**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

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

Docket No.: 2021-0243

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# PETITIONER'S REPLY BRIEF

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Date: January 31, 2022

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## TABLE OF CONTENTS



## TABLE OF AUTHORITIES



## ARGUMENT

### I. The Fund and the Board fail to acknowledge the holding in Appeal of Hartford which has determined the test for employer knowledge of a "permanent impairment" for Second Injury Fund purposes.

#### A. The Carrier satisfied the employer knowledge of a "permanent impairment" test.

The fact that the Fund's brief only cited Appeal of Hartford 162 N.H. 91 (2011) once and was simply cited for the proposition that the Court reviews

issues of statutory interpretation *de novo* is telling. The Fund is ignoring the holding in Hartford while attempting to recreate the wheel. This appeal essentially boils down to what type of knowledge does the employer need to have in determining a "permanent physical or mental condition" as outlined in RSA 281-A:54 and defined by RSA 281-A:2 XIV.

The Fund accepts the Carrier's outline of proof to establish compliance with the statutory definition of "permanent impairment" which is 1) establishing a "permanent condition"; and 2) establishing the condition is serious and would constitute a hinderance to obtaining employment. FB[1] at 11. Once the Carrier establishes the Employer's knowledge of a "permanent impairment", then the Fund's remaining arguments are extraneous, and the Board's decisions must be reversed.

The Board's decision is based solely on the fact that the Employer did not know of the "permanent impairment" in a medical context[2]. The Board's decision extrapolates that since the Employer did not know of the "permanent impairment" then there was no "subsequent disability by injury" because the Carrier failed "to show a prior and permanent injury...." Appendix, at 116. The Board based its decision on an incorrect analysis.

In Hartford, the Court had the opportunity to review the same statute in question for this appeal. When reviewing the statutory requirement of RSA 281-A:54 and RSA 281-A:2 XIV, the Court stated,

> The question is not whether the impairment is one which would prevent the claimant from doing his work in a normal

[1] FB refers to the Fund's Brief.
[2] The Fund accepts job applications and memos to the employee's files to determine employer knowledge of a "permanent impairment." Medical evidence is not required. Appendix, pg. 299.

> and acceptable manner but whether the impairment is one which is likely to be an adverse factor in the claimant's being employed or being retained in employment. Many handicapped persons are, in fact, able to do their work as well as those free from handicap but there may be a greater risk of injury to them or there may be a risk that, in the event of injury, their total permanent disability will be greater than the disability which would have resulted from the subsequent injury alone. For these and related reasons, employers may be reluctant to employ such persons; the Second Injury Law was designed to overcome this reluctance. Hartford, at 96, 97.

The Hartford Court found "instructive two decisions of the Court of Appeals of Arizona addressing whether the hindrance or obstacle to reemployment test under that state's statute is objective, in the sense of looking to the nature of the employee's preexisting condition, or subjective, in the sense of looking to the particular employee's ability to engage in employment." Hartford, at 95. (Emphasis added). "Both decisions ruled that the test was an objective one." Hartford, at 95. The Board was required to base its decision on an "objective" basis, not a medical basis, and not on a more probable than not basis in determining "employer knowledge" of a "permanent impairment."

Hartford held, "we adopt the language of *Country Wide Truck* to frame the proper query: 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." (Internal quotes omitted). Hartford establishes that the employer does not need to know the "permanent" nature of the condition but that the "impairment" be an "obstacle or hinderance to obtaining

employment or to obtaining employment if the employee should become unemployed." Based on the Hartford decision, there is no need for the Employer to establish it had actual knowledge of the "permanent impairment" in a medical sense, as the test is based on an "objective" standard of whether the known condition is an obstacle to obtaining employment.

Regarding "employer knowledge" of a "permanent impairment", the court in Special Fund Div. v. Indus. Com'n of Ariz., 182 Ariz. 341, 347 (App.1994), which the Hartford Court found instructive, determined, "When 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 at 340. Additionally, the court in Special Disability Trust Fund v. Martin Marietta Corp., 512 So.2d 1036, 1039 (Fla. App. 1987), construed the same statutory language as here, and stated, "**we consider it immaterial that the earlier injury which claimant suffered on November 4, 1982 caused no orthopedic permanent impairment rating.**" Appendix at 357. (Emphasis added). The Marietta Court also found, "The record as such strongly supports the finding that the employee's preexisting condition was permanent, in that the restrictions were never removed during the employee's continued work performance for nearly 18 months, or until the occurrence of the second injury." Id.

In this case, the Employer's knowledge of the initial injury and the subsequent treatment established that the Employer knew of a "permanent impairment' on an objective basis. The Claimant was not performing the job she was hired to do since the original date of injury which created the initial period of disability. "Disability is generally defined as the inability

to pursue an occupation or perform services for wages because of physical or mental impairment.'..." Appeal of CNA Ins. Cos., 143 N.H. 270, 273 (1998). The Employer understood the Claimant's physical limitations by providing accommodated work due to the severe work restrictions for nine months.

