

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR KENT COUNTY**

FELAMI A. MOORE,	:	
	:	
Appellant,	:	C.A.No. K15A-03-002 JJC
	:	
v.	:	
	:	
CORPORATE KIDS LEARNING	:	
CENTER,	:	
Appellee.	:	

*Submitted: August 17, 2015*

*Decided: October 6, 2015*

**MEMORANDUM OPINION**

**Upon Consideration of Appellant’s Appeal from the Industrial Accident  
Board  
AFFIRMED**

Benjamin A. Schwartz, Esquire of Schwartz & Schwartz, Dover, Delaware; attorney for the Appellant.

Wade A. Adams, III, Esquire of Chrissinger & Baumberger, Wilmington, Delaware; attorney for the Appellee

Clark, J.

## **I. INTRODUCTION**

\_\_\_\_\_ This is an appeal by Claimant-Below Felami Moore (hereinafter “Appellant”) of the decision of the Industrial Accident Board (hereinafter “the Board” or “IAB”) denying Appellant’s medicals-only Petition to Determine Additional Compensation due. The issue here is whether there was substantial evidence to support the IAB’s finding that Appellant’s surgery and subsequent treatment were not reasonable, necessary and related to the industrial accident. For the following reasons, the IAB’s decision in this matter is **Affirmed**.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

The IAB conducted a hearing in this case on February 19, 2015. At issue were both Appellant’s claim for total disability benefits and payment of medical expenses. In the IAB’s March 9, 2015 decision, the IAB determined that (1) total disability benefits and (2) surgery related medical expenses alleged to relate to a January 28, 2013 slip-and-fall at work were not compensable. Appellant did not appeal the IAB’s finding that total disability benefits were no longer due. Appellant did appeal, however, the Board’s finding that medical expenses for the lumbar spine surgery were not reasonable, necessary or compensable.

The evidence presented at the hearing in this case includes, *inter alia*, competing expert testimony, testimony by the Appellant, and surveillance videos of the Appellant. Appellant is a 38 year-old woman who worked as a teacher’s aide and a kitchen manager for the Corporate Kids Learning Center (hereinafter “Corporate Kids”). While working at Corporate Kids, on January 28, 2013, Appellant slipped and fell on ice at work, which was an acknowledged compensable industrial accident.

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On the day of the fall, Appellant went to the Emergency Room for pain. At that visit, Appellant's emergency room records indicated that her lumbar and thoracic spine were not tender upon examination.

Thereafter, Appellant began treating for back pain with Dr. Schwartz, an orthopaedic surgeon, who ordered an MRI. Dr. Schwartz reviewed the MRI, and determined that the MRI was normal. Dr. Schwartz diagnosed Appellant with a sprain, and did not recommend surgery or injections for its treatment. Appellant then began treatment with Dr. Balu for pain management, and began receiving total disability benefits from Corporate Kids.

At Dr. Balu's initial exam, he noted that Appellant had paraspinal spasm and facet tenderness. Appellant then began a course of treatment with Dr. Balu once every four weeks for pain management, which included receiving pain medication and lumbar facet injections. She was also prescribed a cane, for use on an as needed basis, because she claimed to have trouble bending, standing, walking, and sitting. Although Appellant's lumbar spine MRI was negative, Dr. Balu ordered and performed a discogram in July 2013.

According to the medical testimony, the purpose of the discogram was to further evaluate the possibility of discogenic low back pain. Dr. Balu testified that the discogram evidenced that Appellant had pain during the exam in the lower discs of her spine, namely at L4-5 and L5-S1. Balu testified that during this procedure she evidenced concordant pain making the discogram results positive.<sup>1</sup> A CT scan was

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<sup>1</sup> Concordant pain means that the pain produced by the test is consistent with the patient's daily pain experience.

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then performed as a confirmatory test following the discogram. The radiologist that read the CT scan indicated in the report that there was no frank tear. In other words, the CT scan result was negative. The allegedly damaged discs did not leak dye.

Following the discogram, Dr. Balu discussed treatment options with Appellant, offering to continue conservative treatment or to perform disc injections to control the pain. Since Appellant desired a surgical evaluation, Dr. Balu referred her to Dr. Katz for a surgical opinion. Dr. Katz recommended a fusion surgery, but was unable to perform it due to a delay with the insurance carrier not authorizing payment for the surgery. Due to Dr. Katz's medical leave, Appellant's care was then transferred to Dr. Rudin.

