IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

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| WORLD AIRWAYS, INC., | : | |
| | : | C.A. No. K12A-09-004 WLW |
| Employer-Below/Appellant, | : | |
| | : | |
| v. | : | |
| | : | |
| MICHAEL GOLSON, | : | |
| | : | |
| Employee-Below/Appellee. | : | |

Submitted: November 7, 2013
Decided: February 5, 2014

**ORDER**

Upon Appellant's Appeal From Decision of
the Industrial Accident Board (following remand).
*Affirmed.*

Sean P. Gambogi, Esquire of Kimmel Carter Roman & Peltz, P.A., Newark, Delaware; attorney for Appellee.

Joseph M. Andrews, Esquire of Heckler & Frabizzio, P.A., Wilmington, Delaware; attorney for Appellant.

WITHAM, R.J.

## INTRODUCTION

Before the Court is the appeal of Employer-Below World Airways, Inc. (hereinafter "Employer") from two separate decisions of the Industrial Accident Board (hereinafter "the Board" or "IAB") regarding the Petition to Determine Additional Compensation Due filed by Claimant-Below Michael Golson (hereinafter "Claimant"). The Court originally considered this appeal on July 31, 2013 and remanded this case for further factual finding by the Board. The Board subsequently held an evidentiary hearing and issued a decision of its factual findings on November 7, 2013. The Court shall now consider those findings as well as the other claims originally raised by Employer on appeal.

## FACTUAL AND PROCEDURAL BACKGROUND

On December 14, 2009 Claimant was injured at Dover Air Force Base while working for Employer. Claimant received total disability compensation for his injuries through the workers' compensation laws of Georgia, which only recognized injuries to Claimant's left shoulder and right knee. Claimant's benefits under Georgia law terminated in May of 2010. Claimant received benefits under Georgia law because it was Employer's standard practice to file claims in Georgia after receiving an injury report from an employee, as Employer's maintenance employees are all trained and paid out of Georgia. Pursuant to this procedure, Employer forwarded Claimant's injury report of the 2009 accident to the Chubb Corporation (hereinafter "Chubb"), Employer's third-party workers' compensation claims administrator. Chubb then filed a first report of injury with Georgia. Claimant did not personally

choose to file for benefits in Georgia.

On January 26, 2011, Claimant filed a Petition to Determine Compensation Due under Delaware's Workers' Compensation Act (hereinafter "the WCA" or "the Act") for compensation related to his injuries. In April of 2011, Employer extended to Claimant a settlement offer under which the 2009 accident would be recognized as compensable under Delaware law and Claimant would receive compensation for the period of disability from December 15, 2009 through May 17, 2010. This compensation would be calculated by crediting the amount Claimant would receive under Delaware law by the amount of benefits Claimant was already paid pursuant to Georgia law, resulting in a net payment of $2,064.44. Claimant accepted the terms of the settlement offer. The settlement offer was confirmed in a letter dated April 20, 2011, from Employer's counsel to Claimant's counsel, which provides in pertinent part:

> Employer/Carrier will also enter into a new Agreement and Final Receipt for Delaware's workers' compensation for the same limited period of total disability above, which as discussed, shall result in. . .a net payment of $2,064.44. . . .This settlement shall only extend to those injuries of 12/14/09 that Mr. Golson sustained to his left shoulder and right knee, which were previously recognized by the Georgia State Board of Worker's Compensation; all other injuries of which Mr. Golson complains, other than those that were previously recognized as compensable by the State of Georgia in this matter, shall require the filing of a new petition. . . .

An adjuster with Chubb subsequently sent a settlement check directly to Claimant.

This was a mistake on the adjuster's part, as the settlement check was supposed to be sent to Employer's counsel, who was to deliver the check to Claimant only upon receipt of the signed agreement and receipt referenced in the April 20 letter. By letter dated May 16, 2011 to Claimant's counsel, Employer's counsel documented the sending of the check, provided Claimant's counsel with the agreement and final receipt, and requested that the signed documents be returned to Employer's counsel. The signed copies of the agreement and receipt were never received by Employer's counsel, nor does anyone affiliated with Claimant, Employer or Chubb have any copies of the tendered agreement and receipt. Nonetheless, Claimant withdrew his initial petition.

