

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

DERRIL YNNE BIGGS,	:	
	:	C.A. No. 04A-01-001 WLW
Claimant Below-	:	
Appellant,	:	
	:	
v.	:	
	:	
METAL MASTERS,	:	
	:	
Employer-Below-	:	
Appellee.	:	

Submitted: September 24, 2004

Decided: December 23, 2004

**ORDER**

Upon Appeal of the Decision of the  
Industrial Accident Board.

Affirmed in part; Reversed in part.

Walt F. Schmittinger, Esquire of Schmittinger and Rodriguez, P.A., Dover,  
Delaware; attorneys for the Appellant.

Christopher T. Logullo, Esquire of Chrissinger & Baumberger, Wilmington,  
Delaware; attorneys for the Appellee.

WITHAM, J.

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The Appellant, Derrilyne Biggs (“ Appellant” or “ Ms. Biggs”), has appealed a decision of the Industrial Accident Board (“ the Board”), which granted the Employer’ s Petition for Review and ended Appellant’ s ongoing temporary partial disability benefits. The Board also denied the Appellant’ s request for acknowledgment of a carpal tunnel condition and refused to award her expenses incurred in her visit to the employer’ s physician. For the reasons which follow, the Board’ s decision is affirmed in part and reversed in part.

### **FACTS**

Ms. Biggs began her employment at Metal Masters, Inc. (“ Metal Masters”), in October of 1996. She was employed in the capacity of a factory worker and her job consisted primarily of repeatedly pulling heavy sheets of stainless steel. Ms. Biggs complained of right shoulder pain in 1997 and 1999 and was treated for right flexor strain and tendinitis in 1997. In November of 1999, Ms. Biggs underwent surgery on her right wrist for Keinbock’ s disease, a disease which causes deterioration of bone in the wrist. After a period of recuperation from the surgery, Ms. Biggs returned to work in January of 2000.

Ms. Biggs began complaining in July 2002 that pain had returned to her right arm and shoulder. She was subsequently placed on a light-duty restriction as a result of this pain and Metal Masters honored this restriction. Ms. Biggs returned to her normal work position in January 2003 but she reported that the pain returned soon after she began working again. On January 22, 2003, she began receiving disability payments from Metal Masters. She received full disability payments until June 10,

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2003 at which time she began receiving partial disability payments. Ms. Biggs was subsequently terminated from Metal Masters.

On December 9, 2003, the Industrial Accident Board held a hearing on the petitions from Ms. Biggs and Metal Masters. At the hearing the Board considered three petitions. The first was a Petition to Terminate Benefits, filed by Metal Masters on August 18, 2003 against Ms. Biggs. The second was a Petition to Determine Compensation, filed by Ms. Biggs on June 19, 2003 and the third was a Petition to Determine Compensation Due filed by Ms. Biggs on June 27, 2003.

Dr. Stephen Manifold, an orthopedic surgeon, testified by deposition that he examined Ms. Biggs in July 2002. He diagnosed her with a right shoulder strain primarily over the scapula which he attributed to possible overuse. Dr. Manifold placed a light duty restriction on Ms. Biggs and instructed her not to conduct any repetitive overhead activities with the right arm or lift anything over ten pounds. He treated Ms. Biggs monthly until November 11, 2003.

Dr. Mohammad Kamali, also an orthopedic surgeon, testified by deposition that he examined Ms. Biggs on May 7, 2003 and July 14, 2003. At the examination in May, Ms. Biggs complained of pain in her right shoulder but did not complain of pain in her wrist. Dr. Kamali examined Appellant' s right shoulder and right wrist and diagnosed Ms. Biggs with chronic right shoulder pain. He imposed a lifting restriction of thirty pounds. At the July 14, 2003 examination, Dr. Kamali reviewed an EMG report of Appellant' s right upper extremity. According to Dr. Kamali, the EMG suggested evidence of moderate carpal tunnel syndrome in Appellant' s right

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wrist. Dr. Kamali examined Appellant' s wrist and found that the scar tissue from her 1999 surgery was visible. Dr. Kamali then performed a grip test and a wrist flexion test on Ms. Biggs and determined that the test was negative and that her grip was symmetrical and with normal limits, all of which indicated that Ms. Biggs did not have carpal tunnel syndrome. Dr. Kamali also noted that Ms. Biggs had a normal range of motion and no tenderness in her right shoulder. Dr. Kamali opined that any evidence of moderate carpal tunnel syndrome was probably not related to Ms. Biggs' s work at Metal Masters but was rather most likely a result of scarring from her surgery for Keinbock' s disease. He also testified that he believed, as of July 14, 2003, that Ms. Biggs could return to work on a full-time basis without restriction.

