IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

KRISTINA MILLER,	)	
	)	
Appellant,	)	
	)	
V.	)	C.A. No. N10A-11-005 JRS
	)	
BROADMEADOW HEALTH CARE,	)	
	)	
	)	
	)	
Appellee.	)	

Date Submitted: November 1, 2011
Date Decided: February 1, 2012

Upon Consideration of an
Appeal From the Industrial Accident Board.
AFFIRMED.

O R D E R

This 1st day of February, 2012, upon consideration of the appeal of Kristina Miller ("Ms. Miller") from the decision of a Hearing Officer of the Industrial Accident Board (the "IAB") denying her Petition to Determine Additional

Compensation Due,[1] it appears to the Court that:

1. On June 28, 2006, Ms. Miller sustained a work related injury while employed at Broadmeadow nursing facility ("Broadmeadow") operated by Broadmeadow Health Care.[2] Ms. Miller, a Certified Nursing Assistant, was injured while assisting a patient in the bathroom when the patient began to fall backwards.[3] In an attempt to keep the patient from being injured, Ms. Miller reached her right arm behind the patient's back to break the fall, taking all of the weight of the patient.[4] The strain of this motion caused Ms. Miller immediate pain in her upper back, specifically, on the top of her right shoulder and in the thoracic region of her back.[5]

2. Immediately after the incident, Ms. Miller reported to the charge nurse that she had hurt her upper back, right shoulder and right arm, and was sent to the Occupational Medical Clinic ("OMC").[6] The OMC diagnosed Ms. Miller with a thoracic strain. Subsequently, Ms. Miller saw Michael Mattern, M.D. ("Dr.

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[1] The Industrial Accident Board of the State of Delaware, Decision on Petition to Determine Compensation, Hearing No. 1288590 (Oct. 25, 2010) (hereinafter "IAB Decision") at 10-11.

[2] *See* IAB Decision at 2, 4.

[3] *Id.* at 4.

[4] *Id.* at 5.

[5] *Id.*

[6] *Id.*

Mattern"), an orthopedic surgeon, two or three times and received two months of physical therapy from Christiana Care. Dr. Mattern diagnosed Ms. Miller with a dorsal (or thoracic) back strain with secondary levator scapular syndrome. Ms. Miller's treatment at Christiana Care was directed to the area of the right shoulder blade, just below the neck, and the records mention pain in the cervicothoracic junction (where the last cervical segment ends and the thoracic spine begins).[7] On August 22, 2006, Dr. Mattern discharged Ms. Miller from care with no restrictions and Ms. Miller returned to full duty at Broadmeadow sometime in August or September.[8] Ms. Miller continued to do home exercises as instructed in physical therapy.[9]

3. Approximately seven months later, in April of 2007, Ms. Miller went to William Atkins, M.D. ("Dr. Atkins") with complaints of pain in her upper back and neck radiating into her arm, as well as headaches.[10] Dr. Atkins ordered two MRIs

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* During the IAB hearing, Ms. Miller testified that between August 22, 2006 and April 5, 2007, she maintained monthly visits to her primary care physician, Kanchan Kotak, M.D. ("Dr. Kotak"), for pain management related to her back, as well as for neck pain and headaches that had developed since her work accident. *See* Industrial Accident Board of the State of Delaware, Transcript of Hearing No. 1288590 (Aug. 27, 2010) (hereinafter "Hearing Tr.") at 30-34. Broadmeadow objected to the consideration of this information because Dr. Kotak's medical records (continued...)

which indicated nothing remarkable in Ms. Miller's thoracic spine, but showed bulging of Ms. Miller's discs in the cervical area. Dr. Atkins treated Ms. Miller with pain medication and sent her for chiropractic care with Todd A. Richardson, D.C. ("Dr. Richardson"), which focused on the neck and right shoulder blade. Ms. Miller was also referred to three other doctors with no long term benefits provided.

4. Broadmeadow acknowledged that Ms. Miller's thoracic sprain was compensable as it related to her June 28, 2006 work injury.[11] On March 15, 2010, Ms. Miller filed a Petition to Determine Additional Compensation Due, seeking payment for medical expenses incurred for subsequent treatment to her cervical spine. For purposes of this appeal, the central question posed to the IAB was whether the medical expenses claimed by Ms. Miller for treatment of her cervical spine were compensable.[12]

5. On August 27, 2010, by stipulation of the parties, a Hearing Officer of

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[10](...continued)
had never been produced to Broadmeadow. *Id.* at 30. In its October 25, 2010 decision, the IAB struck Ms. Miller's testimony with regards to Dr. Kotak based on the lack of notice and resulting prejudice to Broadmeadow. IAB Decision at 8.

