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| DELAWARE WORKERS COMPENSATION  Industrial Accident Board Decision & Appellate  CASELAW Update  **By Cassandra Faline Roberts, Esq.**  **Paula C. Witherow, Esq.**  C:\Users\scove\AppData\Local\Microsoft\windows\Temporary Internet Files\Content.Outlook\RRCYEF86\KijArR5iq.jpg  DSBA Annual Workers’ Compensation Seminar  Wilmington, DE  May 2, 2017 |

***ATTORNEYS FEES***

***Hikmet Saglam v. Direct TV, IAB No. 1360704 (1/27/17).* The Claimant is awarded an attorney’s fee of $3660 for resolution of a Petition for Review the day prior to the Hearing.**

***Eric Shepeard v. Signiture Furniture Services, IAB No. 1420180 (10/10/16).* (*ORDER)*. There is no attorney’s fee entitlement where the Petition for Review is granted AFTER the date of filing but PRIOR to the date of decision.** [Amalfitano/Richter]

***AVERAGE WEEKLY WAGE***

***Rachel Constantine v. Kelly Services, IAB No. 1432357 (1/17/17).* This case discusses how to calculate the average weekly wage for a substitute teacher who only worked three days a week – “The only evidence presented was Claimant’s testimony that she worked an average of three days a week and had a contract rate of $104.00 per day with Kelly Services, which yields an average weekly wage of $312.00.” The Board further ruled that the Claimant’s average weekly wage was to be calculated pursuant to 19 Del. C. § 2302(b)(2) since she worked less than 13 weeks for Kelly Services at the time of the industrial accident.** [Weik/Richter]

***CAUSATION ISSUES \_\_\_\_\_\_\_ \_\_\_\_\_***

***Joseph Bowden v. Harold Ives Trucking, IAB No. 1149880 (10/7/16).* The current need for injections with regard to a Claimant with chronic low back pain, a history of a L4 to S3 fusion, and adjacent segment disease with radiculopathy is causally related to a 1998 work accident and its residual.** [Schmittinger/Wilson]

***Fame Smith-Edwards v. State of Delaware, IAB No. 1160711 (12/14/16).* You do NOT take the claimant as you find him as to any unrelated conditions which are not aggravated by the work accident.** [Long/Panico]

***Tamaryn Gardener v. First Student Transportation, IAB No. 1442315 (11/29/16).*****The IAB finds in favor of a work accident and resulting injury but further finds that the injury has “resolved” by the time of the Hearing – “Claimant only suffered lumbar and cervical strain/sprain injuries in relation to the work accident that have since resolved.”** [Fredericks/Skolnik]

***Marta Olivares v. Hampton Inn Newark, IAB No. 1307669 (8/25/16).* Thoracic fusion surgery performed in 2015 is held by the Board to be causally related to a 2007 work accident based on the testimony of Dr. Matthew Eppley.** [Welch/Taylor]

***Rosemarie Metcalf v. State of Delaware, IAB No. 1391747(9/7/16).* Surgery performed after a 12/21/12 work related motor vehicle accident is not causally related to said accident where claimant had similar pathology on MRI five months *prior* to the work event.** [Stewart/Panico]

***Kenyatta Brooks v. State of Delaware, IAB No. 1425461 (12/22/16).* The IAB finds a work-related cervical spine injury but further rules that said injury has resolved within 12 weeks.** [Gregory/Rimmer]

***Robert Kisco v. Kitchen Kapers, IAB No. 1305756 (12/14/16).* Adjacent Segment Disease does NOT skip multiple levels – “Dr. Kalamchi was convincing that the worst changes seen should not have been about 4 or 5 levels above the fusion, with 2 or 3 open levels in between not showing worse deterioration than that displayed at T10-11.”** [Krayer/Ellis]

***Karen Savage v. State of Delaware, IAB No. 1419349 (8/29/16).* The Board allows the claimant to add the low back to what was an already-compensable hip injury based on the testimony of Dr. James Zaslavsky.** [Silverman/Durstein]

***Francis Campbell v. IKO Production, IAB No. 1427668 & 1436892 (2/2/17).* The IAB finds in favor of the work injury but also finds that said injury was “fully resolved” with the claimant “back to baseline” by February 2016.** [Zavodnick/Durstein]

***Richard Passwaters v. Town of Bridgeville, IAB No. 1411443 ( ).* The Board rules that the claimant’s diagnosis of complex regional pain syndrome of the left lower extremity is not causally related to the 3/26/14 work accident but attributable to a subsequent event at home tripping over a dog.** [Lazzeri/Roberts]

***Genaro Vega v. Bristol Industrial Corp., IAB No. 1421071 (9/30/16).* A preexisting rotator cuff tear is compensable in relation to a 10/31/14 work accident under the Reese “but for” standard of causation with Dr. Mesa testifying on behalf of the claimant and Dr. Piccioni testifying on behalf of the employer.** [Welch/Andrews]

***Carl Reeder v. L’s Tire Service, IAB No. 1421187 (9/30/16).* On a claimant’s DACD Petition, the Board awards a proposed lumbar spine surgery as compensable pursuant to Blake and adopting the opinion of Dr. Rastogi.** [O’Neill /Adams]

***Francis Calhoon v. State of Delaware, IAB No. 1419968 (8/25/16).* A left total knee replacement is awarded by the Board in reliance on Blake and Reese with Dr. Joseph Farrell on behalf of the claimant and Dr. Andrew Gelman testifying on behalf of the employer.** [Lazzeri/Rimmer]

***Ronna Lee Pyne v. Beebe Medical Center, IAB No. 1380572 (12/30/16).* A 2016 left total knee replacement is deemed unrelated to a 2012 work accident with the Board embracing the opinion of the defense medical expert Dr. Lawrence Piccioni.** [Roman/Menton]

***Gary Sandler v. Sentinel Self-Storage, IAB No. 1414120 (8/29/16).* The Board awards the left shoulder to an already-established and otherwise compensable right shoulder injury based on a theory of overcompensation offered by Dr. Kahlon – “Dr. Kahlon explained that he believes that it would be understandable for claimant to have increased his use of the left shoulder, given the right shoulder condition, even after the right shoulder was stabilized. Dr. Kahlon further confirmed that when patients have significant dysfunction on one side, there can be use of the other side in a maladaptive way. In his view, this is what aggravated the claimant’s left shoulder after he was released to medium duty work following the FCE.”** [Witherow/Richter]

***CASUAL EMPLOYMENT\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_***

***Mary Lou Vail v. State of Delaware, IAB No. 1442031 (1/31/17).* A poll worker is denied worker’s compensation benefits as a “casual employee” pursuant to 19 Del. C. § 2301(10).** [Mason/Frabrizzio]

***COURSE AND SCOPE***

***Mark DeSantis v. State of Delaware, IAB No. 1439533 (12/29/16)*. This case reviews the law of course and scope as it relates to semi-travelling employees and concluding that the Claimant’s injuries from a motor vehicle collision on 1/16/14 arose out of his employment and with the Board concluded that “Claimant’s job activity on October 16, 2014 represented circumstances of travel that were unusual and urgent.”** [Friebott/Julian]

***James Yun v. Mid Atlantic Electrical Services, IAB No. 1440844 (9/6/16).* (*ORDER*). A Claimant in a motor vehicle accident in the company van dropping off coworkers on his way home is NOT in course and scope with the Hearing Office commenting that the Claimant was “not on the clock” at the time of the accident and that according to his employment contract, his work hours started when he arrived at the job site and ended when he left the job site, further noting that he was not paid for his time travelling to or from work, nor was he reimbursed for mileage.** [Roggio/Richter]

***Thomas Speakman v. John Stele Junior, Inc., IAB No. 1438211 (1/31/17).* A Claimant involved in a motor vehicle accident on his way home is ruled to be in course and scope as a travelling employee based on the following: “Claimant’s unrebutted testimony established that he had no fixed place of employment. He travelled to job sites and customer locations in his company furnished truck, which also had a computer and functioned as a rolling office, if you will. He also had an office set up in his home to complete paperwork and submit job estimates and reports. The Board finds that the Claimant is clearly a travelling employee with no fixed office or location of employment… Claimant testified that he was on his way home when the accident occurred, however, he still had work to do when he got there.”** [Houser/Andrews]

***DME ISSUES\_\_\_\_\_­­\_\_\_\_\_\_\_\_\_\_\_\_***

***Jasmine Miles v. Marriott International, IAB No. 1397875 & 1425075 (10/14/16).* In this case the defense medical expert “relied heavily” on the records of the treating physician and “the Board agrees with this approach”, noting that the carrier’s Petition for Review was granted and that Dr. Andrisani was the defense medical expert.** [Morrow/Morgan]

***Paulette Hendricksen v. Liberty Mutual Insurance, IAB No. 1393845 (1/3/17) (ORDER).* The defense medical evaluation report is allowed to issue inside the “30 day” noting that production of the DME report inside the 30 day does not in itself violate any Board rule.** [Long/Segletes]

