DELAWARE WORKERS COMPENSATION
Industrial Accident Board
CASELAW Update
& Appellate Outcomes

By Cassandra Faline Roberts, Esq.

John J. Ellis, Esq.

DSBA Workers' Compensation Seminar

September 15, 2020

ADJACENT SEGMENT DISEASE

Janice Kavanaugh v. Compass Group, IAB Hearing 1471024, (5/14/20). The Claimant filed a DACD Petition to compel compensability of an anterior cervical discectomy and fusion C4-C7 to be performed by Dr. Eskander. Employer agreed that surgery at C5-6 and C6-7 was reasonable, necessary and causally related but contests the reasonableness and necessity of the anterior cervical discectomy and fusion at the C4-5 level. Dr. Eskander testified on behalf of the Claimant and Dr. Kalamchi testified as the defense medical expert. The Board accepted the opinion of Dr. Eskander that it was reasonable and necessary to include the C4-5 level because fusing C5-6 and C6-7 would force the C4-5 level to do more work with the further observation that the highest rated of adjacent segment disease is seen after a C5-6 ACDF because of the higher likelihood of progression at C4-5 and C6-7. It did not help that the defense medical expert ultimately agreed that including the C4-5 level was a reasonable approach although it was not the approach he would have pursued. The Board awarded the surgery in its entirety. [Fredricks/Gin]

ATTORNEYS FEE ISSUES

Jose Prado v. City of Wilmington, IAB Hearing 1469180, (4/28/20). A 30-day offer which utilizes a lower comp rate than that which is awarded cannot overcome an attorneys fee entitlement if the matter proceeds to Hearing. [Bustard/Newill]

AVERAGE WEEKLY WAGE

Scott Bell v. Respira, IAB Hearings 1454703 & 1463405, (5/14/20) (ORDER). Where payroll records are unavailable for the 26 weeks prior to the work accident, the Board agrees with the Claimant that it is reasonable to use the W-2 for the prior year noting that the Employer had dissolved its business while the Claimant was able to produce his W-2 forms for the years 2014, 2015, and 2016, demonstrating that the Claimant worked an average of 53.7 hours per week and not the standard 40 hour workweek the Employer utilized in its initial average weekly wage calculations. The reformation of the average weekly wage and related compensation entitlement was applied retroactively. [Gambogi/Baker]

Christina Amrhein v. Baxter Enterprises, IAB Hearing 1477037, (5/20/20) (ORDER). The proper vehicle to challenge an average weekly wage on an already-approved Agreement as to Compensation is with the filing of a Petition for Review pursuant to 19 Del. Code Section 2347. [Trapp/Davis]

CAUSATION

Steven Thurman v. Acosta Sales & Marketing, IAB Hearing 1476709, (8/18/20). With regard to a compensable claim involving injury to the left shoulder and a related surgery, the Board further awards medical treatment expenses for the cervical spine to include a fusion surgery at C5-7 based upon the testimony of Dr. Evan Crain and with the perennial observation that symptoms arising from a potential shoulder and/or neck injury frequently overlap. [Fredricks/Lockyear]

Aurora Gonzalez-Phillips v. Cafe Gelato, IAB Hearing 1466227, (4/30/20). On a claim accepted as compensable for post-concussion syndrome and migraine with further acknowledgement of vision and vestibular issues, the Board denies the Petition seeking to add seizure disorder based on the defense testimony of Dr. John Townsend and rejecting the testimony of Dr. Vincent Schaller. Dr. Townsend testified that he found it significant that Claimant did not lose consciousness in the accident and experienced no loss of time. He noted that with a seizure disorder connected to head trauma, he would expect there to be a more substantial blow to the head with actual traumatic brain findings. [Long/Carmine]