On or about March 7, 2012, Claimant filed a Petition to Determine Additional Compensation Due for benefits relating to a claimed 20 percent permanent impairment to his cervical spine, 7 percent permanent impairment to his right knee, and 10 percent permanent impairment to his left shoulder. Claimant's new Petition also sought a finding that the cervical injury arose from the 2009 accident; Employer moved to dismiss the portion of Claimant's Petition pertaining to the alleged cervical injury. On July 17, 2012, a panel of the Board (hereinafter "the Motion to Dismiss Board") found that Claimant's cervical injury claim was not barred by *res judicata* or by 19 *Del. C.* § 2361(a), which the Motion to Dismiss Board determined to be the applicable statute of limitations. The Motion to Dismiss Board determined that the timely filing of the January 2011 petition and subsequent settlement agreement satisfied the two-year statute of limitations of § 2361(a). The Motion to Dismiss

Board concluded that this agreement, in turn, satisfied the five-year statute of limitations of § 2361(b). The Motion to Dismiss Board further found that *res judicata* was not triggered because the settlement specifically allowed Claimant to file a new petition for injuries not previously compensated under Georgia law.

On August 6, 2012, a separate panel of the Board (hereinafter "the Petition Board") held a hearing on the merits of Claimant's Petition, and took deposition testimony from two experts: Dr. Peter Bandera (hereinafter "Dr. Bandera"), who testified on behalf of Claimant, and Dr. Todd Schmidt (hereinafter "Dr. Schmidt"), who testified on behalf of Employer. Dr. Bandera testified that Claimant's cervical injury was causally related to the 2009 accident, whereas Dr. Schmidt testified that the injury was unrelated to the accident. Both experts also testified as to the permanency ratings of the injuries to Claimant's right knee and left shoulder. Only Dr. Bandera testified as to the permanency rating of the cervical injury.

On August 29, 2012, the Petition Board applied the "but for" standard of causation and found that Claimant's cervical injury was causally related to his 2009 workplace accident. The Petition Board expressly stated that it reached this conclusion because it "accepts as both more credible and persuasive, the testimony of Dr. Bandera over that of Dr. Schmidt."[1] The Petition Board also found that while the experts relied on similar methodologies in reaching their respective permanency

[1] *Golson v. World Airways, Inc.*, Hearing No. 1363026, at 23 (Del. Indus. Accident Bd. Aug. 29, 2012).

ratings, the impairment described by Dr. Bandera was more accurate and persuasive.[2] Accordingly, the Petition Board awarded Claimant compensation for medical expenses related to the cervical injury and compensation for 20 percent permanent impairment to the cervical spine, 10 percent permanent impairment to his left shoulder, and 7 percent permanent impairment to his right knee. Employer appealed the decisions of both the Motion to Dismiss Board and the Petition Board.

By Order dated July 31, 2013, this Court found that the Motion to Dismiss Board's determination that Claimant's Petition to Determine Additional Compensation Due was timely filed was not supported by substantial evidence, and held that the Motion to Dismiss Board erred by applying the two-year statute of limitations under 19 *Del. C.* § 2361(a).[3] The Court found that the Motion to Dismiss Board should have applied the statute of limitations under 19 *Del C.* § 2303(b), because that statute by its express terms applies to benefits paid under the law of another state, but further determined that 19 *Del. C.* § 2361(b) may toll this statute of limitations based on the payment made pursuant to the April 2011 settlement agreement.[4] The Court concluded that while § 2361(b) would toll the statute of limitations under § 2303(b) if the parties had previously entered into an implied-in-fact agreement of compensability, the Motion to Dismiss Board did not resolve the

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[2] *Id.* at 26-27.

[3] *World Airways, Inc. v. Golson*, C.A. No. K12A-09-004 WLW, at 8 (Del. Super. Ct. July 31, 2013).

