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

Opening Brief of the Claimant Below-Appellant

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DATED: November 5, 2012

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Nature of the Proceedings

This is an appeal of an Industrial Accident Board (hereinafter "I.A.B." or "Board") decision dated October 5, 2011, following a hearing that took place on September 28, 2011 in the case of Patricia Boone v. Syab Services, IAB Hearing No. 1198151. The hearing concerned the Employer's request for an Order compelling the Claimant to source her prescriptions from a specific pharmacy provider selected by the Employer. The hearing below was a legal hearing, at which no evidence was accepted, the Board having heard only legal arguments from the parties before rendering its decision.

The Board's decision ordered the Claimant to use the Employer's pharmacy vendor for her work injury-related prescriptions, by the above-referenced Order dated October 5, 2011.

Following the Board's decision, the Claimant below-Appellant filed an appeal to the Superior Court of the State of Delaware, in and for Kent County. Following briefing, the Superior Court issued a decision dated August 23, 2012 in which the Superior Court affirmed the decision of the IAB.

The Claimant below-Appellant has subsequently appealed the Superior Court's decision to this Court. This is the Claimant below-Appellant's Opening Brief.

Summary of Argument

1. The Industrial Accident Board failed to recognize the Claimant's legal right, codified in 19 Del. C. § 2322(a), to decline the Employer/Carrier's offer of medical (including pharmacy) services, and to procure such services on her own, via her own preferred provider.

2. The Superior Court erred in failing to ascribe meaning to the statutory language of 19 Del. C. § 2322(a), and therefore erred in affirming the Board's decision permitting the carrier to direct the claimant's use of the carrier's preferred pharmacy provider rather than her own preferred pharmacy provider.

Statement of Facts

The Claimant below-Appellant is Patricia Boone. The Employer below-Appellee is Syab Services/Capitol Nursing.

Claimant sustained a work-related low back injury on August 12, 2001 while working for the Employer/Appellant. Trial transcript at 5; Appendix at A-8 (hereinafter cited "Tr-__; A-__"). Ms. Boone has had several surgeries as a result of her work injury, and has for some time been treating with Dr. Ganesh Balu, a pain management physician, for her continuing work-related symptoms. Id. For some time her treatment has consisted in large part of management with medications prescribed by Dr. Balu. Id.

Employer did not contest any of the treatment prescribed by Dr. Balu, including the specific medications at issue. Id. However, rather than have the Claimant obtain the prescriptions from a pharmacy provider of her choice, the Employer sought to have the prescriptions filled by its contractual, "preferred provider" benefit program. Tr-5, 6; A-8, 9. The reason for the Employer's request was an effort to obtain cost savings to the carrier for the prescriptions dispensed. Tr-7, 8; A-10.

Employer submitted a purported Exhibit at the legal hearing, in an effort to document the purported cost savings available via the use of the Employer's proposed contract

supplier. Tr-8; A-11. Claimant objected to the submission of this evidence, which was provided for the first time at the time of the hearing below, on the basis that it was unsupported by any testimony or even a proffering witness. Id. The Board took note of the objection, but did not rule on the objection (although the Board did admit the document as an Exhibit). Id.

Claimant argued that the Board was without authority to compel the Claimant to utilize a particular provider for her medications. Relying on 19 Del. C. § 2322[1], Claimant argued that the Claimant has the right to procure her own medical "services, medicine and supplies" from providers selected by the Claimant. Tr-13, 14; A-16, 17. Claimant further argued that recent amendments to the Workers' Compensation Act, and corresponding enactment of regulations governing payment for

[1] 19 Del. C. § 2322(a) provides that: "[d]uring the period of disability the employer shall furnish reasonable surgical, medical, dental, optometric, chiropractic and hospital services, medicine and supplies, including repairing damage to or replacing false dentures, false eyes or eye glasses and providing hearing aids, as and when needed, unless the employee refuses to allow them to be furnished by the employer."

