DELAWARE WORKERS COMPENSATION
Industrial Accident Board
CASELAW Update
& Appellate Outcomes

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DSBA ANNUAL WORKERS COMP BREAKFAST SEMINAR

IAB DECISIONS

AVERAGE WEEKLY WAGE

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

CAUSATION

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

Eric Burris v. Baltimore Air Coil, IAB #1508549, (11/17/21). A DCD Petition is denied with the Board ruling that a blow to the head with a long delay in the manifestation of subdural hematoma symptoms is not credible as to implicate the work injury with Dr. Dawn Tartaglione, neurosurgeon, testifying on behalf of the Claimant and Dr. John Townsend, neurologist, testifying on behalf of the employer. [Schmittinger/O'Brien]

Tammy Brown v. Integrity Staffing Solutions, IAB #1499064, (6/21/21). Even with multiple pre-disposing factors to include age, BMI, gender, and diabetes, the Board finds in Claimant's favor on the compensability of right carpal tunnel syndrome. Dr. Rasis testified for the Claimant and Dr. Gelman for the employer. [Marston/Bittner]

Shawn Furrowh v. City of Wilmington, IAB #1482316, (6/10/21). Where the Claimant is actively and heavily treating at the time of the work accident, a claim for total knee replacement surgery fails even under *Blake*. The Claimant was actively treating for arthritis in the right knee and had been for some time and as recently as six days prior to the fall, Claimant was back for injections and his knee was swollen. A day prior to the accident Claimant had an injection. A year prior to the accident there is notation that Claimant's right knee was starting to fail and he started visco supplementation injections. Dr. Lawrence Piccioni served as the defense medical expert. [Fredericks/Bittner]

CREDITS AND REIMBURSEMENTS

Matthew Bryant v. Marjam Supply Co., IAB #1481980, (9/28/21). Claimant must reimburse unemployment for benefits received while he has been disabled from work and otherwise entitled to workers comp. [Sharma/Morgan]

Thelma Garcia-Espinoza v. American Bread Company, IAB #1491086, (5/21/21) (ORDER). The Board employs a comparative fault analysis in evaluating an overpayment credit sought by the carrier due to an error in calculating the average weekly wage. The outcome was that the Board apportioned fault 75% to the carrier and 25% to the Claimant such that on a total overpayment of approximately $24,000, the carrier was entitled to a credit at 25% or roughly $6000. [Bustard/Adams]

DISFIGUREMENT

Karen Moore v. Purdue Farms, IAB #1454312, (8/30/21). This case is an example of an award of 150 weeks of benefits to the right upper extremity in a case involving a right arm crush injury, multiple fractures, skin grafting and a 40% PPD. [Lazzeri/Panico]

EMPLOYEE V. INDEPENDENT CONTRACTOR

Allan Sheingold v. C&S Entrerprises, IAB #1507415, (5/11/21). In considering the indicia of an employment relationship involving a construction worker doing general labor, the Board rules that the claimant is an employee. [Donnelly/Sharma]

FINES

Charles Lamb v. Peninsula Oil, IAB #1470033, (11/29/21) (ORDER). The Board imposes sanctions and fines for a Carrier's payment of TTD benefits "erratically" and consistently late, despite the previous Order and fines. "it is a blatant disregard for the law and the Board's Order." [Hendee/Reale]

MEDICAL TREATMENT ISSUES

Micheline Victor v. Delmar Nursing & Rehab Center, IAB #1447871, (4/29/21). The Claimant's Petition to compel payment of a proposed knee surgery is denied based on the risks outweighing the benefits to include complications related to Claimant's diabetes, heart disease, and/or prior stroke. "The Board accepts Dr. Schwartz's opinion that the significant risks for Claimant outweigh the potential for a modest benefit at best and the proposed surgery could even make Claimant's range of motion worse, which would be catastrophic." [Marston/Gin]

Latisha Stainbroook v. Milcroft Senior Center, IAB #1477012, (5/13/21). On a DCD Petition, the credibility of the Claimant and her treating physician fail where there is a second "altered" version of a critical office note with DME doctor Schwartz testifying that "there is never a valid explanation for multiple records over a different temporal time fashion relating to the same medical visit…if the record is not temporal, it should be identified as an addendum with identification of the date the addendum was made." [Marston/Baker]

