

MAY 09 2023

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

TABRE NELSON,)	
)	
Employee,)	
)	
v.)	Hearing No. 1520650
)	
PROFESSIONAL REALTY)	
MANAGEMENT)	
)	
Employer.)	

DECISION ON PETITION FOR REVIEW

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on Friday March 31, 2023, in the Hearing Room of the Board, in Wilmington, Delaware.

PRESENT:

PETER HARTRANFT

ROBERT MITCHELL

Eric D. Boyle, Esq., Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Michael Minuti, Esq., Attorney for the Employee

Nicolas E. Bittner, Esq., Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Tabre Nelson (“Claimant”) sustained injuries in a work accident on January 19, 2022, while in the course and scope of her employment with Professional Realty Management (“Employer”). Injuries to the neck and low back were acknowledged as compensable. Claimant alleges further injuries to her left hand and wrist and left leg. Claimant is currently receiving benefits for total disability which began on January 20, 2022. Claimant’s total disability compensation rate is \$415.80 based on an average weekly wage of \$623.67. Employer filed this Petition for Review alleging that Claimant can return to work and her total disability benefits should be terminated. Claimant contends that she remains physically unable to work and should remain on total disability. A hearing was held on the Petition on March 31, 2023. This is the Board’s decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. Samuel Matz, a board-certified orthopedic surgeon, testified by deposition on behalf of Employer. Dr. Matz examined Claimant on May 24, 2022, and October 25, 2022. In conjunction with these exams, he reviewed the medical records. Dr. Matz testified that Claimant told him at the first examination that she slipped down some steps on a wet floor injuring her left side. She claimed injuries to her neck and upper back, left hand, wrist, and left leg. Dr. Matz agreed that Claimant initially went to St. Francis Hospital but was not treated there but instead was transferred over to GoCare Silverside, an urgent care facility. Their records indicated that Claimant fell onto the left side of her back and neck. She denied any loss of consciousness or head trauma. Dr. Matz agreed this history was consistent with her statement to him. Claimant then followed up with St. Francis Family Practice on January 24, 2022. He agreed that the initial record indicated that she slipped and fell down a set of stairs with no loss of consciousness or head trauma. The diagnosis

at that time was strain of the left trapezius muscle and lumbar paraspinal muscle with pain and swelling of the left wrist. Claimant then began treating with Delaware Injury Care in February 2022. The initial intake form indicated that she was having 10 out of 10 constant severe pain which was aching, burning, and tingling. She also was stating that she had shooting pain and spasms. She did not indicate any headache or migraine on those forms. The Delaware Injury Care diagnosis indicated a lot of spinal diagnosis but no injuries to either hand or wrist nor a concussion diagnosis. Claimant again denied head trauma. Dr. Matz agreed that the treatment at this facility was essentially chiropractic treatment. Claimant had MRI studies of the neck and low back done on February 28, 2022.

Dr. Matz reviewed the findings of these MRI studies which he noted were done at an open MRI which is not as accurate as a closed scanner. On the lumbar scan there was a disc herniation at T11-12 and some arthritic findings at L5-S1. The arthritic findings were on the right side. There was no evidence of any left-sided pathology or impingement. Dr. Matz agreed that a 35-year-old can have herniations and be asymptomatic. Dr. Matz also testified that the MRI scan showed facet arthropathy on the right side. He testified there was a lack of findings that would explain Claimant's left-sided radicular complaints. Just because she had the herniated disc does not mean that it results in radicular symptoms, in particular because the disc is not compressing the nerve on the involved side. On the cervical MRI scan the impression was cervical malalignment and clinical correlation was suggested. At C-4-5 there was a broad-based disc herniation impinging on the thecal sac. At C6-7 there was a central disc herniation impinging on the thecal sac with edema in the annulus at the site of the herniation reflecting and an acute annular tear.

Dr. Matz next reviewed Dr. Grossinger's records. Claimant began seeing Dr. Grossinger on April 25, 2022. His records indicated Claimant fell, struck her head and sustained brain trauma

as a result of the accident. He agreed there were three other providers documenting that Claimant specifically denied any head injury. However, Dr. Grossinger diagnosed a concussion and a traumatic brain injury. Dr. Matz explained the trigger point injections that Dr. Grossinger performed in the cervical and lumbar spine. This is essentially injecting medicine into the locations of pain as denoted by the patient. But it is not a specific spinal injection. Dr. Matz agreed that Dr. Grossinger then performed EMG studies and diagnosed a double crush syndrome. Dr. Matz explained that double crush syndrome means the patient has pathology in the neck and in the arm or wrist on the same side. This would be right sided carpal tunnel syndrome with a right sided cervical radiculopathy. In this case there is no double crush syndrome because the findings in the neck and wrists are on the opposite sides. A left C7 radiculopathy and a right carpal tunnel syndrome. He then went on to discuss further injections of epidural steroids that Dr. Grossinger did which were supposed to be in a series but there was a lack of documentation as to the effectiveness of the initial injection.