***Paulette Hendricksen v. Libert Mutual Insurance, IAB No. 1393845 (1/3/17) (ORDER).* Where the DME report issues after the claimant’s medical expert deposition, the claimant’s expert can be re-deposed at employer’s expense.** [Long/Segletes]

***Alicia Tobar-Desoto v. Mount Aire Farms, IAB No. 1447959 (12/14/16).* (*ORDER)*. The Board awards a DME credit of $1295.00 where the claimant failed to appear for a DME even after the employer made arrangements for transportation and translation.**

***DISFIGUREMENT***

***Sonya Lowe v. State of Delaware, IAB No. 897133 (10/18/16).* The Board awards 12 weeks for lumbar surgical scars as a result of the work injury, to include scarring associated with the implant of a spinal cord stimulator and to include “blotchy red marks” that are a result of heat exposure from heating pads because claimant cannot feel heat when she applies the pads.** [Schmittinger/Panico]

***Sharon Scarmozzi v. Lowe’s Home Center, IAB No. 1402957 (8/19/16).* A 2 inch surgical scar inside the elbow is awarded 2 weeks of disfigurement benefits.** [Mason/Wilson]

***Denise West v. Bank of America, IAB No. 1415184 (8/23/16).* A 2.5 inch by .25 inch scar on the front of the neck from a cervical spine surgery is awarded 4 weeks.** [Gambogi/Simpson]

***Mark DiEnno v. EI DuPont de Nemours, IAB No. 1444753 (10/7/16).* A scar on the right shoulder from a rotator cuff repair surgery which is 2 inch by 1 is awarded 4 weeks.** [Silverman/Ralston]

***Janelle Abosch v. The Nemour Foundation, IAB No. 1391667 (10/5/16).* The claimant is awarded 6 weeks of benefits for a 2 inch surgical scar at the front of her neck.** [Long/Ralston]

***Juan Torres v. Reybold Homes, IAB No. 1289204 (2/2/17).* The claimant is awarded 8 weeks of disfigurement benefits for a skin graft patch.** [Krayer/Taylor]

***Juan Torres v. Reybold Homes, IAB No. 1289204 (2/2/17).* The claimant is awarded 5 weeks of benefits for scarring for a scar resulting from skin graft surgery which is 3.5 inches in length.** [Krayer/Taylor]

***Juan Torres v. Reybold Homes, IAB No. 1289204 (2/2/17).* The claimant is awarded 12 weeks of disfigurement for an altered gait which is described by the Board as a “moderate, staggered limp”.** [Krayer/Taylor]

***DISPLACED WORKER***

***Walter Wright v. Justin Tanks, IAB No. 1388316 (10/10/16).* This case includes an example of an appropriate job search with the Board ruling that the claimant is actually displaced and as such, the employer’s Termination Petition is denied.** [Wilson/Hartnett]

***ESTOPPEL & WAIVER\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_***

***Charles Bublitz v. First Choice Auto Repair, IAB No. 1300945 (2/2/17).* The IAB rules that payment of bills from 2012 on creates an implied Agreement as to a 2007 work accident that waives any causation defense.** [O’Neill/Hartnett]

***IDIOPATHIC FALL DOCTRINE\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_***

***Patricia Briggs v. Christiana Care Health Services , IAB No. 1435725 (1/12/17).* A fall on the employer’s premises is deemed outside of course and scope of employment due to a successful defense of “idiopathic fall doctrine” and based in large part on the Hearing Officer finding that “Claimant’s testimony is not particularly reliable and is inconsistent with the medical records…”** [Boyle/Newill]

***Linda Capone v. State of Delaware, IAB No. 1376808 (10/3/16)*. In a highly fact-driven case resulting in an IAB decision approximately 93 pages in length, the Claimant’s allegation of an 11/10/11 trip and fall at work is denied under the “Idiopathic Fall Doctrine.”** [Boswell/Julian]

***MEDICAL EXPERTS FOR DEFENSE EVALUATIONS\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_***

***Vernon Robinson v. New Castle County, IAB No. 1400980 (8/25/16).* Dr. Ralph Ierardi for vascular defense medical evaluation.** [Friedman/Tickle]

***Marta Olivares v. Hampton Inn Newark, IAB No. 1307669 (8/25/16).* Dr. Neil Kahanovitz for orthopaedic defense medical evaluation.** [Welch/Taylor]

***Thomas Jones v. Solar Tight Installations, IAB No. 1415917 (1/3/17).* Dr. Thomas Barnett for hernia defense evaluation.** [Welch/Andrews]

***Jasmine Miles v. Marriot International, IAB Nos. 1397875 & 1425075 (10/14/16).* Dr. Damien Andrisani for orthopaedic defense medical evaluation involving injuries to the right shoulder, wrist, and neck.** [Mauro/Morgan]

***William Rife v. Lowe’s Home Center, IAB No. 1418108 (10/18/16).* Dr. William Spellman for orthopaedic DME involving claim of injury to the spine and right upper extremity.** [Schmittinger/Nichols]

***Kevin Capel v. Johnson Controls, IAB No. 1268060 (9/7/16).* Dr. David Maine for pain management DME for purposes of a Utilization Review appeal involving treatment with Dr. Bruce Grossinger.** [Schmittinger/Nardo]

***Lisa Chambers v. Perdue Farms, IAB No. 1363444 (9/30/16.* Dr. Nathan Schwartz, board certified in anesthesiology and pain management for defense evaluation involving an allegation of complex regional pain syndrome.** [Schmittinger/Frabrizzio]

***Philip Basiliko v. Gaming Entertainment DE, IAB No. 1431983 (8/23/16).* Dr. Eric Kalish, general surgeon, for defense medical evaluation involving an allegation of hernia.** [Donovan/Terrison]

***MEDICAL TREATMENT ISSUES***

***Linda Curran v. Select Medical Specialty, IAB No. 1429081 (1/27/17).* The Board awards surgery proposed by Dr. Eskander where claimant has exhausted conservative options, where she demonstrates an acute neurological problem, and where the surgery carries a 50/60% chance of success.** [Stewart/Logullo]

***Bertha Schwartz v. Twenty-Nine Corp., IAB No. 1331435 (10/11/16).* Claimant’s medical bills for residential nursing home care are due to the residual of the work accident and not due to aging based on the testimony of Dr. Fink and rejecting the opinion of Dr. Townsend.** [Lengkeek/Logullo]

***Tracy Phipps v. Lowe’s Home Centers, IAB No. 1285110 (10/28/16). (ORDER)*. A trial spinal cord stimulator is not subject to the pre-authorization of Section 1341-5.4.4** [Stewart/Wilson]

***Tracy Phipps v. Lowe’s Home Centers, IAB No. 1285110 (10/28/16).* You cannot bootstrap spinal cord stimulator implant surgery to authorization for a trial spinal cord stimulator – “The Board finds that Dr. Falco’s request impermissibly attempts to obtain pre-authorization for two procedures, since the request includes both the trial and if successful the actual implant procedure. Thus, the request would preclude Employer from challenging the results of the stimulator trial through a Utilization Review. In effect, Dr. Falco is attempting to bootstrap approval for the implant surgery before even determining whether a trial was successful.”** [Stewart/Wilson]

***Patrick Kalix v. Gilse & Ransom, IAB No. 1280555 (1/27/17) (ORDER*) In what is likely the very first medical marijuana case in the pipeline, the Board denies the claimant’s motion for Rule to Show Cause why the carrier should not be required to pay for the claimant’s medical marijuana in favor of a merits Hearing.** [Marston/Baker]

***Brenna Meixner v. Easter Seals, IAB No. 1298685 (1/31/17).* The Board awards anti-coagulants and specialized ultra sound for pregnancy due to the work accident and a deep vein thrombosis with Dr. Casey Bedder and Dr. John Townsend testifying on behalf of the claimant and Dr. Jason Brokaw testifying on behalf of the employer.** [Bartkowski/Chrissinger-Cobb]

***Robert McCabe v. Bayside Roofing, IAB No. 1363751 (12/27/16).* The Board rejects a claim for medical bill payment where Dr. Balu cannot offer specifics – “In the case at hand, only Dr. Balu testified. However, Dr. Balu was unable to answer questions about his office’s billing practices and specifically about claimant’s medical bills. Without the testimony regarding the medical bills, claimant is unable to meet his burden of proof that any medical bills are still outstanding and that clean claims were submitted to the insurance carrier on behalf of Bayside Roofing.”** [Schmittinger/Ellis]

***PARTIAL DISABILITY***

***William Lumsten v. General Motors, IAB No. 1240633 (10/14/16)*. For purposes of calculating partial disability benefit entitlement, you NEVER deviate from the claimant’s average weekly wage at the time of the work accident.** [Gambogi/Wilson]

***Karen Kelly v. Dialysis Parent LLC, IAB No. 1425005 (12/14/16)*. The Board awards partial disability benefits based on a labor market survey in the case of a registered nurse and as such the Claimant is awarded a TPD benefit of $272.44 weekly.** [Carmine/Julian]