Dr. Upadhyay, a physiatrist, testified for Ms. Biggs. Dr. Upadhyay first evaluated Ms. Biggs on November 26, 2002, at which time Ms. Biggs complained of right shoulder pain. After examining Ms. Biggs, Dr. Upadhyay determined that she suffered from chronic repetitive strain in the shoulder and he recommended a light-duty work restriction. Ms. Biggs presented to Dr. Upadhyay again on January 7, 2003, still complaining of unresolved right shoulder pain. Dr. Upadhyay conducted an EMG on February 4, 2003 which, according to Dr. Upadhyay, revealed evidence of carpal tunnel syndrome in Appellant' s right wrist. Dr. Upadhyay attributed this diagnosis to the chronic repetitive activities Ms. Biggs performed at work. Ms. Biggs next visited Dr. Upadhyay on March 11, 2003, at which time Ms. Biggs reported an eighty percent improvement in her right shoulder

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and exhibited normal shoulder strength. Dr. Upadhyay also testified that on September 17, 2003, Ms. Biggs stated that she could perform overhead work without discomfort. Dr. Upadhyay performed a second EMG on October 21, 2003 which again revealed some evidence of carpal tunnel syndrome in the right wrist. Based on this observation, Dr. Upadhyay continued Appellant' s sedentary duty restrictions but permitted use of a keyboard or telephone. He did not recommend corrective surgery for the carpal tunnel syndrome.

Dr. Uphadyay testified that he believed that Appellant' s alleged carpal tunnel syndrome was related to her employment at Metal Masters. Dr. Upadhyay admitted that Ms. Biggs did not complain of wrist pain during his examinations of her on November 26, 2002 and January 7, 2003. Dr. Uphadyay acknowledged that he had not reviewed any of Appellant' s previous medical records and was not aware of Appellant' s earlier wrist surgery for Keinbock' s disease or documentation of reports of earlier tenderness in Appellant' s right carpal tunnel.

Ms. Biggs testified that she had recently completed the required course and planned to begin work as a real estate inspector in January 2004. She acknowledged that this work could entail crawling around in small spaces and climbing into attics.

The Board' s decision, issued December 23, 2003, concluded that, based on the testimony from Dr. Kamali and Appellant' s own representations, Appellant was no longer partially disabled and could return to work without restrictions. The Board determined that Appellant had “ not met her burden to prove a recurrence of total disability attributable to a cumulative, detrimental effect from her work at

Metal Masters.”<sup>1</sup> The Board found, on the other hand, that Metal Masters had met its burden to show that Appellant was able to work and that Appellant was not partially disabled to any extent that could affect her earning capacity.

The Board found the testimony of Dr. Kamali more persuasive than that of Dr. Upadhyay. The Board believed that Dr. Kamali, as an orthopedic surgeon, “ stood in a better position to evaluate the effects of carpal tunnel syndrome than Dr. Upadhyay, a physiatrist.”<sup>2</sup> The Board intentionally disregarded much of Dr. Upadhyay’ s testimony because it was “ perplexed as to how he could offer an opinion on causation in the absence of a complete medical history.”<sup>3</sup> The Board therefore accepted the findings of Dr. Kamali that, as of July 14, 2003, Appellant was able to return to work on July 14, 2003 and that her present condition was, more likely than not, related to scarring from her earlier wrist surgery.