[11] Hearing Tr. at 5-6. *See* 19 *Del. C.* § 2322 ("During the period of disability the employer shall furnish reasonable surgical, medical, dental, optometric, chiropractic and hospital services, medicines and supplies . . . as and when needed . . . .").

[12] Hearing Tr. at 5-6.

the IAB held a hearing on Ms. Miller's petition for additional compensation.[13] At the hearing, the relevant medical testimony was offered by Selina Y. Xing, M.D. ("Dr. Xing"), a specialist in physical medicine and rehabilitation, and Andrew J. Gelman, D.O. ("Dr. Gelman"), an orthopedic surgeon.

6. Dr. Xing testified by deposition on behalf of Ms. Miller and opined that Ms. Miller's complaints of neck pain radiating into both shoulders were related to cervical discogenic pain and a cervical nerve injury sustained in the work accident of June 28, 2006. In reaching her opinion, Dr. Xing, who began treating Ms. Miller in September 2008, considered the fact that Ms. Miller's thoracic MRI, dated April 9, 2007, was unremarkable, while Ms. Miller's first cervical spine MRI, dated the same day, indicated multiple levels of annular bulges with right-sided C3/C4 neuroforaminal stenonis (comparable to a spur or narrowing-type change in the spine).[14] In addition, a second MRI performed on January 8, 2010 indicated a disc protrusion at the C5/6 and C6/7 levels, suggesting that Ms. Miller's condition had gotten worse.[15] Dr. Xing noted that, in her experience, it was rare to have an upper

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[13] *See* 19 *Del. C.* § 2301B(a)(4),(6) (granting a Hearing Officer the power to stand in the position of the IAB and to conduct hearings by consent of the parties); Hearing Tr. at 5.

[14] Deposition of Selina Y. Xing, M.D., Hearing No. 1288590 (Aug. 24, 2010) (hereinafter "Xing Dep.") at 8. Dr. Xing also mentioned that Dr. Atkins took an EMG in 2007 which indicated bilateral C5/6 radiculitis. *Id.* at 15.

[15] Xing Dep. at 16-17.

thoracic disc injury and more common to find pain radiating from the cervical area.[16] Furthermore, Ms. Miller's chronic pain had lasted longer than a normal thoracic sprain, indicating that disc pathology was involved. According to Dr. Xing, the pain Ms. Miller described to her other providers, including Dr. Pawan Rastogi, an orthopedic surgeon, Dr. Atkins and Dr. Gelman, was typical of pain generated in the cervical spine. On cross-examination, Dr. Xing admitted that she had not seen the records from Ms. Miller's initial visits to the OMC or Dr. Mattern.[17] The only medical records following Ms. Miller's initial thoracic sprain diagnosis that Dr. Xing had reviewed were her physical therapy notes from Christiana Care.[18] When shown the records from Dr. Mattern, Dr. Xing agreed that he had diagnosed Ms. Miller with a dorsal back strain on July 31, 2006.[19]

7. Dr. Gelman testified by deposition on behalf of Broadmeadow and opined that, based on his physical evaluation of Ms. Miller on April 30, 2008, and his review of Ms. Miller's medical records, Ms. Miller's initial thoracic (or dorsal) strain in June 2006 was unrelated to Ms. Miller's subsequent neck pain and alleged cervical injury. In his opinion, Ms. Miller's initial thoracic spine injury was treated with

[16] *Id.* at 14-15.

[17] *Id.* at 23-24.

[18] IAB Decision at 4.

[19] *Id.*

physical therapy and was probably "of a self-limiting nature and resolved itself."[20] Dr. Gelman attributed Ms. Miller's subsequent neck pain to a mild cervical spine degenerative facet disease depicted in her April 2007 MRI, unrelated to *any* traumatic injury, including that which occurred on June 28, 2006.[21] Dr. Gelman's diagnosis was based on several factors including the lack of any complaints to her early medical providers of "pain in the neck with range of motion, palpable pain in the neck, Spurling's findings on physical exam testing, [or] any objective neurological issues with regards to either upper extremity."[22] On cross-examination, Dr. Gelman confirmed that he had not seen any complaints of neck pain due to this degenerative disease in Ms. Miller's records prior to her work accident and also admitted that physiologically, in a hypothetical anatomy, the right trapezius, the levator scapular region, and the rhomboid (all areas in which Ms. Miller originally had pain) were served by nerves in the cervical spine, specifically C3/C4.[23]

8. On October 25, 2010, the IAB issued its decision in favor of Broadmeadow. The IAB found that Ms. Miller's complaints in 2006 involved the

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[20] Deposition of Andrew J. Gelman, D.O., Hearing No. 1288590 (August 25, 2010) (hereinafter "Gelman Dep.") at 14.