Dr. Rudin reviewed the x-rays, MRI, post-discogram CT scan, and Appellant's history and complaints. Dr. Rudin testified that he found the Appellant's open-MRI to be unremarkable. He further testified, however, that he would never use an open MRI for decision-making, especially when considering surgery, and questioned the quality of Appellant's open MRI. Relying on the discogram results, among other variables such as pain level, Dr. Rudin testified that surgery was the most reasonable course of action for Appellant at that time. Material to Dr. Rudin's recommendation was that Appellant had "unrelenting, significant, clinically limiting back pain", which was derived from the language in the guidelines for issuing a discogram. He testified that he was unaware of any indicia of psychological or emotional issues that changed his opinion that surgery was appropriate for her situation. He further testified that he observed no symptom magnification by Appellant.

Dr. Rudin performed a L4-5 and L5-S1 discectomy and fusion on April 22,

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2014. Thereafter, Appellant completed one course of physical therapy, and then additional physical therapy due to unrelated kidney problems.

The employer, Corporate Kids, ordered two defense medical examinations (hereinafter “DMEs”) with Dr. Kalamchi. The first DME was on September 10, 2013 in which Dr. Kalamchi observed Appellant walking with a cane and with a very awkward, guarded gait. He observed that Appellant was grimacing, squinting, and making facial expressions to indicate extreme pain, which he found to not match her physical pathology. During his exam, he observed no clinical palpable spasm (tightness of the paraspinal musculature). Dr. Kalamchi reviewed Appellant’s Lumbar Spine MRI and report and concluded that it was a normal MRI with no disc pathology.

Dr. Kalamchi performed the second DME on December 1, 2014, after Appellant’s lumbar spine surgery. In conjunction with that exam, Dr. Kalamchi reviewed Appellant’s discogram and post-discogram CT scan results. Dr. Kalamchi concluded that Appellant’s results were normal. In other words, Dr. Kalamchi did not agree that the result of the discogram evidenced disc injury. More importantly, the post-discogram CT scan, according to Dr. Kalamchi, showed there was no disc injury which would have been the pathology necessary to warrant surgery.

Dr. Siegal, a neuroradiologist, also testified via deposition at the IAB hearing on behalf of Corporate Kids. Dr. Siegal first testified, in contrast to Dr. Rudin, that the MRI was of good quality. He reviewed Appellant’s discogram and CT scan and also concluded that Appellant’s lumbar spine was normal. He explained that the dye injected during the discogram did not leak from either disc, which established that

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there was no disc injury in this case.

During the course of Appellant's treatment, there were three surveillance videos taken of Appellant on April 19, August 13, and August 26, 2014. These videos showed Appellant walking, bending, and holding a bag without any expression of pain. Dr. Kalamchi was given these videos to view before the IAB hearing. He made special note of the video dated April 19, 2014, which was recorded three days before Appellant's surgery. In that video, he testified that Appellant's gait was much better in the video than in her presentation during her exams in his office. Dr. Kalamchi testified that Appellant's presentation in the video was not how she presented to him, since she moved normally in the video and did not appear to be restricted in the least.

In addition, Dr. Kalamchi also testified that he reviewed the two post-surgery surveillance videos, and that her mobility and motion in those videos were markedly better than in his office during his post-surgery DME. Dr. Kalamchi further testified that because of Appellant's mobility in the videos, he opined that she had other issues impacting her presentation upon examination other than pain or physical injury. The Board also reviewed the videos, and found special relevance in the video taken three days before Appellant's surgery.

Based on Dr. Kalamchi and Dr. Siegal's conclusions and the surveillance videos, Corporate Kids refused to pay for Appellant's lumbar spine surgery, claiming that it was neither reasonable, necessary, or related to her industrial accident. Appellant petitioned the IAB for Additional Compensation Due. The petition was denied and Appellant filed a timely appeal of the Board's decision in this Court.

### III. STANDARD OF REVIEW

It is well settled that this Court's appellate review of the IAB's factual findings is limited to determining whether the Board's decision is supported by substantial evidence.<sup>2</sup> Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>3</sup> On appeal, the Court views the facts in the light most favorable to the prevailing party below.<sup>4</sup> Moreover, the Court does not weigh the evidence, determine questions of credibility or make its own factual findings.<sup>5</sup> Absent any errors of law, which are reviewed *de novo*, a decision of the IAB supported by substantial evidence will be upheld unless the Board abused its discretion.<sup>6</sup> The Board abuses its discretion when its decision exceeds the bounds of reason in view of the circumstances.<sup>7</sup>

### IV. DISCUSSION

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<sup>2</sup> *Bullock v. K-Mart Corp.*, 1995 WL 339025, at \*2 (Del. Super. May 5, 1995) (citing *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960)).

