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| DELAWARE WORKERS COMPENSATIONIndustrial Accident Board CASELAW Update& Appellate Outcomes**By Cassandra Faline Roberts, Esq.****Andrew Carmine, Esq.**DSBA Mid-Winter WC SeminarJanuary 18, 2017 |

***ATTORNEYS FEES***

***David Ward v. Letica Corporation, IAB No. 1393135 (12/16/16) ORDER.*  The attorney’s fee awarded can exceed 30% of the medical bill amount at issue where the award also results in certain additional “inchoate benefits” noting that in this case part of the award included acknowledgment of an additional left upper extremity/shoulder injury which will likely come to surgery.** [Fredricks/Chrissinger-Cobb]

***AVERAGE WEEKLY WAGE***

***Tamika Shuler v. Providence Service Corp v. Workers Compensation Fund,* *IAB Nos. 1419271 & 1422122 (9/12/16) ORDER.* The Board will not agree to an average weekly wage and comp rate presented at the agreement of the parties where the evidence suggests that the average weekly wage should be something other than what has been presented and with the Fund taking a position as to an appropriate average weekly wage.** [Houser/Richter/Cleary]

***CAUSATION***

***Jermaine Clarke v. Sysco, IAB No. 1444676 (12/1/16).* IAB rules that repetitive unloading of heavy boxes is competent to cause bilateral carpal tunnel syndrome with Dr. David Sowa testifying on behalf of the claimant and Dr. Willie Thompson testifying on behalf of the employer.** [Freibott/Gin]

***Ruben Martinez –Ocampo v. MF Stoneworks LLC, IAB No. 1416310 (9/13/16).*****The development of carpal tunnel syndrome in 2016 is held NOT to be causally related to a 2014 work accident with Dr. Richard DuShuttle testifying on behalf o the claimant and Dr. Robert Smith testifying as the defense medical expert, and with the further observation that Dr. DuShuttle failed to diagnose carpal tunnel for well over a year and a half after the work accident.** [Schmittinger/Andrews]

***Wanda Cabrera v. Davids Bridal, IAB No. 1431377 (9/15/16).* A neck injury and recognition of a cervical disc herniation are awarded to the claimant as the result of the cumulative detrimental effect of carrying bridal gowns at work based on the testimony of Dr. Sugarman.** [Warren/Panico]

***Janice Carson v. Amazon.com, IAB No. 1441896 (11/2/16)*. A cumulative detrimental effect claim is rejected where not reported until after the claimant has retired and where the medical records do not initially reference any relationship to work with Dr. Peter Townsend testifying on behalf of the claimant and Dr. Sam Matz testifying as the defense medical expert.** [Heesters/Ellis]

***Mark Everline v. State of Delaware, IAB No. 1414648 (11/10/16)*. The left knee is ruled compensable on a DACD Petition following a compensable right knee injury, as the result of a degenerative latent conditioned aggravated and accelerated by the work event which resulted in four right knee surgeries.** [Freibott/Menton]

***COURSE AND SCOPE***

***Lisa Hart v. Maxim Healthcare, IAB No. 1415768 (12/19/16).* Where the claimant’s job as a certified nursing assistant involves being paid on an hourly basis and being reimbursed for mileage traveling to clients’ homes, a deviation from the route to stop for gas or retrieve gas money from her husband is not a deviation which removes her from the course and scope of employment.** [Lazzeri/Lockyer]

***DISFIGUREMENT***

***Virgil Pugh v. New Castle County, IAB No. 1354747 (12/1/16) (ORDER).* A claim for dental disfigurement due to missing teeth as the result of serious dental decay causally related to narcotic usage required by the work injury is ruled premature where the Board has ordered the carrier to pay for permanent dental implants, which have yet to be undertaken.** In this case, the Board also notes that there is a distinction between disfigurement entitlement involving removable prosthesis and those things that are made a permanent part of the body. [Mason/Perry]

***Kieran Snidowski v. Pulte Homes, IAB No. 1208092 (11/30/16).* A dental disfigurement claim is premature until the permanent dental implants awarded by the Board are undertaken, noting that the implants were awarded due to serious dental decay and tooth loss as a result of pain-related narcotic usage.** [Silverman/Tatlow]

***IDIOPATHIC FALL***

***Linda Capone v. State of Delaware, IAB No. 1376808 (10/3/16).* A DCD Petition seeking benefits for injuries to the right ankle, cervical spine and lumbar spine is denied due to an idiopathic fall in a decision which covers 94 pages of testimony and discussion in a highly factually-driven set of circumstances and with the claimant being deemed not credible.** [Boswell/Julian]

