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

DELAWARE SUPERMARKETS by and through its Worker's Compensation Carrier, Travelers Insurance Company,	)	
Appellant/Employer-Below,	)	
v.	)	C.A. No. N12A-09-003-WCC
CARMEL J. SARNE AND DELAWARE, SUPERMARKETS by and through its Worker's Compensation Carrier, PMA, Insurance Company,	)	
Appellee/Employee-Below,	)	
and	)	
DELAWARE SUPERMARKETS by and through its Worker's Compensation carrier, PMA Insurance Company,	)	
Appellee/Employer-Below.	)	

Submitted: February 15, 2013
Decided: June 28, 2013

Appeal from the Industrial Accident Board – REVERSED

OPINION

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CARPENTER, J.

Delaware Supermarkets ("Employer") by and through its former worker's compensation carrier, Travelers Insurance Company ("Travelers"), appeals the Industrial Accident Board's ("IAB") August 16, 2012 decision, which required Travelers to pay Carmel J. Sarne ("Sarne") disability benefits and related expenses. On appeal, Travelers seeks to shift liability to PMA Insurance Company ("PMA"), Employer's subsequent insurance carrier, by alleging the IAB erred as a matter of law and that the IAB's decision was not supported by substantial evidence

For the reasons discussed below, the decision of the IAB is hereby **REVERSED.**

FACTUAL BACKGROUND

In 2008, Sarne started working at the Employer's ShopRite location in Wilmington, Delaware. While employed as a chef/hot foods manager there, Sarne suffered a work accident on November 25, 2010 when she tripped and fell over a backpack on the ground. Although Sarne had previously injured her neck and back in a 2005 car accident, her injuries as a result of the 2010 work accident were distinguishable. Specifically, Sarne suffered neck and back injuries, among others, and developed Complex Regional Pain Syndrome ("CRPS"), also referred to as Reflex Sympathetic Dystrophy ("RSD"), in her upper right extremity.

Travelers was the Employer's insurance carrier at this time, and Travelers paid total disability benefits from November 27, 2010 until October 17, 2011.[1] Because Sarne had continued difficulty using and moving her right hand and arm, she completed a six-week, in-patient treatment program at the Rosomoff Comprehensive Rehabilitation Center ("Rosomoff") in Miami, Florida. The aggressive and comprehensive treatment Sarne received there allowed her to regain movement and use of her right hand and arm and, ultimately, return to light duty work for approximately two (2) hours per day, five (5) days per week at ShopRite. As of October 17, 2011, Sarne also collected partial disability benefits at a variable rate.

On January 20, 2012, Sarne suffered a second work accident when she tripped and fell over a U-Frame cart as she was exiting the meat cooler, which caused her to land on her right side and injure her upper chest and shoulder. At the time of this second work accident, Employer's insurance carrier had changed from Travelers to PMA. Since the 2012 work accident, Sarne has not returned to work or searched for another job.

Over the course of the past few years, Sarne has been treated and/or evaluated by several physicians and experts. After the 2010 work accident, Sarne

[1] Sarne received total disability benefits of $466.98 per week, which was based on her average weekly wage of $699.13 at the time of injury.

initially sought treatment at Christiana Hospital's emergency room. Although Sarne does not recall what specific treatment she received there, she subsequently saw Dr. Joseph DiRenzo, her primary care physician, for treatment. Sarne completed a course of physical therapy at NovaCare and, afterward, saw Dr. Bruce Grossinger, a neurologist and pain management physician. Because Sarne was complaining of headaches, neck pain, shoulder pain, and leg weakness, Dr. Joseph Moeller, a neurologist, performed an EMG on Sarne's right arm and leg. Sarne was diagnosed with CRPS/RSD, removed from work, and placed on several medications, including Neurontin, Percocet, Ultram, Voltarn, and Cymbalta.

When Sarne continued to experience pain, she was referred to treatment at Rosomoff. From August to September of 2011, Sarne received a combination of physical therapy, acupuncture, occupational therapy, and massage at Rosomoff. After her treatment there, Sarne regained the ability to open her right hand and was cleared to return to work, with restrictions, as a meat wrapper at the same ShopRite location. During her transition back to part-time work, Sarne only continued to see Dr. DiRenzo and only took Cymbalta. Although Sarne required assistance at home and returned to see Dr. DiRenzo on December, 21, 2011 and January 18, 2012 for complaints of increased pain, she appeared to be improving until she suffered the second work accident on January 20, 2012.

