IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

KATHLEEN HELLSTERN, an individual, Claimant-Below, Appellant, v. CULINARY SERVICES GROUP, Employer-Below, Appellee.	))))))))))))	C.A. No. N18A-07-008 JRJ

OPINION

Date Submitted: October 18, 2018
Date Decided: January 31, 2019

On Appeal from the Industrial Accident Board: Decision Affirmed.

Vincent J. X. Hedrick, II, Esquire, Beverly L. Bove Attorney at Law, 1020 West 18th Street, P.O. Box 1607, Wilmington, Delaware, Attorneys for Employee-Below, Appellant.

Joseph Andrews, Esquire, Law Office of Joseph Andrews, 737 South Queen Street, Suite 3, Dover, Delaware, Attorney for Employer-Below, Appellee.

Jurden, P.J.

I. INTRODUCTION

On December 12, 2017, Kathleen Hellstern filed a Petition to Determine Additional Compensation Due to Injured Employee (the "Petition") with the Industrial Accident Board (the "Board"), seeking compensation for medical bills and travel expenses related to an injury to the L2-L3 level in her lumbar spine. Hellstern claims her L2-L3 level injury is related to a prior work accident that occurred on February 26, 2015 in which Hellstern injured the L3-L4 level of her low back, her right ankle and her right hip ("2015 Work Accident"). The Board denied Hellstern's Petition and found "that [Hellstern] has not met her burden of proof to show that she suffered a compensable injury to the L2-3 level of the lumbar spine as a result of the [2015 Work Accident] or a subsequent surgical procedure."[1] Hellstern now appeals the Board Decision dated June 26, 2018 (the "IAB Decision")[2] dismissing her Petition.[3]

For the reasons explained below, the Court finds the IAB Decision is supported by substantial evidence in the record and free from legal error, and that the Board did not abuse its discretion.

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[1] *Hellstern v. Culinary Services Group*, No. 1426858, at 20 (Del. I.A.B. June 26, 2018).
[2] *Id.*
[3] Claimant-Below Appellant's Opening Brief ("Op. Br."), E-File 62405495, at 4.

II. BACKGROUND

A. Factual Background

On February 26, 2015 (the 2015 Work Accident), Hellstern, while walking outdoors between two buildings at the Delaware Psychiatric Hospital, slipped and fell on a patch of ice.[4] At the time of the 2015 Work Accident, Hellstern was in the course and scope of her employment with Culinary Services Group ("CSG").[5] Hellstern and CSG agreed that the fall caused stenosis to the L3-L4 level, a right ankle sprain and right hip contusion.[6] Hellstern's total disability began on February 27, 2015 and CSG agreed to pay her lost wages and medical benefits.[7] On July 28, 2016, Hellstern had a L3-L4 fusion, laminectomy and Coflex removal.[8] Then on October 3, 2017, Dr. Rudin operated on Hellstern to remove the L3-L4 level hardware and to extend the fusion to L2-L3.[9]

On December 12, 2017, Hellstern filed a Petition with the Board, seeking acknowledgment for an additional injury to the L2-L3 level in her lumbar spine as reasonable, necessary and causally related to the 2015 Work Accident. CSG

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[4] *See* Op. Br., E-File 62405495, Ex. G, Stipulation of Facts ("Stipulation of Facts").
[5] *Hellstern*, No. 1426858, at 2. Hellstern testified that "[s]ince 2014 she was an operations manager for [CSG] working 60 to 70 hours per week." *Id.* at 8.
[6] *See* Stipulation of Facts. Her L4-L5 was uninjured and the hardware removal was unrelated. *Id.*
[7] *See* Stipulation of Facts; *see also Hellstern*, No. 1426858, at 2.
[8] *See* Stipulation of Facts. Hellstern was hospitalized from August 1, 2015 until August 2, 2015 because she had a wound hematoma evacuated. *Id.*
[9] *Hellstern*, No. 1426858, at 5; *see also* Op. Br. at 6 (citing Op. Br. Ex. C, Deposition of Dr. Rudin ("Rudin Dep."), 26:2-17).

disputes the claim that the L2-L3 level is causally related to the 2015 Work Accident. The Board held the hearing on May 23, 2018 to determine whether Hellstern's L2-L3 fusion and related treatment was reasonable, necessary and causally related to the previous accident.

B. The Board Hearing

At the hearing, Hellstern testified in-person and two witnesses testified via deposition: Dr. Bruce Rudin,[10] an expert witness, on behalf of Hellstern; and Dr. Robert Smith, an expert witness, on behalf of CSG.[11] The exhibits submitted to the Board were Dr. Rudin's deposition with bills, CSG's Summary of Pain Complaints from Dr. Smith's Testimony (the "Summary Chart"), and Dr. Smith's deposition.[12]

Dr. Rudin testified that Hellstern underwent a low back surgical procedure in 2009 to address "wear and tear" (the "2009 Surgery").[13] Dr. Rudin further testified that he first treated Hellstern in 2011 and ultimately performed a spinal

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[10] In preparation for his deposition, Dr. Rudin reviewed Hellstern's medical records and Dr. David Stephens' medical reports for CSG and Dr. Smith's defense report. *See Hellstern*, No. 1426858, at 2.

[11] Op. Br., E-File 62405495, Ex. B, Transcript of May 23, 2018 Hearing ("Trial Tr."), 39-75 (Hellstern testimony), 12-38 (Dr. Rudin testimony), 76-121 (Dr. Smith testimony).

[12] *Id.* at 12 (Deposition of Dr. Bruce Rudin with Bills), 65 (Summary of Pain Complaints from Dr. Smith's Testimony (the "Summary Chart")), 76 (Deposition of Dr. Robert Smith).

[13] Rudin Dep. 9. It is unclear, from the record, what Hellstern received during the 2009 Surgery because Dr. Smith testified that it was a L3-L4 surgery, Dr. Rudin testified that it was an L4-L5 fusion, and Hellstern first testified that she did not recall a 2009 surgery but confirmed the information on a 2010 doctor's note stating that she had a L3-L4 surgery and then later testified that it was a L4-L5 surgery. *See* Trial Tr. 53-55, 62-64, 69-70; *see also* Smith Dep. 29-30.

fusion at the L4-L5 level for degenerative problems (the "L4-L5 Fusion").[14] After the L4-L5 Fusion, Hellstern did relatively well, except for pain related to screws implanted during the L4-L5 Fusion.[15] In early February 2015, Hellstern received a hardware block for the pain from the screws and Dr. Rudin determined that she needed to have the hardware removed.[16] The 2015 Work Accident was a few weeks after Hellstern's hardware block. Dr. Rudin testified that the 2015 Work Accident caused an "asymptomatic condition in [Hellstern's] lumbar spine that was subsequently made symptomatic . . . ."[17]

When Hellstern became symptomatic, Dr. Rudin treated Hellstern's L3-L4 injury arising from the 2015 Work Accident.[18] Dr. Rudin testified that he tried to treat Hellstern conservatively but "ultimately" she needed surgery.[19] On April 28, 2015, Dr. Rudin performed a laminectomy[20] at the L3-L4 level and installed a

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[14] *See Hellstern*, No. 1426858, at 2-3; *see also* Rudin Dep. 9:19 ("She had some wear and tear in her back that was giving her a problem."). Dr. Rudin testified that prior to the 2015 Work Accident and after it, Hellstern received lumbar injections from Dr. Downing and pain management from Dr. Xing. *See* Rudin Dep. 14. Dr. Stephens was CSG's medical examiner after the 2015 Accident until his retirement in December 2016. Rudin Dep. 14.

