Randy J. Holland Delaware Workers' Compensation Inn of Court - Group 5

CROSS-EXAMINATION OF DR. PHIL LESH

TEACHING POINTS

- IT'S TOUGH BEING A PHILLIES FAN!! See 2015 N.L. East Final Standings and early predictions for 2016. But "hope springs eternal" for next year.
- Work/Life Balance. Late afternoon depositions rarely start on time. If your deposition starts late, you are going to have to deal with it. It's a fact of life for an attorney practicing in the workers' compensation field. No use getting off on the wrong foot with the deponent before questioning even starts. If you have important plans, choose another night or try to schedule depositions for earlier in the day whenever possible.
- Prepare your medical expert witnesses. If the doctor's qualifications are going to be stipulated to (which they routinely are), the doctor should know that going in so the deposition can move along smoother.
- Supply your medical expert with materials to review in plenty of time prior to the deposition to avoid the argument that necessary medical records or other documents have not been reviewed in order to render an opinion (whether your medical expert actually takes the time to review the records is a whole other issue). In cases that warrant it, consider scheduling a longer prep time with your medical expert a week or so before their deposition as opposed to the customary pre-deposition 15 minute prep.
- Be careful what you put in writing to your medical expert. While the letter from the defense attorney would not come into evidence, it is fair game for cross-examination. Under an old Industrial Accident Board Case-**Sisofo**, letters to medical expert witnesses were discoverable. Discovery of the letters to expert witnesses is more restrictive under new Superior Court Civil Rule 26 (b)6
- Again, be sure to prepare your medical experts. They should have a good understanding as to what the issues are for which they are testifying. Take care to outline what the issues are without putting anything in writing to

your expert which can in any way be interpreted as influencing the opinion(s) for which they are being asked to supply.

- Pick your battles. It is very unlikely that you will get a medical expert to concede to your case during a cross-examination. This is especially true for medical experts who testify routinely in workers' compensation cases.
- Be very weary of asking one too many questions. It is much safer to make your relevant points as best you can and get out sooner than later.
- Surveillance Videos. Make sure YOU take the time to review them way ahead of the hearing. And make sure you supply a copy to your medical expert well ahead of their deposition so they can review it as well to make sure you are on the same page as to its use at the deposition. Yes, they are tedious, there is usually no sound, and they are normally not nearly as entertaining as we would like (contrary to Shaku's portrayal of Roberta Johnson) but they can be a valuable piece of evidence for both sides depending on what is depicted.
- Remember, at the Board hearing, you will have your opening statement to set the stage for your case with the points that you make during depositions and then closing argument to drive those points home. With that understanding, also keep in mind that Board members are well-versed in hearing the cases that come before them. There is no need to unnecessarily extend the time of a deposition or a hearing by trying to make every point, especially those that the Board can recognize on their own.

(2) When an officer of the State of Delaware, county, city or other governmental agency sues or is sued in an official capacity, the officer may be described as a party by an official title rather than by name; but the court may require that the officer's name be added.

V. DEPOSITIONS AND DISCOVERY.

Rule 26. General provisions governing discovery.

(a) Discovery methods. -- Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery scope and limits. -- Unless otherwise limited by order of the Court in accordance with these rules, the scope of discovery is as follows:

(1) In general. -- Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the Court if it determines that: (i) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The Court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

(2) Insurance agreements. -- A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial preparation: Materials. -- Subject to the provisions of subdivision (b)(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering the discovery of such materials when the required showing has been made, the Court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a

stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the party making it and contemporaneously recorded.

(4) Trial preparation: Experts. -- Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this Rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the Court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this Rule, concerning fees and expenses as the Court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the Court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this Rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this Rule the Court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this Rule the Court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of privilege or protection of trial preparation materials. -- When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective orders. -- Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the Court or alternatively, on matters relating to a deposition taken outside the State of Delaware, a court in the state where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) That the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the Court; (6) that a deposition after being sealed be opened only by order of the Court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Court.

If the motion for a protective order is denied in whole or in part, the Court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and timing of discovery. -- Unless the Court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of responses. -- A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired except as follows:

(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response although correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the Court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(f) Discovery conference. -- At any time after commencement of an action the Court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The Court shall do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the Court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the Court may combine the discovery conference with a pretrial conference authorized by Rule 16.