The Board also found that Appellant’ s own statements indicated that she no longer suffered a disability. The Board noted that Appellant did not complain of pain in her wrist at either of her visits to Dr. Upadhyay on November 26, 2002 or January 7, 2003. The Board also remarked that, at Appellant’ s visit with Dr. Upadhyay on September 17, 2003, Appellant reported that she could perform

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<sup>1</sup> *Biggs v. Metal Masters*, IAB Hearing No. 1224323, 1234260 & 1234099 (Dec. 23, 2003), at 10.

<sup>2</sup> *Id.* at 8.

<sup>3</sup> *Id.* at 10.

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overhead work without discomfort and she completed a normal physical exam. The Board also found that Appellant' s testimony that she intended to work as a home inspector provided a clear indication that she was physically capable of working. The Board was also not persuaded by Appellant' s testimony that her job as a real estate inspector would not violate Dr. Upadhyay' s recommendation that she only choose sedentary employment with little or no lifting.

Based on these findings, the Board granted Metal Masters' Petition to Terminate Benefits, effective August 18, 2003. It also denied, without explanation, Appellant' s Petitions to Determine Compensation Due which included a request for reimbursement of expenses incurred in submitting to the July 14, 2003 evaluation by Dr. Kamali.

**PARTIES' CONTENTIONS**

Appellant, Ms. Biggs, asserts that the Board' s decision was not supported by substantial evidence on the record. Appellant insists that the Board cannot simply accept a doctor' s testimony without examining the doctor' s basis for reaching that conclusion. She notes that a medical expert' s opinion may not be based merely on speculation or conjecture but must be based on a reasonable degree of medical certainty and stated in terms of probability.<sup>4</sup> Appellant claims that the Board should not have relied on the opinion of Dr. Kamali because Dr. Kamali' s testimony does

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<sup>4</sup> Appellant bases her claims on *Revello v. Acme Markets*, 1986 WL 2261 (Del. Super.) and *Ware v. Baker Driveway*, 295 A.2d 734 (Del. Super. Ct. 1972), *aff'd*, 303 A.2d 358 (Del. 1973).

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not amount to substantial evidence. Ms. Biggs claims that Dr. Kamali's opinion was not based on substantial evidence because Dr. Kamali was unable to articulate how Appellant's Keinbock's disease could result in evidence of moderate carpal tunnel syndrome. Ms. Biggs also maintains that Dr. Kamali could have resolved whether or not the Keinbock's disease caused the evidence of carpal tunnel by taking an x-ray but failed to do so and therefore his opinion is not reliable.

Appellee, Metal Masters, responds that there is substantial evidence in the record to support the Board's finding that Ms. Biggs is no longer totally disabled and that she has failed to show any correlation between her alleged injuries and her work activities at Metal Masters. Appellee asserts that, because Ms. Biggs is seeking action from the Board by requesting disability benefits, she bears the burden of proving that the injury is work-related. Appellee maintains that the Board's decision that Ms. Biggs has not sufficiently shown that the injury was work-related was not an error of law. Appellee contends that the Board's decision to give greater weight to Dr. Kamali's testimony was legitimate and Dr. Kamali's testimony served as substantial evidence that Appellant did not suffer from carpal tunnel syndrome and that she could return to work.

Appellee further argues that there is substantial evidence on the record indicating that Appellant was no longer partially disabled. Appellee relies on the testimony of Dr. Kamali, who testified that when he examined Ms. Biggs on July 14, 2003, she had a normal range of motion and there were no signs of tenderness in her right shoulder. Appellee also notes that Dr. Upadhyay testified that Ms.

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Biggs had stated that she could perform overhead work without discomfort. Finally, Metal Masters argues that Appellant's own statements that she was planning to begin work as a real estate inspector, which would entail crawling under buildings and climbing into attics, demonstrate that Appellant is capable of working and is no longer partially disabled.