***Rose Barbour v. State of Delaware, IAB No. 1423741 (10/17/16).* On this Petition for Review the Claimant is denied a partial disability benefit entitlement based on a finding of “voluntary removal from the work force.”** [Green/Rimmer]

***PERMANENT IMPAIRMENT***

***Thomas Varga v. County Wide HR, IAB No. 1423871 (12/13/16).* On a Petition seeking a 30% impairment to the right lower extremity based on an allegation of complex regional pain syndrome, the rating of Dr. Xing fails and the Board awards a 15% impairment based on the opinion of Dr. Meyers.** [Hedrick/Panico]

***Eric Hiller v. Newark Concrete, IAB No. 1306309 (10/12/16).* A claim of 39% impairment to each lower extremity based on a deep vein thrombosis is rejected in favor of the defense medical expert rating of 9% with Dr. Cary testifying on behalf of the claimant and Dr. Meyers testifying on behalf of the employer.** [Pratcher/Tatlow]

***Marcella Nichols v. State of Delaware, IAB No. 1354728 (10/20/16). (ORDER*). The payment of the permanent impairment may preclude a “resolved” or “back to baseline” argument.** [Lengkeek/Ellis]

***Lotant Eustache v. Mountaire Farms of Delmarva, IAB No. 1412763 (12/7/16).* The Board rejects the 26% impairment rating of Dr. Bandera and awards a 6% impairment for De Quervains based on the opinion of Dr. Crain.** [Roggio/Taylor)

***Brenna Meixner v. Easter Seals, IAB No. 1298685 (1/31/17).* The Board awards a 17% impairment to the brain based upon the opinion of Dr. John Townsend – Dr. Townsend cited claimant’s consistent forgetfulness, partial recollection of events, slight difficulty with time relation, slight impairment in problem solving, processing speed issues, and working memory problems.** [Bartkowski/Chrissinger-Cobb]

***Diana Charles v. State of Delaware, IAB No. 1420310 (10/20/16).* The permanency DME of Dr. Gelman fails for lack of use of a dynamometer.** [Freibott/Panico]

***PRACTICE AND PROCEDURE\_\_\_\_\_***

***Kia Clarke v. State of Delaware, IAB No. 1401212 (8/30/16).* The Claimant is NOT permitted to void or otherwise set aside a prior agreement with the employer stipulating that future chiropractic care would not be the payment liability of the worker’s compensation carrier with the Hearing Office ruling that “a valid settlement agreement existed between the parties.”** [Bednash/Morris-Johnston]

***Jennine Mitchell v. George Krapf Junior & Sons, IAB No. 1442885 (1/10/17). (ORDER*) This matter was heard by the Board on 1/5/17 on an initial DCD Petition; the Board members were at an impasse and unable to reach an agreement as to a decision on the Petition. As such, this matter was to be rescheduled for a new Hearing with a new Board panel.** [Bifferato/Menton]

***Michael Foxwell v. Giles & Ransome, IAB No. 1440647 (1/3/17).* (*ORDER*) This matter came before the board on 12/22/16 on an initial DCD Petition and the Board members were unable to reach an agreement; the Board rejected the employer’s argument that Claimant’s petition should now be dismissed on the basis that the Claimant did not meet his burden of proof in the Hearing with the Board agreeing that this is more like a “hung jury” such that Claimant is entitled to a new Hearing in front of a new Board panel.** [Houser/Lockyer]

***Delmarva Cleaning & Maintenance v. Christopher Rumbley, IAB No. 1433050 (8/18/16).* (*ORDER*) The Board cannot dismiss (with or without prejudice) a Petition that has been withdrawn by the claimant.**

***William Henderson v. NVF Company, IAB No. 1428969 (10/2/16).* (*ORDER*) The claimant’s Motion to Stay a DCD Petition on the basis of uncertainty as to the proper carrier is denied.** [Crumpler]

***Jackie Johnson v. Amazon.com, IAB No. 1436090 (10/13/16).* (*ORDER*) The Board grants the employer’s Motion to Compel to schedule a lumbar discogram as prescribed by Dr. Rudin where “claimant missed multiple appointments that were set up for the discogram and Dr. Rudin has advised that there is nothing that can be done by him until she has the testing.”** [Weis/Ellis]

***Kerrie Unger v. New Castle County, IAB No. 1419344 (12/2/16).* (*ORDER*) The Board denies the employer’s Motion to Compel the claimant to attend a Functional Capacity Evaluation where the claimant already underwent an FCE 6 months earlier at the request of the treating physician and where no doctor has indicated that this testing needs to be updated.** [Freeberry/Tickle]

***Thomas Varga v. County Wide HR,* *IAB No. 1423871 (12/13/16).* The admission of medical publications as exhibits is prohibited under DRE 803(18).** [Hedrick/Panico]

***Christopher Cimo v. Kings Creek Country Club, IAB No. 1434748 (10/14/16).* The “30 day rule” is enforced to bar the testimony of one HR witness as substitution for another.** [Freeberry/Swift]

***PROVIDER CERTIFICATION\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_***

***Stephanie Saulsbury v. Harrison Enterprises, IAB. No. 1394334 (10/18/16).* The out-of-state medical provider amendment of 7/27/15 is NOT retroactive.** [Schmittinger/Andrews]

***Stephanie Saulsbury v. Harrison Enterprises, IAB. No. 1394334 (10/18/16).* This case contains an explanation of the 7/27/15 amendment to Section 2322D as to out-of-state providers.** [Schmittinger/Andrews]

***SECTION 2311/CONTRACTOR STATUTE***

***Leandro DaSilva v. MWM Construction & Berlin Builders, IAB Nos. 1430185 & 1430803.* (ORDER) The certificate of insurance required under Section 2311 must be valid for coverage in Delaware.** [Kimmel/Silar/Angelo]

***STATUTE OF LIMITATIONS***

***Willard May v. Delaware Park, IAB Nos. 1243967 & 1200752 (12/14/16).* (*ORDER)*. This case contains a discussion of the interplay between the statute of limitations and the impact, if any, on a pay without prejudice of medical bills – “the 2011 payment was openly made without prejudice under the statute. Claimant did not exercise his right to bring the claim to Hearing to have the Board determine compensability. Now, the 5 year statute of limitations has passed since the last true payment of compensation for the 1999 injury, barring the present petition.”** [Wasserman/Skolnik]

***Lawrence Juliano v. Wayman Fire Protection, IAB No. 1144093 (10/11/16).* (ORDER). Evidence of a telecopier transmittal by claimant is sufficient to establish that the Petition was filed within the statute of limitations.** [Ippoliti/Baker]

***Wanda Johnson-Lister v. Christiana Care Health Services, IAB No. 1261651 (1/12/17).* ORDER. The 5 year statute of limitations of 19 Del. C. § 2361 runs from the date the last payment is MADE as opposed to that date of the period of disability the payment is intended to cover*.*** [Welch/Skolnik]

***Lawrence Juliano v. Wayman Fire Protection, IAB No. 1144093 (1/6/17)* (*ORDER*) on Motion for Re-argument). The statute of limitations does not bar a claim where evidence suggests the error in question belongs to the Department of Labor – “the question then becomes whether it is proper for the Board to bar an otherwise timely filing as untimely simply because the Board was unaware of the filing. The Board does not believe that it can properly do that for purposes of the statute of limitations, the issue is when the Petition was filed – not when the Board became aware of that Filing. The delay in processing this Petition stems from the fact that the Petition was apparently not properly docketed when it came in by telecopier. It is unknown how or why that happened. Claimant however should not be deprived of his claim because of that administrative error.”** [Ippoliti/Baker]

***SPECIFIC DIAGNOSES\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_***

***Thomas Jones v. Solar Tight Intallation, IAB No. 1415917 (1/3/17).* The Board rules in favor of the employer that an umbilical hernia is not causally related to a work accident with Dr. Kalish testifying on behalf of the claimant and Dr. Barnett testifying on behalf of the employer – “The first time claimant complained of pain related to the umbilical hernia was on 10/24/14. Dr. Barnett did not dispute claimant’s umbilical hernia-related symptoms to Dr. Kalish in April 2015 but commented that there is no way a person can wait that long (10 months) before seeking treatment for such complaints had they been ongoing. Claimant would have been in the emergency room or at the surgeon’s office constantly during that time looking for help.”** [Welsh/Andrews]

***Vernon Robinson v. New Castle County,******IAB No. 1400980 (8/25/16).* The Board rules in favor of the claimant that he developed a “popliteal pseudo aneurysm” of the right leg after heaving lifting at work.** [Freidman/Tickle]

***TERMINATION***

***Fame Smith-Edwards v. State of Delaware, IAB No. 1160711 (12/14/16).* The employer’s Petition to Terminate is granted and the Functional Capacity Evaluation plays a role with the Board taking into account also the opinion of the Defense Medical Expert Dr. Rushton as well as a surveillance video.** [Long/Panico]