(g) Signing of discovery requests, responses, and objections. -- Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: (1) Consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the Court, upon motion, or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf

the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Rule 27. Deposition before action or pending appeal.

Omitted.

Rule 28. Persons before whom depositions may be taken.

(a) Within the United States. -- Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken (1) before an officer authorized to administer oaths by the laws of the place where the examination is held, or (2) before a person appointed by the Court in which the action is pending. A person so appointed has power to administer oaths and take testimony. The term "officer" as used in Rules 30, 31 and 32 includes a person appointed by the Court or designated by the parties under Rule 29.

(b) In foreign countries. -- Depositions may be taken in a foreign country (1) pursuant to any applicable treaty or convention, or (2) pursuant to a letter of request (whether or not captioned a letter rogatory), or (3) on notice before a person authorized to administer oaths in the place where the examination is held, either by the law thereof or by the law of the United States, or (4) before a person commissioned by the Court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony. A commission or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter of request that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter of request may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter of request may be addressed "To the Appropriate Authority in (here name the country)." When a letter of request or any other device is used pursuant to any applicable treaty or convention, it shall be captioned in the form prescribed by that treaty or convention. Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States under these Rules.

(c) Disqualification for interest. -- No depositions shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

(d) Designation of officers. -- The officers referred to in paragraphs (a) and (b) hereof may be designated in notices or commissions either by name or descriptive title and letters of request may be addressed "To the Appropriate Authority in (here name the state or country)."

Rule 29. Stipulations regarding discovery procedure.

Unless the Court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these Rules for other methods of discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may be made only with the approval of the Court.

Rule 30. Depositions upon oral examination.

(a) When depositions may be taken. -- After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to

HOLLAND INN GROUP 5 PRESENTATION: OUT OF CONTROL CLIENT INSTRUCTING ATTORNEY ON TRIAL STRATEGY

Is an attorney required to follow a client's instructions on trial strategy when it may conflict with the Delaware Rules of Professional Conduct?

A. Preamble: A Lawyer's Responsibilities

(2) As a representative of clients, a lawyer performs various functions. .... As advocate, a lawyer **zealously** asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of **honest dealings with others**.

(4) ... A lawyer **should keep in confidence** information relating to information of a client except so far as disclosure is required or permitted...

(8) A lawyer's responsibilities as representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when **an opposing party is well represented, a lawyer can be a zealous advocate** on behalf of a client and at the same time assume that justice is being done.

(9) In the nature of the law practice, however, conflicting responsibilities are encountered....**Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underling the Rules**. These **principles include the lawyer's obligation zealously to protect and purse a client's legitimate interests**, with the bounds of the law. While maintaining a professional, courteous and civil attitude toward all persons involved in the legal system

B. Rule 1.2 (a) Scope of representation.

... **A lawyer shall abide by a client's decisions** concerning the objectives of representation and, as required by Rule 1.4 **shall consult with the client as to means by which they are to be pursued.**

C. Rule 1.4 (a) (5) Communication.

... **A lawyer shall consult with the client** about relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assist not permitted by the Rules of Professionals Conduct or other law.

D. Rule 1.6 (a) Confidentiality of information.

A lawyer shall not reveal information relating to the representation of client **unless the client gives informed consent**...

E. Rule 3.3. Candor toward the tribunal. Comment(2):

This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer ...has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal.

F. Rule 3.4 Fairness to opposing party and counsel

The rule does not state shall inform opposing counsel weakness of their case before Trial.

RANDY J. HOLLAND DELAWARE WORKERS COMPENSATION INN OF COURT – GROUP 5

TALKING/TEACHING POINTS: (Davy Crumpler & Andy Carmine)

1. If an attorney anticipates that his client or witness may become hostile or even violent and dangerous at the hearing, does he/she have a duty to warn the IAB prior to the hearing?

   -No such rule exists.

   - DE. Rules of Prof. Conduct - Rule 1.6. (Confidentiality of information)
   (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
   (1) to prevent reasonably certain death or substantial bodily harm;

2. Does Employer Atty have a duty or should he report the conduct of Claimant Atty to ODC, the IAB, etc?

   - DE. Rules of Prof. Conduct - Rule 8.3. (Reporting professional misconduct)
   (a) A lawyer who knows that another lawyer has committed a violation of the rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
   Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover.