Following this second accident, Sarne sought initial treatment at Christiana Hospital's emergency room. On January 23, 2012, Sarne again returned to Dr. DiRenzo, who placed her back on Percocet. Additionally, Sarne saw Dr. Koenigsberg, who gave her twenty-four (24) injections in her back and recommended she use a neuro-stimulator. On April 12, 2012, Sarne saw Dr. John Townsend, a neurologist, who discussed CRPS/RSD with her and made recommendations similar to those of Dr. Koenigsberg. Dr. Townsend believed that Sarne's 2012 work accident aggravated her pre-existing complaints regarding her right arm and, therefore, Sarne needed aggressive treatment and should not return to work. Specifically, Dr. Townsend noted that Sarne had increasing complaints of right arm, shoulder, and leg pain.

Dr. Alan Fink, a neurologist, examined Sarne on behalf of Travelers after both accidents. The first exam occurred on March 23, 2011 and the second on April 27, 2012. On the March 23, 2011 exam, Dr. Fink reported that he was not impressed by Sarne's complaints that others attributed to CRPS/RSD. Although Dr. Fink noted Sarne had a passive range of motion, weakness in the upper extremities, decreased sensation, and decreased reflexes, he believed that she would improve with physical therapy and continued pain management treatment. On the April 27, 2012 exam, however, Dr. Fink noted that Sarne was worse than

she was at the March 23, 2011 exam. Specifically, Dr. Fink noted that Sarne was taking multiple medications and could not move her right shoulder. Although Dr. Fink confirmed that Drs. Mandel, Moeller, and Koenigsberg all diagnosed Sarne with CRPS/RSD, he remained unconvinced. However, Dr. Fink noted that Sarne had localized pain and that her complaints were more severe in 2012 than 2011.

Dr. Jeffrey Meyers, a physical medicine and rehabilitation physician, examined Sarne on April 17, 2012 at the request of PMA. Dr. Meyers assessed Sarne's medical history, listened to her recount the 2012 work accident, and reviewed her prior records and studies. Upon examination, Dr. Meyers did not find Sarne exhibited markers such as changes in skin temperature or color, which are indicative of CRPS/RSD. Although Dr. Meyers noted that Sarne moved in a labored manner due to pain on her right side and had increased thoracic kyphosis with a hunched posture, he did believe that she was back to baseline and could return to work. Admittedly, however, Dr. Meyers stated that much of his testing for the cervical spine, right shoulder, and right pelvis was incomplete because he could not perform testing due to pain reported by Sarne. Dr. Meyers did not believe Sarne required any additional treatment and recommended she continue to follow-up with Dr. DiRenzo and a CRPS/RSD specialist.

PROCEDURAL BACKGROUND

On March 6, 2012, Sarne filed a Petition to Determine Compensation Due against PMA, seeking acknowledgment that the January 20, 2012 work accident was compensable and alleging that this subsequent work accident worsened her pre-existing condition. Alternatively, Sarne filed a concurrent Petition to Determine Compensation Due against Travelers, alleging that the January 20, 2012 work accident entitled her to a recurrence of benefits. On February 29, 2012, Travelers filed a Petition to Review, alleging that Sarne is capable of returning to work or, alternatively, that PMA should pay her benefits. PMA, however, asserts that Sarne's current condition is a result of an exacerbation or flare up of her pre-existing injuries, making Travelers responsible for the disability payments.

A hearing was held before the IAB on July 19, 2012 and an Order was issued on August 16, 2012, finding that an identifiable accident occurred on January 20, 2012. In addressing the nature and extent of Sarne's injuries, the IAB held that Travelers failed to meet its burden in order to shift responsibility to PMA. Therefore, the IAB: 1) granted Sarne's Petition to Determine Additional Compensation Due against Travelers; 2) denied Sarne's Petition to Determine Compensation Due against PMA; and 3) granted Travelers Petition for Review. Further, the IAB required Travelers to pay Sarne's: 1) total disability benefits from

January 20, 2012 until April 17, 2012; 2) partial disability benefits at a rate of $362.75 per week; 3) reasonable and necessary medical expenses; 4) attorney's fees of $8,250.00; and 5) medical witness fees. As a result, Employer by and through Travelers timely filed this appeal.