***Brenda Rash v. St. Francis Hospital, IAB No. 1411023 (12/2/16).* The Employer’s Termination Petition is granted with the IAB rejecting the opinion of Dr. Xing who endorsed a one year period of total disability following surgery.** [Krayer/McGarry]

***Nanette Boney v. Delaware Supermarkets, IAB No. 1348424 (12/5/16).* The employer’s Petition for Review is denied and the lack of a Function Capacity Evaluation plays a role – “The Board acknowledges that an FCE might provide helpful information in regard to the Claimant’s physical capabilities. However, this additional data is not available at this point and therefore has no bearing on the current Termination Petition. Claimant could not be expected undergo an FCE when her treating physician was not recommending it and the employer’s medical expert never recommended one until he testified at his deposition.”** [Marrow/Morgan]

***Donna Speel v. HCR Manor Care, IAB No. 1332429 (1/10/170).* The employer’s Petition to Terminate is denied – “The Board finds Dr. Ivins’ opinion more persuasive because of his long-term association with Claimant’s case as her primary care pain management physician; the medical records documenting a lengthy history of treatment that has failed to relieve Claimant’s severe symptoms and Claimant’s credible testimony about the difficulty her symptoms present as she goes about her activities of daily living.”** [Saints/Wilson]

***Jasmine Miles v. Mariott International, IAB Nos. 1397875 & 1425075 (10/14/16).* The employer’s job offer fails due to failure to complete the requisite state form and in the absence of a labor market survey, the claimant is awarded partial disability benefits at her total disability benefit rate.** [Morrow/Morgan]

***UTILIZATION REVIEW***

***Kraig Davis v. Waste Industries, IAB No. 1408611 (12/15/16).* A Utilization Review non-certification of Dr. Balu pain management treatment is reversed.** [Schmittinger/Carmine]

***Wynonah Wallace v. Kent County Levy, IAB No.1354583 (10/14/16).* A Utilization Review non-certification of treatment with Dr. Eskander is reversed with the Board also awarding a disputed surgery to address a non-union.** [Welch/Gin]

***Nancy Vodvarka v. State of Delaware, IAB No. 1422180 (2/7/17).* A Utilization Review non-certification of physical therapy treatment is reversed.** [Schmittinger/Skolnik]

***Tim Lloyd v. Franklin Fibre, IAB No. 1382021 (9/6/16).* A Utilization Review non-certification of trigger point injections is affirmed.** [Butler/Roberts]

***Brenda Gardner v. Johnson Controls, IAB No. 1397357 (12/13/16)*. A Utilization Review non-certification of 86 massage treatments is reversed and ongoing massage is awarded.** [O’Neill/Lockyer]

***Barbara Shepperson v. Young, Malnberg & Howard, IAB No. 1386579 (10/24/16).* The Board reverses a Utilization Review non-certification of chiropractic treatment and physical therapy.** [Schmittinger/Nardo]

***Darias Christy v. Pepsi, IAB No. 1429306 (10/27/16).* The Board reverses a Utilization Review non-certification of Chiropractic treatment.** [Morrow/Brown]

***Karl Boscher v. Emmit Oat Contractor, IAB No. 1294942 (1/11/17).* The IAB affirms a Utilization Review non-certification of treatment with Dr. Cary including Percocet, Soma and OxyContin but allows a 6 month titration period for the narcotics.** [Stewart/Nardo]

***Michael Hayes v. NCR Repair, IAB No. 1407776 (12/9/16).* The IAB reverses a Utilization Review non-certification of chiropractic even where carrier has already paid for 2 years of chiropractic treatment.** [Bustard/Nichols]

***Karen Phillips v. Eddie Bauer, IAB No. 1340550 (12/27/16).* A Utilization Review non-certification of Lunesta is affirmed.** [Gji/Carmine]

***Karen Phillips v. Eddie Bauer, IAB No. 1340550 (12/27/16).* A Utilization Review certification of OxyContin and Oxycodone is reversed.** [Ji/Carmine]

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**Appellate Court Decisions**

**(with grateful acknowledgement of Law Clerk Dean Roland for research assistance)**

**Supreme Court**

*Roos Foods v. Guardado*, 152 A.3d 114 (Del. November 29, 2016).

**The Supreme Court reversed and remanded the findings of the Industrial Accident Board (the “Board”), holding that an undocumented worker'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 employer petitioned the Board to terminate permanent disability benefits on the ground that the worker was no longer disabled. The Board found that the employer met its initial burden of showing that the worker was no longer totally disabled. The Board then found that the employee was a prima facie displaced worker based solely on her status as an undocumented worker. The Superior Court affirmed, but cited different reasons for finding employee a prima facie displaced worker, which included: “Guardado 1) is 38–years-old, 2) is unskilled, 3) only speaks Spanish, 4) has the equivalent of a high school diploma from El Salvador, 5) can only use her right hand for light-duty work and left hand as an assistance hand, 6) has only worked for five years, and 7) is an undocumented worker unable to work legally in the United States.”

On appeal, the Supreme Court reiterated the standard for terminating total disability benefits: “the employer must initially show that the claimant is not completely incapacitated. The claimant may then rebut that showing by establishing that she is a displaced worker.” If the employee meets that burden, the burden then shifts back to the employer to show regular employment that is actually available to the employee based on his or her capabilities. To establish that jobs are actually available to the claimant, the employer needs to consider the claimant’s undocumented status.

*AFL Network Servs. v. Heglund*, 151 A.3d 896 (Del. November 15, 2016).

**The Supreme Court reversed the findings of the Superior Court, agreeing with the Board, that Claimant’s proposed surgery was not reasonable or necessary. The Court noted that it is the Board’s province to weigh evidence and judge the credibility of witnesses. Because substantial evidence supported the Board’s decision and the Board’s findings of fact, the Superior Court committed reversible error by substituting its judgment for the Board’s.** The employer’s expert testified that the proposed surgery would not help, and could actually make the condition worse as it did not address the underlying problem. Claimant’s expert testified that the surgery would be helpful to possibly tighten loose screws from a previous surgery. It was within the discretion of the Board to credit employer’s expert and discount claimant’s expert.

*Tedesco v. Bayhealth Med. Ctr.*, 150 A.3d 1209 (Del. November 4, 2016).

**The Supreme Court affirmed the findings of the Superior Court, finding that an appellate court does not retain jurisdiction to review orders of the Board after a case has been remanded back.** The Court noted that the procedure for reviewing the Board’s order after a remand proceeding is the same as if the order was the disposition in the original proceeding. *See* 19 *Del. C.* § 2350(b). An appeal must be filed within 30 days of issuance of the Board’s final order in a remand proceeding.

*Greenville Country Club v. Greenville Country Club*, 150 A.3d 1194 (Del. November 2, 2016).

**The Supreme Court affirmed the findings of the Board and the Superior Court, finding that, on the question of successor liability, the employer’s insurance carrier for claimant’s initial injury was responsible to compensate claimant for the later recurrence of the injury notwithstanding that the insurance carrier was no longer employer’s insurance carrier during the second accident and employer’s subsequent insurer initially determined the injury was compensable.** The Court framedthe issue as “whether liability for a later manifestation of injury, occurring after both accidents, falls upon the first carrier or the second carrier.” The Court noted that the “last injurious exposure” rule requires that “[l]iability for a later condition fall[] upon the carrier responsible for the injury which proximately causes the later condition, whether it be the first injury or the second injury. The burden of proving that the second event caused the later condition is upon the initial carrier.” The Board relied on the opinion of four of five doctors who determined the subsequent work accident could not have caused the reoccurrence and as such, the first injury was the cause of the recurrence. The Court found that the evidence easily met the standard of substantial evidence.

*Johnson v. Delhaize Am., LLC*, 138 A.3d 1149 (Del. May, 5, 2016).

**The Supreme Court affirmed the findings of the Board and the Superior Court, finding that the appeal was filed nearly a year after the Superior Court’s order, well outside of the applicable period.** The time to file an appeal pursuant to Super. Ct. Civ. R. 72 and 19 *Del. C.* § 2349 is thirty days from when the notice of award is mailed to the parties. The fact that the hearing transcript was mailed to New York had no bearing on the case, because although improper, the date the statute began to run was based on the mailing of the Board’s Order, not the hearing transcript.

**Superior Court**

*Morris James LLP, v. William Weller*, 2017 WL 1040713 Wharton, J. (Del. Super. Mar. 16, 2017)***.* The Superior Court reversed and remanded the decision of the Board, finding that the Board applied the incorrect legal standard in ruling that a softball related injury occurred within the course and scope of employment and thus was covered by workers’ compensation.** When an event is company sponsored, courts utilize the four factor conjunctive test adopted by Delaware Courts in *Nocks*. If the event is not company sponsored, the Court uses the three factor disjunctive test set forth in *Larson’s* and adopted by Delaware Courts in *Dalton*. The Board and the Superior Court found that the event was not company sponsored; however, the Board used the factors set forth in *Nocks,* not *Dalton.* In addition to one factor set appearing in the conjunctive and the other in the disjunctive, the *Dalton* factors require that the benefit the employer receives be a “substantial direct benefit.” The Court remanded the matter to determine if the findings of the Board that the firm “probably” benefited from increased productivity was a “substantial direct benefit’ pursuant to *Dalton*.

