

Benjamin K. Durstein

Shareholder

BKDurstein@mdwvcg.com

Wilmington – 302.552.4341



As a member of the Workers' Compensation Department, Ben represents employers, insurance carriers and third-party administrators in defense of workers' compensation claims before the Industrial Accident Board and Delaware courts.

Ben earned his Bachelor of Arts degree from the University of Delaware in 2007, and went on to receive his *juris doctor* from Widener University School of Law in 2012. After law school, he served as a judicial law clerk to the Honorable James T. Vaughn, Jr., who was then President Judge of the Delaware Superior Court.

Ben is a member of Delaware Claims Association, Delaware State Bar Association Workers' Compensation Section and the Randy J. Holland Delaware Workers' Compensation American Inn of Court. He is admitted to practice in the State of Delaware.

Education

- Widener University Delaware Law School (J.D., *cum laude*, 2012)
- University of Delaware (B.A., 2007)

Admissions

- Delaware, 2013

Honors & Awards

- The Best Lawyers: Ones to Watch®, Workers' Compensation Law – Employers (2024-2025)
- Top Lawyer, Workers' Compensation Employer Defense, Delaware Today Magazine (November 2022)

Practices

- Workers' Compensation Defense

Associations & Memberships

- Delaware Claims Association
- Delaware State Bar Association; member, Workers' Compensation Section
- Randy J. Holland Delaware Workers' Compensation American Inn of Court

Classes/Seminars Taught

- *Ethics and the Duty to the Tribunal and Opposing Counsel*, panelist, Delaware State Bar Association and the Industrial Accident Board Workers' Compensation Seminar 2023, Wilmington, Delaware, May 2, 2023
 - *Strategies to Limit Exposure and Minimize Risk*, Marshall Dennehey Workers' Compensation Seminar, October 27, 2022
 - *Do's and Don'ts in the Practice of Workers Compensation*, Delaware State Bar Association William D. Rimmer Workers' Compensation Seminar 2022, Wilmington, Delaware, May 3, 2022
 - *Are You Coming or Going – Do You Know Your Course and Scope?*, Marshall Dennehey webinar, October 26, 2020
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Results

Petition to Terminate Ongoing Receipt of TPD Benefits Granted on Basis that Claimant Voluntarily Removed Himself from the Workforce

The Industrial Accident Board (IAB) granted our petition to terminate the ongoing receipt of temporary partial disability (TPD) benefits on the basis that the claimant had voluntarily removed himself from the workforce. The claimant was a correction officer who suffered head injuries in an altercation with an inmate. He was out of work for a time and eventually released to return to work on modified duty. His restrictions were permanent and, because they could not be accommodated by his employer, he was placed on TPD. After more than a year with no indication of an attempt to return to the workforce, we challenged his ongoing entitlement to receive TPD. We worked with the employer to obtain documentation regarding the claimant's job search (or lack thereof), other sources of income (pension, Social Security) and recreational/social activities since he had been separated from employment. In addition, we put forward both medical and vocational expert testimony at the hearing. As a result, the IAB reasoned that the claimant was able to work in a medium-duty job, that jobs were available within his restrictions, the he had conducted a minimal job search since his work release more than a year and a half earlier, and that his description of his daily activities was consistent with a person content with a retirement lifestyle rather than someone who intended to continue to work. Accordingly, he was no longer entitled to wage replacement benefits.

Petition to Terminate Temporary Partial Disability Benefits Granted

We were successful in having our petition to terminate the ongoing receipt of temporary partial disability benefits granted on the basis that the claimant had voluntarily removed himself from the workforce. The Industrial Accident Board reasoned that the claimant was

able to work in a medium-duty job, that jobs were available within his restrictions, the he had conducted a minimal job search since his work release more than a year and a half earlier, and that his description of his daily activities was consistent with a person content with a retirement lifestyle rather than someone who intended to continue to work. Accordingly, he was no longer entitled to wage replacement benefits.

DELAWARE SUPREME COURT AFFIRMS THE DECISIONS OF THE IAB AND SUPERIOR COURT, HOLDING THAT AN EMPLOYER CORRECTLY PAID FOR KETAMINE INFUSION TREATMENT IN ACCORDANCE WITH THE DELAWARE FEE SCHEDULE

The claimant injured her right wrist in 2016 while working as a teacher for the State. Her injury eventually developed into complex regional pain syndrome (CRPS) involving multiple extremities. From 2017 to 2021, the State paid for 23 ketamine infusion treatments to treat the claimant's CRPS. The treatment was rendered by an out-of-state provider. In 2019, the State contracted with a new bill-review company that paid substantially lower amounts than was previously paid for the same treatment. The claimant filed a petition that alleged these lower payments were insufficient and inconsistent with Delaware law. The Industrial Accident Board determined that the payments made by the State were correct under the Delaware Workers' Compensation Act's health care payment system and Fee Schedule. The Superior Court affirmed the decision.