[21] *Id.*

[22] *Id.* at 15.

[23] *Id.* at 23-25.

thoracic area and not the cervical area.[24] The IAB's decision incorporated the reasons articulated by Dr. Gelman in his opinion, which included his diagnosis of a degenerative disease that was unrelated to Ms. Miller's work injury.[25] The IAB also agreed with Dr. Gelman's assessment that if Ms. Miller had a neck-specific injury in June of 2006, it would have appeared by August of 2006.[26] The IAB observed that "[n]one of the medical providers in 2006 noted any cervical complaint or provided any cervical treatment."[27] Further, the IAB found Dr. Xing's conjecture that Ms. Miller's early symptoms reflected a cervical nerve injury to be unpersuasive. In this regard, the IAB noted that Dr. Xing did not present any "objective diagnostic testing to validate the conclusion that there is or has been any C6-7 nerve problem."[28] Based on these findings, the IAB concluded that Ms. Miller had failed to establish by a preponderance of the evidence that her cervical condition was causally related to her work injury and, accordingly, denied Ms. Miller's petition for payment of medical

[24] IAB Decision at 9.

[25] *Id.* at 8, 10.

[26] *Id.* at 10.

[27] *Id.* at 9.

[28] *Id.* at 10.

expenses related to a cervical condition.[29]

9. In its decision, the IAB commented on three objections raised during the hearing, one of which the Court will note due to its significance to this appeal. During the IAB hearing, Ms. Miller testified she saw her primary care physician, Dr. Kotak, on a monthly basis between August 2006 and April 2007 for pain management stemming from neck pain and headaches.[30] Broadmeadow objected to this testimony based on Ms. Miller's failure to produce Dr. Kotak's records in discovery and because Dr. Xing had not relied upon them in her opinion. Based on the lack of any "documentary verification provided as to what Claimant's complaints were to her primary care physician, or notations as to what diagnosis that physician reached," coupled with Broadmeadow's inability effectively to question Ms. Miller about the details of those visits, the IAB struck the testimony as "unduly prejudicial."[31]

10. On appeal to this Court, Ms. Miller presents two arguments. First, she contends that the IAB's decision to completely disregard Ms. Miller's testimony regarding her visits with Dr. Kotak constituted legal error.[32] Ms. Miller argues that,

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[29] *Id.* at 10-11.

[30] Hearing Tr. at 30-34.

[31] IAB Decision at 8.

[32] Appellant's Opening Brief on Appeal (Sept. 15, 2011) (hereinafter "Opening Br.") at 8.

in cases where causation is at issue, both the credibility and the testimony of a claimant are essential in deciding causation and no articulated reason was given, as required in *Lemmon v. Northwood Construction*,[33] for disregarding Ms. Miller's testimony regarding Dr. Kotak.[34] Ms. Miller contends that her testimony would have completed the causal chain between the June 28, 2006 work injury and her subsequent neck pain in April 2007. Ms. Miller also argues that Broadmeadow was "put on notice from both the Petition to Determine Compensation Due and the Pre-Trial Memorandum" that Dr. Kotak was a possible witness and, further, Dr. Xing was questioned about Dr. Kotak's medical bills without objection from Broadmeadow.[35] Moreover, Ms. Miller suggests that if anything needed to be struck from the record, the IAB should have narrowed its decision to references to the unproduced records, as opposed to all aspects of Ms. Miller's testimony regarding Dr. Kotak.[36] Second, Ms. Miller contends that the IAB's decision was not supported by substantial evidence and, in fact, the record, especially with Ms. Miller's testimony intact, provided substantial evidence supporting a causal link between Ms. Miller's neck

[33] 690 A.2d 912 (Del. 1996).

[34] Opening Br. at 9.

[35] Industrial Accident Board Pre-Trial Memorandum (Aug. 28, 2007), attached at Appellant's Appendix Ex. 2; Opening Br. at 9.

