Polanco v. Port to Port International*, IAB No. 1431892 (3/8/16) (ORDER).** **With regard to Claimant's objection that "unlike employer, he cannot to hire an accident reconstructionist to provide contrary testimony," noting that such expert fees would not be reimbursable even if Claimant prevails, "the Board simply cannot rule that Employer is prohibited from mounting a defense simply because Claimant's finances are bad."**
[Pruitt/Andrews]

***William Burns v. RNH Installations*, IAB No. 1427723 (2/22/16).** **Where the claimant is represented, his conversation with the claims handler without the permission of his attorney is not admissible- - "While the Board believes that Mr. Yekstat was personally unaware that claimant was represented at the time, the Board agrees that the principles of the attorney-client relationship required that Mr. Yekstat be prohibited from testifying concerning the unpermitted conversation."** [Freibott/Ellis]

***Chester Stallings v. Arrow Leasing*, IAB No. 1431665 (2/15/16) (ORDER).** **A Motion in Limine to exclude testimony/evidence concerning the claimant's blood alcohol level at the time of a work-related motor vehicle is denied.** [Butler/Ament/Swift]

***Chester Stallings v. Arrow Leasing*, IAB No. 1431665 (2/15/16) (ORDER).** **Motion in Limine to exclude evidence of claimant's prior criminal history for drug offenses and driver's license revocation is granted as being "more prejudicial than probative."** [Butler/Ament/Swift]

***Bobby Sweetman v. Willis Chevrolet*, IAB No. 1436026 (3/15/16) (ORDER).** **An employer may file a Petition for Review based on "failure to sign Agreements and Final Receipts" for the purpose of resolving a dispute as to the content of the Agreement and in this case while the employer is paying total disability on a "payment without prejudice" basis.** [Friedman/Andrews]

***Marianne Rivera v. Cintas Corporation*, IAB No. 1306581 (2/10/16) (ORDER).** **An employer cannot compel a delay in a scheduled surgery, and as such the Board denied the employer's emergency Motion to Compel.** [Silverman/L. Wilson]

***Kent Robertson v. State of Delaware*, IAB No. 1396702 (2/3/16) (ORDER).** **Where the merits Hearing entertains both a permanency DACD and a Utilization Review appeal, the claimant's medical witness fee for permanent impairment is awarded as a cost against the employer even though the permanency claim is denied.** [Dunkle/Menton]

***Nickeya Harris v. Food Liner*, IAB No. 1414551 (1/28/16).** **The late production of Dr. Morgan's records is considered "trial by ambush" and the employer's Motion to Strike a portion of the DME cross exam is granted with the following commentary: "The Board finds the presentation of medical records with opinions from another physician in this way is improper. Clearly it appears that counsel for claimant is trying to bootstrap the opinion of Dr. Morgan into this Hearing. Dr. Morgan has not been listed as a witness nor have his records been previously provided to Employer's counsel, in fact Dr. Stephens testified that he had not seen them prior to being asked about them at deposition. It is clearly prejudicial, unfair, and amounts to trial by ambush by allowing testimony concerning these records and by extension, Dr. Morgan's opinion. Consequently, the Board will grant the**

Motion and strike the testimony and any reference to Dr. Morgan's records from the record. [Silverman/Ward]

Brian Hollins v. Christiana Care Health Services, IAB No. 1394083 (1/26/16). **Where employer for the first time raises in closing arguments that Claimant, following settlement negotiations had entered into an Agreement acknowledging contusions to the low back and right hip which "had resolved" and where such argument was not raised on the Pre Trial Memorandum or at any point prior to closing, the Board agrees that lack of notice to Claimant of employer's argument is reason enough not to allow it.** Basic due process requires that a party receive some notice as to what issues are being contested at Hearing in order to prepare a response "trial by surprise is unprofessional and to be discouraged, not encouraged." The Board nonetheless went on to find as a factual matter the claimant's compensable right hip injury did resolve shortly after the work accident and in so doing, denied a 2015 surgery. [Castro/Newill]

Ernest Webb v. State of Delaware, IAB No. 1416801 (1/7/16) (ORDER). **The Board will not order a Termination of partial disability on a Motion for Summary Judgment based on a treating doctor's releasing for full duty.** [Amalfitano/Swift]