<sup>3</sup> *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

<sup>4</sup> *Chudnofsky v. Edwards*, 208 A.2d 516, 518 (Del. 1965).

<sup>5</sup> *Bullock*, 1995 WL 339025, at \*2 (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965)).

<sup>6</sup> *Hoffecker v. Lexus of Wilmington*, 36 A.3d 349, 2012 WL 341714, at \*2 (Del. Feb. 1, 2012) (TABLE) (citing *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009)).

<sup>7</sup> *Id.*

Here, the IAB was faced with competing expert opinions regarding the appropriateness of the medical treatment in this case. The Board reviewed the evidence and based upon its assessment of Appellant's credibility, credibility of the competing two sets of expert opinions, and other evidence of record, it found that the medical expenses at issue were not reasonable, necessary and related to the industrial accident. After review of the record, the Court finds that there is substantial evidence to support the Board's decision in this case.

**A. Resolution of credibility issues involving conflicting medical testimony is within the Board's discretion.**

Appellant bore the burden of proving that her lumbar spine surgery medical expenses were reasonable, necessary, and causally related to her accident. The issue of whether medical services are reasonable is wholly factual and under the "exclusive fact-finding purview of the Board".<sup>8</sup> The proper function of the Board is to resolve any factual conflicts presented to it.<sup>9</sup> Further, it is the duty of the Board to determine credibility of testimony, and apportion the appropriate weight to afford various testimony, including expert opinions.<sup>10</sup> In doing so, the Board may rely on one expert's opinion over another.<sup>11</sup> When such opinions conflict, the Board is free to rely upon either opinion, provided there is substantial evidence to support the Board's

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<sup>8</sup> *McCracken v. Wilson Beverage*, 1992 WL 301985, at \*2 (Del. Super. Oct. 15, 1992).

<sup>9</sup> *Breeding v. Advance Auto Parts*, 2014 WL 607323, at \*3 (Del. Super. Jan. 27, 2014).

<sup>10</sup> *Bell Atlantic-Delaware, Inc. v. Hall*, 2001 WL 258612, at \*7 (Del. Super. Feb. 5, 2001).

<sup>11</sup> *Id.*

decision.<sup>12</sup> When the Board indicates that one expert's testimony is more persuasive than the other, "no further clarification of why the Board rejected the testimony of the [other] expert is needed."<sup>13</sup> When the Board acts as a fact-finder and makes such credibility determinations, they are conclusive.<sup>14</sup> These factual determinations are given a high level of deference on appeal and will not be overturned unless there is no satisfactory proof to make such a determination.<sup>15</sup>

In the case at hand, the central issue turns on the credibility of the medical experts as well as that of the Appellant. The Board found Appellant to not be credible, and also found her expert's opinions to not be credible since they were based predominantly on her subjective indications of pain. The Board found the DME experts, Dr. Kalamchi and Dr. Siegal, more persuasive than Appellant's medical experts.

Appellant argues that the Board wrongfully ignored Dr. Rudin's testimony that he based his decision on an objective test – the discogram result. Appellant also argued that a decision based on an objective finding, in the face of other objective findings that there was no disc injury, is insulated from challenge. In this case, Dr. Kalamchi, presented the opposite opinion regarding the discogram results, and particularly relied upon the post-discogram CT scan result. There were accordingly

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

<sup>13</sup> *Breeding*, 2014 WL 607323, at \*3

<sup>14</sup> *Feeney-Wathen v. Bayhealth Medical Center*, 2014 WL 2120263, at \*3 (Del. Super. May 9, 2014).

<sup>15</sup> *Murphy & Landon, P.A. v. Pernic*, 2015 WL 5042713, at \*11 (Del. Aug. 26, 2015).

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two opposing opinions of record regarding the meaning and relevance of the discogram. The Board found Dr. Kalamchi's testimony more persuasive than Dr. Rudin's because it was more consistent with the facts of the case and was corroborated by surveillance video.

Although it involved a different result, the case of *Bell Atlantic-Delaware, Inc. v. Hall*, is instructive regarding the IAB's discretion in such cases.<sup>16</sup> In that case, the Claimant ("Hall") suffered injuries from a work-related accident.<sup>17</sup> Hall received treatment for the injuries. However, Hall was also involved in a subsequent second non-work related accident. The relevant issue in that case was whether certain medical expenses were necessitated by the first accident or the intervening accident as well as when treatment for the first accident ended. The Board, in that case, as in the case at hand, assessed the credibility of the claimant and the credibility of two competing experts with opposite opinions as to causation. As this Court held in *Bell-Atlantic*, the Board was within its discretion to give greater or controlling weight to the testimony of one doctor over another.<sup>18</sup>

It is the Board's obligation to articulate its reasoning for its findings. Here, in its 30 page decision, the Board found that

Claimant is not credible and that the lumbar spine surgery was not reasonable or necessary. . . . Claimant's presentation on the surveillance video on April 19, 2014, which was three days before the surgery, shows a different image of Claimant that she presented to the physicians.