Matthew Bryant v. Marjam Supply Co., IAB #1481980, (9/28/21). Stem Cell Plasma Rich Protein treatment is denied based on Dr. Gelman's testimony that the treatment is investigational, with unproven efficacy, and not included in the Delaware Practice Guidelines for chronic pain or lumbar spine treatment. Dr. Grossinger has experience providing PRP treatment for his own patients in large joints such as the hips, knees, and shoulder; however, he is not an orthopedist and does not have experience with stem cell PRP treatments for the spine. [Sharma/Morgan]

Joseph Wilson v. Gingerich Concrete, IAB #1215102, (5/6/21). Where the physician allows his provider's certification status to expire, his surgery bill is not compensable in a case involving Dr. Bose, who performed surgery on Claimant more than a full year after the lapse of his certification. [Schmittinger/Baker]

PERMANENCY

Austin Tidwell v. Ferris Home Improvements, IAB #1493242, (12/22/21). On a DACD Petition seeking an award of 12% impairment to the left upper extremity for a work injury which was post-operative times two, the Board is persuaded by the defense medical expert that the appropriate award is 3% with the comment that "permanent impairment ratings are based on loss of function and not on the severity of the injury at the time of the injury…as a result of the surgeries, the fractures despite their severity were fixed and Claimant's bones are anatomically aligned." [Long/McGarry]

PRACTICE AND PROCEDURE

Marvin Velazquez v. Mario Malone Enterprises, IAB #1499984, (6/17/21) (ORDER). Where the basis of the Termination Petition is documented inacurately in error, the carrier and not The Fund pays TTD benefits until the error is corrected. In this case the employer initially filed a PFR on the basis of an actual return to work as opposed to a physical ability to return to work. [Mason/Greenberg/Slattery]

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

David Johnson v. Delaware Horse Racing Associating, IAB #1495549, (6/1/21) (ORDER). The DOL has the right to reject documents which are incorrect on their face. [Newill/Slattery)

Estate of James Achcet v. Jesco, IAB #1474056, (6/8/21). If the treating physician changes his permanency opinion after the issuance of his initial report, he is expected to issue an addendum report. In this case the Board declined to strike the doctor's testimony given that Dr. Meyers reduced his PPD rating and "basically impeached his own opinion by disavowing his own impairment report. His revised opinion

shows that his previous impairment rating was, to say the least, over-inflated." [Allen/Skolnik]

RESOLVED/BACK TO BASELINE

Jorge Zuniga v. First State Insulation LLC, IAB #1489302, (4/1/21). On a Petition for Review seeking to terminate partial disability, the Board grants the PFR but declines to rule that the work related injury has resolved. "The Board will not make a blanket statement when no additional treatment has been ordered or is specifically at issue…Likewise, the Board is not going to rule on any potential for permanent impairment as First State requested since Claimant has not been evaluated for any PPD." [Vest/Trapp]

Ivor Grenardo v. Employers Outsourcing Inc., IAB #1506062, (8/30/21). Where Claimant was already actively treating prior to the work accident, the Board finds a compensable aggravation that has since "resolved". [Wilson/Wilson]

SECTION 2353 FORFEITURE

Lonny Jamison v. First Group America, IAB #???? (11/29/21). The Claimant's failure to follow the defense medical expert's suggestion as to medical treatment without an actual offer of services by the Carrier does not equate Section 2353 forfeiture – "It is not reasonable to expect Claimant to react to something recommended in a report from the defense doctor without some further affirmative action by the Employer." [Hemming/Skolnik]

Michelle Howard v. Avalanche Strategies, LLC, IAB #1497645, (5/6/21). Declining a Section 2353 job offer for personal reasons disqualifies the Claimant for an award of Temp Partial – "Avalanche offered Claimant a job within her restrictions at no wage loss, which she declined for personal reasons; therefore, the Board finds Claimant will not suffer a loss in earning capacity and is not entitled to partial disability benefits. The Claimant was living three hours away in Pennsylvania by then, and without transportation, so she declined the position. [Lazzeri/Bittner]

TERMINATIONS

Trayvonne Baker v. Delaware Last Mile Logistics, IAB #1488061, (2/4/21). The job search focused on military positions is not reasonable with the Board commenting that "Claimant conducted a job search mostly limited to military positions similar to the full time military position he had left in Georgia before

moving to Delaware. While it may be understandable that Claimant would want to find a military job similar to the one he held, the Employer cannot be expected to pay total disability benefits until one of those job prospects came to fruition." [Owen/Ellis]

Robert Peck v. La Vida Hospitality, IAB #1490311, (1/8/21). The Claimant's self-sabotaging cover letter renders his job search unreasonable and the employer's PFR is granted. "While some of what Claimant shared may have been eventually subject to sharing in some form or to some extent, Claimant preemptively laid out what appeared to be the most negative attributes of his present situation, physical and otherwise, that one might imagine. In fact, it would seem just as likely that anyone who received this letter assumed, as this Board did, that Claimant does not really want to be considered for employment." [Denham/McGarry]