Subsection (b) further provides the Claimant with the right to procure such benefits on her own, at the carrier's expense: "(b) If the employer, upon application made to the employer, refuses to furnish the services, medicines and supplies mentioned in subsection (a) of this section, the employee may procure the same and shall receive from the employer the reasonable cost thereof within the above limitations."

medical services inclulded a Fee Schedule for payment of medical services, including pharmacy costs. Tr-14; A-17.

Claimant further argued that the problem that arises for medication access in particular relates to the method of billing for medications by pharmacies in general. Specifically, pharmacies generally require pre-authorization before dispensing medications, or payment by the Claimant at the time the prescription is dispensed. Tr-15; A-18. Authorization, of course, is controlled by the carrier, and pharmacies seek authorization at the time the prescription is presented to be filled. Id. If the prescription is not authorized, the prescription goes unfilled. Id.

Claimant noted that, in response to this authorization problem, several pharmacy companies, including the pharmacy provider in use by the Claimant in this case, have begun billing workers' compensation carriers for the prescriptions without seeking authorization in advance. Id. This policy enables claimants to obtain medications without the disruptions that can occur when carriers refuse to authorize prescriptions at the time they are dispensed. Tr-15, 16; A-18, 19.

Claimant also argued that the basis for the Employer's request, namely that medications would be less costly through its preferred, contractual provider, is inapposite as well.

The workers' compensation system presently includes cost containment provisions, including a Fee Schedule that establishes the costs of medical services and prescriptions for workers' compensation claims. Tr-17; A-20; *See generally* 19 Del. C. § 2322B; 19 Del. Admin. Code Ch. 1341 ¶4.13. Claimant's chosen pharmacy provider is billing and accepting payment for Claimant's prescriptions in accordance with the workers' compensation fee schedule. Tr-18; A-21.

The Industrial Accident Board issued a decision following the hearing, in which it granted the Employer's request and ordered the Claimant to obtain her prescriptions from the Employer's preferred pharmacy provider. The Board found that the Employer's request is consistent with the Employer's obligation to furnish reasonable medications under 19 Del. C. § 2322(a). The Board notes that "[s]ubsection (b) does not apply unless Syab refuses to furnish the medications."

The Claimant thereafter appealed the Board's decision to The Superior Court, in and for Kent County. The Superior Court, couching the issue as one of administrative discretion, affirmed the decision of the IAB below. Boone v. SYAB Services, C.A No. K11A-10-003-WLW, Witham, J. (Del. Super. Ct. 8/23/2012).

Claimant thereafter appealed the Superior Court's decision to this Court. This is Claimant's Opening Brief.

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.

Question Presented

The Claimant below raised the issue of the Board's statutory authority, in light of 19 Del. C. § 2322(a), to order the claimant to utilize the employer's preferred pharmacy provider during the course of the legal hearing before the IAB. References to the Claimant's argument below appear in the transcript at pp. 13-19.

Scope of Review

In reviewing whether the Industrial Accident Board properly exercised its authority in applying the facts to the law, the role of the appellate court is to examine the record to determine whether substantial evidence exists to support the findings below. Hebb v. Swindell-Dressler, Inc., 394 A.2d 249 (Del. 1978); Histed v. A.I. duPont de Nemours & Co., 621 A.2d 340 (Del. 1993). "Substantial evidence" means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Histed, *supra*, citing Olney v. Cooch, 425 A.2d 610, 614 (Del. 1981). Some evidence, or any evidence, may be insufficient to support the Board's

factual findings; the evidence must be substantial, and this Court's duty is to weigh and evaluate the evidence for sufficiency to support the Board's findings. M.A. Hartnett, Inc. v. Coleman, 226 A.2d 910 (Del. 1967). This Court's review of questions of law is *de novo*. Duvall v. Charles Connell Roofing, 564 A.2d 1132 (Del. 1989).

