THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Appeal of Lawson Group & a.
(Workers' Compensation Appeals Board)

Docket No.: 2021-0243

PETITIONER'S BRIEF

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Date: November 29, 2021

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TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES AND OTHER AUTHORITIES

QUESTIONS PRESENTED FOR REVIEW

1) Did the Board commit an error of law when it failed to properly analyze the definition of "Permanent physical or mental impairment" at the time Ms. Krajewski ("Claimant") was retained by Summit as defined in RSA 281-A: 2 XIV and 54 III?.....Appendix to Brief, pg.5
2) Did the Board commit an error of law by requiring a heightened burden of proof to establish written documentation of the "employer knowledge" criteria than required under RSA 281-A: 54 III?.....pg. 9
3) Did the Board commit legal error by requiring medical evidence to establish a "permanent" condition? .....pg. 81

4) Is the Fund prohibited by equitable estoppel principals to deny this claim based on an employer's requirement to prove it had actual medical knowledge of a "permanent" preexisting condition, based on information being provided to the public by the Department of Labor?.....pg. 84
5) Did the Board committed legal error when it determined the Carrier "failed to meet the 'subsequent disability' by injury requirement"?.p. 88
6) Did the Board commit an error of law by finding the missing page from Dr. Polivy's IME report was "lack of candor to the Fund" and not harmless error?.....pg. 69
7) Was the Board's decision a violation of the Carrier's Constitutional due process rights to a fair and impartial hearing?.....pg. 69

STATUTORY LANGUAGE

RSA 281-A:2– Definitions

XIV. "Permanent physical or mental impairment", as used in RSA 281-A:54, means any permanent condition that is congenital or due to injury or disease and that is of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining employment if the employee should become unemployed.

RSA 281-A:32 Scheduled Permanent Impairment Award.

XI. Payment Due. Payment of the scheduled award becomes due upon prompt medical disclosure, **after maximum medical improvement has been achieved**, regarding the loss or loss of the use of the member of the body. (Emphasis added).

RSA 281-A:54 - Payment for Second Injuries From Special Fund.

I. If an employee who has a permanent physical or mental impairment, as defined in RSA 281-A:2, XIV, from any cause or origin incurs a subsequent disability by injury arising out of and in the course of such employee's employment on or after July 1, 1975, which results in compensation liability for a disability that is greater by reason of the combined effects of the preexisting impairment than that which would have resulted from the subsequent injury alone, the employer or the employer's insurance carrier shall in the first instance pay all awards of compensation provided by this chapter. However, the commissioner shall reimburse such employer or insurance carrier from the special fund created by RSA 281-A:55 for all compensation payments subsequent to those payable for the first 104 weeks of disability. Provided, however, that prior to the first 104 weeks of disability, the employer shall be reimbursed 50 percent after the first $10,000 paid on all compensation for temporary total, temporary partial, permanent partial, permanent total, medical, or rehabilitation benefits for all injuries occurring on or after January 1, 1991.

II. If the subsequent injury of such an employee occurring on or after July 1, 1975, shall result in the death of the employee and it shall be determined that the death would not have occurred except for such preexisting permanent physical or mental impairment, the employer or the employer's insurance carrier shall in the first instance pay the compensation prescribed by this chapter. However, the commissioner shall reimburse such employer or insurance carrier from the special fund created by RSA 281-A:55 for all compensation payable in excess of 104

weeks, provided, however, that prior to the 104 weeks, the employer shall be reimbursed 50 percent over and above the first $10,000 of all compensation, medical, rehabilitation benefits, or funeral expenses which the employer was required to pay for all injuries occurring on or after January 1, 1991.

III. In order to qualify under this section for reimbursement from the special fund, an employer shall establish by written records, or by affidavit executed at the time of hire or retention in employment, that the employer had knowledge of the employee's permanent physical or mental impairment at the time that the employee was hired or at the time that the employee was retained in employment after the employer acquired such knowledge.

IV. The special fund shall not be bound as to any question of law or fact by reason of an award or an adjudication to which it was not a party or in relation to which it was not notified at least 3 weeks prior to the award or adjudication that it might be subject to liability for the injury or death.

V. An employer or insurance carrier shall notify the commissioner of any possible claim against the special fund as soon as practicable but in no event later than 100 weeks after the injury or death.

281-A:56 Penalty for False Representation. –

I. A person who makes a false statement or representation for the purpose of obtaining any benefit or payment under this chapter, whether for himself or herself or for any other person, and who does not believe the statement or representation to be true, shall be subject to prosecution and punishment for false swearing under RSA 641:2, unsworn

falsification under RSA 641:3, or perjury under RSA 641:1, as the case may be, and, upon conviction, the court may order forfeit all of the person's rights to the compensation sought. In addition to any other remedy, the employer or insurance carrier providing the benefit or payment shall be entitled to restitution as authorized in RSA 651:63.

II. An employer or insurance carrier, or any employee, agent, or person acting on behalf of an employer or insurance carrier, who makes a false statement or representation in the course of reporting, investigating or adjusting a claim for any benefit or payment under this chapter and who does not believe the statement or representation to be true shall be subject to prosecution and punishment for false swearing under RSA 641:2, unsworn falsification under RSA 641:3, or perjury under RSA 641:1, as the case may be.

Lab Rule 506.04 - Reimbursement from the Special Fund for Second Injuries

... (d) Proof of eligibility shall include:

(1) Either notarized true copies of the written record of knowledge by the employer that the employee had a permanent impairment, prior to the work related injury which the employer is using as a basis for reimbursement by the fund along with a completed "Second Injury Fund Sworn Statement of Employer", form WCSIF-1a (3/2010), contained in Appendix II or an affidavit stating that the employer had knowledge of the employee's permanent physical or mental impairment which must be executed by the employer at the time of hire or retention but before the second injury may be used as written record;

(2) Medical evidence of the preexisting permanent impairment;

(3) Medical evidence of a subsequent disability as a result of the second injury or disability; and

(4) A medical evaluation which indicates that the disability is greater due to the combined effects of the preexisting impairment and the work related injury than would have been caused by subsequent injury alone. The employer or carrier may use "Second Injury Fund Certification by Physician", form WCSIF-1b (12/1996), contained in Appendix II to submit this information.

New Hampshire Constitution Part I Art. 35. [The Judiciary; Tenure of Office, etc.]

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit. It is therefore not only the best policy, but for the security of the rights of the people, that the Judges of the Supreme Judicial Court should hold their offices so long as they behave well; subject, however, to such limitations, on account of age, as may be provided by the Constitution of the State; and that they should have honorable salaries, ascertained and established by standing laws.

STATEMENT OF THE CASE

This case involves The Lawson Group's, as the third-party administrator for Summit Packaging Systems ("Summit"), self-insured, (collectively "Carrier"), request for reimbursement from the Second Injury Fund ("Fund") pursuant to RSA 281-A:54. The only criterion for reimbursement is established by RSA 281-A: 54 III which states, "**In order**

to qualify under this section for reimbursement from the special fund, an employer shall establish by written records, or by affidavit executed at the time of hire or retention in employment, that the employer had knowledge of the employee's permanent physical or mental impairment at the time that the employee was hired or at the time that the employee was retained in employment after the employer acquired such knowledge." (Emphasis added). One main focuses of this appeal is whether the Carrier established, by written records, "employer knowledge" of the Claimant's "permanent physical or mental impairment" as defined by the statute.

Lab Rule 506.04 (d) (1-4) establishes the "proof of eligibility" requirements. The Department of Labor ("Department") has added to and/or modified the statute by creating rules that require medical evidence to prove the employer's knowledge of a "permanent impairment". Lab Rule 506.04 (d) (2-4) require medical evidence which goes beyond the statutory obligation contained in RSA 281-A: 54 III.

The Department is disseminating misleading information to the public. The Department's website describes what the employer's written records may consist of to establish "employer knowledge." The Department indicates the employer's "written record can take any form you wish (e.g. pre-placement physical examination report, a memorandum to the personnel file, interview notes signed and dated by the interviewer, or a letter from a rehabilitation counselor who knew the worker) as long as:

- The information is recorded in writing
- The record clearly identifies the employer, employee and the date the record was created

- **The record presents information about the workers' impairment and the limitations caused by the impairment**

This is the only steps that the employer needs to take." Appendix, pgs. 231 and 299. (Emphasis added).

Based on the Department's information to the public, Summit was not required to know the "permanent" nature of the preexisting condition. Summit's only requirement is to show information about the "impairment" and the "limitations." The Board's decision required Summit to have actual medical knowledge of a "permanent impairment."

On August 8, 2005, the Claimant was hired as a machine operator which is a medium duty position. Appendix, pg. 140. On or about January 10, 2016, the Claimant sustained a work-related injury to her left arm, shoulder, and neck with cervical radiculopathy. Id. at 166. Summit accommodated the Claimant's initial work restrictions by creating a temporary alternative duty position in Q.A. Id. at 216.

On February 4, 2016, the Claimant's work restrictions were maximal lifting of 10 pounds; unable to do fine motor and squat; no repetitive motion of left wrist, elbow and shoulder; occasional bend, kneel, climb, reach and drive; frequent stand and walk and no restrictions on sitting which Summit accommodated. Appendix, pg. 161. On September 12, 2016, after 8 months of accommodated duty, the Claimant underwent a C5 – C7 anterior cervical discectomy and fusion with left iliac crest bone graft harvesting. Id. at 183.

There is no dispute the Claimant was out of work as of September 12, 2016. There is no dispute the Carrier timely placed the Fund on notice

of a potential claim with the date of subsequent disability being September 12, 2016. On August 24, 2018, the Carrier submitted all documents in order to perfect the claim. Appendix, pg. 147. The Carrier submitted Second Injury Fund Sworn Statement of Employer ("Exhibit P") which included all medical records in Summit's possession prior to the subsequent date of disability. Id. at 153-167.

In compliance with the invalid Lab Rule 506.04 (d) (2-4), the Carrier also submitted Second Injury Fund Certification By Physician ("Exhibit Q"). Andrew Forrest, MD certified the Claimant's "pre-existing permanent impairment" of "C6-7 radiculopathy". Appendix, pg. 169. Dr. Forrest also certified the Claimant's "functional limitations caused by" her C6-7 radiculopathy was "pain and weakness in her (L) arm." Id. Dr. Forrest stated the "subsequent work related injury was diagnosed as C5-C7 fusion." Id. at 170. Dr. Forrest concluded the "combination of the two impairments cause a greater disability than would have been caused by the subsequent injury alone" by indicating "the deficits in neck ROM and ↑ [increased] pain result in greater impairment than just radicular pain and weakness in (L) arm." Id.

On February 15, 2019, the Fund denied the Carrier's application for reimbursement for three (3) reasons. Appendix, pg. 144. The first reason was "based on the medical documentation submitted, Ms. Krajewski never reached MMI where a permanent impairment could be determined...." Id. The next reason was "the one and only period of disability was for surgery and therefore was a continuation of the 01/10/2016 date of injury." Id. The final reason was "no written records of Ms. Krajewski's employer, Summit Packaging Systems, have been submitted that establishes that they had

knowledge of any permanent impairment prior to subsequent disability date of 09/12/2016." Id. at 145. The Fund acknowledged, "Ms. Krajewski was able to work with modification in duties until 09/12/2016...." Id. The Fund did not provide any medical or other evidence to support the denial issued.

There were two Board hearings on the merits. The first hearing was on March 16, 2020, with a decision rendered on April 29, 2020. Brief, pg. 47. At this hearing, the Board allowed, over the objection of the Fund, testimony of Ms. Diane Adams. The Fund's objection was Ms. Adams' testimony was irrelevant. Id. pgs. 367-368. Ms. Adams is a duly qualified vocational expert and provided her expert opinion as to whether the Claimant's permanent physical impairment was a hinderance or obstacle to obtaining employment should she become unemployed.