Subsequently in November Dr. Grossinger also did an EMG of the lower extremities which purported to show an L5 radiculopathy. Dr. Matz reviewed a note dated October 31, 2022, from the Philadelphia Hand to Shoulder Center. Claimant was there for an evaluation of the right upper extremity following a slip and fall at work with symptoms including a burning sensation in both hands as well as neck pain. The exam notes indicated that Claimant had severe pain with movement of her neck. The bilateral wrist exam was too difficult because Claimant was guarding and grimacing with pain throughout the examination. Claimant was reporting diffuse pain throughout the hand with tenderness over both elbows. The doctor could not describe some of the pain complaints mechanically based on either the imaging or the clinical exam. Dr. Matz believed that the doctor was documenting evidence of symptom magnification and inconsistencies on the

examination. Generally, people with carpal tunnel syndrome are not grimacing and complaining of pain in the elbows and other parts the arm. The record also indicates a right carpal tunnel release might help the wrist but not with all the other symptoms she was complaining about. Dr. Matz agreed that the records indicated that Claimant was offered a right carpal tunnel injection, but she wanted to immediately move forward with the surgery.

On physical exam on May 24, 2022, Claimant was complaining of pain in the neck and upper back with tingling and numbness in the left hand and fingers. She had paint pain in the mid to low back radiating down the left leg with occasional tingling. She was prescribed medication that had not arrived yet. Claimant came into the exam room and sat in a chair constantly shaking her left hand throughout the visit. Sitting too long or laying on her back would be too uncomfortable. Claimant had a full range of cervical motion with no spinous process tenderness. There was discomfort to palpation over the left trapezius and paraspinals. There was full range of motion of the shoulders, elbows, wrists, and hands. Reflexes were present and symmetric. Grip strength was voluntarily diminished on the left compared to the right. She had decreased sensation to light touch throughout the left hand. She had limited lumbar mobility with full range of motion of the hips, knees, ankles, and feet. Straight leg raising test was negative in the sitting position. Sensory exam was normal in the lower extremities.

Dr. Matz explained that when he sees patients with carpal tunnel syndrome or cervical disc issues, he generally does not see them coming in the exam room shaking their hand. Dr. Matz found it curious that Claimant was scheduled for a right carpal tunnel release but was shaking the left hand instead. Dr. Matz' impression following the first examination was that Claimant sustained a work-related injury on January 19, 2022, with a contusion and strain of cervical, thoracic and lumbar regions. She had radicular signs and symptoms in the left-hand, wrist and left leg. She had

herniated discs in the cervical and lumbar spines. Dr. Matz felt that Claimant was embellishing her symptoms during physical examination with signs of symptom magnification. Dr. Matz did note that the MRI scan suggested pathology that could lead to the symptoms voiced by Claimant. Her current treatment was reasonable, necessary, and related to the accident. She may require injection treatment. Dr. Matz did not feel that there was any independent injury to the left hand, right-hand or left leg. At that point he wanted Claimant to remain off work pending further treatment. Dr. Matz did note that there was embellishment of the symptoms, but he gave her the benefit of the doubt.

On his second examination on October 25, 2022, Dr. Matz documented her history and additional treatment. Claimant indicated to him that she had two or three injections into her lower back. She was having ongoing chiropractic treatment three times a week. She was scheduled for a visit with Dr. Grossinger on November 10, 2022. She was having terrible pain and her back was no better. She has back pain going down the legs and cannot get comfortable. She is supposed to see another doctor for her back. Her neck was also no better and she still had complaints of neck pain with numbness and tingling on both hands. She was taking Mobic and was still out of work. She denied prior injuries to her neck or back or other work accidents. At this examination Claimant came in shaking both hands. Dr. Matz commented that Claimant was still magnifying her symptoms and demonstrating inconsistencies such as voluntarily limiting her cervical motion. Dr. Matz found a positive Lhermitte's sign which can be consistent with symptom magnification. He documented multiple subjective issues without clear-cut objective findings. Passive dorsiflexion of both ankles caused severe pain radiating in the low back which is another inconsistency. He did not see additional injection reports from Dr. Grossinger's office. He saw one spinal injection and then trigger point injections.

After the exam and reviewing the updated records Dr. Matz' impressions remained pretty much the same, except that he added symptom magnification to the list. Claimant had subjective complaints outweighing the objective findings on physical examination. She has findings which are not rooted in any anatomic basis. Claimant has subjectively described no improvement whatsoever despite several months of treatment. At this point Dr. Matz believed that Claimant would not benefit from additional treatment and that she had essentially reached maximum medical improvement. She was able to return to work full duty with no restrictions as it relates to the injury. Dr. Matz felt that the current treatment had not helped based on Claimant's history and based on her over the top presentation, further treatment would likely not change anything.

Dr. Matz reacted to Dr. Grossinger's testimony that the AMA guidelines hold out EMG testing as the gold standard for diagnosing radiculopathy and carpal tunnel syndrome. Dr. Matz disagreed with that noting that many people who have carpal tunnel syndrome would have normal electrodiagnostic studies. A substantial number of people who are asymptomatic will have positive findings on EMG studies. Finally, he noted that there is a subjective component to electronic diagnostic testing. He agreed with the AMA Guides which indicated that the quality of the person performing and interpreting the study was critical. Dr. Matz testified that the best practice was to have an independent physician administer the testing, not the treating physician. He affirmed that in this case Dr. Grossinger was the one who performed the EMGs. Dr. Matz also agreed that with a significant complaint of radiculopathy one would want to get a referral to an orthopedic spinal surgeon or someone who does spinal surgery for an evaluation. One would expect that to be done in the first 6 to 12 months, although he noted someone with the symptoms that Claimant was expressing would likely be a disastrous or surgical candidate.