STANDARD OF REVIEW

On appeal, the Court's review of the IAB's decision is limited to determining whether the IAB's findings and conclusions are supported by substantial evidence and free of legal error.[2] Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[3] Additionally, questions of law are reviewed *de novo*.[4] However, the Court "does not weigh the evidence, determine questions of credibility, or make its own factual findings."[5] Further, the Court "must give deference to 'the experience and specialized competence of the Board,' and must take into account the purposes of the Workers' Compensation Act."[6] Therefore, if substantial

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[2] *See e.g.*, *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).
[3] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).
[4] *See Baker v. Allen Family Foods*, 1997 WL 818015, at *2 (Del. Super. Dec. 2, 1997) (citations omitted).
[5] *ILC of Dover, Inc. v. Kelley*, 1999 WL 1427805 (Del. Super. Nov. 22, 1999) (citing *Johnson*, 213 A.2d at 66 (Del. 1965)).
[6] *Del. Transit Corp. v. Hamilton*, 2001 WL 1448239 (Del. Super. Oct. 31, 2001) (citing *Histed*, 621 A.2d at 342 (Del 1965)).

evidence exists and there is no error of law, the Court must affirm the IAB's decision.[7]

DISCUSSION

"Successive carrier recurrence/aggravation disputes, like the instant case, involve a situation where the condition of an employee seeking worker's compensation is due to two different accidents which occurred while the employer was insured by two difference insurance carriers."[8] Here, all experts and treating physicians agree that Sarne's 2012 work accident increased the severity of her symptoms and complaints relating to the pain in her neck, shoulder, and lower back areas. Additionally, neither party disagrees that Sarne currently suffers from compensable work-related injuries. However, the issue on appeal is whether the 2012 work accident constitutes an "aggravation," which would render PMA responsible, or whether it should be classified as a "recurrence" for which Travelers would be held liable. Therefore, "[i]n successive carrier disputes where compensability is conceded, as here, the determination is one of liability between carriers."[9] Travelers argues that the IAB's decision to classify the 2012 work accident as a recurrence was not supported by substantial evidence and, therefore, constitutes legal error. Conversely, PMA contends that the IAB's decision to hold

[7] *See Stevens v. State*, 802 A.2d 939, 944 (Del. Super. 2002).
[8] *Bailey v.Milford Memorial Hosp.*, 1995 WL 790986, at *12 (Del. Super. Nov. 30, 1995).
[9] *Standard Distrib. Co.v. Nally*, 630 A.2d 640, 645 (Del. 1993).

Travelers liable was supported by substantial evidence and should be affirmed on appeal.

The seminal case regarding this issue is *Standard Distrib. Co. v. Nally*[10]. In *Nally*, the Delaware Supreme Court delineated the rule Delaware courts should follow for determining successive carrier responsibility in recurrence/aggravation disputes; specifically, it "places responsibility on the carrier on the risk at the time of the initial injury when the claimant, with continuing symptoms and disability, sustains a further injury unaccompanied by any intervening or untoward event which could be deemed the proximate cause of the new condition."[11] In other words, the initial carrier remains liable if the injury is simply a recurrence. "On the other hand, where an employee with a previous compensable injury has sustained a subsequent industrial accident resulting in an aggravation of his physical condition, the second carrier must respond to the claim for additional compensation."[12] Further, "[t]he burden of proving the causative effect of the second event is upon the initial carrier seeking to shift responsibility for the consequences of the original injury."[13] Thus, the focus in determining liability in

[10] 630 A.2d 640 (Del. 1993).
[11] *Id.* at 646.
[12] *Id.* (citing *Pa. Mfrs. Assn. Ins. Co. v. Home Ins. Co.*, 584 A.2d 1209 (Del. 1990)).
[13] *Id.* (citations omitted).

aggravation/recurrence disputes must turn on whether the nature of the second event proximately caused the injuries now being complained of.[14]

The Court's finding will start with putting an ancillary issue to rest. While PMA made a valiant attempt to suggest the second work-related accident on January 20, 2012 did not occur, this is, at best, an unsupported suspicion that the IAB already decided was unfounded. Since this assertion by PMA would also be inconsistent with the medical testimony, the Court finds the IAB's decision as to this issue—that there was, in fact, a second accident that constituted an intervening or untoward event—is supported by substantial evidence.