Brian Persaud v. Colonial Electric Supply, IAB Hearing 1479794, (5/20/20). The Board limits bilateral knee injuries sustained in November 2018 to "contusions" and finds that they have both "resolved" for purposes of denying a proposed left knee surgery. Based on the defense medical testimony of Dr. Gelman the Employer disputed that the Claimant's preexisting Osgood Schlatter Disease was aggravated, exacerbated, or accelerated to prompt the need for left knee surgery in regard to the work accident. Dr. Jeremy Axe testified on behalf of the Claimant and Dr. Gelman for the Employer with the Board embracing Dr. Gelman's testimony that both the right knee and left knee contusions resolved within a few weeks of the workplace trauma. [Heesters/Roberts]

Joseph Subach v. PBF Energy Partners, IAB Hearings 1384482 & 1391175, (5/26/20). On a DACD Petition seeking compensation for a left total knee replacement proposed by Dr. Dellose due to overuse of the left knee given the initial right knee injury causing a limp, the Board gave deference to Dr. Dellose who explained that pain prompts a compensatory type of gait to take the force off the side that is hurting the most and that in this case, Claimant was using the left knee to brace for the weight of his body. The altered gait was well-documented in the medical records dating back to 2012. This decision also includes a comprehensive discussion of how Blake v. State operates in tandem with Reese v. Home Budget Center. [Karsnitz/Carmine]

Lisa Webb-Ruby v. Cigna Corporation, IAB Hearings 1448068 & 1491031, (7/9/20). The cumulative detrimental effect of typing and head movement are competent to produce a surgical neck injury on an already-compensable claim involving bilateral upper extremities. Dr. Boulos testified on behalf of the Claimant and Dr. Ger testified on behalf of the Employer with the Hearing Officer commenting that Dr. Boulos "is a neurosurgeon who treats hundreds of spine patients each year and thus has more specialized expertise in the spine than Dr. Ger, who specializes in the treatment of hands and upper extremities. Dr. Boulos provided a reasonable explanation for how Claimant's repetitive neck movements could have caused the tissue build-up that ultimately caused the spinal stenosis and nerve compression. Dr. Ger may be correct that the degenerative disease in Claimant's spine developed over many years, but that does not preclude work as a substantial factor in the development of her neck pathology, given that the work activities continued over many years as well." [Owen/Tatlow]

Linda Callahan-Terry v. State of Delaware, IAB Hearing 1473826, (4/29/20). The Board rules that age-related natural progression is the basis for Claimant's renewal of medical treatment in 2017 and a surgery claimed as causally related to a 2008 work injury is denied. Dr. Tony Cucuzzella and Dr. Mark Eskander testified on behalf of the Claimant, and Dr. Scott Rushton

and Dr. Jeff Meyers testified on behalf of the Employer. Particularly compelling to the outcome was the fact than an MRI in 2015 for the first time showed spondylolisthesis or slippage, of L4 on L5 representing a new finding not present on earlier MRIs and also absent on a CT scan performed in 2014. Dr. Rushton pointed out that facet join arthritis combined with subtle spondylolisthesis is a common structural diagnosis for women in the Claimant's age range, and that women develop the problem four times more often than men. [Welch/Bittner]

Ernest Krygier v. James Miller, IAB Hearing 1489607, (7/13/20). On a DACD Petition alleging a right knee condition requiring a total knee replacement after favoring the right knee following a compensable left knee injury, the Board rules in favor of the Employer based on the testimony of Dr. Gelman, who testifies that based on the medical literature discussing the theory of biomechanics, with the exception of a very extreme antalgic gait or limp, there is no basis to conclude in favor of any injury on the initially uninjured side, and in this case specifically supported by medical record evidence which was devoid of any serious limp following any of the Claimant's compensable left knee surgeries. [Crumplar/Roberts]

COLLATERAL ESTOPPEL

Maikeysha Bratcher v. Integrity Staffing Solutions, IAB Hearing 1496866, (8/6/20) (ORDER). The tender of an Agreement accompanied by a Final Receipt documenting payment of a closed period of total disability, in tandem with a total disability check, does not create an implied open Agreement. [Holmes/Bittner/Slattery]