Merits of Argument

The issue in this appeal concerns a fundamental issue of access to medical services in relation to work-related injuries in Delaware – whether it is the claimant, or the employer, who enjoys the right to direct medical care, and in particular the selection of the provider for medical services, medicines and supplies.

Different states have addressed this dilemma in several ways. According to Professor Larson, under most statutes the employee may choose his or her own physician. 9 Lex K. Larson, *Larson's Workers Compensation*, §94.02[1] (Matthew Bender, Rev. Ed. 2012). In some states, the employer designates the physician; in others, the employee may select a physician from a list provided by the employer or the governing administrative agency. Id. As will be discussed more thoroughly below, Delaware falls within the majority view

of allowing claimants to choose their own medical providers. *See*, 19 Del. C. § 2322. This issue of control is at the heart of the controversy — the ability to control health care decisions is the ability to control *access* to health care for compensable work injuries.

A. The Statuory Framework

Claimant's right to select her own medical providers is of paramount importance. Nineteen Del. C. § 2322(a) establishes this right:

> During the period of disability the employer shall furnish reasonable surgical, medical, dental, optometric, chiropractic and hospital services, medicine and supplies, including repairing damage to or replacing false dentures, false eyes or eye glasses and providing hearing aids, as and when needed, **unless the employee refuses to allow them to be furnished by the employer.**

19 Del. C. § 2322(a) (emphasis added). Indeed, the language of the present statute, codifying the Claimant's right to obtain "services, medicines and supplies" in connection with a work-related injury, was initially enacted in 1919, and has remained substantially the same through the intervening 90-plus years. 30 Del. Laws c. 203, p. 535. That same legislative enactment also contained the operative language, "unless employee refuses to allow them to be furnished by the employer." Id. Thus, even nearly a century ago the

Legislature recognized that there may be reasons why an injured worker may not wish to avil himself of medical services provided at the order of his employer, and provided a means by which claimants could access health care services directly.

The Delaware Legislature expanded on and more specifically articulated this right of injured workers by enacting 19 Del. C. § 2323, which provides, in part, that: "Any employee who alleges an industrial injury shall have the right to employ a physician, surgeon, dentist, optometrist or chiropractor of the employee's own choosing."[2] In so doing, the Legislature assured claimants a right of independence from the control that employers and their carriers may be able to assert over medical providers that are directly provided (or even employed by) the employer and/or carrier.

The Legislature has also historically retained for the Board the authority to control costs of medical care in the workers' compensation system. In 1947 the Legislature provided that "the costs of such services, medicines and supplies shall not exceed the regular costs for such services,

[2] The predecessor to 19 Del. C. § 2323 was originally enacted in 1943, and at that time provided that a claimant may apply to the Board for permission to use a physician other than that furnished by the employer. (44 Del. Laws c. 201, p. 573). In 1961 §2323 took on its present form, explicitly codifying the claimant's right of choice. (*See* 53 Del. Laws c. 126, p. 399). The evolution of this right was, of course, more expansive in claimants' favor as the successive revisions were enacted.

medicines and supplies, and in case of controversy the costs shall be subject to the approval of the Industrial Accident Board." 46 Del. Laws c. 27, p. 40.[3] Similar language remained in the Workers' Compensation Act, and the Board remained without any specific guidance or framework for what constituted the "reasonable" costs of medical treatment, until more recent legislative amendments in 2007.

The Legislature made substantial changes to the Workers' Compensation Act in 2007, including provisions for a Fee Schedule for medical services, procedures, supplies and medications. 76 Del. Laws c. 1, §9. In enacting these changes, the Legislature codified the policy of the intended Health Care Payment System in 19 Del. C. § 2322B(1):

> The intent of the General Assembly in authorizing a health care payment system is not to establish a "push down" system, but is instead to establish a system that eliminates outlier charges and streamlines payments by creating a presumption of acceptability of charges implemented through a transparent process, involving relevant interested parties, that prospectively responds to the cost of maintaining a health care practice, eliminating cost-shifting among health care service categories and avoiding institutionalization of upward rate creep.