Dr. Matz also addressed a semantic difference in reports where he noted herniated disc disease versus spine. Dr. Matz added that disc herniations can resolve on scans. Dr. Matz testified that based on the records and reason to diagnose head trauma or any record of any he that Claimant sustained a contusion and strain to the specific correlation with what was seen on the diagnostic balance based on everything he reviewed it is the most just like there was a thoracic and lumbar strain. Dr. Matz subjective complaints objectively, he believed the work resolved. Dr. Matz was not aware of anything that work after November 2022 and unlike Dr. Grossinger, he was would have affected treatment. Dr. Matz pointed out that that time. He noted that this lack of treatment suggests by the complaints. Dr. Matz also felt that any carpal tunnel work accident. Carpal tunnel is ubiquitous and is very He saw nothing suggesting that there was trauma that associated same with the low back, with the low back it was his opinion than subjective complaints it has resolved. Essentially the lumbar spine.

Dr. Matz discussed the correlation between radiology complaints with respect to the upper extremity issues. He also did not see a distinct left leg injury. Finally, Dr. Matz did not attribute

opinions between the first and second MRI. He noted a herniated disc in the lumbar and cervical spine. You can see that on subsequent MRI scans. Dr. Matz testified that based on the records and reason to diagnose head trauma or any record of any he that Claimant sustained a contusion and strain to the specific correlation with what was seen on the diagnostic balance based on everything he reviewed it is the most just like there was a thoracic and lumbar strain. Dr. Matz subjective complaints objectively, he believed the work resolved. Dr. Matz was not aware of anything that work after November 2022 and unlike Dr. Grossinger, he was would have affected treatment. Dr. Matz pointed out that that time. He noted that this lack of treatment suggests by the complaints. Dr. Matz also felt that any carpal tunnel work accident. Carpal tunnel is ubiquitous and is very He saw nothing suggesting that there was trauma that associated same with the low back, with the low back it was his opinion than subjective complaints it has resolved. Essentially the lumbar spine.

Dr. Matz discussed the correlation between radiology complaints and dermatomal patterns. He also did not believe there was any evidence for a distinct left leg injury. Finally, Dr. Matz did not attribute any work restrictions to the work

accident. He agreed that even if there was a finding that Claimant still had ongoing symptoms that would not preclude her from returning to work. He did not see any medical reason why Claimant could not return to her preinjury job. Dr. Matz reviewed the labor market survey dated February 27, 2023, identifying 12 job positions in a sedentary duty capacity. He felt that Claimant could perform the physical functions of all these jobs.

On cross examination Dr. Matz explained the difference between the terminology on his May 24, 2022, report when he had an impression of herniated cervical and lumbar discs and the October 25, 2022, report where it indicated herniated disc disease. Dr. Matz testified that he wasn't saying Claimant did not have herniated discs, he was using different terminology to describe the same thing. While you can have disc disease and not have herniations he did use the term herniation in both reports. He had not reviewed any MRIs prior to the ones taken after this accident. He testified that of the two MRI scans the cervical one had the more significant findings. Dr. Matz admitted that he was just relying on the report and did not have the actual MRI films for review. Dr. Matz described in more detail how the radicular symptomatology was not consistent with the MRI findings. There was no description of the herniation localizing to the left side where Claimant had the symptomology. He did admit that the cervical and lumbar regions were pain generators based on his first report. He did not recall any other records or any records other than the Philadelphia Hand and Shoulder Center that indicated there was an embellishment in the complaints.

Dr. Matz expected that Claimant would have had a consultation with some form of surgeon at this point although he did not think it was clear-cut that she was a surgical candidate. He went on to indicate that he did not believe Claimant required surgery and if she had surgery, it would be a big mistake. Obviously if Claimant had surgery, she would require time off from work, but Dr.

Matz did not believe the injuries from the work accident required surgery. Looking at the labor market survey Dr. Matz agreed that the ability to move from time to time would be helpful for Claimant's subjective complaints. He noted the labor market survey jobs were all sedentary including no lifting over 10 pounds. As far as lifting restrictions he felt it was difficult to judge because of the embellishment and the symptomatology but he felt Claimant could lift 15 to 20 pounds easily. He felt a set of nerve conduction studies from an outside examiner might be helpful in this case.

Truman Perry, a vocational rehabilitation specialist, testified by deposition on behalf of Employer. Mr. Perry is employed by Perry and Associates as a Senior Vocational Case Manager. His primary job is to conduct labor market surveys for workers compensation cases or vocational assessments in Superior Court. He has been doing this since 2011. Prior to that he worked in the banking industry. He has testified on numerous occasions before the Industrial Accident Board. Mr. Perry agreed that he compiled a labor market survey at the request of Employer's counsel and prepared a report dated February 27, 2023.

Mr. Perry relied on information provided about Claimant including that she was 36 years old and lived in Wilmington. He had her 2015 application for employment with Employer and a copy of her resume. She is a high school graduate. She did also have a few online course certificates through her employer, which include a variety of different subjects from safety to customer service. Claimant's job history showed a number of different jobs with cleaning and housekeeping roles including at hotels. Mr. Perry noted that he had medical information and documentation from Dr. Matz that Claimant was released to eight hours per day full duty but noted that he was requested to look for sedentary duty jobs that would be vocationally suitable for Claimant. He also summarized Claimant's transferable skills.