Ms. Adams' written opinion concluded, "given Dr. Sinkov restrictions starting 2/4/16 it is **highly unlikely** that she could find work given her inability to perform fine motor, and being restricted to occasional drive. These restrictions present a significant barrier to finding work in her labor market. Only one employer could confirm work within Ms. Krajewski's work capacity; this does not constitute labor market accessibility." Appendix, pg. 136. (Emphasis original). Ms. Adams testified the Claimant's work restrictions as of February 4, 2016 "constitute a hinderance or obstacle for Ms. Krajewski to obtain employment." Id. pg. 372 [lines 17-20]. This testimony satisfied the requirement outlined in Appeal of Hartford, 162 N.H. 91 (2011).

On April 29, 2020, the Board denied the Carrier's claim. The decision failed to acknowledge or comment on Ms. Adams' testimony and

indicated, "There were no witnesses." Appendix, pg. 47 and 48. The Board determined "the Carrier failed to meet its burden to show the Claimant had a preexisting and permanent mental or physical impairment." Id., pg. 48. The Board also found the Carrier, "failed to meet the 'employer knowledge' requirement." Id. Finally, the Board denied the Carrier's claim because it "failed to meet the 'subsequent disability' by injury requirement." Id.

On May 22, 2020, the Carrier filed a Motion for Reconsideration. Appendix, pg. 3. The Fund filed its objection. On June 17, 2020, the Board granted the Motion for Rehearing. Brief, at 53. At the September 11, 2020, prehearing conference, the Board requested the Carrier to provide "some evidence" as to why the New Hampshire Workers' Compensation Medical Form (75-WCA-1) ("Form") was developed. Appendix, pgs. 268-270. The reason for the request was the Carrier argued that the Form was developed to establish a permanent impairment pursuant to RSA 281-A: 32 and was not a Second Injury Fund form to establish employer knowledge pursuant to RSA 281-A: 54 III. Id. at 5 – 7.

The Board also questioned why the last page of Dr. Polivy's March 24, 2016 IME opinion was omitted in Exhibit P. Appendix, at 158-159. Dr. Polivy's entire report, however, was contained in Exhibit Q and provided to the Fund. Id. at 220-222. On October 15, 2020, an Affidavit of Kyle Kienia indicated Summit had Dr. Polivy's entire report in its possession. Id. at 262.

On December 18, 2020, the rehearing was held. A decision was rendered on February 9, 2021, and again on March 2, 2021. Brief, pgs. 54 and 61. The Board's March 2, 2021, decision denied the Carrier's claim

based on three (3) reasons or one (1) independent reason. Id. at 61-68. First, the Board determined "the Carrier failed to meet its burden to show the Claimant had a preexisting and permanent mental or physical impairment at the time the Claimant was retained by the Employer...." Id. at 62. The second reason, the Carrier "failed to meet the 'employer knowledge' requirement...." Id. Finally, the Board denied the claim because it "failed to meet the 'subsequent disability' by injury requirement." Id.

The Board also denied the claim on "this lack of candor to the Fund, **is an independent basis** to deny the Employer's claim." Brief pg. 67. (Emphasis added). The supposed "lack of candor" was the last page of Dr. Polivy's report was not contained in Exhibit P, although contained in Exhibit Q. The rehearing decision did not state whether the "independent basis" of "lack of candor" was the sole reason for the Board's decision.

On March 30, 2021, the Carrier filed its Motion for Reconsideration on Rehearing. Appendix, pg. 66. On April 22, 2021, the Fund filed an objection. On May 12, 2021, the Board issued a decision denying the Carrier's Motion for Reconsideration on Rehearing. Brief, at 69. This issue concerning the "lack of candor" comment was not clarified. Id.

SUMMARY OF ARGUMENT

The Board failed to properly analyze whether the Carrier met its burden of proof that Summit had knowledge of a "permanent physical or mental impairment" as defined by RSA 281-A:2 XIV and case law. The Court in Appeal of Hartford, 162 N.H. 91, 97 (2011) held, "the inquiry should be whether the impairment is such that an employer who knew of it and its extent would more likely than not significantly consider it when

making a decision to hire or retain the employee." According to Hartford and the statute, this is the only requirement that needs to be satisfied for Second Injury Fund reimbursement that this Court has announced.

By Summit creating a modified job for the Claimant establishes Summit knew of the Claimant's condition and limitations. Summit understood the severity of the preexisting condition by creating a less than light duty job position. Appendix, pg. 216. Ms. Adams' testimony and expert opinion established the "hinderance" the Claimant's condition had in finding another job. The Carrier satisfied this inquiry and reimbursement should have been awarded.

The Board claimed that "unless the Employer is aware that the employee has a permanent injury (sic) at the point they hire or retain an employee, there is no ability for the Employer to recover from the Second Injury Fund." Brief, pg. 68. The Board focused on the word "permanent", and indicated Summit was required to know the condition is medically "permanent" in order to qualify for reimbursement.

The Board relied on Lab Rule 506.05 (d) (2-4) which are ultra vires and void. Lab Rule 506.04 (d) 2-4 require medical evidence to prove a claim. RSA 281-A:54, however, does not require medical evidence to support reimbursement. RSA 281-A: 54 III specifically states, "In order to qualify under this section for reimbursement from the special fund, an employer shall establish by written records, or by affidavit... that the employer had knowledge of the employee's permanent physical or mental impairment..." as defined by RSA 281-A:2 XIV.

The Fund is abusing its discretionary function in evaluating Second Injury Fund claims. The Fund and Board are equitably estopped by

requiring an employer to prove a "permanent" impairment, based on information disseminated to the public by the Department.

The Board specifically stated it "will not consider medical records that were not part if Exhibit P." The decision is flawed by not reviewing the specific requirement of showing the subsequent disability criteria which is contained in Exhibit Q. Summit established the Second Injury Fund criteria of a subsequent period of disability by injury.

There was no "lack of candor" on part of Summit. Summit produced Dr. Polivy's entire report, albeit in a different section of the completed application. The missing page from Dr. Polivy's report was an error in copying. Yet the Board creates a reason for denying the claim when the Fund did not even argue it. The Board committed legal error in denying the claim based on "lack of candor."

The Board shifted its prehearing conference request for information from "why was the 75-WCA-1 form developed" to what was "Summit's understanding regarding the use of the permanency information [on the] 75WCA-1 form." Appendix, compare pgs. 268-270 and Brief at 66. The decision stated the "Carrier did not offer evidence of Summit's understanding." Brief at 66. This change in the Board's inquiry concerning the Form prejudiced the Carrier because at the September 11, 2020 prehearing conference the Board only requested "a reason why the 75WCA-1 Form was developed", then changed the request to "Summit's understanding of the form." The Carrier was only on notice to produce a reason "why the Form was developed" and this shift in request for information violated the Carrier's due process rights to a fair and impartial hearing.

Here, Summit implemented a procedure which adheres to the legislative intent without fail, while the Board turns a blind eye to the remedial purpose of the statute. This decision is a disincentive for employers to retain employees with "permanent impairments."

The Board's decision should be reversed.

ARGUMENTS

I. THE BOARD FAILED TO PROPERLY ANALYZE THE DEFINITION OF "PERMANENT PHYSICAL OR MENTAL IMPAIRMENT" AT THE TIME THE CLAIMANT WAS RETAINED IN EMPLOYMENT BY SUMMIT.

The purpose of the Fund "was created to encourage employers to hire or retain employees with permanent physical or mental impairments of any origin by reducing the employer's liability for workers' compensation claims." Appeal of CNA Ins. Cos., 143 N.H. 270, 272-273 (1998). RSA 281-A: 2 XIV defines, "'Permanent physical or mental impairment', as used in RSA 281-A:54, means any permanent **condition** that is congenital or due to injury or disease and that is of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining employment if the employee should become unemployed." There are two prongs to this definition, 1) establishing a "permanent condition"; and 2) establishing the condition is serious and would constitute a hinderance to obtaining employment. Neither prong require medical evidence or a showing that an injured worker must be at maximum medical improvement ("MMI") or have a permanent impairment assessed by a physician.

1) Summit established the Claimant had a "permanent impairment" as defined by RSA 281-A:2 XIV.

The Board's decision failed to adhere to the Court's decree that "We construe **liberally** the Workers' Compensation Law in order to give the broadest reasonable effect to its remedial purpose. Thus, when construing the statute, we resolve all reasonable doubts in favor of the injured worker." Appeal of Hartford, at 93. (Citations omitted, emphasis added). In addition, "the board's role is to serve the broad remedial purpose of the statute." Appeal of Morin, 140 N.H. 515, 519 (1995). Here, the Board construed the statute so narrowly and strictly which does not provide the "broadest reasonable effect" in encouraging "employers to hire or retain employees with permanent" conditions.

The Board spent ample time addressing whether the Claimant was at "MMI" or had a permanent impairment assessed by a physician. The Board relied on two boxes in the bottom right-hand corner of the Form which is erroneous. Appendix, pg. 271. The Board stated, "Karen Wetherbee, APRN did not select the box "yes" in answering the question posed of the 75 WCA-1 form: "Has injury caused a permanent impairment?" Brief, pg. 66. The Board confused permanent impairment under RSA 281-A: 32 (Scheduled Permanent Impairment Awards) with the definition contained in RSA 281-A: 2 XIV. The comments by the Board that APRN Wetherbee did not check off the boxes concerning "MMI" or "permanent impairment" establishes the Board conducted an improper analysis. Id. at 65, 66.

The only applicability of "MMI" is a prerequisite to obtaining a permanent impairment assessment under RSA 281-A: 32. There is no statutory requirement for an injured worker to be at "MMI" or obtain a

permanent impairment award in order to access the Fund under RSA 281-A: 54. The Board added language and requirements to the statute.

In 1988, under HB 12, the Workers' Compensation statute was re-codified to its present version of RSA 281-A. The former Director of the Department of Labor, Ann Crane, was at the legislative hearing where comments were made about the Second Injury Fund's "permanent physical and mental impairment" language. Ms. Crane clarified that the language was only applicable for Second Injury Fund purposes. Appendix, pg. 225. Ms. Crane wanted the definition to stay in RSA 281-A: 54 because of what attorneys "have done to the law" in general. Id. at 226.

HB 12 contained an "exhibit A" regarding the definition and the concerns of the definition; noting "there will be confusion with Section 32 (Scheduled Permanent Impairment)." Appendix, pg. 228. Here, the Board confused the definition of "permanent physical and mental impairment" with the permanent impairment section of the statute, RSA 281-A: 32.

At the December 18, 2020 rehearing, the Director's testimony was "she did not know why the 75 WCA-1 form was developed" and was "not terribly familiar" with Second Injury Fund forms. Brief, pg. 66; Appendix, pgs. 268, 386 and 391. If the Department is unfamiliar with the reasons for the Forms' creation, then this generated an ambiguity about the creation of the statutory forms. See, Appeal of Hiscoe, 147 N.H. 223, 230 (2001) ("As a matter of longstanding practice, we adopt a construction favorable to the claimant when statutory language is ambiguous.")

The Form was developed pursuant to RSA 281-A: 23 V(b) and is not a Second Injury Fund form. See, Appeal of Leborgne, 173 N.H. 488, 494 (N.H. 2020) ("The New Hampshire Workers' Compensation Medical Form

was developed pursuant to paragraph V as the 'form on which health care providers and health care facilities shall report medical, surgical or other remedial treatment. RSA 281-A: 23 V(b)"). The Board was required to review the limitations of the "condition" and not whether the Form checked off a box establishing a right under RSA 281-A: 32. The Board committed legal error in not assessing the limitations of the Claimant's condition on the Form.

The Fund developed Exhibit Q to address the "preexisting permanent impairment". Exhibit Q requires a physician certification that a claimant has a "preexisting permanent impairment" under RSA 281-A:54 which the Carrier provided. Appendix, pg. 169. Exhibit Q states, "Medical evaluation **as described in RSA 281-A:54** and Administrative Rules Section Lab 506.04(2) must be filed...." Id. (Emphasis added). The Form has no such statement.