UTILIZATION REVIEW APPEALS

Dorothy Wyatt v. State of Delaware, IAB #1277430, (6/9/21). A Utilization Review non-certification of narcotics prescribed by Dr. Swaminathan is affirmed with the Board ruling that high-dosed opiates in combination with benzodiazepines is unsafe. Dr. Brokaw served as the defense medical expert. [Schmittinger/Klusman]

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

Angeles Vergara v. Washington Street Ale House, IAB #1451481, (10/26/21). A Utilization Review Certification of a hardware removal surgery is affirmed with the Board giving deference to Dr. Eskander as the treating surgery as opposed to Dr. Schwartz, the defense medical expert. [Owen/Carmine]

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

VOLUNTARY REMOVAL FROM LABOR MARKET

Obadian Adeleye v. US Security Associates Holding, IAB $1460014, (6/1/21). In this case the Board awarded the Claimant partial disability on a PFR, commenting that receipt of Social Security alone does not equate to a withdrawal from the labor market, nor does a stated intent to retire at a certain age. At the time of the Hearing the Claimant was 70 years of age and of note, Claimant was already on Social Security prior to his employment with US Security. [Laursen/Logullo]

APPELLATE OUTCOMES

Browning v. State, No. 173, 2021 (1/10/22). The Supreme Court affirmed a Board decision finding that the claimant was not within the course and scope of employment and not on the employer's premises at the time of her accident. The claimant was a Superior Court bailiff in Kent County. She parked on a public street on her way to work. When she stepped onto the grass between the road and sidewalk she fell into a sinkhole. That area was under the control of the City of Dover, not the State. She had also not crossed onto the courthouse property line. [Stanley/Morris-Johnston].

Dutton Bus Svc Inc v Garrison., C.A. No. S21A-05-003 MHC (12/21/21).

The employer challenged a Board decision that awarded a statutory max attorney's fee of $11,214.90 on the basis that it was excessive and should be reduced. The court disagreed and affirmed the fee award. There was no abuse of discretion as the Board said it considered every Cox factor. The Board's analysis of the Cox factors did not need to be abundantly detailed. [Marston & Donovan/Baker].

Harris v Citigroup., C.A. No. N20A-11-004 JRJ (10/28/21).

This claimant appealed both a Board order that denied her request for continuance as well as a decision that denied a DCD petition. The claimant cancelled her doctor's deposition nine days prior to hearing and sought a continuance after the treating physician declined to offer favorable testimony on the issue of causation. The Board denied the continuance as this did not qualify under Board Rule 12 as an unforeseen circumstance that would prevent a full and fair hearing. It was the claimant that was responsible for scheduling her expert for deposition without knowing his opinion on causation. Therefore, the court agreed there was not good cause to support a

continuance. The Board decision denying the petition was also supported by substantial evidence. [Marston/Baker].

Lawson v Amazon.com, C.A. N21A-01-006 DCS (10/29/21).

The Board granted the employer's Petition for Review and found that the claimant sustained only a low back strain that resolved. The claimant contended on appeal the Board did not give proper weight to a prior Board decision that denied an employer's petition seeking rescission of the parties Agreement and referral of Claimant to the Fraud Prevention Bureau. Specifically, it was argued that the outcome was contrary to the 'law of the case' and involved 'claim splitting." The court disagreed and affirmed the decision. The most recent Board decision considered additional facts, new testimony and the novel issue of whether or not the injury resolved. Actions under Section 2347 did not implicate claim splitting as the statute permits employers to file petitions for review to address whether a work injury has resolved. [Silverman & McDonald/Ellis].

Sheppard v Allen Family Foods. C.A. S20A-07-001 RHR (9/29/21).

[Note- this case is pending on appeal before the Supreme Court]

This was a procedural dispute on appeal concerning whether the employer should have requested Utilization Review (UR) to challenge the compensability of narcotic medications. The employer filed a petition for review after receiving a DME report finding that the medications were not reasonable or related to the work accident. Mid-hearing, the claimant presented a motion for directed verdict due to no UR being requested to address the medications. The Board denied the motion and ultimately granted the petition, finding that the narcotic medications were not reasonable or necessary. The claimant on appeal argued that the employer should have requested UR before the issues came before the Board, and that the employer failed to prove a change of circumstances since a prior Board decision in 2014 was issued. The court did not agree. The employer was entitled to file a petition without requesting UR since the defense expert provided a good faith causation defense. There was evidence of a change in condition from the claimant's noncompliance with medical direction, dishonesty with providers and lack of subjective or functional improvement from the medications. [Schmittinger & Holmes/Morgan]

Alutech United Inc. v Sammons., C.A. N21A-02-001 FWW (8/12/21).

