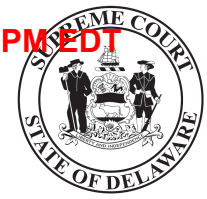

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ANSWERING BRIEF OF APPELLEE RESCARE HOME CARE

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN

/s/ Linda Wilson

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Rescare Home Care

DATED: May 30, 2013

15/1640711.v1

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NATURE OF PROCEEDINGS

On June 10, 2011, Amanda Wyatt ("Claimant") filed a Petition to Determine Compensation Due with the Industrial Accident Board ("Board"), alleging she injured her low back on December 15, 2010, in the course and scope of her employment with Rescare Home Care ("Employer"). B1.[1] That petition was heard by the Board on January 18, 2012. Written summations were requested and submitted by the parties. The Board issued its Decision on Petition to Determine Compensation Due ("decision") on February 3, 2012. B302.

In its decision, the Board found in favor of Claimant on the issue of causation. It awarded Claimant total disability benefits from December 15, 2010 to February 1, 2011, at a rate of $364.33 per week, an attorney's fee of $8,000.00, reimbursement of medical witness fees, and "payment of medical bills." B325.

On February 15, 2012, Employer filed a timely motion for reargument pursuant to Board Rule 21. On or about February 28, 2012, Claimant filed her response in opposition to Employer's motion for reargument. The Board issued an Order on Motion for Reargument ("Order") on May 30, 2012. B326.

On June 19, 2012, Employer filed an appeal of the Board's decision/Order. Claimant filed a Cross-Appeal on June 27, 2012. On March 6, 2013, the Superior Court rendered its decision, reversing the Board's decision on causation. B330.

[1] Shortly before filing the June 10, 2011 petition, Claimant filed and withdrew a petition alleging a December 10, 2010 date of injury. The IAB No. for that petition is 1362801.

On March 15, 2013, Claimant filed a Notice of Appeal with the Delaware Supreme Court. Claimant filed her Opening Brief April 29, 2013. Employer filed a Motion to Affirm May 9, 2013. That motion was denied by Order dated May 10, 2013. This is Employer's Answering Brief.

SUMMARY OF ARGUMENT

1. Employer denies that the Superior Court erred when it reversed the Board's decision on causation. Claimant was required to prove her case with substantial medical evidence. She failed to do so. Testimony of lay witnesses does not cure the deficiency.

2. Admitted in part. Admitted that the Board's decision on causation was based on medical testimony, as well as testimony from Claimant and one lay witness.

3. Denied that Claimant had emergency back surgery, or that the Board erred in denying claims for medical expenses.

4. Denied that Claimant had emergency back surgery and that the evidence presented supports a finding that Claimant's surgery is compensable.

STATEMENT OF FACTS

Claimant testified about what might be characterized as three different phases of low back problems. The last one, which she testified began at around lunch time on December 15, 2010, with a specific lifting incident that caused numbness / incontinence and resulted in the need for surgery, is the alleged work injury.[2]

In 2010, Claimant was employed by Employer as a CNA. B42. In that role, she cared for a child named Isaac, who was completely dependent. B42-B43. Isaac was five and weighed approximately 50 pounds. B43. She had been caring for him for about 2 years. B43. She assisted him at home and school. B44. He attends Howard T. Ennis School in Georgetown. B44-B45. She would drive to Isaac's school, and meet him at the bus. B45. She would tend to him during the day and put him on the bus at the end of the day. B45-B46.

Claimant first experienced back problems early in the day on October 21, 2010, when she bent over at home to pick something off the floor ("the bending incident at home"). B46-B47. Following the bending incident at home, Claimant went to Isaac's school but, because of the back pain, was unable to perform her duties. So, she notified the Employer of her problem and went directly from the school to the hospital to seek treatment for her back pain. B47. She never

[2] Any use of the terms "numbness" or "the numbness problem" are in reference to the alleged work injury.

experienced anything like this before. B47. She continued to have back symptoms for about a week and a half. B49. She took a couple of days off. Then, when she returned to work, she took it easy on lifting. B49.