The Form is not tailored to the Second Injury Fund requirements and is ambiguous concerning the definition of "permanent physical and mental impairment" under RSA 281-A:54. The workers' compensation statute should be liberally construed to resolve doubts in statutory construction to provide the broadest reasonable effect of its remedial purpose. See, Appeal of CNA Ins. Cos., 143 N.H. 270, 273 (1998). The Board failed to recognize the ambiguity between the Form and Exhibit Q and failed to apply the remedial purpose of the Fund which was "created to encourage employers to hire or retain employees with permanent physical or mental impairment of any origin...." Id., at 272-273.

The proper analysis is whether Summit knew of the Claimant's condition and limitations yet retained the Claimant in employment.

Summit was not required to have medical knowledge of a "permanent" condition. *Larson's* states, "The knowledge that the employer must have of the nature of the injury also was held to include awareness that the condition was of a kind likely to be a hindrance to employment." *Larson's Workers' Compensation Law* § 91.03[3], at 91-42 (Matthew Bender ed. rev. 2011).

Summit established the Claimant had a permanent impairment as defined by RSA 281-A:2 XIV. The documents contained in Exhibit P describes the Claimant's permanent condition on the Forms. On January 26, 2016, APRN Wetherbee indicated the Claimant's condition as "1. Neck pain, 2. Left trapezius muscle strain, spasm, persistent, 3. Left shoulder pain, improved, 4. Left cervical radiculopathy, persistent." Appendix, pg. 163. On February 3, 2016, APRN Wetherbee adds another condition to the Claimant's diagnosis to include "5. Cervical DDD C5-7 with foraminal narrowing." Id., at 162. On February 4, 2016, the Claimant's work restrictions were maximal lifting of 10 pounds; unable to do fine motor and squat; no repetitive motion of left wrist, elbow and shoulder; occasional bend, kneel, climb, reach and drive; frequent stand and walk and no restrictions on sitting which Summit accommodated. Id., at 161.

For the Board to find APRN Wetherbee's records "do not establish that the Claimant has a physical impairment" is arbitrary as the medical records establish a physically limiting condition which was worsening. Appendix, pg. 63. The Board was "required to base its findings on this issue upon the medical evidence rather than solely upon its own lay opinion", which it failed to do. Appeal of Kehoe, 141 N.H. 412, 417 (1996).

Dr. Forrest was the only physician to complete Exhibit Q, and he determined the Claimant had a "preexisting permanent impairment", as defined by statute. The Fund had ample opportunity to have Dr. Forrest's Exhibit Q reviewed by another physician for deficiencies but chose not to do so. No other physician provided an opinion regarding this specific Second Injury Fund medical requirement.

The Board committed legal error by failing to properly analyze the "preexisting permanent impairment." Exhibit Q is the only form that addresses Second Injury Fund medical criteria. The Carrier met its burden of proof in establishing the Claimant had a "preexisting permanent impairment", as defined, through Exhibits P and Q.

2) The Carrier established the Claimant's permanent impairment was a hinderance to obtaining employment if she became unemployed.

The second part of the definition requires the Carrier to show the Claimant's preexisting impairment would "constitute a hindrance or obstacle to obtaining employment or to obtaining employment if the employee should become unemployed." RSA 281-A:2 XIV. The Court in Hartford addressed what constitutes "a hindrance or obstacle to maintaining or obtaining employment" which "is objective, in the sense of looking to the nature of the employee's preexisting condition..." Hartford, at 95. The Board declined to address this second requirement. Brief, pgs. 62-63.

Here, Summit retained the Claimant in employment, although her physical impairment would not have allowed her to engage in gainful employment had she been terminated as of February 4, 2016. Appendix, pg. 136. The Board, in all three decisions, never mentions Ms. Adams'

testimony or expert opinion and stated, "there were no witness." Brief, at 47-48.

By submitting Ms. Adams' expert opinion, the Carrier satisfied the inquiry of whether an employer "would more likely than not significantly consider it when making a decision to hire or retain the [Claimant]" given her work restrictions. Hartford, at 97. With the work restrictions as of February 4, 2016, Ms. Adams concluded, "These restrictions present a significant barrier to finding work in her labor market. Only one employer could confirm work within Ms. Krajewski's work capacity; this does not constitute labor market accessibility." Appendix, pg. 136. Ms. Adams' rationale was "it is **highly unlikely** that she could find work given her inability to perform fine motor, and being restricted to occasional drive." Id. (Emphasis original). Given the Claimant's permanent condition, she was unable to access the labor market had she become unemployed.

In addition, Summit had Dr. Polivy's March 24, 2016 report which found the Claimant had "symptoms consistent with left C6 sensory radiculopathy." Appendix, pg. 222. Dr. Polivy stated, "Any need for surgical intervention to include an anterior cervical discectomy and fusion at one or two levels would be secondary to the natural progression of the aging process and her **pre-existing degenerative spondylitis**." Id. (Emphasis added). Degenerative spondylitis is a permanent condition.

Despite Dr. Polivy's report indicating surgery due to a preexisting condition and the surgery would not be work related, Summit retained the Claimant in employment. Summit continually retained the Claimant until her subsequent period of disability, the date of her surgery on September 16, 2016. It was not until a Board decision dated August 7, 2017, was it

decided that the September 12, 2016 surgery was work-related. Appendix, pgs. 34-38. Summit retained the Claimant knowing of the preexisting physical condition causing a disability prior to her subsequent period of disability resulting from surgery.

The Hartford court stated that "the employee's ability to perform his or her existing job, or one like it, is not determinative of whether the preexisting impairment is a 'hindrance or obstacle to employment'." Hartford, at 96. The Court noted, "The CAB's reliance upon the employee's abilities to perform their most recent job was error." Hartford, at 97. The Board erroneously based its decision on "the only time that the Claimant was out of work was the period of time after the surgery that took place on September 12, 2016." Brief, pg. 63. The Board's rationale is legal error.

Finally, *Larson's* states, "The knowledge that the employer must have of the nature of the injury also was held to include awareness that the condition was of a kind likely to be a hindrance to employment." *Larson's Workers' Compensation Law* § 91.03[3], at 91-40 (Matthew Bender ed. rev. 2011). By Summit creating a modified job for the Claimant established Summit knew of the Claimant's impairment and Ms. Adams' expert testimony and opinion established the hinderance it would have on the Claimant in finding another job. Summit understood the severity of the preexisting impairment by creating a less than light duty job position. Appendix, pg. 216.

The Board committed legal error when it determined "the Carrier failed to meet its burden to show the Claimant had a preexisting and

permanent mental or physical impairment" as defined by RSA 281-A:2 XIV.

II. THE BOARD REQUIRED A HEIGHTENED BURDEN OF PROOF TO ESTABLISH WRITTEN DOCUMENTATION OF THE "EMPLOYER KNOWLEDGE" CRITERIA THAN REQUIRED PURSUANT TO RSA 281-A:54 III

The Board denied the claim because Summit, "failed to meet the 'employer knowledge' requirement." Brief, pg. 62. The Board required a heightened burden of proof for the "employer knowledge" criteria. The Board stated, "Unless the Employer is aware that the employee has a **permanent injury (sic)**... there is no ability for Employer to recover from the Second Injury Fund." Id., pg. 68. (Emphasis added). The Board required Summit to have actual medical knowledge of a "permanent" impairment. There is no indication as to what type of "employer knowledge" is required to receive reimbursement from the Fund, i.e., actual medical knowledge, constructive medical knowledge, mere knowledge of a limiting condition or an inference of knowledge. The Board's decision goes beyond the liberal interpretation of the statute. "Proper statutory interpretation, however, requires a [reading] in the context of the statutory scheme, not in isolation." Appeal of Weaver, 150 N.H. 254, 256 (N.H. 2003) (citation omitted).

This Court has yet to confirm what type of "employer knowledge", medically, is required to satisfy RSA 281-A: 54 III. The Board interpreted the statute in a strict and narrow manner, even though the statute requires a liberal interpretation. See, Appeal of CNA Ins. Cos., 143 N.H. 270, 273 (1998). See also, Special Fund Div. v. Industrial Com'n of Arizona, 182

Ariz. 341, 347 (1994) ("[W]hen the injury is serious or of a particular type, an **inference of knowledge** is well founded **based on mere knowledge of the injury and subsequent treatment**.") Appendix, pg. 340. (Emphasis added). The Special Fund Division case was cited to, and its analysis adopted, in Appeal of Hartford which established the analysis to be undertaken for Second Injury Fund claims. Here, the Board required Summit to have actual medical knowledge of a "permanent" condition which is not a requirement.

In Special Fund Div. v. Industrial Com'n of Arizona, 191 Ariz. 149 (1998), the Court concluded, "in so far as possible, the statutory requirements should be interpreted to further the legislative policy and in a manner comporting to the realities of business practice." Appendix, at 476 ¶15. The realities of business practice are very few employers understand when a medical condition is "permanent." To require an employer to have specialized medical knowledge goes beyond the statutory intent.

Summit satisfied the "employer knowledge" requirement by submitting Exhibit P along with all records in its possession. Appendix, pgs. 154 – 167. According to *Larson's*, "**It is clear that the employer does not have to know exactly what the employee's prior condition is in medical terms**." *Larson's Workers' Compensation Law* § 91.03[3], at 91-40 (Matthew Bender ed. rev. 2011). (Emphasis added). Given that our Fund only requires "written records" of the prior condition and the filing of Exhibit P, the Board's requirement that the employer have actual knowledge of an injury being "permanent" is beyond the scope and requirements of the statute and Lab Rule.

The Carrier submitted Exhibit P as required by Lab Rule 506.04 (d) (1). Exhibit P specifically states the employer is providing written records "Pursuant to N.H. RSA 281-A:54, III and N.H. Admin. Rule Lab 506.04(d)(1)… ." The Fund failed to call an employer witness to address any alleged deficiencies in Exhibit P, nor did the Fund provide any evidence that Summit did not comply with the statute or Lab Rule. The Carrier and Summit complied with the statute and Lab Rule requirements regarding employer knowledge.

The Department's website describes, in detail, the employer's written records requirement. The Department's information provided to the public does not require the employer to have knowledge of a "permanent" condition. Appendix, pgs. 231 – 234. The word "permanent" is left out.

The Department states employer's "written record can take any form you wish (e.g. pre-placement physical examination report, a memorandum to the personnel file, interview notes signed and dated by the interviewer, or a letter from a rehabilitation counselor who knew the worker) as long as:

- **The information is recorded in writing**
- **The record clearly identifies the employer, employee and the date the record was created**
- **The record presents information about the workers' impairment and the limitations caused by the impairment**

This is the only steps that the employer needs to take." Appendix, pgs. 231, 234. (Emphasis added). Employers are not required to know the "permanent" nature of the preexisting condition.

Summit met the Department's criteria of "employer knowledge". Prior to the subsequent date of disability of September 12, 2016, Summit

possessed the February 4, 2016 Form signed by Dr. Sinkov and Dr. Polivy's March 24, 2016 medical opinion. These records were in writing, clearly identified the employer and employee which is dated, and presented information about the impairment and limitations. Appendix, pgs. 161, 220. The employer knowledge criterion was satisfied. For the Board to find otherwise was legal error.

In addition, based on the Fund and Board's strict interpretation of the statute, this creates uncertainty concerning whether the Department will be enforcing the remainder of the statute in such a strict manner. The concerning issue is the Fund's denial is based on "employer knowledge" of a "permanent" impairment contained in Exhibit P with the Board accepting the Fund's rationale. Exhibit P is entitled "Second Injury Fund **Sworn Statement** of Employer." (Emphasis added). Appendix, pg. 154. A sworn statement is signed and notarized after the affiant takes an oath that the information provided is true to the best of his or her knowledge. A sworn statement, by definition, contains either a true statement of fact or that fact is false. There is no middle ground to a sworn statement.

Exhibit P is singed "Pursuant to N.H. RSA 281-A 54, III and N.H. Admin. Rule Lab 506.04(d)(1)." Appendix, pg. 154. RSA 281-A:54, III states, "...the employer had knowledge of the employee's permanent physical or mental impairment...." This sworn statement is signed "under the penalties of perjury." Id. The written records attached to Exhibit P, however, are just one aspect of the employer's acquired knowledge of a "permanent" condition. As a result, Exhibit P is signed by an employer indicating the employer does have "knowledge" that the employee had a "permanent" condition as a true statement of fact.