Mr. Perry agreed that the labor market survey listed 12 different job positions that were both full-time and part-time. He primarily gets information from Indeed.com the online job search engine. The labor market survey covers the period of November 2022 through February 2023. In general, the types of jobs included several work from home jobs receiving phone calls and emails. These use a laptop computer as well. There are also a few other customer service jobs including one at McDonald's and a security job at the Delaware Park casino. There were several other security type jobs as well as a toll collector position. There was a job from the YMCA of Delaware working at the reception desk. All the positions were classified as sedentary duty. He testified that some of the positions require standing but most accommodate sitting or standing positions. Mr. Perry has personally observed these jobs. Mr. Perry agreed that all except two of the job positions offer both full and part-time work. Mr. Perry testified that they would accommodate someone who needs to start at part-time for a period before moving to full time. They would certainly accept Claimant's application and give it the same consideration as anyone else.

Mr. Perry testified that there was a low average weekly wage of \$564.27 and a high average weekly wage of \$601.16. The average was \$582.72. For the part-time wages the overall average was \$282.06 per week. Mr. Perry testified that he determined what jobs were available as of the afternoon prior to the hearing. Two jobs were unavailable, the Delaware River and Bay Authority toll collector position and the SP Plus parking cashier position were no longer available. This changed the average wages to \$590.76 for full time and \$284.76 for part time. Mr. Perry agreed these job positions represented a sampling of jobs available in the job market at that time. In Mr. Perry's opinion if Claimant began a job search, she could find a job quickly, within the first several weeks. The fact that Claimants work experience was mostly housekeeping would not be an impediment because the jobs that Mr. Perry listed on his labor market survey are entry level. Her

work experience also shows that she has been able to hold down a job. Mr. Perry identified jobs that were in the general Wilmington, Newcastle and Newark area. She can also rely on public transportation to get to the jobs. Mr. Perry testified that he was unaware of whether Claimant had a driver's license since the only thing in the file was a non-driver identification card. If Claimant had not been able to drive in the past, she obviously found a way to get to work for her prior positions. Mr. Perry addressed some issues with respect to carpal tunnel syndromes and the different type of jobs that require you to use technology such as a phone or scanner.

On cross examination Mr. Perry expanded on the customer service phone jobs regarding the equipment. In his experience in customer service positions, he has seen both a wireless handset where someone can walk around and not be tied to a desk as well as a deskbound position. Some people use a headset set up and some people just pick up the phone and call.

Claimant testified on her own behalf. She was working at Brandywine Apartments when the accident happened, and she has worked at that location for approximately 6 to 7 years. Her job is what is called turn cleaning. This means she generally does a complete and thorough cleaning of an apartment unit when it is vacated by a tenant. This is a more detailed cleaning than a periodic housecleaning and includes cleaning the appliances. The accident occurred after the morning meeting. She was supposed to go clean one apartment but had equipment she left including drip pans at another apartment. She went back to this apartment first to get the equipment. After she grabbed it, she turned to make sure the door was locked. When she turned back to go down the steps she slipped and fell down a flight of steps landing on her left side. There was a tenant nearby who called Claimant's supervisor who then came to the scene. Claimant's supervisor told her that she had slipped on a wet floor and wanted her to go to the hospital. They first went to the office to complete accident paperwork.

Following the accident Claimant went to St. Francis Hospital but they didn't do anything for her so instead she went to Silverside urgent care to be seen on the day of the accident. At the urgent care center, they told Claimant she had torn muscle fibers in her neck and trapezius muscle. Claimant did not know how to follow up since she didn't have insurance, but she called her family doctor with St. Francis Family Practice. Claimant noted that they do not handle workers compensation cases. Claimant got the ball rolling after she spoke with Michael (Claimant's counsel). After that she started treating with Dr. Juste at Delaware Injury Care. They ordered MRI scans for her. Claimant testified that she had so much going on and was in a lot of pain, and so was unsure where the injuries were located. She feels it is much more than a sprain.

Claimant testified that she loves her job and wants a hundred percent to return. She is 36 years old and has four kids. Right now, it is hard for her to do basic activities of daily living such as showering and washing dishes or playing with her children. Her sleep is very chaotic. She just wants someone to fix her pain so she can do her daily activities. She does not do drugs. Claimant testified that when she saw Dr. Grossinger the shots he provided were very painful for her. She believes it was a steroid shot that was very painful. Dr. Grossinger also provided a medical marijuana prescription card which she was willing to try. In addition to having pain in the neck Claimant was also having pain in the hands. Both of her hands were going numb. Dr. Grossinger referred Claimant to Dr. Osterman at the Philadelphia Hand in Shoulder Center. Dr. Osterman wanted to determine if the pain was coming from her neck first before doing surgery on her hands. Dr. Osterman wanted her to see a neck and back specialist before working on her hands, in case they went ahead with the hand surgery, and it didn't solve anything. Dr. Osterman gave her the option of injections, but Claimant wanted to move ahead with the surgery on her hands. The only reason she could not go forward with the carpal tunnel surgery was due to problems with the

workers compensation insurance. Medicaid does not pay for this type of treatment. Claimant would like to see a neck and back surgeon, but she can't do that because for insurance reasons. She needs workers compensation. She wants to see a neurosurgeon. She is still seeing Dr. Grossinger and will get more injections. Her pain has not gotten any better, Claimant has good and bad days with her pain which is dependent on her activity level and the weather. Claimant won't say that her pain is a ten, she has days where it is a 5-6/10. She is very uncomfortable at night, that is the worst time. She must change her positions a lot, every 30 to 15 to 30 minutes. When she is sitting Claimant shifts her position to help her back. She has to use a pillow. This does help alleviate the pain temporarily. She has a burning pain in her lower back which she feels if she stands too long.