The only objective analysis regarding the Claimant's condition was the report provided by Ms. Diane Adams, which both the Board and Fund ignore. "[G]iven Dr. Sinkov's restrictions starting 2/4/16, it is **highly unlikely** that she could find work...." (Emphasis Original). Appendix, at 136. This establishes employer knowledge of a "permanent impairment" as defined by RSA 281-A:2 XIV and satisfies the Hartford test.

B. The Carrier satisfied the second prong of the "employer knowledge" test regarding whether the Claimant's condition was an obstacle or hinderance to obtaining employment.

The Fund acknowledged the "Board's March 2, 2021 decision does not include a finding on the hinderance requirement." FB, at 14. The Fund also admitted "the second requirement is conditioned on the first", therefore, "there was no need for the Board to determine whether the impairment would have been a hinderance to employment." Id. The Fund's argument supports the Carrier's position that the Board's decision generalizes its rationale that since the Employer did not know of the "permanent impairment" then there was no "subsequent disability by injury" because the Carrier failed "to show a prior and permanent injury...." Appendix, at 116. The Board and Fund's logic is unsustainable.

"When a lower tribunal has not addressed a factual issue, but the records reveals that a reasonable fact finder necessarily would reach a certain conclusion, [this Court] may decide that issue as a matter of law." Appeal of Cote, 139 N.H. 575, 580 (1995).

Here, the record demonstrates the Claimant's condition, prior to the subsequent disability, constitutes "an obstacle or hinderance to obtaining employment" should the Claimant become unemployed. As noted above, given the restrictions provide by the Claimant's treating physician on February 4, 2016, it was "highly unlikely that she could find work." This Court must review this factual issue and conclude the Carrier established that the Claimant's preexisting condition was an "obstacle to obtaining employment."

The Carrier has shown that the Claimant's preexisting condition was a "permanent impairment" based on an objective analysis and that condition was a "hinderance to employment." This Court must reverse the Board's decision.

## II. The Fund's argument that Exhibit Q be filled out "before the alleged subsequent disability", must be "a contemporaneous record generated by" a treating physician, and is "not a medical record" is without merit.

The Fund argues in a convoluted manner that Exhibit Q is irrelevant for the Board's determination in the analysis of a "permanent impairment" and as a "medical record" in establishing a subsequent disability. The analysis for determining a "permanent impairment" is outlined in Section I, supra.

A. The Carrier can utilize Exhibit Q in establishing a "permanent impairment" on a medical basis and is required to utilize Exhibit Q to establish a subsequent disability.

The Fund argues that Dr. Forrest's signed Exhibit Q was completed "more than two years after the Claimant's initial injury." FB, at 13. The Fund then argues "the critical period for determining permanency is *before* the alleged subsequent disability by injury." Id. (Italics original). To accept the Fund's logic, Carriers must obtain Exhibit Q prior to the subsequent date of disability that is the subject of Second Injury Fund reimbursement. This reasoning is fundamentally flawed. Exhibit Q could never be filled out *before* the subsequent disability and Exhibit Q requires the physician to address the prior "permanent impairment".

The Fund fails to recognize that notice of a potential claim against the Fund is 100 weeks. RSA 281-A:54 V states, "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." The notice deadline provides carriers the opportunity to investigate whether a claim can be filed against the Fund. The fact that Exhibit Q is filed more than two years after the subsequent date of disability is irrelevant.

The Department/Fund developed Exhibit Q to establish, on a medical basis (although not required by the statute), among other issues, whether a claimant has a "permanent impairment" as defined by RSA 281-A:2 XIV. Dr. Forrest's opinion does just that, establishes a permanent impairment prior to the subsequent date of disability. Appendix, at 169. The Fund relies on an argument that "contemporaneous records prepared by the

providers" are required to establish whether a claimant has a "permanent impairment." FB 13. This argument is without merit, see Section I, supra.

Treating providers are not opining on Second Injury Fund issues and are not completing any Second Injury Fund forms, especially Exhibit Q, at any "contemporaneous" office visit. Treating physicians provide restrictions and limitations for claimants' injuries. And it is those restrictions and limitations provided by the treating physicians which establishes the basis in determining the employer's knowledge of a "permanent impairment". See, argument in Section I above.

B. The Fund argues the Board was not required to consider Exhibit Q to determine a subsequent date of disability "because Exhibit Q is not a medical record" and Exhibit Q was not a contemporaneous record generated by one of the Claimant's medical providers ignores the Lab Rules and defies logic.

Supporting the Board's erroneous decision, the Fund creates this muddled conclusion that Exhibit Q "is not a medical record." FB at 22. This belies Lab Rule 506.04 (d) (4) which only requires a "medical evaluation" and Exhibit Q's "instructions to the physician completing the form". Id. The Fund acknowledges that the Board's decision "did not cite Lab 506.04 (d), nor did it use any language to suggest that it had relied on the rule." FB at 17. The Fund is arguing Lab Rule 506.04 (d) is inapplicable in determining eligibility for reimbursement from the Fund, therefore, this Court should accept Carrier's argument that Lab Rule 506.04 (d) (2-4) is invalid and are not needed to establish Second Injury Fund reimbursement.