[36] *Id.* at 8-9. *See also* Appellant's Reply Brief on Appeal (Oct. 21, 2011) (hereinafter "Reply Br.") at 5.

complaints and her work injury.[37]

11. Broadmeadow argues in opposition that the IAB based its decision on substantial evidence and properly excluded Ms. Miller's testimony regarding Dr. Kotak because it was unduly prejudicial to Broadmeadow in light of the fact that claimant failed to produce any of Dr. Kotak's records.[38] Broadmeadow asserts that the record reflects Ms. Miller was initially diagnosed with and treated for a thoracic sprain exclusively, without objection from Dr. Xing or Ms. Miller.[39] Neither Occupational Health, Dr. Mattern, nor the physical therapy notes from Christiana Care documented any cervical complaints and Ms. Miller was not provided cervical spine treatment between June 2006 and August 2006.[40] In addition, Dr. Xing opined that the C6/C7 nerve root was the source of Ms. Miller's pain, but "Dr. Rastogi, in his treatment report from March 2010, did not note any nerve root compression anywhere in the cervical spine," and the EMG performed by Dr. Atkins reflected a C5/C6 radiculitis - - meaning, "there was no objective diagnostic study that confirmed an

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[37] Opening Br. at 10-11.

[38] Appellee's Answering Brief on Appeal (Oct. 10, 2011) (hereinafter "Answering Br.") at 7, 10.

[39] Answering Br. at 7.

[40] Cervical complaints would include: "pain with neck range of motion, palpable spasm, Spurling's findings or neurological compromise related to her cervical spine." Answering Br. at 8.

injury had been sustained to the cervical spine or its surrounding musculature."[41]

12. With regard to the stricken testimony, Broadmeadow argues that it was Ms. Miller's burden to prove her injury and to produce Dr. Kotak's medical records. By not doing so, even with notice to Broadmeadow, she did not shift the burden to Broadmeadow to acquire the documents or disprove Ms. Miller's assertions.[42] The IAB articulated a reason for its decision to strike Ms. Miller's testimony - - namely, that considering it would be unduly prejudicial.[43] Furthermore, even if Ms. Miller's testimony had not been stricken, the IAB accepted Dr. Gelman's medical opinion, based on Ms. Miller's initial medical records through August 22, 2006, over Dr. Xing's medical opinion, which did not consider those initial medical records at all.[44] Broadmeadow asserts that the IAB's decision was based on the substantial evidence presented through the entire record and that Ms. Miller's testimony regarding Dr. Kotak, as stricken from the record, would not have altered the outcome.[45]

13. On appeal from the IAB, the Superior Court's review is limited to determining whether the IAB's decision was supported by substantial evidence and

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[41] Answering Br. at 8.

[42] *Id.* at 10-11.

[43] *Id.* at 12.

[44] *Id.* at 12-13.

[45] *Id.* at 13.

free from legal error.[46] The Court must search the entire record to determine whether, on the basis of all of the testimony and exhibits, the IAB could fairly and reasonably reach its conclusions.[47] The Court, however, "does not sit as trier of fact with authority to weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions."[48] It is solely within the purview of the IAB to judge credibility and resolve conflicts in testimony.[49] Where substantial evidence supports the administrative decision, the Court must affirm the ruling unless it identifies an abuse of discretion or a clear error of law.[50] Questions of law are reviewed de novo.[51]

14. When an employee suffers a compensable injury, the employer is required to pay for reasonable and necessary medical "services, medicine and supplies" causally connected with that injury.[52] The employee seeking compensation

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[46] *Glanden v. Land Prep, Inc.*, 918 A.2d 1098, 1100 (Del. 2007). "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Oceanport Indus. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994).

[47] *Nat'l Cash Register v. Riner*, 424 A.2d 669, 674-75 (Del. 1980).

[48] *Johnson v. Chrysler Corp.*, 214 A.2d 64, 67 (Del. 1965).

[49] *Id.*

[50] *Munyan v. Daimler Chrysler Corp.*, 909 A.2d 133, 136 (Del. 2006).

