BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

RICHARD SEENEY,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1504254
	)	
	)	
MARVEL CONSTRUCTION CO.,	)	
	)	
Employer.	)	

CERTIFICATION OF FACTS TO ANY JUDGE OF THE SUPERIOR COURT

Richard Seeney ("Claimant"), through his counsel, requests that the Industrial Accident Board ("Board") issue a contempt referral against Chubb subsidiaries Insurance Co. of North America, ACE Property & Casualty Insurance Co. and their third-party administrator ESIS (collectively "Carrier"), the workers' compensation insurance carrier for Marvel Construction Co. ("Employer"), based on Employer's repeated unjustified delay and/or failure to comply with Board orders.

The Board does not have the power to issue a contempt order directly. Pursuant to title 19, section 2320(c) of the Delaware Code:

> If any person, in proceedings before the Board disobeys or resists any lawful order or process, . . .[or] neglects to produce after having been ordered to do so any pertinent document, . . . the Board shall certify the facts to any Judge of the Superior Court, who shall thereupon hear the evidence as to the acts complained of. If the evidence so warrants the Judge shall punish such person in the same manner and to the same extent as for a contempt committed before the Superior Court, or shall commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of or in the presence of the Superior Court.

It has been held that "when the Board seeks contempt proceedings in [Superior] Court for failure to comply with an order of the Board, it is acting in an administrative capacity initiating a judicial proceeding before [Superior] Court. In taking that action it is not performing its quasi-judicial function." *State v. Trimworks*, Del. Super., C.A. No. 90M-JN-23, Taylor, J., 1991 WL 15229, at *2 (January 25, 1991). As such, there is "no reason under applicable statutes or under constitutional principles which requires the Board to hold a hearing and make a decision thereon before instituting this proceeding. Respondent's constitutional rights are assured by the hearing which it will be entitled to have before this Court enters any order on the merits of this petition." *Trimworks*, 1991 WL 15229, at * 2.

In accordance with section 2320(c), the Board, by the Board Members whose signatures are set forth below, does hereby certify the following facts to any Judge of the Superior Court for appropriate contempt proceedings against Employer/Carrier and/or its agents:

(1) On November 6, 2020, Claimant filed a Petition to Determine Additional Compensation Due seeking a finding of a recurrence of total disability from April 25, 2002 ongoing, as well as payment of medical expenses and recognizing additional injuries to the toes, kidneys and skin as being causally related to Claimant's October 3, 1969 work accident. On December 5, 2020, Claimant filed a Petition for Disfigurement Benefits for disfigurement to multiple body parts. On December 31, 2020, and January 5 and January 13, 2021, Claimant filed additional Petitions to Determine Additional Compensation Due for permanent impairment benefits for impairment to a wide variety of body parts.

(2) On December 2, 2020, the Board, finding that Employer/Carrier had failed to provide complete production as required by Board Rule 11(C), issued an order to compel

Employer/Carrier to provide full and complete production within 20 calendar days of the order. *See Seeney v. Marvel Construction*, Del. IAB, Hearing No. 1504254 (December 2, 2020).

(3) On January 26, 2021, the Board issued an order concerning sanctions against Employer/Carrier for failure to comply with the December 2nd order. The Board stated:

> After considering the arguments, the Board finds that ESIS, the workers' compensation insurance carrier for Marvel, is a large, sophisticated company that has been paying Claimant's workers' compensation benefits since 1969 and it most certainly had a file for this claim. The Board was clear its December 2, 2020 Order that the file must be produced by December 21, 2020 or Marvel/ESIS could face sanctions. It appears that ESIS was content to simply say the file was lost without regard to the impact such a loss has to Claimant or the workers' compensation process. The records that have been produced were not produced to Claimant until January 15, 2021 and there are still missing records dating back to 1969. Given such a blatant disregard for and noncompliance with the Board's December 2, 2020 Order, the Board finds that a fine in the amount of $1,500.00, as requested, is appropriate in this case.

Seeney v. Marvel Construction Co., Del. IAB, Hearing No. 1504254, at 5 (January 26, 2021). The Board further elaborated:

> On January 22, 2021, a few days after the hearing, Marvel's counsel contacted the Board's Hearing Officer and Claimant's counsel to inform the Board and Claimant that more records were found since the Motion hearing by using the partial claim number Claimant pointed out during the hearing. The partial claim number was in Marvel's possession the entire time, as it was in the adjuster's records, but Marvel/ESIS did not even try to locate the documents using the partial claim number until after Claimant's counsel mentioned it during the hearing. This is another example of Marvel/ESIS not doing everything in its power to find the original file until faced with consequences. It is helpful for all parties that more records have been located and will be sent to Claimant; however, it does not change the fact that Marvel/ESIS did not comply with the Board's December 2, 2020 Order by producing the documents on time and did not even look for those documents in its Buffalo, New York storage facility until Claimant brought the partial claim number to Marvel's attention during this hearing. Marvel has been content with simply stating that the records were lost without

> actually doing everything in its power to find the records that it is required to keep and required to produce.

