

The Prospect of a Board Decision Appeal – the Board’s and Hearing Officers’ Perspective

I. Appeal Statistics from 2017 and past 5 years in terms of percentage of appeals and number of reversals.

- a. Appeal percentage remains very low
 - i. In last five years, only 9.6% of decisions appealed (average of about 38 per year).
 - ii. The reversal and/or remand rate has also remained low, 14 of 186 appeals (about 0.725% of all decisions rendered in past five years).
- b. There are other important factors that will dictate whether or not a party will appeal a decision, such as cost and likelihood of success on appeal.

II. Concern by the Board / Hearing Officers about the possibility of appeal when deliberating or when accepting or excluding evidence over objection.

- a. Generally, the potential for appeal is not a primary concern for the Board or Hearing Officers.
- b. The Board is most concerned about giving both parties as fair a hearing as possible, while hearing as much probative evidence as that will allow.
- c. The Board is most concerned with making the right decision and providing a just result.
- d. Administrative hearings are more informal, so more is allowed “in” than would be allowed in Superior Court.
 - i. The Board follows the rules of evidence applicable to the Superior Court insofar as practicable, however; (Board Rule 14C)
 - 1. The Board is permitted to consider evidence “which, in its opinion, possesses any probative value commonly accepted by reasonably prudent persons...” and; (Board Rule 14C)
 - 2. The Board may “in its discretion, disregard any customary rules of evidence and legal procedures so long as such a disregard does not amount to an abuse of discretion. (Board Rule 14C)
 - 3. Appellate Courts have recognized that “administrative boards ought not be constrained by the rigid evidentiary rules which govern a jury trial. On the contrary, all evidence which could conceivably throw light on the controversy should be heard.” *Thomas v. Christiana Excavating* 1994 WL 750325, No. 94A-03-009 at *5, (Del. Super. Ct., Nov. 15, 1994), *citing Ridings v. Unemployment Insurance Appeal Bd.*, 407 A.2d 238, 240 (Del. Superior Ct., Sept. 10, 1979).
 - 4. However, Board is charged with ensuring that it makes a just determination in every proceeding (Del Code Sec. 2301A(i), and fundamental principles of justice do need to be observed. (*See General Chemical Div, Allied Chemical & Dye Corp v. Fasano*, 94 A.2d 600 (Del. Super. Ct., Jan 26, 1953).

- e. Board will not admit even relevant evidence in certain circumstances.
 - i. Trial by surprise or “unhandsome dealing” is frowned upon.
 - 1. There is a heightened obligation on all practitioners before the Board to show professionalism and courtesy to opposing parties.
 - 2. Attorneys should avoid obstructive or misleading conduct.
 - ii. The best policy is to be open and above-board with the opposition.
- f. The Board and Hearing Officers realize that we sometimes make mistakes even when focusing on trying to do the right thing, but if we get it wrong, there are higher courts to direct us and make things right.

III. Concern with appeal in terms of sufficiency of legal analysis within the written decision.

- a. The decision attempts to mesh the evidence with the legal analysis.
 - i. This does not always happen easily;
 - ii. Even so, does not mean that the end result is unjust or incorrect.
- b. The Board realizes that there is an appellate process in place to step in if the Board goes too far afield, and to correct errors.
- c. There are times where issues arise if the case law is still unclear; in such cases, the Board will use its best judgment in deciding the case.
 - i. In fact, there are times where we hope the Courts might clear up confusion in order for future cases to be more easily decided.
 - 1. Recent example: Section 2311 General Contractor/ Subcontractor liability cases where a GC may be deemed liable for an injury although the GC is not technically an employer.
 - 2. Two separate Boards had two cases with almost identical fact patterns, only a couple months apart.
 - a. Each Board heard almost the same evidence, yet went in completely opposite directions after deliberating.
 - b. The Court stepped in on one of the two cases to let us know that we were wrong. In this way, the Courts are essential in putting us back on track and clearing up any confusion.
- d. The Board and the Hearing Officer do not endeavor to make written decisions completely bulletproof from an appeal perspective.
 - i. When writing up a decision, the Hearing Officer does his or her best to make the Board’s decision and rationale for the decision clear, and to also properly support the Board’s decision from a legal perspective.
 - ii. When hearing a case or issuing a decision, at times, we realize that a case might be more likely to be appealed; however, the Board’s focus in conducting the hearing, reaching a fair decision and writing up the decision does not change.

Summary of Appeals

(Status of appeals taken as of December 31, 2017)

In the last five years, the Board (or Hearing Officers) have rendered 1,931 decisions on the merits. Of those decisions, 186 (approximately 9.6%) were appealed (an average of 37.8 per year). 178 of those appeals have been resolved. Only 14 decisions have been reversed and/or remanded, in whole or in part. This represents a "reversal rate" of only 0.725% of all decisions rendered in those five years.

Year Appeal Taken In:	2013	2014	2015	2016	2017
Total Number of Decisions:	394	370	393	399	375
Total Number of Appeals:	38	41	37	41	29
Affirmed:	24	18	22	16	1
Reversed and/or Remanded:	4	2	3	3	2
Dismissed/Withdrawn:	10	21	12	22	18
Pending: ¹	0	0	0	0	8

Five-Year Cumulative	
Total Number of Decisions:	1,931
Total Number of Appeals:	186
Affirmed:	81
Reversed and/or Remanded	14
Dismissed/Withdrawn	83
Pending:	8

¹ For purposes of these statistics, an appeal is no longer considered "Pending" once a Superior Court decision has been issued. Some Superior Court decisions have been appealed to the Delaware Supreme Court. If a Supreme Court decision is different from that given by the Superior Court, the statistics will be updated to reflect the final holding. Therefore, for example, while no cases are "Pending" from 2016, some of those appeal results may change in the future because of decisions by the Supreme Court.

Source: Delaware Department of Labor's 20th Annual Report on the Status of Workers' Compensation Case Management