On Friday, December 10, 2012, she was working and her back was sore.[3] B50. She called her mother and told her she was in a lot of pain and that "it feels different." B102. Claimant testified that, prior to December 15, 2010, her symptoms were just in her back. They did not extend into the leg. B51 and B69. However, Dr. Balapur Venkataramana, who performed surgery on Claimant, testified that Claimant told him that she woke on December 9, 2010 with severe pains down her left lower extremity from her buttocks to her calf. B206. Claimant testified that her back was still sore on Monday [December 13, 2010] so she took Monday off. B50.

Claimant testified she had back pain on Wednesday, December 15, 2010, before she went to work. B79. However, she "knew that [she] needed to at least try to go [to work]". B52.

On December 15, 2010, she met Isaac at the bus and cared for him. B52. Then, when she transferred him to his chair for lunch, all the pain she had been

[3] Low back symptoms in December 2010, prior to the specific lifting incident that occurred at lunchtime on December 15, 2010, will be referred to as the "early December problem". Claimant filed a different petition, alleging she injured her low back on December 10, 2010. B79. She withdrew that petition and there has not been an acknowledgment or determination that the symptoms she was experiencing in early to mid December 2010 were related to her work.

having went away and everything went numb. B52-B53. She finished out the day. B54. She then went home. B56. She called Isaac's mother to say she would not be at their house that night. B56.

On December 17, 2010, she went to see Dr. Venkataramana. She was at his office with her mother, waiting in the lobby. B58. She mentioned something about work, which caused Dr. Venkataramana's receptionist to come over and ask if this was a workers' compensation case, advising Claimant that Dr. Venkataramana does not take workers' compensation cases and that, if this was a workers' compensation case, Claimant would have to be referred somewhere else. B58. Claimant testified she was concerned about being seen quickly so she [must have lied to the receptionist because she] went in to see Dr. Venkataramana. B58. Upon questioning by the Board, she testified that she was willing to pay for treatment out of her pocket if necessary. B95.

Claimant told Dr. Venkataramana she woke up on Wednesday morning with the [numbness] problem. B59 and B114. She also told him about the October 21, 2010 emergency room visit, and the December 10, 2010 and ongoing symptoms. B59.

Claimant told Dr. Venkataramana that her job was to care for a completely dependent child. B60. She did not tell Dr. Venkataramana that her numbness started when she lifted Isaac. B60. Her mother went in with her to see Dr.

Venkataramana. B66. Her mother was there the entire time she was with Dr. Venkataramana. B107. Claimant testified that her mother heard Claimant tell Dr. Venkataramana that she woke with the numbness. B67. Her mother did not say anything to let Dr. Venkataramana know that the problem happened at school when Claimant was lifting Isaac. B67.

Claimant's mother, who was sequestered during Claimant's testimony, testified that she heard Claimant tell Dr. Venkataramana that Claimant was lifting Isaac when she felt the numbness come on. B107.

Dr. Venkataramana examined Claimant and sent her to get an MRI, X-ray and blood work. B60. He told her to meet him at Beebe Hospital the next morning so they could review the MRI together and discuss a plan of action. B60. When they met the next day, Dr. Venkataramana told her that he thought she needed to have surgery and that she should have it as soon as possible. B60. She agreed and surgery was done the next day, December 19, 2010. B60. She continues to treat with Dr. Venkataramana. B63. Following surgery, she felt better and the numbness went away. B62. Dr. Venkataramana has not released her to go back to CNA work but has said she could do "brain work." B62.

Dr. Venkataramana testified that he began treating Claimant on December 17, 2010. B204. Claimant told him she worked as a caregiver for a child who was one hundred percent dependent. B205. On October 21, 2010, she bent over and