Appellant Biggs also argues that the Board erred when it failed to award her the expenses she incurred in conjunction with her second medical evaluation by Dr. Kamali, the employer's examining doctor, as required by 19 *Del. C.* §2343. That statute provides that "[f]or all examinations after the first, the employer shall pay the reasonable traveling expenses and loss of wages incurred by the employee in order to submit to such examination."<sup>5</sup> Ms. Biggs claims that, because she attended two examinations with Dr. Kamali, she should be reimbursed for her expenses incurred in attending the second examination on July 14, 2003. She argues that the statute is not discretionary and it was an error of law for the Board to refuse to grant the travel expenses for the second visit to Dr. Kamali. Ms. Biggs also argues that the Board failed to articulate any reason why it denied the expenses. Appellee responds by arguing that the Court should limit the term "examination" in 19 *Del. C.* § 2343 to include only subsequent examinations for the same specific type of injury identified in the first visit. Appellee argues that, under this reading of the statute, the Court should deny Ms. Biggs the expenses she incurred on her second

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<sup>5</sup> 19 *Del. C.* § 2343(a).

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visit to Dr. Kamali' s office because one visit involved an examination of the shoulder and the other visit primarily involved an examination of the wrist.

**STANDARD OF REVIEW**

The appropriate standard for the Superior Court in reviewing an appeal from the Industrial Accident Board is whether the Board' s decision is supported by substantial evidence and is free from legal error.<sup>6</sup> Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.<sup>7</sup> The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.<sup>8</sup> It merely determines whether the evidence is legally adequate to support the Board' s factual findings.<sup>9</sup> The Court' s review of questions of law on appeal is *de novo*.<sup>10</sup>

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<sup>6</sup> *Histed v. A.I. duPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *see Hebb v. Swindell-Dressler, Inc.*, 394 A.2d 249, 250 (Del. Super. Ct. 1978).

<sup>7</sup> *Oceanport Ind. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994) (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. Ct. 1986), *app. disp.* 515 A.2d 397 (Del. 1986).

<sup>8</sup> *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

<sup>9</sup> *See 29 Del. C. §10142(d)*.

<sup>10</sup> *Darling v. Sara Lee Corp.*, 2004 WL 1588253, at \*2 (Del. Super.).

## DISCUSSION

### *Total Disability*

Where the Employer files a Petition to Terminate benefits, it bears the ultimate burden of proving that the Claimant is no longer totally disabled and will not suffer an economic loss.<sup>11</sup> To demonstrate that the Claimant does not suffer from a total disability, the Employer must show that the Claimant is able to work with or without restrictions.<sup>12</sup> In the case at hand, the Board concluded that Metal Masters had met its burden and that Dr. Kamali's testimony established that Ms. Biggs was no longer totally disabled. The Board's decision to give greater weight to Dr. Kamali's testimony over that of Dr. Upadhyay is a legitimate and recognized practice and does not constitute an error of law.<sup>13</sup> The testimony of a medical expert "constitutes substantial evidence to support the Board's finding."<sup>14</sup> As long as the expert's opinion is based on substantial evidence and logical, the Board's decision to rely on it is unquestionable.<sup>15</sup> It is not the role of this Court to weigh questions of credibility.<sup>16</sup> In the absence of an error of law, the Court must defer to the

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<sup>11</sup> *Strawbridge & Clothier v. Campbell*, 492 A.2d 853, 854 (Del. 1985).

<sup>12</sup> *See generally Howell v. Supermarkets General Corp.*, 340 A.2d 833, 835 (Del. 1975).

<sup>13</sup> *Simmons v. Del. State. Hosp.*, 660 A.2d 384, 388 (Del. 1995).

<sup>14</sup> *Lohr v. Acme Markets*, 1999 WL 1611427, at \*2 (Del. Super.).

<sup>15</sup> *Kirkwood Animal Hospital VCA v. Foster*, 2004 WL 2187621, at \*4 (Del. Super.).

<sup>16</sup> *Coleman v. Department of Labor*, 288 A.2d 285, 287 (Del. Super. Ct. 1972).

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Board' s assessment of the credibility of witnesses and the weight to be given to their testimony.<sup>17</sup> In this case, the Board gave adequate reasoning for its decision by observing that Dr. Upadhyay' s opinion should be given lesser weight than that of Dr. Kamali because Dr. Upadhyay had not fully examined Appellant' s medical records and was not aware of her previous medical conditions.