Having reconfirmed that the second accident occurred, which by all physicians' accounts affected Sarne's condition and ability to function, the Court now delves into the world created by *Nally*—to determine whether this was simply a recurrence from the prior accident or an aggravation of her pre-existing condition. Although *Nally* does not directly define "recurrence," it references a prior Delaware Supreme Court case in which "recurrence" was defined as "the return of an impairment without the intervention of a new or independent accident."[15] However, this definition is not particularly helpful since, if accepted, the case would simply shift liability to the subsequent carrier if another

[14] *See id.* at 645.
[15] *Id.* at 644 (citing *DiSabatino & Sons, Inc. v. Facciolo,* 306 A.2d 916, 919 (Del. 1973)).

work-related injury occurred. With regard to the term "aggravation," *Nally* stated that an "'aggravation' means that a condition is 'made worse, more serious, or more severe.'"[16]

Recognizing the medical difficulty of distinguishing between a recurrence and an aggravation, subsequent cases, therefore, have moved away from attempting to define the dissension and, instead, focused the inquiry on whether the change in the worker's medical condition is attributable to the second accident.[17] In the context of this case, such an inquiry is clearly more logical. It is undisputed that Sarne's condition, at a minimum, was worse after the second accident. As such, the only question to decide is whether the worsened condition was caused by the second accident or, rather, was simply a natural, expected consequence of the initial accident. As emphasized in *Nally*, "the question is not whether the employee's pain or symptoms have returned but whether there has been a new injury or worsening of the previous injury attributable to an untoward [subsequent] event.[18]

Having returned the primary focus to causation, the Court now turns to the case at issue. At the hearing, the IAB held that Sarne's 2012 work accident was an

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[16] *Id.* at 645 (citing *Webster's Ninth New Collegiate Dictionary*, 64 (1990)).
[17] *See e.g.*, *Turulski Custom Woodworking v. Sun Dog Cabinetry*, 2004 WL 1172884, at *7 (Del. Super. May 11, 2004); *Mountaire Farms, Inc. v. Pitts,* 2000 WL 710094, at *5 (Del. Super. May 1, 2000).
[18] *See Nally*, 630 A.2d at 645.

untoward event, yet classified her injury as a recurrence for which the original carrier, Travelers, was responsible. In support of its decision, the IAB accepted the testimony of Dr. Meyers, PMA's expert, to find that the 2012 work accident "only caused a temporary exacerbation of [Sarne's] chronic CRPS" because her "condition . . . was already declining."[19] In further support, the IAB stated that: 1) Sarne was already having increased symptoms as a result of the 2010 work accident, evidenced by her two prior visits to Dr. DiRenzo before the 2012 work accident; 2) Sarne's medication doses were increased shortly before the 2012 work accident; 3) Dr. Fink, Traveler's expert, provided inconsistent testimony as to whether Sarne suffered a recurrence or an aggravation; 4) the records of Sarne's treating physicians supported a finding that she had suffered a recurrence; and 5) Sarne's testimony was inconsistent.[20]

It is well accepted that when the parties present competing experts in a workers' compensation case, the IAB is free to rely on either expert's testimony.[21] Further, "[i]t is not within the purview of this Court to resolve issues of credibility and assign weight to evidence presented."[22] "As a general rule, the credibility of

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[19] *Sarne v. Del. Supermkts*, Nos. 1380625 and 1379438, at *41 (Del. I.A.B. Sept. 14, 2012).
[20] *Id.* at *41-42.
[21] *See San Juan v. Mountaire Farms*, 2007 WL 2759490, at *3 (Del. Super. Sept. 18, 2007) (citations omitted).
[22] *Christiana Care Health Sys, VNA. v. Taggart*, 2004 WL 692640, at *12 (Del. Super. Mar. 18, 2004) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 67 (Del. 1965)).