[15] *Hellstern*, No. 1426858, at 3; *see also* Rudin Dep. 10:1-7.

[16] Trial Tr. 43-44.

[17] Rudin Dep. 10:8-15; *see also Hellstern*, No. 1426858, at 3. Dr. Rudin testified that a "3/23/15" MRI showed "broad-based herniation at L3-4." Rudin Dep. 9.

[18] *Hellstern*, No. 1426858, at 2.

[19] Rudin Dep. 10.

[20] A laminectomy is a minimally invasive procedure. *See Hellstern*, No. 1426858, at 3. Dr. Rudin testified, "I tried to do a minimally invasive procedure in her lumbar spine at L3-4. I did a laminectomy, meaning that I took the pressure off the nerve." Rudin Dep. 10:16-22.

Coflex (the "First L3-L4 Surgery").[21] Unfortunately, "over time, roughly about a year or so, [Hellstern] deteriorated and got worse."[22]

On July 28, 2016, to address Hellstern's worsening condition, Dr. Rudin performed a wide laminectomy at the L3-L4 level, removed the Coflex and inserted pedicle screws (the "Second L3-L4 Surgery").[23] In early August 2016, Hellstern was hospitalized and treated for a hematoma of her surgical wounds. Dr. Rudin testified that Hellstern "had a rough postoperative course but ultimately recovered" from the Second L3-L4 Surgery and "was tolerating her symptoms for the course of roughly a year when she started to get worse again."[24]

On December 7, 2016, Dr. Stephens, CSG's medical examiner, examined Hellstern, and related all of her medical treatment from the 2015 Work Accident to December 7, 2016 as reasonable, necessary and related to the 2015 Work Accident.[25] Dr. Stephens' note mentions that Hellstern had a waddling gait, which was an ongoing symptom from the L3-L4 injury.[26]

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[21] A Coflex is a device designed to make a worn segment last longer next to a fusion. *See Hellstern*, No. 1426858, at 3; *see also* Rudin Dep. 9-11.
[22] *Hellstern*, No. 1426858, at 3. MRI and CT scans taken after the April 28, 2015 surgery showed severe spinal stenosis at the L3-L4 level. *See id.*; *see also* Rudin Dep. 11:8-9.
[23] Dr. Stephens, CSG's medical examiner, opined that all of Hellstern's medical treatment was reasonable, necessary and related to the February 26, 2015 accident. *See Hellstern*, No. 1426858, at 3.
[24] *See Hellstern*, No. 1426858, at 3; *see also* Rudin Dep. 12:1-17.
[25] Rudin Dep. 14-15.
[26] Rudin Dep. 44-45.

In 2017, about a year postoperative, Hellstern developed progressively worsening problems in her lower extremities and had trouble walking any distance.[27] Dr. Rubin testified that, at this time, Hellstern was developing spinal stenosis, above the fusion, at the L2-L3 level.[28] Dr. Rudin testified that the progression of the L2-L3 stenosis was documented on scans from 2014, 2015, 2016 and 2017.[29]

Dr. Rudin testified that on May 18, 2017, in an effort to avoid surgery, he recommended Hellstern receive injections from Dr. Downing.[30] The injections did not help relieve Hellstern's pain.[31] As a result, Dr. Rudin performed a L2-L3 fusion on Hellstern on October 3, 2017 (the "L2-L3 Fusion").[32] Dr. Rudin testified that the last pain rating First State Orthopaedics recorded for Hellstern was a "6 to 7 out of 10," on December 13, 2017.[33]

Hellstern Testimony

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[27] Rudin Dep. 12:14-17; *see also Hellstern*, No. 1426858, at 3. Hellstern developed worsening leg pain, thigh pain, heaviness, tiredness and fatigue in her legs. *Hellstern*, No. 1426858, at 3.
[28] Rudin Dep. 15. Dr. Rudin testified that a CT scan from February 6, 2017 showed moderate to severe spinal stenosis at the L2-L3 level, which a March 8, 2017 MRI confirmed. Rudin Dep. 15-16.
[29] *See Hellstern*, No. 1426858, at 3; *see also* Rudin Dep. 13.
[30] Rudin Dep. 19.
[31] Rudin Dep. 19.
[32] Rudin Dep. 26, 41.
[33] Rudin Dep. 49.

At the hearing, Hellstern testified that she is fifty years old and her highest level of education was a year of college in computers.[34] In the fall of 2014, Hellstern started working for CSG as an Operational Manager for three state facilities.[35] Hellstern testified that she worked between sixty-five and seventy hours a week. Her duties included managing food production and the employees for all three facilities.[36] Hellstern also testified that she had to walk around the various facilities for her job. Hellstern further testified that before the 2015 Work Accident, she would walk two miles every day on her lunch break.[37]

Prior medical history

Throughout her testimony, Hellstern contradicted herself about her medical history prior to treating with Dr. Rudin. In the end, Hellstern testified that in 2009 she had a L4-L5 "de-compressive or laminectomy" performed by Dr. Abbott.[38] Hellstern also testified that she treated with Dr. Schumann in 2010 in relation to her 2009 Surgery and he referred her to Dr. Rudin.[39] Hellstern could not recall being treated in 2010 for chronic low back pain at the L3-L4 level.

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[34] Trial Tr. 40.
[35] Trial Tr. 40. Hellstern also testified that she worked for four years as the "Supervisor of dietary" at the "State of Delaware at Delaware City at Governor Bacon," before she worked for CSG. Trial Tr. 41.
[36] Trial Tr. 40.
[37] Trial Tr. 42.
[38] Trial Tr. 53-55, 62-64, 69-70.
[39] Trial Tr. 53-55.

During her direct examination, Hellstern testified that in 2011 Dr. Rudin performed the L4-L5 Fusion to address low back pain.[40] According to Hellstern, after the L4-L5 Fusion she felt fine until she fell in her bathtub towards the end of 2014 and began experiencing localized pain in her back.[41] As a result, Hellstern visited Dr. Rudin in early 2015. According to Hellstern, Dr. Rudin believed her pain related to hardware installed for her L4-L5 Fusion.[42] In early February 2015, Dr. Rudin's diagnosis was confirmed when Hellstern received a hardware block that gave her immediate relief.[43] Hellstern testified that Dr. Rudin recommended surgery to remove the L4-L5 hardware.[44]

2015 Work Accident and L3-L4 First Surgery

The day of the 2015 Work Accident, Hellstern testified she left her office to walk to the main kitchen, and while walking on the sidewalk between buildings, slipped on snow and ice and fell on her back and right side.[45] Hellstern testified that she sought treatment on the day of the 2015 Work Accident at "Medics (inaudible) on Route 13."[46] Hellstern further testified that she had a follow up with Dr. Rudin and he recommended injections from "Dr. Downing to see if it would

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[40] Trial Tr. 42.
[41] Trial Tr. 42-43.
[42] Trial Tr. 43.
[43] Trial Tr. 43-44. On direct examination, Hellstern testified that Dr. Downing performed the hardware block but on redirect examination Hellstern testified that Dr. Witherall performed the hardware block on February 12, 2015. *See* Trial. Tr. 43, 61.
[44] Trial Tr. 44.
[45] Trial Tr. 44 (falling on right hip, right ankle, and right arm).
[46] Trial Tr. 44. Dr. Rudin testified that Hellstern went to MedExpress. *See* Rudin Dep. 9.