Seeney v. Marvel Construction Co., Del. IAB, Hearing No. 1504254, at 5-6 (January 26, 2021).

(4) Both parties filed for reargument of the Board's January 26, 2021 Order. In part, Employer/Carrier expressed concern about the portion of the order discussing Employer/Carrier finding more records after the Motion Hearing, particularly the suggestion that it used the partial claim number to locate those records. The Board observed:

> If the Board was incorrect in its statement that the records were found due to Marvel using the partial claim number that Claimant pointed out during the Motion hearing, the Board retracts that portion of the sentence; however, it does not change anything of substance in the Board's January 26, 2021 Order, because Marvel still found the additional records well after the deadline set forth in the Board's December 2, 2020 Order to fully respond to the request for production by December 21, 2020. Marvel had not yet produced the newly found records to Claimant's counsel at the time it notified the Board and Claimant on January 22, 2021 of the discovery of those additional records.

Seeney v. Marvel Construction Co., Del. IAB, Hearing No. 1504254, at 3-4 (February 19, 2021). The Board went on to state that it found no reason to amend any of the remainder of the language of the January 26th Order.

(5) About the same time as this reargument order was being considered, the Board considered a motion by Employer/Carrier that, in part, sought to compel Claimant to respond to its production request. The Board observed that "Employer has requested that Claimant be required to respond to Employer's Request for Production; however, Employer has not detailed to which specific production requests Claimant should be compelled to respond." *Seeney v. Marvel Construction*, Del. IAB, Hearing No. 1504254, at 5 (February 26, 2021). The Board recognized that the age of the case (the injury having occurred in October of 1969) had created difficulties on both sides in producing relevant documents. Despite the fact that Employer had failed to "provide

detailed information as to what information has not been produced," the Board issued a general order for Claimant to produce any documents in his possession, custody or control that had not already been produced or authorized for release. *Id.*, at 5-6. The Board also denied Employer/Carrier's request for a continuance of the scheduled hearing on the merits of Claimant's petitions.

(6) The merit hearing began on March 12, 2021. The Board subsequently issued an order noting that, during that first day of the hearing, it came to light that Claimant had not produced divorce documents, including correspondence with his former attorney. Also, during the testimony of Edward Bouscaren (an adjustor for Employer/Carrier), "it was discovered that ESIS had not produced all of the documents requested that are within ESIS's possession. Specifically, ESIS did not produce the entire payment log dating back to 1993 that is in ESIS's possession, as it was in the computer system that Mr. Bouscaren was viewing during his testimony." *Seeney v. Marvel Construction Co.*, Del. IAB, Hearing No. 1504254, at 2 (March 18, 2021). Mr. Bouscaren could not explain "why the entire payment log contained in the computerized record was not produced even to Marvel's attorney. The payment log produced only dated back to 2016." *Id.* Accordingly, the Board ordered that Employer/Carrier produce the entire payment log and any other requested documents it possessed that had not been produced, while Claimant was to produce his divorce documents and a privilege log for those things claimed to be protected under privilege.

(7) Claimant came back before the Board on May 13, 2021, again seeking production of documents from Employer/Carrier. This consisted of two items. First, Claimant sought production of a "privilege log" to detail why areas of redaction on a produced adjuster activity log should be given privilege protection. Second, when the merit hearing began on March 12, 2021, Employer/Carrier announced that it was now accepting compensability of Claimant's kidney

injury, although it was disputing the degree of permanent impairment. Employer/Carrier had had a medical report prepared by a nephrologist (Dr. Wood) concerning causation of the kidney injury but maintained that the medical report was "not relevant." The Board agreed with Claimant that both the privilege log and the medical report were relevant information and were to be produced. *See Seeney v. Marvel Construction Co.*, Del. IAB, Hearing No. 1504254, at 1-2 (May 13, 2021).

(8) The merit hearing was held on March 12, May 19 and May 24, 2021. The Board conducted deliberations on June 7 and July 12, 2021. The decision on the merits was issued on July 20, 2021. *See Seeney v. Marvel Construction Co.*, Del. IAB, Hearing No. 1504254 (July 20, 2021)(hereinafter "*Merit Decision*"). In this decision, among other things, the Board discussed Claimant's need for a home health aide:

> It is clear to the Board, though, through all of the medical testimony that Claimant's sisters are physically unable to take care of Claimant's daily hygiene and wound care at this point. The Board finds that it is unfair to ask Claimant's sisters to take care of his hygiene and wound care. Claimant's skin is paper thin and very fragile, so he must be treated extremely carefully when moving him, because even rough fabric can tear his skin. Therefore, the Board accepts the testimony from Drs. Andrews and Meyers that additional professional skilled care is required at this time. Dr. Meyers opined that Claimant would have a better prognosis and fewer hospitalizations if he has appropriate skilled nursing care for his wound care. Dr. Meyers explained that certain aspects of Claimant's hygiene require skilled care because of the wounds on his lower body and his sister or an average person cannot deal with them. Dr. Perkel agreed with Dr. Meyers regarding Claimant's hygiene care and the home care. The Board accepts Dr. Perkel's opinion that it is reasonable to start with the home health aide at 8-hours per day to see if that is sufficient with the ability to increase to 16-hours per day if necessary, along with a skilled nurse once a week to treat Claimant.