*Selby v. Talley Bros., Inc.*, 2017 WL 835196 Rocanelli, J. (Del. Super. Mar. 1, 2017).

**The Superior Court affirmed the decision of the Board, finding that Claimant failed to meet his burden of proving the accident occurred in such a way that caused the injuries complained of. It is within the province of the Board to reconcile competing medical testimony by crediting the opinion of one expert over another and “[w]here the Board elects to adopt one expert opinion over another, the adopted opinion constitutes substantial evidence for the purpose of appellate review.”** Claimant alleged that while working for his employer on a bridge, an unidentified vehicle hit a safety apparatus, causing him injury. Several eyewitnesses refuted the testimony, and testified that the safety apparatus was unhooked from Claimant at the time the car neared the jobsite and could not have caused Claimant’s injuries. The Board and Superior Court found that the accident did not occur in the way Claimant asserted and as such he was not entitled to worker’s compensation benefits.

*Hamilton v. Indep. Disposal Serv.*, 2017 WL 631770 Rocanelli, J. (Del. Super. Feb. 15, 2017).

**The Superior Court affirmed the decision of the Board, finding that Claimant failed to establish the necessary relationship between Claimant's spinal injury and Claimant's work accident and as such was not due additional compensation. Additionally, compensating Claimant for some of his earlier medical bills did not create an implied agreement for compensation of Claimant's surgery.** The Board credited employer’s expert and discredited Claimant’s expert. There were multiple injuries within the period after Claimant’s work related injury and the surgery in question, precluding a finding that the work accident caused Claimant’s injuries to a reasonable degree of medical probability. The accident occurred in 2002 and the injury and surgery Claimant deems necessary as a result of the accident did not manifest itself until ten years later. There was no implied agreement for compensation because the record did not indicate that employer was on notice of the exact details of the treatment - that the compensation was for injections to a spinal disc.

*Capital Unif. & Linen Serv. v. Martin*, 2017 WL 624855 Witham, R.J. (Del. Super. Feb. 13, 2017).

**The Superior Court reversed and remanded the decision of the Board finding that the Board failed to expressly reconcile contradictory testimony by Dr. Zaslavsky, and as such, the Board did not base its determination on substantial evidence. Dr. Zaslavsky stated during his testimony that the Claimant was out of work and also on light duty. These conflicting statements, without being reconciled, could not support the Board’s ruling based on substantial evidence.** Claimant’s differing levels of ability were important here as different levels of disability payments were made, ranging from total disability initially, to partial disability, and back to total disability. The last period of total disability conflicted with Dr. Zaslavsky’s testimony that Claimant was released to light duty at that time. Before making such an award, the Board was required to resolve these conflicting claims.

*State v. Ewing*, 2016 WL 6805351 Butler, J. (Del. Super. Nov. 7, 2016).

**The Superior Court affirmed the decision of the Board, finding that substantial evidence supported the Board’s findings that Ewing had never voluntarily removed herself from the workforce (retired). Had Ewing voluntarily retired, retirement could serve as a complete bar to disability benefits, even if Ewing was qualified as partially disabled at the time.** The Board found, and the Superior Court agreed, that Ewing’s attempts at finding employment, which included updating resumes and cover letters, obtaining letters of recommendation, submitting a job application, and obtaining a new professional certification, while not an intensive broad-based job search, did not amount to an effective retirement where Ewing voluntarily removed herself from the workforce.

*Torres–Molina v. Allen Family Foods*, 2016 WL 6609553 Graves, R.J. (Del. Super. Nov. 7, 2016).

**The Superior Court affirmed the decision of the Board, finding that Torres-Molina was not entitled to a deposition fee from her testifying physician. In affirming the decision of the Board, the Superior Court found that Claimant’s employer recognized Claimant’s injury as compensable and communicated that information to Claimant’s attorney two weeks before the scheduled deposition.** The Doctor testified his office would not charge for a deposition cancelled a week in advance. Claimant’s attorney failed to communicate this information to Claimant and the unnecessary deposition proceeded. The Court could not pass on such an unnecessary expense to the employer.

*Delaware Veterans Home v. Dixon*, 2016 WL 6561451 Witham, R.J. (Del. Super. Nov. 4, 2016).

**The Superior Court reversed and remanded the decision of the Board, finding that the Board applied the incorrect law, the Board’s award was too indefinite, and was not supported by substantial evidence.** The issue on appeal involved the proper billing codes for a physician to be compensated by Worker’s Compensation. The Court noted that Worker’s Compensation Law had been overhauled in recent years. One of the changes involved the proper billing procedure; codes had to be unbundled which streamlined the payment process. The Board found that there were irregularities in the billing codes and left it to the parties to “communicate and determine the proper codes ... so that the bills can be paid.” This was incorrect as the Board’s duty was to “hear and determine” the dispute; this type of award was too indefinite. Further, the Board placed the burden on the employer to show the codes were not compliant, when the burden should have been on the party seeking payment.

*Davis- v. Keystone Human Servs.*, 2016 WL 6072364 LeGrow, J. (Del. Super. Oct. 14, 2016).

**The Superior Court affirmed the decision of the Board and the Findings and Recommendation of the Commissioner assigned to the case on appeal.** The appeal, properly referred to as an objection, was timely filed within 10 days; however, the objection did not “set forth with particularity the basis for the objections” to the Commissioner’s findings pursuant to Superior Court Civil Rule 132. All that was filed was a sentence, referring the court back to Appellant’s Opening and Reply Brief, which was filed before the Commissioner made his findings. Although dismissal was warranted on this basis alone, the court reviewed the record *de novo* and found no reversible error.

*Weitzel v. State*, 2016 WL 4249766 Brady, J. (Del. Super. Aug. 9, 2016)

**The Superior Court affirmed the decision of the Board, finding that Claimant failed to prove that she was injured at the time and date alleged, and also whether the accident in question ever occurred.** On appeal, Claimant attempted to re-litigate factual issues, a function that the Superior Court does not carry out when reviewing a Board decision. The court also determined that the medical evidence presented to the Board was more than sufficient to meet the substantial evidence standard. The evidence showed that Claimant underwent treatment for her back, neck, and extremities before the accident *sub judice* and there was no physical change in her condition following the alleged accident. The evidence further showed that the events in question could not have occurred the way claimant suggested as multiple accounts contradicted her version of the facts.

*English v. Reed Trucking*, 2016 WL 3637341 Wallace, J. (Del. Super. Ct. July 6, 2016).

**The Superior Court affirmed the decision of the Board, finding that Claimant was five percent impaired and medical witness costs were appropriate for the employer to bear following the award. Both sides appealed the Board’s findings.** Claimant appealed the findings related to the percentage of impairment. Claimant’s argument, at bottom, was that it was error for the Board to credit employer’s medical expert over his own. Not so, as the Board is free to adopt one expert’s opinion and discredit the other. Employer challenged the award of medical witness costs. Employer’s argument was that since it offered eight percent impairment at settlement, a Board’s award of five percent impairment cannot be viewed as an “award.” The court disagreed, finding that the legislature specifically excluded attorney’s fees in such a situation, but did not do that same for medical witness costs. The omission was telling and the court affirmed the Board’s decision in all respects.

*Fountain v. McDonald's*, 2016 WL 3742773 Brady, J. (Del. Super. June 30, 2016).

**The Superior Court affirmed the decision of the Board, finding that Claimant failed to meet her burden that the 2014 treatment and surgery were necessary, reasonable, and casually related to her 2001 work accident.** Initially following the accident, Claimant received a substantial amount of medical treatment, much of which was paid by Employer’s workers’ compensation carrier. Almost fifteen years later, claimant alleged that another surgery, which was reasonable, necessary, and casually related to the 2001 accident was compensable. Employer’s medical expert opined that the treatment, while reasonable and necessary, was not casually related to the work accident that occurred nearly 15 years earlier. The expert claimed the surgery was needed due to a scoliosis surgery that Claimant had years prior. Employer’s medical expert determined that multiple people who underwent scoliosis surgery experienced similar problems to Claimant at approximately the same time after the initial surgery. Ancillary issues decided include: a medical examination report is not necessary pursuant to Board Rule 9 when permanent impairment is not alleged, late submission of the Pre-Trial Memorandum did not constitute unfair surprise because Employer utilized common defenses, and *res judicata* or collateral estoppel did not prevent a medical expert from reviewing another experts opinion that was previously discredited by the Board so long as the subsequent expert did not rely on that opinion. Crediting Employer’s expert over Claimant’s constituted substantial evidence that was necessarily affirmed on appeal.

*Nanticoke Health Servs., v. Washington*, 2016 WL 3621108 Bradley, J. (Del. Super. June 28, 2016).