   - DE. Rules of Prof. Conduct – Rule 8.4 (Misconduct)
   It is professional misconduct for a lawyer to:
   (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
   (d) engage in conduct that is prejudicial to the administration of justice;

CASE LAW:

-Tiffany Wright v. Christiana Care: IAB No. 1401923 (Sept. 26, 2014)

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

TIFFANY WRIGHT,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1401923
	)	
CHRISTIANA CARE,	)	
	)	
Employer.	)	

ORDER

This matter came before the Board on September 4, 2014, on a motion by Tiffany Wright ("Claimant") seeking to strike certain witnesses listed by Christiana Care Health Systems ("Employer"); to strike a labor market specialist; and to strike an asserted forfeiture defense.

Background: Claimant was injured in a compensable work accident on August 7, 2013. The injury was acknowledged as compensable. On April 23, 2014, Claimant filed a Petition to Determine Additional Compensation Due seeking payment of medical expenses and acknowledgement of a concussion/headaches as part of the compensable injury. On July 8, 2014, Employer filed a Petition for Review alleging that Claimant was no longer totally disabled. Both petitions have been consolidated to be heard on November 3, 2014.

By letter dated May 28, 2014, Employer listed nine people as witnesses for the hearing. These included a claims adjuster (Alison Barkley), two doctors and six employees of Employer. Upon inquiry by Claimant, Employer clarified that the six employees worked in Employer's Employee Health department in either an administrative capacity or as a nurse/nurse practitioner. Employer declined to indicate what relevant information, if any, any of the listed witnesses had pertaining to the pending petitions, arguing that it had no "obligation" to "preview" the testimony of the witnesses.

By letter dated June 23, 2014, Employer added three additional employee witnesses and also stated that the forfeiture provisions of section 2353 of title 19 "may" apply. Upon inquiry by Claimant, Employer identified the witnesses as working in the Urology Gynecology unit of Employer (which is where, as the Board understands it, Claimant had been working). Once again, Employer declined to indicate what relevant information the listed witnesses might possess. Employer also refused to state the basis for the alleged forfeiture defense, arguing that it was under no obligation to preview the defense.

On June 24, 2014, Employer provided a completed pre-trial memorandum listing an additional witness, namely Tracey Wilkerson, a vocational rehabilitation expert. As of the time of this motion hearing, no labor market survey has been produced.

Claimant argues that, to the extent that witnesses and defenses are raised prior to a hearing, those witnesses and defenses must bear some reasonable relationship to the issues to be adjudicated. Claimant seeks to strike Alison Barkley as a witness, arguing that a claims adjuster would have nothing relevant to state pertaining to the issues of reasonable and necessary medical expenses and whether Claimant is capable of working with or without restrictions. Claimant seeks to strike Tracey Wilkerson because no labor market survey has been produced. Claimant seeks to strike the nine employees of Employer on the basis that there has been no indication that they have anything relevant to provide with respect to the pending issues, considering that Claimant has an already acknowledged work injury.

Employer argues that the Board's rules require it to list witnesses and defenses more than thirty days prior to the hearing. However, Employer's investigation of the claim continues up to the day of the hearing. As such, Employer is compelled to list *potential* witnesses and defenses to preserve them in case the subsequent investigation reveals information involving those

witnesses or defenses. Generally, the week prior to a hearing is when Employer prepares the case and trims down the witness list. For example, the claims adjuster took a verbal statement from Claimant and some of the co-workers listed as witnesses by Employer were identified by Claimant herself in that statement. If, at the hearing, Claimant were to make a comment that contradicted the statement, Ms. Barkley would be a necessary witness and, potentially, those co-workers as well. Employer also argues that Ms. Wilkerson still has time to prepare a labor market survey, noting that, as of the date of this motion hearing, they were still about a month away from the 30-day pre-hearing mark. Finally, Employer notes that the other employee witnesses from Employee Health all saw or spoke with Claimant concerning her injury and could have relevant information about Claimant's recovery and her ability to work.

Ruling: Many of the issues in this case arise from the limited discovery authorized under the Board's rules. Some are easily dealt with.

Employer listed a claims adjuster as a witness and has provided an explanation as to the content of that witness' testimony, namely the recorded statement taken from Claimant. The Board will not strike her as a witness.