COMMUTATIONS AND SETTLEMENTS

Kari-Ann Jones v. Universal Health Services, IAB Hearing 1412276, (8/24/20) (ORDER). An agreed-upon commutation with an offer and acceptance is enforceable, even where the Claimant dies before signing the commutation documents. "Accordingly, the Board finds both that the parties did reach a meeting of the minds on the commutation and that the commutation was in the Claimant's best interest at the time that the parties entered into their agreement. It does not serve the purposes of the Workers Compensation Act to allow parties to avoid their commitments based on the fortuity of whether a Claimant dies before the Board acts." [Nitsche/Tatlow]

Jorge Santiago v. Davis Young Associates, IAB Hearing 1402639, (8/14/20) (ORDER). A global commutation is enforceable even if the Claimant discovers after conveying acceptance that there are additional medical treatment expenses of which he was unaware. [Tice/Bittner]

DEFENSE MEDICAL EVALUATION

Benjamin Curtis v. Town of Laurel, IAB Hearing 1223271, (6/15/20) (ORDER). The Board denies the Claimant's request for transportation to attend the defense medical evaluation based on his allegation that his vehicle is unreliable. Employer previously provided

transportation at a cost of $682.65 to a prior DME when the Claimant's vehicle was actually inoperable. The Board observes that Claimant is able to attend pain management appointments without assistance which are in Dover, Delaware. While the DME is scheduled to occur in Wilmington, Delaware, which is farther from Claimant's home, the Board finds the evidence insufficient to warrant Employer providing transportation for the upcoming DME. [Aldrich/Ellis]

Scott Ralph v. State of Delaware, IAB Hearing 1471106, (5/15/20), (ORDER). With regard to the Employer 's Motion to compel forfeiture and a credit against future benefits on the basis of a missed defense medical evaluation with Dr. Steven Fedder in Bala Cynwyd, PA, the Board rules in Claimant's favor that the last minute DME cancellation notice was reasonable due to Covid 19 concerns and specifically noting that this DME was scheduled for April 14, 2020 at height of the State of Emergency. [O'Neill/Ellis]

DISPLACED WORKER

Jose Gonzalez v. Kriss Contracting, IAB Hearing 1315631, (8/30/20). The Board rules that the Claimant is prima facie displaced where he cannot complete the Functional Capacity Evaluation in a single session and where at best the FCE results demonstrated a part-time sedentary duty work status. In this case "the Claimant was unable to complete the FCE in one session and had to be driven home after the first session." The Petition for Review was denied. [Schmittinger/Morgan]

FRAUD

Erin Messner v. Amazon.com, IAB Hearing 1441030, (5/14/20) (ORDER). A carrier's decision to not conduct a thorough investigation at the time of claim acceptance does not equate to fraud on the part of the Claimant.

HOEY DISPLACED WORKER

Sarah Okoth v. Parkview Nursing & Rehabilitation, IAB Hearings 1475486 & 1485366, (7/20/20). With regard to the Employer 's Petition to Terminate total disability, the Board finds that the Claimant is not a Hoey displaced worker where it is medically undisputed that the Claimant cannot return to work as a CNA with her permanent restrictions. [Marston/Reale]

LABOR MARKET SURVEY

Jose Gonzalez v. Kriss Contracting, IAB Hearing 1315631, (8/30/20). Motion in Limine denied as to precluding consideration of an updated labor market survey with the Board commenting that "the updated survey is not unduly prejudicial as the very nature of a labor market survey requires that the survey be updated to reflect jobs available contemporaneously…the jobs listed on the updated survey are the same as those listed on the original survey, with the only difference being that six of the nine original jobs being designated as allowing for part-time employment." [Schmittinger/Morgan]