**The Superior Court affirmed the decision of the Board, finding that as to the issue of successor liability, Employer’s insurance carrier at the time of Claimant’s first work related accident was responsible to compensate Claimant for her injuries.** All interested parties stipulated that the accident was compensable; however the carriers disputed which was responsible to cover the expenses. The Court found, as did the Board, that although there were intervening injuries between the first accident and the present, those injuries were minor and subsided quickly. Because the initial accident was the cause of Claimant’s injury and that injury was what the doctor treated, Employer’s carrier during the initial work accident was responsible to compensate Claimant for her medical expenses.

*Davis–Moses v. Keystone Human Servs.*, 2016 WL 3583203 LeGrow, J. (Del. Super. June 24, 2016).

**The Superior Court affirmed the decision of the Board, finding that limited testimony as to the severity of the accident was allowable because Claimant’s doctor characterized the accident in such a way and in relation to Claimant’s injury that he opened the door for such inquiry. Normally, such inquiry is not allowed, but because of the narrow use and Claimant’s characterization of the accident, the Board and Court allowed limited evidence on the issue.** Employer’s attorney only used the evidence to discredit Claimant’s doctor’s testimony, not to show that Claimant’s injury was not severe.

*Bayhealth Med. Ctr. v. Loper*, 2016 WL 3568643, Witham, R.J. (Del. Super. June 22, 2016).

**The Superior Court affirmed the decision of the Board, finding that Claimant remained totally disabled and in any event, Claimant was a displaced worker.** After Claimant underwent a second surgery to address an injury she suffered to her back at work, her employer moved to terminate total disability benefits. There was conflicting expert testimony. Claimant’s expert stated that she could possibly return to sedentary part-time work, but she still needed to finish her therapy. Employer’s expert said that Claimant could return to light-duty full-time work. The Court found Claimant’s expert’s statements to be general in nature. In addition to the continued therapy, claimant was still on pain medication and had pain levels of an eight or nine out of ten. The expert had to examine Claimant before he felt comfortable taking her off total disability. Further, the Court agreed that Claimant was a displaced worker. Claimant made a good-faith effort to secure employment. She applied at all the jobs the vocational case manager identified, but was unable to secure employment due in large part to her disability.

*Kirkland v. Terminix*, 2016 WL 3365815 LeGrow, J. (Del. Super. June 17, 2016), aff'd, 151 A.3d 896 (Del. 2016) (Table).

**The Superior Court affirmed the decision of the Board, finding that the Board had the authority and properly resolved the issue *sub judice*. Claimant injured her back at work and began receiving total disability benefits. Employer moved to terminate the total disability benefits. The parties signed a stipulation stating “disability has ended” and she “no longer opposed [Terminix’s] Petition to terminate her disability benefits.”** Terminix, however, desired to proceed on the Petition, alleging Kirkland’s work injuries had resolved fully and sought to terminate her medical benefits as well. Claimant posited that the medical benefits issue was not properly before the Board and a second petition “terminating medical benefits” had to be filed in order for the Board to consider the issue. The Board and the Court disagreed, finding that notice was at least sufficient as contained in the pre-trial stipulation and a 60-day continuance was granted in order for Claimant to conduct further discovery on the issue. Claimant failed to conduct any further discovery. The Court and Board found that Claimant did not suffer any prejudice and the Board properly considered the issue.

2016 WL 3365815

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

Shelina KIRKLAND, Claimant-below/Appellant,

v.

TERMINIX, Employer-below/Appellee.

C.A. No. N15A–08–003 AML.

|

Submitted: March 8, 2016.

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Decided: June 17, 2016.

On appeal from a decision of the Industrial Accident Board: AFFIRMED.

ORDER

ABIGAIL M. LEGROW, Judge.

**\*1** This is Shelina Kirkland’s appeal from an August 17, 2015 decision of the Industrial Accident Board (the “Board”), After a hearing, the Board granted Terminix’s Petition for Review, terminating Kirkland’s benefits, based on the Board’s determination that Kirkland’s injuries had resolved fully as of August 6, 2013.

Background and Procedural History

On April 29, 2013, Shelina Kirkland injured her low back and neck while working for Terminix. Her injuries were acknowledged as compensable, and she received workers’ compensation benefits, including total disability benefits.

On December 12, 2014, Terminix filed with the Board a Petition for Review (the “Petition”) to terminate Kirkland’s receipt of total disability benefits. A hearing on the Petition was scheduled for May 15, 2015. In accordance with Board Rule 9,1 the parties filed a pre-trial memorandum with the Board on February 24, 2015. Terminix’s medical expert, Dr. Kalamchi, was deposed on May 12, 2015. Kirkland did not depose any of her experts listed on the pre-trial memorandum before the May 2015 hearing.

On May 15, 2015, the date of the Board hearing, the parties signed a stipulation in which Kirkland conceded her “disability has ended” and she “no longer opposes [Terminix’s] Petition to Terminate her disability benefits,”2 Terminix, however, wanted to proceed on the Petition, alleging Kirkland’s work injuries had resolved fully.3 Kirkland contended that Terminix needed to file a second petition “terminating medical benefits” in order for the Board to consider that issue.4

Following argument from both sides, the Board decided that the issue of whether Kirkland’s work injuries had resolved properly was before them.5

Specifically, the Board stated:

“[T]he petition that was filed is the appropriate measure to have the issue of whether [Kirkland’s] condition has resolved. This is the proper vehicle to have that issue resolved and just the fact that there is now a concession ... a late concession that [Kirkland] is no longer totally disabled, [Terminix] should still have a chance to litigate that issue of whether the condition has been fully resolved.”6

The Board did, however, continue the case for 60 days to allow Kirkland “a chance to depose her own doctor on [the] issue”7 of whether she recovered from her work injuries.8 Although Kirkland scheduled her treating chiropractor’s deposition for June 15, 2015,9 Terminix’s counsel was informed on June 14, 2015 that “they had elected to cancel the deposition.”10

On July 6, 2015, the parties reconvened to litigate whether Kirkland’s injuries had resolved fully. At that hearing, Terminix submitted Dr. Kalamchi’s deposition transcript. Kirkland relied on her own testimony.

On August 17, 2015, the Board issued its decision and concluded the only issue to decide was “whether the injuries Claimant sustained in the April 29, 2013 work accident have completely resolved.”11 Based on the record, the Board granted Terminix’s Petition, determining that Kirkland’s work-related injuries had resolved fully as of August 6, 2013.12 Kirkland appealed the Board’s decision on August 24, 2015.

The Parties’ Contentions

**\*2** Kirkland contends that the issue of whether her work-related injuries had resolved fully was not properly before the Board and that the Board’s ultimate decision on that issue therefore “constitutes reversible error because the Board decided an issue that was not properly placed before it” in violation of its own Rules13—specifically, Board Rule 26. That Rule states: “When a petition is pending before the Board, ... a party wishing to [*inter alia,* request to review an open compensation agreement] must file a formal petition.”14

Kirkland argues that Terminix’s pending Petition alleged only that “Claimant is physically able to return to work,” and, therefore, the sole issue on which the Board could render a determination was whether Kirkland physically was able to return to work after her April 29, 2013 work injuries.15 She contends that, under Rule 26, the Board could not consider whether her injuries had resolved fully unless and until Terminix filed a second petition specifically raising that issue. Because no such petition was filed, Kirkland argues the Board erred in determining Kirkland’s injuries resolved as of August 6, 2013.16

Kirkland also argues that whether she received notice of the July 6, 2015 hearing’s subject-matter “sufficiently in advance” of the hearing is irrelevant because Rule 26 conclusively requires a petition to be filed.17 Nonetheless, Kirkland contends that if notice was relevant, her counsel was not “properly notified by the [Board] that there would be a hearing on the issue of whether ... [her] work related injuries had fully resolved.”18 Relying on *Phillips v. Delhaize America, Inc.,*19 Kirkland argues that the “Board’s proceedings are governed by both the requirements of due process and the [Administrative Procedures Act (the ‘APA’) ].”20 Accordingly, the Board must “inform the party of the time, place, and date of the hearing and the subject matter of the proceedings.”21 In *Phillips,* this Court determined the Board failed to comply with “either due process or the APA’s notice requirements [since] [t]he Board did not send any notice at all to [the parties] about what [the Board] intended [to] address at the legal hearing.”22

Kirkland further contends that the pre-trial memorandum was not sufficient notice because Terminix checked off the box indicating that “Claimant’s continued injuries are not causally related to the accident,” which, Kirkland argues, is not the same as alleging her injuries “completely resolved.”23 Lastly, Kirkland argues she was prejudiced by the Board’s decision because, had she known the Board was going to consider whether her condition had resolved, her cross-examination of Terminix’s medical expert “would have been far different and more focused on that issue.”24