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<sup>16</sup> *Bell Atlantic*, 2001 WL 258612, at \*7

<sup>17</sup> *Bell Atlantic*, 2001 WL 258612, at \*1-3

<sup>18</sup> *Id.* at \*7.

Claimant was very functional and had no signs of low back pain on April 19, 2014.<sup>19</sup>

Moreover, the Board discussed in detail why it found Dr. Kalmachi's testimony persuasive in this case, how Dr. Siegal's testimony and opinion was consistent with Dr. Kalamchi's, and why it rejected Dr. Rudin's testimony as to the necessity of surgery.<sup>20</sup> Among other facts and reasons cited, the Board articulated how Dr. Rudin's reliance on the practice guidelines for a discogram and subsequent surgery was inappropriate here because those guidelines require "functionally limiting unremitting back pain."<sup>21</sup> In rejecting Dr. Rudin's testimony, the IAB found that "the surveillance video shows that Claimant's low back pain was nowhere near as severe as she described to the physicians and her pain did not functionally limit her."<sup>22</sup>

Lastly, the Board found that "Dr. Rudin's reliance only on the discogram and Claimant's subjective complaints to support his opinion that the lumbar fusion surgery was appropriate is unpersuasive considering the normal MRI, which was a clear and valid study, and considering the normal post discogram CT scan, as well as considering Claimant's presentation on the surveillance video three days before surgery."<sup>23</sup> Accordingly, the Board's decision to rely upon Dr. Kalamchi's opinion as opposed to Dr. Rudin's was not an abuse of discretion, is adequately articulated

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<sup>19</sup> Bd. Decision at \*27.

<sup>20</sup> Bd. Decision at \*28-29.

<sup>21</sup> Bd. Decision at \*29.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at \*29-30.

on the record, and is free of legal error. The remaining issue in this appeal requires a review of the record to ensure that the Board's decision was based on substantial evidence.

**B. The Board's decision was based on substantial evidence.**

Since factual findings are the role of the Board, overturning a factual finding of the Board is appropriate only if there is no satisfactory proof supporting that finding.<sup>24</sup> “[A] Board abuses its discretion when it ignores rules of law or practice as to produce injustice.”<sup>25</sup> Further, the Board is required to provide the reasons for its decision.<sup>26</sup> If a “reasonable mind” can reach the same decision as the Board, then the “substantial evidence” standard of review is satisfied. Here, the Board adequately explained its decision, and there is sufficient evidence of record to support it.

In *Breeding v. Advance Auto Parts*, this Court addressed a similar IAB appeal to the case at bar. There, the Board was faced with two medical experts with conflicting testimony as well.<sup>27</sup> *Breeding*, the claimant, was a manager at Advance Auto Parts who got injured while on the job, with pain mostly on the right side of his back.<sup>28</sup> *Breeding* was diagnosed with a L3-4 herniated disc.<sup>29</sup> *Breeding* received

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<sup>24</sup> *Pernic*, 2015 WL 5042713, at \*11

<sup>25</sup> *Feeney-Wathen*, 2014 WL 2120263, at \*6

<sup>26</sup> *McCracken*, 1992 WL 301985, at \*1

<sup>27</sup> *Breeding*, 2014 WL 607323, at \*2-3

<sup>28</sup> *Id.* at \*1

<sup>29</sup> *Id.*

surgery and, after roughly three and a half months, returned to work.<sup>30</sup> However, Breeding began feeling pain again, but mostly in his left side.<sup>31</sup> He was referred to Dr. Sugarman, who performed a second surgery on Breeding after reviewing an MRI that showed evidence of degenerative disc disease.<sup>32</sup> Immediately after the surgery, Dr. Sugarman did not find a causal relation between the two.<sup>33</sup> However, after further consideration, and subsequent review of older MRI films, Dr. Sugarman changed his opinion and related the second surgery to the accident.<sup>34</sup>

