BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

DAVID HAMILTON,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1222906
	)	
INDEPENDENT DISPOSAL SERVICE,	)	
	)	
Employer.	)	

ORDER ON CLAIMANT'S SECOND MOTION FOR RE-ARGUMENT

Following a hearing on the merits on October 30, 2015, the Board issued a Decision on January 26, 2016, on David Hamilton's, ("Claimant"), Petition to Determine Additional Compensation Due denying his request for compensation of an L5-S1 spinal fusion surgery performed twelve years after his initial November 7, 2002 work injury involving a pop in his back when he lifted a toter while working for Independent Disposal Service, ("Employer"). Claimant failed in his factual, as well as his legal arguments to support compensation of the procedure.

Prior to the issuance of this Decision Claimant filed his first Motion for Re-Argument, pursuant to Board Rule 21(B), and Employer timely responded. These submissions were considered by the Board's in its Decision. Claimant argued that certain medical bills should be considered as evidence for Claimant's legal argument that payment was made under compulsion by Employer for injections of the L5-S1 level of Claimant spine; which was ultimately operated on in December of 2014, twelve years after the work accident. In his motion Claimant maintained that the billing ledgers referred to by Dr. Balu during his deposition testimony were timely produced to Employer before the hearing. Employer continued to maintain that it did not

receive the correspondence attached to Claimant's motion and noted that there were no billing statements in Claimant's production responses, despite numerous requests, and that even after Dr. Balu's deposition and Employer's objection, there was still no production or indication that Claimant would make an issue out of payments allegedly paid by the carrier. For the reasons stated therein, the Board agreed with Employer that Claimant's handling of this matter resulted in unfair surprise due to Claimant's lack of notice of his legal argument, noting that while technical rules are relaxed in administrative hearings, fundamental rights, such as the right to cross-examine witnesses effectively, remain. *General Chemical Div., Allied Chemical & Dye Corp. v. Fasano,* 94 A.2d 600, 601 (Del. Super. Ct. 1953). Trial by surprise is not favored in Delaware and not endorsed by this Board.

On February 15, 2016 Claimant filed the current, and his second, Motion for Re-Argument, this time pursuant to Board Rule 21(C) given that it was filed after the Board rendered its Decision, and alleging as follows: a Pre-Trial Memorandum was forwarded to Employer prior to the hearing on the merits indicating that compensability was admitted so Employer should have anticipated Claimant's argument regarding payment under compulsion; and that correspondence attached to Claimant's motion allegedly indicates that Employer's counsel knew about the carrier's history of paying for Claimant's treatment, thus, there was no trial by surprise, rather Employer had knowledge and its own pay log supports the accuracy of Dr. Balu's testimony regarding his paid bills involving L5-S1 injections. Claimant also maintains that as a certified provider Dr. Balu was required to and therefore sent treatment records which indicated a targeted treatment at the L5-S1 level.

Claimant argues that the idea that the carrier was in the dark as to what disc level Dr. Balu was treating is irrational because of the two discograms with post-procedure CT imaging

showing L5-S1 pathology, accompanied by years of inter-discal injections administered to that level. Claimant maintains that it repeatedly provided Dr. Balu's records while the petition was pending. Claimant argues that the Board improperly concluded that Claimant had waived his ability to provide evidence of Employer's admission to liability for Claimant's L5-S1 treatment. Employer had Dr. Balu's medical records, from both Dr. Balu's office directly and through counsel by Claimant's repeated production of them. The Employer paid for the L5-S1 treatment, knew what it paid for and when it challenged Dr. Balu's treatment, Employer submitted it to UR thereby conceding causation. Claimant maintains that Employer should not be permitted to profit from short-stopping Claimant's Pre-Trial Memorandum; dismissing its adjuster as a witness for the hearing and then pleading surprise and prejudice when its own payment history is placed before the Board.

Claimant requests that the Board reverse its January 26, 2016 Decision and enter judgement as a matter of law in favor of Claimant; or permit Claimant to subpoena the carrier's adjuster to present additional evidence to the Board on the issue of Employer's implied agreement for the L5-S1 disc level.

On February 19, 2016 Employer responded with the following rebuttal arguments: 1) Claimant's Motion for Re-argument was not timely filed; 2) Claimant already argued this at hearing and filed his first Motion to Re-Argue on November 11, 2015 which raised the same arguments and attempted to submit much of the same evidence that Claimant is now attempting to do; and 3) the Board's Decision addresses these issues and thus, *res judicata* applies and precludes Claimant from attempting a third bite at the apple. Employer requests that the Board dismiss Claimant's latest motion.

Employer reiterates that it did not receive any of the letters that Claimant has produced. Employer notes that these letters were not produced at hearing, or in Claimant's first Motion to Re-Argue. Employer alleges that the letters seem to be *post-facto* fabrications as there is no proof that they were even sent. Claimant's counsel appears to have suddenly discovered his own letters. Employer denies any prior conversations wherein it agreed to pay without prejudice. Employer notes that Claimant was unresponsive to its discovery requests and did not speak to Employer's counsel except at the deposition of Claimant's expert.