Terminix responds that Rule 26 does not require Terminix “to file a second Petition for Review in order to have the Board address whether [Kirkland’s] work injuries have resolved.”25 Rather, the “relevant standard is whether an issue has been raised sufficiently in advance of [the] hearing to provide parties notice and an opportunity to be heard.”26 Citing *Jepsen v. University of Delaware,* Terminix contends; “An issue is properly before the Board if it is the subject of a petition or included on the Pre–Trial Memorandum.”27 Moreover, Terminix argues: “Even if [Kirkland’s] interpretation of Rule 26 was debatable, the courts generally ‘will not force the Board to impose a literal and hyper[-]technical interpretation of the rules where the Board itself has chosen not to do so.” ’28

**\*3** Terminix asserts that the Board agreed that the pending Petition encompassed the issue of whether Kirkland’s work injuries fully had resolved. The Board’s decision was reasonable, Terminix contends, given that Kirkland was on notice that Terminix intended to terminate her benefits based on the medical expert opinion that her work injuries had resolved.29 For example, in August 2013, Dr. Kalamchi opined that Kirkland’s work-related related cervical and lumbar strains had “resolved.”30 Moreover, at the May 15, 2015 hearing, the Board specifically told Kirkland that the next hearing would address the fully-resolved issue. Therefore, even if Kirkland was unaware of the issue until the hearing, she was not prejudiced because, at the very latest, Kirkland was notified by the Board on May 15, 2015 that there would be a hearing in 60 days.31

Terminix further argues that “Delaware courts have many times in the past affirmed Board [d]ecisions finding that a[c]laimant’s condition has returned to baseline and that the employer is no longer responsible for current problems.”32 Terminix contends that Kirkland offered no medical evidence to rebut the fact that she had a “pre-existing and symptomatic degenerative back condition,”33 and that “Dr. Kalamchi’s testimony constituted substantial evidence for the Board to rely on”34 in finding that Kirkland’s work injuries fully resolved. Accordingly, Terminix posits, the Board’s decision should be affirmed.

Standard

This Court repeatedly has emphasized its limited role in reviewing the Industrial Accident Board’s decisions; the Court must determine if the Board’s factual findings are supported by substantial evidence in the record35 and whether its decision legally was correct.36

“Substantial evidence” is less than a preponderance of the evidence but more than a “mere scintilla.”37 It is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”38 The Court must review the record to determine if the evidence is legally adequate to support the Board’s factual findings. In so doing, the Court evaluates the record in the light most favorable to the prevailing party to determine whether substantial evidence existed reasonably to support the Board’s conclusion.39 The Court does not “weigh evidence, determine questions of credibility or make its own factual findings.”40

Moreover, “an administrative agency’s interpretation of its rules [is] presumptively correct.”41 Generally, judicial deference is given to “an administrative agency’s construction of its own rules in recognition of its expertise in a given field.”42 Accordingly, “an administrative agency’s interpretation of its rules will not be reversed unless ‘clearly wrong,” ’43 On appeal, the Court reviews legal issues *de novo.*44

Analysis

Kirkland has not challenged the validity of the Board’s decision that her work injuries had resolved. The limited issue currently before this Court is whether that issue properly was before the Board in the first place. For the reasons set forth below, I find that the Board was within its discretion to determine whether Kirkland’s work injuries had resolved.

**\*4** The Board Rules applicable here are sufficiently vague so as to require interpretation by the Board. That interpretation is given great weight45 and unless “clearly wrong,” will not be reversed.46 In this case, the Board determined on two separate dates, and after a change in composition,47 that the pending Petition, along with the pre-trial memorandum, sufficiently raised the issue of whether Kirkland’s work injuries had resolved fully,48 I cannot say that the Board’s interpretation of its Rules clearly is wrong.

Rule 26 states, in pertinent part, that:

When a petition is pending before the Board, either party may assert an additional issue but a party wishing to assert one or more of the following issues must file a formal petition ...

(1) A request to review an open compensation agreement.

For its part, Rule 9 requires that parties complete a pre-trial memorandum before a Board hearing, which includes a “complete statement of what the petitioner seeks and alleges.”49 The pre-trial memorandum may be amended up to 30 days prior to the hearing.50 Terminix’s Petition alleged Kirkland physically was able to return to work.51 The pre-trial memorandum further clarified the issues Terminix was raising, namely whether Kirkland’s continuing injuries were work-related.52 That contention reasonably can be read as Terminix asserting Kirkland’s work injuries fully had resolved. The Board’s determination that Terminix satisfied Rules 9 and 26 therefore was not clearly erroneous.

Even if I concluded the Board’s interpretation of its Rules was erroneous, Kirkland’s appeal nevertheless would fail because any error of the Board was remedied by the 60–day extension to allow additional discovery. It is “settled in Delaware that before the Board can consider an issue, the issue must be raised sufficiently in advance of the hearing to provide the parties notice and an opportunity to be heard.”53 This Court has held that: “An issue is before the Board if it is the subject of a petition submitted to the Board *or* is appropriately noticed at the Pretrial Hearing.”54 Conversely, if a party is not given proper notice of an issue before the hearing, that issue is not properly before the Board.55

For example, in *Murphy Steele, Inc. v. Brady,* an employer sought to terminate a claimant’s total disability benefits. The employer’s intentions were reflected in both the pre-trial memorandum and the petition for review. The claimant, however, neither petitioned the Board for partial disability benefits, nor “directly indicate[d] in the Pre–Trial Memorandum that he was entitled to partial disability benefits.”56 This Court held that the “first mention of this [partial disability benefits] issue in the opening statement was not sufficient notice,” to the employer and remanded the matter to the Board “so that the Employer is given the opportunity to disprove partial disability.”57

**\*5** On the other hand, “[i]n proceedings before the Board, it can hardly be expected that technical niceties of pleading will be observed and, where the informality thereof works no substantial injustice to the other party, it should not be allowed to defeat an otherwise meritorious claim.”58 For example, in *Yellow Freight System, Inc. v. Berns,*59 an employer argued that a claimant failed to mention a certain defense in the pre-trial memorandum. The Board, however, not only “chose to hear and consider Claimant’s position,” but relied on it.60 This Court rejected the employer’s argument, holding that “[w]le the Board’s procedural rules are promulgated for ‘more efficient administration of justice,’ this Court will not force the Board to impose a literal and hyper-technical interpretation of the rules where the Board itself has chosen not to do so.”61

Kirkland’s appeal elevates form over substance. Kirkland was not “harmed or misled by any defect in [the] form of the petition.”62 The informality here, if there was any, cannot defeat an otherwise meritorious claim, especially where Kirkland elected not to present her case at a later date.

In sum, I find Kirkland suffered no prejudice by the Board’s hearing the issue on July 6, 2015. Here—unlike in *Phillips* where the Board sent no notice at all to the parties or *Murphy Steele* where the first mention of the issue was in opening statements—the Board informed Kirkland of exactly what issue was going to be contested at the July 6, 2015 hearing, giving her time to depose her expert on the issue. Kirkland, therefore, was given adequate notice that whether her work injuries fully had resolved would be addressed at the July 6, 2015 hearing. Although she argues she would have questioned Dr. Kalamchi in a different manner had she been aware that the issue of full recovery was going to be heard by the Board, she did not seek to re-depose the doctor in the 60–day window before the hearing. Moreover, Kirkland offers no explanation for why she presented no medical expert of her own at the July 6, 2015 hearing.63

Based on the foregoing, I find the Board’s interpretation of their Rules was not clearly erroneous and the Board was within its discretion in relying on Dr. Kalamchi’s opinion and finding that Kirkland fully recovered from her April 29, 2013 accident. The Board’s August 17, 2015 Decision therefore is AFFIRMED.

IT IS SO ORDERED.