started having severe pain in her low back. B205. She was out of work for three days but then improved. B206. On December 9, 2010, she woke with severe pain down the left lower extremity. B206. She went to work and the pain continued. B206. By December 13, 2010, the pain became so bad she could not work. B206. On December 15, 2010, she woke with no pain but there was numbness in both buttocks and in the back of both thighs and the left leg. B206. His impression was that she had a herniated disc at either L4-5 or L5-S1 with a cauda equina syndrome. B208. He ordered an MRI of the lumbar spine. B208. His plan was to do surgery. B211. He performed surgery on December 19, 2010. B212. He ordered pain medication. B218. He has seen her for follow up visits. B213. He released her to return to work with light duty restrictions in February 2011. B214 and B220. He opined that the type of work Claimant does caused the herniated disc and the need for surgery. B223.5. He agrees with Dr. Hanley that Claimant may have torn an annulus and had leaking before December 15, [2010] but the loss of bladder control was the proximate cause of the final disc herniation and cauda equina syndrome. B224. Dr. Venkataramana did not testify about any medical bills.

Kevin Hanley, M.D. examined Claimant at the request of the employer. B238. Claimant told him she had symptoms in her left lower extremity around December 10, 2010. B241, B261. Initially, she did not tell him about the October

21, 2010 visit to the ER. B243. He believes her problem probably derives from the October 2010 event. B277, B282. There is only a possibility that her work caused the problem that caused the need for surgery. B254, B287. Simply standing up could have caused her problem. B255. He cannot give an opinion, to a reasonable medical probability, as to the etiology of Claimant's disk problem. B293. He does not believe Claimant has cauda equina syndrome. B268.

ARGUMENT

I. The Superior Court did not err when it reversed the Board's decision on causation

A. Question Presented

Whether the Superior Court erred when it reversed the Board's decision on causation. B299.

B. Scope of Review

In an appeal from the Board, the function of the Court is to determine whether the Board's findings are supported by substantial evidence and free from errors of law.[4] Where substantial evidence supports the Board's conclusions, the Court will not disturb that conclusion absent an error of law.[5] Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[6] The Court will review the entire record to determine whether the Board could have fairly and reasonably reached its conclusion.[7] In doing so, it will review the record in the light most favorable to the party prevailing below.[8] The Court does not sit as a trier of fact and will not substitute its judgment for that rendered by the Board.[9] On questions of fact, the Court shall

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[4] *Talmo v. New Castle Cnty*, 444 A.2d 298 (Del. Super. Ct. 1982) *aff'd 454 A.2d 758 (*Del. *1982)*.
[5] *General Motors Corp. v. Freeman*, 164 A.2d 686 (Del. 1960).
[6] *Streett v. State*, 669 A.2d 9, 11 (Del. 1995).
[7] *Nat'l Cash Register v. Riner*, 424 A.2d 669 (Del. Super Ct. 1980).
[8] *General Motor Corp. v. Guy*, 1991 Del. Super. LEXIS 347.
[9] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

give deference to the experience and specialized competence of the Board.[10] In reviewing alleged errors of law, the Court's review is plenary.[11]

C. Merits of argument

The petition before the Board was filed by Claimant. Thus, she has the burden of proof.[12] She must prove her claim by a preponderance of the evidence.[13] She must prove each element of the claim.[14] In order to prove the necessary causal link between her injury and her employment, Claimant must introduce medical testimony establishing causation "within a reasonable degree of medical probability."[15] Where there is an identifiable accident, the "but for" standard applies.[16]

The Superior Court correctly reversed the Board's decision on causation because there is not substantial medical evidence in the record to support the Board's decision. Claimant alleges she suffered a work injury on December 15, 2010, at around lunch time, when she lifted Isaac. In order to causally link this lifting incident, which the Board found occurred, to the medical condition that resulted in the need for surgery, Claimant introduced the testimony of Dr.

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[10] *29 Del. C. §10142 (d)*.
[11] *Brooks v. Johnson,* 560 A.2d 1001 (Del. 1989).
[12] 29 *Del. C*. §10125(c).
[13] *Lawson v. Chrysler Corp.*, 199 A.2d 749 (Del. Super. Ct. 1964).
[14] *Strawbridge & Clothier v. Campbell, 492 A.2d 853, 854* (Del. 1985).
[15] *Turner v. Johnson Controls*, 44 A.3d 923 (Del. 2012).
[16] *Reese v. Home Budget Ctr*., 619 A.2d 907 (Del. 1992).