help."[47] The injections, however, did not provide Hellstern with long lasting relief.[48] As a result, Dr. Rudin recommended surgery (the First L3-L4 Surgery) to install a Coflex to help "open up the spinal canal."[49]

Before undergoing the First L3-L4 Surgery, Hellstern had an MRI and a "CAT Scan, CT."[50] In April 2015, Dr. Rudin performed the First L3-L4 Surgery on Hellstern to install the Coflex and remove the L4-L5 hardware.[51] Hellstern testified that after the First L3-L4 Surgery, she had trouble walking, she could not walk up steps, her legs felt heavy and were numb, she had issues bending and lifting anything, and her hip and low back were constantly in pain.[52]

Comparing Symptoms and Pain Before and After the 2015 Work Accident

Hellstern testified that leading up to the 2015 Work Accident she did not have issues walking.[53] After the 2015 Work Accident, Hellstern testified that she experienced "enormous pain" in her back, right side, hip, ankle, and arm.[54] Hellstern stated that she had trouble walking after the 2015 Work Accident

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[47] Trial Tr. 44.
[48] Trial Tr. 46.
[49] Trial Tr. 46.
[50] Trial Tr. 46.
[51] Trial Tr. 46, 74-75. The procedure for the L4-L5 was not related to the 2015 Work Accident. *See* Stipulation of Facts.
[52] Trial Tr. 46-47.
[53] Trial Tr. 43, 45, 56. On redirect examination, Hellstern testified that leading up the 2015 Work Accident she did not have pain because of the hardware block. Trial Tr. 60.
[54] Trial Tr. 45.

because "[her] legs were heavy with the ankle. It made me not able to walk well because they said it was fractured or they put a cast on it."[55]

Second L3-L4 Surgery and Complications

Hellstern testified that after the First L3-L4 Surgery, she had more diagnostic tests, including "CT and MRIs," which showed stenosis and a bulging disc at L3-L4.[56] Based on those findings, Dr. Rudin recommended Hellstern undergo another surgery (the Second L3-L4 Surgery).[57] Hellstern testified that she underwent the Second L3-L4 Surgery in July 2016.[58]

Hellstern testified that she suffered several complications from the Second L3-L4 Surgery and was hospitalized for about a month. First, she was hospitalized for a blood clot and underwent two emergency surgeries.[59] Then she was diagnosed with diverticulitis.[60] Hellstern stated that she could not recall when she followed up with Dr. Rudin after the Second L3-L4 Surgery, but she dealt with the same issues she had after the First L3-L4 Surgery, as well as numbness and a burning sensation in her groin and thighs.[61]

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[55] Trial Tr. 45.
[56] Trial Tr. 47.
[57] Trial Tr. 47.
[58] Trial Tr. 47
[59] Trial Tr. 47. Hellstern testified that she had a third surgery to remove a medical bag that collected the blood clot. Trial Tr. 47-48.
[60] Trial Tr. 48.
[61] Trial Tr. 49.

Hellstern testified that at her follow up with Dr. Rudin, he recommended she have more diagnostic tests.[62] Hellstern then testified that in either April or May of 2017, Dr. Rudin told her the diagnostic tests showed stenosis and a narrowing of the canal at L2-L3.[63] According to Hellstern, Dr. Rudin told her the L2-L3 problem was from stress being placed on it by the L3-L4 fusion (the Second L3-L4 Surgery) and he recommended a third surgery.[64] Hellstern then underwent surgery for an L2-L3 fusion but testified that post-operatively she still experiences pain (the "L2-L3 Fusion").[65]

Hellstern testified that another CAT scan showed no bone growth and loose pins at L2-L3. Hellstern also testified, on cross examination, that she is a smoker but is quitting.[66] She testified that Dr. Rudin recommended a fourth surgery to secure the loose pins.[67] Hellstern testified that from 2016 to 2017, she was

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[62] Trial Tr. 50.
[63] Trial Tr. 50.
[64] Trial Tr. 51.
[65] Trial Tr. 51.
[66] Trial Tr. 58. Hellstern testified that Dr. Rudin informed her that smoking inhibits bone growth. She also testified that she quits smoking around the time her undergoes a surgery, that she currently only smokes one to two cigarettes a day, and she is prescribed Chantex. Trial Tr. 58-59. Hellstern further testified that after the L2-L3 Fusion she had the flu, pneumonia and a vitamin D deficiency, which she believes worsened the healing. Trial Tr. 59; *see also* Rudin Dep. 27.
[67] Trial Tr. 52.

prescribed Dilaudid and extended release morphine, but has been tapered off the latter.[68]

Pain Rating

On cross examination, CSG pointed out that during doctors' visits before and after the 2015 Work Accident, Hellstern rated her pain as a "7/10" and a "6/10" respectively.[69] In response to this information, Hellstern testified:

> There's a difference, I would say, in the pain that -- the pain I felt before the accident, how I would judge it to the pain that . . . [I] have to do the same numbers after the accident. There's a difference in pain level. It should have been really -- before the accident, it would have been a four or five. How I rate it today, the severity of the pain now that I have is a seven, if you understand that. At the time, I didn't know how severe the pain is [sic] or how to grade it, I should say.[70]

In response to a follow up question on why she did not just increase her pain rating by two, Hellstern testified that a nine or a ten out of ten are for extreme pain and that before the accident she did not realize that the pain could be worse and so she had to adjust her pain rating, accordingly.[71]

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[68] Trial Tr. 52. Dr. Rudin testified that Hellstern was on a very high dosage of high grade narcotics and that it would be better for Hellstern to take less, "if she can tolerate it." Rudin Dep. 37-38.
[69] Trial Tr. 57 ("7/10" reported on "2/4/15" and "6/10" reported on "2/26/15).
[70] Trial Tr. 57.
[71] Trial Tr. 58.

On redirect examination, Hellstern testified that during a doctor's visit on "5/3/17" her pain was a "7 or 8/10," her gait was significant because she was limping, and she had a decrease in the range of motion in her lumbar.[72]

Then during her recross examination, CSG admitted the Summary Chart over Hellstern's objection, explained the information and format of the Summary Chart, and asked Hellstern: "Do you have any disputes with the pain treatments that were referenced? . . . Or is your testimony that, well, now you've figured out how to recalculate pain?"[73] Hellstern responded:

> What I tried to explain to you before is, how I would have rated it by pain levels before the surgery . . . would have been different than after. There was clearly a difference in severity of pain that I feel, that I felt before and after the surgery. And it also could be, on the day, I could have taken -- it could have rained or something and caused me more pain or something at the time. But usually, my pain level is around a seven, since after the surgery.[74]

Then on re-redirect examination, Hellstern's counsel asked Hellstern questions about the various pain ratings in the Summary Chart.[75] Hellstern testified about her pain ratings for "8/24/2011," "6/25/14," "5/30/14," "2/4/15," "3/4/15," "4/28/15," and "8/19/15."[76]

Dr. Rudin Expert Opinion

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[72] Trial Tr. 61.
[73] Trial Tr. 65-66.
[74] Trial Tr. 66.
[75] Trial Tr. 70-74.
[76] Trial Tr. 70-74. The Board determined that Hellstern's counsel could not question Hellstern any further about the Summary Chart because they knew "she's had pain and [they knew] she's had issues. We don't – we're wasting time on this." Trial Tr. 73.