The claimant appealed to the Delaware Supreme Court, arguing that the Board failed to correctly apply the Act and Fee Schedule regulations, as interpreted in the Superior Court opinion *Delaware Veterans Home v. Dixon*. Specifically, the claimant alleged that the Board failed to assess the adequacy of medical billing codes by referring to resources from the American Medical Association or the National Correct Coding Institute. The Supreme Court rejected this argument. The claimant bore the burden of proving whether the billing codes used by the provider for the ketamine infusion treatments were insufficient or inaccurate. The resources cited by the claimant were, indeed, referenced in the Fee Schedule administrative regulations, but no evidence was presented by the claimant at the Board hearing. It was neither the employer's nor the Board's responsibility to present that evidence. Therefore, there was no legal error. The court further advised that the Act's Oversight Panel is the proper forum to determine whether specific billing codes provide reasonable compensation for particular treatment, which was a secondary argument advanced by the claimant. The decisions were affirmed.

Industrial Accident Board grants motion for reimbursement.

We succeeded in having the Industrial Accident Board grant reimbursement of an amount of total disability benefits tendered that were offset by contemporaneous short-term disability payments. The Board denied the claimant's motion to compel production of paystubs that he claimed were required to determine the appropriate offset amount, if any. The Board reasoned that the information provided was sufficient to calculate the overpayment amount and that the Fair Labor Standards Act did not require the pay records be kept in any particular form.

Defense prevails before the Industrial Accident Board.

The claimant alleged several injuries. The Board denied the claimant's petition for additional compensation due on all counts, and granted the employer's petition for review to terminate total disability benefits. Specifically, the Board concluded that (1) a proposed left ankle reconstruction surgery was not reasonable and necessary, (2) there was insufficient evidence to prove a compensable left knee injury, (3) there was insufficient evidence to prove a compensable lumbar spine injury and (4) the claimant was capable of unrestricted return to work.

Successful defense of workers' compensation case before the Delaware Supreme Court.

In its order, the Supreme Court affirmed a decision of the Superior Court that had affirmed a Board decision regarding the compensability of travel expenses for trips to and from medical appointments. The claimant had petitioned for parking and toll expenses incurred during her trips to visit a doctor at University of Pennsylvania from her residence in Dover, Delaware. Although the amounts in question were low, the case is significant as it potentially applies to every Delaware workers' compensation case. Specifically, the court agreed with the employer's arguments that the plain language of the applicable Delaware statute provides that mileage expenses are to be reimbursed by the employer for travel to and from compensable medical appointments.

Thought Leadership

July 1, 2025

Industrial Accident Board Denies EMT's Motion to Amend Injury Date, Citing Statute of Limitations and Inexcusable Neglect

February 1, 2025

Petition to terminate total disability benefits for claimant who had light-duty restrictions that could not be accommodated denied; claimant had reasonable expectation of returning to pre-injury job with same employer when his condition improved.

January 1, 2025

Delaware Superior Court reverses Industrial Accident Board decision, holding the Board erred as a matter of law and abused its discretion when it awarded compensation to a claimant whose intoxication proximately caused a motor vehicle accident.

December 1, 2024

TOP 10 DEVELOPMENTS IN DELAWARE WORKERS' COMPENSATION IN 2024

November 1, 2024

Petition for compensability of post-concussion syndrome treatment granted.

Petition to terminate total disability benefits, alleging ability to return to work w/restrictions and forfeited right to benefits for refusing reasonable medical treatment, denied

October 1, 2024

Relying on Delaware Superior Court memorandum opinion that determined the Industrial Accident Board correctly decided to terminate total disability benefits following a total knee replacement, Delaware Supreme Court affirms Boards' decision.

September 1, 2024

The Delaware Superior Court affirms Industrial Accident Board's decision and rejects claimant's argument on appeal that the Board's decision to allow certain questioning from the employer's attorney constituted a reversible abuse of discretion.

August 1, 2024

Delaware Superior Court reverses and remands Industrial Accident Board's decision involving a Utilization Review appeal because it was unclear whether the Board had correctly applied the relevant Delaware Healthcare Practice Guidelines.

July 1, 2024

The Delaware Supreme Court affirms decision that a COVID-19 workplace exposure at a poultry processing plant did not qualify as a compensable occupational disease.

June 1, 2024

Superior Court affirms IAB decision enforcing workers' compensation settlement agreement and rejected claimant's attorney's argument of entitlement to common law "attorney's charging lien" that was not a term of the settlement.

May 1, 2024

Delaware Supreme Court affirms the decisions of the IAB and Superior Court, holding that an employer CORRECTLY paid for ketamine infusion treatment in accordance with the Delaware Fee Schedule.

April 1, 2024

Superior Court affirms decision denying claimant's motion to strike medical expert testimony regarding medical records produced for the first time after claimant's medical expert's deposition.

March 1, 2024

Delaware Supreme Court affirms IAB decision and rejects employer's arguments that Superior Court Civil Rule 41(a)(1) and the doctrine of collateral estoppel barred claimant from filing a petition for a recurrence of total disability benefits.

February 1, 2024

Delaware Superior Court affirms an Industrial Accident Board decision that a claimant injured while performing an employer-related volunteer activity was not within the course and scope of employment.

January 1, 2024

Superior Court affirms decision that claimant failed to prove she contracted COVID-19 at work, but does not reach issue of whether COVID-19 qualifies as an occupational disease for a nurse who worked in the “COVID wing” of a hospital.