TERMINATION

Shirley Latham v. State of Delaware, IAB No. 1371799 (3/14/16). **The Employer's Petition for Review is denied where claimant can at best work 2 hours at a time with a specific finding that "claimant is not medically employable".** [Donovan/Durstein]

Ciprian Rivera v. Lumber Liquidators, IAB No. 1318716 (3/9/16). **In granting the Employer's Termination Petition, the Board observes that the employer is not required to show a "change in condition" but simply that the disability has ended.** [Lutness/Morgan]

Ciprian Rivera v. Lumber Liquidators, IAB No. 1318716 (3/9/16). **A return to work does not require the absence of pain.** [Lutness/Morgan]

Carol Layton v. Allen Hatchery, IAB No. 1375419 (1/11/16). **The Board enters an order compelling the Claimant to cooperate with an offer of vocational placement services further commenting that the Board had previously determined the Claimant was physically capable of working with restrictions but was a prima facie displaced worker due to a low IQ and the need for assistance in finding employment.** [Green/Baker]

Walter Johnson v. George Weston Interbake, IAB No. 1219123 (1/11/16). **The Employer's Termination Petition is denied with regard to a 60 year old post-operative times 6 with a recommendation that he submit to a Functional Capacity Evaluation.** [Owen/Tatlow]

TOTAL DISABILITY

Reginald Martin v. Capital Uniform, IAB No. 1428903 (2/25/16). **On a DCD Petition awarding total disability benefits, the Board rules that Hoey does not apply and that a claimant with a transient injury has no duty to seek out other work as long as the employment at time of injury has not been terminated.** [Amalfitano/Richter]

UTILIZATION REVIEW

Wendy Justice v. Genesis Health Care, IAB No. 1356757 (2/18/16). **The Board reverses a Utilization Review non-certification of a 6th spinal surgery performed by Dr. Zaslavsky after the claimant showed a diagnostic response to a C5 selective nerve root block.** [McDonald/Harrison]

Larry Crews v. Fairville Management, IAB No. 1430287 (2/10/16) (ORDER). **Where the IAB at a Hearing on the merits has ruled in favor of a compensable injury to include a finding that medical treatment to date is reasonable and necessary, the employer cannot, on Motion for Re-argument, reserve the right to submit the medical bills to Utilization Review- - "the Superior Court has determined that if causation is before the Board, that it must also determine the reasonableness and necessity of medical treatment expenses" pursuant to Poole v. State of Delaware.** [Amalfitano/Richter]

Carl Allen v. Debro Inc., IAB No. 1098467 (2/29/16). **The Board affirms a Utilization Review certification of pain management treatment with Dr. Antony but agrees that future urine drug screening is no longer necessary "since claimant has not abused his medication over the years and he now takes the medication on an as-needed basis, a negative drug screen will not have much meaning."** [Schmittinger/Menton]

Larry Edwards v. Bay Shippers, IAB No. 1409634 (3/2/16). **The Board reverses a Utilization Review non-certification of Dr. McIllrath's manipulation under anesthesia: "The Board notes that because of his occupation, claimant does not have the ability to take most pain medications that would typically accompany more active and painful treatment, such as physical therapy or chiropractic care.** This is something that is clearly a major issue for Claimants' treatment regimen, because claimant is unable to work while taking most medications that would typically otherwise be prescribed. It is for these reasons that the Board was convinced by Dr. McIllrath that Claimant's atypical presentation necessitates some deviation from the guidelines, such as the MUA treatment at issue." [Warren/Hunt]

***Jose Lopez v. TNT Construction*, *IAB No. 1416637 (1/11/16).* The Board reverses a Utilization Review non-certification of pain management treatment with Dr. Balu to include an award of "plasma rich protein injections"- - "although PRP injections are relatively new and are not discussed in the Guidelines, the Board finds that they are not experimental treatment and they are reasonable to try in this case."** [Dunkle/Durstein]

***Kathy Melvin v. Playtex Apparel*, *IAB No. 772541 (1/28/16) (ORDER).* Where the argument is that the treatment in question is "unreasonable and unnecessary" that treatment must be referred to Utilization Review or the medical bills are owed.**