With regard to Tracey Wilkerson, the problem is that she had not yet provided a labor market survey. Employer notes that the so-called "Thirty-Day Rule" has not yet been reached and there remains time for production of the report. In fact, production of the labor market survey is not subject to the "Thirty-Day Rule" contained in the *Rules of the Industrial Accident Board for the State of Delaware* ("*Board Rules*"), Rule 9.[1] This rule provides for the submission

[1] There is another rule in workers' compensation that is *also* called the "Thirty-Day Rule." An employer may avoid paying a successful claimant an attorney's fee if, thirty days prior to the hearing date, the employer gives a written settlement offer to the claimant that is "equal to or greater than the amount ultimately awarded by the Board." DEL. CODE ANN. tit. 19, § 2320(10)b. This settlement-offer version of a "Thirty-Day Rule" is completely separate from the thirty day requirement concerning preparation of the pretrial memorandum discussed by Rule 9 and is not involved in the current motion.

of a pretrial memorandum by the parties, on which such things as the names and addresses of prospective witnesses are to be listed. This memorandum may be amended or modified by the parties at any time prior to thirty days before the hearing. *Board Rules*, Rule 9(B)(6). Rule 9 only requires the production of certain limited documents as part of the pretrial memorandum. Thus, for example, a claimant seeking payment of medical expenses must provide copies of the disputed bills to counsel. *Board Rules*, Rule 9(B)(5)(b). If there is a permanent impairment claim, a claimant must also provide the medical report upon which the claim is based. *Board Rules*, Rule 9(B)(5)(d). If there is an intent to use any movie, video or still picture at the hearing, either a copy of that item or information as to where it can be viewed must be provided. *Board Rules*, Rule 9(B)(5)(f). These things are all subject to the Thirty-Day Rule, but Rule 9 does not specifically require the production of a labor market survey. Such production comes as the result of a proper Request for Production and production can only be made once the document in question physically exists.[2]

The bottom line in all of this is that the mere fact that a labor market survey had not been produced at the time that the vocational rehabilitation expert was listed as a witness by Employer is not in itself a basis for striking the witness.

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[2] Of course, this does not mean that a labor market survey can be withheld until just before the hearing. Basic due process rights must be respected and "trial by surprise," whether achieved accidentally or by design, is not permitted. When pertinent documents are produced less than thirty days prior to a hearing, the standard to be applied is whether the production is unduly prejudicial to the party who received the documents late. Claimant certainly has the right to investigate the employers on a labor market survey, *see Torres v. Allen Family Foods*, 672 A.2d 26, 32 (Del. 1995), and a late production may affect Claimant's ability to do that. As such, production of a labor market survey thirty days prior to the hearing is a good practice, even if not specifically required by the *Board Rules*. Delayed production could potentially result in the survey being struck on the basis of unfair surprise. On the other hand, balanced with this is the requirement that a labor market survey show evidence of reasonably contemporaneous job availability. *See Watson v. Wal-Mart Associates*, 30 A.3d 775, 780 (Del. 2011). As such, a labor market specialist is often expected to update a previously prepared survey up to the week of the hearing. Such updates, of course, can only be provided when they are done and must, of necessity, be done shortly before the hearing. There may still be prejudice to a claimant if a new employer is listed on such an update, but not if the previously produce survey is simply being updated as to the continuing availability of the listed jobs. These are the sort of issues that the Board routinely weighs to assure that relevant evidence is considered at a hearing without causing undue prejudice to either party.

This brings us to the nine "employee" witnesses. The Board has some sympathy for Claimant on this point. Employer's listing of large number of witnesses causes some degree of administrative difficulty for the Board as well. Nevertheless, there is no rule that limits the number of witnesses that can be listed. Discovery under the Workers' Compensation Act is extremely limited and there is no formal provision for interrogatories to allow an opposing party to explore what a listed witness will add to the litigation.

Claimant references *Delaware Home & Hospital v. Martin*, Del. Super., C.A. No. K11A-07-001, Young, J., 2012 WL 1414083 (February 21, 2012), *aff'd*, Del. Supr., No. 232, 2013 (September 24, 2013). Certainly, that case is instructive. The employer twice requested production of documents concerning the claimant's job search efforts. Because her job search was not memorialized in any document, the claimant did not disclose any information. At the hearing, she testified as to making a job search. The employer objected and the claimant's position was that she was not "required" to produce anything because she had not documented the search. Claimant asserted that making any other response would be similar to answering an interrogatory, which is not provided for in the *Board Rules*. The Board allowed the testimony. On appeal, Superior Court reversed. Concerning the distinction between a request for production and an interrogatory, the Court observed that "[t]his sort of razor thin distinction could appear to border on what was once referred to as 'unhandsome dealing.' Not having the information in some formalized, written form is decidedly not the equivalent of not having the information." *Delaware Home & Hospital*, 2012 WL 1414083 at *2. The Court discussed the relaxed rules of evidence under which the Board routinely operates and noted that the claimant's failure to be candid about her job search efforts when asked by the employer effectively hampered the ability of employer to cross-examine the witness on a significant issue. As such, the Court found that