Appellant contends that Dr. Kamali' s testimony was not based on substantial evidence and therefore Metal Masters did not meet its burden of proof. She argues that Dr. Kamali was unable to adequately explain the existence of mild evidence of carpal tunnel syndrome and that Dr. Kamali failed to perform an X-ray to determine whether Appellant had carpal tunnel syndrome. Ms. Biggs further argues that Dr. Kamali' s testimony is contradictory because it does not make sense that Keinbock' s disease could cause the carpal tunnel syndrome but then subsequently resolve.

It appears to the Court that Dr. Kamali' s opinion was based on substantial evidence because he reviewed Appellant' s past history, examined the EMG report and also conducted a wrist flexion test and a grip test to determine whether Appellant had carpal tunnel syndrome. These tests and findings are a sufficient and substantial basis for a medical opinion and it was not an error of law for the Board to base its decision on the testimony of Dr. Kamali. The Board' s finding that Ms. Biggs did not have carpal tunnel syndrome was also supported by substantial

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<sup>17</sup> See *General Motors Corp. v. Cresto*, 265 A.2d 42, 43 (Del. Super. Ct. 1970).

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evidence. Dr. Kamali testified that he performed the wrist flexion test for carpal tunnel syndrome on Ms. Biggs which turned out negative and that any evidence of mild carpal tunnel syndrome could be caused by scarring from Appellant' s earlier surgery for Keinbock' s disease. It was not unreasonable for the Board to rest its decision on Dr. Kamali' s expert testimony.

*Partial Disability*

The Employer, in seeking to completely terminate benefits, also bears the burden of proof to show that the employee/claimant no longer suffers from a partial disability.<sup>18</sup> The Board' s decision that Metal Masters had met its burden to prove that Ms. Biggs was no longer partially disabled was also supported by substantial evidence and did not contain any errors of law. The Board based its decision on Dr. Kamali' s testimony that Ms. Biggs could return to work without restrictions. Dr. Kamali based this conclusion on his July 14, 2003 evaluation of Ms. Biggs at which he determined that she had a normal range of motion in her right shoulder and observed no tenderness or signs of continued deficiency. Dr. Upadhyay also testified that Ms. Biggs enjoyed an eighty percent improvement by March 11, 2003 and observed that Ms. Biggs had no tenderness or trigger points in the injured shoulder at that time.

The Board also based its opinion on Appellant' s own testimony that she was

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<sup>18</sup> *Harsey v. Harbor Health Care Center*, 1999 WL 167857, at \*4 (Del. Super.) (citing *Waddell v. Chrysler Corp.*, 1983 WL 413321, at \*3 (Del. Super.)).

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planning to begin work as a real estate inspector, an occupation which required crawling into small spaces and climbing into attics. Ms. Biggs further stated, on September 17, 2003, that she could perform overhead work with no discomfort. The Board's conclusion that Appellant's statements indicated that she was fit to work without restrictions is a question primarily of fact to be determined by the Board. These facts from Appellant's medical examination, combined with her own statements, constitute substantial evidence on the record sufficient to justify the Board's finding that Ms. Biggs was no longer partially disabled and could work without restrictions.

*Connection Between Appellant's Alleged Injury and Work at Metal Masters*

Ms. Biggs, by filing the Petitions to Determine Compensation Due, is seeking action by the Board and bears the burden of proving that the injury is work-related.<sup>19</sup> Because the Board determined that Dr. Upadhyay's testimony was not to be given as much weight as Dr. Kamali's testimony, it concluded that Ms. Biggs had not met her burden to establish that the injury was work-related. As discussed above, the Board may properly give greater weight to a particular expert's testimony over that of another. It was reasonable for the Board to give greater weight to Dr. Kamali's testimony because Dr. Upadhyay had not reviewed Ms. Biggs's previous medical records and did not have a complete knowledge of her past history. Dr. Kamali,

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<sup>19</sup> *Strawbridge & Clothier v. Campbell*, 492 A.2d 853, 854 (Del. 1985) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64 (Del. 1965)).