Lab Rule 506.04 (d) (4) states, "proof of eligibility **shall** include... (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'", Exhibit Q. (Emphasis added). Since the Lab Rule provides Exhibit Q to determine the medical basis for the combined effects of the two disabilities, the Fund's argument that Exhibit Q is not a medical record is befuddling, since it is required under the Rules.

Exhibit Q is provided to a medical doctor, who provides a medical opinion, based on a "medical evaluation" of medical records provided, and signs the form as a physician. This is a medical record contrary to what the Fund argues. To accept the Fund's logic would render medical record review opinions as not being medical evidence to submit at Department hearings which are always accepted as a medical record. There is no difference between a medical records review opinion and the "medical evaluation" of the medical records for Exhibit Q.

The term "medical evaluation" is undefined by statute or Lab Rule and is therefore ambiguous. A "medical evaluation" does not require a "contemporaneous" examination as the Fund suggests. A "medical evaluation" is also conducted by reviewing medical records and providing an opinion.

The Fund is adding language to both RSA 281-A:54 and Lab Rule 506.04 (d) in requiring Exhibit Q to be a "contemporaneous record." There is no evidence alluded to by the Fund that suggests Exhibit Q is not a medical record and must be contemporaneously filled out by a treating

physician. These requirements espoused by the Fund would render all applications to the Fund invalid because Exhibit Q is not a medical record and not generated in a contemporaneous fashion. The Fund's logic renders the Lab Rule inapplicable.

Exhibit Q is the only form that satisfies the requirement of the initial disability combined with the subsequent disability is "greater by reason of the combined effects." In this case, there was no medical evidence to contradict Dr. Forrest's findings that the Carrier satisfied this requirement.

### III. Dr. Polivy's missing last page.

The Fund's interpretation of what the Board was considering when the last page of Dr. Polivy's report was not in Exhibit P is based on an "assumption." FB, at 24. Even if the Board's comment regarding the "lack of candor" comment was harmless error, Dr. Polivy's report does not support the Board's conclusion that the Claimant's initial disability was not a permanent impairment. Again, the Board incorrectly based its decision concerning Exhibit P (Employer knowledge) on a medical basis and not an objective one.

The Board takes liberty with Dr. Polivy's opinion and wrote "Dr. Polivy felt the Claimant's symptoms would completely resolve within the next two to three months." Appendix, pg. 115. Dr. Polivy's actual opinion stated, "I would anticipate that her current symptoms should resolve...." Appendix, pg. 222. The Board could not possibly know what Dr. Polivy "felt", which is synonymous with "knew", that the symptoms would "completely resolve." Dr. Polivy specifically stated that he "anticipated", which is a

projection into the future, the symptoms "should resolve." Dr. Polivy never suggested that the symptoms would "completely resolve."

In fact, Dr. Polivy's opinion was inaccurate concerning the resolution of the Claimant's symptoms. The Claimant's symptoms did not "resolve." Dr. Polivy stated, any "fusion at one or two levels would be secondary to ... **her pre-existing degenerative cervical spondylitis**." Appendix, at 222. (Emphasis added). The initial work injury of January 11, 2016 aggravated the Claimant's pre-existing condition which caused the "permanent impairment" of a "left C6 sensory radiculopathy." Id.

The fact the Employer retained the Claimant while having Dr. Polivy's report in its possession satisfies all criteria for establishing reimbursement from the Fund. Dr. Polivy's report satisfies the existence of a prior "permanent impairment" issue, the left C6 radiculopathy. Dr. Polivy noting that any future surgery would not be work related and despite this knowledge the Employer retained the Claimant in employment. Dr. Polivy also acknowledges that future surgical intervention in the form of a cervical fusion could occur and would then *a fortiori* result in a greater disability.

## IV. The Fund misinterprets "subsequent disability"

The Fund argues the subsequent surgery "constituted a single 'continued uninterrupted' disability". FB at 20. The Board's decision and the Fund's arguments are inconsistent with Appeal of CNA, 143 N.H. 270 (1998). 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." Appeal of CNA, at 273. The statute "requires only 'subsequent disability.'" Id., at 274. (Emphasis added). The "by injury arising out of and in the course of ...employment" is simply the original injury. This is why the Fund has the original "DOI" (date of injury) listed, and an "Appeal of CNA" date on its forms. Appendix, pg. 144. The Fund acknowledges, through its own forms, that a subsequent disability can arise out of the original date of injury.

The Fund and Board are adding language to the statute in prohibiting Second Injury Fund reimbursement because the subsequent disability arose out of the original injury. This is legal error.

## CONCLUSION

This Court should reverse the Board and find that The Lawson Group, the third-party administrator for self-insured Summit Packaging Systems met its requirements for eligibility for the Second Injury Fund.

## STATEMENT OF COMPLIANCE – WORD LIMITATION

I hereby certify that this reply brief is in compliance with the 3,000-word limitation as set forth in Supreme Court Rule 16 (11). This reply brief contains 2,896 words.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing is being timely provided through the electronic filing system's electronic service to John F. Brown at John.Brown@doj.nh.gov and to the Solicitor General at Solicitor.General@doj.nh.gov for the Attorney General Office.

Date: January 31, 2022 */s/ Gary S. Harding*

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