the witnesses, the weight of their testimony, and the reasonable inferences to be drawn therefrom are for the IAB to determine."[23] Although the Court recognizes that the IAB must be accorded deference when there are conflicting expert opinions, successive carrier disputes present a unique challenge as the terms "recurrence" and "aggravation" have different medical and legal interpretations. Therefore, "[b]ecause testifying physicians may be imprecise in word choice, at least from a legal standpoint, the [IAB] and the reviewing court should look to the substance of the testimony."[24] The task is further frustrated when the physicians, like here, do not testify before the IAB either in person or by video, thus giving the IAB the herculean task of reviewing hundreds of pages of depositions from which to make credibility decisions. Unfortunately, such a process, particularly in a case of this nature, significantly undermines the deference given to the IAB's findings.

Dr. Townsend, a neurologist, testified on Sarne's behalf. Regarding Sarne's 2012 work accident, Dr. Townsend testified that "something discrete happened that caused a trauma and an increase in her symptoms."[25] Specifically, upon his April 12, 2012 examination, Dr. Townsend observed that: 1) there was a 3-degree difference in temperature between Sarne's right and left arm, which he measured

[23] *Clements v. Diamond State Port Corp.*, 831 A.2d 870, 878 (Del. 2003).
[24] *Mountaire Farms, Inc. v. Pitts*, 2000 WL 710094, at *6 (Del. Super. May 1, 2000).
[25] Dr. Townsend Dep. 28.

with a digital thermometer; 2) Sarne's right arm was pale in color; 3) there was a 2-centimeter difference in circumference between Sarne's right and left arm; and 4) there was "decreased wrinkling and fewer venous structures in [Sarne's] right hand."[26] While these observations collectively indicated that Sarne, despite being right-handed, did not use her right arm frequently, Dr. Townsend also noted that these observations confirmed her subjective history of being "worse off" after the 2012 work accident.[27] As a result of these observations and his review of her history, Dr. Townsend concluded that "[Sarne] had a history of chronic cervical and lumbar strain and right upper extremity complex regional pain syndrome, and . . . felt that she had aggravated her pre-existing complaints based on the new incident . . . ."[28]

While Dr. Townsend uses the buzzword "aggravated," the Court looks beyond this superficial characterization and notes that he also made the following substantive observations: 1) "[Sarne] had objective physical findings that would corroborate that things were worse at the time that [he] saw her than they had been prior to that [2012] incident"; 2) as a result of the 2012 work accident, Sarne could not return to the light duty work she had been performing prior; 3) when Dr. Townsend saw Sarne on April 12, 2012, she had not returned to her pre-2012 work

[26] Dr. Townsend Dep. 35-37.
[27] Dr. Townsend Dep. 35; *see also* IAB Hr'g. Tr. 41, 43, 59.
[28] Dr. Townsend Dep. 37-38.

accident baseline; 4) but for the 2012 work accident, Dr. Townsend would have expected Sarne to have continued to improve without requiring additional medications or invasive procedures; 5) there was no indication Sarne was suffering a worsening of her symptoms immediately preceding the 2012 work accident; and 6) the treatment Sarne required following the 2012 work accidence was "above and beyond that which was required following the first incident."[29]

Dr. Fink, a neurologist, testified on behalf of Travelers. Because Dr. Fink examined Sarne both on March 23, 2011 and April 27, 2012, he was able to testify about her condition both before and after the January 20, 2012 work accident. Although Dr. Fink was "not impressed" by Sarne's complaints of CRPS/RSD during his first examination of her, he did observe that she had weakness in her right upper extremity, decreased sensation in her right arm, decreased reflexes in her right upper extremity, cervical/lumbar spasm, and an inability to actively open her right hand.[30] Dr. Fink also noted that the comprehensive treatment Sarne later received at Rosomoff allowed her to "turn a corner"; specifically, Dr. Fink stated that Sarne "had a 50 percent decrease in her pain," could voluntarily move her right arm and open her right hand, and return to light duty work.[31] Like Dr. Townsend, Dr. Fink testified that he would have expected Sarne to continue to