The employer, Advance Auto Parts, had Dr. Townsend, a DME doctor, review the same medical records and MRIs. He concluded that the second surgery and the accident were not related as Breeding's pain was different from the pain caused by the accident.<sup>35</sup> In that case, the Board accepted Dr. Townsend's opinion over Dr. Sugarman's because it found Dr. Townsend's testimony more persuasive and consistent with the facts of the case and Breeding's condition.<sup>36</sup> Furthermore, the Board found that medical records from different doctors corroborated Dr. Townsend's conclusion that Breeding made a full recovery after his first surgery and that the

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Breeding*, 2014 WL 607323, at \*1

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at \*2

<sup>36</sup> *Id.*

second surgery was not related to the original work accident.<sup>37</sup>

On appeal, this Court affirmed the Board's decision in *Breeding* for two primary reasons. The Board's decision clearly indicated that the Board found Dr. Townsend's testimony more persuasive; therefore, the court held that the Board did not need to further clarify why it rejected Dr. Sugarman's testimony.<sup>38</sup> Secondly, based on Dr. Townsend's expert opinion which was corroborated by underlying facts, there was also substantial evidence supporting the Board's decision.

In the case at hand, Appellant argues that the substantial evidence threshold was not met because the Board ignored (1) Dr. Kalamchi's admission in his disposition that the discogram was positive, and (2) Dr. Kalamchi's refusal to use the phrase "the surgery was unnecessary." While Dr. Kalamchi testified that the discogram results were positive, the Board did not ignore his testimony. Although a discogram test is somewhat objective, the objectivity relies upon the physician and the patient, as opposed, for example, an imaging study. Dr. Kalamchi explained, and the Board accepted, that although the exam can be objective, it is dependent on the interpretation of the examiner. According to Dr. Kalamchi's testimony, it is possible to obtain an inaccurate result from the tests based on an examiner's technique as well as the responses of the patient. Dr. Kalamchi, in this case, testified that the result of the discogram was not accurate.<sup>39</sup> Even if the discogram was interpreted as being positive, the MRI scans, post-discogram CT scan and other exams all indicated that

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at \*4

<sup>39</sup> Kalmachi Depo. at 47.

the surgically removed discs were not injured. There was no frank tear, and there was no leak in the discogram or CT scan evidencing any disc injury. Dr. Kalamchi's opinion was that surgery should not have been performed on a normal disc, even if the discogram was positive. The Board clearly placed great weight on what was the second, more objective aspect of the discogram process, the post-discogram CT scan.

Dr. Kalamchi testified that Appellant was not a surgical candidate due to her psychosomatic and emotional behavior, and the lack of any disc injury. He also testified that surgery was not "medically indicated" in Plaintiff's case.<sup>40</sup> He likewise testified that she was "overtreated" based on her lack of disc pathology.<sup>41</sup> During his cross-examination, Dr. Kalamchi confirmed further that "surgery was not needed in this case."<sup>42</sup> That he chose to not use the word "unnecessary" in his testimony does not preclude a finding that the Board's decision was supported by substantial evidence. In addition to an expert medical opinion that surgery was inappropriate, the Board relied upon appellant's medical records. It also independently viewed the surveillance videos taken of Appellant that it found supported Dr. Kalamchi's testimony, and that his testimony, as the expert testimony in *Breeding*, was most aligned with the underlying facts and the evidence regarding Appellant's condition. The Board was convinced that the videos showed that Appellant did not have "functionally limiting unremitting back pain" as testified to by her treating physician, who relied on that assessment to order a discogram and to subsequently justify the

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<sup>40</sup> Kalamchi Depo. at 25.

<sup>41</sup> Kalamchi Depo. at 26.

<sup>42</sup> Kalamchi Depo. at 54.

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surgery. The Board's decision was reasoned and based on the evidence in finding that Appellant's pain did not functionally limit her, as she claimed to her physicians. Namely, on April 19, 2014, just three days before her surgery, a surveillance video viewed and commented upon by the Board in its decision, showed Appellant leaning in her car, standing and walking normally for an hour and a half, with only a seven minute break. She was, throughout this time, shown to not be limping, using her cane, or exhibiting any pain. This evidence directly contradicted Dr. Balu and Dr. Rudin's testimony while supporting Dr. Kalamchi's testimony.

Finally, the surveillance video of August 26, 2014 showed that Appellant was not at home resting or at the hospital as she testified at the hearing, thus directly contradicting her sworn IAB testimony. For all of these reasons, the Board found Appellant's presentation to her doctors to be misleading and relied on Dr. Kalamchi and Dr. Siegal's testimony. There was substantial evidence in the record to support the Board's decision.

## **V. CONCLUSION**

For the foregoing reasons, the decision of the IAB is **AFFIRMED**.

/s/Jeffrey J Clark  
Judge