First, Dr. Rudin testified to Hellstern's medical history through her Second L3-L4 Surgery.[77] Dr. Rudin opined that Hellstern developed spinal stenosis at L2-L3 "as a result of the stiffening of the L3-4 level."[78] Dr. Rudin opined that the stress the fused discs (L3-L4 and L4-L5) would have absorbed was transferred to the L2-L3 level even though it could have transferred to either the disc above or the disc below.[79] Dr. Rudin testified that a CT scan from February 6, 2017 and a MRI from March 8, 2017 confirmed that Hellstern "developed additional wear and tear at the L2-3 level that certainly in my opinion . . . wouldn't have happened had she not had the spinal fusion at L3-4. So my diagnosis is an [sic] adjacent segment degeneration . . . ."[80] Dr. Rudin opined that adjacent segment degeneration ("ASD") is "the exact diagnosis that [Hellstern] has at L3-4 . . . . But it was made symptomatic by [the 2015 Work Accident]."[81]

Dr. Rudin opined that since Hellstern had her L3-L4 and L4-L5 fused the L2-L3 would be more likely wear out.[82] According to Dr. Rudin, this is the "normal expectation of what happens in a patient with a bad back that needs . . . a

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[77] *See generally* Rudin Dep. 7-13.
[78] Rudin Dep. 13.
[79] Rudin Dep. 13.
[80] Rudin Dep. 16-17. Dr. Rudin testified that his May 30, 2017 note states Hellstern's L3-L4 fusion healed but "has resulted in stenosis and is certainly responsible for the heaviness, tightness and fatigue . . . in her thighs, which prevents her from walking." Rudin Dep. 20.
[81] Rudin Dep. 17.
[82] Rudin Dep. 18.

spinal fusion."[83] In support of his opinion, Dr. Rudin testified that a person has five discs in their back and "theoretically" each disc does "20 percent of the work," but when a disc is fused the work is spread among the non-fused discs.[84] Dr. Rudin opined that because Hellstern had two fusions the remaining discs were now doing thirty-five percent of the work and the disc above the fusion, the L2-L3, always works harder, "[m]aybe 50 percent more work than it would normally do."[85]

Dr. Rudin testified that he will not treat a patient without looking at "the films."[86] In Dr. Rudin's opinion, the films are an important piece of information that he considers along with a patient's history, physical exam and the patient's objective complaints.[87] Dr. Rudin then testified that a decision to perform surgery is based on "many things" and he would never "operate solely based on a film because it's the patient's complaints that are what's important."[88] Dr. Rudin further testified, "[decisions to perform surgery are] not based on what was on the film. The film just confirms what we know when we see the patient."[89]

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[83] Rudin Dep. 18. Dr. Rudin further testified that when an older person has "bad discs" they do not last as long after a fusion compared to a young person with healthy discs. Rudin Dep. 22.
[84] Rudin Dep. 21.
[85] Rudin Dep. 21.
[86] Rudin Dep. 23. Dr. Rudin testified that he looks at the films because if the report has a mistake he does not want to treat a patient based on a mistake. Rudin Dep. 23-24.
[87] Rudin Dep. 24.
[88] Rudin Dep. 24.
[89] Rudin Dep. 25.

Dr. Rudin was highly critical of Dr. Smith's medical report and addendum (the "DME"). With respect to Dr. Smith's DME and the fact that Dr. Smith did not look at films from the last three years, Dr. Rudin testified: "I've actually never seen anything like it . . . . I mean, it's almost insulting [that Dr. Smith only compared one film from before and one film from after the 2015 Work Accident]. . . . It doesn't even make sense."[90] Dr. Rudin further testified with regard to Dr. Smith's findings that the X-ray did not look different before and after the accident, "flies in the face of any kind of real, . . . legitimate ethical, . . . ability to render an opinion."[91]

Dr. Smith Expert Opinion

Dr. Smith testified about Hellstern's medical history, including various studies and reports relevant to Hellstern's low back injuries.[92] He also testified that

[90] Rudin Dep. 28-29. Dr. Rudin testified that Dr. Smith did not comment on Hellstern's surgery, the films showing the progression of stenosis at L2-L3, three CAT scans and "two or three" MRIs since 2015, and that Dr. Smith does not mention that Hellstern "claudicates" and cannot walk. Rudin Dep. 29. On cross examination, however, Dr. Rudin concedes that Dr. Smith's DME included a physical exam, and noted that Hellstern had satisfactory gait. Rudin Dep. 33-37. Dr. Rudin then testified that even though Dr. Smith's DME contained that information, Dr. Smith did not ask questions which illicit subjective answers, such as "How far can Hellstern walk?" Rudin Dep. 33-34. Dr. Rudin also testified that he would ask those types of questions but would not attempt to determine if the patient's statements were accurate by testing how long or far the patient could walk. *See* Rudin Dep. 35-37.

[91] Rudin Dep. 29-30.

[92] *See generally* Op. Br. Ex. D, Dr. Smith's Deposition ("Smith Dep.").

when he conducts a DME he performs a records review, asks the patient for their subjective medical history and performs a physical exam.[93]

Dr. Smith testified there are two objective reasons to perform a lumbar fusion, like the L2-L3 fusion. Those two reasons are: (1) to "stabilize an unstable segment" or (2) to address a "progressive neurological deficit from the nerve roots coming out at that segment . . . from stenosis, of whatever kind, if it was degenerative or traumatic" then you would do a wide laminectomy.[94] Dr. Smith opined that Hellstern's records from 2010 or 2011 until the L2-L3 Fusion do not show instability at L2-L3 or a neurological deficit.[95] To support his opinion, Dr. Smith testified that the April 2016 electrodiagnostic study of Hellstern's lower extremities "only showed mild chronic L4 and L5 radiculopathy bilaterally. There was no mention of any L3 radiculopathy on that study."[96]

Dr. Smith further testified that Hellstern's medical records do not mention any instability at L5-S1.[97] Dr. Smith opined that this was significant because Dr.

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[93] Smith Dep. 7. Dr. Smith testified that a person's subjective history is important because it and the clinical findings are "two sides of the same coin basically" and without both it is nearly impossible to make a diagnosis. Smith Dep. 7-8. Dr. Smith also testified that the physical exam is important because it helps correlate with the other information and the records are important because they provide contemporaneous details. Smith Dep. 8-9.

[94] Smith Dep. 14-16.

[95] Smith Dep. 15-16.

[96] Smith Dep. 17.

[97] Smith Dep. 22. At this point in the deposition, Hellstern's counsel objected to Dr. Smith testifying to information not contained in his DME except for records from November 2017 onward because those were just produced. Smith Dep. 18-22. Dr. Smith testified that he "didn't notice [the ASD theory] until [he] looked at [Dr. Rudin's] recent records and his deposition, that there was never any mention of the L5-S1 level." Smith Dep. 23.