[3] This provision was itself an expansion in the availability of medical treatment to injured workers, in that prior to the enactment of this statute, the Act provided for maximum dollar amount of medical services for which an employer could be made to pay.

19 Del. C. § 2322(B)(1). Subsection (3) of that section provides a method of establishing a maximum allowable payment for health care services for workers' compensation claimants, thereby conclusively establishing "reasonable" charges for such treatment in the future.[4] The Department of Labor has subsequently promulgated regulations as required by the 2007 amendments, including a fee schedule for prescription medications. *See* 19 Del. Admin. Code Ch. 1341, ¶4.13.1.

Thus, Delaware is not only a "claimant choice" state with respect to selection of medical providers, but also a cost containment state with respect to the expenses associated with the treatment of injured workers. This is important because it addresses both concerns that arise in connection with the policy decision over whether claimants or employers should have the right to direct medical care. Professor Larson's treatise on Workers' Compensation describes the competing concerns as follows:

> The perennial controversy on the "choice of doctor" question is the result of the necessity of balancing two desirable values. The first is the value of allowing an employee, as far as possible, to choose his or her own doctor. This value stems from the confidential nature of the doctor-patient relation, from the desirability of the patient's trusting the doctor, and from various other considerations. The other desirable value is that of achieving the

[4] Notably, the payments under the Health Care Payment System were intended to be adjusted yearly based on changes in medical costs generally over time. 19 Del. C. § 2322B(3).

> maximum standards of rehabilitation by permitting the compensation system to exercise continuous control of the nature and quality of medical services from the moment of injury. If the injured employee has completely unlimited free choice of doctor, in some cases he or she may select a doctor, because of personal relationship or acquaintance, who is not qualified to deal with the particular kind of case, or who at any rate is incapable of providing service of the quality required for the optimum rehabilitation process.
>
> The attempt to balance these two values has led to one of the stormiest issues in the history of workers' compensation. For many years, the rallying cry of "free choice" has attracted a considerable amount of partisan support. However, in more recent years, when the rallying cry of "rehabilitation" has become even more prominent, the people who have been strongly in favor of free choice are confronted with the problem of reconciling this position with that of being equally strong advocates of optimum rehabilitation.

Larson, Workers' Compensation Law, Ch. 5, § 94.02[2] (Matthew Bender, 2011). Notably, the concerns regarding the "claimant choice" controversy are ammply addressed in Delaware – claimant's choice of provider is assured by the express language of the statute; the employers' interest in rehabilitation is addressed by the Practice Guidelines establishing the framework for reasonable care of work-related injuries; and the cost of medical services is addressed by enactment of the Fee Schedule. Of particular note in this case is that the Employer does not raise any concerns over

whether the claimant's treatment is "optimum" — indeed, the employer has conceded that the medications at issue are reasonable, thus obviating the primary concern on the other side of the policy debate.

B. The Board's Decision in This Case

The Employer in this case sought to have the claimant source medications via an employer-provided (and employer-controlled) pharmacy provider, rather than the claimant's preferred provider. Importantly, there was no dispute that the charges using Claimant's pharmacy provider were consistent with the Fee Schedule, thus assuring that the costs of those prescriptions were reasonable and appropriate. Nevertheless, the carrier sought additional savings that it claimed would result by use of the carrier's preferred provider.

The Board's decision turns on the carrier's statutory requirement to furnish reasonable medications, for which premise the Board cites 19 Del. C. § 2322(a). The Board overlooks, however, the Claimant's superceding right, codified in the very same subsection, to "refuse[] to allow them to be furnished by the employer." Id. Claimant has and is refusing to let the employer furnish pharmacy services in this case, but the Board ignores Claimant's right to do so. The Board's

decision constitutes legal error and therefore must be reversed.