***William Middleton v. American Infrastructure*, *IAB No. 1422158 (1/27/16).* The Board reverses a Utilization Review non-certification of treatment with Dr. Ginsberg and Dr. Zaslavsky.** [O'Neill/Lockyer]

***Donald Catts v. Horizon Services*, *IAB No. 1381907 (2/10/16).* On a Utilization Review where the issue is at least implied, it is not a problem that the defense medical expert report does not expressly state that the treatment in question is "unreasonable and unnecessary".** The Board made this observation in the context of denying Claimant's Motion to Exclude the testimony of DME doctor Eric Schwartz based on his report not providing any opinion as to reasonableness/necessity of the specific treatment after which he testified at this deposition specifically that the treatment was not reasonable or necessary. The Board squarely rejected the claimant's argument that he had been prejudiced in his ability to effectively cross-examine the witness, adopting the Employer argument that there could be no question that the sole reason Claimant was seen by Dr. Schwartz was for purposes of a UR appeal. [Krayer/Richter]

Hazel Hurtt v. Johnson Controls*, IAB No. 1348036 (1/12/16).* The Board affirms a Utilization Review certification of Dr. Balu treatment including compound cream. [Long/Lukshunas]

***April Hallett v. Markatos Services*, *IAB No. 1424295 (1/11/16).* The Board affirms a Utilization Review non-certification of chiropractic treatment rendered by Dr. McIllrath.** [Bustard/Richter]

VOLUNTARY REMOVAL FROM THE LABOR MARKET

***Caroline Thompson v. State of Delaware*, *IAB No. 1396739 (1/25/16).* The Board grants the Employer's Termination Petition and denies any benefits for partial disability based on a finding of voluntary removal from the labor market commenting that this was not a case where the claimant was told to retire or face termination and in fact the claimant filed for a regular service pension instead of a disability pension with no other evidence the claimant faced termination or that the work injury was the reason for her retirement.** [Ji/Rimmer]

APPELLATE OUTCOMES

***Roos Foods v Guardado*, C.A. No. S15A-05-002 ESB (1/26/16).** **At issue in this appeal was the application and extent of the Supreme Court opinion from Campos v Daisy Construction Company (2014) that addressed the interplay between the Delaware worker's compensation system and benefits for undocumented aliens. In this case, the Board denied a Petition for Review filed by the employer seeking termination of total disability benefits.** The claimant had a compensable work injury to her wrist and was released to light duty with other restrictions. The claimant could not speak English, had the equivalent of a high school degree and was not authorized to work in the U.S. The Board found that the claimant was medically employable but was a *prima facie* displaced worker and therefore legally totally disabled. A labor market survey was rejected as it did not take into consideration the claimant's lack of legal work status. The employer appealed and the Superior Court affirmed the Board's decision. The court found that the claimant's inability to legally work would make it difficult for her to find a job. Campos was cited to for the proposition that any difficulty of a claimant finding work due to being undocumented is appropriately borne by the former employer. **Matter pending before the Supreme Court.** [Schmittinger/Baker]

***LaRue v Evraz Claymont Steel*, C.A. No. N15A-07-003 PRW (2/10/16).** **The claimant filed an appeal from the Board's decision on attorney's fees after finding for the claimant that a low back injury was causally related to an acknowledged 2007 work accident. Based on the language of 19 Del. C. 2320, the Board awarded "the lesser of $9,400.00 or 30% of the actual award."** Following an employer motion, the Board clarified that the attorney's fee award was $5,417.87. This took into account the actual award of medical expenses of $2,095.58 plus nonmonetary benefits. On appeal, the claimant argued that the Board failed to properly analyze the Cox factors. The court affirmed the Board decision. It was held that the Board does not need to isolate and analyze each of the Cox factors. The decision simply must demonstrate to the reviewing court that there was consideration of the Cox factors. [Freebury/Frabizzio&Skolnik]

