

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

<b>KIM BUTCHER,</b>	)	
	)	
<b>Appellant,</b>	)	
	)	
<b>v.</b>	)	<b>C.A. No. N13A-06-003 PRW</b>
	)	
	)	
<b>WILMINGTON TRUST COMPANY,</b>	)	
	)	
<b>Appellee.</b>	)	
	)	

Submitted: January 24, 2014  
Decided: March 31, 2014

*Upon Appeal from the Decision of the Industrial Accident Board.*  
**REMANDED and STAYED.**

**OPINION AND ORDER**

Michael B. Galbraith, Esquire, (Argued), Gary S. Nitsche, P.A., Weik Nitsche Dougherty & Galbrait, Wilmington, Delaware, Attorney for Claimant-Appellant Kim Butcher.

Danielle K. Yearick, Esquire, (Argued), Andrew M. Lukashunas, Esquire, Tybout Redfearn & Pell, Wilmington, Delaware, Attorney for Employer-Appellee Wilmington Trust Company.

**WALLACE, J.**

## I. INTRODUCTION

This appeal is from a May 20, 2013 Decision of the Industrial Accident Board (the “Board”)<sup>1</sup> denying Ms. Kim Butcher’s Petition to Determine Additional Compensation Due, as well as three Orders of the Board dated October 5, 2012, December 10, 2012, and April 4, 2013. In its May 20, 2013 decision, the Board found that Ms. Butcher had not demonstrated a change in condition to warrant additional treatment; there was no substantial difference in the treatment provided by her two doctors; the initial Utilization Review (“UR”) of the first doctor’s treatment applied to the second doctor’s treatment; and because an appeal of the UR is still pending, the reasonableness and necessity of the second doctor’s treatment would be addressed at that appeal.<sup>2</sup> Because the appeal of the UR is still pending, this matter is not ripe for review and is hereby **STAYED** and **REMANDED** to the Board for proceedings consistent with this opinion.

## II. FACTUAL AND PROCEDURAL CONTEXT

### A. Ms. Butcher’s Work-Related Injury and Treatment with Dr. Atkins

Ms. Butcher was employed by Wilmington Trust Company (“Wilmington Trust”) when, on June 22, 2009, she sustained a back injury during the course and

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<sup>1</sup> *Butcher v. Wilmington Trust*, Industrial Accident Board Hearing No. 1339380 (May 20, 2013).

<sup>2</sup> *See id.* at 23-24.

scope of her employment. She notified her employer, who acknowledged her injury as compensable. Shortly thereafter, Ms. Butcher began treating with Dr. William Atkins for her back injury. Wilmington Trust paid for the treatment she received from Dr. Atkins until December 1, 2009.

**B. Utilization Review and Subsequent Treatment with Dr. Bandera**

On December 1, 2009, Wilmington Trust denied coverage for Ms. Butcher's continuing treatment with Dr. Atkins and submitted the treatment for Utilization Review ("UR"). On December 29, 2009, Ms. Butcher ceased treatment with Dr. Atkins. A UR was issued on February 5, 2010 non-certifying the treatment with Dr. Atkins past December 1, 2009. After approximately seven months, Ms. Butcher began treating again for her back injury, this time with Dr. Peter Bandera, starting on July 26, 2010. (The Board later found Dr. Bandera's treatment to be substantially similar to what Dr. Atkins had performed for Ms. Butcher in 2009.<sup>3</sup>) No pre-approval was sought for Dr. Bandera's treatment.<sup>4</sup> Wilmington Trust denied coverage for a majority of the visits and procedures, with the exception of a few treatments between March and May of 2011. These payments were allegedly

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<sup>3</sup> See *id.* at 20, 23.

<sup>4</sup> Additionally, Dr. Bandera was not informed of the February 5, 2010 UR non-certifying treatment when he began treating Ms. Butcher.

made in error, and Wilmington Trust subsequently issued a blanket denial of all treatments.<sup>5</sup> Ms. Butcher continued to treat with Dr. Bandera.

