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Case Number 112,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AMANDA WYATT,	)	
	)	
Employee-below, Appellant	)	No. 112, 2013
	)	
v.	)	Court Below – Superior Court
	)	of the State of Delaware
RESCARE HOME CARE,	)	in and for Sussex County
	)	C.A. No. S12A-06-004 ESB
Employer-below, Appellee	)	

Opening Brief of Employee-below, Appellant

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NATURE OF PROCEEDINGS

Amanda Wyatt, Claimant-Below, Appellant ("Claimant"), injured her low back while working for Rescare Home Care, Employer-Below, Appellee ("Employer") on December 15, 2010. On June 10, 2011, Claimant filed a Petition to Determine Compensation Due with the Industrial Accident Board of the State of Delaware Sitting in Milford Delaware ("Board") seeking a determination that her injury is a compensable industrial accident. Employer denied that Claimant's injury was work-related.

A hearing on Claimant's Petition to Determine Compensation Due was held on January 18, 2012. Six people testified at the hearing, including Claimant, her co-worker, Mary Leight, and Claimant's treating neurosurgeon, Dr. Balapur Venkataramana.[1] On February 3, 2012, the Board issued its decision on Claimant's petition granting Claimant's petition as to the compensability of her low back injury and as to payment of medical bills and total disability benefits. The Board also awarded medical witness fees and attorney's fees to Claimant.

On February 15, 2012, Employer filed a Rule 21 Motion for Reargument pertaining to the award of payment of medical bills claiming payment of medical bills should have been denied on the grounds that a) no clean claims were submitted to the workers' compensation carrier by Claimant's medical providers,

[1] Dr. Venkataramana testified by deposition at the hearing.

and b) Claimant's neurosurgeon was not certified under the Workers' Compensation Statute and failed to obtain pre-authorization of his treatment of Claimant. On May 30, 2012, the Board issued an order granting Employer's Motion for Reargument, thereby denying the payment of Claimant's neurosurgeon's medical bills on the grounds that he was not certified and failed to obtain preauthorization of his treatment of Claimant. Under the "first visit exception," payment of the neurosurgeon's first office visit of Claimant was compensable.

On June 19, 2012, Employer appealed the February 3, 2012 decision of the Board on the Petition to Determine Compensation Due. Claimant filed a Notice of Cross-Appeal on June 27, 2012 with the Superior Court of Delaware in and for Sussex County claiming error in the May 30, 2012 Order on Motion for Reargument of the Board. On March 6, 2013, Judge E. Scott Bradley issued an order reversing the decision below. Judge Bradley held that that there was insufficient medical testimony upon which the Board could base its decision that Claimant had suffered a compensable work injury. On March 15, 2013, Claimant filed a Notice of Appeal in this Court. This is Claimant's Opening Brief on appeal.

SUMMARY OF ARGUMENT

1. The Superior Court erred in reversing the Board's decision as to the causation of Claimant's back injury because there was sufficient evidence upon which the Board based its decision.

2. The Board's finding as to causation was based upon not only medical testimony, but also Claimant's testimony and the testimony of two other witnesses who testified as to Claimant's condition immediately after the work related lifting injury that brought on the onset of numbness and cauda equina symptoms.

3. The Board erred in denying Claimant's claim for recovery of medical expenses incurred as a result of her emergency back surgery.

4. The evidence presented to the Board, including the testimony of both medical experts support a finding that Claimant's emergency back surgery is compensable under the emergency exception to the preauthorization requirement.

STATEMENT OF FACTS

Claimant, a twenty-seven year old female, was employed by Employer as a certified nursing assistant ("CNA") for about four or five years prior to being injured.[2] As a CNA with Employer, she worked with a five-year old child named Isaac who was completely dependent upon her for walking, bathing, feeding, and clothing.[3] At the time of the industrial accident, Isaac weighed approximately fifty (50) lbs.[4] Five days a week, Isaac attended school at Howard T. Ennis School, and Claimant cared for Isaac at the school.[5]

On a typical day, Claimant met Isaac at school where she assisted him in getting off the bus.[6] She stayed with him and cared for him throughout his school day.[7] After school, she assisted Isaac getting onto the bus and then met him at his home.[8] Claimant also cared for Isaac at his home as needed.[9] Claimant did not usually go to Employer's office and no one from Employer assisted her with any of her duties.[10]

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[2] A- 3.
[3] A- 3-4.
[4] A- 4.
[5] A- 5-6.
[6] A- 6-7.
[7] *Id.*
[8] *Id.*
[9] A- 6.
[10] A- 6-7.