the claimant should have disclosed the requested information to prevent unfair prejudice to the employer. "Claimant's characterization of the request as an interrogatory may be fair. Claimant's suggestion that Appellant is not entitled to an answer thereof, however, is not." *Delaware Home & Hospital*, 2012 WL 1414083 at *3.

The Court's concern is over ensuring the fundamental fairness of the litigation process before an administrative board. Because of the informality of administrative proceedings, "[t]he 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 discretion." *Board Rules*, Rule 14(C). The Board is to consider evidence that contains probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. *See Board Rules*, Rule 14(C). However, the Board is also charged with ensuring that it makes a just determination in every proceeding, *see* DEL. CODE ANN. tit. 19, § 2301A(i), and fundamental principles of justice need to be observed. *See General Chemical Div., Allied Chemical & Dye Corp. v. Fasano*, 94 A.2d 600, 601 (Del. Super. 1953). Thus, because of the informal nature of litigation before the Board, there is something of a heightened obligation on practitioners before the Board to show professionalism and courtesy to opposing parties and to avoid misleading conduct that might be characterized as "unhandsome dealing."[3]

[3] The *Principles of Professionalism for Delaware Lawyers* (hereinafter "*Professionalism*") advises that integrity includes acting with candor and that "[c]andor requires both the expression of the truth and the refusal to mislead others in speech and demeanor." *Professionalism*, Principle A.1. In conducting litigation, "a lawyer should strive to make our system of justice work fairly and efficiently. A lawyer should avoid conduct that undermines the judicial system or the public's confidence in it, as a truth seeking process for resolving disputes in a rational, amicable and efficient way." *Professionalism*, Principle B. In handling discovery issues, "responses should be timely, candid and not evasive. Good faith efforts should be made to resolve by agreement objections to matters contained in pleadings, discovery requests and objections." *Professionalism*, Principle B.2. These principles, of course, do not set "any minimum standards of professional care and competence." *Professionalism*, Introduction. Rather, they are merely a means "to promote and foster the ideals of professional courtesy, conduct and cooperation." *Id.* One cannot be sanctioned for violating these principles. They do, however, constitute fundamental principles that should guide and inform every attorney's conduct.

In this regard, there is certainly nothing illegal or improper in listing witnesses so long as there is a good faith basis for the listing. Employer's initial, and unhelpful, response to Claimant's inquiry concerning these witnesses was that it had no obligation to preview their testimony. This may be technically true, but it does also run the risk of creating a "surprise" situation, which would be improper and force the Board to take action to remedy that surprise. "Nothing is more repugnant to our traditions of justice than to be at the mercy of witnesses one cannot see or challenge, or to have one's rights stand or fall on the basis of unrevealed facts that perhaps could be explained or refuted." 3 Lex K. Larson, *Larson's Workers' Compensation. Desk Edition*, § 127.11[3][a] (Matthew Bender, Rev. Ed.). At this legal hearing, Employer further explained that certain listed witnesses were co-workers referenced in the statement that Claimant gave to Ms. Barkley, while the others met with Claimant at Employee Health. The records of Employee Health have, presumably, been provided to Claimant. The Board finds this sufficient to give Claimant some reasonable idea of their likely testimony. It is not a full "preview" of the testimony, but gives sufficient guidance to prevent undue surprise. Such a statement given at the time of Claimant's initial inquiry might have avoided the need for this legal hearing.[4] With the providing of this extra guidance, the Board finds no basis to strike the witnesses.[5]

The question of the forfeiture defense involves similar concerns, although in some ways it is a more troubling issue. Employer's initial response was only that it was under no obligation to preview its defense. However, it is equally true that Employer has no right to list a defense for

[4] The Board also observes that being overly closed-mouth about such things can be counter-productive. It is far more cost-efficient for all parties to settle disputes without proceeding to litigation before the Board. Giving the opposing side some insight into one's case can help pave the way to settlement. This is not limited to the "strong" elements of one's case. Even if, for example, a proposed defense is only a 50-50 proposition, it would also be a 50-50 proposition for the opposing party and might well encourage settlement rather than risk going to hearing.