Rudin's theory of ASD at L2-L3 relies on the theory that a fusion causes an adjacent segment to be overburdened and cause the segment "to become unstable and symptomatic."[98] In Dr. Smith's opinion, the lack of documentation of any problems at the L5-S1 level showed that Dr. Rudin's theory of ASD at L2-L3 was inaccurate because the L5-S1 already has a natural fusion with the sacrum and the other adjacent segment, L4-L5, was fused in 2011.[99] Therefore, Dr. Smith opined that the L5-S1 is more likely to be the first segment to deteriorate, not L2-L3, which was adjacent to one fusion and not between two fusions.[100] Dr. Smith further testified that only between five and twenty percent of people develop ASD.[101] Dr. Smith testified that when a person does develop ASD it is the result of multiple factors including, preexisting disease, how the fusion was done and the position of the fusion.[102] Dr. Smith testified that Dr. Rudin fused the L3-L4 and L4-L5 levels in neutral positions, which is the proper position "so it doesn't cause any increased or decreased lordosis of the lumbar spine."[103] Dr. Smith also testified that the images and reports he reviewed showed that the L2-L3 was "compatible with age-related degenerative disease, which [Hellstern] had before

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[98] Smith Dep. 22-23.
[99] *See* Smith Dep. 23-24.
[100] Smith Dep. 23-24.
[101] Smith Dep. 24, 26-27.
[102] Smith Dep. 26-27.
[103] Smith Dep. 27.

the [2015 Work Accident]."[104] Dr. Smith testified that he looked at two films, the July 7, 2014 CT scan and the March 23, 2015 MRI, which showed that there was no difference in the L2-L3 as a result of the 2015 Work Accident.[105]

Dr. Smith testified that during his examination of Hellstern, her complaints were similar to those she told previous doctors and that she told him about her 2009 Surgery.[106] Dr. Smith testified that he checked for objective indicators to verify Hellstern's subjective complaints and his findings did not support performing an L2-L3 fusion.[107] Dr. Smith disagreed with Dr. Rudin's finding that surgery was necessary. Dr. Smith opined that the findings from the various reports "reflect preexisting degenerative disease that may have mildly progressed over that time period," but there was no instability or neurological deficit.[108]

Dr. Smith then testified as to various pain ratings recorded in Hellstern's medical records and stated that the pain complaints did not appear to change much over the past seven years, but opined that Hellstern's pain most likely had

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[104] Smith Dep. 28.
[105] Smith Dep. 28. Dr. Smith testified that there was "mild degenerative disease [at] L2-3 before [the 2015 Work Accident] and there appeared to be mild, essentially not changed degenerative disease after this accident." Smith Dep. 29. Dr. Smith testified that the 2015 Work Accident did not cause any "acute structural change" at the L2-L3 level. Smith Dep. 29.
[106] Smith Dep. 29-30.
[107] Smith Dep. 30-33.
[108] Smith Dep. 36-40.

intensified.[109] On cross examination, Dr. Smith testified that Dr. Rudin's May 31, 2017 note states Dr. Rudin's diagnosis of ASD and that he probably read it when he reviewed the records.[110]

Dr. Smith testified that Dr. Rudin's basis for performing the L2-L3 Fusion was moderate stenosis at L2-L3.[111] Dr. Smith found this odd because people with moderate stenosis usually do not "have a lot of symptoms."[112] Dr. Smith further testified that Dr. Rudin did not treat L2-L3 and did not attribute the progression at L2-L3 to the accident until recently.[113] Therefore, Dr. Smith opined that there was not a great change based on the imaging report and he could not "see how [Dr. Rudin] can [sic] come up with a theory that his adjacent fusion caused some great deficit or instability or neurological deficit at the L2-3 level."[114]

C. The Board's June 26, 2018 Decision to Deny Claimant's Petition

1. Relevant law as Determined by the Board[115]

Pursuant to 19 *Del. C.* § 2304, an employee is entitled to compensation "for personal injury or death by accident arising out of and in the course of

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[109] Smith Dep. 43-47. On cross examination, Hellstern's counsel read from various medical notes and had Dr. Smith verify as to the context surrounding Hellstern's pain ratings on particular visits. Smith Dep. 73-76.
[110] Smith Dep. 88, 92.
[111] Smith Dep. 24.
[112] Smith Dep. 25.
[113] Smith Dep. 36-40.
[114] Smith Dep. 41-42.
[115] *See Hellstern*, No. 1426858, at 19-21.

employment."[116] An employee's injury is compensable if "the injury would not have occurred but for the accident."[117] If the accident is the "setting" or "trigger," then causation is satisfied for compensability.[118] Further, "a preexisting disease or infirmity, whether overt or latent, does not disqualify a claim for workers' compensation if the employment aggravated, accelerated, or in combination with the infirmity produced the disability."[119] As the petitioner, the employee-claimant bears the burden of proof.[120] The employer can rebut the employee-claimant's claim via evidence rebutting the claim was work related.[121]

2. The Board's Application of the Law

The issue before the Board was whether Hellstern's L2-L3 level suffered adjacent segment degeneration ("ASD") as a result of the 2015 Work Accident. Hellstern's burden of proof was to show that her subsequent lumbar spine surgery would not have occurred but for the 2015 Work Accident. The Board held that Hellstern failed to meet her burden of proof. In support of its decision, the Board relied on Dr. Smith's opinion, finding his testimony more persuasive and more

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[116] 19 *Del. C.* § 2304.
[117] *Reese v. Home Budget Ctr.*, 619 A.2d 907, 910 (Del. 1992).
[118] *Id.* at 910. The accident does not need to be the sole cause or even a substantial cause for the injury to be compensable. *Id.*
[119] *Id.*; *see also State v. Steen*, 719 A.2d 930, 932 (Del. 1998) (determining the compensability of a subsequent injury "must be determined exclusively by an application of the 'but for' standard of proximate cause.").
[120] 29 *Del. C.* § 10125(c). The employer is not obligated to identify or prove the existence of a non-work cause of injury.
[121] *See Strawbridge & Clothier v. Campbell*, 492 A.2d 853, 854 (Del. 1985).

credible than Dr. Rudin's.[122] The Board relied on Dr. Smith's opinion because it found his explanation of ASD was "more scientifically reasonable and credible."[123] In particular, the Board pointed to: Dr. Smith's explanation that it would be unusual for the L2-L3 level to be affected instead of the L5-S1 level because being between two fused segments puts more stress on the L5-S1; Dr. Smith's testimony that ASD is uncommon and occurs in less than twenty percent of fusion cases; and Dr. Smith's opinion that a fusion is normally considered to address instability or neurological defects, which were absent in this case.[124] In summary, the Board held "[a]ll things considered there is scant evidence that surgery at the L2-3 level was reasonable, necessary or causally related to the work accident."[125]

III. STANDARD OF REVIEW

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[122] In *DiSabatino v. Wortman*, 453 A.2d 102, 106 (Del. 1988), the Court held that the Board could rely on one expert over another so long as its decision was based on substantial evidence. *See also General Motors Corp. v. McNemar*, 202 A.2d 803 (Del. 1964) (Board as finder of fact resolves conflict between opposing medical testimony). In this case, the Board found Dr. Rudin's opinion to be less credible. The Board noted that Dr. Rudin criticized Dr. Smith for not reviewing the films and that he testified that he always personally reviews the films. *Hellstern*, No. 1426858, at 20-21. However, the Board determined that Dr. Rudin did not rely on the films. *Id.* Instead, Dr. Rudin relied "mostly on the complaints of pain." The Board determined Hellstern's pain and complaints were "fairly constant throughout her treatment and were present to an extent even prior to the accident." *Id.* at 21. The Board determined that Hellstern "clearly has a degenerative condition in her back which already caused her to have a fusion prior to the work accident." *Id.* Finally, the Board held that "Dr. Rudin is justifying the failure of his prior fusion and the second one following the [2015 Work Accident] on what appears to the Board to be very thin evidence of [ASD]." *Id.*

[123] *Hellstern*, No. 1426858, at 20.

[124] The Board noted that Hellstern's subjective complaints of pain in her lower extremities did not "seem to have changed much during her course of care," (*Hellstern*, No. 1426858, at 21.) and that Dr. Smith's opinion is supported by an electrodiagnostic test that was negative for lower extremity radiculopathy. *Id.*

[125] *Hellstern*, No. 1426858, at 21.