***Gillette v. Amazon.com*, C.A. No. N15A-02-008 DCS (1/22/16).** **The claimant filed a Petition to Determine Compensation Due alleging a thoracic spine injury occurring on 8/4/14. The Board concluded that there was no work related accident and denied the Petition.** The claimant challenged the decision on appeal, claiming in part that the Board failed to properly evaluate whether a work injury aggravated her pre-existing back condition. The Board noted that there was substantial evidence in the decision from the combined medical and factual evidence that no work accident occurred as alleged. Once the Board found that no accident occurred, there was no reason to analyze whether there was any aggravation to a pre-existing condition. With there being no work-related event and no claim of cumulative trauma, the claimant did not meet her burden of proof. As such, the Court affirmed the Board's decision. **[**Schmittinger&Dunkle/Ellis]

***English v Reed Trucking*, C.A. No. N15A-05-007 PRW (3/24/16).** **In a "battle of the experts", the Board accepted the opinions of defense expert Dr. Gelman over the claimant's expert Dr. Rodgers on the issue of permanent impairment. Dr. Rodgers relied on a range of motion comparison to the uninjured shoulder to reach his rating.** One persuasive factor to the Board was that the uninjured shoulder had limitations as well and questioned the use of the range of motion method. The Board determined that use of the 6th edition of the AMA Guides was more accurate for determining permanency here as it contained a rating most specific to the

claimant's injury and surgery. A physical examination done by Dr. Rodgers at the time of hearing was not convincing. On appeal, the claimant asserted that the Board's decision did not provide proper explanation of how it reached a permanency rating concerning the uninjured shoulder and failed to give proper weight to Dr. Rodger's exam at the hearing. The court held that the medical testimony of the accepted doctor represents sufficient competent evidence and affirmed the decision. [Nitsche&Pratcher/ Andrews]

AFL Network Services v. Thomas Heglund, C.A. No. N15A-01-009 ALR (4/18/16). **The claimant filed a Petition to Determine Compensation Due, seeking payment for a neck surgery with Dr. Bose. There were two prior compensable neck surgeries. The employer challenged the new proposed surgery as being unreasonable and unnecessary based on the opinion of Dr. Rushton.** A Hearing Officer after reviewing the evidence concluded that the surgery would be unreasonable/unnecessary. The case was remanded for additional consideration by the Superior Court as the court believed the decision was not supported by substantial evidence. On remand, the Hearing Officer once again found based on the evidence that the surgery would be unreasonable. The claimant appealed for a second time. The court found that the decision below was not consistent with the factual findings and reversed the denial of surgery. In Hegland III, the Hearing Officer granted the petition for surgery and the employer appealed. The court affirmed Hegland III. Although the Board is permitted to accept the testimony of one expert over another, the court explained that the Board should not have determined the reasonableness of a proposed surgery based in part on whether it was likely to have a successful outcome. **Matter pending before the Supreme Court.** [Nitsche&Pratcher /Wilson]

UTILIZATION REVIEW DECISIONS

April Hallett v. Markatos Services, IAB Hearing No. 1424295 (1/11/16). **The claimant injured her neck and back in a September 22, 2014 work accident. Claimant sought chiropractic treatment from Dr. Matthew McIlrath which exceeded the thirty visits allowed by the Practice Guidelines. Employer requested UR of Dr. McIlrath's treatment from January to March of 2015 that exceeded the thirty visits allowed. The UR company non-certified the challenged treatment and claimant petitioned the Board for *de novo* review.** Employer disputed the reasonableness and necessity of the treatment at issue based on the opinions of Dr. Elliot Leitman, who does not believe in the benefits of chiropractic manipulation. Claimant had preexisting neck and low back injuries for which she was treating extensively leading up to the work accident. The employer contended that the claimant had returned to baseline and therefore the chiropractic treatment at issue was not causally related to the work accident. While acknowledging that the evidence appeared to support that the claimant may have returned to baseline in March of 2015 (when she unilaterally stopped treating with Dr. McIlrath before returning 6 months later), the Board determined that by submitting medical treatment to UR, the employer conceded the causal relationship of the specific medical treatment submitted to UR. However, the Board ultimately found that Dr. McIlrath's chiropractic treatment was not reasonable or necessary. The Board noted that during the two months of treatment at issue claimant's pain level remained the same; her medications were not

reduced; she continued to work full-time, full-duty; and Dr. McIlrath did not document any objective functional improvement in terms of physical findings specifically resulting from his treatment. [Bustard/Richter]