**C. Ms. Butcher's First DACD Petition and September 27, 2012  
Legal Hearing**

It was not until June 11, 2012 that Ms. Butcher filed a Determination of Additional Compensation Due (“DACD”) with the Board regarding treatment with Dr. Bandera from July 28, 2010 through the date of filing. A hearing on the merits of the DACD was initially scheduled for October 18, 2013. Wilmington Trust moved to dismiss, citing the February 5, 2010 UR in support of its argument that Dr. Bandera was providing the same treatment as Dr. Atkins, which had been non-certified by the time Ms. Butcher began treating with Dr. Bandera. The Board held a legal hearing on the motion to dismiss on September 27, 2012. It found, in an order dated October 5, 2012, that: 1) Wilmington Trust could rely on the February 5, 2010 UR, and that it was binding as long as Dr. Bandera was performing the same treatment; 2) Ms. Butcher's best fit a “changed circumstances” situation, and thus Ms. Butcher had the burden to prove a change in her condition after December 1, 2009; 3) if Ms. Butcher met her burden of proof, Wilmington Trust would have a chance to submit Dr. Bandera's treatment to a new UR; 4) if Ms. Butcher was

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<sup>5</sup> The Board rejected Ms. Butcher's argument that Wilmington Trust should be estopped from denying coverage because of these erroneous payments, finding that she had not detrimentally relied on them. *See Butcher v. Wilmington Trust*, Industrial Accident Board Hearing No. 1339380, at 21-23 (May 20, 2013).

unable to meet her burden, the prior UR would govern Dr. Bandera's treatment, and the DACD would be denied.<sup>6</sup> Ms. Butcher moved for reargument on October 16, 2012, two days before the scheduled October 18, 2012 hearing on the merits. That hearing was then continued to April 3, 2013 in order to allow the Wilmington Trust to respond to the motion for reargument. The Board denied Ms. Butcher's motion for reargument, however, in a December 12, 2010 order.<sup>7</sup>

**D. Ms. Butcher's Second DACD Petition Appealing the UR**

On April 1, 2013, two days before the Board hearing scheduled for April 3, 2013 on the first DACD petition, Ms. Butcher filed a second DACD. The second DACD appealed the February 5, 2010 UR that non-certified the treatment past December 1, 2009, seeking de novo review. That appeal, in the form of the second DACD, is still pending.<sup>8</sup> At oral argument, counsel for Wilmington Trust noted that Ms. Butcher's counsel wished to go forward with the April 3, 2013 hearing despite the then-recent and pending appeal of the UR.

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<sup>6</sup> See Ex. A to Claimant's Op. Brf. at 2-3.

<sup>7</sup> See Ex. B to Claimant's Op. Brf. at 7.

<sup>8</sup> The Delaware Supreme Court struck down a provision of the Workers' Compensation Act requiring UR appeals to be made within 45 days of their issuance as unconstitutional. *See Christiana Care Health Servs. v. Palomino*, 74 A.3d 627, 631 (Del. 2013) (concluding that "the Superior Court properly determined that the 45-day limitation of Regulation 5.5.1 is invalid."). Thus, claimant's appeal of the UR three years later is not untimely.

### **E. Board Hearing on the Merits of Ms. Butcher's First DACD Petition**

On April 3, 2013, the Board heard testimony from Ms. Butcher, the claims adjustor Ms. McLaughlin, Dr. Bandera, and Dr. Brokaw in its hearing on the merits of Ms. Butcher's first DACD petition.<sup>9</sup> In a decision dated May 20, 2013, the Board found that: 1) the claimant did not show a change in condition since December 1, 2009; 2) there was no substantial difference between the treatments administered by Dr. Atkins and Dr. Bandera; 3) the February 5, 2010 UR now applies to Dr. Bandera's treatment; and 4) because of the pending appeal of the UR, the reasonableness and necessity of Dr. Bandera's treatment (i.e., the compensability of that treatment) will be decided in that appeal. Ms. Butcher has appealed the IAB's order. Meanwhile, the UR appeal is still pending.

### **III. STANDARD OF REVIEW**

Upon its limited appellate review of the factual findings of an administrative agency, the reviewing court must determine "whether the agency's decision is supported by substantial evidence."<sup>10</sup> "Substantial evidence" is defined as "such

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<sup>9</sup> Dr. Brokaw was identified as Wilmington Trust's expert, over Ms. Butcher's objection that this identification was untimely. The Board denied claimant's motion to exclude Dr. Brokaw's testimony at a motion hearing on March 28, 2013 and via written order dated April 4, 2013. See Ex. C to Claimant's Op. Brf. at 4.

<sup>10</sup> *E.I. Dupont De Nemours & Co. v. Faupel*, 859 A.2d 1042, 1046 (Del. Super. Ct. 2004); see also DEL. CODE ANN. tit. 29, § 10142(d) ("The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted.").

relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>11</sup> The reviewing court does not make its own factual findings, determine questions of credibility, or weigh evidence.<sup>12</sup> Rather, if the Court finds “substantial competent evidence to support the finding of the Board,” the function of the court on appeal is “to affirm the findings of the board.”<sup>13</sup> A Board’s finding of fact may only be overturned when “there is no satisfactory proof in support of a factual finding of the Board.”<sup>14</sup> These standards are those employed when the Court must review a final decision of the Board that is ripe for review. But under the peculiar circumstances presented here, they are not yet applicable.

