

22 649

RECEIVED

AUG 11 2020

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

HECKLER & FRABIZZIO

REBECCA CLARK,)
)
 Claimant,)
)
 v.)
)
 STATE OF DELAWARE,)
)
 Employer.)

Hearing No. 1393189

*Perm DAD dismissed
where no adequate
of resolved and
Not
Compensable*

ORDER

This matter came before the Board on July 9, 2020, on a motion by the State of Delaware (“Employer”) for a partial dismissal of a pending petition filed by Rebecca Clark (“Claimant”). Pursuant to the Industrial Accident Board’s COVID-19 Emergency Order dated May 11, 2020, this motion hearing was conducted by video conferencing using the WebEx video platform.

Pending before the Board is Claimant’s Petition to Determine Additional Compensation Due filed on May 20, 2020, seeking compensation for alleged permanent impairment from concussion (14%); the cervical spine (31%); and the left upper extremity (17%). In addition, on May 26, 2020, Claimant filed a Petition to Determine Disfigurement, seeking compensation for cervical disfigurement.

Employer seeks dismissal of Claimant’s petitions (with the exception of the left upper extremity claim) on the basis that the Board has previously found that Claimant’s cervical surgery was not compensable and that her claimed concussion injury had resolved.

Background: A hearing was previously held before the Board on October 27, 2017. In its decision, the Board recited that Employer had recognized that, as a result of the work accident, Claimant sustained “a concussion and left shoulder, arm and hand sprain/strain injuries.” *Clark v. State*, Del. IAB, Hearing No. 1393189, at 2 (February 12, 2018). Claimant filed petitions seeking,

among other things, a finding of compensable injuries to the head, neck and left leg as well as a finding of a traumatic brain injury ("TBI") as well as seeking payment of two cervical surgeries. *See Clark*, at 2-3.

With regard to the surgeries, the Board denied Claimant's petition on technical grounds. With regard to the first surgery (a cervical fusion at C1-2 performed on February 9, 2015), it was noted that, while Employer had agreed that Claimant had sustained a cervical injury, the compensability of the surgery was denied because it had been performed by a non-certified health care provider without preauthorization. *See Clark*, at 64-66. With regard to the second surgery (October 21, 2015), the Board found that, while Employer had apparently agreed to a "cervical surgery," the October 2015 surgery was not a "cervical" surgery, but rather was done at the L2 level. *See Clark*, at 66-67. The Board also affirmatively concluded that Claimant had failed to establish that the October 2015 surgery was causally related to the work accident. *See Clark*, at 73.

The Board further addressed any further outstanding cervical treatment beyond the surgeries. After reviewing the evidence, it affirmatively found "Dr. Sommers and Dr. Fedder most persuasive that while Claimant might have possibly sustained a sprain/strain injury to the neck in relation to the work accident, the condition has since resolved." *Clark*, at 78.

With respect to any head injury, TBI or post concussive syndrome treatment, the Board noted that, while Employer had initially acknowledged a concussion, it argued that the condition was mild and had since resolved. *See Clark*, at 80. The Board again found the opinions of Employer's medical experts (Dr. Sommers and Dr. Fedder) to be more persuasive than the opinion of Claimant's expert (Dr. Henderson). Based on the evidence that it reviewed, the Board found that "given the lack of objective findings as well as the fact that many of Claimant's treatment

providers have noted conclusions supportive of intentional or unintentional misrepresentation of symptoms,” Claimant had failed in her burden of proof of showing that she suffered anything “more than a brief concussion and contusion to the back of the head in relation to the work accident.” *Clark*, at 83.

The Board’s decision was appealed to Superior Court, which affirmed. *See Clark v. State*, Del. Super., C.A. No. N18A-03-004, Streett, J. (June 19, 2019). Claimant then appealed to the Supreme Court, which summarily affirmed on the basis of the Superior Court decision. *See Clark v. State*, 2020 WL 521490 (Del. 2020).

Parties’ Positions: Therefore, certain findings are final. The Board affirmatively found that Claimant’s cervical surgery was not compensable. Employer argues that, therefore, a surgical scar from that non-compensable surgery cannot form the basis for a disfigurement claim. The Board also found, as a factual matter that, while Claimant may have sustained a sprain/strain injury to the neck in relation to the work accident, that condition had resolved. Employer argues that, therefore, a petition seeking permanent impairment because of that neck injury must be dismissed because the Board already concluded that the underlying injury itself had resolved. Likewise, the Board affirmatively found that Claimant only sustained a brief concussion in the work accident and it agreed with Employer’s medical experts that that mild concussion had also resolved. Employer argues, again, that since the compensable medical condition has been found to have resolved, Claimant cannot now seek permanent impairment benefits for that condition.

Claimant argues that her petitions for benefits should be permitted to go forward based on the recent decision of *Washington v. Delaware Transit Corp.*, 226 A.3d 202 (Del. 2020). In that case, the parties proceeded to a hearing on the claimant’s petition seeking a recurrence of total disability effective December 7, 2016. The claimant’s chiropractor had released the claimant to

return to work in a light duty capacity on December 5, but then took him back out of work again on December 7 based on an increase in symptoms. The claimant's doctor testified that the claimant had "fully recovered" by June of 2017. The employer's doctor opined that the claimant was capable of returning to work as early as December of 2016 and, at the latest, could fully return to work by June 22, 2017. The employer's doctor opined that the claimant was "fully recovered" and did not need ongoing treatment. *See Washington*, 226 A.3d at 205-06. The Board held that the claimant had failed to prove by a preponderance of the evidence that he had had a recurrence of total disability, explicitly accepting the testimony of the employer's doctor over that of the claimant's doctor. *See Washington*, 226 A.3d at 207.