[29] Dr. Townsend Dep. 31, 37-38, 52, 55.
[30] Dr. Fink Dep. 12-13.
[31] Dr. Fink Dep. 16-17.

improve and eventually return to work full time, had she not suffered the 2012 work accident.[32] Dr. Fink explained that the 2012 work accident created a setback, returning Sarne to a state similar to her post-2010 accident, pre-Rosomoff condition.[33] Dr. Fink stated that Sarne was "worse [after the 2012 work accident] than when [he] examined her previously" and that she had not returned to her post-Rosomoff, pre-2012 accident baseline.[34] Further, Dr. Fink elaborated that, in order to believe Sarne had not suffered an aggravation or worsening of symptoms after the 2012 work accident, one would have to ignore the progress she made at Rosomoff, which allowed her to return to light duty work.[35] Moreover, Dr. Fink testified that an aggravation of Sarne's condition was not only supported by her testimony but also by her post-2012 work accident course of treatment, which included diagnostic studies, injections, and narcotics that had not been required immediately preceding the 2012 work accident.[36]

Although the Court recognizes that Dr. Fink, like Dr. Townsend, uses the buzzword "aggravation" to describe Sarne's post-2012 accident condition, the Court notes that, again, Dr. Fink's objective observations correlate with Sarne's subjective complaints. While Dr. Fink's examination may not have been as

[32] Dr. Fink Dep. 22.
[33] Dr. Fink Dep. 24.
[34] Dr. Fink Dep. 31.
[35] Dr. Fink Dep. 27-28.
[36] Dr. Fink Dep. 28.

comprehensive as Dr. Townsend's, the Court finds this does not discredit Dr. Fink's conclusions, particularly because he was the only non-treating, testifying expert who examined Sarne both before and after the 2012 work accident. Therefore, notwithstanding the superficial characterization of Sarne's condition as an aggravation, Dr. Fink's substantive observations support the conclusion that Sarne suffered a worsening of her pre-existing condition as a result of the 2012 accident.

Dr. Meyers, a physical medicine and rehabilitation physician, testified on behalf of PMA. In addition to reviewing Sarne's medical records and obtaining a medical history from her, Dr. Meyers conducted an examination and observed the following: 1) Sarne held "her right in a light fist"; 2) Sarne "moved with labored movement due to reports of pain on the right side"; 3) Sarne's "skin temperature was warm and equal to touch"; and 4) Sarne had decreased sensation on her right side.[37] Although Dr. Meyers testified that he performed some "specific maneuvers" in order "to attempt to elicit and document specific pathology," he acknowledged that he was unable to perform many of his normal tests due to Sarne's complaints of pain or fear of pain.[38] Nonetheless, Dr. Meyers diagnosed Sarne as having a "flare/exacerbation of her [CRPS/RSD]," which he "related to

[37] Dr. Meyers Dep. 25-26, 28
[38] Dr. Meyers Dep. 28.

her preexisting condition from the incident of November 25th, 2010."[39] In offering his interpretation of the medical definitions of "aggravation" and "exacerbation," Dr. Meyers explained that "[a]n exacerbation or a flare is a *temporary* worsening of a condition that was already there and that there was no *permanent* change or *permanent* worsening that would continue and change the condition down the line" while "[a]n aggravation is a *permanent* worsening as a *new injury* on top of another one that would then remain permanent."[40] Dr. Meyers, therefore, believed that Sarne had a mild flare/exacerbation of CRPS/RSD and that she had returned to baseline when he saw her on April 17, 2012.[41]

The IAB, for reasons unexplained in its opinion, accepted and relied upon the testimony of Dr. Meyers who examined Sarne on April 17, 2012, three (3) months after the second accident. Dr. Meyers was not involved in Sarne's treatment or care, and his opinions were based upon a single examination and his review of medical reports. By Dr. Meyers' own admission, his examination was limited by Sarne's physical condition, particularly the pain that she would experience from testing he would normally perform.