[4] *Id.*

factual issues necessary to make this determination.[5] Accordingly, the Court reversed the Motion to Dismiss Board's finding that the Petition to Determine Additional Compensation Due was timely filed, and remanded the case for the Board to conduct a new hearing to determine: (1) whether Employer felt obliged or compelled under the WCA to compensate Claimant for the injuries sustained to Claimant's right knee and left shoulder; and (2) whether Employer issued the payment of income benefits under a feeling of compulsion.[6]

On August 2, 2013, Claimant filed a Motion for Reargument, asking the Court to make its own findings on the foregoing issues without requiring further fact-finding by the Board. The Court ultimately denied the motion on November 8, 2013. The Board (hereinafter "the Remand Board") conducted an evidentiary hearing on October 31, 2013 on the two issues noted in this Court's July 31 Order. The Remand Board took testimony from three witnesses: Tamara Tillman (hereinafter "Tillman"), a claims supervisor with Chubb; Rachel Murphy (hereinafter "Murphy"), Employer's workers' compensation specialist; and Claimant. Tillman and Murphy both testified as to the details of the April 2011 settlement offer and the mistaken delivery of the check to Claimant. Both Tillman and Murphy testified that they believed that the agreement would protect Employer from claims relating to other body parts. Tillman testified that Chubb believed that it would not be bound by the WCA until Chubb

[5] *Id.* at 9-10.

[6] *Id.* at 10.

received the signed copies of the agreement and receipt from Claimant. Murphy testified that she "absolutely wanted a signed Agreement and Receipt before any money issued."[7] Claimant testified that he never saw an agreement or receipt form; he believed he would simply receive a check for agreeing to the settlement, and thus did not expect to receive any agreement and receipt.

On November 7, 2013, the Remand Board issued a decision with its findings. After summarizing the relevant case law on implied agreements under § 2361(b), the Remand Board answered the first question posed by this Court–whether Employer felt compelled under the Act to compensate Claimant–in the affirmative. The Remand Board noted that while Employer only made a single payment to Claimant, the settlement payment "was done under a feeling of compulsion under the Act–Employer was faced with defending a petition filed under the Act and this was a major motivating factor in agreeing to make the payment of benefits."[8] The Remand Board also noted that the settlement amount was calculated according to what Claimant would receive under the Act, and thus "[t]he Act and the provisions of the Act permeate the entire [settlement] transaction."[9]

As to the second question on remand–whether the settlement payment was issued under that feeling of compulsion–the Remand Board focused on the adjuster's

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[7] *Golson v. World Airways, Inc.*, Hearing No. 1363026, at 9 (Del. Indus. Accident Bd. Nov. 7, 2013).

[8] *Id.* at 15.

[9] *Id.* at 16.

mistaken sending of the check directly to Claimant rather than to Employer's counsel. The Remand Board found that the adjuster's mistake was not in issuing the check to Claimant, but in how the check was sent. The Remand Board found that Tillman's and Murphy's belief that Employer's obligations under the Act would terminate upon receiving the agreement and receipt was mistaken and incorrect under Delaware law. The Remand Board described the failure to sign a formal written agreement and receipt as mere "technical or administrative flaw[s]."[10] The Remand Board concluded that the misunderstanding of Employer and Chubb on the legal ramifications of the payment did not change the nature of the payment; accordingly, the Remand Board found that "Employer felt compelled under the Act to agree to this settlement and it logically follows that the payment made in accordance with this settlement was similarly compelled under the Act."[11]

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[10] *Id.* at 17.

[11] *Id.* at 19. The Remand Board also dedicated a considerable portion of its decision to dicta that expressed concern over Employer's limited reading of the "date of injury" limitations period of § 2303(b), as compared to Claimant's broader "date of accident" period based on § 2361(a). *See id.* at 10-11. The Remand Board construed the legislative intent of § 2303(b) as not supporting Employer's argument. The Remand Board also found Employer's "date of injury" argument "particularly troublesome" based on the fact that Claimant did not personally choose to file benefits in Georgia. *Id.* at 11. The Remand Board stated: "[i]t would be an odd reading indeed of section 2303(b) to state that an employer, through its own choice to pay benefits under the laws of another jurisdiction, could somehow unilaterally deprive a claimant of rights under Delaware law that he would have had if he had filed first in Delaware." *Id.* The Remand Board found no need to resolve this issue of statutory interpretation, as it found § 2361(b) to be dispositive of the statute of limitations issue. *Id.*