In October 2010, Claimant began to experience back pain.[11] On October 21, 2010, she awoke in the morning to get ready for work, bent over to pick something up, and felt back pain.[12] She went to work as usual because she knew Isaac needed her and there was no one else assigned to Isaac.[13] Claimant lifted Isaac once at work and realized she could not do it again.[14] She called Employer and told them she had to get medical attention.[15] She left work and went to a hospital emergency room where she complained of back pain and soreness.[16] She had no symptoms into the leg or foot and no feeling of urinary or bowel urgency.[17]

At the emergency room, she was told that she probably pulled a muscle in her back and was prescribed a muscle relaxer and pain medication.[18] Claimant did not seek any additional medical treatment for the October 2010 symptoms.[19] She took a couple of days off of work to rest.[20] When she returned to work, she took it easy by limiting her lifting of Isaac or having his mother assist in lifting him.[21]

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[11] A- 7.
[12] A- 7-8.
[13] A-8.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] A- 8-9.
[18] A- 9.
[19] *Id.*
[20] A- 10.
[21] *Id.*

Claimant's back was fine on October 24 or 25, 2010, and she experienced no further back pain or soreness until early December 2010.[22]

On Friday, December 10, 2010, Claimant was working with Isaac at his school and experiencing back pain.[23] Claimant did not work the weekend, but with no relief on the following Monday, Claimant took the day off to rest.[24] On Tuesday, her back was feeling a little bit better and she went to Isaac's home on Tuesday night to care for him.[25] Claimant did not experience any symptoms into the legs, buttocks, or feet, or any urinary symptoms between December 10th through 14th.[26] Her symptoms were only in her lower back.[27]

Claimant returned to work at Isaac's school on the morning of Wednesday, December 15, 2010.[28] She met Isaac at his school and helped get him off the bus and transferred him several times that morning.[29] When she transferred Isaac for lunch, her low back pain suddenly went away and everything went numb.[30] She had no feeling in her left foot, and she also felt urgency to urinate.[31] Claimant left

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[22] *Id.*
[23] A- 11.
[24] *Id.*
[25] A- 11-12.
[26] A- 12-13.
[27] A- 13.
[28] A- 12-13.
[29] A- 13-14.
[30] A- 14.
[31] *Id.* The Board found Claimant credible and accepted her testimony regarding the industrial accident. Specifically, the Board accepted Claimant's testimony that the back pain she felt prior

the room to walk to the bathroom when she encountered Beth Leight, a physical therapist at the school.[32] Ms. Leight observed that Claimant was limping.[33] She had never seen Claimant that way.[34] Claimant informed Ms. Leight that she was picking up Isaac and experienced intense pain, and then she felt her leg go numb.[35] Ms. Leight was familiar with Isaac with whom Claimant worked and described him as an extremely heavy lift.[36] She recalled Isaac's previous caregiver also experienced back problems.[37]

When Claimant returned to the classroom, she called her mother, LeAnne Waltz, who is a medical assistant and surgery coordinator at a doctor's office, and informed her of her symptoms.[38] The doctors for whom Ms. Waltz worked are general surgeons.[39] Ms. Waltz informed Dr. Tatineni, one of the general surgeons for whom she worked, about her daughter's symptoms and the doctor stated that she needed to be seen right away.[40] Since Dr. Balapur Venkataramana, a board-certified neurosurgeon, is the only neurosurgeon in the Beebe directory and that is

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to December 15, 2010 suddenly went away when she lifted Isaac and was replaced with numbness, left foot drop, and urinary urgency. A- 91.

[32] A- 14.

[33] A- 41-42. The Board accepted the testimony of Ms. Leight. A- 92.

[34] A- 42.

[35] A- 43.