The issue here is about control of and claimants' access to medications. As pointed out to the Board below, pharmacies are different from other medical providers, in that they generally require specific confirmation of authorization from a carrier before they will dispense medications. Absent such explicit authorization, a claimant is faced with the dillema of either paying out of pocket (which is often prohibitively expensive) or going without the medication until the authorization is obtained.[5]

Our courts have held repeatedly that the Workers' Compensation Act 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). Notably, the Legislature has not carved out the choice of pharmacy provider issue and reserved it for employers and/or carriers. Absent such legislative directive, it was improper for the Board to find that the employer and carrier have such a right. Indeed, in an analogous case in the State of Alabama, the Court of Civil Appeals found that "[a]n action brought under the Alabama Work[ers'] Compensation laws is purely statutory" and

[5] The delay could be as long as six or more months, if it is necessary to file a petition and seek an order of the Board in order to obtain the necessary authorization.

that "[i]f the legislature had intended for an employer to have the authority to select the pharmacy to be used by an injured employee, the legislature could have granted that authority in the Act." Davis Plumbing Co. v. Burns, 967 So. 2d 94, 99 (Ala. Civ. App 2007). Of course, the same principles of statutory interpretation apply in Delaware. *See, e.g.,* Watts, *supra* at 1083 ("[w]hen construing a statute, courts assume that the legislature intended all words in the statute to have meaning.").

Finally, the fee schedule provisions of the statute and regulations provide not only for a definition of reasonable charges for procedures, treatments and medications, but they also reflect the reality that carriers may be able to negotiate more advantageous rates with individual providers. The fee schedule establishes maximum (reasonable) charges for which carriers will be responsible; however, "If an employer or insurance carrier contracts with a provider for the purpose of providing services under this chapter, the rate negotiated in any such contract shall prevail." 19 Del. C. § 2322B(4). However, the Board's ruling goes much further than the statute permits – whereas an employer may negotiate with providers for further fee reductions under the statute, here the employer sought to compel the use of a single provider, and did so *expressly because* the employer claims to have negotiated

preferred rates with the proposed provider. The employer sought, and the Board allowed, not only a further negotiated rate, and not even to force that further negotiated rate on the claimant's chosen provider, but to force the claimant to use *only* that chosen provider, to the exclusion of all others. That's not what the statute provides, neither by the letter nor the spirit of the law.

The Superior Court, unfortunately, ignores entirely the final clause of 19 Del. C. § 2322(a) ("…unless the employee refuses to allow them to be furnished by the employer.") Instead, the Court decided that the Board's decision was "reasonable". Indeed, the Superior Court wrote that "[i]t would be an unreasonable reading of [the statute] that if the employer furnished reasonable medicine and supplies as and when needed that the employee may refuse to accept…" Boone v. Syab Services, (Del.Super.Ct. 8/23/2012), *supra* at *6. In fact, however, that is *exactly* what 19 Del. C. § 2322(a) provides – claimants may, in fact, refuse to have an employer supply medicines (among other things) an may procure them from their own chosen providers. Those other providers are still constrained by the fee schedule and the Practice Guidelines – in short, even with a claimant's right to select her own treating doctors, we still have the benefits of the cost containment effects of those regulatory mechanisms.

If the workers' compensation statute is to be read liberally (Estate of Watts, *supra*), then the language of 19 Del. C. § 2322(a) permitting a claimant to refuse the employer's tender of medical services, medicines and supplies and procure them on her own cannot simply be ignored. "[W]ords in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning, and courts must ascribe a purpose to the use of statutory language, if reasonably possible." Oceanport Industries, Inc. v. Wilmington Stevedores, Inc., 636 A.2d 892, 900 (Del. 1994) (citations omitted). The Superior Court's ruling ascribes no purpose to that portion of 2322(a) on which the claimant relies – as if the language did not actually appear in the statute. The Board, and the Court, must give effect to the statutory language, and the failure to do so here is a legal error that requires reversal.