**All Citations**

Not Reported in A.3d, 2016 WL 3365815

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| Footnotes | |
| 1 | State of Delaware Industrial Accident Board Rules, attached as Ex. B to Terminix’s App. to Answering Br. (hereinafter cited as “Board Rule(s)” or “Rule(s)”). |
| 2 | Termination Slip. & Order, attached as Ex. A–18 to Appellant’s App. to Opening Br. |
| 3 | Tr. 4:6–9, May 15, 2015 hearing, attached as Ex, 9 to Appellant’s App. to Opening Br. |
| 4 | *Id.* 7:12–17. |
| 5 | *Kirkland v. Terminix,* No. 1419447, at 14 (Del.I.A.B. Aug. 17, 2015) (Decision on Petition to Terminate Benefits) (hereinafter cited as “I.A.B. Decision, Aug, 17, 2015”). |
| 6 | Tr. 9:4–12, May 15, 2015 hearing, attached as Ex. 9 to Appellant’s App. to Opening Br. |
| 7 | *Id.* 9:16–19. |
| 8 | I.A.B. Decision, Aug, 17, 2015, at 15, |
| 9 | Tr. 5:19–20, July 6, 2015 hearing, attached as Ex. 10 to Appellant’s App. to Opening Br. |
| 10 | Terminix’s Answering Br. 2. |
| 11 | I.A.B. Decision, Aug, 17, 2015, at 14. |
| 12 | *Id.* at 19. |
| 13 | Appellant’s Opening Br. 7. |
| 14 | *Id.* at 7–8 (citing Board Rule 26:  When a petition is pending before the Board, either party may assert an additional issue but a party wishing to assert one or more of the following issues must file a formal petition ...  (1) A request to review an open compensation agreement....). |
| 15 | Appellant’s Opening Br. 8. |
| 16 | *Id.* |
| 17 | Appellant’s Reply Br. 2. |
| 18 | Appellant’s Opening Br. 9. |
| 19 | 2007 WL 2122139, at \*2 (Del.Super. July 20, 2007) (citing [19 *Del. C.* § 2301A (d)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000005&cite=DESTT19S2301A&originatingDoc=Ie1c47eb836aa11e6a807ad48145ed9f1&refType=SP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_5ba1000067d06) and 29 *Del. C.* § 10161). |
| 20 | Appellant’s Opening Br, 8. |
| 21 | *Id.* (citing *Phillips,* 2007 WL 2122139, at \*2 (citing *J.L.B. Corp. v. Delaware A.B.C.C.,* 1985 WL 189008, at \*2 (Del.Super. June 7, 1985))). |
| 22 | Appellant’s Opening Br. 9 (citing *Phillips,* 2007 WL 2122139 at 2). |
| 23 | Appellant’s Reply Br. 3. |
| 24 | Appellant’s Opening Br. 10. |
| 25 | Terminix’s Answering Br. 17. |
| 26 | *Id.* at 18. |
| 27 | *Id.* (citing *Jepsen v. Univ. of Del.,* 2003 WL 22139774, at \*3 (Del.Super.Aug. 28, 2003). |
| 28 | Terminix’s Answering Br. 18 (citing *Yellow Freight Sys., Inc .,* 1999 WL 167780, at \*4 (Del.Super.Mar. 5, 1999)). |
| 29 | Terminix’s Answering Br. 18–19. |
| 30 | Kalamchi Dep. 10:24. |
| 31 | Terminix’s Answering Br. 19. |
| 32 | *Id.* at 15 (citing *Schreffler v. Heavy Equip. Rentals,* 2011 WL 1848896, at \*6 (Del.Super.Apr. 26, 2011) (“The Board’s decision ... is supported by substantial evidence that Claimant’s ongoing symptoms are related solely to his pre-existing condition,”)); *Cottman v. Burris Fence Constr.,* 918 A.2d 338 (Del.2006) (TABLE) (affirming decision that sprain from work injury had resolved and any further symptoms were the result of an underlying chronic condition)); *see also Paynter v. Allen Family Foods,* C.A. No. S10A–12–003, at 12 (Del.Super. June 14, 2011) (“Employer does not carry the burden for the cost of treatment due to a degenerative condition unrelated to the workplace injury.”). |
| 33 | Terminix’s Answering Br. 15–16. |
| 34 | *Id.* at 13. |
| 35 | [*Histed v. E.I. duPont de Nemours & Co.,* 621 A.2d 340, 342 (Del.1993)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993067019&pubNum=0000162&originatingDoc=Ie1c47eb836aa11e6a807ad48145ed9f1&refType=RP&fi=co_pp_sp_162_342&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_162_342). |
| 36 | [*Johnson v. Chrysler Corp.,* 213 A.2d 64, 66 (Del.1965)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1965134086&pubNum=0000162&originatingDoc=Ie1c47eb836aa11e6a807ad48145ed9f1&refType=RP&fi=co_pp_sp_162_66&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_162_66). |
| 37 | [*Richardson v. Perales,* 402 U.S. 389, 401 (1971)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127062&pubNum=0000780&originatingDoc=Ie1c47eb836aa11e6a807ad48145ed9f1&refType=RP&fi=co_pp_sp_780_401&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_780_401). |
| 38 | [*Histed,* 621 A.2d at 342](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993067019&pubNum=0000162&originatingDoc=Ie1c47eb836aa11e6a807ad48145ed9f1&refType=RP&fi=co_pp_sp_162_342&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_162_342) (citing [*Olney v. Cooch,* 425 A.2d 610, 614 (Del.1981)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981107850&pubNum=0000162&originatingDoc=Ie1c47eb836aa11e6a807ad48145ed9f1&refType=RP&fi=co_pp_sp_162_614&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_162_614)). |
| 39 | *Burmudez v. PTFE Compounds, Inc.,* 2006 WL 2382793, at \*3 (Del.Super.Aug. 16, 2006). |
| 40 | [*Olney,* 425 A.2d at 614](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981107850&pubNum=0000162&originatingDoc=Ie1c47eb836aa11e6a807ad48145ed9f1&refType=RP&fi=co_pp_sp_162_614&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_162_614). |
| 41 | [*Div. of Soc. Servs. v. Burns,* 438 A.2d 1227, 1229 (Del.1981)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1982102403&pubNum=0000162&originatingDoc=Ie1c47eb836aa11e6a807ad48145ed9f1&refType=RP&fi=co_pp_sp_162_1229&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_162_1229). |
| 42 | *Id.* (citing *Diebold, Inc. v. Marshall,* 585 F.2d 1327 (6th Cir.1978)). |
| 43 | [*Burns,* 438 A.2d at 1229](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1982102403&pubNum=0000162&originatingDoc=Ie1c47eb836aa11e6a807ad48145ed9f1&refType=RP&fi=co_pp_sp_162_1229&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_162_1229) (citing [*Peterson v. Hall,* 421 A.2d 1350, 1353 (Del.Super.1980)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980145197&pubNum=0000162&originatingDoc=Ie1c47eb836aa11e6a807ad48145ed9f1&refType=RP&fi=co_pp_sp_162_1353&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_162_1353)). |
| 44 | [*Person–Gaines v. Pepco Holdings, Inc.,* 981 A.2d 1159, 1161 (Del.2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019911820&pubNum=0000162&originatingDoc=Ie1c47eb836aa11e6a807ad48145ed9f1&refType=RP&fi=co_pp_sp_162_1161&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_162_1161). |
| 45 | *Riley v. Chrysler Corp.,* 1987 WL 8273, at \*1 (Del.Super.Mar. 6, 1987) (“The Board’s interpretation of its own rule is entitled to great weight.”); *see also Goldsborough v. New Castle County,* 2011 WL 51736 (Del.Super.Jan. 5, 2011). |
| 46 | [*Burns,* 438 A.2d at 1229](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1982102403&pubNum=0000162&originatingDoc=Ie1c47eb836aa11e6a807ad48145ed9f1&refType=RP&fi=co_pp_sp_162_1229&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_162_1229), |
| 47 | Board member Terrence Shannon retired shortly after the May 27, 2015 hearing. |
| 48 | *See Kirkland v. SMCS Terminix,* No. 1419447, at 2 (Del. I.A . B. May 27, 2015) (ORDER); I.A.B. Decision, Aug. 17, 2015, at 14. |
| 49 | Rule 9(B)(5)(b). |
| 50 | Rule 9(B)(6)(a). |
| 51 | Terminix’s App. to Answering Br. Ex. A. |
| 52 | *Id.* Ex. C. |
| 53 | *Murphy Steel, Inc. v. Brady,* 1989 WL 124934, at \*2 (Del.Super.Oct. 3, 1989); *see also* Rule 8(C): “No order involving a matter submitted under this Rule shall be issued by the Board against the non-moving party until the non-moving party has been given an opportunity to be heard on the issue.” |
| 54 | *Jepsen,* 2003 WL 22139774, at \*3 (emphasis added). |
| 55 | *Id.* |
| 56 | *Murphy Steel, Inc.,* 1989 WL 124934, at \*3. |
| 57 | *Id.* |
| 58 | [*Gen. Motors Corp. v. Socorso,* 105 A.2d 641, 644 (Del.Super.1953)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1954111946&pubNum=0000162&originatingDoc=Ie1c47eb836aa11e6a807ad48145ed9f1&refType=RP&fi=co_pp_sp_162_644&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_162_644) (citing Larson’s Workmen’s Compensation Law 252); *see also Conner v. Boulden Buses, Inc.,* 1993 WL 54493, at \*6 (Del.Super.Feb. 19, 1993) (“[A]n informal tribunal such as the Board may, in appropriate circumstances, rule on different legal grounds than those presented by the parties if neither party is clearly prejudiced.”). |
| 59 | 1999 WL 167780 (Del.Super.Mar. 5, 1999). |
| 60 | *Id.* at \*4. |
| 61 | *Id.; see also* [*Socorso,* 105 A.2d at 644](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1954111946&pubNum=0000162&originatingDoc=Ie1c47eb836aa11e6a807ad48145ed9f1&refType=RP&fi=co_pp_sp_162_644&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_162_644). |
| 62 | [*Socorso,* 105 A.2d at 644](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1954111946&pubNum=0000162&originatingDoc=Ie1c47eb836aa11e6a807ad48145ed9f1&refType=RP&fi=co_pp_sp_162_644&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_162_644); *see also Conner,* 1993 WL 54493. |
| 63 | Appellant’s Opening Br. 6 (“Claimant’s counsel opted not to depose an expert witness prior to the July 6, 2015 new hearing date.”). |