Merit Decision, at 169. The Board went on to hold:

> Claimant should be getting a home health aide for at least 8 hours per day and a skilled nurse once a week at a minimums based on Dr. Perkel's testimony. Claimant needs to be able to take a shower on a daily basis, not a sponge bath, for proper hygiene. Also, Claimant is

> able to see either his primary care physician or a spinal cord injury specialist every other month if those doctors deem it necessary.

Merit Decision, at 170.

(9) In that same decision, the Board made the following observation:

> The Board feels compelled to add that it believes ESIS acted egregiously in handling Claimant's claim over the past 52 years and it finds Mr. Bouscaren's testimony is not credible. Although Mr. Bouscaren testified that an adjustor needs to be responsive to a claimant, he and the other adjustors at ESIS have not been responsive to Claimant in a timely manner over the decades of this claim.

Merit Decision, at 175-176.

(10) The parties came before the Board again on September 8, 2021, on Claimant's motion to compel payment of certain outstanding medical expenses to Claimant's counsel instead of directly to the providers. It was noted that Employer/Carrier had received "clean claim" documentation of Claimant's end-stage renal failure and dialysis treatment with Fresenius Kidney Care on August 27, 2021. The Board ordered Employer/Carrier "to issue full payment for all Fresenius/kidney related treatment, from July 24, 2020 through July 21, 2021" directly to Claimant's counsel "within thirty days of August 27, 2021." *Seeney v. Marvel Construction Co.*, Del. IAB, Hearing No. 1504254, at 5 (September 17, 2021).

(11) Employer/Carrier moved for reargument of the September 17th order, arguing that the clean claim documentation was not received until August 27, 2021, and so, at the time of the motion hearing, it was under no obligation to pay. Employer/Carrier denied that it agreed to pay the Fresenius bills for the July 24, 2020 to July 21, 2021 dates of service. In denying the reargument, the Board stated:

> Claimant made a claim for ongoing kidney dialysis treatment with Fresenius as early as November 6, 2020 (now nearly one full year ago). Employer has accepted the kidney claims on at least three occasions: at the March 12, 2021 merit hearing, via email

> correspondence on April 26, 2021, and then again at the September 8, 2021 motion hearing. In its Motion for Reargument, Employer alleges that it "never denied" the kidney injury claims; however, on April 26, 2021, Employer's own counsel confirmed in correspondence to Claimant's counsel that Employer/carrier "...is **no longer** contesting the kidney issue (*emphasis added*)." Claimant's Response to Employer's Rule 21 Motion, Exhibit 10. Employer's counsel's use of the terms "no longer" confirms that Employer had contested the kidney issue prior to that.
>
> Furthermore, in its September 17, 2021 Order, the Board directed Employer to pay the July 2020 to July 2021 Fresenius claims, as soon as the review period date had passed (thirty days from receipt on August 27, 2021). As set forth in 19 *Del. C.* § 2322, the Board's September 17, 2021 Order required Employer to pay clean claims within 30 days. The Board's Order confirmed the statutory requirement to pay and the date for submitting any claim for Utilization Review ("UR")(if UR had been applicable) has expired. Furthermore, Claimant's kidney treatment is not part of the treatment guidelines, subject to UR appeal. Therefore, Employer's acceptance of the kidney injury results in its obligation to pay for that treatment.

Seeney v. Marvel Construction Co., Del. IAB, Hearing No. 1504254, at 3-4 (November 4, 2021). The Board went on to recite the statutory requirement for payments to be made within 30 days of the receipt of "clean claim" documentation (which in this situation had been received on August 27, 2021). The Board held:

> Employer may contest claims only if there is a **good faith basis** for doing so (emphasis added). In this case, Claimant's dialysis treatment clearly is required treatment for Claimant's kidney issue. Having already accepted the kidney issue as compensable several times (as early as March 12, 2021 and as recently as September 8, 2021), Employer's continued contesting of the payment of required dialysis treatment lacks a good faith basis.

Id., at 4. The Board ordered Employer/Carrier to make the ordered payments within ten days of the Board's order.