## STANDARD OF REVIEW

When an appeal from the IAB is remanded to the Board, the Board must "decide the matter, after the remand hearing, on the basis of the evidence from the prior hearing plus any new evidence and legal arguments the parties decide to present."[12] This Court's review of the Board's factual findings is limited to determining whether the findings are supported by substantial evidence.[13] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[14] The Court views the facts in the light most favorable to the prevailing party below.[15] The Court does not weigh the evidence, determine questions of credibility or make its own factual findings.[16] Absent any errors of law, which are reviewed *de novo*, a decision of the IAB supported by substantial evidence will be upheld unless the Board abused its discretion.[17] The Board abuses its discretion when its decision exceeds the bounds of reason in view

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[12] *State v. Steen*, 719 A.2d 930, 934 (Del. 1998).

[13] *Bullock v. K-Mart Corp.*, 1995 WL 339025, at *2 (Del. Super. May 5, 1995) (citing *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960)).

[14] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

[15] *Chudnofsky v. Edwards*, 208 A.2d 516, 518 (Del. 1965).

[16] *Bullock*, 1995 WL 339025, at *2 (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965)).

[17] *Hoffecker v. Lexus of Wilmington*, 36 A.3d 349, 2012 WL 341714, at *2 (Del. Feb. 1, 2012) (TABLE) (citing *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009)).

of the circumstances.[18]

## DISCUSSION

### *Based on the Remand Board's findings, Claimant's Petition was timely filed*

Section 2361(a) provides that "all claims for compensation shall be forever barred unless, within 2 years after the accident, the parties have agreed upon the compensation. . . ."[19] Section 2303(b), which by its terms applies to benefits awarded under the laws of another state, provides that such award "shall not be a bar to a claim for benefits under [the Act], provided that claim under [the Act] is filed within two years after such injury or death."[20] As noted in the Court's July 2013 Order, the Motion to Dismiss Board should have applied the statute of limitations found in § 2303(b) rather than § 2361(a), because Claimant originally received benefits under Georgia law.[21] However, § 2361(b) provides that when "payments of compensation have been made in any case under an agreement approved by the Board or by an award of the Board," then "no statute of limitation" shall take effect until after five years from the date of the last payment "for which a proper receipt has been filed with the Department."[22] This language includes the two-year statute of limitation of §

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[18] *Brenner v. Village Green, Inc.*, 2000 WL 972649, at *1 (Del. Super. May 23, 2000) (citing *E.I. duPont de Nemours Co. v. Admiral Ins. Co.,* 711 A.2d 45, 55 (Del. Super. 1995)).

[19] 19 *Del. C.* § 2361(a).

[20] 19 *Del. C.* § 2303(b).

[21] *Golson*, C.A. No. K12A-09-004 WLW, at 8.

[22] 19 *Del. C.* § 2361(b).

2303(b).

While § 2361(b) requires a formal filing with the Board in order to validate an agreement of compensation, in *Starun v. All Am. Eng'g Corp.*, the Delaware Supreme Court found an implied-in-fact agreement to trigger the five-year statutory period.[23] Even though there was no formal written agreement, the carrier in *Starun* paid the claimant's medical expenses for injuries suffered in a workplace accident over a three year period, leading the Supreme Court to hold that "the only reasonable conclusion is that the Carrier considered itself obliged to do so under the Act."[24] Under *Starun*, "where the facts indicate that the employer or its carrier made a payment under a feeling of compulsion, then an agreement within the meaning of § 2361(b) [has] arisen.[25] The Supreme Court has recognized that when such implied agreements exist, no formal filing with the Board is required.[26] Simple payment of expenses, including when such payment is attributable solely to mistake on the part of the carrier or employer, is not enough to trigger the five-year statutory period.[27]

The Remand Board applied the foregoing case law to the instant case and

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[23] *Starun v. All Am. Eng'g Corp.*, 350 A.2d 765, 767 (Del. 1975).

[24] *Id.*

[25] *New Castle Cnty. v. Goodman*, 461 A.2d 1012, 1013 (Del. 1983).