***MEDICAL TREATMENT ISSUES***

***Kimberly Farmer v. Hotel Rodney & All Pro Maids, IAB No. 1386354 & 1413373 (9/16/16).* The Board awards the claimant a Spinal Cord Stimulator based on the testimony of Dr. Antony with the following commentary: “A trial of a stimulator is reasonable. Both Dr. Antony and Dr. Kates agree that continual steroidal injections would not be good for Claimant in the long run. The difference between the doctors is that Dr. Antony is proposing a substitute treatment for Claimant, while Dr. Kates has nothing to offer.”** [Schmittinger/Lukashunas/Roberts]

***Sandra Thurston v. The Pilot School, IAB No. 1011794 (9/29/16).* The IAB awards Ketamine topical spray for reflex sympathetic dystrophy based on the testimony of Dr. Mitchell Cohen, a physician Board certified in psychiatry, neurology and pain medicine.** [Marston/Chrissinger-Cobb]

***Sandra Thurston v. The Pilot School, IAB No. 1011794 (9/29/16).* The IAB awards Cymbalta in lieu of a generic counterpart where “Dr. Cohen opines the Claimant should utilize the brand name and not the generic because studies are performed with the brand name and he refers to a double blind study in support of his position… More importantly to the Board is that Dr. Cohen that Claimant is one of the most severe CRPS-Type 1 cases that he has seen and Cymbalta is essential for her care…Dr. Cohen has convincingly testified that this particular medication is so essential that he is not willing to take the risk of changing to a generic. Dr. Cohen effectively points out that Claimant is in severe pain and depression and could become suicidal. Thus, the Board finds that Claimant is to remain on the brand name medication Cymbalta.”** [Marston/Chrissinger-Cobb]

***Sidony Ntiege v. Pinnacle Rehabilitation, IAB no. 1428716 (11/3/16)*. The resumption of chiropractic treatment is not compensable when it follows a full duty work release and an 18 month gap in treatment.** [Schmittinger/Ellis]

***Barbara Zakarewicz v. Garda World Security, IAB Nos. 1334149 & 1442235 (11/16/16).* Dr. Fedder as a neurosurgeon performing a defense medical evaluation trumps Dr. Rudin on the issue of a proposed 3-level spine fusion with the following observation: “Notably, Dr. Fedder points out that Claimant is not on any prescription medication and by all accounts she is not a person who is in constant severe pain or who has any nerve compression. Yet, Dr. Rudin recommends an intrusive 3 level lumbar spine fusion surgery…In September of 2011 Dr. Rudin recorded that the likelihood of a successful outcome, given Claimant’s size, would be very low. Yet, now, 5 years later he recommends the same surgery without any objective changes in her diagnostic testing. Her films have not changed and even her discogram results have remained the same. Claimant now weighs 20 pounds *MORE* than she did then. Dr. Rudin was unaware of Claimant’s exact weight guessing it to be over 300 pounds.”** [Marston/Morris-Johnston]

**PAYMENT WITHOUT PREJUDICE**

***Bobby Sweetman v. Willis Chevrolet, IAB No. 1436026 (9/22/16)*. The Board rules that failure to place “payment without prejudice” language on several medical treatment expense payments is “harmless error”.** [Wilson/Andrews]

***Ivan Taylor v. Steel Tech, IAB No. 914432 (11/22/16)*. A payment without prejudice letter issued 40 days after a medical bill is paid is not effective and payment counts to enlarge the statute of limitations.** [Welsh/Durstein]

***PERMANENT IMPAIRMENT***

***Gerald Fay v. Donald Deaven, IAB No. 1432671 (9/15/16).* An award of 100% of the ability to swallow is worth 300 weeks and compared to an esophageal permanency.** [Silverman/Morgan]

***Gerald Fay v. Donald Deaven, IAB No. 1432671 (9/15/16).* An award of 40% impairment to the upper digestive tract is based on 300 weeks.** [Silverman/Morgan]

***Gerald Fay v. Donald Deaven, IAB No. 1432671 (9/15/16).* An award of 10% to “skin” which is based on the existence of decubitus ulcers is based on 300 weeks.** [Silverman/Morgan]

***Patricia Hutkin v. State of Delaware, IAB No. 1414655 (11/2/16).* Dr. Rodgers’ 20% upper extremity impairment rating is criticized with the IAB awarding the claimant a 6% impairment.** [Heesters/O’Connor]