MEDICAL TREATMENT ISSUES

Jose Gonzalez v. Kriss Contracting, IAB Hearing 1315631, (8/30/20). Plasma-rich protein injections are experimental as to the spine as agreed upon by both Dr. Brokaw and Dr. Yalamanchili with even Dr. Balu acknowledging that he was unsure whether the PRP treatments would allow the Claimant to return to work or help the Claimant improve. As such, the Board ruled that the proposed PRP treatment was unreasonable and unnecessary. [Schmittinger/Morgan]

Faith Allen v. Ceramic Protection Corporation of America, IAB Hearing 1289503, (8/27/20). Defense medical evaluation with Dr. Jason Brokaw defeats a Petition for a permanent spinal cord stimulator implant to the neck following a trial stimulator implant in 2018. The Board was swayed by Dr. Brokaw's six-point assessment based on the circumstances of this case to include a number of factors as follows: multiple cervical surgeries, C4-T1 posterior fusion, numerous surgeries around the arms as the result of the 2006 work accident, history of chronic pain management including high dose opioid medications, history of tobacco abuse, high body mass index, and psychiatric overlay. [Marston/Harrison]

Kaeisha Righter v. Five Star Quality Care, IAB Hearing 1463251, (8/25/20) (ORDER). Where a medical provider is ordered by the Board to reissue its bills to allocate between compensable charges and non-compensable charges, the Board rejects the reissued billing statement which simply deleted the non-compensable diagnosis codes - - "the revised HICF for that date of treatment still list the same four modalities and charges the same total of $250.00. The only difference is that the diagnosis code for the lumbar spine has been deleted. This pattern is repeated throughout the original and the revised HICF - - the charges stay the same and it is just the diagnosis codes that have been changed. There is no apparent effort made by the doctor's office to apportion out that treatment that was for the unrelated lumbar condition." The Board denies the Claimant's Motion to order payment of the bills in the reissued format. [Gambogi/Baker]

Zelda Sheppard v. Allen Family Foods, IAB Hearing 1373143, (6/22/20). Where Claimant illegally using marijuana for years, narcotic pain medications are not reasonable or necessary based on the defense testimony of Dr. Jason Brokaw. The Hearing officer offered the following concerns: "Claimant had been using marijuana illegally for many years according to her statements to Dr. Brokaw and based on the UDS. The illegal use of marijuana negatively impacts credibility as well as the credibility of Patricia Grady, the licensed nurse practitioner who testified on Claimant's behalf. Ms. Grady's testimony was negatively impacted because she was either ignoring what is listed on the UDS or turning a blind eye to it or she was misled by Claimant into believing Claimant had a valid medical marijuana card. Even if Ms. Grady believed Claimant had a valid medical marijuana card, Ms. Grady testified Claimant applied for it in mid-2019 which still means that Ms. Grady was either unaware or ignored the UDS which showed marijuana use since 2011". [Schmittinger/Morgan]

Linda Dambro v. AstraZeneca, IAB Hearing 1376347, (4/7/20). The IAB orders a home stair lift and gym membership for aqua therapy on the Claimant's DACD Petition, along with ongoing chiropractic treatment at a frequency of two times a month, and denies a request for acupuncture and massage therapy. [Hedrick/Davis]

Linda Holloway v. State of Delaware, IAB Hearing 1462123, (7/18/20). The Dr. Rushton DME is compelling to persuade the Board that a proposed multi-level soft fusion without instrumentation in a patient with multi-level scoliosis, instability and spinal stenosis has a poor chance of success. The Board was also concerned that the Claimant did not receive a second opinion in terms of whether the surgery was reasonable and necessary and also did not appear to be adequately informed on the procedure itself or of the risk/benefit ratio with this surgery. [Bustard/Bittner]