Specifically, Employer notes that it did not receive Claimant's September 29, 2015 letter or attached Pre-trial Memorandum, which had also not been provided to the Board prior to the hearing. Moreover, even if it had been forwarded in September of 2015, which it was not, this still would have been six months late as the Pre-trial conference was held March 24, 2015. Employer also argues that even if the Pre-trial Memorandum had been sent on September 29, 2015 it would have been too late for Employer to make a settlement offer and most importantly, it does not clearly indicate Claimant's argument that Employer paid for treatment at the L5-S1 level under compulsion. Employer goes on to maintain that essentially Claimant's exhibits attached to his second Motion for Re-Argument do not support his arguments and are instead contradictory. Claimant is essentially arguing that causation is presumed simply because Dr. Balu is a certified provider. As to Claimant's specific argument that Dr. Balu's treatment was submitted to UR and therefore, causation is presumed, Employer maintains that this is an argument that was never raised previously. As well, before the hearing Claimant stipulated that causation was at issue.

On February 22, 2016 Claimant filed a letter response asking that Employer retract its assertion that the attachments to his motion seem to be *post-facto* fabrications as Claimant finds

this deeply disturbing and uncouth. Finally, Claimant does not believe that its arguments were considered in the Board's Decision because the first Motion for Re-Argument was filed under Board Rule 21(B), before the Decision and the second is under 21(C), after the Decision. On the same day, Employer filed an e-mail response further reiterating its position, noting a pattern involving lack of candor and late notice and production on Claimant's part in this case when prior defense counsel brought this to the Board's attention in 2011.

First, the Board finds that Claimant's Motion for Re-argument was timely filed. A motion for a rehearing or a re-argument must be filed within ten days of the receipt of the Board's Decision, which is sent by certified mail. *Board Rules*, Rule 21. In computing any period of time, Rule 28 of the *Board Rules* adopts the provisions of Superior Court Civil Rule 6. That Rule states that when the time prescribed is less than eleven days, "intermediate Saturdays, Sundays and other legal holidays" are to be excluded. Super. Ct. Civ. R. 6(a). When service is by mail, three days are added to the proscribed period. Super. Ct. Civ. R. 6(e).

Claimant filed its Motion for Re-argument on February 15, 2016. Claimant maintains that the Board's Decision was received on February 1, 2016. If that date is utilized as the receipt date then the ten days would have expired February 15, 2016. Therefore, Claimant's motion is timely filed.

Thus, the Board considers the merits of Claimant's argument and agrees with Employer that the Board has already addressed the bulk of these issues in its Decision and Claimant is simply rehashing the same arguments as were already presented at the hearing and in its first motion. The only difference with this second Motion to Re-Argue is that Claimant has attached some new documentation, the greater part of which does not support his theory. This new

documentary evidence could have been produced previously, either when Employer filed its requests for production; at hearing; or in his first Motion for Re-Argument.

To justify a new trial based on newly discovered evidence, "it must appear that the new evidence is such as will probably change the result if a new trial is granted; that the evidence could not have been discovered before trial by the exercise of due diligence; that the evidence is material to the issue; that the evidence is not merely cumulative; and that the evidence is not merely of an impeaching or contradictory character." *See Joyner v. Chrysler Corp.*, 567 A.2d 422, 422 (Del. Supr. 1988) (citing *State v. Watson*, 186 A.2d 543 (Del. Super. 1961)). The Board finds that none of the documentation attached to Claimant's second Motion for Re-Argument, i.e., Claimant's production of letters allegedly sent by Claimant's counsel to Employer's counsel; e-mail correspondence between the parties; payment ledgers; and two UR decisions, etc. is newly discovered. It all could have been discovered prior to the hearing, by the exercise of due diligence. All documents presented were in Claimant's possession and many were subject to discovery prior to the hearing and in fact, most had been requested by Employer, but not produced.

Interestingly, the Board notes that the several exhibits attached to Claimant's motion do not actually support his assertions. Just for one example, Claimant argues that his Exhibit B, an email correspondence between Mr. William Fletcher and Employer's counsel reflects a knowledge by Employer of Claimant's argument that Employer paid for treatment of Claimant's L5-S1 injury under compulsion; however, the last response is from Employer's counsel specifically asking "[w]ould you let me know what your are [sic] suing for..." So the attached exhibit actually contradicts Claimant's assertion that Employer knew or should have known.

For another example, Claimant insists that he forwarded a Pre-Trial Memorandum to Employer and argues that because yes is indicated under the question of compensability Employer should have known of Claimant's specific argument regarding payment under compulsion. Here again, just because the Pre-Trial Memorandum has a yes under the question of compensability does not constitute notice to Employer of Claimant's argument that Employer had paid under compulsion for that specific level of the spine. Moreover, as previously noted the Pre-Trial Memorandum was also not in the Board's file. Claimant provided a copy at the hearing. Typically the moving party, here Claimant, initiates the process of forwarding the Pre-Trial Memorandum and a courtesy copy is sent for the Board's file. None was in the file at hearing. Thus, it is believable to the Board that this document was not forwarded to Employer prior to the hearing. It also lends further support to Employer's assertion that despite his many requests billing statements were not produced prior to the hearing. As well, it gives credence to Employer's argument that it did not receive the correspondence attached to Claimant's motion and that even after Dr. Balu's deposition there was still no production or indication that Claimant would make an issue out of payments allegedly paid by the carrier.