[51] *Id.*

[52] 19 *Del. C.* § 2322.

bears the burden of proving by a preponderance of the evidence that the injury was caused by a work related accident.[53] If medical evidence is in conflict, the IAB is the finder of fact and must resolve that conflict.[54] In resolving the conflict, the IAB "'is free to choose between conflicting medical expert opinions,' which will constitute substantial evidence for purposes of appeal."[55]

15. In this case, the IAB properly exercised its role as fact-finder when it considered the competing opinions of the experts and chose the opinion which it determined to be most credible and best supported by the medical evidence. The IAB adopted Dr. Gelman's view that Ms. Miller's initial complaints in 2006 did not involve her neck and that her initial diagnosis was limited to a thoracic sprain which steadily improved over several months.[56] None of Ms. Miller's medical providers in 2006 noted any cervical complaint or provided any treatment to her cervical spine.[57] Additionally, the IAB found unpersuasive Dr. Xing's conjecture that Ms. Miller's

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[53] *Coicuria v. Kauffman's Furniture*, 1997 WL 817889, at *2 (Del. Super. Oct. 30, 1997), *aff'd*, 706 A.2d 26 (Del. 1998).

[54] *Munyan*, 909 A.2d at 136.

[55] *Glanden*, 918 A.2d at 1102 (quoting *DiSabatino Bros. Inc. v. Wortman*, 453 A.2d 102, 106 (Del. 1982)). *See also Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992).

[56] IAB Decision at 9-10.

[57] *Id.*

early symptoms reflected a cervical nerve injury."[58] The IAB noted that the MRIs and EMG taken in 2007 did not support this finding and "no objective testing [] validate[d] the conclusion that there is or has been any C6-7 nerve problem."[59] Dr. Xing "agreed that even as late as March 2010 Dr. Rastogi could detect no nerve root compression anywhere in the cervical spine [and did not suggest surgery]."[60] Consequently, the IAB agreed with Dr. Gelman's opinion that Ms. Miller's neck pain was a result of a mild degenerative disease and not a result of Ms. Miller's work injury.

16. The Court is satisfied that the IAB's decision that Ms. Miller failed to establish causation by a preponderance of the evidence with regards to her cervical spine, based on Dr. Gelman's opinion, was supported by substantial evidence in the record. The stricken portions of Ms. Miller's testimony, contrary to Ms. Miller's arguments on appeal, were not "essential" or "crucial" to her case.[61] As described

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[58] *Id.* at 9.

[59] *Id.* at 10.

[60] *Id.*

[61] Ms. Miller argues that even the IAB recognized in its decision that "the testimony surrounding the Dr. Kotak treatment [was] 'crucial.'" Reply Br. at 5. Ms. Miller exaggerates the IAB's statement. The IAB noted that when medical causation is at issue, medical records and verification of diagnoses and treatment by medical experts are crucial. IAB Decision at 8. It was not Ms. Miller's testimony that was "crucial" to the IAB's decision to withhold compensation. Rather, the IAB found that Ms. Miller's failure to provide evidence of Dr. Kotak's treatment was (continued...)

above, the IAB stated multiple bases for its decision and pointed out several flaws in Dr. Xing's contrary opinion.

17. Moreover, even if considered, the stricken testimony does not change the outcome of the IAB decision.[62] Ms. Miller's stricken testimony was that her complaints of neck pain and headaches surfaced sometime during her treatment with Dr. Kotak between August 2006 and April 2007 - - after Ms. Miller had completed physical therapy with Christiana Care and Dr. Mattern in August 2006 and returned to work.[63] That testimony does not conflict with the IAB's conclusion, as endorsed by Dr. Gelman, "that, if Claimant had a neck-specific injury in June of 2006, it would have appeared by August of 2006."[64] The IAB was correct when it stated that there

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[61](...continued)
"crucial" to its determination that her testimony regarding Dr. Kotak must be stricken. *Id.*

[62] The following excerpt of the IAB decision reflects the only portion of the decision arguably affected by the stricken testimony:

> [After Ms. Miller was discharged by Dr. Mattern,] [t]he next documented medical visit was not until early April 2007, over seven months later. It is in April that, for the first time, neck-specific complaints are documented. I agree with Dr. Gelman that, if Claimant had a neck-specific injury in June of 2006, it would have appeared by August of 2006, not as late as April of 2007.

IAB Decision at 10.

[63] Hearing Tr. at 31 ("Q. How often did you see her [Dr. Kotak] in that time period [between August of 2006 and April of 2007]? A. At least once a month because during that time after the back injury I started to have headaches because my neck was hurting a lot.")