***Hazel Hurtt v. Johnson Controls*, *IAB Hearing No. 1348036 (1/12/16).* The Board denied in its entirety employer's appeal from a UR certification of Dr. Ganesh Balu's medical treatment. The claimant injured his left ankle in a December 31, 2009 work accident and subsequently underwent two left ankle surgeries in 2012.** Claimant began treating with Dr. Ganesh Balu in December 2013. The employer requested UR of Dr. Balu's treatment, including prescription medications and a topical cream compound, from May 2015 ongoing. The UR determination certified Dr. Balu's ongoing medical treatment as being compliant with the chronic pain treatment guidelines. The employer filed a UR appeal petition with respect to the Topiramate (aka Topamax) and the topical cream compound. The claimant also filed a DACD petition seeking compensability of Dr. Balu's ongoing treatment and payment of outstanding bills. Based on the testimony of its medical expert, Dr. David Maine, the employer argued that using Topamax or the cream is not reasonable or necessary because they are used to treat conditions the claimant does not have, and that the claimant's pain could be better controlled by using other oral medications and injections instead. Employer also contended that Dr. Balu has a financial interest in prescribing the cream over prescribing oral medication because the cream is made in his office. The Board acknowledged employer's arguments and also recognized that throughout the course of Dr. Balu's treatment, claimant's complaints, physical exam findings, medications, dosages, and pain ratings have remained essentially the same. However, the Board noted that the prescriptions at issue including the cream were found to be compliant with the Practice Guidelines specifically to treat the claimant. The Board ultimately accepted Dr. Balu's testimony that his medication regimen was keeping the claimant stable and that the medication was appropriately prescribed. While claimant's medication dosages had not changed since he started treating with Dr. Balu, the cream has enabled claimant to maintain a medication regimen involving less oral medication than the alternative. The Board also noted that while it may be true that Dr. Balu has a financial gain in prescribing the cream, the alternative to claimant using the cream would be to take more oral medication than he was currently taking. [Long/Lukashunas]

***William Middleton v. American Infrastructure MD, Inc.*, *IAB Hearing No. 1422158 (1/27/16).* The Board granted claimant's consolidated petitions, which included a DCD petition for compensability of a lumbar decompressive laminectomy surgery on the L3 to S1 levels performed by Dr. James Zaslavsky, and a UR appeal petition for *de novo* review of a UR non-certification of lumbar injection treatment with Dr. Adam Ginsberg.** Dr. Zaslavsky testified on behalf of the claimant and Dr. Andrew Gelman testified for the employer. The Board found the opinions of Dr. Zaslavsky to be more convincing than those of Dr. Gelman and determined that the work accident caused acute injuries to claimant's lumbar spine as well as accelerating and aggravating a pre-existing dormant condition. In reaching its decision, and in rejecting Dr. Gelman's degenerative causation argument, the Board applied the standard of causation espoused by the Delaware Supreme Court in *Blake v. State of Delaware*, Del. Supr., No. 477, 2001, Order at ¶ 4 (Mar. 12, 2002) ("The proper standard … is whether the surgery would have been required *at that time* but for the accident"). The Board also reversed the UR non-certification of the injections performed by Dr. Ginsberg and found that the injections were

reasonable and necessary in this case. Moreover, the Board specifically noted that it agreed with Dr. Zaslavsky that the treatment was provided within the applicable chronic pain and low back treatment guidelines. [O'Neill/Lockyer]

***Linda Perkins v. State of Delaware*, *IAB Hearing No. 1379405 (2/8/16)*.** **The employer appealed two UR certification decisions concerning chiropractic treatment and physical therapy with Dr. Arnold Glassman's office, and acupuncture treatment provided by Dr. Barry Bakst. Dr. Lawrence Piccioni testified on behalf of the employer and opined that the chiropractic care, physical therapy and acupuncture treatment were not reasonable or necessary because of the duration of claimant's complaints, the lack of improvement in her subjective pain scores and because the treatment is, at best, only palliative and not curative.** The Board reversed the UR certification of the chiropractic and physical therapy, noting that the UR determination mistakenly believed that such care had not previously been tried. The Board agreed with Dr. Piccioni that, having had years of chiropractic care and physical therapy, the claimant was able to maintain her condition with home exercises. The Board affirmed the UR certification of the acupuncture, noting the situation was considerably different as the acupuncture treatment had proven most beneficial throughout claimant's history. [Galbraith/Menton & Panico]