Leigh Stewart v. DE Supermarkets, IAB Hearing 1392515, (7/22/20) (ORDER). Where the carrier intends to deny seven out of 10 refills of compound cream but does not follow the statutory procedure for treatment denial, all of the treatment in question is awarded. The violations in question were outlined as follows: "The insurance carrier did not provide a written explanation denying in whole or in part the medical bills, in violation of 19 Del. Code Section 2322(F)(e). The carrier also did not refer any of the medical bills to Utilization Review, in violation of 19 Del. Code Section 2322(F)(h). It did not notify claimant or his attorney of an intention by any other means to dispute any of the medical bills. The carrier paid three of the ten properly-submitted bills and one of those paid bills was for the second to last batch. This is not a situation in which, for example, the insurance carrier paid for the first three batches and suddenly stopped paying, leaving room for a challenge that the subsequent batches were no longer reasonable or necessary. Such payments were not made by mistake; they were intended and that includes for the ninth batch. The insurance carrier did not pay without prejudice." [Ippoliti/Morgan]

PERMANENT IMPAIRMENT

Jose Prado v. City of Wilmington, IAB Hearing 1469180, (4/28/20). The Board rejects a 33% cervical spine permanency rating where Claimant has returned to work full duty as a firefighter, with Dr. Rodgers testifying for the Claimant and Dr. Gelman testifying for the carrier. Further impactful to the Board's deliberations was the fact that the Claimant accrued more than 444 hours of overtime following his return to work in 2019, had completed a strenuous survival training in the summer of 2019, and was recently recertified as firefighter of the year for 2020. [Bustard/Newill]

Ernest Tolbert Sr. v. City of Wilmington, IAB Hearing 1462941, (4/27/20). A return to work full duty does not negate a claim for permanent impairment noting that the Claimant was 58 years of age and a Master Corporal in the police department. The Board awards an 11% impairment to the lumbar spine in accordance with the opinion of Dr. Jeff Meyers. [Freibott/Bittner]

James Agnor v. State of Delaware, IAB Hearing 1473550, (8/7/20). The Board applauds Dr. Piccioni's DME and 3% leg rating under the AMA Sixth Edition, because the Sixth Edition incorporates a meniscus repair in its rating where the Fifth Edition does not. As such, Dr. Rodgers' 20% impairment rating for the left lower extremity is rejected. [Roman/Julian]

Timothy Massey v. RIMSI Corporation, IAB Hearing 1383032, (6/17/20). In considering a DACD Petition seeking to recover a 36% impairment to the lumbar spine, with Dr. Jeffrey Meyers testifying on behalf of the Claimant and Dr. Lawrence Piccioni testifying on behalf of the Employer, the Board awards 36% and finds that ***Sewell v. Delaware River and Bay Authority*** applies to prohibit any apportionment of the permanency. [Freibott/Andrews]

Darrick Williamson v. Red Clay Consolidated School District, IAB Hearing 1451862, (5/21/20). Dr. Rodgers' 37% bilateral knee impairment rating fails, where it appears to be based on the contemplation of a total knee replacement which has not yet occurred and instead the claimant is awarded 7% to each knee based on the defense medical evaluation of Dr. Piccioni. [Rahaim/Bittner]

Rebecca Clark v. State of Delaware, IAB Hearing 1393189, (7/30/20) (ORDER). The Board grants the Employer's Motion to Dismiss the Claimant's DACD Petition seeking permanency for a concussion and for the cervical spine where the Board has previously adjudicated that the Claimant's cervical spine surgery was not compensable and that her claimed concussion injury had resolved. [Hendee/Bittner]

PRACTICE AND PROCEDURE

Corey Berry v. Kentucky Fried Chicken, IAB Hearing 1485440, (7/9/20). This case is an example of the ***Employer*** filing a DCD Petition to compel an adjudication as to nature and extent of a work injury and in this case, also for purposes of limiting the nature of injury and period of benefit entitlement but noting that the Claimant's counsel was still entitled to an attorney's fee award in the amount of $7200.00 [Donovan/Andrews]