[26] *McCarnan v. New Castle Cnty.,* 521 A.2d 611, 616 (Del. 1987), *overruled on other grounds*, *Andreason v. Royal Pest Control*, 72 A.2d 115 (Del. 2013).

[27] *Tenaglia-Evans v. St. Francis Hosp.*, 913 A.2d 570, 2006 WL 3590385, at *3 (Del. Dec. 11, 2006) (TABLE).

found: that a feeling of compulsion existed on the part of Employer and Chubb; that feeling of compulsion was attributable to the Act; and the settlement payment made in 2011 was made under that feeling of compulsion. The Court finds that these conclusions are supported by substantial evidence. While it is true that only a single payment was made in this case, the Remand Board correctly pointed out that Employer's settlement offer and subsequent payment were only made *after* Claimant filed his initial Petition to Determine Compensation Due. The testimony of Tillman and Murphy support this conclusion. Thus, Employer and Chubb were compelled under the Act to make the 2011 payment to Claimant.

The Remand Board also correctly concluded that the payment was made under this feeling of compulsion. The Remand Board's analysis focused on the effect of the adjuster's mistaken sending of the settlement check to Claimant, rather than to Employer's counsel. Tillman incorrectly believed that Employer and Chubb were not bound to pay anything until the signed agreement and receipt was received by Employer's counsel. Yet the testimony of Tillman and Murphy established that Employer and Chubb had already determined to pay Claimant based on a feeling of compulsion attributable to the Act. As the Remand Board correctly concluded, the mistake was not in the sending of the check, but in the procedure of how the check was sent. Regardless of whether the check was first sent to Claimant or to Employer's counsel, Employer and Chubb still intended to compensate Claimant in order to settle a potential claim under the Act. Further, Claimant testified that he was not even aware that he was supposed to receive a final agreement and receipt prior

to receiving the settlement check. It would be unfair and unjust to punish Claimant for a mistake solely attributable to Chubb. Accordingly, there is substantial evidence to support the Remand Board's finding that an implied agreement of compensation was reached between Claimant and Employer. This agreement falls within *Starun* and its progeny, and triggered the five-year limitations period under § 2361(b). It follows that Claimant's Petition to Determine Additional Compensation Due was timely filed.

Based on this conclusion, there is no need for the Court to address the parties' arguments regarding the meaning of the "date of injury" limitation under § 2303(b), because the five-year period of § 2361(b) applies instead. However, the Court notes that the Remand Board's concerns with the more limiting interpretation urged by Employer are cogent and incisive, particularly due to the fact that Claimant, through no choice of his own, initially received out-of-state benefits that triggered the application of § 2303(b). This is distinct from a scenario in which a claimant actively chooses to file a claim in another state before filing in Delaware. Based on this, it may be time for the legislature to revisit § 2303(b) to more clearly delineate the scope of that provision's limitations period.

***The Motion to Dismiss Board correctly rejected Employer's arguments regarding res judicata***

Having upheld the Remand Board's findings, the Court now turns to the remainder of Employer's arguments on appeal. Employer argues that the Motion to Dismiss Board erred in rejecting Employer's *res judicata* argument and denying

Employer's motion to dismiss. Employer argues that the April 2011 settlement agreement precludes Claimant from filing a new petition for claims pertaining to injuries other than the left shoulder and right knee.

*Res judicata* prevents an administrative agency from considering issues of law that have previously been adjudicated.[28] The doctrine does not apply to claims for permanent disability that follow adjudication of initial claims for total disability,[29] but may apply to settlement agreements in which a party is released from liability.[30] In *Chavez v. David's Bridal*, this Court applied *res judicata* to bar the appellant's claims because the settlement agreement between the parties expressly released the employer from all responsibility for any injury after a specified date.[31]

In its July 17, 2012 decision, the Motion to Dismiss Board correctly found that *res judicata* did not apply. The settlement agreement reached between Claimant and Employer in April of 2011 is distinct from the settlement in *David's Bridal*, in that the settlement offer here expressly stated that claims for any injuries other than those to Claimant's left shoulder and right knee "shall require the filing of a new petition." By its very terms, the settlement offer does not bar the filing of new petitions for any benefits. Accordingly, the Motion to Dismiss Board correctly concluded that *res*

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[28] *Betts v. Townsends, Inc.*, 765 A.2d 531, 534 (Del. 2000) (citing *M.G. Bancorporation v. Le Beau*, 737 A.2d 513, 520 (Del. 1999)).