The 2007 amendments to the Workers' Compensation Act establishing the fee schedule, and thus establishing constraints on "outlier charges", did not equate to employer-directed health care in any aspect of our workers' compensation system. The legislative policy articulated in 19 Del. C. § 2322B(1) specifically disavows an intention to create a "push down" system, yet that is what the Employer has sought and the Board has granted. The Board's ruling, and the

Superior Court's affirmance of same, run counter to the express statutory language as well as to the legislative policy identified both in the statute and case law and therefore must be reversed.

Conclusion

WHEREFORE, based on the foregoing, the Claimant Below Appellant, Patricia Boone by and through her attorneys, Schmittinger & Rodgriguez, P.A., hereby respectfully requests that the Court reverse the decision of the Industrial Accident Board and remand this matter for an order that the claimant may utilize her chosen pharmacy provider, and that the employer has no right to dictate the claimant's choice of provider for her medical services, medicinces and supplies, consistent with the statutes and case law referenced above.

Respectfully submitted,

SCHMITTINGER AND RODRIGUEZ, P.A.

BY: /s/ Walt F. Schmittinger

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DATED: November 5, 2012

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

PATRICIA BOONE,	:	
	:	C.A. No. K11A-10-003 WLW
Claimant Below -	:	
Appellant,	:	
	:	
v.	:	
	:	
SYAB SERVICES/CAPITOL NURSING	:	
	:	
Employer Below -	:	
Appellee.	:	

Submitted: May 2, 2012
Decided: August 23, 2012

ORDER

Upon an Appeal from the Decision of
the Industrial Accident Board.
Affirmed.

Walt F. Schmittinger, Esquire of Schmittinger and Rodriguez, P.A., Dover, Delaware; attorney for the Appellant.

John J. Klusman, Jr., Esquire of Tybout Redfearn & Pell, Wilmington, Delaware; attorney for the Appellee.

WITHAM, R.J.

Having reviewed the parties' submissions as well as the record below, the Court concludes as follows:

1. This is an appeal from a decision of the Industrial Accident Board's ("Board") decision of October 5, 2011 ordering Patricia Boone ("Appellant") to obtain all future prescription medications related to her industrial accident injury through Express Scripts.

2. On August 12, 2001, Appellant sustained a work-related lower back injury while working for Syab Services/Capital Nursing ("Employer" or "Appellee"). Employer does not contest the treatment prescribed by her doctor but sought an order from the Board to have the prescription obtained and filled by its contracted "preferred provider" benefit program known as Express Scripts. Under the program, with no cost to the Appellant, she will be able to go to any pharmacy to have her prescription filled or mailed to her. The program saves costs to the carrier and the Appellee.

3. The sole issue at the hearing is whether the Appellant has a right to procure her prescriptions from a provider of her choice or whether she must utilize a benefit program called Express Scripts contracted with the insurance carrier at no cost to the Appellant.

4. The Board found that the Appellee's request was reasonable and permissible pursuant to 19 *Del. C.* §§ 2322 and 2323 and issued an order on October 5, 2011 for the Appellant to obtain all further prescription medications related to her industrial injury through Express Scripts.

5. A timely appeal was filed on October 19, 2011 from the Board's decision. On February 20, 2012, an opening brief was filed and on March 30, 2012, the answering brief was filed.

Standard of Review

6. It is well settled that the function of this Court on review is to determine whether the Board's decision is supported by substantial evidence.[1] The function of the Superior Court in evaluating an appeal from the IAB is to determine whether there exists substantial evidence free from legal error to support the finding of the Board.[2] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a particular conclusion.[3] It is more than a scintilla and less than a preponderance.[4] In reviewing the record for substantial evidence, the Court will consider the record in the light most favorable to the party prevailing below.[5] Only when no satisfactory proof in support of a factual finding of the Board exists may Superior Court overturn a decision of the Board.[6] Superior Court does not hold responsibility as a trier of fact with authority to weigh evidence, determine credibility,

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[1]*General Motors v. Freeman*, Del. Supr., 164 A.2d 686, 688 (1960).

[2]*General Motors Corp. v. Jarrell*, 493 A.2d 978, 980 (Del. Super. 1985).