Venkataramana. The Board accepted Dr. Venkataramana's opinion over Dr. Hanley's as support for its finding on causation.

The Board may accept the testimony of one physician over another, so long as there is substantial evidence to support the decision.[17] In this case, Dr. Venkataramana's testimony is insufficient to constitute substantial medical evidence because it is without foundation.[18] This is because, while Claimant testified, and the Board accepted Claimant's testimony about a lifting incident at lunch time on December 15, 2010, this is not the history that was relied upon by Dr. Venkataramana. As a result, he did not testify that a lifting incident at lunch time on December 15, 2010 caused the medical condition that resulted in the need for surgery.

Claimant testified she was afraid Dr. Venkataramana would not treat her if he knew her problem was work related. So, she lied and told him that, on December 15, 2010, she woke with the numbness problem. This was confirmed by Dr. Venkataramana, who testified that, when Claimant came to see him on December 17, 2010, she told him that she woke on December 15, 2010 with the numbness problem.

Claimant has the burden of proving that "but for" a lunch time lifting incident at Isaac's school on December 15, 2010, she would not have needed Dr.

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[17] *Standard Distributing Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993).
[18] *Perry v. Berkley*, 996 A.2d 1262, 1271 (Del. 2010).

Venkataramana's treatment, including the surgery. Dr. Venkataramana's testimony is insufficient to meet this burden because the history he relied upon was the history Claimant gave him on December 17, 2010 and, in that history, there was no discussion about lifting Isaac at lunch time on December 15, 2010. Thus, Dr. Venkataramana never testified Claimant would not have needed his treatment, including the surgery, "but for" the specific lifting incident on December 15, 2010, or that a lunch time lifting incident on December 15 2010 triggered the need for his treatment and the surgery. Dr. Venkataramana testified he was aware Claimant had to lift as part of her job. However, this testimony would seem to go toward a cumulative detrimental effect claim and Claimant is not alleging that her repetitive work activities caused the problem that resulted in the need for surgery. Since Claimant did not tell Dr. Venkataramana about a specific lifting incident on December 15, 2010, when offering his opinion, Dr. Venkataramana did not offer an opinion that would support a finding that a specific incident caused the problem that resulted in the need for surgery. When Dr. Venkataramana was advised that Claimant provided a different history to Dr. Hanley, which was the history Claimant gave to the Board and the Board accepted, Dr. Venkataramana did not amend his opinion to say, if that other history is determined to be the correct history, it is still his opinion that her numbness problem, which resulted in the need for surgery, is work-related. B223.5. Thus, Dr. Venkataramana's testimony, which

was relied upon by the Board to support its finding on causation, is insufficient to constitute substantial medical evidence to support a finding that "but for" a December 15, 2010 lunch time lifting incident involving Isaac at his school, Claimant would not have started experiencing the numbness / incontinence that resulted in the need for surgery.

Furthermore, Dr. Venkataramana, in addition to having a different understanding of when the numbness started and what Claimant was doing when the numbness started than what the Board found, has a different understanding of Claimant's physical condition prior to when the numbness started as compared to Claimant's testimony regarding her condition. According to the history Dr. Venkataramana took from Claimant, Claimant awoke on December 9, 2010 with severe pain down the left lower extremity. B206. However, Claimant testified she had no lower extremity symptoms prior to the lunch time lifting incident on December 15, 2010. B71, B69, B51-B52. Further, because Claimant told Dr. Venkataramana that when she woke on December 15, 2010, the pain was gone and she now had numbness in both lower extremities, and because Dr. Venkataramana was not at the hearing to hear Claimant's testimony that, in fact, she woke with back pain on December 15, 2010, which continued until around lunch time, there is no testimony from Dr. Venkataramana regarding the significance of these facts and

how they impact his opinion regarding causation.[19] B79, B70, B52. The Board appears to have just assumed what his opinion would be.

The Board acknowledged that Claimant withheld pertinent facts from Dr. Venkataramana. B321. His lack of awareness of certain facts, and his failure to amend his opinion on causation once alternative facts were brought to his attention results in a medical opinion that lacks foundation and is, therefore, insufficient to constitute substantial medical evidence.