***Kieran Snidowski v. Pulte Homes, IAB No. 1208092 (9/22/16) (ORDER).*The issue of whether 80 weeks is the appropriate value for a 100% loss of teeth is deemed to be premature with the Board commenting: “There has been no medical expert testimony presented to provide any factual basis for it to consider in the present case. Decision on permanent impairment Petitions are based on the Board’s factual determination for a claimant’s actual loss of use combine with an application of what constitutes a proper equitable compensation for that loss of use… when it involves an unscheduled body part. Lacking any medical testimony here, the Board does not find the motion request ripe for any such declaratory decision.”** [Silverman/Tatlow]

***PRACTICE AND PROCEDURE***

***Tamaryn Gardener v. First Student Transportation, IAB No. 1442315 (11/29/16).* IAB precludes testimony consisting of a witness account of a premises video which is no longer available to the parties.** [Fredricks/Skolnik]

***Phyllis Eure v. Delaware Park, IAB No. 1125400 (9/13/16) (ORDER).* An employer cannot compel a claimant to mediate a case.** [Stewart/Rimmer]

***Phyllis Eure v. Delaware Park, IAB No. 1125400 (9/13/16) (ORDER).* The employer can force a Hearing on a Petition for Commutation with the Board commenting that “clearly there is a high burden of proof on the part of a petitioner in the case of a disputed commutation. However, that the burden of proof is high does not mean it cannot be met. As such, claimant’s motion to dismiss is denied.”** [Stewart/Rimmer]

***Brenda Boyce v. State of Delaware, IAB No. 1410247 (10/28/16) (ORDER).* This decision contains an excellent recitation of the standard required for both Res Judicata and Collateral Estoppel in an opinion authored by Chief Hearing Officer Christopher Baum.** [Weik/Taylor]

***Christopher Moore v. Amazon.com, IAB No. 1432270 (11/2/16) (ORDER).* An Agreement as to Compensation is ordered rescinded by the Board based on the claimant’s failure to disclose prior treatment – “the Board does not believe there is enough evidence to support a finding of fraud on the part of Claimant, but clearly there is at least mutual error in Claimant’s failure to list Dr. Schwartz as a prior treating doctor, despite being requested to list all treating doctors within the last 10 years. It cannot be said that Claimant’s lapse of memory was harmless as Dr. Schwartz’s treatment was directly related to the right knee and the failure to list him delayed the prompt receipt of his records. Even if done unintentionally or accidentally, it was misleading conduct.”** [Donovan/Ellis]

***Virgil Pugh v. New Castle County, IAB No.1354747 & Kieran Snidowski v. Pulte Homes, IAB No. 1208092 (9/22/16) (ORDER).* The Board denies a Motion to Consolidate two unrelated cases for purposes of a disfigurement Petition which raises the identical issues where the claimant’s have sustained similar problems to their teeth due to xerostomia, a condition that causes dry mouth from taking narcotic pain medications.** [Freibott/Silverman/Perry/Tatlow]

***Marion Alexander v. Severn Management, IAB No. 1429645 (10/31/16) (ORDER).* An employer cannot force the issue of permanency or disfigurement by filing a Section 2347 Petition for Review.** [Green/Andrews]

***Kerrie Unger v. New Castle County, IAB No. 1419344 (11/11/16) (ORDER).* New Castle County is ordered to produce the claimant’s personnel file with the Board ruling that it would be unduly burdensome to require the Claimant to travel to a New Castle County office to view and copy such file.** [Freeberry/Tickle]

***“RESOLVED”/“BACK TO BASELINE”***

***Tamaryn Gardener v. First Student Transportation, IAB No. 1442315 (11/29/16).* The IAB rules in favor of a work accident producing injuries to the neck and back but further finds that pursuant to the defense medical evaluation of Dr. Matz and allowing for the claimant’s long standing pre-existing condition, those work related injuries have “resolved”.** [Fredricks/Skolnik]

***Kenyatta Brooks v. State of Delaware, IAB No. 1425461 (12/22/16).* The IAB finds in favor of a work-related cervical injury but further specifically finds that such injury “resolved” within 12 weeks.** [Gregory/Rimmer]