The Board did not rely on any evidence to dispute "employer knowledge" in Exhibit P. The Board rejected Exhibit P without any evidence that Summit made any contradictory statement of fact that it knew the condition was permanent. The Board determined Summit's Exhibit P is untrue because Summit did not know of the "permanent impairment"; therefore, Exhibit P is a false statement. The Board cannot supplant Summit's knowledge contained in Exhibit P with speculation of what Summit knew or did not know without any evidence.

The Board's decision creates a potential detrimental consequence for employers and may have a chilling effect on employers filing Second Injury Fund claims. The Board's rationale could result in RSA 281-A:56 (Penalty for False Representation) being applied to those Second Injury Fund applications where the Fund denies the claim based on "employer knowledge" contained in Exhibit P. RSA 281-A:56 I and II is not discretionary. It states, "A person who makes a false statement or representation… shall be subject to prosecution…."

Based on a strict reading of the statute, the Board's decision could affect employers by creating the possibility of the Department or the Fund prosecuting employers for filing a false statement. Therefore, an employer is not required to know the specific medical condition is "permanent." So long as an employer knows of the limiting nature of the condition and alters or modifies the injured worker's job duties, that satisfies the remedial purpose of the statute regarding "employer knowledge."

III. THE BOARD COMMITTED LEGAL ERROR BY REQUIRING MEDICAL EVIDENCE TO ESTABLISH A "PERMANENT" CONDITION

Neither the statute nor case law require medical evidence for Second Injury Fund reimbursement. RSA 281-A:54 III explicitly states, "**In order to qualify under this section** for reimbursement from the special fund, an employer shall establish by written records...." (Emphasis added). The Court in Hartford noted, "the inquiry should be whether the impairment is such that an employer who knew of it and its extent would more likely than not significantly consider it when making a decision to hire or retain the employee." Hartford, at 97. That is the only requirement the Court has announced.

The statute does not reference employers need to produce medical evidence to "qualify under this section for reimbursement." Lab Rules 506.04 (d) 2-4, go beyond the statute and is adding requirements to the statue by requiring carriers to produce medical evidence.

"Administrative rules may not add to, detract from, or modify the statute which they are intended to implement." Appeal of Cover, 168 N.H. 614, 621 (N.H. 2016) (citations omitted). Lab Rule 506.04 (d) 2-4, "impermissibly modifies the statute and is therefore invalid." Id. at 622. The need for medical evidence is not a requirement to receive Second Injury Fund reimbursement. If the legislature wanted employers to obtain and submit medical evidence, it could have said so.

Assuming arguendo, that medical evidence is required, the Court has "held that the issue of medical causation is a matter properly left for medical experts, and that the board's findings on that issue must be based

upon the **medical** evidence rather than solely upon its own lay opinion." CNA, at 323. Here, the Board relied on its own lay opinion in finding Summit did not have knowledge of a "permanent" condition.

The only physician to address the specific Second Injury Fund requirement contained in Lab Rule 506.02 (2-4) was Dr. Forrest. The Fund did not produce any evidence to support a different conclusion. The Board relied on its lay opinion of whether a medical condition is permanent which is not allowed. The Board admitted it "will not consider medical records that were not part of Exhibit P of the Second Injury Fund Application." Brief, pg. 66. To forgo a review of the specific requirement to address whether a medical condition is "permanent" as required and contained in Exhibit Q, the Board committed legal error by failing to review all medical evidence to address this issue.

IV. THE FUND IS EQUITABLY ESTOPPED TO REQUIRE AN EMPLOYER TO PROVE ACTUAL MEDICAL KNOWLEDGE OF A "PERMANENT" PREEXISTING CONDITION BASED ON INFORMATION BEING PROVIDED TO THE PUBLIC BY THE DEPARTMENT OF LABOR

Based on the Department's representation to the public, as noted above and at Appendix, pg. 231, the Carrier is asserting equitable estoppel. The information being disseminated by the Department does not mention the need for employer's knowledge of a "permanent" impairment.

"A party asserting equitable estoppel must prove four elements: (1) a representation or concealment of material facts made with knowledge of those facts; (2) the party to whom the representation was made must have been ignorant of the truth of the matter; (3) the representation must have been made with the intention of inducing the other party to rely upon it; and

(4) the other party must have been induced to reasonably rely upon the representation to his or her injury." Zannini v. Phenix Mutual Fire Ins. Co., 172 N.H. 730, 738 (N.H. 2019) (Citation omitted).

As for the first element, the Department/Fund is concealing or misrepresenting material facts to the public that an employer needs to have specific medical knowledge that an employee has a "permanent" medical condition to access the Fund. The Fund's denial and the Board's decision required Summit to prove medical knowledge of a "permanent" condition and relied on this fact to deny Summit's claim. This element is satisfied.

Concerning the second element, Summit provided documentation with Exhibit P as required. Exhibit P makes no reference Summit needed to submit any records describing the "permanent" quality of the preexisting impairment. Summit was without specific knowledge it was required to prove a "permanent" condition based on the Department's website. Neither the Department nor the Fund had any conversation with Summit regarding its filing and the criteria necessary for reimbursement. Summit is not in the business of filing Second Injury Fund claims. Summit relies on information available to the public from the Department. The Department is providing inaccurate information regarding what type of knowledge the Fund is seeking to receive reimbursement.

With the third element, the Department is making representations with the sole purpose of having the public rely on this information to submit Second Injury Fund claims. The Department made representations "with the intention of inducing the other party to rely upon it." The Department made available on its website for public viewing the evidence to be submitted for Fund reimbursement.

The last element is met as Summit was "induced to reasonably rely upon the representation" which resulted in the Board's denial. Summit, to its detriment, relied on the Department's information that there is no need to show a "permanent" impairment which has caused financial injury by not receiving reimbursement.

The Board is therefore equitably estopped to deny the Carrier's request for reimbursement based on Summit not having medical knowledge of a "permanent" impairment due to misinformation being provided to the public by the Department.

V. THE BOARD COMMITTED LEGAL ERROR WHEN IT DETERMINED THE CARRIER "FAILED TO MEET THE 'SUBSEQUENT DISABILITY' BY INJURY REQUIREMENT"

The Board denied the Carrier's claim because it "failed to meet the 'subsequent disability' by injury requirement." Brief, pg. 63. The Board indicated, "There was no evidence that there was a new accident or injury after the January 10, 2016 injury at work." Id. The Board stated, "While not required, there was no evidence of an aggravation of her ongoing January 10, 2016 injury and disability." Id. Then the Board stated, "There was no new event which would qualify as an injury." Id. The Board concluded that the "subsequent disability" requirement was not met.

The Board admits an aggravation is "not required" but contradicts itself by requiring the Carrier to establish a "new event which would qualify as an injury." Brief, pg. 63. The Board's internal inconsistency confirms that it was confusing "disability" and "injury." The statute "does not require that the injured employee suffer a new and discrete injury before reimbursement from the fund becomes possible." CNA, at 273-274.

What needs to be shown to meet this criterion is a subsequent period of disability by injury.

"The distinctive feature of the compensation system is that its awards (apart from medical benefits) are made **not for physical injuries** as such, **but for disability** produced by such injury." Petition of Croteau, 139 N.H. 534, 539 (1995) (citations omitted, emphasis added). Clearly, "the statute does not preclude recovery from the fund if the '**subsequent disability** by injury' is either an aggravation or recurrence of the original disability." CNA, at 272-273. (Emphasis added). The CNA Court never stated the subsequent disability was required to be from either an aggravation or recurrence but focuses on the term "disability." The CNA court defined "**disability**" as "**the inability to pursue an occupation or perform services for wages because of physical or mental impairments.**" Id. (Emphasis added).

The CNA case also determined the "words 'subsequent disability by injury' are clear and unambiguous ...and, therefore, does not require that the injured employee suffer a new and discrete injury before reimbursement from the fund becomes possible." CNA at 274. A subsequent disability can arise out of the original injury, hence CNA claims. Here, the Claimant was unable to pursue an occupation as of February 4, 2016, as noted by Ms. Adams' expert report. As of February 4, 2016, the Claimant had a "disability."

The Carrier produced evidence establishing the first period of disability when Summit retained the Claimant in employment with the knowledge of her restrictions, limitations and providing accommodations for over 8 months. The Claimant would not have found a new job given

those restrictions if she were to become unemployed. Appendix, pg. 136. The subsequent disability was being removed from the workforce on September 12, 2016 after her C5-C7 fusion surgery.

As the CNA court explained, "An 'injury' is understood to be an act that damages, harms or hurts." CNA, at 273. Here, it is undeniable surgery does "hurt" and caused a subsequent disability far greater than the original disability. The original disability resulted in severe work restrictions, while the subsequent disability caused by the surgery removed the Claimant's work capacity entirely. The combination of the prior disability combined with the subsequent disability caused a greater impairment in which the modified job position that the Claimant was working prior to the surgery, now needed to be modified even further. Id. at 344 and 298. The subsequent disability arose out of the surgery which is "an act that damages, harms or hurts."

In this case, the two periods of disability are, 1) the initial disability stemming from the C6-7 persistent radiculopathy in which Dr. Sinkov's work restrictions of February 4, 2016, were so cumbersome the Claimant would not have found employment were she to become unemployed, and 2) the subsequent total disability that ensued after the September 12, 2016 surgery. There is no doubt that a surgery can cause a "disability" contrary to the Board's assertions.

Since we are dealing with "disability" and not "injury", the Board's rationale is erroneous. The Board, like the Fund, is confusing the terms "disability", "injury" and "impairment". If there is ambiguity in the statute, then the Court explained that "we liberally construe the workers' compensation statute, resolving reasonable doubts in statutory construction

in favor of providing the broadest reasonable effect to its remedial purposes of compensating injured employees." CNA, at 273. (Citation omitted). The Board created an ambiguity interpreting the statute. Instead of liberally construing the statute in favor of the employee, the Board added language to the statute and created a heightened burden of proof by insisting "the Claimant's disability and impairment began on January 10, 2016 and has continued uninterrupted to varying degrees to the present." Brief, pg. 63. The Board failed to differentiate "disability" from "impairment".

RSA 281-A:54 states that the employer is entitled to reimbursement if an employee "incurs a subsequent disability by injury arising out of and in the course of such employee's employment...." The "by injury arising out of and in the course of ...employment" is simply the original injury. Neither the statute nor case law places any restrictions on the cause of the "subsequent disability" and does not preclude recovery from a continuing injury that causes two discrete periods of "disability." In fact, "had the legislature intended to limit the second injury fund to particular causes of disability, it could have expressly provided such limitations in the statute." CNA, at 273. The statute "requires only '**subsequent disability**.'" Id., at 274. (Emphasis added).

The Fund's denial has the original "DOI" (date of injury) and an "Appeal of CNA" date listed. Appendix, pg. 144. The Fund, through its forms, acknowledges that a subsequent disability can arise out of the original injury. The CNA case establishes that the "subsequent disability by injury" statutory language refers to the original injury. If the "subsequent disability by injury" language did not relate to the original injury, then there would be no Second Injury Fund CNA claims.

In this case, the "injury" referred to in the statute is the original injury of January 10, 2016. The original work injury caused the first period of disability occurring on February 4, 2016 with Dr. Sinkov's restrictions. It should be noted that Dr. Sinkov stated after the surgery that the "**residual symptoms which are likely to be permanent...happened prior to surgery....**" Appendix, pg. 211. (Emphasis added). This is also medical evidence the Claimant had a "permanent impairment" prior to the subsequent disability by injury.

Furthermore, the preexisting condition continued even after the September 12, 2016, surgery. Prior to the surgery the Claimant was working in a less than light duty capacity. After the surgery, the loss of motion combined with the preexisting condition impaired the Claimant in her day-to-day living and at work which caused a greater disability. As a result, the combination of the two impairments caused a greater disability. The surgery did not improve the Claimant's symptoms as the Fund claims.