When reviewing an appeal of a Board decision, the Court's role is limited to determining whether the Board decision is free of legal error and supported by substantial evidence.[126] "Substantial evidence" is less than a preponderance of the evidence but is more than a "mere scintilla."[127] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[128] The Court does not "weigh evidence, determine questions of credibility or make its own factual findings."[129] When an appeal contains an issue on a factual determination, the Court takes "due account of the experience and specialized competence of the agency."[130] The Court "will not substitute its judgment for that of an administrative body where there is substantial evidence to support the decision and subordinate findings of the agency."[131] Furthermore, discretionary rulings by the Board "will not be disturbed on appeal unless it is based on clearly unreasonable or capricious grounds."[132] On appeal, the Superior Court reviews legal issues *de novo*.[133]

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[126] *Christiana Care Health Sys., VNA v. Taggart*, 2004 WL 692640, at *10 (Del. Super. 2004) (citing *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960)); *see also Histed v. E.I. DuPont deNemours & Co.*, 621 A.2d 340, 342 (Del. 1993).
[127] *Richardson v. Perales*, 402 U.S. 389, 401 (1971).
[128] *Histed*, 621 A.2d at 342 (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).
[129] *Olney*, 425 A.2d at 614.
[130] *Taggart*, 2004 WL 692640, at *10 (citing 29 *Del. C.* § 10142(d)).
[131] *Id.* at *10 (citing *Olney*, 425 A.2d at 613).
[132] *Taggart*, 2004 WL 692640, at *10 (citing *Thomas v. Christiana Excavating Co.*, 1994 WL 750325, at *4 (Del. Super. 1994)).
[133] *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009).

Absent an error of law, the IAB Decision will be upheld if supported by substantial evidence unless the Board abused its discretion.[134] A Board commits abuse of discretion when it exceeds "the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce injustice."[135] If the Court determines that the Board abused its discretion, then the Court must determine "whether the error rises to the level of significant prejudice which would act to deny the [appellant] a fair trial."[136] In particular, when the issue before the Court is whether the Board abused its discretion when making an evidentiary ruling, the appellant must "establish a 'clear abuse of discretion' to be entitled to a reversal."[137]

IV. DISCUSSION

A. Substantial Evidence

Hellstern asserts that, based on a preponderance of the evidence, she demonstrated within a reasonable medical probability that she suffers from ASD at the L2-L3 level, which arose from the 2015 Work Accident and subsequent L3-L4 fusion. Therefore, Hellstern's L2-L3 Fusion and related treatment are reasonable, necessary and causally related to the 2015 Work Accident.[138].

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[134] *See Breeding v. Advance Auto Parts*, 2014 WL 607323, at *3 (Del. Super. 2014) (citing *Hoffecker v. Lexus of Wilmington*, 2012 WL 341714, at *2 (Del. 2012)).
[135] *Harper v. State*, 970 A.2d 199, 201 (Del. 2009)
[136] *Id.*
[137] *Id.*
[138] Claimant-Below Appellant's Opening Brief, E-File 62405495, at 22.

Hellstern further contends that the Board's decision is not supported by substantial evidence because there is no expert medical evidence in support of the Board's decision comparing diagnostic films before and after the Second L3-L4 Surgery. Thus, no expert medical evidence reliably supports that the L3-L4 fusion did *not* cause ASD at L2-L3.[139] Hellstern asserts that Dr. Smith's opinion does not support the Board's determination because Dr. Smith stated in his report that he could not determine causation without reviewing all of the imaging results, and in his addendum he stated he only reviewed two films, both of which pre-date the Second L3-L4 Surgery.[140]

Hellstern also argues that, unlike Dr. Smith, Dr. Rudin reviewed every diagnostic film and "would never determine causation, diagnosis, or need for surgery without looking at the diagnostic films."[141] Further, "Dr. Rudin is the only expert who reviewed all of the diagnostic films in this case and the only expert who can opine what the expert saw based upon reviewing the films."[142] Hellstern argues that Dr. Smith's testimony does not equate to substantial evidence simply because he is an expert witness.[143]

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[139] Op. Br. at 29.
[140] Op. Br. at 29-30.
[141] Hellstern's Reply Brief ("Reply Br."), E-File 62537793, at 8 (citing Ex C. 23, Rudin Dep.).
[142] Reply Br. at 11.
[143] Hellstern contends that she only stipulated to the fact that Dr. Smith was board certified and that her arguments go to Dr. Smith's bias and what weight should be given to his opinions. Hellstern cites to *Bank of America v. Sudler*, C.A. No.15A-02-003 CLS, at * 10 (Del. Super. 2015) (citing *Christiana Care Health Sys., VNA v. Taggart*, 2004 WL 692640, at *12 (Del.

In opposition, CSG asserts that substantial evidence supports the IAB Decision that Hellstern's L2-L3 Fusion was unreasonable and unnecessary.[144] CSG asserts that Hellstern's stipulation to Dr. Smith being a qualified expert witness enabled the Board to choose either qualified expert and disqualify the other.[145] Finally, CSG states that the Board found Dr. Smith's opinion to be "more scientifically reasonable and credible."[146] In response to Hellstern's argument that the Board did not rely on substantial evidence because the evidence did not include the comparison of the imaging films, CSG argues that the burden of proof rests with Hellstern and she failed to meet it.[147] CSG contends that Hellstern had the burden to prove her L3-L4 fusion caused ASD at L2-L3 and CSG had no burden to prove that the L3-L4 fusion did *not* cause ASD at L2-L3.[148] CSG also argues that

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Super. 2004)), for the proposition that expert testimony does not constitute substantial evidence by itself and instead must be based on substantial evidence. However, in *Sudler*, the Court held that there was nothing in the record to support the expert's testimony. *Sudler*, C.A. No.15A-02-003 CLS, at *11. In *Taggart*, the Court held that once an expert was stipulated to the Board "was entitled to accept" the expert's opinion and the weight to be given "to the expert testimony of a treating physician . . . is for the Board to determine, as the trier of fact." *Taggart* 2004 WL 692640, at *12. Therefore, Hellstern's stipulation to Dr. Smith as an expert witness allowed his opinion to be considered as substantial evidence. Furthermore, in *Taggart*, the Court held that when the employee attacked the formation of the defense expert's opinion, a *Daubert* objection, the employee waived their ability to appeal because the "proper time to object to an expert's qualifications or proffered testimony is at trial; not on appeal." *Id.* at *17. Therefore, Hellstern's veiled attempt to raise a *Daubert* objection on appeal was waived when Hellstern did not object at the hearing. Instead, Hellstern pointed to her deposition objection and explained her reasoning but in the end did not raise an objection at the hearing and instead stated "[b]ut I trust that the Board will make whatever finding it needs to in reviewing the record." Trial Tr. 82.

[144] CSG Answering Brief ("Answering Br."), E-File 62484552, at 27.

[145] Answering Br. at 27-28.

[146] Answering Br. at 28.

[147] Answering Br. at 31.

[148] Answering Br. at 31.

Dr. Rudin did not testify that a comparison of films before and after the L3-L4 fusion would prove causation. Instead, Dr. Rudin testified that "he did not perform the L2-L3 [Fusion] based on anything found in any films."[149] Therefore, CSG concludes that Hellstern failed to meet her burden of proof because her own expert did not provide evidence to support her argument regarding the lack of evidence on comparing films.