[5] As Employer refines its case and learns that certain witnesses will no longer be necessary, it would be good practice, in line with the principles of professionalism discussed earlier, for Employer to notify Claimant and the Board that those witnesses will no longer be called.

which it has no good faith basis to assert. Employer points out that it needs to list its defenses no later than thirty days prior to the hearing date. The Board understands this, although the Board would also note that the Thirty-Day Rule is not nearly as inviolate as Employer seems to think. The pretrial memorandum can be amended less than thirty days prior to a hearing either by stipulation of the parties or by order of the Board. *Board Rules*, Rule 9(B)(6)(e). If late-discovered evidence reveals a new defense, the Board could grant an amendment to the pretrial memorandum to fulfill its duty to ensure a just determination, although a continuance of the hearing might also be required to allow the opposing party time to investigate the defense. However, assuming that Employer does not want to risk an amendment, then a difficult situation is created: Employer feels the need to list a defense to "preserve" it, but at the time of its listing Employer does not actually have an evidentiary basis to believe that it has such a defense. Employer runs the risk of being accused of asserting a defense for which it has no good faith basis. A failure by Employer to be more specific about the nature of the defense also lays the groundwork for a charge of creating unfair surprise. There are, for example, many bases for a claim of forfeiture. Rule 9 does require a "complete statement of defenses" as part of the pretrial memorandum. *See Board Rules*, Rule 9(B)(5)(c). By refusing to narrow down the possibilities, Employer runs the risk at hearing of the Board finding it to be an "incomplete" statement of the defense, resulting in unfair surprise to Claimant. The Board might then strike the defense or continuing the hearing to provide Claimant sufficient time to respond to the defense.

In such a situation, keeping in mind that it is incumbent on counsel not to mislead the opposing party, good practice would be to explain candidly to opposing counsel why the defense has been listed and, as Employer refines its case, to either formally withdraw the defense or

notify opposing counsel that evidence in support of the defense had been uncovered.[6] Such a procedure would preserve the potential defense for Employer while not running the risk of improperly misleading the opposing party or creating an unfair "surprise" situation which, as discussed before, parties must try to avoid.

The Board recommends that Employer follows the suggested procedure outlined above to avoid surprising the opposing party at hearing. At this point, however, the Board finds no basis to strike the defense.

For the reasons stated above, Claimant's motion is denied.

IT IS SO ORDERED this 26th day of September, 2014.

INDUSTRIAL ACCIDENT BOARD

Will C Hare For
TERRENCE M. SHANNON

Marilyn J. Boto
MARILYN J. BOTO

Mailed Date: 9.30.14

OWC Staff

Christopher F. Baum, Hearing Officer for the Board
Heather A. Long, Attorney for Claimant
Gregory P. Skolnik, Attorney for Employer

[6] Documentary evidence in support of the defense, of course, would need to be provided promptly in response to a Request for Production. Thus, for example, if the forfeiture defense is based on Claimant's refusal of employment procured for the employee, *see* DEL. CODE ANN. tit. 19, § 2353(c), documentation of the employment offer would need to be provided.

PRINCIPLES OF PROFESSIONALISM FOR DELAWARE LAWYERS

PREAMBLE

The Delaware State Bar Association and the Delaware Supreme Court have jointly adopted the Principles of Professionalism for Delaware Lawyers for the guidance of Delaware lawyers, effective November 1, 2003. These Principles replace and supercede the Statement of Principles of Lawyer Conduct adopted by the Delaware State Bar Association on November 15, 1991. They are not intended, nor should they be construed, as establishing any minimum standards of professional care or competence, or as altering a lawyer's responsibilities under the Delaware Lawyers' Rules of Professional Conduct. These Principles shall not be used as a basis for litigation, lawyer discipline or sanctions. The purpose of adopting the Principles is to promote and foster the ideals of professional courtesy, conduct and cooperation. These Principles are fundamental to the functioning of our system of justice and public confidence in that system.