(12) Employer/Carrier appealed both the September 17, 2021 order and November 4, 2021 order to Superior Court. Following oral argument before Judge Clark, that appeal was

dismissed with prejudice. *Marvel Construction Co. v. Seeney*, Del. Super., C.A. No. K21A-11-002, Clark, J. (April 14, 2022)(ORDER).

(13) On November 9, 2021, the parties appeared before the Board on Claimant's petition seeking to have Employer/Carrier pay for a specially equipped vehicle. Claimant presented evidence that the vehicle was reasonable, necessary and related to the 1969 work accident. Employer presented no contradictory evidence. Claimant moved for a directed verdict. Employer requested thirty days to review the vehicle expense claim. The Board granted this request. On December 7, 2021, Employer/Carrier notified the Department of Labor that it had paid part of the vehicle expense claim. The Board subsequently issued an order, observing:

> In this case, Claimant filed a petition, obtained an expert, and presented his full case at a merit hearing. At the merit hearing, Employer presented no evidence to contradict Claimant's expert witness testimony. Furthermore, after presenting no contradicting evidence and being allowed an additional thirty days to review Claimant's vehicle expense claim, Employer acknowledged compensability of the claim and paid Claimant $40,660.00 for vehicle modification expenses. Thus, without offering any persuasive evidence of its own, Employer conceded compensability, not only after Claimant had already engaged in a significant amount of preparation, but also after Claimant had presented his case at a merit hearing. Additionally, Employer made no settlement offer prior to the merit hearing. Therefore, the Board finds Claimant is entitled to a directed verdict, as well as an attorney's fee and medical expert fees.

Seeney v. Marvel Construction Co., Del. IAB, Hearing No. 1504254, at 2-3 (January 24, 2022).

(14) Employer/Carrier moved for reargument requesting that this order be vacated, arguing that the issue of the compensability of a specialized van was not properly noticed to be decided at the November 9, 2021 hearing. The Board disagreed, observing that Claimant had raised the claim of a specially equipped vehicle five months prior to the November 9th hearing and Employer itself, on October 11, 2021, had specifically objected to the claim arguing that the Board had previously declined to make such an award. Employer also argued that the claim was not ripe

because the Board had granted Employer's request to leave the record open for 30 days to review the vehicle expense claim. The Board rejected this argument:

> Employer's assumption is misguided, as the Board granted Employer's request to leave the record open to allow the parties time to settle the claim without further Board intervention. Based on the parties' subsequent and continued filings, the Board's attempt to encourage cooperation between the parties was overly optimistic. Had Employer considered the specialized van claim when it first received notice of the claim, or at anytime prior to the November 9, 2021, the matter could have resolved, as Employer ultimately conceded the compensability of the specialized van's costs. Had Employer conceded the van's expense at any time prior to after Claimant was required to present his case at a merit hearing, Claimant could have saved litigation expenses and time, which Employer has since been ordered to pay.

Seeney v. Marvel Construction Co., Del. IAB, Hearing No. 1504254, at 4-5 (February 24, 2022).

(13) As noted earlier, ¶ 8, in the *Merit Decision* the Board had ordered that Claimant have a home health aide for at least 8 hours per day and a skilled nurse once a week, at a minimum, to provide him with proper hygiene and wound care. Employer/Carrier did not appeal that decision and it became a final order of the Board by August 19, 2021. Despite this, Claimant's counsel represents that, beginning by at least September 2, 2021, he was contacting Employer/Carrier's counsel to have the home health aide provided for Claimant's care. Claimant's counsel represents that Employer/Carrier delayed in complying with the Board's order, such that no home health aide was provide by the end of February 2022. Claimant's counsel further represents that Claimant, lacking such aide, developed new decubitus ulcers which then became infected, leading to hospitalization for sepsis. Claimant died on March 7, 2022. The cause of death listed on the death certificate was "long term sequelae of paraplegia (neurogenic bladder, renal failure, decubitus ulcers) crush injury to lower thoracic spine."

True and correct copies of the Board's orders and decision referenced above are attached, along with a copy of Claimant's death certificate.

In accordance with title 19, section 2320(c) of the Delaware Code, the Board, by the Board Members whose signatures are set forth below, certifies the foregoing facts to any Judge of the Superior Court for appropriate contempt proceedings concerning Employer/Carrier's conduct and the conduct of its agents in this litigation.

IT IS SO ORDERED this 3rd day of June, 2022.

INDUSTRIAL ACCIDENT BOARD

Mark A. Murowany (Chair)
MARK A. MUROWANY

Robert J. Mitchell
ROBERT J. MITCHELL

I, Christopher F. Baum, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

Christopher F. Baum

Mailed Date: June 3, 2022

OWC Staff

Joseph Andrews, Esquire, & Taylor E. Trapp, Esquire, for Claimant
Scott L. Simpson, Esquire, for Employer/Carrier