[36] *Id.*

[37] *Id.*

[38] A- 14-15, A- 29.

[39] A- 30.

[40] A- 31-32.

the neurosurgeon to whom her practice refers patients, Claimant's mother called and made an appointment for Claimant to see Dr. Venkataramana.[41] The appointment was for Monday, but when Ms. Waltz informed Dr. Tatineni that the appointment was for the following week, he called Dr. Venkataramana and got an appointment for Claimant on Friday, December 17, 2010.[42]

Claimant finished out the remainder of her work day without lifting Isaac.[43] When she left work, she felt no pain and had numbness down the back of her legs and buttocks and into her left foot.[44] Claimant called Isaac's mother and informed her that she could not go over to their house because of her symptoms.[45] That evening, Claimant's symptoms worsened, and she could not control her bladder functions.[46]

Claimant did not speak to anyone at Employer on December 15, 2010 about her symptoms.[47] On December 16, 2010, Claimant spoke with Betty Acres, the nursing supervisor at Employer and informed her that she had hurt her back at the

[41] A- 32-33.
[42] A- 33.
[43] A- 15.
[44] A- 16.
[45] *Id.*
[46] A- 17-18.
[47] A- 16.

school and that she had scheduled an appointment with Dr. Venkataramana for Friday, December 17, 2010.[48]

On December 17, 2010, Claimant went with her mother to Dr. Venkataramana's office for her appointment. In the reception area, the Claimant mentioned work while talking to her mother, and the receptionist overheard the conversation and asked whether she had a workers' compensation injury.[49] The receptionist stated she was asking because Dr. Venkataramana does not take workers' compensation cases and she would have to be referred elsewhere.[50] Claimant was scared about not being able to see Dr. Venkataramana that day because the doctor for whom her mother worked had said Claimant needed to be seen that week and that doctor had helped her get the appointment with Dr. Venkataramana on the 17th.[51]

Claimant told Dr. Venkataramana about her condition in October and December 2010 and explained how she experienced sudden numbness and no pain on December 15th, except Claimant stated that this occurred when she woke up rather than when she was lifting Isaac at work.[52] She did not tell him that the sudden numbness occurred while she was at work because she was scared that he

[48] A- 17.
[49] A- 18.
[50] *Id.*
[51] A- 18-19.
[52] A- 19-20.

would not treat her and scared about her condition.[53] At her appointment on December 17th, Claimant complained of numbness in both buttocks, back of both thighs, and on the left side along her left leg to the heel and toes.[54] She also stated that from December 16th she was incontinent of urine.[55] Claimant explained to Dr. Venkataramana that she was the caregiver to a handicap child who was 100% dependent.[56]

After Dr. Venkataramana examined Claimant he immediately sent her to get an MRI, x-ray and blood work, and he instructed her not to leave the building.[57] His clinical impression was that Claimant had a herniated disc at L4/5 or L5/S1 with cauda equine syndrome and compression of the nerve roots in the lumbar spine.[58]

Dr. Venkataramana instructed Claimant to meet him at Beebe hospital the next day, Saturday, December 18th so they could review the MRI and decide on a course of action.[59] On Saturday, December 18th, Claimant met Dr. Venkataramana at Beebe hospital and he informed her that she needed to have

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[53] A- 26. The Board accepted Claimant's testimony that she was scared to tell Dr. Venkataramana about the lifting incident as the onset of the numbness and urinary incontinency because his staff had just told her that he did not treat workers' compensation patients. A- 91-92.
[54] A- 34-35.
[55] A- 35.
[56] *Id.*
[57] A- 20.
[58] A- 36.
[59] A- 20.

surgery the next day.[60] Dr. Venkataramana read the MRI to show a large disc herniation at L5/S1 lateralized to the left, significant spinal stenosis at L4/5, and early degeneration of L5/S1.[61] Spinal surgery to decompress the nerve roots, discectomy, laminectomy, and fusion was performed by Dr. Venkataramana at Beebe hospital on Sunday, December 19th.[62] Surgery had to be performed on an urgent basis due to ongoing compression of the nerves.[63]