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who had examined Appellant' s medical records, testified that any evidence of moderate carpal tunnel syndrome was likely related to scarring from Appellant' s earlier surgery for Keinbock' s disease and not from Appellant' s work activities at Metal Masters. Dr. Kamali' s testimony is a sufficient basis for the Board to determine that any evidence of mild carpal tunnel syndrome was not related to Appellant' s work at Metal Masters.

Although Ms. Biggs argues otherwise, Dr. Kamali also provided a sufficient explanation for the fact that he could not diagnose Ms. Biggs with carpal tunnel syndrome and that any evidence of mild carpal tunnel syndrome was not work-related. Dr. Kamali testified that the scar tissue from Appellant' s prior surgery for Keinbock' s disease may have caused complaints of slight carpal tunnel syndrome. The Board, as the finder of fact, made the determination that this testimony was reasonable and within a degree of medical probability. It was not an error of law for the Board to so conclude.

*Failure to Award Expenses Incurred in Submitting to Medical Examination*

Appellant, Ms. Biggs, has requested that she be reimbursed for her second trip to Dr. Kamali, the employer' s evaluating physician. Appellee Metal Masters urges the Court to read the term " examination" in 19 *Del. C.* § 2343 narrowly to only permit Ms. Biggs to recover expenses incurred from examinations " after the first" that are based on the specific injuries and complaints identified during the first evaluation.

To read the term " examination" so narrowly would be a novel approach. No

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case has come to the Court’ s attention, nor has Metal Masters presented any cases, limiting the term “ examination” to refer only to evaluations for the same injury or complaint identified in the first visit. In addition, the Supreme Court, as well as this Court, generally reads the Workmen’ s Compensation Act broadly and liberally. The Delaware Supreme Court has observed that the Workmen’ s Compensation Act is a “ remedial statute with a benevolent purpose” and should be “ liberally construed to effectuate its purpose.”<sup>20</sup> This Court has held that a “ broad, not narrow, interpretation of the coverage of the provisions of the Delaware Workmen’ s Compensation Act is in keeping with the basic purpose and spirit of its enactment.”<sup>21</sup> Appellant also notes that the statute does not draw any distinction between the doctor’ s focus in the first examination and subsequent examination.

It is unnecessary, in any event, to determine the exact scope of the term “ examination” because Metal Masters’ argument fails under the facts of this case. Metal Masters argues specifically that Ms. Biggs should not be allowed to recover her travel expenses incurred in visiting Dr. Kamali on July 14, 2003 because, at that visit, Dr. Kamali examined Ms. Biggs for evidence of carpal tunnel syndrome whereas on May 7, 2003 he evaluated her for shoulder pain. According to Dr.

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<sup>20</sup> *State v. Cephas*, 637 A.2d 20, 25 (Del. 1994) (citing *Delaware Tire Center v. Fox*, 411 A.2d 606, 607 (Del. 1980)). See also *Mosley v. Bank of Delaware*, 372 A.2d 178, 179 (Del. 1977).

<sup>21</sup> *Delaware Tire Center v. Fox*, 401 A.2d 97, 100 (Del. Super. Ct. 1979).

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Kamali' s deposition, however, Appellant also complained of occasional pain in her right shoulder and right arm to the wrist at the July 14, 2003 visit. Although Dr. Kamali primarily examined Appellant' s wrist during the July 14<sup>th</sup> visit, he also examined her right shoulder. There is a sufficient overlap between the two visits in question, both of which involved an examination of the right shoulder, such that it appears the two visits were connected to the same injuries identified in the first evaluation.

It is, therefore, not necessary to determine the exact scope of the term “examination” under 19 *Del. C.* § 2343 because the two visits to Dr. Kamali are related to the same injuries alleged by Ms. Biggs in the first visit. The traditionally broad interpretation of the Workmen' s Compensation Act further indicates that the term “examination” should be read broadly to include the second examination in this circumstance. Accordingly, Appellee Metal Masters must pay the expenses incurred by Appellant in submitting to the second visit to Dr. Kamali. The Board' s decision as to this issue is reversed.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

J.

WLW/dmh  
oc: Prothonotary  
xc: Order Distribution  
File