The employer challenged a Board decision that found the claimant sustained compensable injuries. The primary argument on appeal was that the claimant expert's testimony did not meet the standard of reasonable medical probability on the issue of causation. The expert used terms such as 'can be', 'feasible' and

'theoretically', and employer contended such language made the expert's opinion unduly speculative. The court recognized this language as being equivocal, but concluded that the testimony overall constituted substantial evidence of a causation opinion within reasonable medical probability. [Long/Carmine].

Wesley v State., C.A. No. N21A-01-005 JRJ (8/23/21).

Similar to the argument in Sammons, the court considered a challenge to the sufficiency of a medical expert's testimony on the nature and extent of a work injury. The claimant sought reversal of the Board's decision that the work injury was merely a temporary strain/sprain. The Board had rejected the opinion of the claimant's expert that there was a more significant ongoing injury. They also did not accept the defense expert's opinion that there was no work injury at all. They found credible the defense expert's alternate opinion that the claimant sustained at most a strain/sprain. The claimant pointed to the defense expert stating that a resolved strain was a "possible scenario." The court however held that there was substantial evidence to support the Board's determination. Even if the defense expert's statement was speculative, there was additional credible evidence to support the finding that the work injury was a limited-duration strain. [O'Neill/Bittner].

Holloway v State, C.A. No. N20A-07-005 CEB (6/9/21).

This was an appeal of a Board decision finding that a proposed surgery was not causally related to the work injury. The Board determined that the proposed surgery was related in full to pre-existing severe spinal stenosis. The claimant argued that the Board did not properly apply the 'but for' causation standard and noted internal inconsistences in the testimony of the defense expert. The court affirmed the decision, noting that the Board has discretion to accept one expert over another in a 'battle of the experts.' When finding one expert more credible, the Board does not have to reconcile every contradiction or inconsistency in the testimony. As to the causation standard, the Board was not required to cite to any specific case in the decision such as Reese v. Home Budget Center. [Bustard/Bittner].

Padgett v. R&F Metals, Inc., C.A. S20A-11-003 RHR (6/30/21).

The claimant appealed a Board decision finding that a 5th back surgery was not reasonable or necessary. The primary argument was that the Board failed to apply the proper 'but for' causation standard. The claimant has been involved in two non-work related incidents between the 4th and 5th surgeries that had impacted his back. The court affirmed the decision. The Board finding that the intervening injuries were sufficient to break any causal connection was the equivalent of the Board stating that, but for the intervening injuries, the 5th surgery would not have been needed. [Long/Skolnick].

Pierre v Purdue Farms, C.A. No. K20A-11-001 NEP (8/12/21).

[Note- this case is pending on appeal before the Supreme Court]

The case concerned the application of forfeiture under 19 Del. C. 2353. The claimant injured his face after running on the worksite and colliding with a steel pole. The Board agreed with the employer that the claimant forfeited his entitlement to worker's compensation benefits as the injury occurred due to deliberate and reckless indifference to danger. The claimant had previously received repeated warnings not to run in the building. Although the claimant said he was just walking fast prior to the collision, a witness testified that he was sprinting at the time. The court affirmed the Board's decision. There was substantial evidence that the claimant's conduct was deliberate as opposed to thoughtless. He admitted he knew running was a safety violation and provided no testimony to support that his actions were merely thoughtless. Further, although the claimant's proficiency in English was debatable, he admitted he understood the multiple prior warnings he had been given. [Donovan/Panico].

Ingino-Cacchioli v Infiniti Consulting, C.A. No. N20C-12-243 JRJ (8/19/21).

The Superior Court issued an order staying a suit filed by the plaintiff. The plaintiff contended the employer was monetarily liable for the decedent contracting a fatal case of COVID-19 at work. The employer filed a motion to dismiss on the basis that the claim was barred by the exclusivity provision of the Worker's Compensation Act. The plaintiff argued that COVID-19 did not qualify as an occupational disease covered by the Act since COVID-19 did not result from the peculiar nature of the employment and was not associated with his job duties. The court ruled that the Board was the appropriate body to rule on that issue in the first instance. Since a petition was already pending, the court stayed the suit until the Board rules on the issue. [Warner/Elzufon & Alderson].