In fact, the September 9, 2017, FCE stated, "it is felt that her current position in Q.A. falls within her lifting capacity, but that frequent reaching and sustained positioning required are likely contributing to ongoing aggravation of Ms. Krajewski's UE symptoms. A job site evaluation to assess for modifications to this Q.A. position may help to decrease the repetitive UE use and static positioning of the neck, shoulder and hand that are likely increasing Ms. Krajewski's symptoms. If this approach is unsuccessful, decreasing her work hours would lessen the UE repetition and likely lead to better tolerance for this job." Appendix, pg. 216. The Claimant's job required further modifications after the surgery.

This FCE report establishes two requirements. First, the Q.A. position which was provided by Summit due to her original disability, was causing an aggravation of her symptoms prior to the surgery, which the Fund acknowledged was an elective surgery. And due to the surgery, Summit was now expected to further modify the Q.A. position after the surgery. So, the original disability combined with the subsequent disability caused by the surgery, created a greater impairment.

Additionally, Dr. Forrest was the only physician to address this Second Injury Fund criteria, indicating that the two impairments caused a greater disability by finding "the deficits in the neck ROM and [increased] pain result in greater impairment than just the radicular pain and weakness in left arm." Appendix, pg. 170. The Board, however, declined to review Exhibit Q, but still ruled the Carrier failed to meet the subsequent disability by injury requirement that only Exhibit Q can answer. The Board committed legal error by not reviewing the specific requitement of showing the subsequent disability criteria contained in Exhibit Q.

Furthermore, the Board commits legal error in refusing to review all evidence submitted. The Board provided a stand-alone statement of it "will not consider medical records that were not part of Exhibit P of the Second Injury Fund Application." Brief, pg. 66. Then the Board stated, "There were no other records submitted with the Carrier's Second Injury Fund Application which in anyway suggests that the Claimant had suffered a permanent impairment prior to her surgery." Id. The Board's decision is internally inconsistent. The Board is required to review all evidence submitted considering the statute and Lab Rules. For the Board to limit its review to Exhibit P is legal error.

VI. THE BOARD COMMITTED LEGAL ERROR BY DENYING REIMBURSEMENT DUE TO "LACK OF CANDOR TO THE FUND" WHEREBY A MISSING PAGE WAS HARMLESS ERROR

The Board indicated "an independent basis to deny the Employer's claim" due to "lack of Candor to the Fund" because the last page of Dr. Polivy's IME report was "not part of the Employer's Exhibit P...." Brief, pg. 67. The Board acknowledged that "A complete copy of Dr. Polivy's report is found at page 90" of the Evidentiary Packet. The Fund had the complete copy of Dr. Polivy's report in the Carrier's application. The Fund did not deny the Carrier's application based on the missing page of Dr. Polivy's report, yet the Board steps in the shoes of the Fund to find a way to deny this claim.

The Board overreacted to Dr. Polivy's last page not in Exhibit P and calls Summit's error "lack of candor." Dr. Polivy's full report, however, which Summit had in its possession, was contained in Exhibit Q. The Fund made no argument that the missing page was an issue when denying the claim or at either hearing. "An error is considered harmless if it is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights **of the party asserting it**." McIntire v. Lee, 149 N.H. 160, 167 (2003). See also, In re Currin, 149 N.H. 303, 307 (2003) (If a party does not make an argument before the DOL, then that party cannot make the argument on appeal to the board.)

There was no "lack of candor" on part of Summit. The Carrier produced the entire report, albeit in a different section of the completed application. The missing page was simply an error in copying. Yet the

Board, *sua sponte*, creates an "independent basis" for denying the Carrier's claim when there was no argument by the Fund about it. The Board committed legal error in denying the Carrier claim based on "lack of candor." The missing page in Exhibit P is harmless error.

VII. THE BOARD VIOLATED THE CARRIER'S CONSTITUTIONAL DUE PROCESS RIGHTS TO A FAIR AND IMPARTIAL HEARING

The Boards actions, comments, internal inconsistencies, changing requirements of evidence being submitted and issuing multiple decisions with minor changes begs the question of whether the Carrier received a fair hearing. The Board disregarded the Carrier's rights under Part I, Article 35 of New Hampshire's Constitution, which states, in part, "It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit." "It is well established that due process guarantees also apply to administrative agencies." Appeal of Lathrop, 122 N.H. 262, 265 (1982). The Board violated the Carrier's due process right to a fair and "impartial interpretation of the laws".

The Board was standing in the Fund's shoes when it issued the decision. This is evidenced by the "lack of candor" comment noted above, the Panel Chair's comments about the Director being "our witness" and changing the requested evidence concerning the Form. At the hearing, the Board seemed to be investigating the claim on its own.

The Panel Chair stated to Carrier's counsel after the first question, "I know you said Director Albert, but for the record, **Danielle Albert is our witness,** and she is the Director." Appendix, pg. 383. This comment by the Panel Chair indicates an unfairness towards the Carrier as it was the Carrier who requested the Director to be a witness. This comment produced an uneasiness for the rest of the hearing as it showed the Carrier was entangled with a hearing facing three opponents, the Fund, the Board and the Department.

"At its most basic level, the requirement to afford due process forbids the government from denying or thwarting claims of statutory entitlement by a procedure that is fundamentally unfair." Appeal of Mullen, 169 N.H. 392, 397 (2016) (Citation omitted). See also, Saviano v. Director, N.H. Div. of Motor Vehicles, 151 N.H. 315, 320 (2004) ("The ultimate standard for judging a due process claim is the notion of fundamental fairness."). "Fundamental fairness requires that government conduct conform to the community's sense of justice, decency and fair play." Saviano, 151 N.H. at 320. Here, the constitutional due process guarantees of fundamental fairness are grounded on the principle of being provided notice of the documents to be submitted at the hearing and not have that requirement changed after a hearing is concluded.

The Board shifted its prehearing conference request for information from "why was the 75-WCA-1 form developed" to what was "Summit's understanding regarding the use of the permanency information [on the] 75WCA-1 form." Appendix, pg. 270; Brief, at 66. The decision stated that the "Carrier did not offer evidence of Summit's understanding...." Brief, at 66. The Carrier was only on notice to produce "some information"

concerning the development of the Form. This shift in the Board's inquiry prejudiced the Carrier by changing the requirements after the hearing concluded.

The Board was also comingling the adjudicative function. The Board's obligation in entering the hearing is "to be of conscience and capable of reaching a just and fair result." Appeal of Mullen, 169 N.H. 392, 399 (2016). To say that the Director was "our witness", formulate the "lack of candor" comment, and change information required to be submitted shows the lack of a fair hearing. It appeared during the entire hearing that the Board was investigating the claim on behalf of the Fund instead of listening to the Carrier's arguments. "When a single individual commingles investigative, accusative, and adjudicative functions, the mere appearance of prejudice may be sufficient to violate due process." Appeal of Trotzer, 143 N.H. 64, 68 (1998).

In addition, with the Board issuing three (3) decisions based on two (2) hearings. The original decision was dated April 29, 2020. The second decision is dated February 9, 2021, which is the same as the April 29, 2020, decision except for the date change. The third decision is dated March 2, 2021, which is substantially similar to the prior two decisions except for some minor rewording, adding limited testimony from the Director of the Department of Labor and vilifying the employer for missing one page of a report in Exhibit P and calling it "lack of candor" towards the Fund.

When a decision shows "prejudgment concerning issues of fact in a particular case … there is no doubt that [ ] would constitute a ground for disqualification." Lathrop, at 265. The Board showed its unwillingness to address the Carrier's arguments by not addressing any argument in its

decision and by making gratuitous comments. The Board's decision is purely result orientated jurisprudence. The Board decided what the outcome of the case it wanted and then worked backward to determine the reasoning that reached the desired conclusion.

Here, Summit complied with the statute by retaining the Claimant in employment even though her condition was a serious obstacle for her to obtain employment if she were terminated. For some reason, Summit is being vilified for following the statute to a "T" and doing what was right both legally and morally. In most cases, employers simply say to an injured claimant "do not come back to work until you are at 100%" and the claimant is placed on workers' compensation benefits. If that occurs, then the employer cannot access the Fund because they did not retain the employee. This type of decision is a disincentive for employers to retain employees who sustain a work injury and the comments and changes in the Board's request for evidence shows a prejudicial motive behind the decision.

CONCLUSION

WHEREFORE, for the reasons contained herein, The Lawson Group, third-party administrator for self-insured Summit Packaging Systems respectfully requests that this Court reverse the decision of the Compensation Appeals Board on the presented issues.

REQUEST FOR ORAL ARGUMENT

The Petitioner, The Lawson Group, third-party administrator for self-insured Summit Packaging Systems, respectfully request that this Court schedule oral arguments to hear Attorney Gary S. Harding in this matter.

SERVICE

The undersigned hereby certifies that a copy of this brief is being forwarded via this Court's electronic filing system to:

For the Second Injury Fund:

John F. Brown, Esq.
Office of the Attorney General
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Concord, NH 03301

STATEMENT OF COMPLIANCE – WORD LIMITATION

I hereby certify that this brief is in compliance with the 9,500-word limitation as set forth in Supreme Court Rule 16 (11). This brief contains 9,437 words.

CERTIFICATE OF ATTACHMENT OF APPEALED DECISIONS

The undersigned also certifies that pursuant to New Hampshire Supreme Court Rule 16 (3)(i), that the appealed decisions are in writing and are appended to this Brief.

Respectfully submitted,

The Lawson Group, the third-party administrator for self-insured Summit Packaging Systems

By its Attorneys,

BERNARD & MERRILL, PLLC

November 29, 2021

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CERTIFICATE OF SERVICE

A copy of this Motion has this day been forwarded to Heather Neville, Esq., as counsel for the Second Injury Fund, through this Court's electronic filing system.

November 29, 2021 \s\ *Gary S. Harding*

State of New Hampshire

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April 29, 2020

DECISION OF THE COMPENSATION APPEALS BOARD

BARBARA KRAJEWSKI

V.

SUMMIT PACKAGING SYSTEMS

Docket # 2019-C-0283

APPEARANCES: Summit Packaging Systems, Inc. and The Lawson Group were represented by Attorney Gary Harding
Special Injury Fund was represented by Ryan O'Riordan under N.H. Supreme Court Rule 36 and Assistant Attorney General Heather Neville

ISSUES: RSA 281-A: 54 - Second Injury Fund

DATE OF INJURY: January 10, 2016 (by agreement).

WITNESSES: No witnesses.

HEARING: A hearing was held at the New Hampshire Department of Labor, Concord, New Hampshire on March 16, 2020.

PANEL: The panel was comprised of Dennis Adams, Harry Ntapalis and Laurence W. Getman, Esq., Panel Chair.

BACKGROUND and FINDINGS OF FACT:

The Lawson Group, the third-party Administrator for Summit Packaging Systems, Inc. (collectively "Carrier") submitted an application for reimbursement from the Second Injury Fund ("Fund") on August 24, 2018 (page 17)[1]. On February 15, 2019, Meredith St. Germain, the

[1] Page references refer to the Evidentiary Packet submitted by the Carrier

Special Funds Coordinator, denied the Carrier's request for Second Injury Fund Reimbursement. (page 15). A timely appeal was filed by the Carrier. A Compensation Appeals Board hearing was held and documentary evidence was received without objection. There were no witnesses. Both parties submitted requests for findings of fact and rulings of law, memoranda of law and written closing arguments.

The Fund was created to encourage employers to hire or retain employees with permanent impairments by reducing the employers' liability for increased disability that previously impaired individuals may incur as a result of work-related injury. *See* In re: CNA Insurance Companies, 143 N.H. 270, 272 (1998).