Kennedy Brown v. Christiana Care Health Services, IAB Hearing 1494722, (6/22/20) (ORDER). On the Employer 's Motion to Compel a reply to a Request for Production for discovery of records as to a prior incarceration, the Board rules in favor of the Employer that this information is discoverable as "reasonably calculated to lead to relevant evidence, although it may or may not be admissible at a Hearing on the merits…" [Tice/Eastes]

Robert Vigliotta v. State of Delaware, IAB Hearing 1427241, (7/7/20). The Board rules that prior deposition testimony can be used for impeachment purposes but "wishes to stress that it discourages the practice. What workers comp attorneys need to understand is that the Board is not an untutored jury. The Board is an experienced fact finder on these matters. As such, litigation tactics that may seem impressive to a jury are not necessarily impressive to the Board. Many of the doctors who testify in workers comp cases appear before the Board very, very frequently." [Karsnitz/Menton]

Jo Ellen Brenegan v. Pep Boys, IAB Hearing 1491098, (7/31/20) (ORER). A preference for a live Hearing is not good cause for a continuance during Covid-19, although in this situation the Board agreed to a brief continuance based on "technological issues" since it was apparent that Claimant would have some difficulty appearing. [Rammuno/Baker]

Deborah Davis v. Tybout Redfearn and Pell, IAB Hearing 1489367, (7/16/20) (ORDER). The Employer's continuance request is denied because "the Board can adequately judge credibility using a video connection." [Silverman/Lockyear]

Tracy DiRusso v. State of Delaware, IAB Hearing 1176922, (7/8/20) (ORDER). In evaluating a request for continuance of a Hearing on a UR appeal, said continuance request is denied with the Board commenting that there is "no due process violation with video Hearings" and further observing that "a video Hearing functions as the equivalent of an in-person Hearing." [Silverman/Hauske]

Angel Harrington v. Fetterman Agency, IAB Hearing 1456673, (4/15/20) (ORDER). On a Motion for Clarification following a merits Hearing decision in which the Board rejected the Employer's argument of forfeiture due to alleged intoxication, the Board confirmed that its award of medical witness fee reimbursement would include reimbursement for the fee of Dr. Fruncillo, a Board-certified physician, and Board-certified toxicologist, who rendered an opinion as to whether claimant was intoxicated at the time of accident. [Lazzeri/Bittner]

"RESOLVED"/"BACK TO BASELINE"

Michelle Westbrook v. Walgreens, IAB Hearing 1432077, (5/11/20). The Board finds that the Claimant did not meet her burden to show that low back treatment incurred after 7/20/17 remained causally related to an August 2015 work related condition and similarly concluded that the lumbar sprain and strain experienced in the work accident had already "resolved" to the "back to baseline" condition as of 7/2017. In finding for the Employer the Board noted evidence supporting a pre-existing chronic low back condition with left lower extremity symptoms prior to the August 2015 work accident, noting that this condition was deemed "chronic" as early as 2011 with references back to a motor vehicle accident occurring 10 years earlier. Dr. Gelman testified as the defense medical expert and was found "persuasive" that the Claimant's clinical exam was objectively normal in September 2016 and May 2019. [Morrow/Ellis]

STRESS CLAIMS

Yolanda Jones v. Westside Family Healthcare, IAB Hearing 1483556, (6/4/20). On a DCD Petition seeking compensation for depression and anxiety related to a stressful work environment, the Claimant's Petition is denied, noting that Dr. John Detweiler testified on behalf of the Claimant and Dr. James Langan testified on behalf of the Employer . The Board ruled that the Claimant failed to establish that the work environment was stressful and a substantial cause of her psychological diagnosis and treatment. The Board based this decision on the testimony of Dr. Langan and the managers at Westside who testified about Employer 's efforts to work with Claimant to improve her interpersonal skills over the years, the reasonable nature of Claimant's job duties and workload, and Claimant's inability or willingness to accept criticism or improve her behavior. The Employer even transferred Claimant to another office at one point to give her a fresh start with a different office manager. The Board does not find evidence that Claimant was

being mistreated by either Employer or coworkers or that the Employer was unfair in how it handled her interpersonal problems. Additionally, the Board was aware that Claimant had a preexisting history of chronic depression for which she had been receiving ongoing treatment and medication for many years. [Morrow/Newill]