***SPECIFIC DIAGNOSES***

***Danita Walker v. AAA Mid-Atlantic, IAB No. 1370669 (12/20/16).* A claim for “calcific tendinosis” of the shoulder is rejected by the Board with the Board making the following comments: “Dr. Roberts’ causation opinion is curious. He admits the current medical literature gives no clear explanation for what can cause calcific tendinosis. He felt that it had not proven to be degenerative, but he agreed that neither trauma nor poor blood flow had been clearly elucidated as a cause. Despite this, he then opines that the claimants’ condition was causally related to her work accident because he thought calcific tendinosis could be secondary to a work injury. This conclusion goes contrary to his own testimony. Dr. Fink confirmed that medical science does not know how calcific tendinosis is caused.”** [Owen/Logullo]

***STATUTE OF LIMITATIONS***

***Ivan Taylor v. Steel Tech, IAB No. 914432 (11/22/16)*. A payment without prejudice letter issued 40 days after a medical bill is paid is not effective and payment counts to enlarge the statute of limitations.** [Welsh/Durstein]

***UTILIZATION REVIEW***

***Sandra Williams-Poplos v. State of Delaware, IAB No. 1418228 (11/28/16).* IAB affirms a Utilization Review non-certification of chiropractic treatment with Dr. McIllrath, noting that Dr. Joseph Irwin, chiropractor, served as the defense medical expert.** [Heesters/Morris]

***Michael Wiernusz v. National Steel Erection, IAB No. 1287701 (12/27/16).* The IAB reverses a Utilization Review non-certification of OxyContin and Oxy IR and further awards an intrathecal morphine pump.** [Hedrick/Morgan]

***Mark Mott-Lynn v. State of Delaware, IAB No. 1238954 (12/30/16).* The IAB reversed a Utilization Review non-certification of caudal epidural injections based on the testimony of Dr. Balu with the further comment on the part of the hearing officer that “I also find that it would beneficial to Claimant and to the workers’ compensation process if Dr. Balu’s records were kept up to date with the relevant information regarding the benefits of the injection and Claimant’s pain levels at each visit.”** [Bednash/Morris-Johnston]

***Jennifer Hack v. Nanticoke Health Services, Inc., IAB No. 1356089 (9/13/16).* The Board reverses a Utilization Review non-certification of Cymbalta.** [Marston/Logullo]

***Jennifer Hack v. Nanticoke Health Services, Inc., IAB No. 1356089 (9/13/16).* The IAB affirms the Utilization Review non-certification of the medication SUBSYS commenting that “SUBSYS is used to treat cancer pain only and it has the highest overdose and death risk because of its rapid onset it should not be combined with other short acting medications such as Hydrocodone. Since SUBSYS is to be used for cancer pain only, it is unrelated to any type of pain management claimant would need.”** [Marston/Logullo]

***Calvin Wilkerson v. Colbert & Pierson LLC, IAB No. 1385426 (11/10/16)*. The IAB affirms a Utilization Review non-certification of Ketamine with Dr. John Townsend testifying on behalf of the employer and Dr. Enrique Aradillas testifying on behalf of the claimant.** [Green/Carmine]

***Ana Luna de Vasquez v. Valassis, IAB No. 1421797 (11/15/16)*. The Board once again emphasizes that referral of a medical treatment issue to Utilization Review on a disputed body part waives any causation defense.** [Welch/Lockyer]

***Tonya Brown v. State of Delaware, IAB No. 1428984 (11/16/16) (ORDER).* A prior Utilization Review decision which disallows land-based physical therapy can be used to deny aqua therapy.** [Long/Klusman]

**APPELLATE OUTCOMES**

***Greenville Country Club v. Greenville Country Club*, No. 101, 2016 (Del. Nov. 2, 2016). This case involved a successive carrier issue. At issue was whether liability for a later manifestation of injury, occurring after both accidents, falls upon the first carrier or the second carrier. The Supreme Court, affirming the Superior Court and Board decisions, determined that “liability for a later condition falls upon the carrier responsible for the injury which proximately causes the later condition, whether it be the first injury or the second injury…” and “[t]he burden of proving that the second event caused the later condition is upon the initial carrier.”** In this case, the claimant suffered two accidents while working for Greenville Country Club resulting in injuries to his low back; a slip and fall in 2009 (when Guard Insurance Group was on the risk) and a slip and fall in 2012 (when Technology Insurance was on the risk). Both claims were accepted by the respective carriers. Ultimately, the claimant underwent lumbar spine surgery in 2014. Guard argued that once Technology acknowledged the 2012 low back injury, causation was severed away from the first 2009 work accident and Technology, as the second carrier, had liability for all compensation arising from the lumbar spine from 2012 forward. The Board and the Courts disagreed, finding that “the successive carrier is not strictly liable as a matter of law for a later condition which manifests itself after the second injury.” Rather, the Board and Courts found that causation was still an issue that must be proven. In this case, four of the five medical experts testified that the claimant’s low back condition in 2014, requiring surgery, was causally related to the original 2009 work accident and not the subsequent 2012 work accident. [Taylor/Greenberg].