In order for the Carrier to recover from the Fund, the Carrier must first demonstrate that the injured employee had a preexisting and permanent mental or physical impairment, as defined by RSA 281-A:2, XIV. The Carrier must show by a medical evaluation a "subsequent disability by injury arising out of and in the course of employment". Among other requirements, the Carrier must show that the employer had knowledge of the employee's preexisting permanent impairment at the time the employee was hired or, alternatively, retained by the employer after learning of permanent impairment. RSA 281-A:54, III. The "employer knowledge" requirement can be fulfilled either by written employment records or by an affidavit executed at the time of hire or retention in employment. *Id.* Because the Carrier failed to meet its burden to show the Claimant had a preexisting and permanent mental or physical impairment, failed to meet the "employer knowledge" requirement, and failed to meet the "subsequent disability by injury" requirement, the Panel declines to address the remaining requirements under RSA 281-A:54.

The Carrier bears the burden of proof to demonstrate by a preponderance of the evidence each of the statutory requirements for reimbursement from the Fund. Lab 203.10(a).

On August 8, 2005, Summit Packaging Systems, Inc. (Summit) hired Barbara Krajewski (Claimant) as a laborer and machine operator (pages 10, 11). On January 10, 2016, while working at Summit, the Claimant was taking a 65 lb. spool of tubing off a skid when it slipped out of her hands. She attempted to catch it which caused a pulling on her left shoulder. She first sought medical treatment on January 13, 2016 at the Bedford Occupational Acute Care Center. She reported radiating pain into her left arm with numbness and tingling into the left index finger, as well as neck pain. The Claimant denied any neck or left arm complaints prior to the incident on January 10, 2016. This claim was accepted by Carrier. She had increasing pain in

her left arm and elbow for which she received physical therapy. Due to ongoing complaints, she had an MRI scan on January 29, 2016. The MRI showed disc degeneration, spondylolisthesis, facet hypertrophy along with foraminal stenosis at C5/6 and C6/7. She was referred to Dr. Sinkov who tried trigger point injections for a cervical nerve impingement. The Claimant continued to work with job modifications and continued to receive medical treatment up until Dr. Sinkov performed cervical surgery on September 12, 2016. The Claimant underwent a C5-C7 discectomy and fusion at C5, C7. The Claimant was out of work following the surgery but has since returned to the Employer in a modified duty capacity. It appears that the only time that the Claimant was out of work was the period of time after the surgery that took place on September 12, 2016. According to medical records, she has been released to full-time/light duty work. There was no evidence that there was a new accident or injury after the January 10, 2016 injury at work. While not required, there was no evidence of an aggravation of her ongoing January 10, 2016 injury and disability. There was no new event which would qualify as an injury. There was no "subsequent" period of disability. See RSA 281-A: 54. The Claimant's disability and impairment began on January 10, 2016 and has continued to varying degrees to the present. The Claimant continues to work for Summit in a modified duty status. The fact that medical treatment changed from conservative therapies to surgery does not create a new or subsequent period of disability. There was no subsequent disability by injury. The Claimant's surgery was not a "subsequent disability by injury". RSA 281-A: 54, III.

According to RSA 281-A: 54, III, the Employer needs to submit written records to establish that the Employer had knowledge of a permanent mental or physical impairment prior to the claimed subsequent disability. The Carrier claims that the subsequent disability commenced on the date of the surgery (September 12, 2016). Based on the records submitted, the Claimant never reached maximum medical improvement prior to September 12, 2016. Also based on the medicals submitted with the Application for Second Injury Benefits, the Claimant did not have a permanent impairment prior to the subsequent period of disability claimed by the Employer.

Kyle Kienia of Summit Packaging Systems submitted a Second Injury Fund Sworn Statement of Employer which was dated August 29, 2018. The Sworn Statement is Exhibit P of the Application for Second Injury Fund Benefits. (See pages 24-38). In the context of a cervical injury, it is axiomatic that until an employee has reached maximum medical impairment (MMI), they cannot be said to have suffered a permanent impairment. Until a patient reaches the point

where there is no reasonable possibility that the condition will improve any further, the injury is not permanent. A patient who is not at MMI, could, for example, continue to improve to the point that they become completely and totally asymptomatic or otherwise completely recover from an injury. For example, Dr Polivy opined that as of March 24, 2016, the Claimant was not yet a MMI and that she would fully recover from her injury. Until a patient reaches MMI, the patient is still in the healing phase of their recovery. There is no evidence whatsoever, in the medicals submitted, that suggests that the Claimant had reached maximum medical improvement or that she had a permanent impairment as required by the statute RSA 281-A: 54. In fact, the medical records attached to Exhibit P repeatedly indicated that the Claimant had neither reached maximum medical improvement nor suffered a permanent impairment, prior to the day of surgery. The Claimant's orthopedist Dr. Sinkov submitted New Hampshire's Workers' Compensation medical forms: (see p. 26, 27, 30 and 31 of Exhibit P.

- February 2, 2016 "not at MMI/Permanent Impairment undetermined".
- May 5, 2016 "not at MMI/Permanent Impairment undetermined".
- May 24, 2016 "not at MMI/Permanent Impairment undetermined".
- July 7, 2016 "not at MMI/Permanent Impairment undetermined".

These records do not in any way assist the Carrier in meeting its burden of proof.

Karen O'Neill Wetherbee, APRN submitted New Hampshire's Workers' Compensation medical forms:

- January 14, 2016 "not at MMI".
- January 15, 2016 "not at MMI".
- January 19, 2016 "not at MMI".
- January 26, 2016 "not at MMI".
- February 2, 2016 "not at MMI".

These records were attached to Exhibit P.

With respect to the medical forms submitted by Karen Wetherbee, there is no suggestion that the Claimant would suffer a permanent impairment.

The Carrier relies, in-part, on a medical form (75 WC5-1) prepared by Karen O'Neil Wetherbee, APRN dated February 3, 2016 (p.33). This form related to a January 26, 2016 office visit (16 days after the January 20, 2016 work injury). The Carrier relies on the word "persistent" in that medical form to sustain its burden of showing that the Employer had written records evidencing. *See* 281-A: 54 III. However, no reasonable person reading Karen Wetherbee's January 26, 2016 medical record (p. 33) could conclude that the Claimant had suffered a permanent impairment.

In the context of this form, authored 16 days after the work accident, the use of the phrase "Left cervical radiculopathy, persistent" simply means the condition continues to persist or has not gone away. The use of the word "persistent" may mean the problem may continue for indefinite period of time but not that the problem was permanent and would never go away. This interpretation is buttressed by the fact that Karen Wetherbee, APRN did not select the box "yes" in answering the question posed of the 75WCA-1 form. "Has injury caused a permanent impairment?"

The only other record submitted by Summit Packing Services as part of Exhibit P was a partial report by Dr. Polivy (page 28 & 29). The part of the report that was submitted in no way suggests that the Claimant had reached MMI or that she had sustained permanent injury. A complete copy of Dr. Polivy's report is found at page 90 but page 3 of Dr. Polivy's report was not part of the Employer's Exhibit P of the Carrier's application. The third page of Dr. Polivy's March 24, 2016 report indicated he did not feel the Claimant's symptoms were permanent and in fact Dr. Polivy felt the Claimant's symptoms would completely resolve within the next two to three months. Dr. Polivy goes on to say that the Claimant has not reached a medical end result as a result of her work injury. There were no other records submitted with the Carrier's Second Injury Fund Application which in anyway suggest that the Claimant had suffered a permanent impairment prior to her surgery. Neither Dr. Sinkov nor Dr. Polivy felt that the Claimant had suffered a permanent impairment prior to her surgery. Unless the Employer is aware that the employee has a permanent injury at the point they hire or retain an employee, there is no ability for Employer to recover from the Second Injury Fund. On this record, the Panel cannot and does not conclude that the Employer's written records were sufficient to justify reimbursement from the Second Injury Fund.

DECISION:

The Employer has raised a number of challenges to the Special Injury Fund Coordinator's decision. Based on the Employer's failure to meet the written documentation requirement of the statue, the failure to show a subsequent disability by injury and failure to show a prior and permanent injury, the Panel finds that the Carrier has failed to meet its burden of proof. The Panel declines to rule on the remaining requirements under the statute.

THE FUND'S REQUEST FOR FINDINGS OF FACT AND RULINGS OF LAW:

Paragraphs 1 and 2 are correct.

Paragraphs 3 to 54, 59 to 61 are simply restatements of what is contained in the medical records. There was no testimony concerning these medical records. The medical records say what they say and no further comment on those records is necessary.

Paragraphs 55 to 58, 62, 66 to 69 and 72 are accepted and are considered correct statements

The first sentence in Paragraph 63 is true. The second sentence is not ruled on.

The Panel declines to rule on paragraphs 65, 70 and 71 because the Panel did not reach the issue these paragraphs were pertinent to.

CARRIER'S REQUEST FOR FINDINGS OF FACT AND RULINGS OF LAW:

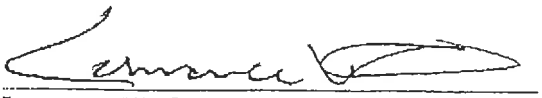
The Panel agrees with the following Requests: Paragraphs 1, 4, 6, 15, 16.

The Panel rejects the following Requests: 3 (September 12, 2016 is not a subsequent date of disability), 9 (page 3 of Dr. Polivy's report was omitted), 14, 17, 18, 19, 20, 22, 23, 33, 35.

Paragraph 2, 10, 11, 12, 13 are restatements of medical records which say what they say and speak for themselves given the lack of any testimonial evidence.

The remaining paragraphs relate to issues not addressed by this Decision, therefore the Panel declines to rule on the same.

This was a unanimous decision of the panel.



Laurence W. Getman, Esq., Panel Chair
Compensation Appeals Board

LWG/sar

State of New Hampshire

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June 17, 2020

Gary S. Harding
Bernard & Merrill, PLLC
314 Elm Street
Manchester NH 03101

Heather Neville, Esq.
Assistant Attorney General
33 Capitol Street
Concord, NH 03301

Re: Barbara Krajewski v. Summit Packaging Systems
Docket # 2019-C-0283

ORDER ON THE CARRIER'S MOTION FOR RECONSIDERATION

The Panel has reviewed the Carrier's Motion for Reconsideration and the Special Fund for Second Injuries' Objection to the Motion for Reconsideration. The Panel grants the Carrier's request for rehearing.

A prehearing conference should be scheduled to discuss the scope of the rehearing and evidence requested by the Panel. The Panel Members should sit at the prehearing conference in this case.

So Ordered.

Sincerely,

Laurence Getman, Esq., Panel Chair
Compensation Appeals Board

State of New Hampshire

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February 9, 2021

Michelle, Broadhurst, Esq.
Bernard & Merrill, PLLC
814 Elm St
Manchester NH 03101

Re: Barbara Krajewski V Summit Packaging Systems, Inc.
Docket # 2019-C-0283

Dear Attorney Broadhurst:

Enclosed is a copy of the decision rendered by the Compensation Appeals Board in the above-captioned matter.

Any party to the proceeding aggrieved by an order or decision of the Panel may appeal same to the Supreme Court pursuant to RSA 541:6 Appeal. - *Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal the petition to the Supreme Court.*

Should either party wish to utilize an audio recording of the hearing, it will be held for six months from the date of the decision. After that time, it will be destroyed in accordance with our retention policy. The digital recording is available through the Department of Labor for a fee of $20.00.

Respectfully submitted,

Laurence W. Getman, Esq., Panel Chair
Compensation Appeals Board

Cc: Heather, Neville, Esq.

State of New Hampshire

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February 9, 2021

DECISION OF THE COMPENSATION APPEALS BOARD

BARBARA KRAJEWSKI

V.

SUMMIT PACKAGING SYSTEMS

Docket # 2019-C-0283

APPEARANCES: Summit Packaging Systems, Inc. and The Lawson Group were represented by Attorney Gary Harding
Special Injury Fund was represented by Ryan O'Riordan under N.H. Supreme Court Rule 36 and Assistant Attorney General Heather Neville

ISSUES: RSA 281-A: 54 - Second Injury Fund

DATE OF INJURY: January 10, 2016 (by agreement).

WITNESSES: No witnesses.