With regard to determining causation, the Board is the finder of fact and must base its decision on substantial evidence and must resolve medical testimony conflicts.[150] The Board may adopt one expert's opinion testimony over the other, which constitutes substantial evidence.[151] In Delaware, an "experienced practicing physician is an expert, and it is not required that he be a specialist in the particular malady at issue in order to make his testimony as an expert admissible."[152] On appeal, the Court shall not consider an appellant's reliance on "countervailing expert testimony" because "it was the proper function of the [B]oard to resolve any conflicts in the factual evidence presented to it."[153] When the Board adopts one expert's opinion and testimony over the other, the Board is not required to support its decision on more than the expert's testimony and opinion that is supported by

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[149] Answering Br. at 31.
[150] *General Motors Corp. v. McNemar*, 202 A.2d 803 (Del. 1964) *overruled in part on other grounds*, *Reynolds v. Continental Can Co.*, 240 A.2d 135 (Del. 1969).
[151] *See DiSabatino Bros. v. Wortman*, 453 A.2d 102, 106 (Del. 1982); *see also Breeding*, 2014 WL 607323, at *3; *Bullock v. K-Mart Corp.*, 1995 WL 339025, at *3 (Del. Super. 1995).
[152] *Wortman*, 453 A.2d at 106.
[153] *Breeding*, 2014 WL 607323, at *3.

other medical testimony and by the Board's evaluation of the claimant's credibility.[154]

The Court finds that the Board based its decision on substantial evidence because it is based on the expert opinion and testimony of Dr. Smith. This is a question of fact, which is a decision for the Board and not the Court. It is clear from the Board's Decision that it found Dr. Smith's explanation of ASD to be more scientifically reasonable and credible than Dr. Rudin's. Based on Dr. Smith's explanation that it would be unusual for the L2-L3 to be affected instead of the L5-S1 and that ASD is not a common problem ("occurring in less than 20% of fusion cases"),[155] the Board found that Hellstern did not prove "the existence of and causal relationship of the [ASD], the Board finds insufficient evidence to conclude in [Hellstern's] favor."[156] The Board found it noteworthy that, although Dr. Rudin criticized Dr. Smith for not reviewing all the films, "Dr. Rudin himself did not appear to rely on the films," but instead on the complaints of pain.[157] The Board determined that Hellstern has a degenerative condition in her back and that her pain and areas of complaint "remained fairly constant throughout her treatment and were present to an extent even prior to the accident."[158] The Board determined

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[154] *See Wortman*, 453 A.2d at 106.
[155] *Hellstern*, No. 1426858, at 20.
[156] *Id.*
[157] *Id.* at 20-21.
[158] *Id.* at 21.

that Dr. Rudin was attempting to justify the failing fusions that he surgically performed on "very thin evidence."[159] Finally, the Board notes that Dr. Smith's opinion is supported by Hellstern's "2016 EMG," which was negative for lower extremity radiculopathy.

B. The Board's Admission of CSG's Summary Chart

1. Admission of the Summary Chart

Hellstern argues that the Board's decision to admit the Summary Chart constitutes reversible legal error because the Summary Chart is "irrelevant, unnecessarily cumulative, and the probative value was outweighed by the prejudice of its admission."[160] To support this argument, Hellstern argues that the Summary Chart is "duplicative" because the information contained in the Summary Chart was already in the record through Dr. Smith's testimony. In opposition to Hellstern's argument, CSG argues that Hellstern admitted in her opening brief that

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[159] *Id.*

[160] Op. Br. at 36. In her Opening Brief, Hellstern cites to a number of cases that discuss evidentiary rules but those cases are based on the evidentiary standards for a court and not for the relaxed standards of an administrative agency. Hellstern cited the following cases: *United States v. Lambert*, 580 F.2d 740 (U.S. App. 5th Cir. 1978) (criminal trial preventing the admission of evidence); *see also United States v. Schuster*, 777 F.2d 264 (U.S. App. 5th Cir. 1985) (same); *United States v. Hill*, 643 F.3d 807 (U.S. App. 11th Cir. 2011) (same). The only case that involved a civil trial was *Jade Trading, LLC v. United States*, 67 Fed. Cl. 608 (U.S. Fed. Cl. 2005). In *Jade*, the Court precluded summary charts because the charts were not made available before trial *and* the information underlying the charts was "not reasonably made available" until well after the Court's order about disclosing evidence. *Jade*, 67 Fed. Cl. at 609. *Jade* is distinguishable from the instant case because the information the Summary Chart was based on was information Hellstern *gave* to CSG.

the Summary Chart was a summary of "voluminous information . . . already in the record [that was submitted to the Board] without objection."[161]

CSG correctly argues that the Board is "free to use [the Superior Court of Delaware's] rules of evidence as a guide" but those rules are not binding on the Board.[162] In addition, the Board's rules of evidence are "significantly more relaxed than those that apply in the Superior Court."[163] CSG correctly argues that the Board has relaxed rules of evidence because the Board is the finder of fact, not a

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[161] Answering Br. at 32 (citing Op. Br. at 33); *see also* Trial Tr. 64-65. Delaware Rules of Evidence 1006 provides: "The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court."

[162] Answering Br. at 32 (citing *Harasika v. State*, 2013 WL 1411233 at *3 (Del. Super. 2013)). In *McDonalds v. Fountain*, 2007 WL 1806163, at *2 (Del. Super. 2007), the Court held that administrative agencies "operate less formally than courts of law and, as such, rules of evidence do not strictly apply." The Court in *McDonalds*, further held that the probative value of a medical report, which was testified to by both medical experts, was minimal because "the Board was already substantially aware of the substance of the report." *Id.* In *McDonalds*, the employer unsuccessfully tried to admit the medical report of a doctor because it was hearsay and the employee was unable to cross-examine the author of the medical report. *Id.* The Board, however, considered the testimony from both parties' expert witnesses about the report. *Id.* Hellstern cites to *McDonalds* for the proposition that a fair and complete trial requires the Summary Chart to be produced before the hearing, and that Hellstern should have been able to fully examine the information. However, the information was already known to the parties and Dr. Rudin, Dr. Smith and Hellstern all testified as to information contained on the Summary Chart. In fact, the Summary Chart was not admitted into evidence until CSG's recross examination of Hellstern and then Hellstern's counsel continued with his third direct examination of the witness.

[163] Answering Br. at 32 (citing *Thomas v. Christina Excavating*, 1994 WL 750325, at *5 (Del. Super. 1994)). In *Thomas*, 1994 WL 750325, at *5, the Court held that Board's use of V.A. hospital records was not an abuse of discretion or an error of law. The rules of evidence of an IAB hearing are "significantly more relaxed than those that apply in . . . the Superior Court." *Id.* ("administrative boards ought not to be constrained by the rigid evidentiary rules which govern jury trials."). Instead, the Board may hear "all evidence which could conceivably throw light on the controversy . . . ." *Id.*

jury.[164] CSG further contends (and the Board apparently agreed) that the Summary Chart was "[t]he quickest way to show" that Hellstern's pain rating was consistent over several years and to contradict her testimony that "she never really 'knew' how to rate pain before the accident."[165] The Board did not commit legal error by admitting the Summary Chart because it was admissible under D.R.E. 1006, administrative hearings have relaxed rules of evidence, and the Board was not persuaded that the Summary Chart was unnecessary, cumulative or that the probative value was outweighed by the alleged prejudice.[166]

The policy behind relaxed rules of evidence is reflected in IAB Rule 14(B) which provides:

> The rules of evidence applicable to the Superior Court of Delaware shall be followed insofar as practicable; provided, however, that evidence will be considered by the Board which, in its opinion, possesses any probative value commonly accepted by reasonably prudent men in the conduct of their affairs. 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.[167]

Therefore, under IAB Rule 14(B), the Board was legally authorized to consider the Summary Chart because it possessed probative value.

