



IN THE SUPREME COURT OF THE STATE OF DELAWARE

Patricia Boone,

Claimant Below-
Appellant,

v.

**Syab Services/Capitol
Nursing,**

Employer Below-
Appellee.

No. 525, 2012

Court Below: The Superior
Court of the State of
Delaware, in and for Kent
County, C.A. No. K11A-10-
003-WLW

Reply Brief of the Claimant Below-Appellant

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Table of Contents

Table of Contents **ii**

Table of Citations **iii**

Argument **1**

 ISSUE 1: The Board erred as a matter of law in ruling that
 the Claimant must obtain her prescriptions from the
 Employer’s preferred pharmacy provider. **1**

 Merits of Argument **1**

Conclusion **5**

Table of Citations

Cases

Davis Plumbing Co. v. Burns, 967 So.2d 94
(Ala.Civ.App. 2007) 4

Estate of Watts v. Blue Hen Insulation, 902 A.2d 1079
(Del. 2006) 4

Holden v. Gaico, Inc., 736 A.2d 202 (Del. 1999) 2

Statutes

19 Del. C. § 2322(a) 1

19 Del. C. § 2323 2

Argument

ISSUE 1: The Board erred as a matter of law in ruling that the Claimant must obtain her prescriptions from the Employer's preferred pharmacy provider.

Merits of Argument

Employer's argument begins, as it did below, with the position that it is the employer's obligation to furnish medicines and supplies to an injured worker, relying on 19 Del. C. § 2322(a). The Employer initially ignores the concluding clause of that subsection, which enables a claimant to refuse to allow such services, medicines and supplies to be provided by the employer. Id. The Employer later contends that this provision of § 2322(a) is a reference to the claimant's supposed "right" to forfeit workers' compensation benefits under §2353 (See Employer's Answering Brief at pp 9-10, Footnote 1). This is a bizarre construction of the statute, as the Claimant does not have a "right" to forfeit benefits – indeed, the very section cited, § 2353, imposes consequences as a penalty for claimants who meet the forfeiture provisions of the statute.

The Board, and the Court, have an obligation to read the Workers' Compensation Act *in pari materia* – the statute must be read in the context of the other statutes on the same subject matter. Holden v. Gaico, Inc., 736 A.2d 202 (Del.

1999). The Employer's reading of § 2322(a) ignores the Claimant's right to select her own medical providers under 19 Del. C. § 2323, and the underlying purposes of the claimant's right of choice as to medical providers.

The important right at issue in this case is that of access – the Claimant does not contend, as the employer intimates¹, that the prescriptions at issue will be somehow different if sourced from a different provider. The issue is whether the Claimant will have access to those medications at all – if the Claimant is compelled to obtain medications from the Carrier's preferred source only, and medications are only dispensed if the Carrier authorizes the prescriptions at the time they are dispensed, then the Claimant is effectively barred from obtaining prescriptions if the authorization is not forthcoming at the time the prescription is presented at the pharmacy.² The Claimant now needs to file a petition and request a hearing before the Board for relief from the order

¹ Employer's Answering Brief at p. 8.

² It is not enough to say, as the Employer suggests, that the claimant may use any number of pharmacies in the State, or have them shipped via mail order to her home. Each of these pharmacies is a participant in the Employer's preferred pharmacy provider network. Each pharmacy would therefore seek (and insist upon) authorization before dispensing the prescribed medications. Without that authorization, none of the participating pharmacies will dispense the medications, leaving the claimant again in the untenable position of needing medications, and having to pursue her right to same before the IAB, with whatever delays and disruptions in her care will be occasioned by the denial of authorization.

that she source her medications through the carrier's preferred provider, and in the meantime her access to those necessary medications is compromised. Such a result is not consistent with the intent and purpose of the workers' compensation act generally, or these specific provisions permitting claimants their choice of providers. In other words, a prescription is a prescription, but it matters *if* it comes.

The statute and public policy support the right of claimants to access medications through whichever providers they wish, and the legitimate concerns of the carrier, and the system, are addressed by the statute itself, and specifically the fee schedule providing for limits on the costs of medications in the workers' compensation system. The carrier notes that it has the right to negotiate with providers for even better discounts than the fee schedule provides; however, the statute does not impose on claimants a right of carriers to compel claimants to make use of the providers with whom a carrier has negotiated those preferred rates. The very policy underlying the statute, as codified in 19 Del. C. § 2322B(1), is that this is not a "push down" system, but instead is intended to eliminate outlier charges. By definition, if the claimant's chosen pharmacy is charging for prescriptions consistent with the Fee Schedule, then those are not 'outlier

charges'. The carrier seeks what the Legislature specifically declined to give – a 'push down' system is not what was intended, and yet the Board has imposed a 'push down' mechanism on the claimant in this case (and by extension, all other claimants if this decision is permitted to stand) in contravention of the statute, public policy and the express intent of the Legislature.

Employer finally argues that the Claimant's citation to an Alabama case, Davis Plumbing Co. v. Burns, 967 So.2d 94 (Ala.Civ.App. 2007), is inapposite, arguing that it is distinguishable based on different statutory language. Indeed, the Employer cites to the statutory language in Alabama in its brief; however, Claimant fails to see how this is anything other than a distinction without a difference.

Where, as here, we have a statute that is to be liberally construed in favor of injured workers (*see, e.g., Estate of Watts v. Blue Hen Insulation*, 902 A.2d 1079 (Del. 2006)), the Employer's construction of the statute is the incorrect one. The legislative policy supports facilitating access to medications and treatment for claimants, within the constraints of the fee schedule. The carrier's desire for a 'push down' system, and the Board's ruling to that effect, contravene the legislative intent and purpose of the statute, and must therefore be reversed.

Conclusion

WHEREFORE, based on the foregoing, and based further on the arguments advanced in the Claimant/Appellant's Opening Brief, the Claimant Below Appellant, Patricia Boone, by and through her attorneys, Schmittinger & Rodriguez, P.A., hereby respectfully requests that the Court reverse the decision of the court below affirming the Board's decision, and remand this matter for an award of worker's compensation benefits consistent with the statutes and case law referenced above.

Respectfully submitted,

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