[29] *Id.* at 535.

[30] *Chavez v. David's Bridal*, 979 A.2d 1129, 1135 (Del. Super. 2008).

[31] *Id.* at 1137.

*judicata* does not bar Claimant's claim for benefits relating to his cervical injury. As noted *supra*, the doctrine is also inapplicable to Claimant's claims for permanent disability for his left shoulder and right knee. Thus, there was no legal error when the Motion to Dismiss Board rejected Employer's *res judicata* arguments.

***The Petition Board applied the correct standard for causation***

Employer also argues that the Petition Board erred as a matter of law in applying the incorrect test of causation as to Claimant's cervical injury. Employer also seems to argue that Delaware is the wrong forum. Employer does not elaborate on its improper forum argument. Claimant correctly points out that he was injured while working within the territorial limits of Delaware.[32] Further, Employer extended an offer to Claimant to settle Claimant's initial petition under Delaware law. Claimant accepted this settlement offer. It follows that Employer cannot now claim that Delaware is the improper forum. Thus, Employer's argument as to improper forum is wholly without merit.

As to Employer's causation argument, the Delaware Supreme Court has explained that the "substantial cause" standard applies to "claims arising out of the ordinary stress and strain of employment," whereas the "but for" standard applies to "specific and identifiable industrial accidents."[33] In this case, the Petition Board applied the but for standard of causation and found that Claimant's 2009 workplace

[32] *See* 19 *Del. C.* § 2303(a).

[33] *Reese v. Home Budget Ctr.*, 619 A.2d 907, 911 (Del. 1992).

accident caused his cervical injury. The 2009 accident at Dover Airforce Base is a specific and identifiable accident; accordingly, the Petition Board applied the correct test for causation.

***The Petition Board's decision is supported by substantial evidence***

Employer's final argument on appeal is that the Petition Board's decision is not supported by substantial evidence. In determining causation, the Board is free to accept the opinion of one party's expert witness over the contrary testimony presented of the other party's expert.[34] "The function of reconciling inconsistent testimony or determining credibility is exclusively reserved for the Board."[35] When the Board indicates that it found one expert more persuasive than that of the other, no further clarification of why the Board rejected the testimony of the appellant's expert is needed.[36]

Employer raises various arguments that can best be summarized as contending that the Petition Board wrongly accepted the expert testimony of Claimant's expert, Dr. Bandera, over the testimony of Employer's expert, Dr. Schmidt. However, the Petition Board expressly stated that it had found Dr. Bandera's testimony "more credible and persuasive" than Dr. Schmidt's testimony. The Petition Board relied on

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[34] *DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 106 (Del. 1982) (citing *Gen. Motors v. Veasey*, 371 A.2d 1074, 1076 (Del. 1977)).

[35] *Simmons v. Del. State Hosp.*, 660 A.2d 384, 388 (Del. 1995) (citing *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1106 (Del. 1988)).

[36] *DiSabatino Bros.*, 453 A.2d at 106.

Dr. Bandera's testimony to find that the 2009 accident caused Claimant's cervical injury. The Petition Board also found Dr. Bandera's proffered permanency ratings more accurate and persuasive than those presented by Dr. Schmidt. These credibility determinations were solely the function of the Petition Board. Employer has failed to establish how these credibility decisions were somehow the product of an abuse of discretion. Thus, there is substantial evidence to support the Petition Board's decisions regarding causation of the cervical injury and the permanency ratings of Claimant's injuries. Accordingly, the Court shall not disturb the Petition Board's acceptance of Dr. Bandera's testimony on appeal.

## CONCLUSION

Based on the foregoing, the decisions of the IAB below–including the decisions of the Motion to Dismiss Board, Petition Board and Remand Board–are **AFFIRMED**.

**IT IS SO ORDERED.**

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh