



IN THE SUPREME COURT OF THE STATE OF DELAWARE

PATRICIA BOONE,)	
	)	No. 525, 2012
Claimant-Below/)	
Appellant,	)	ON APPEAL FROM THE SUPERIOR
	)	COURT OF THE STATE OF
v.	)	DELAWARE IN AND FOR KENT
	)	CASTLE COUNTY
SYAB SERVICES / CAPITOL	)	C.A. NO. K11A-10-003-WLW
NURSING)	
)	
Employer-Below)	
Appellee.)	

EMPLOYER-BELOW/APPELLEE'S ANSWERING BRIEF ON APPEAL

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NATURE OF PROCEEDINGS

This Appeal is from the August 23, 2012 decision of the Superior Court of Delaware affirming the October 5, 2011 decision of the Industrial Accident Board. Boone v. Syab Services/Capitol Nursing, 2012 WL 3861059 (Del. Super.) (Order), attached hereto as Exhibit "A"; Boone v. Syab Services/Capitol Nursing, IAB No.: 1198151 (Oct. 5, 2011), attached hereto as Exhibit "B".

The Claimant-below/Appellant, Patricia Boone (hereinafter "Claimant" or "Boone"), sustained a compensable low back injury from an industrial accident. Ex. B at 1. The Employer-below/Appellee, Syab Services/Capitol Nursing (hereinafter "Employer" or "Syab"), filed a Motion to Compel with the Industrial Accident Board (hereinafter "Board" or "IAB"), asking for an order, compelling Claimant to obtain her prescription medication through Express Scripts. Id.

The motion was presented at a hearing before the Board on September 28, 2011. Ex. B at 1. The Board issued its written decision on October 5, 2011. Ex. B at 1-3. The Board granted Employer's motion and compelled Claimant to obtain her prescription medication through Express Scripts. Ex. B at 2-3.

The Claimant appealed the Board's decision to the Superior Court. Ex. A at 1-6. Claimant contended that the Board erred as a matter of law in requiring her to obtain her prescriptions from Express Scripts. Ex. A at 4. Employer argued that the Board did not commit legal error and that the Board's decision should be affirmed. Id. The Superior Court issued its Order on August 23, 2012, wherein the Superior Court

affirmed the Board's decision, holding that the Board had correctly applied the law. Ex. A.

The Claimant appealed the Superior Court's Order to this Court and asserts the same argument. Op. Br. at 2.

This is the Employer-below/Appellee's Answering Brief on Appeal.

SUMMARY OF ARGUMENT

1. **DENIED.** The Superior Court correctly affirmed the Industrial Accident Board's decision, concluding that Claimant does not have a superceding right to decline reasonable medicine and supplies furnished by Employer under 19 Del. C. §2322(a) through Express Scripts, and procure her prescriptions through a vendor of her own choosing at a higher cost.

2. **DENIED.** The Superior Court correctly affirmed the Industrial Accident Board's decision holding that the Claimant may only select a pharmacy of her own choosing if Employer fails to furnish reasonable medicine and supplies.

STATEMENT OF FACTS

Claimant, Patricia Boone, suffered a compensable low back injury on August 12, 2001. (A8). It is uncontested that Claimant has undergone multiple surgeries and is currently receiving medical management services through the office of Dr. Balu. (A8). Dr. Ganesh Balu has not only been prescribing various medications, but he fills those prescriptions in his office. (A8).

Employer does not dispute any of the treatment that Claimant has received, nor does Employer dispute the use of the medications prescribed by Dr. Balu. However, Employer requested that Claimant fill those prescriptions through Employer's contracted vendor, Express Scripts. (A8). Employer sought an order from the Board, requiring Claimant to use the Express Scripts program to fill her prescriptions, rather than filling those prescriptions at the office of her treating provider, Dr. Balu, at a higher cost. (A8); Ex. B.

Employer argued that Express Scripts allows Claimant to fill her prescriptions at virtually any pharmacy, drug store, grocery store or to have the prescriptions sent directly to her home, if she so chose. (A9). Claimant would receive the exact same prescription: the same dose, and the same quantity; however, Claimant would get it the medicine through Express Scripts rather than Dr. Balu's office. (A9; A14).