The claimant then filed a petition seeking compensation for permanent impairment. Medical experts for both parties agreed that the claimant had some degree of impairment, but they disagreed as to the actual rating. However, the Board did not consider the testimony of these experts, but instead granted the employer's motion for dismissal on the grounds that the Board, in its prior decision, had already concluded that the claimant's shoulder injured had returned to "normal" and he was "fully recovered." *See Washington*, 226 A.3d at 208-09. Superior Court affirmed the Board's decision, but the Supreme Court reversed. The Court indicated that the prior decision was focused on whether the claimant had sustained a recurrence of total disability (the inability to work), while a permanent impairment claim looks at whether the claimant has a loss of use of an affected body part. While the issues may be related, they are different. *See Washington*, 226 A.3d at 212.¹

¹ The Supreme Court's decision in *Washington* is completely consistent with the long-held principle that, when determining the degree of a claimant's permanent impairment, it is reversible error for the Board to consider factors such as loss of earning capacity. *See Williams v. Chrysler Corp.*, 293 A.2d 802, 803 (Del. 1972). Permanent impairment is to be based on the physical loss of use of a body part, not on a loss of earning capacity (which is the issue for total or partial disability compensation).

Ruling: In the present case, the Board agrees with Employer that the nature of the Board's previous decision is considerably different than the one considered in *Washington*. In the Board's prior decision in *Clark*, it was specifically addressing the issue of whether Claimant continued to have certain compensable injuries. As discussed above, the *Clark* decision was on Claimant's petition "seeking findings of compensability of injuries to the head, neck and left leg" as well as a finding of compensability of TBI and the compensability of certain medical expenses including two surgeries. *See Clark*, at 2. Thus, Claimant's work capacity or loss of earning capacity was not in issue, but rather the issue was whether Claimant continued to have compensable injuries to the head and cervical spine. The Board specifically found that while Claimant may have "possibly sustained a sprain/strain injury to the neck in relation to the work accident, the condition has since resolved." *Clark*, at 78. With regard to concussion, the Board agreed with Employer's expert that Claimant had only sustained a mild concussion that had resolved or, in other words, Claimant failed to prove that she sustained anything more than "a brief concussion and contusion to the back of the head." *Clark*, at 83.

These findings of fact distinguish this case from *Washington*. In *Washington*, it was completely consistent to find in one decision that a claimant was capable of working while finding in another decision that that claimant has sustained a loss of use of a body part (permanent impairment). Work capacity is not the same as loss of use of a body part. It would, however, be completely inconsistent and contradictory for the Board to affirmatively find in one decision that Claimant has no ongoing compensable injury, but then, in a later decision, find that Claimant has a permanent impairment due to that no longer existing injury. The specific issues (whether Claimant had ongoing compensable injuries to the cervical spine and head) were directly disputed

in the earlier decision and the Board found against Claimant. Those findings were affirmed on appeal and are final.

There would hardly ever be an end to workers' compensation litigation if a claimant could first file a petition seeking a finding of a compensable injury and then, having lost that, being allowed to file a new petition for total disability (on the argument that total disability was not "in issue" in the prior decision), and then another new petition for permanent impairment (again, on the basis that that specific benefit was not part of either the first or second hearings), and then filing a fourth petition for medical treatment expenses (on the argument that that specific benefit was not in issue for the first three hearings). Whether a claimant has a compensable injury is a core finding that underlies every claim for workers' compensation benefits. One cannot be entitled to any benefits under the Act without having an ongoing compensable injury. Once the Board finds that a compensable injury resulting from a work accident either does not exist or has subsequently resolved, there simply can be no further entitlement to benefits with respect to that claimed injury.

Accordingly, Claimant's petition, at least as it pertains to seeking permanent impairment benefits for an alleged compensable injury to the cervical spine and head must be dismissed.

Some further explanation is needed with regard to the petition for disfigurement benefits. The surgery that resulted in the cervical scar was denied as compensable, but the specific reason given was that the treating surgeon was not a certified Workers' Compensation practitioner. In other words, the denial was not based on the reasonableness, necessity or causal relatedness of the surgery, but on a technical classification of the surgeon. That classification issue relieved Employer of the duty to pay for the surgery, but did not, in itself, relieve Employer of the underlying liability for the injury.

However, a review of the Board's prior decision makes it clear that Employer never did accept the compensability of that surgery, nor has the Board ever found it to be compensable. While there was some discussion in the decision that, at one point, Employer agreed to pay for a cervical surgery, that cervical surgery never took place. As such, the issue concerning the compensability of the surgical scar must fall under the same rationale concerning the compensability of cervical permanent impairment: when the Board was asked to directly rule on whether Claimant had any ongoing cervical injury from the work accident, the Board ruled that any cervical injury was just a sprain/strain which had resolved. *See Clark*, at 78. As such, the surgical scar from a cervical fusion surgery is not related to the work accident.

Accordingly, the Board grants Employer's motion and DISMISSES Claimant's petition for cervical disfigurement. With regard to Claimant's petition for permanent impairment, the claims with respect to cervical impairment and concussion impairment are dismissed, but the permanency claim with regard to the left upper extremity remains active and is currently is scheduled to be heard on October 29, 2020.

IT IS SO ORDERED THIS 30th DAY OF JULY, 2020.

INDUSTRIAL ACCIDENT BOARD

Peter W. Hartranft / 03
PETER W. HARTRANFT

Vincent D'Anna / 03
VINCENT D'ANNA

I, Christopher F. Baum, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

Christopher F. Baum

Mailed Date:

C.R. 8-3-2020
OWC Staff

Michael J. Hendee, Esquire, for Claimant
Nicholas Bittner, Esquire, for Employer