PRINCIPLES

A. *In general.* A lawyer should develop and maintain the qualities of integrity, compassion, learning, civility, diligence and public service that mark the most admired members of our profession. A lawyer should provide an example to the community in these qualities and should not be satisfied with minimal compliance with the mandatory rules governing professional conduct. These qualities apply both to office practice and to litigation. A lawyer should be mindful of the need to protect the standing of the legal profession in the view of the public and should bring these Principles to the attention of other lawyers when appropriate.

1. Integrity. Personal integrity is the most important quality in a lawyer. A lawyer's integrity requires personal conduct that does not impair the rendering of professional service of the highest skill and ability; acting with candor; preserving confidences; treating others with respect; and acting with conviction and courage in advocating a lawful cause. Candor requires both the expression of the truth and the refusal to mislead others in speech and demeanor.

2. Compassion. Compassion requires respect for the personal dignity of all persons. In that connection, a lawyer should treat all persons, including adverse lawyers and parties, fairly and equitably and refrain from acting upon or manifesting racial, gender or other bias or prejudice toward any participant in the legal process.

3. Learning. A lawyer's commitment to learning involves academic study in the law followed by continual individual research and investigation in those fields in which the lawyer offers legal services to the public.

4. Civility. Professional civility is conduct that shows respect not only for the courts and colleagues, but also for all people encountered in practice. Respect requires promptness in meeting appointments, consideration of the schedules and

commitments of others, adherence to commitments whether made orally or in writing, promptness in returning telephone calls and responding to communications, and avoidance of verbal intemperance and personal attacks. A lawyer should not communicate with a Court* concerning pending or prospective litigation without reasonable notice whenever possible to all affected parties. Respect for the Court requires careful preparation of matters to be presented; clear, succinct, and candid oral and written communications; acceptance of rulings of the Court, subject to appropriate review; emotional self-control; the absence of scorn and superiority in words or demeanor; observance of local practice and custom as to the manner of addressing the Court; and appropriate dress in all Court proceedings. A lawyer should represent a client with vigor, dedication and commitment. Such representation, however, does not justify conduct that unnecessarily delays matters, or is abusive, rude or disrespectful. A lawyer should recognize that such conduct may be detrimental to a client's interests and contrary to the administration of justice.

5. Diligence. A lawyer should expend the time, effort, and energy required to master the facts and law presented by each professional task.

6. Public service. A lawyer should assist and substantially participate in civic, educational and charitable organizations. A lawyer should render substantial professional services on a charitable, or pro bono publico, basis on behalf of those persons who cannot afford adequate legal assistance.

B. *Conduct of Litigation.* In dealing with opposing counsel, adverse parties, judges, court personnel and other participants in the legal process, a lawyer should strive to make our system of justice work fairly and efficiently. A lawyer should avoid conduct that undermines the judicial system or the public's confidence in it, as a truth seeking process for resolving disputes in a rational, amicable and efficient way.

1. Responsible choice of forum. Before choosing a forum, a lawyer should review with the client all alternatives, including alternate methods of dispute resolution. A lawyer should not file or defend a suit or an administrative proceeding without as thorough a review of the facts and the law as is required to form a conviction that the complaint or response has merit.

2. Pre-trial proceedings. A lawyer should use pre-trial procedures, including discovery, solely to develop a case for settlement or trial and not to harass an opponent or delay a case. Whenever possible, stipulations and agreements should be made between counsel to reduce both the cost and the use of judicial time. Interrogatories and requests for documents should be carefully crafted to demand only relevant matter, and responses should be timely, candid and not evasive. Good faith efforts should be

* As used in these Principles, "Court" includes not only state and federal courts, but also other tribunals performing an adjudicatory function including administrative hearing panels and boards as well as arbitration tribunals.

made to resolve by agreement objections to matters contained in pleadings, discovery requests and objections.

A lawyer should endeavor to schedule pre-trial procedures so as to accommodate the schedules of all parties and attorneys involved. Agreements for reasonable extensions of time should not be withheld arbitrarily.

Only those depositions necessary to develop or preserve the facts should be taken. Questions and objections at deposition should be restricted to conduct appropriate in the presence of a judge.

3. Communications with the Court or Tribunal. A lawyer should speak and write respectfully in all communications with the Court. All papers filed in a proceeding should be as succinct as the complexity of the matter will allow. A lawyer should avoid ex parte communications with the Court on pending matters, except when permitted by law. Unless specifically authorized by law, a lawyer should not submit papers to the Court without serving copies of all papers upon opposing counsel in such a manner that opposing counsel will receive them before or contemporaneously with the submission to the Court.