Claimant continued to treat with Dr. Venkataramana after the surgery.[64] In February 2011, Dr. Venkataramana told Claimant she could do light work and start walking, cycling, swimming, stretching and bending.[65] She was not to do any impact exercises, such as jogging or, and lifting was limited to ten pounds.[66] He has not released Claimant to return to work as a CNA. While her condition continues to improve, she still has some numbness in the buttocks and left leg and some urgency issues, although no urinary leaking. Dr. Venkataramana completed a workers' compensation release to work form on September 20, 2011 for Claimant that restricts her to light duty work four hours a day with no twisting or

[60] *Id.*
[61] A- 36-37.
[62] A- 37.
[63] A- 37-38.
[64] At the time of the hearing before the Industrial Accident Board in January 2012, Claimant's last appointment with Dr. Venkataramana was in September 2011. A- 79.
[65] A- 38.
[66] *Id.*

kneeling.[67] Claimant did not contact Employer after she was released to work because she did not think Employer had any light duty work available.[68]

Claimant did not exercise prior to the industrial accident.[69] She had not gone bowling since about 2005 and had not skated in a long time.[70] She had not been in a physical altercation since she was in high school.[71] From October to December 2010, Claimant's activities included working many hours, grocery shopping, and spending time with friends watching television.[72]

Dr. Venkataramana does not believe that the records or the history indicate that Claimant had cauda equina syndrome or a large extruded disc as of October 21, 2010.[73] Claimant would not have been able to return to work as a CNA and lift a forty-five or fifty pound Isaac in October, November, or December if she had been in the condition in which he saw her on December 17, 2010 because of the

[67] A- 21-22.
[68] A- 27-28.
[69] A- 23.
[70] *Id.*
[71] A- 24.
[72] A- 25.
[73] A- 39.

pain, numbness, and weakness that she had that day.[74] In his opinion, Claimant's disc herniation was caused by the type of work she does.[75]

The Employer's medical expert was Kevin Hanley, M.D. Dr. Hanley testified that on the date of his March 7, 2011 examination of Claimant, she provided him a timeline of her onset of symptoms.[76] Claimant informed Dr. Hanley that her back pain turned to sudden numbness and bladder incontinence when she was lifting Isaac at work on December 15, 2010.[77] Dr. Hanley testified that if Claimant's version of the onset of symptoms was true, he would agree that her injury was work related. Regarding his opinion as to causation after his March 7, 2011 examination of Claimant, Dr. Hanley stated: "On the basis of the history she gave me that she had a sudden increase of symptoms with a specific episode of lifting it was my belief that that was the episode that had completed the rupture of the disc."[78] During his testimony, Dr. Hanley was specifically asked his opinion on causation based upon Claimant's recount of the lifting incident:

> Q. Is it fair to say, doctor, that if she did lift the child on the 15th as she told you and suffered an increase in symptoms resulting in urgency ad actual loss of bladder control that night that would be the cause of the herniation?

[74] A- 39-40.
[75] A- 40. The Board accepted Dr. Venkataramana's testimony that Claimant's large fragmented herniated disc and cauda equina syndrome are related to her lifting Isaac at work. A- 93.
[76] A- 46.
[77] A- 47-48.
[78] A- 49.

> A. I think I've already said that. I think I said in my October 18th report that if, indeed, she did what she said that would serve as a basis for causal relationship."[79]

Thus, when considering the testimony of Dr. Venkatarmana in conjunction with the testimony of Dr. Hanley, it is clear there were two medical expert opinions that agreed the lifting event of December 15, 2010, if believed, was the cause of Claimant's disc rupture and cauda equina symptoms.

[79] A- 52.

