

BEFORE THE INDUSTRIAL ACCIDENT BOARD  
OF THE STATE OF DELAWARE

C. MAUDE DONOVAN,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1266167
	)	
KENT CONSTRUCTION CO.,	)	
	)	
Employer.	)	

ORDER

During the motion hearing conducted on Wednesday, July 8, 2009, the Board entertained C. Maude Donovan's ("Claimant") *Motion in Limine* to exclude any testimony or evidence regarding Utilization Review.

Claimant argued that the statute<sup>1</sup> and regulations provide for *de novo* review from Utilization Review. Claimant argued that since it is *de novo* review, the Board should get a fresh perspective on the case and is not impacted by the Utilization Review report. Claimant also argues that Utilization Review takes place without any input from Claimant or Claimant's medical providers, so it is a completely one-sided process that is conducted by the employer and, therefore, if any weight is given to the Utilization Review report, then it would be prejudicial and deprive Claimant of being involved in the process.

Kent Construction Company ("Kent") argued that the statute and regulations provide for *de novo* review, so the Board should be allowed to review the Utilization Review report. Kent

<sup>1</sup> 19 Del. Code § 2322F(j).

also argued that the statute and regulations call for *de novo* review, not a trial *de novo*, so the Utilization Review report should be allowed in as evidence before the Board. Kent argued that the Utilization Review process involves an independent medical review of Claimant's medical treatment and proposed treatment plan and it is not a review by Kent's doctors, so the process is independent from Kent. Kent also argued that Board Rule 14 states that all probative evidence should be considered and that the Utilization Review report is probative evidence. Kent argued that the rules of evidence in Board hearings are more lenient than in Superior Court and that all evidence should be heard. *Alfree v. Johnson Controls Inc.*, Del. Super., C.A. No. 97A-04-005-CG, Goldstein, J. (September 12, 1997). Kent went on to argue that there is no prejudice to Claimant by allowing evidence and testimony regarding the Utilization Review report, because Claimant can request copies of all of the documents from the Utilization Review panel and because the Board can simply give the report the weight it thinks the report deserves.

In response to Kent's arguments, Claimant argued that although the rules of evidence are expanded before the Board, they are not expanded to the point of impeding Claimant's due process rights. The Board does not accept medical records without medical testimony and there are no depositions taken in conjunction with the Utilization Review report. Kent wants the Utilization Review report entered into evidence to go to the weight of the issue at hand without deposing any witness.

After considering the arguments, statute and regulations, the Board finds that it has no choice but to grant Claimant's *Motion in Limine*. The statute and regulations state that there is *de novo* review from the Utilization Review process. Since there is *de novo* review, the Board will not allow any reference to the Utilization Review report or process during the hearing on the merits of this case.

IT IS SO ORDERED this 20<sup>th</sup> day of JULY 2009.

INDUSTRIAL ACCIDENT BOARD

Elaine Bowen  
Elaine Bowen

Romayne Seward  
Romayne Seward

OWC Staff  
OWC Staff

HO:JGB

Mailed Date: 7/21/09

cc: Walt F. Schmittinger, Attorney for the Claimant  
Maria P. Newill, Attorney for the Employer