Claimant argues that her testimony and the testimony of her lay witnesses bolsters Dr. Venkataramana's testimony regarding causation, resulting in there being sufficient evidence in the record to support the Board's decision on causation. Claimant's argument is based on *General Motors Corp. v. Freeman*.[20] The instant case is distinguishable from *Freeman*. In *Freeman*, Claimant did not have a detached retina prior to the alleged work accident, and then he did. This is different than the instant case, where Claimant admits she woke on December 15, 2010 with significant back pain. Ms. Leight's testimony that, at around lunch time, she saw Claimant dragging her leg, is consistent with either history (woke up with numbness or numbness began after she lifted Isaac at lunch time).[21] More

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[19] There has been no Agreement or determination that any symptoms Claimant had prior to lunch time on December 15, 2010 are work related.
[20] 164 A.2d 686 (Del. 1960).
[21] There is no finding of the Board that Claimant's mother is credible. Furthermore, relying solely on a history from Claimant, without more, is insufficient to constitute reliable foundation

importantly, the issue is not whether Claimant began having numbness on December 15, 2010. The issue is whether there is substantial medical evidence to causally link the numbness and resulting need for surgery to a specific lifting incident that occurred around lunch time on December 15, 2010. Since Dr. Venkataramana did not testify that a specific incident at lunch time on December 15, 2010 caused the problem that resulted in the need for surgery and since the Board found that such an event occurred and that this is what caused the need for surgery, Dr. Venkataramana's testimony is insufficient to constitute substantial medical evidence in support of the Board's decision on causation. Because Dr. Venkataramana was not aware of certain elements of Claimant's history, or did not indicate he was accepting the alternative history, he could not be examined and offer testimony on the facts as the Board determined them to be.

Claimant suggests that Dr. Hanley's testimony can be used to support Claimant's petition. The Board did not base its decision on Dr. Hanley's testimony. In fact, it specifically found that his testimony was not persuasive. B322. The Board found that Claimant had cauda equina syndrome. B322. When it considered Dr. Hanley's opinion, it noted that "[h]e did not even think that Claimant had cauda equina syndrome. . . " B322. Furthermore, his opinion was that a specific lifting incident could "possibly" have caused the condition that

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for the medical expert's opinion. *Miller v. United States*, 422 F.Supp. 2d 441, 444 (D. Del. 2006).

resulted in the need for surgery. B254, B287. This was not an opinion as expressed to a reasonable medical probability. Additionally, he, like Dr. Venkataramana, had a history from Claimant that, prior to December 10, 2010, she had symptoms into her leg on the left. B241. However, at the hearing, Claimant testified that she had no symptoms into her leg prior to lunch time on December 15, 2010. B71, B69. Given the foregoing, Dr. Hanley's testimony would also be insufficient to constitute substantial medical evidence in support of the Board's decision on causation.

II. The Board did not err when it denied the claim for medical bills of a non-certified provider who did not seek preauthorization

A. Question Presented

Whether the Board erred when it denied the claim for medical bills of a non-certified provider who did not seek preauthorization. B301.

B. Scope of Review

In an appeal from the Board, the function of the Court is to determine whether the Board's findings are supported by substantial evidence and free from errors of law.[22] Where substantial evidence supports the Board's conclusions, the Court will not disturb that conclusion absent an error of law.[23] Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[24] The Court will review the entire record to determine whether the Board could have fairly and reasonably reached its conclusion.[25] In doing so, it will review the record in the light most favorable to the party prevailing below.[26] The Court does not sit as a trier of fact and will not substitute its judgment for that rendered by the Board.[27] On questions of fact, the Court shall

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[22] *Talmo v. New Castle County*, 444 A.2d 298 (Del. Super 1982) *aff'd 454 A.2d 758 (*Del. *1982)*.
[23] *General Motors Corp. v. Freeman*, 164 A.2d 686 (Del. 1960).
[24] *Streett v. State*, 669 A.2d 9, 11 (Del. 1995).
[25] *Nat'l Cash Register v. Riner*, 424 A.2d 669 (Del. Super Ct. 1980).
[26] *General Motor Corp. v. Guy*, 1991 Del. Super. LEXIS 347.
[27] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

give deference to the experience and specialized competence of the Board.[28] In reviewing alleged errors of law, the Court's review is plenary.[29]

C. Merits of argument

If this Honorable Court concludes that the Superior Court erred in reversing the Board's decision regarding causation, the Board's decision denying claims of a non certified provider who did not seek preapproval should be upheld and its decision ordering payment of other medical bills should be reversed.