ARGUMENT

(1) Questions Presented

a. Whether the Superior Court erred in holding the Board's finding that Claimant had sustained a work related injury was not based on sufficient medical testimony.[80]

b. Whether the Board erred in denying compensability of Claimant's medical bills for her emergency spinal surgery.[81]

(2) Scope of Review

The factual findings of an administrative agency are subject to limited appellate review. "On appeal from a decision of the Board, this Court must determine whether the agency ruling is supported by substantial evidence and free from legal error."[82] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[83] The reviewing court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[84] The appellate court determines whether the evidence is legally adequate to support the agency's factual findings. "Absent error of law, the

[80] *See Rescare Home Care v. Amanda Wyatt*, C.A. No. S12A-06-004 ESB, Mar. 6, 2013 at 10-12 (attached hereto as Ex. A).
[81] *See* Opening Brief of Amanda Wyatt, Claimant-Below, Appellee/Cross Appellant, *Wyatt v. Rescare Home Care*, C.A. No. S12A-06-004 ESB, Oct. 31, 2012 at 9.
[82] *Diamond Fuel Oil v. O'Neal*, 734 A.2d 1060, 1063 (Del. 1999).
[83] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994).
[84] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

standard of review for a Board's decision is abuse of discretion. The Board has abused its discretion only when its decision has 'exceeded the bounds of reason in view of the circumstances.'"[85]

(3) Merits of Argument

I. The Superior Court erred in reversing the Board's decision that Claimant's injury was a compensable industrial accident since the Board's decision was based upon sufficient evidence.

Based upon the testimony presented at the hearing, the Board found that Claimant had sustained a compensable work injury. On appeal to the Superior Court, the court reversed the Board's finding as to causation stating that there was insufficient medical testimony to support a compensable work related injury. The Board's decision was based upon sufficient evidence, and thus it was error for the Superior Court to reverse the Board's finding.

The Board may rely upon other credible evidence in addition to medical expert testimony to support the employee's claim as to causation.[86] This Court stated in the case of *General Motors Corp. v. Freeman*:

> If the testimony of [the medical] experts should show that the injury was possibly the result of the trauma and such testimony is supplemented by other credible evidence tending to show that the injury occurred directly

[85] *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009).

[86] *Streett v. State*, 669 A.2d 9, 11-12 (Del. 1995) ("[M]edical evidence is not the only evidence the Board may rely upon in making its factual determinations with respect to the claimant's injury.")

> after the trauma, without interruption, we think that such evidence would be sufficient to sustain an award.[87]

In *Freeman*, the employer claimed there was inadequate medical testimony supporting the claimant's claim that he had suffered a detached retina due to a workplace injury.[88] Stressing the limited scope of review of an appellate court in reviewing a decision of an administrative board, the *Freeman* court stated:

> The position of the Superior Court and of this Court on appeal is to determine only whether or not there was substantial evidence to support the findings of the Board. If there was, these findings must be affirmed. It is true that the testimony of the medical experts in this case was weak and uncertain and might well have justified the Board in reaching a contrary opinion. That question is not before us. There was evidence showing that the injury was the result of the trauma, that claimant had not suffered from this condition before and, further, that it was a direct and uninterrupted result of the accident.[89]

The lay evidence in addition to the "weak" medical testimony was held to be sufficient to sustain the Board's decision.[90] Similarly, in this case, the evidence as to causation was not simply medical testimony, but medical testimony supported by lay witness testimony. There was testimony from Claimant, her mother, and a co-worker that supported Claimant's claim that her back injury occurred while she was lifting Isaac at work and both medical experts agreed that if the sequence of events occurred in the manner as Claimant described then her injury was caused by

[87] 164 A.2d 686 (Del. 1960).
[88] *Freeman*, 164 A.2d at 688.
[89] *Id.* at 689.
[90] *See id.*

the work event.[91] The Board specifically found the testimony of Claimant, her mother, and her co-worker to be credible.

At the hearing, Claimant testified as to the events leading up to her back injury. Claimant testified as to a minor back problem that occurred many months prior to her back injury of December 15, 2010 that left her with cauda equina symptoms and the need for emergency surgery. The Board specifically found that Claimant's testimony that her injury occurred when she was lifting Isaac was credible.