Additionally, Claimant makes sweeping statements in his Motion that are not supported by the evidence. Claimant argues that the idea that the carrier was in the dark as to what disc level Dr. Balu was treating is irrational because of the two discograms with post-procedure CT imaging showing L5-S1 pathology, accompanied by years of inter-discal injections administered to that level. The problem here is, as noted in the Board's Decision, that it is not until many years after the work accident that anything showed up on discogram at that level. Initial testing, including a lumbar spine MRI and discogram, showed no involvement at that level. *David Hamilton v. Independent Disposal Service*, Del. IAB, Hearing No. 1222906, at 28-29 (January

26, 2016). Nothing was seen at L5-S1 on MRI until twelve years after the work accident when an annular tear was seen, which even Claimant's expert admits is a long time for dormancy. *Id.* Moreover, it does not automatically follow that because Claimant's injections at L5-S1 were paid for by the Employer that the surgery is compensable. For example, as the Board noted in its Decision, there is some evidence in the record that Dr. Balu's injections were not targeted, pursuant to Dr. Piccioni's testimony, who the Board has found credible in this case. *Id*, at 36.

Lastly, as to Claimant's argument that Dr. Balu's treatment was submitted to UR and therefore, causation is presumed, Employer is correct that this argument that was not raised at the hearing, or even on Claimant's first Motion for Re-Argument, and thus, the Board will not consider it. Most significant is that Claimant presented the exact opposite before the Board at hearing. In the Stipulated Facts presented to the Board before the hearing at Paragraph I(A) Claimant stipulated that causation was at issue. So Claimant cannot now, after clearly taking the opposite stance before the Board, argue that as a matter of law causation was not really at issue after all. As well, the UR decisions are not newly discovered evidence.

Again, as discussed thoroughly in the Board's Decision, Claimant failed to provide proper notice to Employer's counsel of his legal argument. This Board is charged with the duty of ensuring that a fair hearing on the merits of a case is held so that there is a just determination of every petition. *See* DEL. CODE ANN. tit. 19, § 2301A(i). As noted, trial by surprise is not favored in Delaware and not endorsed by this Board. In litigation, each side in a case must be given a fair opportunity to question the factual reliability of evidence presented. As has long been recognized, administrative agencies such as the Board operate less formally than courts of law. *Standard Distributing Co. v. Nally*, 630 A.2d 640, 647 (Del. 1993). Evidentiary rules are significantly more relaxed in administrative board hearings. *See Thomas v. Christiana*

Excavating Co., 1994 WL 750325 at *5 (Del. Super. Ct.), *aff'd sub nom. Thomas v. Christiana Excavating Co.*, 655 A.2d 309 (Del. 1995). "The Board may, in its discretion, disregard any customary rules of evidence and legal procedures so long as such a disregard does not amount to an abuse of discretion." *Rules of the Industrial Accident Board* ("*Board Rules*"), Rule 14(B). However, fundamental principles of justice, such as due process, need to be observed. *See General Chemical Div., Allied Chemical & Dye Corp. v. Fasano*, 94 A.2d 600, 601 (Del. Super. 1953).

Claimant has not shown that Employer was aware of, and could prepare for, the legal argument that Claimant raised at the hearing regarding payment under compulsion. Claimant has now had three opportunities to present evidence supporting this theory, but has not done so. Claimant had a second opportunity to produce evidence when he filed his first Motion for Re-argument prior to the issuance of a written Decision.[1] As discussed in the Board's Decision, this evidence did not support Claimant's argument. Now Claimant has produced more of the same, similar evidence which has been in Claimant's control all along and could have been produced at the hearing, or with his first Motion for Re-Argument on the same issue, had Claimant's counsel exercised due diligence. Yet even most of this tardily produced evidence does not support his claim regarding prior knowledge.

Claimant asks that the Board reverse its Decision and enter judgement as a matter of law in favor of Claimant; or permit Claimant to subpoena the carrier's adjuster to present additional evidence to the Board on the issue of Employer's implied agreement for the L5-S1 disc level. The Board denies Claimant's requests. This is now Claimant's third bite at the apple, and the Board will not allow a fourth. The Board does not find it necessary to require Employer to retract

[1] That Claimant maintains his arguments are new and different because his second Motion for Re-Argument is filed under Board Rule 21(C) and the first was under Board Rule 21 (B) is without merit as the thrust of his argument is no different in either Motion.

certain statements made in its response, as Claimant requests. Instead, the Board agrees with Employer to the extent that the "paper trail" presented by Claimant is by no means newly discovered evidence which is required to justify a new trial; and is basically too little, too late.

For the above stated reasons, Claimant's second Motion for Re-argument is **DENIED**.

IT IS SO ORDERED THIS 13th DAY OF MAY, 2016.

INDUSTRIAL ACCIDENT BOARD

JOHN D. DANIELLO

FOR:
ROBERT MITCHELL

Mailed Date: 5-17-16

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