#### **IV. DISCUSSION**

As long as the current appeal of the Utilization Review is still pending before the Board, this matter is not ripe for review by this Court. The ripeness doctrine requires suits to be brought at the right time in order to conserve judicial resources.<sup>15</sup> Often, a precondition for ripeness, especially when it comes to an

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<sup>11</sup> *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009) (quoting *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

<sup>12</sup> *Id.* at 1161.

<sup>13</sup> *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

<sup>14</sup> *Id.* at 67.

<sup>15</sup> *See Salem Church (Delaware) Assocs. v. New Castle Cnty.*, 2006 WL2873745, at \*4 (Del. Ch. Oct. 6, 2006).

appeal from an administrative agency, is the exhaustion of administrative remedies.<sup>16</sup> The policy behind the exhaustion doctrine is to maintain the proper relationship between the Court and the agency whose decision it is reviewing.<sup>17</sup> Thus, the Court should “avoid[] interference with the administrative agency”<sup>18</sup> when “issues have yet to run their course and . . . [the] administrative body might resolve the dispute without unnecessary or premature judicial action.”<sup>19</sup> This allows administrative agencies to “perform their statutory functions in an orderly manner,”<sup>20</sup> while preserving both the agencies’ authority and the Court’s resources.<sup>21</sup> Although the exhaustion doctrine is applied subject to judicial discretion, a “strong presumption exists favoring the exhaustion of administrative remedies.”<sup>22</sup> There are exceptions to the presumption: “exhaustion will not be required where administrative review would be futile, where there is a need for prompt decision in the public interest, where the issues do not involve

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<sup>16</sup> See *id.* (citing *Eastern Shore Env'tl., Inc. v. Kent Cnty. Dep't. of Planning*, 2002 WL 244690, at \*5, \*7 (Del. Ch. Feb. 1, 2002)).

<sup>17</sup> See *Levinson v. Delaware Comp. Rating Bureau, Inc.*, 616 A.2d 1182, 1187 (Del. 1992); *Drainer v. Heating Oil Partners*, 2013 WL 3871412 (Del. Super. Ct. June 27, 2013) *aff'd*, 2014 WL 470399 (Del. Feb. 4, 2014).

<sup>18</sup> *Levinson*, 616 A.2d at 1187.

<sup>19</sup> *Salem*, 2006 WL 2873745, at \*4.

<sup>20</sup> *Levinson*, 616 A.2d at 1190.

<sup>21</sup> See *Drainer*, 2013 WL 3871412, at \*10.

<sup>22</sup> *Levinson*, 616 A.2d at 1190.

administrative expertise or discretion or where irreparable harm would result from denial of immediate judicial relief.”<sup>23</sup> None of these exceptions apply in this case.

This matter is not ripe for review by this Court given the pending appeal of the UR with the Board, in which the Board will decide the very compensability sought here. The Industrial Accident Board has an administrative process in place by which the claimant can challenge the UR that non-certified her treatment. Ms. Butcher has availed herself of that process, challenging the validity of the UR determination that the Board found had some preclusive effect on the compensability of Dr. Bandera’s treatment. Yet Ms. Butcher essentially asks this Court, in this appeal, to now determine whether Dr. Bandera’s treatment is compensable. As it stands, the issue of whether Dr. Bandera’s treatment was properly denied as a result of the February 5, 2010 and whether those treatment costs were reasonable and necessary has yet to be determined by the Board. This Court, on its limited review, cannot and should not preempt the Board’s action and make that determination for it. Because there are outstanding issues which “have yet to run their course”<sup>24</sup> in the administrative process, the Court will not interfere

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<sup>23</sup> *Id.*

<sup>24</sup> *Salem*, 2006 WL 2873745, at \*4.

with that process and the Board's ability to perform its "statutory function[] in an orderly manner."<sup>25</sup>

## V. CONCLUSION

For the forgoing reasons, this matter is **REMANDED** to the Industrial Accident Board, and the proceedings in this appeal are **STAYED**, pending resolution of the April 1, 2013 UR Appeal before the Board. Counsel shall file a joint status report regarding this matter within 14 days of the Board's decision of the April 1, 2013 UR Appeal. That report should include a statement as to whether either party intends file an appeal to this Court for any further review of the Board's actions in the April 1, 2013 UR Appeal, and whether consolidation is of such with this appeal is appropriate. The Court and counsel shall then confer on the scheduling of further proceedings in this matter.

**IT IS SO ORDERED.**

/s/ Paul R. Wallace

Paul R. Wallace, Judge

Original to Prothonotary

cc: All counsel via File & Serve

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*Id.*