Claimant's testimony was supported by her co-worker Beth Leight, who saw Claimant just after her injury occurred. Ms. Leight testified that she saw Claimant in the hallway at work and that Claimant was limping. She stated that Claimant told her she was in a lot of pain with numbness and tingling traveling down her legs. Claimant's mother testified that her daughter called her during the day of December 15, 2010 around lunchtime and stated that she was numb and unable to control her bladder.[92]

Claimant's testimony was further supported by the neurosurgeon, Dr. Venkataramana, who treated Claimant for her back injury and performed her emergency back surgery. Dr. Venkataramana opined that Claimant's back injury was directly caused by her lifting activities at work (i.e. lifting Isaac): "My

[91] *See* A- 52; *see also* A- 69-70.
[92] A- 32.

impression was that the type of work she does caused the herniated disc, which brought her to me and that needed surgery."[93]

The Superior Court incorrectly stated that Dr. Venkataramana did not know all of the facts when he rendered his opinion as to the cause of Claimant's injury. This is not accurate. At the time Dr. Venkataramana was deposed and gave his opinion as to causation, he was aware that Claimant had informed the defense expert as to a different set of facts.[94] Despite the difference in factual scenarios, Dr. Venkataramana did not change his opinion and testified that Claimant's condition was caused by her lifting activities at work.

The Employer's expert testified in accord with Dr. Venkataramana, and the Board recognized that Dr. Hanley "agreed that the lifting of the patient as she described was competent to cause the herniation."[95] Dr. Hanley's testimony establishes that Claimant provided him a timeline of her onset of symptoms.[96] Claimant informed Dr. Hanley that her back pain turned to sudden numbness and bladder incontinence when she was lifting Isaac at work.[97] When asked what his opinion of causation would be if Claimant's version of the onset of symptoms was

[93] A- 70.

[94] *See* A- 56. Dr. Venkataramana testified that prior to this deposition he had reviewed Dr. Hanley's March 7, 2011 report, which provided the Claimant's history of events including the December 15th lifting incident with Isaac and the sudden onset of pain. *See* A- 47-48.

[95] A- 90. The Board also recognized that Dr. Hanley's would not opine that the injury was work related "because there are dissenting opinions in the record versus what she told him." A- 91.

[96] A- 46.

[97] A- 47-48.

true, he stated he would agree that her injury was work related. "On the basis of the history she gave me that she had a sudden increase of symptoms with a specific episode of lifting it was my belief that that was the episode that had completed the rupture of the disc."[98] Dr. Hanley was specifically asked his opinion on causation based upon Claimant's recount of the lifting incident:

> Q. Now, is it fair to say then, Doctor, that if she did lift the child on the 15th as she told you and suffered an increase in symptoms resulting in urgency at that point and actual loss of bladder control that night, that that would be the cause of the herniation?
>
> . . .
>
> A. I think I've already said that. I think I said in my October 18th report, that if indeed she did what she said, then that would serve as a basis for causal relationship."
>
> Q. Right. You say on October 18th, In *(sic)* any case, if indeed a lifting episode occurred, then my explanation in my initial report still holds true?
>
> A. Correct.[99]

The Board recognized Dr. Hanley's opinion that "[i]f Claimant did not awake with the numbness on December 15th, but had the onset of numbness while lifting the child, then Dr. Hanley believes that the lifting at work incident caused the disc rupture."[100] Dr. Hanley's opinion as to causation changed only after he learned that Claimant had given a different history of events to Dr.

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[98] A- 49.
[99] A- 52-53.
[100] A- 90-91.

Venkataramana.[101] Dr. Haney chose to believe Claimant's version of events that she reported to Dr. Venkataramana rather than believe the history she had provided to him at his initial examination. The Board, however, ultimately believed Claimant's testimony regarding the lifting episode at work, which was the version told to Dr. Hanley and there was sufficient testimony from both Dr. Venkataramana and Dr. Hanley to support the Board's decision. With both experts agreeing that the lifting event if believed would have caused the disc rupture, it shows that the Board's decision was merely one of credibility, an issue that was not within the province of the Superior Court to disturb.

The Superior Court stepped outside the bounds of its limited scope of review when it decided an issue of credibility; that is which version of the sequence of events is true. There was ample evidence to support the Board's finding as to causation. Fixated on the fact that Claimant had denied a work injury to her doctor, the Superior Court held that Claimant's claim for workers compensation failed because she did not tell her doctor how the injury occurred while she was at work and lifting Isaac. This holding is legal error and must be reversed.