***Donald Catts v. Horizon Services, Inc.*, *IAB Hearing No. 1381907 (2/10/16)*. A Hearing Officer sitting in place of the Board reverses two UR non-certifications of palliative treatment with Dr. Ann Kim, which included cervical and lumbar injections, approximately thirty massage therapy sessions, and occasional Tramadol and Diclofenac for flare-ups.** Dr. Eric Schwartz testified for the employer. Claimant raised a preliminary motion to exclude Dr. Schwartz's testimony because his report contained no opinion as to the reasonableness and necessity of the specific treatment that was the subject of the UR decisions, writing instead that claimant did not require further medical care other than occasional use of Ultram (a/k/a Tramadol). However, during his deposition Dr. Schwartz opined that the treatment was not reasonable or necessary. Claimant argued that he was prejudiced in his ability to effectively cross-examine Dr. Schwartz. The Hearing Officer disagreed, finding that the objection goes to the weight, not the admissibility of Dr. Schwartz's testimony. The Hearing Officer further noted that Dr. Schwartz's opinion that the treatment was not reasonable or necessary was subsumed in his overall opinion. The Hearing Officer ultimately determined that Dr. Kim's treatment was reasonable and necessary as it provided significant relief for the claimant, sometimes lasting up to one year, and enabled him to continue working in a heavy duty position, as well as take less pain medications. [Krayer/Richter]

***Wendy Justice v. Genesis Healthcare*, *IAB Hearing No. 1356757 (2/18/16)*. The Board reverses a UR non-certification determination regarding a sixth cervical spine surgery, consisting of an anterior cervical fusion with left C5 nerve root decompression performed by Dr. James Zaslavsky. Dr. Andrew Gelman testified on behalf of the employer.** The Board determined that the surgery was compensable, accepting Dr. Zaslavsky's opinion that the surgery was recommended after claimant received a diagnostic injection, her MRI results showed her condition was worsening at each visit, and she was experiencing increased weakness and neurological changes. [McDonald/Harrison]

***Carl Allen v. Debro, Inc., IAB Hearing No. 1098467 (2/29/16)*. The Board denies employer's appeal of a UR certification of pain management treatment with Dr. Manonmani Antony under the chronic pain treatment guidelines. The treatment at issue consisted of prescription medication and periodic facet injections.** Dr. James Noone testified on behalf of the employer. The employer argued that the claimant should be getting his prescriptions from his primary care physician at this point, rather than from a pain management physician, but the Board disagreed, however, finding that claimant has the right to choose his own physician and Dr. Antony is an appropriate choice given claimant's longstanding chronic pain condition. The Board did agree with the employer that claimant no longer needs future urine drug screens since the claimant has been compliant with his medication usage over the years and he now takes medication on an as-needed basis. [Schmittinger/Menton]

***Larry Edwards v. Bay Shippers, LLC, IAB Hearing No. 1409634 (3/2/16)*. The Board grants claimant's appeal of a UR non-certification of chiropractic manipulations under anesthesia ("MUA") provided by Dr. Matthew McIlrath. Dr. Douglas Briggs testified on behalf of the employer. The claimant injured multiple** body parts in a severe motor vehicle accident in which he was ejected through the windshield of the tractor trailer he was driving. Dr. McIlrath performed the MUA over the course of three days and claimant experienced significant pain relief and an increase in mobility for several months. Of particular importance to the Board was the fact that Dr. McIlrath's attempts to actively treat the claimant had largely failed, coupled with the claimant's inability to take pain medication due to his return to work driving a tractor trailer. [Warren/Hunt]

For additional information, or to submit cases for
The Delaware Detour & Frolic or CaseLaw Update,
please contact Cassandra F. Roberts at
302-571-6622 (tel)
croberts@ycst.com

Cassandra's law blog, The Delaware Detour and Frolic, can be accessed at:
http://www.cassandraswcblog.com