She would like to return to her job, it is her passion, but she needs to get her health fixed first. Claimant can't get to a job and have her hands lock up. She tried doing some cleaning activities at home such as cleaning out a tub because eventually she wants to have her own cleaning company. She was unable to clean the tub without pain and even just sweeping she feels a lot of pain when she turns her body. It is depressing because Claimant cannot do what she used to do before the accident. Claimant denied having any prior symptoms or pain like this before this accident. She has not had any subsequent accidents either. Claimant does not drive. She has a fiancé who helps around the house. She has four children aged 20, 13, 11 and nine. She lives in a house and is a high school graduate. She never thought about doing office work. You need experience for that, and she just sticks to her field. She did work in a nursing home in several different roles including cleaning and as a CNA before the cleaning jobs. Claimant clarified Dr. Osterman's plan of care regarding her hands. Dr. Grossinger wanted to do more injections. Claimant took it upon herself to find a surgeon for her neck and back but that doctor wanted to get more MRI scans which brought up the problem with her workers compensation coverage again.

Claimant could not recall the doctor's name, but she saw him last month. The office was on Limestone Road. She last saw Dr. Osterman last year in September. Claimant hurt her hands because she tried to break her fall down the steps. Now her problem is her fingers constantly lock up on her and fall asleep. This is a big problem she must switch hands often and cannot ring out rags for cleaning. She is right-handed. She has trouble opening jars and brushing her teeth. Claimant asserted that the doctor at St. Francis said she had just had strains. Her family doctor said she had a tear in her trapezius muscle. The doctor wanted her to get an ultrasound. She only saw the family practice doctor three times and then she went to Delaware Injury Care and followed their protocol. Then Dr. Bruce [Grossinger] came in the picture and she followed his protocol. Claimant wanted to get surgery, but he wanted to go through the protocol first. Claimant testified that she was tired of being poked and just wanted to move forward. The medication is not working for her. The back surgeon she saw wanted to start the process all over again, but she didn't have insurance.

Dr. Bruce Grossinger, a board certified neurologist, testified by deposition on behalf of Claimant. Dr. Grossinger began treating Claimant on April 25, 2022. His initial diagnosis included a concussion with headaches, cervical herniated discs, cervical radiculopathy, lumbar strain and a herniated disc at T12-L1. For treatment Dr. Grossinger initially performed cervical and lumbar injections and provided some generic medication. Dr. Grossinger pointedly mentioned that he never prescribes opioids in any of his cases. He prescribed Claimant meloxicam which is a generic anti-inflammatory medication. He also prescribed baclofen which is a muscle relaxer. He also prescribed several medications to help her with headaches and mood stabilization. He recommended that she continue treatment with her chiropractor.

Dr. Grossinger's understanding of the mechanism of injury from the Claimant was that she slipped and fell down a set of stairs while working as a housekeeper. She struck her head, was dazed, confused and injured her spine. He noted that her symptoms early on included difficulty with word retrieval, sleep disturbance, headaches and other difficulties doing tasks. Claimant had numerous symptoms of a concussion. She had neck pain spreading into her shoulders and arms as well as pain spreading into the hips and legs. Claimant had numbness in the left hand and shook her hand which is a sign of carpal tunnel syndrome. Dr. Grossinger planned to have her undergo upper and lower extremity EMG's. Dr. Grossinger personally reviewed MRIs of the neck and back. Dr. Grossinger reviewed the MRIs and felt that they were quite abnormal. The findings included two moderate herniated discs at C-4-5 and C6-7 with impingement. The lumbar MRI showed a herniated disc at T12-L1. He also noted a finding of facet arthropathy and L5-S1. However, he did not feel that area was symptomatic. In Dr. Grossinger's opinion these findings were aggravated and rendered symptomatic by the fall at work. He agreed that in his opinion the diagnoses were all directly related to the injury at work.

Functionally Claimant noted headaches, foginess, difficulty with word retrieval and mood disturbance. She had numbness in the left hand which was initially ascribed to the neck and the herniated discs, but later it was discovered she had carpal tunnel syndrome. She has radiating neck and low back pain and difficulty with activities of daily living. She had been prescribed some medication prior to seeing Dr. Grossinger which included steroids, anti-inflammatories, and muscle relaxers. Dr. Grossinger did not note any prior injuries in the medical records that he reviewed. Claimant denied prior spinal problems or work injuries. There was a car accident 12 years prior to this injury. She had no restrictions on her work capabilities.