[3]*Parks v. Wal-Mart*, 2004 WL 1427016, at *2 (Del. Super. June 24, 2004).

[4]*City of Wilmington v. Clark,* 1991 WL 53441, at *2 (Del. Super. Mar. 20, 1991)(citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

[5]*Benson v. Phoenix Steel*, 1992 WL 354033, at *2 (Del. Super. Nov. 6, 1992).

[6]*Johnson v. Chrysler Corp.*, 213 A.2d 64, 67 (Del. 1965).

or to make findings of fact and conclusions.[7] An employer is obligated to pay the necessary and reasonable medical expenses related to an employee's work injury.[8]

Discussion

7. The Appellant argues that the Board does not have the authority to order the use of Express Scripts to obtain her prescriptions because the Appellant has a "superseding right" set forth in 19 *Del. C.* § 2322(a) to refuse reasonable medications. Additionally, Appellant argues that legislative policy somehow prohibits employers from contracting with providers to provide services at a reduced rate at or below the fee schedule provisions of the statute.

8. The Appellee contends the Board did not commit legal error by requiring the Appellant to use the prescription card furnished by Appellee. 19 *Del. C.* § 2322(a) provides in pertinent part that "[d]uring the period of disability the employer shall furnish reasonable surgical, medical, dental, optometric, chiropractic and hospital services . . ." Under 19 *Del. C.* § 2322(b), the subsection provides in pertinent part that "If the employer, . . . refuses to furnish the services, medicines and supplies mentioned in subsection (a) of this section, the employee may procure the same and shall receive from the employer the reasonable cost thereof within the above limitations." The Court notes as well that under 19 *Del. C.* § 2323, in pertinent part, "Any employee . . . shall have the right to employ a physician, surgeon, dentist,

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[7] *Id*. At 66.

[8] 19 Del. C. § 2322(a); *e.g. Waples v. state*, 2004 WL 2828279, at *3 (Del. Super. May 11, 2004).

optometrist or chiropractor of the employee's own choosing." This section says nothing about the right of the employee to select a specific pharmacy or provider of prescriptions for medications prescribed by her chosen physician. Indeed, this section was enacted for the mutual benefit of both employer and employee.[9] Sections 2322 and 2323 are "parallel sections related to medical services enacted for the mutual benefit of both the employer and employee."[10]

9. In this case the Board accepted information concerning the Pharmacy Benefit Management Program (Express Scripts) and the medication list for purposes of the proceeding. This Court does not see any error by the Board in accepting these materials for its legal consideration of the employer's request.

10. The Appellant for some time has been treated by her pain management physician for work-related injuries with medication as prescribed by the physician filled at her chosen pharmacy. The employer has sought and received an order from the Board to require all further prescription medications related to her work injury to be filled through Express Scripts.

11. There is no indication that the Express Scripts program will not provide reasonable medicinal supplies, to include drugs, at a pharmacy within the Express Scripts Retail Pharmacy network. The Court agrees that a pharmacy is not a medical provider under 19 Delaware Administrative Code 1341-4.0, definition section 4.18.1.

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[9] *Collins & Ryan v. Hudson*, 75 A.2d 261 (del. Super. 1950).

[10] *Hill v. Archie's Thriftway*, 1997 WL 902839 (Del. Super.).

12. Considering the facts of this case, the Court finds that the Board had satisfactory proof before it to find the Appellee's request reasonable and not otherwise prohibited by 19 *Del. C.* § 2322(b).

13. It would be an unreasonable reading of 19 *Del. C.* §§ 2322 and 2323 to argue that if the employer furnished reasonable medicine and supplies as and when needed that the employee may refuse to accept and then proceed to procure the medicine and supplies at a higher rate and thus be more expensive to the employer.