TERMINATIONS

Michael Garfinkel v. Frank Diver, IAB Hearing 1273542, (8/17/20). On a Petition to Terminate partial disability benefits, the Board rules in favor of the Employer that the Claimant has voluntarily removed himself from the labor market and has adopted a "retirement lifestyle". Impacting the Board's decision in this regard was the Claimant's age of 65, receipt of Social Security benefits, and lack of a good faith job search, as well as his comments to the defense medical expert that he had no plan to return to work and was "content". Accordingly, the Claimant was deemed to have forfeited any entitlement to partial disability. [Weik/Carmine]

UTILIZATION REVIEW

William O'Neill v. Ruan Transportation, IAB Hearing 1459627, (8/13/20). The Board affirms a Utilization Review certification of treatment with Dr. Selina Xing with the Board noting that the defense medical expert, Dr. Eric Schwarz, "is a general orthopediss who acknowledged that he does not perform these types of injections…or specialize in treatment of the spine." Of further note, none of the injections being challenged were repeated since they did not provide long-term or significant relief. [Carmine/Gin]

David DeVincentis v. Delmarva Electric & Technology, IAB Hearing 1425710, (6/15/20). The Board affirms a Utilization Review certification of chiropractic treatment, pain management and proposed spinal cord stimulator, with Dr. Jason Brokaw testifying on behalf of the Employer and Dr. Balu testifying on behalf of the Claimant. The Board embraced as credible Claimant's testimony that his function has improved since he began this treatment and that his pain has been "drastically" reduced in tandem with Dr. Balu's testimony that the Claimant's records demonstrate positive results related to subjective and objective functional gains, including treatment for positional tolerance, range of motion, strength, endurance and activities of daily living. The UR certifying this treatment is affirmed. [Jaworksi/Lukashunas]

Zelda Sheppard v. Allen Family Foods, IAB Hearing 1373143, (6/22/20). Where causal relationship is at issue with regard to medical treatment expenses, this case reiterates the now well-established proposition that a referral to Utilization Review is not proper because a UR referral waives any causation defense. [Schmittinger/Morgan]

Anissa Brookins-Widman v. State of Delaware, IAB Hearing 1410373, (4/20/20). The Board reverses a Utilization Review certification of injections and ablations and denies surgery based on a defense medical evaluation with Dr. Steven Fedder. [Wilson/Bittner]

Tracy DiRusso v. State of Delaware, IAB Hearing 1176922, (8/14/20). The Board affirms a UR certification of opioids with Dr. Balu but reverses a UR certification of plasma-rich protein injections, noting that Dr. Nathan Schwartz testified as the defense medical expert. [Silverman/Hauske]

Monique Williams v. Alliance Commercial Cleaning, IAB Hearing 1487985, (6/22/20). The Board affirms a UR certification of injection treatment with Dr. Zaslavsky but reverses a UR certification of treatment with Dr. Atkins and also grants the Employer's Petition for Review. Dr. Jonathan Kates testified as the defense medical expert. [O'Neill/Hunt]

Raul Rivera v. EBC Carpet Services, IAB Hearing 1338590, (4/7/20). The Board affirms a UR certification of narcotic pain management with Dr. Xing. [Wasserman/Panico]