II. The Board erred in denying the medical expenses for Claimant's emergency back surgery.

A. The Workers Compensation Act Requires That a Medical Provider Who is Not Certified Obtain Preauthorization.

[101] A-50.

After the Board's February 3, 2012 decision, in which they found that Claimant was entitled to payment of her medical bills, Employer filed a Motion for Reargument regarding whether the award of medical bills for Dr. Venkataramana was proper where he was an in-state medical provider, not certified under the Health Care Payment System and had not received preauthorization for his treatment of Claimant. Employer claimed that other than the medical bill for Dr. Venkataramana's first visit, his medical bills were not compensable due to his failure to obtain preauthorization.

Section 2322D(a)(1) of the Workers' Compensation Act requires that a medical provider be certified pursuant to the Delaware Workers' Compensation Statute in order to provide treatment to an employee injured in an industrial accident. If a medical provider is not certified under the Delaware Compensation Statute, the provider must obtain preauthorization from the employer or insurance carrier prior to rendering treatment.[102]

Despite the general rule that requires a non-certified provider to obtain preauthorization, the Board has refused to hold that a *per se* preauthorization requirement exists.[103] Furthermore, there are a limited number of statutory exceptions to the general rule that treatment by a non-certified provider must be

[102] *See Mason v. State of Delaware*, I.A.B. Hearing No. 1198102, Jan. 15, 2010 at 11 (citing 19 *Del. C.* § 2322D(a)(1)).

[103] *See Bertha Polk v. Green Acres Pavilion*, I.A.B. Hearing No. 1253843, Dec. 4, 2009 at 3-4 (in which the Board refused to find that unauthorized services are *per se* not compensable).

preauthorized; such as the first treatment exception[104] and the emergency exception.[105]

B. The Emergency Exception Pursuant to 19 *Del. C.* § 2322B(8)c. Applies to Situations Where Urgent Care is Necessary.

Section 2322B(8)c. of Title 19 of the Delaware Code states the emergency exception to the general rule that if a medical provider is not certified under the Delaware Compensation Statute, the provider must obtain preauthorization prior to treating an industrial accident victim:

> Services provided [by] an emergency department of a hospital, or any other facility subject to the federal Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd, and any emergency medical services provided in a pre-hospital setting by ambulance attendants and/or paramedics, shall be exempt from the health care payment system and shall not be subject to the requirement that a health care provider be certified pursuant to § 2322D of this title. Upon admission to a hospital and discharge from an emergency department, hospital charges are subject to paragraph (8)a. of this section.[106]

In considering the intent of the legislature to allow claimants to seek emergency treatment without concern for certification or preauthorization, it is clear that the "emergency exception" provided by section 2322B(8)c. applies in all situations

[104] *See* 19 *Del. C.* § 2322D(b) ("Such certification shall not be required for an employee's first treatment by a professional or for treatment by emergency personnel.")

[105] *See* 19 *Del. C.* § 2322B(8)c (2007).

[106] Section 2322B(8)c. as it is quoted herein was in effective on the date of the industrial work accident. However, effective August 7, 2012, the statute was amended and subsection (8)c. was redesignated to (8)b. In addition to the redesignation, the subsection was amended in that the first sentence now states "Healthcare provider services . . .", a minor change in phraseology was made, and the last sentence of former (8)c was deleted.

where urgent care is needed. Urgency exists in situations where a claimant's condition can lead to death, paralysis, or loss of limb if not attended to immediately.

In other jurisdictions where an injured employee must chose her treating physician from a panel of selected or certified providers, the employee is permitted to choose a non-panel physician in emergency situations.[107] In Georgia, treatment and emergency hospitalization ordered by a non-panel psychiatrist was held compensable where a significant increase in an employee's depression raised concern for suicide without immediate intervention.[108] The Court of Appeals of Arkansas has held emergency surgery performed by an unauthorized provider to be compensable and specifically refused to limit the term "emergency," as it appeared to the Arkansas Workers' Compensation Act, to situations where life is threatened.[109]

In the case of *Pecott v. American Mutual Liability Insurance Co.*,[110] the Supreme Judicial Court of Massachusetts addressed a recent amendment to the State Compensation Act that provided for an emergency exception to the standing rule that the employer's insurer had the right to select the claimant's physician. The court stated that the amendment "was made for the case of emergency, where