14. Therefore, the Board's decision below is clearly one of administrative discretion and there is substantial evidence to support the findings below. The Board's decision is *affirmed.*

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

IAB 04-57

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BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

PATRICIA BOONE,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1198151
	)	
SYAB SERVICES,	)	
	)	
Employer.	)	

ORDER

On September 28, 2011, the Board conducted a hearing upon Syab Service's ("Syab") Motion to compel Claimant to obtain her medications through Express Scripts, a prescription medication plan. Syab acknowledges that Claimant has a compensable low back injury and it has paid for multiple surgeries, medical treatment and medications. Syab argues that Claimant should be required to use Express Scripts to fill her prescriptions. With Express Scripts, Claimant will be able to go to any pharmacy or have her prescriptions mailed to her home with the same brand name medication and same dosage as she is currently obtaining.

Claimant refuses to use Express Scripts for her medications because she has been getting her prescriptions filled at Dr. Ganesh Balu's office. Syab requests that Claimant be required to use Express Scripts for obtaining her prescription medications because it is much less expensive to fill the prescriptions with Express Scripts than it is through Dr. Balu's office, although Syab acknowledges that Dr. Balu charges the amount set forth in the Delaware Fee Schedule for the medications.

Syab agrees that it is not permitted to specify a medical provider for Claimant to use or direct Claimant's medical treatment; however, Syab argues that that a pharmacy is not a medical provider under 19 *Del. Code* § 2323. Even under the Delaware Treatment Guidelines ("Guidelines") there are separate definitions for "provider" and "pharmacy." Syab also argues that its request is reasonable because Claimant will get the same medications as she gets now and she can choose the pharmacy from a long list of pharmacies that participate with Express Scripts or she can choose to have the medications mailed to her home. Syab argues that 19 *Del. Code* §2322 requires the employer to provide medication as needed, which is what it is doing with Express Scripts.

Claimant argues that the first question is whether the Board has the authority to do what Syab requests. Claimant argues that she has the right to select her own medical managers, including medications and supplies, pursuant to 19 *Del. Code* § 2322(b) and that Syab has to pay for them. The Guidelines include medications in the Fee Schedule and there is nothing in the Guidelines that allows Syab to direct Claimant's means of access to medications.

Claimant argues that using a prescription card is not as easy as Syab says it is because Claimant will need to pay for medications out of her own pocket if the medications are not authorized since pharmacies will not bill the insurance carriers in that situation. Dr. Balu will provide the medications that he prescribes to Claimant and deal with billing the insurance carrier afterwards, so Claimant does not have any problem getting the medications. Also, although Dr. Balu's charges for the medications are higher than through Express Scripts, Claimant argues that those charges are reasonable by definition because they are within the Fee Schedule.

After considering the arguments, the Board finds that Syab's request is reasonable and permissible pursuant to 19 *Del. Code* §§ 2322, 2323. Pursuant to 19 *Del. Code* § 2322(a), Syab

is required to furnish reasonable medications, which it is doing through Express Scripts. Subsection (b) does not apply unless Syab refuses to furnish the medications; if Syab refused to furnish the medication, then Claimant could procure the medication and Syab would be responsible for paying for it.

Furthermore, 19 *Del. Code* § 2323 does not address prescription medications or pharmacies, so Syab is not prohibited from providing Claimant with Express Scripts for her medications. Syab is not directing Claimant's medical care by requiring her to use Express Scripts to supply her medications since she can go to any pharmacy of her choosing or have the medications delivered to her home.

Based on the foregoing, the Board finds that Claimant shall obtain all further prescription medication related to her industrial injury through Express Scripts.

IT IS SO ORDERED this 5th day of OCTOBER 2011.

INDUSTRIAL ACCIDENT BOARD

Victor R. Epolito, Jr.

Mary Dantzler

I hereby certify that the above is a true and correct Order of the Industrial Accident Board.

Julie G. Bucklin
Worker's Compensation Hearing Officer

Mailed Date: 10-7-11

OWC Staff

cc: Walt F. Schmittinger, Attorney for the Claimant
John J. Klusman, Jr., Attorney for the Employer