***Roos Foods v. Guardado*, No. 160, 2016 (Del. Nov. 29, 2016). The issue in this case was whether an injured claimant’s immigration status alone renders her a *prima facie* displaced worker. The Court concluded that an undocumented claimant’s “immigration status is not relevant to determining whether she is a *prima facie* displaced worker, but it is a relevant factor to be considered in determining whether she is an actually displaced worker.”** The Supreme Court further concluded (1) a claimant’s status as an undocumented worker does not automatically entitle such claimant to total disability merely because of such status and (2) there is no requirement that a labor market survey used by an employer in a case involving an undocumented worker include testimony from actual employers that such employers would hire undocumented workers. The Supreme Court recognized that while the IAB decision below might be construed as including “a requirement that employers demonstrate that specific employers exist who hire undocumented workers and have jobs within the claimant’s ability that are open, we clarify that no such requirement exists.” Rather, the Court stated that “using reliable social sciences methods, there should be no barrier to employers in presenting evidence regarding the prevalence of undocumented workers in certain types of jobs in certain regions and combining that with more specific information about actual jobs in those categories.” The Supreme Court’s decision contained several lengthy footnotes in which the court cited labor studies that recognize a significant population of undocumented workers in the Delaware labor market. The case was remanded and the Petition for Review is scheduled to be heard before the Industrial Accident Board. [Schmittinger/Carmine].

***Davis-Moses v. Keystone Human Services*, C.A. No. N15A-10-013 AML, Manning, J. (Del. Super. June 24, 2016). At issue was whether the Industrial Accident Board** **erred in relying on evidence regarding the severity of the auto accident’s impact in concluding that claimant’s cervical spine surgery was not causally related to the work accident and that her condition did not warrant a recurrence of total disability benefits.** In this case, the claimant was injured in a compensable motor vehicle accident on 11/3/2014. Claimant filed a petition in 1/2015 alleging a recurrence of total disability benefits beginning in 12/2014 and a second petition seeking acknowledgement of a 5/11/2015 cervical spine surgery. Dr. Zaslavsky, on behalf of the claimant, testified that the accident was “significant” and “jarred her neck significantly… whipping her head back and forth.” On cross examination the claimant testified that she did not “go back and forth and back and forth,” and that the car was not travelling very fast at the time of the accident. Counsel for the employer challenged the credibility of Dr. Zaslavsky’s testimony using the contradictory testimony of the claimant. Counsel for the claimant objected. The Board found that neither party presented competent medical expert testimony regarding the extent of the impact forces’ correlation to the seriousness of the claimant’s injuries and therefore the testimony was not admissible for that purpose per *Davis v. Maute*, 770 A.2d 36 (Del. 2001)(a party in a personal injury case may not directly argue that the seriousness of personal injuries from a car accident correlates to the extent of the damage to the cars, unless the party can produce competent expert testimony on the issue). However, the Board determined that the testimony was relevant and permissible for a credibility determination. **The Court affirmed the Board’s decision, finding that the Board did not abuse its discretion in allowing the claimant’s testimony as to the nature of the accident and impact as it was entirely relevant to contradict the testimony of Dr. Zaslavsky.** The Court reasoned that it was claimant’s own expert who relied on the severity of the accident impact as support for his opinion as to claimant’s recurrence of total disability and need for surgery. Once he opened the door, “it was entirely reasonable to allow the employer the opportunity to offer contradictory evidence regarding the severity of the accident impact.” [Lutness/Yearick].

***English v. Reed Trucking*, C.A. No. N15A-05-007 PRW, Wallace, J. (Del. Super. July 6, 2016). Claimant appealed an IAB decision awarding claimant 5% permanent impairment to the right upper extremity, accepting Dr. Gelman’s 6th Edition rating over Dr. Rodgers’ 5th Edition rating.** The Board stated that Dr. Gelman’s 6th Edition rating was based on the specific type of injury the claimant sustained while Dr. Rodgers’ 5th Edition rating was based on an analogous procedure, since the claimant’s actual procedure was not listed in the 5th Edition. The Board concluded that the 5th Edition rating overstated and did not accurately reflect the claimant’s “true loss of use.” The Superior Court affirmed, finding that the Board’s decision to accept the 6th Edition rating over the 5th Edition was based on “factual findings that were supported by substantial evidence.” The Court also reminded the parties that the Board is not bound by the opinion of medical experts, citing *Asplundh Tree Expert Co. v. Clark*, 369 A.2d 1084 (Del. Super. 1975)(“It is the function of the Board, not a physician, to attribute a percentage to a claimant’s disability.) Also, that the Board “may even reach a rating not provided by a doctor so long as the Board explains how it reached that result.” [Nitsche/Andrews].