Employers' position is that a pharmacy is not a medical provider, as defined by the statute. (A12-13). Therefore a pharmacy is not impacted by 19 Del. C. § 2323, insofar that that provision grants an injured employee an affirmative right to "employ a physician, surgeon,

dentist, optometrist or chiropractor of the employee's own choosing." Employer argued that the intent of the statute was to prevent an employer from directing the medical care of an employee by selecting a particular doctor or hospital for that employee. (A13). However, Employer contended that a pharmacy is not providing any medical services, but instead, simply provides the prescriptions. (A12).

Furthermore, Employer argued that the treatment guideline define "provider" and "pharmacy" separately in the administrative regulations. (A13-14). A "Provider" is defined as a "facility, health care organization, or practitioner who provides medical care or services." 19 Del. Admin. C. §1341-4.18. Whereas a "Pharmacy" is separately defined as "place where the science, art or practice of preparing, preserving, compounding, dispensing and giving appropriate instruction in the use of drugs is practiced". Id.

Claimant argued that §2322 precludes employers from requiring a claimant to use a carrier's chosen pharmacy. (A16-17). Claimant contends that the statute gives Claimant a right to chose from where she obtains medicine and supplies and contended that usage of Express Scripts could create a problem for medication access. (A16-17; A18-19). Claimant also argued that Dr. Balu's pharmacy was in accordance with the workers' compensation system's fee schedule and that as a result, Claimant argued that usage of Dr. Balu's pharmacy is reasonable. (A20-21).

The Board issued its decision on October 5, 2011. Ex. B. The Board granted Employer's Motion and required Claimant to thereafter obtain her medications from Express Scripts. Ex. B at 3. The Board

reasoned that Employer's request was reasonable and consistent with the statute. Ex. B at 2. Further, the Board concluded that with respect to prescription medication, Claimant's right to procure that medication from a vendor of her own choosing was only implicated if Employer refused to furnish such medication. Ex. B at 3. Moreover, the Board recognized that prescription medications were not addressed in the section of the statute granting Claimant independent rights to select her medical providers. Ex. B at 3.

Claimant appealed the Board's decision to the Superior Court. Ex. A. Claimant argued that the Board committed legal error in requiring Claimant to obtain her prescription medications through Express Scripts. Ex. A at 4. The Superior Court affirmed the Board's decision, concluding that the Board did not commit legal error and that its decision was within its administrative discretion. Ex. A.

Claimant has appealed to this Court and asserts the same arguments below. This is Employer's Answering Brief on Appeal.

ARGUMENT

I. THE INDUSTRIAL ACCIDENT BOARD'S DECISION, AS AFFIRMED BY THE SUPERIOR COURT, DID NOT CONTAIN LEGAL ERROR WHEN IT ORDERED CLAIMANT TO OBTAIN HER PRESCRIPTION MEDICATIONS THROUGH EMPLOYER'S PREFERRED PHARMACY

QUESTION PRESENTED

Whether the Superior Court correctly affirmed the Industrial Accident Board's decision, concluding that the Board did not err in granting Employer's motion to compel, requiring Claimant to obtain her prescription medication through Employer's contracted pharmacy, Express Scripts, as Employer's request was reasonable and consistent with the statute; whether the Board's decision in this regard, is free from legal error and is supported by substantial evidence?

SCOPE OF REVIEW

The Supreme Court reviews decisions from the Industrial Accident Board under the identical standard of the Superior Court. Estate of Jackson v. Genesis Health Ventures, 23 A.3d 1287, 1290 (Del. 2011) citing Vincent v. Eastern Shore Markets, 970 A.2d 160 (Del. 2009). The Court will review the decision for errors of law and these legal issues will be reviewed *de novo*. Id.; State v. Cephas, 637 A.2d 20, 23 (Del. 1994). Absent a legal error, the Court will determine if the decision is supported by "substantial evidence", the Court will not make independent factual findings, nor reweigh issues of credibility. Id. A decision is supported by "substantial evidence" when it is based upon "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Olney v. Cooch, 425 A.2d 610, 614 (Del. 1981). The standard is "less than a preponderance of the

evidence but is more than a 'mere scintilla.'" Hairston v. Christiana Care Health Services, 2010 WL 4527255, *5 (Del. Super.). If supported by substantial evidence, absent legal error, the decision will stand so long as it is not arbitrary and capricious. See generally One River Place v. New Castle County Department of Finance, 2007 WL 1296870, *3 (Del. Super.).

MERITS OF THE ARGUMENT

Employer has a statutory obligation to "furnish" medicine and other reasonable and necessary supplies to an injured employee. 19 Del. C. §2322(a). In the instant case, Employer has requested that the Board require Claimant to allow Employer to furnish Claimant's medicine from Employer's contracted pharmacy, Express Scripts. Ex. B. Through this vendor Employer will furnish the same prescription medications Claimant has been receiving from her physician, Dr. Balu. Claimant will continue to receive the same dosage and the same number of pills, furnished by Employer. Claimant repeatedly argues that such sourcing is an attempt by Employer "to direct medical care" of Claimant and/or to control "access to medical services", however, such allegations are unfounded and are at odds with the specific statutory language that details Employer's obligations. Op. Br. at 8, 9, 10, 12. Prescription medication, like other medical supplies, are interchangeable and do not impact a claimant's direction of medical care. In other words, a prescription is a prescription, no matter from where it comes.

A. The Statutory Framework Supports the Board's Decision

Employer's obligation to Claimant with respect to "[m]edical and other services" is delineated by the Delaware Code. 19 Del. C. §2322(a). It is uncontested that Employer has a statutory obligation to furnish prescription medicine. (A8); §2322(a). However, there is no legal precedent or statute in Delaware that supports Claimant's contention that she may obtain her medication from a vendor of her choosing when the Employer agrees to furnish the medication.

Claimant argues that the latter, subordinate, clause of §2322(a), "unless employee refuses to allow them to be furnished by the employer", creates an independent right for Claimant to choose a particular vendor from which to obtain her medication. Op. Br. at 9-10. Such a right has not previously been recognized and Claimant asserts no case law that supports this contention. This Court has previously held that §2322 "defines the scope of services that an employer shall be required to furnish to an injured employee." General Motors Corp. v. Burgess, 545 A.2d 1186, 1192 (Del. 1988). In that vein, it is clear that the statute simply provides that the Employer is required to provide the delineated "scope of services", "unless employee refuses to allow them to be furnished by the employer." Burgess at 1192; §2322(a). The latter "unless" clause of §2322 simply relieves Employer of its positive obligation to furnish such services under the statute. The statute is unambiguous in this regard¹.

¹ Moreover, contrary to Claimant's contention that she has a "right" to refuse prescriptions furnished by Employer, this Court has previously

Claimant presents a lengthy citation to Professor Larson for the proposition that different states operate their respective workers' compensations schemes in different ways with respect to a claimant's right to choose his or her own physician. Op. Br. at 12-13. Claimant also correctly asserts that Delaware allows claimants to select their own physicians. Op. Br. at 10. However, although Claimant presents an accurate statement of the law, such a representation is irrelevant to the instant inquiry. The issue at hand is not whether Claimant can select her own physician. It is uncontested that she has that right, as the General Assembly explicitly codified a claimant's right to direct medical care and to select one's own physician. 19 Del. C. §2323. The issue in the instant case is whether Claimant has a right to choose the particular vendor or pharmacy from which her prescription medication is obtained.

Claimant incorrectly attributes §2323 as articulating this claimed right to determine from where her prescription medicine is dispensed. Op. Br. at 10. However, §2323 contains no such provision; that section is limited to granting an employee "the right to employ a physician, surgeon, dentist, optometrist or chiropractor of the employee's own choosing." §2323. Conspicuously absent from that text is any reference to "pharmacy" or "medicine". Also omitted from §2323

noted that such refusal implicates the forfeiture provisions under §2353. The refusal under §2322(a) runs parallel to the forfeiture provisions and Employer contends that there is no suggestion that the General Assembly intended §2322(a) to be construed such that Claimant can arbitrarily refuse Employer's offer to furnish the medications. See *generally Burgess* at 1192 ("§2353 is a part of Subchapter III and provides an employer with relief from this statutory obligation, as defined in §2322, against an employee who refuses to accept reasonable services tendered by the employee.").

are other "supplies" including dentures, false eyes or eye glasses and hearing aids. Compare §2322 with §2323. The statute provides for a right for Claimant to choose who provides her medical care, not the vendor from which medical supplies are obtained. This is an important, but sensible distinction, the General Assembly has decided that a Claimant may choose her health care providers, but has not extended a right to Claimant to choose from where Employer furnishes her medication.

This Court has held that "this Court may not assume that an omission 'was the result of an oversight on the part of the General Assembly.'" Burgess citing Giuricich v. Emtrol Corp., 449 A.2d 232, 238 (Del. 1982). In the instant case, the General Assembly did not provide to a Claimant a positive right to choose her vendor for the provision of medicine. See §2323. Moreover, where the General Assembly has expressly provided that "medicine" shall be furnished by the Employer, but has not articulated a Claimant's right to choose a particular pharmacy, "it is reasonable to assume that the Legislature was aware of the omission and intended it." Compare §2322 with §2323; Burgess at 1191. In that regard it is abundantly clear that the General Assembly included "medicine" in §2322, but omitted that very term in §2323.

The statute is unambiguous; it obliges Employer to furnish medicine to Claimant but does not provide Claimant a right to select a particular pharmacy². The Board's order is consistent with the

² Claimant contends that there may be hypothetical "authorization" and "billing" problems which would impact the availability of her

statute, and was within the Board's discretion. See e.g. Burgess at 1191 ("when no ambiguity exists, and the intent is clear from the language of the statute, there is no room for statutory interpretation or construction.") (internal citations omitted).

B. The Delaware Practice Guidelines

The 2007 amendments to the workers' compensation statute established the Health Care Advisory Panel and the Health Care Payment System. 19 Del. C. §2322A; §2322B. Thereafter, regulations were promulgated to implement the fee schedule and the practice guidelines pursuant to legislative authority. 19 Del. Admin. C. §1341 *et. seq.* The administrative regulations contain separate definitions regarding "provider" and "pharmacy" respectively. §1341-4.18. A "provider" as defined "means a facility, health care organization, or a practitioner who provides medical care or services". Id. Employer notes that this definition is consistent with Claimant's right to direct her medical care under §2323. Whereas, the regulations define a pharmacy as "the place where the science, art and practice of preparing, preserving, compounding, dispensing, and giving appropriate instruction in the use of drugs is practiced". §1341-4.18. These separate definitions are consistent with the previously discussed legislative intent for a claimant to have a right to select a medical provider of his or her choosing, but not extending that right to the selection of a particular pharmacy.

prescription medication. Op. Br. at 15. However, the General Assembly has already provided a remedy for this situation. §2322(b). If the Employer fails to furnish the appropriate medication, Claimant may obtain that medication on her own and require Employer to pay accordingly. Ex. B at 3.

Additionally, Claimant argues that Dr. Balu's technical compliance with the fee schedule requires the Board to deny Employer's request. Op. Br. at 16. However, as Claimant properly states, "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". Op. Br. at 14 *citing* 19 Del. C. §2322B(4). As this section clearly notes, an employer or insurer carrier can negotiate a contract with providers to provide services at a reduced rate, which is exactly what Employer has done here. Employer has a preferred provider, Express Scripts, who will furnish prescriptions to the Claimant at a reduced rate. Employer is not directing Claimant's medical care, nor controlling Claimant's access to medical services. Rather, Employer is simply furnishing the Claimant with her prescriptions through a more cost-effective vendor.

Employer's request was a reasonable request. Ex. B. The Board agreed that such a request was reasonable and consistent with the statute and the regulations. Id. Sections 2322 and 2323 "were enacted for the mutual benefit of both the employer and the employee." Hill v. Archie's Thriftway, 1997 WL 902839 at *2 (Del. Super.). In Hill, the claimant alleged that her chiropractic treatment was reasonable and necessary. The Court reviewed §2322 and §2323 when formulating its decision and found that the operative word in both §2322 and §2323 is the word "reasonable". Hill at *2. The legislative purpose of the two sections "is twofold: (1) to insure the employer against unreasonable charges and against fraudulent claims; and (2) to insure at all times adequate medical assistance to the

employee". Id. citing McCormick Transp. Co. v. Barone, 89 A.2d 160 (Del. Super. Ct. 1952), *aff'd.*, 135 A.2d 140 (Del. 1957); Collins & Ryan v. Hudson, 75 A.2d 261 (Del. Super. Ct. 1950).

The same issues are at play in the instant case, the Employer has provided the Claimant with the ability to procure prescriptions at any number of pharmacies in the State, or in the alternative to have them delivered to the Claimant's door via mail order. The prescription obtained would be the same name brand, quantity and dosage as prescribed by the treating physician. Simply because Dr. Balu's pharmaceutical dispensary is in compliance with the fee schedule does not mean that Employer's provision of medication through a preferred vendor was unreasonable. Accordingly, where the Board appropriately evaluated Employers request under the statute and the regulations and determined that such a request was reasonable, the Board's decision should be affirmed.

C. Alabama Case Law is Inapposite to the Board's Decision

Employer asserts that §2322(a) and §2323 are unambiguous and that they provide ample support for the Board's decision. However, Claimant cites an "analogous" Alabama case in support of her argument that she may select a pharmacy of her choosing. Op. Br. at 15-16 *citing Davis Plumbing Co. v. Burns*, 967 So.2d 94 (Ala. Civ. App. 2007). However, Alabama case law is unavailing as the Alabama workers' compensation statute is markedly different to that of Delaware. Compare Ala. Code §25-5-77 (1975) with 19 Del. C. §2322(a). In *Davis*, the employer was seeking the authority to select the pharmacy for the claimant. Davis at 96. The Court in *Davis* concluded that the

employer was not empowered to make this choice. Id. at 98-99. However, the holding turned on the Alabama statute, which provides that "an employer of an injured worker pay for that worker's 'reasonable necessary medical and surgical treatment and attention, physical rehabilitation, medicines". Davis at 99. This section contrasted from Delaware's §2322(a), which requires that the "employer must furnish" the proper care. Further, under the Alabama statute a pharmacist is defined under the same definition as a provider. Id. at 98. Accordingly, given the stark differences between the Alabama and Delaware statutes, Employer suggests that Davis is unpersuasive³.

³ Cf. Sigler v. Dresser Rand, 896 So.2d 189, 198 (La. App. 3 Cir. 12/29/04). Employer notes that Louisiana's statute is worded similarly to Delaware insofar that it requires that "employer shall furnish all necessary drugs." La. Rev. Stat. Ann. §23:1203(A). In Sigler, the Court held that "we do not find that Dresser Rand violated its obligation to Sigler simply because it chose to have his prescriptions filled by a different pharmaceutical company." Sigler at 198.

CONCLUSION

WHEREFORE, based on the facts of this case and the evidence presented at the Industrial Accident Board, the Employer-below/Appellee, Syab Services, hereby respectfully requests that this Court affirm the Superior Court's decision, affirming the decision of the Industrial Accident Board granting Employer's motion to compel and requiring Claimant to obtain her prescription medication from Employer's preferred pharmacy, Express Scripts. Employer's request was reasonable and consistent with the statute. The statute does not contain an independent right for claimants to determine from which vendors medicines and supplies are obtained, so long as they are furnished by the employer. Accordingly, the Board did not err, nor did it abuse its discretion, and its decision should be affirmed.



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Dated: December 6, 2012

EXHIBIT A

Patricia Boone v. SYAB Services

C.A. No. K11A-10-003 WLW

August 23, 2012

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.

Patricia Boone v. SYAB Services

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August 23, 2012

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,

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).

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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,

⁷*Id.* At 66.

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

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August 23, 2012

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.

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

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

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August 23, 2012

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

EXHIBIT B

IAB 04-570

RECEIVED

OCT 12 2011

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 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

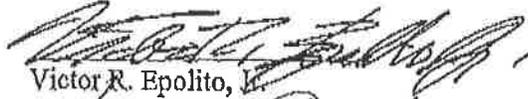
is required to furnish reasonable medications, which it is doing through Express Scripts. Subsection (b) does not apply unless Syab refuses to furnish the medications; if Syab refused to furnish the medication, then Claimant could procure the medication and Syab would be responsible for paying for it.

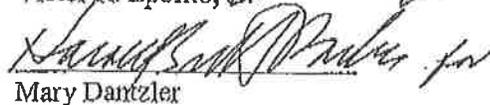
Furthermore, 19 *Del. Code* § 2323 does not address prescription medications or pharmacies, so Syab is not prohibited from providing Claimant with Express Scripts for her medications. Syab is not directing Claimant's medical care by requiring her to use Express Scripts to supply her medications since 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

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PATRICIA BOONE,)	
	)	No. 525, 2012
Claimant-Below/)	
Appellant,	)	ON APPEAL FROM THE SUPERIOR
	)	COURT OF THE STATE OF
v.	)	DELAWARE IN AND FOR KENT
	)	CASTLE COUNTY
SYAB SERVICES / CAPITOL	)	C.A. NO. K11A-10-003-WLW
NURSING)	
)	
Employer-Below)	
Appellee.)	

CERTIFICATE OF SERVICE

I, John J. Klusman, Esquire, hereby certify that on the 7th day of December, 2012, that I have caused two (2) copies of the Employer-Below/Appellee's Answering Brief on Appeal to be served via regular mail and one (1) copy to be served via LexisNexis File & Serve on the following individual:

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