4. Settlement. A lawyer should constantly evaluate the strength of a client's legal position and keep the client advised. A lawyer should seek to settle any matter at any time that such course of action is determined to be consistent with the client's best interest after considering the anticipated cost of continuing the proceeding and the lawyer's good faith evaluation of the likely result.

5. Appeal. A lawyer should take an appeal only if the lawyer believes in good faith that the Court has committed error, or an appeal is otherwise required.

C. *Out of state associate counsel.* Before moving the admission of a lawyer from another jurisdiction, a Delaware lawyer should make such inquiry as required to determine that the lawyer to be admitted is reputable and competent and should furnish the candidate for admission with a copy these Principles.

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

EDWARD OGLESBY, :

Claimant, :

v. : Hearing No. 1391695

KRAFT FOODS, :

Employer. :

JUL 17 2014

CF _____ COPIES _____
MF _____ Enc. _____
FF _____ SUS _____
TN _____ TO _____

ORDER

WHEREAS, on May 21, 2014, Kraft Foods, Inc. ("Employer") filed a Petition for Review which is currently scheduled to be heard by the Board on October 22, 2014;

WHEREAS, on April 15, 2014, Claimant's counsel was notified of a Defense Medical Evaluation with Dr. Andrew Gelman to take place on May 28, 2014 at 3:30p.m. The Claimant attended the appointment with an unidentified woman;

WHEREAS, on June 2, 2014, Employer's counsel received the DME report and Dr. Gelman noted on the report, the Defense Medical Examination was terminated after the Claimant began using foul language. The Claimant did not cooperate with Dr. Gelman and appeared to be angry and frustrated (ATTACHED DME REPORT DATED 5/28/14);

WHEREAS, Employer's counsel was not able to get a completed DME report due to the Claimant's lack of cooperation;

WHEREAS, Employer's counsel incurred the full fee in the amount of $1,200.00 from Dr. Gelman without receiving a completed DME report;

WHEREAS, Employer's counsel rescheduled the DME with Dr. Gelman for August 25, 2014 at 1:00 p.m.;

WHEREAS, Employer seeks an order compelling Claimant to attend the rescheduled DME on August 25, 2014 at 1:00 p.m. with Dr. Gelman and to only be accompanied by a legal assistant, paralegal and/or his attorney;

WHEREAS, Employer seeks a credit in the amount of $1,200.00 from Dr. Gelman without receiving a completed DME report;

WHEREAS, also on May 29, 2014 counsel for Employer requested all of the Claimant's job search records;

WHEREAS, on June 19, 2014, counsel for Employer followed up on the status of the Claimant's job search records and to date have not received the requested documents;

WHEREAS, the response to the additional Request for Production and providing the Claimant's job search records are essential to the Employer's defense and assessment of the claim;

WHEREAS, Employer requests a suspension of the Claimant's ongoing benefits pursuant to *19 Del. C. 1953, § 2343* due to his failure to cooperate with the Defense Medical Examination on May 28, 2014;

IT IS SO ORDERED this 14th day of July 2014 the Board hereby GRANTS Employer's request for the Claimant is to produce the requested job search records no later than August 14, 2014.

IT IS SO ORDERED this 14th day of July 2014 the Employer's request for a credit in the amount of $1,200.00 against future disability benefits is granted.

IT IS SO ORDERED this 14th day of July 2014 the Employer's request to compel the Claimant to attend the new DME date on August 25, 2014 at 1:00 p.m. with Dr. Gelman and to only be accompanied by a legal assistant, paralegal and/or his attorney is granted.

A
in the examination room

IT IS SO ORDERED this _____ day of _____ 2014 the Employer requests a suspension of the Claimant's benefits pursuant to *19 Del. C. 1953, § 2343* due to the Claimant's failure to cooperate with the DME is granted. Denied by the Board.

INDUSTRIAL ACCIDENT BOARD

Mary L. Dentzler
Member

Patricia J. Morrel
Member

L
OWC Staff

Mailed Date: 7.15.14

WCHO:

cc: Walt F. Schmittinger, Esquire, for Claimant
Francis X. Nardo, Esquire, for the Employer