Although Dr. Meyers provided medical definitions of "aggravation" and "exacerbation," the Court cautions that a medical expert is not a legal expert and,

[39] Dr. Meyers Dep. 32.
[40] Dr. Meyers Dep. 33 (emphasis added).
[41] Dr. Meyers Dep. 43-44.

therefore, the medical definitions should not be adopted as legal definitions. Additionally, as previously stated, testifying medical experts may, from a legal perspective, use imprecise word choice and, therefore, the IAB and the reviewing court must glean the true substance of the testimony presented. Here, it appears to the Court that, despite his observations upon examination, Dr. Meyers reached an inapposite conclusion—that Sarne suffered an exacerbation and not an aggravation. Furthermore, the Court notes that Dr. Meyers' conclusion was largely premised on the belief that Sarne had returned to her pre-2012 accident baseline, which Dr. Meyers never actually defined. Moreover, the Court interprets Dr. Meyers' rationale as suggesting that, due to the similarity and location of the injuries Sarne suffered as a result of both accidents, Sarne is in the same condition post-2012 accident as she was following the 2010 accident and, therefore, has returned to that post-2010 accident baseline. However, Sarne's baseline should, more appropriately, be viewed as her condition immediately preceding the 2012 accident. Because Sarne cannot now actively move her arm or perform light duty work, both of which she was able to do prior to the 2012 work accident, the Court finds it would be illogical to conclude that she has returned to her pre-2012 accident baseline. In addition, Dr. Meyers incorporates a distinction between "temporary" and "permanent" worsening that is simply not recognized under the

law. These statements, from the Court's perspective, significantly undermine his opinions when they are viewed in a legal context.

As previously stated, the Court recognizes that, when there is conflicting expert testimony, the IAB is free to rely upon the testimony of one expert over others. However, when there is a battle of experts, like here, the IAB must clearly articulate its rationale for accepting the opinions of a particular expert and discounting others. Here, in spite of issuing a forty-six (46) page opinion, only a page and a half of the decision is devoted to explaining why the IAB concluded that Sarne's condition was simply a recurrence of her initial injury. While the IAB has correctly stated this area of the law in its opinion, the IAB's logic and reasoning as to how the facts supported its conclusion is, at best, difficult to follow. Even more disturbing to the Court is the IAB's apparent fixation with and unwarranted weight given to the assertion that Sarne's condition shortly before the 2012 accident appeared to be worsening. In its opinion, the IAB stated, "[t]his evidence supports the argument that the January fall did not cause any worsening of her condition as it was already declining."[42] This suggests that the IAB believed that the second accident had no effect on Sarne's condition because she

[42] *Sarne v. Del. Supermkts*, Nos. 1380625 and 1379438, at *41 (Del. I.A.B. Sept. 14, 2012).

would have gotten worse anyway. However, there is simply no medical testimony to support that conclusion.

The overwhelming evidence here suggests that the 2012 accident *caused* a worsening of Sarne's condition. She had made significant progress since the 2010 accident, returned to work, and was taking minimal medication. The evidence fairly suggests that, with continued therapy and medication, it was expected that she would continue to improve. That prognosis, however, changed dramatically on January 20, 2012. As such, the Court simply is unable to find that there is substantial evidence to support the IAB's conclusion. Instead, there is clearly substantial evidence to support the conclusion that the 2012 accident caused Sarne to suffer a worsening of symptoms, which would, therefore, shift liability to the second insurer. Finding that there is not substantial evidence in the record to support the IAB conclusions, the Court therefore must reverse the decision on appeal.

CONCLUSION

While the Court has followed the law in this jurisdiction on recurrence/aggravation disputes involving successive carrier liability, it takes the opportunity to suggest the present state of the law not only unduly complicates the situation and makes it difficult for administrative boards to address complex,

medical subtleties but also creates uncertainty for insurance carriers to determine the risk they are insuring. The Court agrees with the assessment made by Judge Herlihy in *Parson v. City of Wilmington*[43] that "the application of these rules can border on the ridiculous."[44] A fairer and simpler rule to both enforce and manage would place responsibility on the insurance carrier at the time of the accident, regardless of the medical determination. The Court, therefore, encourages the bar and the IAB to seek a legislative fix to this often complex problem.

Based on the foregoing reasons, the decision of the Industrial Accident Board is, therefore, **REVERSED.**

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

[43] 2013 WL 297960 (Del. Super. Jan. 24, 2013).
[44] *Id.* at *2.