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[164] Answering Br. at 32 (citing *Harasika v. State*, 2013 WL 1411233 at *3 (Del. Super. 2013)).
[165] Answering Br. at 33.
[166] Answering Br. at 32-33.
[167] Industrial Accident Board Rule 14.

Even if the Summary Chart was inadmissible under IAB Rule 14(B) it is admissible under D.R.E. 1006. Hellstern and CSG agree that Hellstern's pain ratings between 2009 and 2017 were already in the record, which triggers D.R.E. 1006. Pursuant to D.R.E. 1006, a party may use a summary "to prove the content of voluminous writings . . . that cannot be conveniently examined in court."[168] Using its discretion, the Board admitted a helpful summary of pain ratings contained in voluminous doctors' notes, which were the information already in the record.

In addition, the Summary Chart is admissible under D.R.E. 403. Hellstern argues that the Summary Chart was cumulative, unnecessary, and prejudicial and therefore, excluded under D.R.E. 403. D.R.E. 403 provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[169] In accordance with D.R.E. 403, the Board determined that the Summary Chart's probative value was not substantially outweighed by any of the dangers, including "needlessly presenting cumulative evidence." While it is true that the information in the Summary Chart was in the record, if CSG had been required to go through each doctor's visit to discuss the pain ratings, that would

[168] D.R.E. 1006.
[169] D.R.E. 403.

have been another reason to preclude the evidence under D.R.E. 403 as undue delay or wasting time. The Board decided to allow the Summary Chart to conserve time because the information was already in the record. Finally, the Board determined that the Summary Chart was not prejudicial because as previously stated the information was already in the record and all three witnesses testified to it. Thus, the Board rightfully admitted the Summary Chart under IAB Rule 14(B), D.R.E. 1006 and D.R.E. 403.

2. Questioning Hellstern about the Summary Chart

Hellstern argues that the Board committed legal error when it allowed CSG to question Hellstern about the Summary Chart but refused to allow Hellstern's counsel to question her about it. Hellstern asserts that allowing CSG to fully examine Hellstern about the Summary Chart requires it to be produced before the trial or hearing, otherwise the trial is unfair and incomplete.[170] Hellstern maintains that because CSG did not produce the Summary Chart until the hearing, Hellstern was unable to provide contradictory evidence. In addition, Hellstern argues that prohibiting opposing counsel from fully examining the witness while allowing the admitting counsel to examine the witness makes for an unfair and incomplete hearing.[171]

[170] Op. Br. at 35.
[171] Op. Br. at 35.

In opposition, CSG argues the Board properly exercised its discretion under D.R.E. 403 to exclude "evidence that is 'wasting time' and caused by 'presenting cumulative evidence.'"[172] CSG claims that the Summary Chart was the quickest way to rebut Hellstern's testimony that "she never really 'knew' how to rate pain before the accident," because she consistently rated her pain as a "7/10," but the day after the February accident rated her pain as a "6/10."[173] CSG's counsel points out that he asked one question about Hellstern's testimony regarding her pain ratings and then "moved on."[174] CSG also points out that Hellstern's counsel questioned Hellstern "about her complaints line by line" but her answers did not change her prior testimony and she "re-confirmed the pain numbers on the chart."[175]

The Court finds that the Board's decision to stop Hellstern's counsel from continuing his line-by-line examination of the Summary Chart was not legal error. As previously stated, the Board has the discretion to prevent the presentation of cumulative, time consuming evidence pursuant to D.R.E. 403. Hellstern had previously testified on cross, recross and re-redirect examination as to why she did not change her pain ratings. Her testimony did not change.

C. Limitations on Dr. Smith's Expert Testimony

[172] Answering Br. at 33 (citing D.R.E. 403).
[173] Answering Br. at 33.
[174] Answering Br. at 33; *see also* Trial Tr. 65-67.
[175] Answering Br. at 33.

Hellstern asserts that the Board committed legal error when it permitted Dr. Smith's opinion to go beyond his DME.[176] Hellstern further argues that allowing Dr. Smith to offer new opinions, after Dr. Rudin's deposition, is "patently unfair and prejudicial."[177] Hellstern contends that Dr. Smith's new opinions caused severe and unfair prejudice because Hellstern's counsel was unable to prepare a cross examination of Dr. Smith's new opinions, which were crucial to the issue before the Board.[178] Hellstern claims that CSG's late disclosure of Dr. Smith's medical opinions prejudiced Hellstern and CSG had a duty to produce Dr. Smith's medical opinions as soon as they became available. Finally, Dr. Smith's testimony must be limited to his DME because providing his DME "on the eve of an [Board] hearing, is a clear violation of both the spirit and the letter of discovery law."[179]

In support of her argument, Hellstern argues that an expert's opinion is limited to opinions in their report and that CSG cannot refute this argument with case law.[180] Hellstern further asserts that an expert cannot expand their opinion beyond their report.[181]

In response, CSG asserts that the reason Dr. Smith's opinion went beyond his DME was "entirely caused by [Hellstern] and [Dr. Rudin's] perpetration of a 9

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[176] Op. Br. at 23.
[177] *Id.* at 26.
[178] *Id.* at 26-27.
[179] Op. Br. at 28.
[180] *Id.*; Reply Br. at 12.
[181] Op. Br. at 26-28; Reply Br. at 12.

MB document dump more than two weeks after her deadline to produce that information expired."[182] CSG further asserts that Hellstern's delayed production violated I.A.B. Rules 9 and 11 and 29 *Del. C.* § 10122. Therefore, CSG had "no idea how [Hellstern] alleged L2-L3 was related,"[183] and without any information to respond to CSG assumed that Hellstern "believed the accident acutely changed L2-L3, which is why [CSG] was originally going to move to dismiss at [sic] hearing as the Agreement was 'only' L3-L4 was injured."[184] CSG alleges further that Hellstern's counsel knew about the information gap and "tacitly admitted this by stating his objection would not apply to anything gleaned from what he and Dr. Rudin produced weeks after the 30-day deadline."[185] Finally, CSG asserts that Dr. Smith did not know Dr. Rudin's theory of ASD until he received the 9 MB document production and Dr. Rudin's deposition.

The Court finds that the Board did not commit reversible legal error. The Board properly allowed Dr. Smith's testimony because it was probative and addressed Dr. Rudin's earlier testimony. Moreover, Hellstern's counsel objected to the testimony during the deposition, but he did not ask for a ruling during the hearing, and thus did not preserve Hellstern's right to appeal. Finally, as

[182] Answering Br. at 29.
[183] Answering Br. at 30.
[184] Answering Br. at 30.
[185] Answering Br. at 30.

previously discussed, the Board has discretion to admit evidence which might not be admissible under a strict application of the traditional rules of evidence.

V. CONCLUSION

For the foregoing reasons, the Court concludes that there is sufficient evidence in support of the IAB's decision to deny Hellstern's Petition to Determine Additional Compensation Due to Injured Employee and that the Board did not commit legal error or abuse its discretion. Accordingly, the IAB decision is **AFFIRMED**.

IT IS SO ORDERED.

Jan R. Jurden, President Judge

Original to Prothonotary
cc: Vincent J. X. Hedrick, II, Esq.
Joseph Andrews, Esq.