[64] IAB Decision at 10.

were no neck-specific complaints or medical visits documented until April 2007. The only "documentation" provided by Ms. Miller was one medical bill accounting for medication related to an "unspecified backache" in January 2007 (five months after Dr. Mattern's discharge).[65] Even considering Ms. Miller's oral testimony that she developed and was treated by Dr. Kotak for neck pain between August 2006 and April 2007, this testimony would not alter Dr. Gelman's view that the delayed onset of her neck symptoms makes it unlikely that the neck injury was caused by the work accident. Thus, even assuming *arguendo* that the IAB erred in excluding Ms. Miller's testimony, any such error was harmless.[66]

18. But there was no error here; the IAB's decision to exclude Ms. Miller's testimony was a proper evidentiary ruling. "In hearings before the IAB, the rules of evidence are relaxed, because of the nature of the IAB proceedings and in order to comply with the spirit of the worker's compensation statute."[67] Pursuant to its own rules, the IAB may "disregard any customary rules of evidence and legal procedures

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[65] Xing Dep. at 27, Ex. 1.

[66] "A Board's decision may be upheld if it rests upon substantial evidence after objectionable evidence is removed from consideration." *Davis v. Mark IV Transp.*, 2011 WL 2623906, at *3 (Del. Super. June 30, 2011) (citing *Wyrick v. Leaseway Auto Carriers*, 2002 WL 537591, at *3 (Del. Super. Apr. 10, 2002)), *aff'd Davis v. Mark IV Transp.*, 2011 WL 6392950 (ORDER), at *2 (Del. Supr. Dec. 19, 2011).

[67] *Glanden*, 918 A.2d at 1102.

so long as such a disregard does not amount to an abuse of its discretion."[68] The Court finds the IAB's exclusion of Ms. Miller's testimony "concerning visits she allegedly had with her primary care physician" was not an abuse of discretion. The IAB clearly stated that its exclusion of Ms. Miller's testimony was based on its undue prejudice: "There is no documentary verification provided as to what Claimant's complaints were to her primary care physician, or notations as to what diagnosis that physician reached."[69] The basis of the IAB's decision, therefore, was not based solely on a finding that Ms. Miller was "incredible," as suggested by Ms. Miller.[70] Rather, the IAB correctly recognized that Broadmeadow had no way effectively to question Ms. Miller about Dr. Kotak's medical decisions or treatment and, in turn, the IAB had no meaningful way to assess whether her treatment with Dr. Kotak actually supported her claim.

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[68] Industrial Accident Board Rule No. 14(C) provides:

> The rules of evidence applicable to the Superior Court of the State of Delaware shall be followed insofar as practicable; 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 its discretion.

[69] IAB Decision at 8.

[70] Opening Br. at 9.

19. This case is distinguishable from *Lemmon v. Northwood Construction*,[71] in which the Supreme Court found that the IAB had rejected the claimant's testimony based on a credibility determination without *any* explanation.[72] Unlike the decision of the IAB in this case, the Court in *Lemmon* held that the IAB had rejected uncontradicted testimony "based on innuendos" of facts that bore "no relation to the issues at hand."[73] The IAB's decision *sub judice* was not based on innuendos, but concerns of procedure, fairness and the inability of a party meaningfully to confront a witness who was attempting to offer evidence (expert evidence at that) against it through the "back door."[74]

20. Based on the foregoing, the Court is satisfied that the IAB applied the correct legal standards and that its decision is supported by substantial evidence. Accordingly, the decision of the IAB denying Ms. Miller's application for additional compensation must be **AFFIRMED.**

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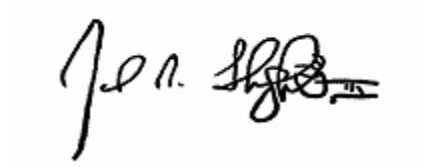
[71] 690 A.2d at 913.

[72] *Id.*

[73] *Id.*

[74] *See* 19 *Del. C.* § 2347. Within Ms. Miller's testimony about Dr. Kotak, she refers to statements made by other nurses, which were properly stricken as hearsay. Hearing Tr. at 33. Similarly, her discussions with Dr. Kotak flirt with notions of hearsay and clearly reflect undisclosed expert testimony, as noted by Broadmeadow's counsel: "And I understand where [Ms. Miller] is allowed to testify that she maybe saw [Dr. Kotak] once a month, but she is talking about interactions between doctor and her that haven't [been] produced that haven't been documented. And needless to say it's heavily prejudicial to the employer in this instance . . . ." *Id.* at 33-34.

IT IS SO ORDERED.



Joseph R. Slights, III, Judge

Original to Prothonotary

cc: Heather Anne Long, Esq.
Raymond Clayton Radulski, Esq.