[107] *See* MWC, § 202:35. Selection of physician, 2 Modern Workers Compensation § 202:35.
[108] *K Mart Corp. v. Bright*, 436 SE2d 801 (Ga. 1993).
[109] *Universal Underwriters Insur. Co. v. Bussey*, 703 S.W.2d 459 (Ark. App. 1986).
[110] 112 N.E. 217 (Ma. 1916).

there was imminent danger, where the suffering and pain were severe, where immediate attention was required and the services of the insurance physician could not be obtained in time to give relief.[111]

Hospitalization and subsequent surgery for a herniated disc was found to be an emergency situation and thus compensable despite not being preauthorized in *Kraeger v. Georgia-Pacific Corp*.[112] The *Kraeger* court stated that it was clear from the record that the hospitalization and the surgery were required in an emergency, and "[t]he board's finding that hospitalization and surgery were necessary was sufficient to dispense with authorization in view of the attendant emergency situation . . . ."[113]

C. The Spinal Surgery Performed by Dr. Venkataramana is Compensable Under the Emergency Exception.

Certainly, many of the facts found by the Board showed exigent circumstances existed in Claimant's situation. Claimant and her mother knew Claimant's situation was an emergency when her symptoms were explained to Dr. Tatineni and his response was that Claimant needed to see Dr. Venkataramana before the end of the week, which was within two (2) days after the onset of cauda equina symptoms. Claimant's first appointment with Dr. Venkataramana was on Friday, and a follow up appointment was held on the next morning to review the

[111] *Pecott,* 112 N.E. at 217.
[112] 53 A.D.2d 929, 385 N.Y.S.2d 194 (N.Y. 1976)
[113] *Kraeger,* 53 A.D.2d at 929.

MRI results from the emergency MRI he ordered the previous day. At that time, he informed Claimant that he had to perform spinal surgery the next day, Sunday.

The Board agreed that Dr. Venkataramana performed the spinal surgery on an urgent basis. The urgent nature of the Claimant's condition was supported by the Employer's own medical expert who agreed that cauda equina is an emergency that needs to be addressed promptly. When asked about the urgent nature of the cauda equina symptoms Claimant was experiencing, Dr. Hanley stated "Yes, cauda equina is an emergency."[114] The medical testimony in the record supports the conclusion that Claimant's spinal surgery was an emergency, and therefore, the medical bills from the surgery are compensable pursuant to the emergency exception.

The fact that Claimant did not inform Dr. Venkataramana that her injury was work related should also be considered in favor of the urgency of her condition. The Board specifically found that Claimant was scared to tell the doctor that her condition was work related after she learned that he did not treat workers compensation patients, because she knew that her condition was serious and in need of treatment on an urgent basis. Claimant could not risk being turned away from the only local neurosurgeon, particularly when the general surgeon who

[114] *See* A- 51.

referred her to Dr. Venkataramana stressed the importance of seeing him before the week's end.

It should be noted, as a practical matter, that if Claimant's mother had not worked at a surgical center where she could discuss her daughter's symptoms with a general surgeon, Claimant would have sought treatment at an emergency room, as she did in October 2010. It was only because the general surgeon informed Claimant's mother that she should see a neurosurgeon right away that an appointment was made to see Dr. Venkataramana. Her treatment with Dr. Venkataramana was emergency treatment, a conclusion supported by the fact that when the general surgeon heard that her appointment with Dr. Venkataramana was not until the following week, he called Dr. Venkataramana and had the appointment scheduled three days sooner. Under this set of facts, there is ample reason to find that Claimant's treatment and surgery by Dr. Venkataramana falls within the emergency treatment exception of section 2322B(8)c.

CONCLUSION

For the foregoing reasons, Claimant respectfully requests this Court reverse the decision of the Superior Court and hold that there was sufficient evidence to support the Board's finding that Claimant suffered a compensable back injury. Furthermore, Claimant requests this Court reverse the Board's finding that Claimant's medical expenses incurred for her neurosurgery are not compensable because of the failure to obtain preauthorization.

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