Dr. Grossinger testified about the EMGs that were completed. The cervical EMG reflected moderate right carpal tunnel syndrome and moderate left C7 radiculopathy. On physical examination Claimant had a positive Tinel's and Phalen's sign on the right side. The EMG result had a motor latency of 5.2 MS which is abnormal. This is a sign of carpal tunnel syndrome. Dr. Grossinger felt the evidence was quite convincing for right carpal tunnel syndrome. He summarized some of the other EMG findings that supported this diagnosis. Dr. Grossinger felt that an EMG was the gold standard for diagnosing radiculopathy and carpal tunnel syndrome according to the AMA guidelines. Following those tests Dr. Grossinger referred Claimant to the Philadelphia Hand and Shoulder Center where she saw Dr. Osterman. He believes that they also clinically correlated carpal tunnel syndrome. They recommended surgery but Claimant wanted to exhaust conservative measures before undergoing surgery. She wanted to wear a splint and take vitamins.

For treatment of the cervical radiculopathy Dr. Grossinger utilized a board-certified interventional spine specialist for injections. On June 22, 2022, Claimant had an epidural steroid injection. He noted that if Claimant only had a muscle strain, she would certainly not have permitted a large needle to be put in her neck. Following that injection Claimant was next seen on September 15, 2022 and was experiencing headaches. He prescribed a different headache medication for migraines called Ubrelvy and started her on Lyrica in place of gabapentin. On physical examination she had a focal neurological deficit which included a 4/5 weakness in the upper and lower extremities as well as spasm in the neck and back and positive cervical facet loading. In November Dr. Grossinger performed a lower extremity EMG reflecting moderate bilateral L5 radiculopathy. This correlates with the L5-S1 facet stenosis that was found on the MRI. While this was an arthritic finding, it was aggravated by the accident.

It was Dr. Grossinger's opinion that up to November 2022 Claimant was totally disabled. He noted that as a housekeeper she has a lot of physical activity which would be detrimental to someone with carpal tunnel syndrome. He also noted that the concussion could make it difficult for her to do that job. Dr. Grossinger testified that it is his opinion that Claimant remains totally disabled up to the present. Dr. Grossinger pointed out that there was a flareup of Covid in Delaware at that time and because of that he had not seen her since September. At the new year he took a sabbatical from his practice, went south to Florida and only just recently returned. Claimant is scheduled to see him sometime next week. He is going to reevaluate her for future care. It was his understanding that she did continue with her chiropractic treatment. Dr. Grossinger also anticipated additional cervical epidural steroid injections and possibly an injection for the carpal tunnel. If all the conservative measures fail, he will direct her back to Dr. Osterman for a carpal tunnel release.

Dr. Grossinger next reviewed and criticized Dr. Matz defense medical examinations. He did agree with Dr. Matz that Claimant had a mixture of soft tissue injuries as well as serious neurological injuries. Dr. Grossinger again confirmed that his clinical examinations along with the EMG findings verified that there was cervical and lumbar radiculopathy. He performed neurological examinations on multiple occasions finding weakness and other deficits as well as positive Spurling's and positive straight leg raising tests. He felt that Dr. Matz was right on the money with the initial diagnosis of cervical and lumbar radiculopathy. Dr. Matz also recognized herniated discs on the MRIs. However, Dr. Grossinger disagreed with the opinion that Claimant was embellishing her symptoms. He felt that the Claimant was honest, reliable and consistent. The other providers involved in the case also did not mention anything about embellishment. He was also not impressed with Dr. Matz' physical examinations. Dr. Grossinger was confused by Dr.

Matz' next examination because his report did not mention herniated discs which would not have magically disappeared. Dr. Grossinger agreed with Dr. Matz that the initial treatment including injections were reasonable necessary and related to the accident. Dr. Grossinger also noted that Dr. Matz observed the symptoms of carpal tunnel during his examination.

Dr. Grossinger after reviewing Dr. Matz' October report did note that the carpal tunnel syndrome has been confirmed in both hands by the specialists at Philadelphia Hand and Shoulder Center. They wanted to perform a carpal tunnel release surgery. Dr. Grossinger noted and agreed that often patients develop carpal tunnel from doing repetitive activities but when someone attempts to break their fall with their hands you can have an acute type carpal tunnel syndrome. Dr. Grossinger also criticized Dr. Matz' physical examination from a neurological point of view noting that he omitted certain muscles and muscle strength testing. Dr. Grossinger testified that he did not want to bore the board by listing all the muscles that he examined on all his visits. He also noted that Dr. Matz didn't critique the EMG findings in his report. Dr. Grossinger disagreed with Dr. Matz' opinion that Claimant was at maximum medical improvement and could be released to full duty status. It sounded like Dr. Matz was examining a different person's body.

Dr. Grossinger again discussed the break in care due to Covid and how it would not make sense to operate on someone with Covid lurking in the background. He disagreed that Claimant could go back to doing housekeeping work in only a few months. Dr. Grossinger testified that Claimant may be ready to try the sedentary jobs in another three to six months. He also would follow Dr. Matz' advice and perform the series of three cervical epidural injections as well as three lumbar epidural injections. That will take time. Ongoing chiropractic care and physical therapy will take time. When you have spinal injections, you need to go home and relax and ice. Dr. Grossinger also noted that Claimant was still improving from her concussion. He would not want

to send her prematurely back into the workforce. She could have a worsening of her injuries. He is trying to get her better without spinal surgery.