APPELLATE OUTCOMES

Warren v Amstead Industries Inc., *C.A. N19A-09-001 CAK (8/10/20)* **The Board granted the employer's termination petition concerning this claimant with compensable arm injuries. The claimant was no longer entitled to total disability benefits as she was found to have withdrawn from the open labor market. The case was appealed and then remanded back to the Board. The Court accepted that the issue of withdrawal from the labor market was not timely raised prior to the expert depositions. On remand, the Board again found that the Claimant had withdrawn from the labor market and granted the termination petition. In her appeal from the remand decision, the claimant argued: 1) the Board improperly analyzed the 'withdrawal' argument first before addressing the factors under the traditional burden shifting analysis; and 2) the claimant should not have been prejudiced from failing to look for work since she thought she was still under total disability certification from her doctor. Procedural errors were identified by the Court. Those errors included the questionable limitation on evidence at the remand hearing concerning anything other than the withdrawal issue and agreeing with the claimant that the traditional analysis of medical employability, displaced worker status and availability of jobs in the labor market should have been addressed first in the remand decision prior to getting to whether she had withdrawn from the labor market. These errors did not create substantial prejudice to the claimant's case and there was also substantial evidence in the record to affirm the decision to terminate total disability benefits. [**Wasserman/Wilson]

Nobles-Roark v Back Burner, *No. N19A-11-001 ALR (7/28/20).* **This concerned the type of evidence the Board can consider as part of its decision. An appeal followed the Board's denial of a petition seeking a determination that medical marijuana treatment was reasonable and necessary. The claimant had argued that use of marijuana helped him wean off narcotic medication. The Board however accepted the defense expert as most credible, noting that the treating physician was not aware of the claimant having comorbidities and contraindications**

to use of medical marijuana and due to the claimant's inconsistent use of medical marijuana. It was argued on appeal that the Board erred by improperly considering medical studies referenced by the defense expert and that those studies contradicted Delaware law on efficacy of medical marijuana. The court rejected these arguments and affirmed the Board's decision. Consideration of the medical studies was appropriate as the Superior Court Rules of Civil Procedure did not apply and the Board's interpretation of its own rules was entitled to significant deference. The Delaware Medical Marijuana Act language did not take precedence over and did not directly apply to the Worker's Compensation Act. Further, even though the Medical Marijuana Act indicates that marijuana in general can be an effective treatment, it does not preclude a finding that it is not reasonable and necessary for a particular patient. [Weik/Menton]

Daniels v State of Delaware, No. N19A-09-002 VLM (6/22/20). **The issue on appeal was how much was owed for deposition cancellation fees under a timely 30-Day Rule settlement offer. As part of the settlement proposal, the employer offered to pay 'reasonable and necessary' deposition cancellation fees. The offer was accepted eight days later. The employer contended it owed the 50% fee applicable at the time of the offer and not the 100% cancellation fee applicable when the offer was accepted. The 50% fee was paid. Claimant filed a motion to compel additional payment and this was denied. The Board denied the motion, stating it was ambiguous as to whether the offer was for the cancellation fee in effect as of the offer or acceptance date. There was also a delay in accepting the settlement offer due to Claimant not being aware of the cancellation policy details. However, the Board deferred on whether the fee paid was reasonable or not. Claimant appealed and the Court remanded the matter back to the Board. In the Opinion, the Court held that there was not substantial evidence to support the Board's finding of an ambiguous agreement. The Board was directed to address several questions, including whether 'reasonableness and necessity' was the proper standard to apply to determine the amount of the cancellation fee, and if so, state the reasons on whether the paid amount was reasonable and necessary. [**Nitsche/Nardo]

Harvey Hanna Assc. v. Sheehan, No. N19A-08-001 CLS (6/5/20). **The Board in this case granted the claimant's petition alleging recurrence of total disability benefits. The employer appealed and challenged whether the evidence supported the finding that there was a significant worsening of condition. Under Delaware law, there must be more than a minor worsening of condition to supporting a finding of recurrence of total disability. The employer presented a number of metrics to demonstrate that there was no significant worsening and in fact the claimant was improving. The Board's decision was affirmed. There was evidence that after prior termination, the claimant had been hospitalized for about one week on an annual basis ever since. This was not occurring prior to termination. As the court does not reweigh evidence on appeal, there was substantial evidence in the record to support the Board finding a significant worsening of condition since the prior termination of total disability.** [Freibott/Carmine]