***Delaware Veterans Home v. Dixon*, C.A. No. K15A-12-001 WLW, Witham, R.J. (Del. Super. Nov. 4, 2016). The issue before the Board was whether charges for surgery, as billed, were payable under the Delaware Healthcare Payment System. Following testimony from Dr. Kalamchi (the surgeon) and the bill reviewer from PMA, the Board issued a decision ordering “those skilled on these matters… to communicate and determine the proper codes… so that the bills can be paid.” The Court reversed and remanded the Board’s decision, ruling that the Board incorrectly applied the law, rendered a vague adjudication, and failed to base its findings on substantial evidence.** The claimant underwent surgery on 1/29/2014 for a compensable low back injury. The employer did not dispute the compensability of the surgery. Dr. Kalamchi’s office submitted the charges to the carrier. The carrier made a partial payment, per the fee schedule, on the basis that the charges were improperly “unbundled.” The Board only heard testimony from Dr. Kalamchi and the bill reviewer from PMS, neither of whom could speak to the accuracy of the coding or the “unbundling” of the charges under the Delaware Healthcare Payment System. As such, the Board ordered the parties to figure out the proper coding to get the bills properly paid. The Court decision provides instruction to the parties and the Board on how medical expense payment disputes should be adjudicated. The Court first reminds the parties that Utilization Review is not the proper forum for billing or fee schedule issues. Rather, the proper procedure is for a petition to be filed requesting the Board to resolve the dispute between a provider and carrier about payment of medical expenses. The Court stated that questions “about correct coding, and the legal standard is provided by statute and regulation.” As Delaware’s Healthcare Payment System places the onus on the provider to code his/her bills appropriately, the claimant/provider has the burden of showing that the codes were justified. To meet this burden the Court recommends the claimant “introduce evidence from the AMA’s CPT resources and by reference to the NCCI Policy Manual,” instead of testimony from the surgeon who is not qualified to testify as to whether the charges were “bundled” or “unbundled.” Also, the Court advised that on petitions challenging payment of medical expenses the parties must join the provider as a party to the action in order to ensure the Board has proper jurisdiction over the dispute. [Schmittinger/Lukashunas].

***AFL Network Services v. Heglund*, No.238, 2016 (Del. Nov. 15, 2016). The Supreme Court ruled that the Superior Court “committed reversible error when it reversed and remanded the Board’s decisions as the Board had weighed the evidence, determined credibility, and made factual findings which were supported by substantial evidence.”** In this case, the claimant filed a Petition to Determine Compensation Due, seeking payment for a neck surgery with Dr. Bose. The employer challenged the 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 Superior Court found that the decision below was not consistent with the factual findings and reversed the denial of surgery. In Heglund III, the Hearing Officer granted the petition for surgery and the employer appealed. The Superior Court affirmed Heglund III, stating 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. The Supreme Court reversed this ruling, finding that the Superior Court improperly substituted its judgment for the Board’s. The Court found the Board’s determination that the opinions of Dr. Rushton were more credible than the opinions of Dr. Bose was well within the Board’s authority and was supported by substantial evidence. [Pratcher/Wilson].

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IAB Case Law Take-Aways

By Cassandra Roberts

* You cannot force a mediation.
* You can force a commutation hearing.
* The Fund can choose to become involved in an average weekly wage issue.
* Dental implants will affect the disfigurement entitlement; otherwise stated, if you force the carrier to pay for implants, you can’t turn around and ask for disfigurement as a toothless wonder.
* When it comes to Ketamine, the Lord giveth and the Lord taketh away.
* The “no longer available” premises video – no you can’t tell the Board what you think it depicts.
* Amnesia as to priors is at your peril and may lead to rescission of the Agreement.
* No, you cannot make claimant view and copy personnel file on premises.
* The concept of “Resolved” – alive and well and limiting claims.
* UR Appeals – where the UR non-cert is based on sloppy, shoddy or incomplete record-keeping, seems like the treating doc gets a do-over.