Dr. Grossinger reviewed some of the labor market survey jobs noting that some of them involve keyboarding and other repetitive work. He noted there were security positions which were observing monitors which again would involve using your hands to work on the computers. At present Dr. Grossinger would preclude Claimant from doing any of these jobs. Dr. Grossinger was asked whether any of the medications would affect Claimant's ability to return to work. Dr. Grossinger testified that he does not prescribe opioids and he never has, but none of Claimant's medications are controlled substances. The muscle relaxers can have sedative properties. The mild sedative properties combined with a proven concussion could potentially be a small barrier to employment. He noted that changing positions wouldn't solve all the issues. There was no cross examination.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Termination

In a total disability termination case, the employer is initially required to show that the claimant is not completely incapacitated (*i.e.*, demonstrate "medical employability"). *Howell v. Supermarkets General Corp.*, 340 A.2d 833, 835 (Del. 1975); *Chrysler Corporation v. Duff*, 314 A.2d 915, 918n.1 (Del. 1973). In response, the claimant may rebut that showing, show that he or she is a *prima facie* displaced worker or submit evidence of reasonable efforts to secure employment which have been unsuccessful because of the injury (*i.e.*, actual displacement). In rebuttal, the employer may then present evidence showing the availability of regular employment within the claimant's capabilities. *Howell*, 340 A.2d at 835; *Duff*, 314 A.2d at 918n.1. In this case

there is a dispute between the experts as to whether the Claimant can physically return to work. Dr. Matz provides an opinion that Claimant can return to work without restrictions and agreed that she could perform the jobs listed on the labor market survey. Dr. Grossinger does not believe Claimant can return to work and it would be another three to six months of treatment before he could reassess her condition. Following a review of all the evidence presented the Board finds that Claimant can physically return to work and her total disability benefits are terminated.

The Board relies on the testimony of Dr. Matz over that of Dr. Grossinger and finds that his opinion is more credible and reliable given the evidence presented in this case. When the medical testimony is in conflict, the Board in the role as the finder of fact must resolve the conflict. *General Motors Corp. v. McNemar*, 202 A.2d 803 (Del. 1964). As long as substantial evidence is found, the Board may accept the testimony of one expert over another. *Standard Distributing Company v. Nally*, 630 A.2d 640, 646 (Del. 1993). First the Board will address the shortcomings in Dr. Grossinger's testimony and why he is just not credible. The elephant in the room is the testimony about the head injury, which according to Dr. Grossinger persists to this day. Meanwhile Claimant denied hitting her head or having any concussion related symptoms. None of the other providers even mention a head injury let alone continuing cognitive difficulties. Dr. Grossinger uses this as one of the reasons he is currently keeping Claimant on total disability. To say that this bizarre testimony impacts the credibility of Dr. Grossinger's opinions is an understatement. He also threw in a diagnosis of a double crush syndrome, but that is not supported by the symptoms or diagnostic studies. Dr. Matz testified for double crush one needs to have all the symptoms on the same side, which is not the case with Claimant.

Another factor impacting Dr. Grossinger's opinions is the testimony about Covid19 and his absence from Delaware for the winter. This testimony purportedly explains the large gap in

treatment or the lack of follow up on the injection treatment. Dr. Matz helpfully explained that he continued to practice this fall and Claimant continued with her chiropractic treatment. There were no State imposed restrictions or mandated closings due to Covid either. Dr. Grossinger then went to Florida for the winter. Good for him but he could easily have referred Claimant to another interventional spine practitioner for the injections. How easy would this have been? Very easy since Dr. Grossinger testified that he has such a practitioner in his office, Dr. Francavilla. Instead, we have a long gap in treatment, which left the series of injections incomplete. Now Dr. Grossinger has revived his plan to perform the injections. This is also one of the reasons he gives for Claimant remaining on total disability for another 3-6 months. While she undergoes this treatment Dr. Grossinger testified that she would be unable to work give the recovery time from an injection.

Secondly, we have the carpal tunnel syndrome diagnosis, which according to Dr. Grossinger precludes Claimant from returning to even sedentary work. The problematic issue here, as noted by Employer was that an injury to one or both hands causing carpal tunnel has not been accepted as compensable or even alleged until this hearing. There was also some conflicting testimony from Claimant about whether she was going to get a carpal tunnel release surgery. On the one hand Claimant testified that Dr. Osterman wanted to wait to confirm the symptoms were not coming from the cervical spine before performing surgery, but on the other Claimant testified that she was going to get surgery but for an insurance coverage issue. While Dr. Matz testified that he did not believe that the carpal tunnel symptoms had any relationship to the work accident, that is not the issue before the Board. Dr. Matz also commented on Claimant's presentation of hand shaking, first the left and then both hands. He found this unusual even for someone with carpal tunnel syndrome. Dr. Matz pointed out that Claimant came in shaking her left hand but the focus from Dr. Osterman and the EMG was on the right side. Presently the Board declines to take a

position on the causal relationship of the carpal tunnel syndrome to the fall at work as it is unnecessary given Dr. Matz' return to work opinion.