The Workers' Compensation Act ("Act") has long required that, during a period of disability, "the employer shall furnish reasonable surgical, medical, dental, optometric, chiropractic and hospital services, medicine and supplies . . . unless the employee refuses to allow them to be furnished by the employer."[30] Even if the claimant is not within a "period of disability," upon application made to the Board, the Board may, at its discretion, require the employer to furnish additional services, medicines and supplies for such further period as the Board deems "right and proper."[31]

In recent years, a provision has been added to the Act that requires health care providers treating an injured employee to be certified or to obtain preauthorization for treatment.

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[28] *29 Del. C.* §10142 (d).
[29] *Brooks v. Johnson,* 560 A.2d 1001 (Del. 1989).
[30] 19 *Del. C.* § 2322(a).
[31] 19 *Del C.* §2322(c).

> Certification shall be required for a health care provider to provide treatment to an employee, pursuant to this chapter, without the requirement that the health care provider first preauthorize each health care procedure, office visit or health care service to be provided to the employee with the employer or insurance carrier. The provisions of this subsection shall apply to all treatments to employees provided after the effective date of the rule provided by subsection (c) of this section, regardless of the date of injury.[32]

An exception to the foregoing is found in Section 2322D(b), which provides that services may be provided "during 1 office visit, or other single instance of treatment, without first having obtained prior authorization, and receive reimbursement for reasonable and necessary services directly related to the employee's injury or condition. . ."[33] Furthermore, emergency medical services and services provided by a hospital emergency department are exempt from the certification requirement.[34]

Dr. Venkataramana is not a certified provider and the record contains no evidence that would support a finding that his treatments falls under the exemption for emergency services which provides:

> 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

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[32] 19 *Del. C.* §2322D(a)(1)(emphasis added). (The rules and regulations went in to effect on May 23, 2008.)

[33] 19 *Del. C.* § 2322D(b). (Employer acknowledges that, if the causation finding is upheld, once a clean claim is produced, it would be obligated to pay the charges associated with Dr. Venkataramana's first office visit with Claimant).

[34] 19 *Del. C.* § 2322B(8)c.

> not be subject to the requirement that a health care provider be certified pursuant to §2322D of this title, requirements for preauthorization of services, or the health care practice guidelines. . . [35]

There is no evidence that his services were provided through 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, or that he was acting as an ambulance attendant and/or paramedic. Furthermore, Dr. Venkataramana testified and the Board found that his care was provided on an urgent basis, not on an emergent basis. B328. Therefore, the treatment provided by Dr. Venkataramana would not be exempt by the section for emergency services

Yet, in its February 3, 2012 decision, the Board determined that Claimant was entitled to the payment of [all] medical bills. Employer filed a Motion for Reargument regarding the award of medical benefits. In its May 30, 2012 Order on Motion for Reargument, the Board "reluctantly finds that it is forced to agree with Rescare's arguments regarding Dr. Venkataramana's bills," and holds that the Employer is not required to pay the bills for Dr. Venkataramana other than for the initial consultation, because he is an in-state physician who is not certified and did not obtain preauthorization. However, the Board found the remainder of the medical bills ("the other medical bills") compensable.

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[35] *Id*.

Dr. Venkataramana is the only provider who has treated Claimant for the alleged work injury. He saw Claimant at the initial office visit. He ordered diagnostic tests, hospital admission, and prescriptions. He performed surgery and, following the surgery, saw Claimant for follow up visits.