HEARING: A hearing was held at the New Hampshire Department of Labor, Concord, New Hampshire on March 16, 2020.

PANEL: The panel was comprised of Dennis Adams, Harry Ntapalis and Laurence W. Getman, Esq., Panel Chair.

BACKGROUND and FINDINGS OF FACT:

The Lawson Group, the third-party Administrator for Summit Packaging Systems, Inc. (collectively "Carrier") submitted an application for reimbursement from the Second Injury Fund ("Fund") on August 24, 2018 (page 17)[1]. On February 15, 2019, Meredith St. Germain, the

[1] Page references refer to the Evidentiary Packet submitted by the Carrier

Special Funds Coordinator, denied the Carrier's request for Second Injury Fund Reimbursement. (page 15). A timely appeal was filed by the Carrier. A Compensation Appeals Board hearing was held and documentary evidence was received without objection. There were no witnesses. Both parties submitted requests for findings of fact and rulings of law, memoranda of law and written closing arguments.

The Fund was created to encourage employers to hire or retain employees with permanent impairments by reducing the employers' liability for increased disability that previously impaired individuals may incur as a result of work-related injury. *See* In re: CNA Insurance Companies, 143 N.H. 270, 272 (1998).

In order for the Carrier to recover from the Fund, the Carrier must first demonstrate that the injured employee had a preexisting and permanent mental or physical impairment, as defined by RSA 281-A:2, XIV. The Carrier must show by a medical evaluation a "subsequent disability by injury arising out of and in the course of employment". Among other requirements, the Carrier must show that the employer had knowledge of the employee's preexisting permanent impairment at the time the employee was hired or, alternatively, retained by the employer after learning of permanent impairment. RSA 281-A:54, III. The "employer knowledge" requirement can be fulfilled either by written employment records or by an affidavit executed at the time of hire or retention in employment. *Id.* Because the Carrier failed to meet its burden to show the Claimant had a preexisting and permanent mental or physical impairment, failed to meet the "employer knowledge" requirement, and failed to meet the "subsequent disability by injury" requirement, the Panel declines to address the remaining requirements under RSA 281-A:54.

The Carrier bears the burden of proof to demonstrate by a preponderance of the evidence each of the statutory requirements for reimbursement from the Fund. Lab 203.10(a).

On August 8, 2005, Summit Packaging Systems, Inc. (Summit) hired Barbara Krajewski (Claimant) as a laborer and machine operator (pages 10, 11). On January 10, 2016, while working at Summit, the Claimant was taking a 65 lb. spool of tubing off a skid when it slipped out of her hands. She attempted to catch it which caused a pulling on her left shoulder. She first sought medical treatment on January 13, 2016 at the Bedford Occupational Acute Care Center. She reported radiating pain into her left arm with numbness and tingling into the left index finger, as well as neck pain. The Claimant denied any neck or left arm complaints prior to the incident on January 10, 2016. This claim was accepted by Carrier. She had increasing pain in

her left arm and elbow for which she received physical therapy. Due to ongoing complaints, she had an MRI scan on January 29, 2016. The MRI showed disc degeneration, spondylolisthesis, facet hypertrophy along with foraminal stenosis at C5/6 and C6/7. She was referred to Dr. Sinkov who tried trigger point injections for a cervical nerve impingement. The Claimant continued to work with job modifications and continued to receive medical treatment up until Dr. Sinkov performed cervical surgery on September 12, 2016. The Claimant underwent a C5-C7 discectomy and fusion at C5, C7. The Claimant was out of work following the surgery but has since returned to the Employer in a modified duty capacity. It appears that the only time that the Claimant was out of work was the period of time after the surgery that took place on September 12, 2016. According to medical records, she has been released to full-time/light duty work. There was no evidence that there was a new accident or injury after the January 10, 2016 injury at work. While not required, there was no evidence of an aggravation of her ongoing January 10, 2016 injury and disability. There was no new event which would qualify as an injury. There was no "subsequent" period of disability. See RSA 281-A: 54. The Claimant's disability and impairment began on January 10, 2016 and has continued to varying degrees to the present. The Claimant continues to work for Summit in a modified duty status. The fact that medical treatment changed from conservative therapies to surgery does not create a new or subsequent period of disability. There was no subsequent disability by injury. The Claimant's surgery was not a "subsequent disability by injury". RSA 281-A: 54, III.

According to RSA 281-A: 54, III, the Employer needs to submit written records to establish that the Employer had knowledge of a permanent mental or physical impairment prior to the claimed subsequent disability. The Carrier claims that the subsequent disability commenced on the date of the surgery (September 12, 2016). Based on the records submitted, the Claimant never reached maximum medical improvement prior to September 12, 2016. Also based on the medicals submitted with the Application for Second Injury Benefits, the Claimant did not have a permanent impairment prior to the subsequent period of disability claimed by the Employer.

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where there is no reasonable possibility that the condition will improve any further, the injury is not permanent. A patient who is not at MMI, could, for example, continue to improve to the point that they become completely and totally asymptomatic or otherwise completely recover from an injury. For example, Dr Polivy opined that as of March 24, 2016, the Claimant was not yet a MMI and that she would fully recover from her injury. Until a patient reaches MMI, the patient is still in the healing phase of their recovery. There is no evidence whatsoever, in the medicals submitted, that suggests that the Claimant had reached maximum medical improvement or that she had a permanent impairment as required by the statute RSA 281-A: 54. In fact, the medical records attached to Exhibit P repeatedly indicated that the Claimant had neither reached maximum medical improvement nor suffered a permanent impairment, prior to the day of surgery. The Claimant's orthopedist Dr. Sinkov submitted New Hampshire's Workers' Compensation medical forms: (see p. 26, 27, 30 and 31 of Exhibit P.

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These records do not in any way assist the Carrier in meeting its burden of proof.

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These records were attached to Exhibit P.

With respect to the medical forms submitted by Karen Wetherbee, there is no suggestion that the Claimant would suffer a permanent impairment.

The Carrier relies, in-part, on a medical form (75 WC5-1) prepared by Karen O'Neil Wetherbee, APRN dated February 3, 2016 (p.33). This form related to a January 26, 2016 office visit (16 days after the January 20, 2016 work injury). The Carrier relies on the word "persistent" in that medical form to sustain its burden of showing that the Employer had written records evidencing. *See* 281-A: 54 III. However, no reasonable person reading Karen Wetherbee's January 26, 2016 medical record (p. 33) could conclude that the Claimant had suffered a permanent impairment.

In the context of this form, authored 16 days after the work accident, the use of the phrase "Left cervical radiculopathy, persistent" simply means the condition continues to persist or has not gone away. The use of the word "persistent" may mean the problem may continue for indefinite period of time but not that the problem was permanent and would never go away. This interpretation is buttressed by the fact that Karen Wetherbee, APRN did not select the box "yes" in answering the question posed of the 75WCA-1 form. "Has injury caused a permanent impairment?"

The only other record submitted by Summit Packing Services as part of Exhibit P was a partial report by Dr. Polivy (page 28 & 29). The part of the report that was submitted in no way suggests that the Claimant had reached MMI or that she had sustained permanent injury. A complete copy of Dr. Polivy's report is found at page 90 but page 3 of Dr. Polivy's report was not part of the Employer's Exhibit P of the Carrier's application. The third page of Dr. Polivy's March 24, 2016 report indicated he did not feel the Claimant's symptoms were permanent and in fact Dr. Polivy felt the Claimant's symptoms would completely resolve within the next two to three months. Dr. Polivy goes on to say that the Claimant has not reached a medical end result as a result of her work injury. There were no other records submitted with the Carrier's Second Injury Fund Application which in anyway suggest that the Claimant had suffered a permanent impairment prior to her surgery. Neither Dr. Sinkov nor Dr. Polivy felt that the Claimant had suffered a permanent impairment prior to her surgery. Unless the Employer is aware that the employee has a permanent injury at the point they hire or retain an employee, there is no ability for Employer to recover from the Second Injury Fund. On this record, the Panel cannot and does not conclude that the Employer's written records were sufficient to justify reimbursement from the Second Injury Fund.

DECISION:

The Employer has raised a number of challenges to the Special Injury Fund Coordinator's decision. Based on the Employer's failure to meet the written documentation requirement of the statue, the failure to show a subsequent disability by injury and failure to show a prior and permanent injury, the Panel finds that the Carrier has failed to meet its burden of proof. The Panel declines to rule on the remaining requirements under the statute.

THE FUND'S REQUEST FOR FINDINGS OF FACT AND RULINGS OF LAW:

Paragraphs 1 and 2 are correct.

Paragraphs 3 to 54, 59 to 61 are simply restatements of what is contained in the medical records. There was no testimony concerning these medical records. The medical records say what they say and no further comment on those records is necessary.

Paragraphs 55 to 58, 62, 66 to 69 and 72 are accepted and are considered correct statements

The first sentence in Paragraph 63 is true. The second sentence is not ruled on.

The Panel declines to rule on paragraphs 65, 70 and 71 because the Panel did not reach the issue these paragraphs were pertinent to.

CARRIER'S REQUEST FOR FINDINGS OF FACT AND RULINGS OF LAW:

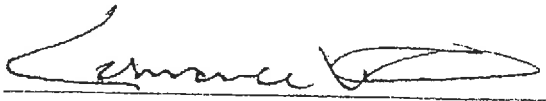
The Panel agrees with the following Requests: Paragraphs 1, 4, 6, 15, 16.

The Panel rejects the following Requests: 3 (September 12, 2016 is not a subsequent date of disability), 9 (page 3 of Dr. Polivy's report was omitted), 14, 17, 18, 19, 20, 22, 23, 33, 35.

Paragraph 2, 10, 11, 12, 13 are restatements of medical records which say what they say and speak for themselves given the lack of any testimonial evidence.

The remaining paragraphs relate to issues not addressed by this Decision, therefore the Panel declines to rule on the same.

This was a unanimous decision of the panel.



Laurence W. Getman, Esq., Panel Chair
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March 2, 2021

DECISION OF THE COMPENSATION APPEALS BOARD

BARBARA KRAJEWSKI

V.

SUMMIT PACKAGING SYSTEMS

Docket # is 2019-C-0283

APPEARANCES: Summit Packaging Systems, Inc. and The Lawson Group were represented by Attorney Gary Harding
Special Injury Fund was represented by Assistant Attorney General Heather Neville

ISSUES: RSA 281-A:54 - Second Injury Fund

DATE OF INJURY: January 10, 2016 (by agreement).

WITNESSES: No witnesses.

HEARING: A rehearing was held at the New Hampshire Department of Labor, Concord, New Hampshire.

PANEL: The panel was comprised of Dennis Adams, Arthur Beaudry and Laurence W. Getman, Esq., Panel Chair.

BACKGROUND and FINDINGS OF FACT:

The Lawson Group, the third-party Administrator for Summit Packaging Systems, Inc. (collectively "Carrier") submitted an application for reimbursement from the Second Injury Fund ("Fund") on August 24, 2018 (page 17)[1]. On February 15, 2019, Meredith St. Germain, the Special Funds Coordinator, denied the Carrier's request for Second Injury Fund Reimbursement. (page 15). A timely appeal was filed by the Carrier. A Compensation Appeals Board hearing was held and documentary evidence was received without objection. There were no witnesses. The Fund submitted requests for Findings of Fact and Rulings of Law. Memoranda of Law and written closing arguments were submitted by the parties. The hearing was held by WebEx. This was a rehearing scheduled pursuant to the Carrier's request. The original hearing was held on March 16, 2020.

The Fund was created to encourage employers to hire or retain employees with permanent impairments by reducing the employers' liability for increased disability that previously impaired individuals may incur as a result of work-related injury. *See* In re: CNA Insurance Companies, 143 N.H. 270, 272 (1998).