The Board also finds that Claimant's presentation is not convincing with respect to ongoing total disability. There is Dr. Matz' opinion that she is embellishing her symptoms, which is supported by Dr. Osterman's examination and report. She also noted symptoms not readily explained by the imaging and physical exam. Claimant was able to go for months without treatment from Dr. Grossinger which calls into question the need for additional intervention requiring further total disability. Claimant also testified several times that her lack of treatment or follow up with a spinal surgeon was due to the lack of insurance. This is not convincing because she is represented, and Employer has acknowledged neck and back injuries. Based on Dr. Matz' initial report they were also paying for the treatment. Similarly for the carpal tunnel, the remedy would be to file a petition if she wanted to proceed with surgery.

Claimant did call into question inconsistencies in Dr. Matz' testimony and reports. He changed the diagnosis from the first report to the second, dropping the specific reference to herniated discs. Dr. Matz did explain that the herniated discs did not support symptoms or findings of radiculopathy because they were right sided whilst Claimant's symptoms were in the left arm. In the Board's view Dr. Matz' report and exams lend credibility to his opinions. He acknowledged the findings on the imaging, agreed to the treatment plans and gave Claimant the benefit of the doubt as to her subjective symptoms. Contrast that to Dr. Grossinger's testimony about Claimant's severe (non-existent) head injury. Dr. Matz also has seen Claimant more recently than Dr. Grossinger. Consequently, the Board finds that Claimant's total disability is terminated. While the Board finds Dr. Matz' opinions are more credible than Dr. Grossinger the Board is not convinced that she should return to her prior position without restrictions.

This gets to the second aspect of the Employer's burden of proof. Claimant having still been on a putative total disability from Dr. Grossinger, despite his recent lack of involvement, is not obligated to search for a job. Employer in addition to Dr. Matz' opinion noted above, has provided evidence of job availability which includes sedentary positions. The Board finds that Claimant should initially return to work in that capacity. Mr. Perry demonstrated availability of jobs in that category that would be vocationally suitable for Claimant. The average weekly wage of the available position is \$590.76. Claimant's pre-injury weekly wage was \$623.07 therefore she has a loss of earning capacity of \$32.91. This results in a weekly temporary partial disability rate of \$21.94. A Claimant may rely on no work notes from their treating physician to remain on total disability and in this case, Dr. Grossinger, as has been noted above, has not released Claimant to return to work. *Gilliard-Belfast v. Wendy's, Inc.*, 754 A.2d 251 (Del. 2000). *See also, Delhaize America, Inc. v. Baker*, Del. Supr., No. 108, 2005, Berger, J., at ¶ 5 (August 12, 2005)(ORDER). Since the Board relied on Dr. Matz' opinion that Claimant could physically return to work total disability benefits will be terminated as of the date of the Board's decision. Consequently, Employer's Petition for Review is hereby **GRANTED**.

Medical Witness and Attorney's Fees

Having received an award, Claimant is entitled to have her medical witness fees taxed as a cost against Employer pursuant to title 19, section 2322 of the Delaware Code.

A claimant who is awarded compensation is entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller." DEL. CODE ANN. tit. 19, § 2320. In determining an award of attorney's fees, the trier of fact must consider the factors outlined in *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del.

1973), such as the time involved in the presentations, fees customarily charged in the locality, the nature and length of the professional relationship with Claimant, and the attorney's experience/reputation. Claimant's counsel represents that his fee arrangement with Claimant is on a contingency basis. There has been no indication that fees or expenses have been, or will be, received by Claimant from any other source. Claimant's counsel submitted an affidavit attesting that he spent approximately seven (7) hours preparing for the current hearing, which lasted approximately one hour and forty minutes (1:40). Claimant's counsel indicated that his work on this case has not precluded him from taking on other cases. Counsel has been admitted to the practice of law in Delaware since 2016 and is experienced in workers' compensation, a specialized area of the law. His firm's association with Claimant began on January 27, 2022. The issue in this case was average in nature. It does not appear that there were any unusual time limitations imposed by the Claimant or the circumstances surrounding the case. Claimant's counsel has also indicated that Employer has the ability to pay an award. Counsel's affidavit was entered without comment or objection.

Claimant was awarded temporary partial disability benefits in the amount of \$21.94 weekly. The total of this benefit at the maximum 300 weeks would be just over \$6500. Taking into consideration the fees customarily charged in this locality for such services as were rendered by Claimant's counsel and the factors set forth above, the Board finds that an attorney's fee in the amount of \$1950.00 is appropriate. In the Board's estimation, this amount does not exceed thirty percent of the total value of Claimant's award pursuant to this Decision.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Employer's Petition for Review is hereby **GRANTED**. Claimant's total disability benefits terminate as of the date of this decision. Claimant is awarded

partial disability benefits of \$21.94 weekly. Claimant is awarded her medical witness costs and an attorney fee in the amount of \$1950.00. In accordance with title 19, section 2347 of the Delaware Code Employer will make appropriate reimbursement to the Worker's Compensation Fund within 30 days of receipt of the notice of the amount due.

IT IS SO ORDERED THIS 4th DAY OF MAY 2023.

INDUSTRIAL ACCIDENT BOARD

Peter Hartranft
PETER W. HARTRANFT

Robert Mitchell
ROBERT MITCHELL

I, Eric D. Boyle, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

Eric D. Boyle

Mailed Date: May 8, 2023

JRS
OWC Staff