The Act is clear that certification is required for a health care provider to provide treatment to an employee without the requirement that the provider first preauthorize each health care procedure . . .or service.[36] It is also clear that preauthorization *shall* be documented for charges for hospital services and items supplied by a hospital, including all drugs, supplies, tests and associated chargeable items and events.[37] The Board found no evidence that Dr. Venkataramana made any effort to seek preauthorization. Thus, while the Board was correct in its Order on Motion for Reargument that the Employer was not obligated to pay Dr. Venkataramana's bills, the Board did not go far enough. Assuming *arguendo* that the Superior Court's decision is reversed and the Board's decision regarding causation is upheld, the Board's award of compensation for medical treatment beyond the first visit to Dr. Venkataramana is contrary to the Act and must be reversed.

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[36] 19 *Del. C*. §2322D(a)(1).

[37] "Charges for hospital services and items supplied by a hospital, including all drugs, supplies, tests and associated chargeable items and events, shall be submitted to the employer or insurance carrier along with a bill or invoice . . . and any preauthorization of the services and items *shall* also be documented. . . ." 19 *Del. C*. § 2322F(b) (emphasis added).

Claimant urges the Court to hold that the emergency exception applies to situations where urgent care is necessary. Doing so would controvert the rules of statutory construction. Standard rules of statutory interpretation require that the Court give effect to plain and unambiguous terms, and give ordinary and common meanings to undefined terms.[38] Ambiguity exists if two reasonable interpretations or meanings can be given to a term.[39] Here, there is no ambiguity.

The Board further erred by ordering Employer to pay medical claims that were not yet ripe. This case was brought before the Board because the Employer disputed Claimant's contention that her back injury was caused by her work.[40] The testimony focused on causation. Obviously, the employer was aware that Claimant

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[38] *See e.g. Dewey Beach Enters. v. Bd. of Adjustment of Dewey Beach*, 1 A.3d 305, 307-08 (Del. 2010) (The rules of statutory construction are well settled . . .a court must determine whether the provision in question is ambiguous. . . if it is unambiguous, no statutory construction is required, and the words in the statute are given their plain meaning. . . Undefined words in a statute must be given their ordinary, common meaning . . words in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning); *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776 (Del. 2012) (Court will interpret clear and unambiguous terms according to their ordinary meaning. . . Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language. . . A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction . . . an ambiguity exists "[w]hen the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings . . .Where a contract is ambiguous, "the interpreting court must look beyond the language of the contract to ascertain the parties' intentions.").

[39] *Id*.

[40] "If the employer and employee . . . fail to reach agreement . . . either party may notify the Department of the facts and the Department shall thereupon notice the time and place of haring . . . " 19 *Del. C.* § 2345.

had had medical treatment. Certainly, as part of her petition, Claimant *could* have presented a proper claim for payment of medical bills. However, she did not do so.

Claimant must prove each element of her claim.[41] The record contains no evidence regarding specific medical claims. It contains no evidence about submitted bills, which would show the names of the providers, the dates of service, the types of service provided, the amount charged for various services, etc. The record contain no evidence that "clean claims" were ever submitted.

Putting aside the issue of provider certification as described in the prior argument, an employer has no obligation to review a medical claim until it has been submitted as a clean claim.[42] Since there is no evidence this was done, once the Board determined causation, it should not have gone any farther. The Board erred because it can only hear and determine a matter when the parties have been unable to reach an agreement on that matter.[43] Such is also the case when there is a disagreement on charges for medical benefits.[44] There can be no evidence that the parties have been unable to reach an agreement with regard to the ordered medical claims if the employer is not provided with the statutorily required documentation of the claims at issue which would then trigger its obligation to

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[41] *Strawbridge & Clothier v. Campbell,* 492 A.2d 853, 854 (Del. 1985).
[42] 19 *Del. C.* § 2322F.
[43] 19 *Del. C.* §2345.
[44] 19 *Del. C.* §2346.

review the claim. Therefore, these claims are not ripe and the Board erred in ordering that they be paid.

CONCLUSION

WHEREFORE, based on the foregoing, Employer hereby respectfully asks that this Honorable Court uphold the Superior Court's reversal of the Industrial Accident Board's decision regarding causation.

Respectfully submitted,

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