In order for the Carrier to recover from the Fund, the Carrier must first demonstrate that the injured employee had a preexisting and permanent mental or physical impairment, as defined by RSA 281-A:2, XIV. The Carrier must show by a medical evaluation a "subsequent disability by injury arising out of and in the course of employment". Among other requirements, the Carrier must show that the employer had knowledge of the employee's preexisting permanent impairment at the time the employee was hired or, alternatively, retained by the employer after learning of permanent impairment. RSA 281-A:54, III. The "employer knowledge" requirement can be fulfilled either by written employment records or by an affidavit executed at the time of hire or retention in employment. *Id.* Because the Carrier failed to meet its burden to show the Claimant had a preexisting and permanent mental or physical impairment at the time the Claimant was retained by the Employer, failed to meet the "employer knowledge" requirement,

[1] Page references refer to the Evidentiary Packet submitted by the Carrier.

and failed to meet the "subsequent disability by injury" requirement, the Panel declines to address the remaining requirements under RSA 281-A:54.

The Carrier bears the burden of proof to demonstrate by a preponderance of the evidence each of the statutory requirements for reimbursement from the Fund. Lab 203.10(a).

On August 8, 2005, Summit Packaging Systems, Inc. (Summit) hired Barbara Krajewski (Claimant) as a laborer and machine operator. On January 10, 2016, while working at Summit, the Claimant was taking a 65 lb. spool of tubing off a skid when it slipped out of her hands. She attempted to catch it which caused a pulling on her left shoulder. She first sought medical treatment on January 13, 2016 at the Bedford Occupational Acute Care Center. She reported radiating pain into her left arm with numbness and tingling into the left index finger, as well as neck pain. The Claimant denied any neck or left arm complaints prior to the incident on January 10, 2016. This claim was accepted by Carrier. She had increasing pain in her left arm and elbow for which she received physical therapy. Due to ongoing complaints, she had an MRI scan on January 29, 2016. The MRI showed disc degeneration, spondylolisthesis, facet hypertrophy along with foraminal stenosis at C5/6 and C6/7. She was referred to Dr. Sinkov who tried trigger point injections for a cervical nerve impingement. The Claimant continued to work with job modifications and continued to receive medical treatment up until Dr. Sinkov performed cervical surgery on September 12, 2016. The Claimant underwent a C5-C7 discectomy and fusion at C5, C7. The Claimant was out of work following the surgery but has since returned to the Employer in a modified duty capacity. It appears that the only time that the Claimant was out of work was the period of time after the surgery that took place on September 12, 2016. According to medical records, she has been released to full-time/light duty work. There was no evidence that there was a new accident or injury after the January 10, 2016 injury at work. While not required, there was no evidence of an aggravation of her ongoing January 10, 2016 injury and disability. There was no new event which would qualify as an injury. There was no "subsequent" period of disability. See RSA 281-A:54. The Claimant's disability and impairment began on January 10, 2016 and has continued uninterrupted to varying degrees up to the present. The Claimant continues to work for Summit in a modified duty status. The fact that the Claimant's medical

treatment changed from conservative therapies to surgery does not create a new or subsequent period of disability. There was no subsequent disability by injury. The Claimant's surgery was not a "subsequent disability by injury". RSA 281-A:54, III.

According to RSA 281-A:54, III, the Employer needs to submit written records to establish that the Employer had knowledge of a permanent mental or physical impairment at the time the Summit retained the Claimant in its employ. The Carrier claims that the subsequent disability commenced on the date of the surgery (September 12, 2016). Based on the written employments records and Affidavit P submitted with the Application for Second Injury Benefits, the Employer did not have written knowledge of a permanent injury at the point the Employer decided to retain the Claimant in its employ. It is the Employer's knowledge of the permanent pre-existing impairment which can trigger Second Injury Fund benefits not the opinion of an expert on the issue.

Kyle Kienia of Summit Packaging Systems submitted a Second Injury Fund Sworn Statement of Employer which was dated August 29, 2018. The Sworn Statement is Exhibit P of the Application for Second Injury Fund Benefits. (See pages 24-38). Attached to Affidavit P are some the Claimant's medicals. The Employer seeks to meet the "Employer knowledge requirement by submitting certain medicals with Exhibit P however the Employer makes no effort to establish that the Employer was in possession of those records when the Employer decided to retain the Claimant in its employ even though she allegedly had a permanent impairment. Without that evidence the Panel can not find that the Employer had medical records in its possession at the time the Employer decided to retain the Claimant in its employ.

Moreover, the records submitted with Affidavit P do not prove that the Employer had knowledge of a permanent injury at the point the Employer decided to retain the Claimant in Summit's employment. For example, Dr Polivy opined that as of March 24, 2016, the Claimant would fully recover from her injury. There is no evidence in the medicals submitted with affidavit P, that would establish that the Claimant had a permanent impairment as required by the statute RSA 281-A: 54. In fact, the medical records attached to Exhibit P repeatedly indicated

that the Claimant's condition might continue to improve. The records relied on by the Employer (Exhibit P) expressly state that the Claimant had not suffered a permanent injury prior at the point the Employer decided to retain the Claimant in its employ. The Claimant's orthopedist, Dr. Sinkov, submitted New Hampshire's Workers' Compensation medical forms: (see p. 26, 27, 30 and 31 of Exhibit P).

- February 2, 2016 "not at MMI/Permanent Impairment undetermined".
- May 5, 2016 "not at MMI/Permanent Impairment undetermined".
- May 24, 2016 "not at MMI/Permanent Impairment undetermined".
- July 7, 2016 "not at MMI/Permanent Impairment undetermined".
-

These records do not in any way assist the Carrier in meeting its burden of proving the Employer had knowledge of a permanent impairment at the point the Employer decided to retain the Claimant.

Karen O'Neill Wetherbee, APRN, one of the Claimant's health care providers submitted New Hampshire's Workers' Compensation medical forms after each office visit as required by the Department of Labor: These records reveal the following:

- January 14, 2016 "not at MMI".
- January 15, 2016 "not at MMI".
- January 19, 2016 "not at MMI".
- January 26, 2016 "not at MMI".
- February 2, 2016 "not at MMI".

These records were attached to Exhibit P. These records do not assist the Employer in establishing the written records requirement or the Employer's knowledge requirement.

With respect to the medical forms submitted by Karen Wetherbee, there is no suggestion that the Claimant would suffer a permanent impairment. While there is no requirement that the Employee reach MMI, these records do not establish that the Claimant has a physical impairment.

The Panel will not consider medical records that were not part of Exhibit P of the Second Injury Application.

The Carrier relies, in-part, on a medical form (75 WC5-1) prepared by Karen O'Neil Wetherbee, APRN dated February 3, 2016 (p.33). This form related to a January 26, 2016 office visit (16 days after the January 20, 2016 work injury). The Carrier relies on the word "persistent" in that medical form to sustain its burden of showing that the Employer had written records evidencing a permanent impairment. *See* 281-A:54 III. However, no reasonable person reading Karen Wetherbee's January 26, 2016 medical record (p. 33) could conclude that the Claimant had suffered a permanent impairment. In the context of this form, authored 16 days after the work accident, the use of the phrase "Left cervical radiculopathy, persistent" simply means the condition continues to persist or has not gone away since last seen. This interpretation is buttressed by the fact that Karen Wetherbee, APRN did not select the box "yes" in answering the question posed of the 75WCA-1 form: "Has injury caused a permanent impairment?"

The Carrier maintains that the Panel should not consider Dr. Sinkov and Karen O'Neil Weatherbee's answer to the permanency questions on the 75WCA-1 forms because those questions only related to permanency considerations pursuant to RSA 281-A:32. Prior to the hearing, the Panel asked the Carrier to bring evidence to the rehearing that would support that contention. The Carrier failed to do so. The Carrier called Danielle Albert, the Director of Workers' Compensation for New Hampshire Department of Labor. Director Albert testified that she did not know why the 75WCA-1 Form was developed. She said the Form was used in a variety of contexts. She did not testify that Employers and medical professions should or would be aware that the permanency questions on 75WCA-1 only related to RSA 281-A:32 – permanency issues. The Carrier did not offer evidence of Summit's understanding regarding the use of the permanency information 75WCA-1 form.

Director Albert was also questioned about information on the Department's website as well as the information requested in the Second Injury Fund Application. The Panel finds that neither the Department's website or its Second Injury Fund Forms relieves the Carrier from its burden of proving what is required by RSA 281-A:54.

The only other record submitted by Summit Packing Services as part of Exhibit P was a portion of an IME report prepared at the Employer's request by Dr. Polivy (page 28 & 29). The part of the report that was submitted in no way suggests that the Claimant had sustained a permanent injury. A complete copy of Dr. Polivy's report is found at page 90 but page 3 of Dr. Polivy's report was not part of the Employer's Exhibit P of the Carrier's application. The third page of Dr. Polivy's March 24, 2016 report indicated that he did not feel the Claimant's symptoms were permanent and in fact Dr. Polivy felt the Claimant's symptoms would completely resolve within the next two to three months. The Panel prior to this re-hearing asked the employer to let the Board know by affidavit or live testimony whether the Employer had Dr Polivy complete 3 page report at the point the Employer filed the application for Second Injury fund benefits. Apparently, the Employer was in fact in possession of Dr. Polivy's complete report when it filed for Second Injury benefits. This lack of candor to the Fund, is an independent basis to deny the Employer's claim.

There were no other records submitted with the Carrier's Second Injury Fund Application which in anyway suggest that the Claimant had suffered a permanent impairment prior to her surgery.

Neither Dr. Sinkov nor Dr. Polivy felt that the Claimant had suffered a permanent impairment prior to her surgery. Unless the Employer is aware that the employee has a permanent injury at the point they hire or retain an employee, there is no ability for Employer to recover from the Second Injury Fund. On this record, the Panel cannot and does not conclude that the Employer's written records were sufficient to justify reimbursement from the Second Injury Fund.

DECISION:

The Employer has raised a number of challenges to the Special Injury Fund Coordinator's decision. Based on the Employer's failure to meet the written documentation requirement required by RSA 281-A:54, the failure to show a subsequent disability by injury and failure to show a prior and permanent injury, the Panel finds that the Carrier has failed to meet its burden of proof. The Panel declines to rule on the remaining requirements under the statute.

THE FUND'S REQUEST FOR FINDINGS OF FACT AND RULINGS OF LAW:

Paragraphs 1 and 2 are correct.
Paragraphs 3 to 54, 59 to 61 are simply restatements of what is contained in the medical records. There was no testimony concerning these medical records. The medical records say what they say and no further comment on those records is necessary.
Paragraphs 55 to 58, 62, 66 to 69 and 72 are accepted and are considered correct statements.
The first sentence in Paragraph 63 is true. The second sentence is not ruled on.
The Panel declines to rule on paragraphs 65, 70 and 71 because the Panel did not reach the issue these paragraphs were pertinent to.

This was a unanimous decision of the panel.

Laurence W. Getman, Esq., Panel Chair
Compensation Appeals Board

State of New Hampshire

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Re: Barbara Krajewski v. Summit Packaging Systems
Docket # 2019-C-0283

ORDER ON THE CARRIER'S MOTION FOR RECONSIDERATION

The Panel denies The Lawson Group's Motion for Reconsideration. The Panel adopts the reasoning for denial expressed in the Fund's Objection to the Motion for Reconsideration. The suggestion that the Panel viewed Danielle Albert at its witness is frivolous. The decision to call or not call Danielle Albert was totally The Larson Group's decision. The Panel was only interested in finding out whether the 75 WCA-1 provisions relating to permanency could only be used exclusively for RSA 281-A: 32 Permanent Impairment. It is up to The Larson Group to prove through testimony their contention that the permanency provisions of 75 WCA-1 had the limited use of providing information on worker's compensation permanent impairment provisions. The Larson Group elected to call a witness who did not offer The Larson Group anything that would support its argument. Furthermore, if The Larson Group felt that the Panel was calling its own witness, it should have brought that issue up at the time and its failure to do so constitutes a waiver of any argument on its motion for reconsideration.

The panel finds no basis for granting a reconsideration and the remaining arguments are unpersuasive. The Larson Group's Motion for Reconsideration is denied.

So Ordered.

Sincerely,

Laurence Getman, Esq., Panel Chair
Compensation Appeals Board