THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0243

Appeal of the Lawson Group and Summit Packaging Systems, Inc.

APPEAL PURSUANT TO RULE 10 FROM A JUDGMENT OF
THE WORKERS' COMPENSATION APPEAL BOARD

BRIEF OF THE RESPONDENT SPECIAL FUND FOR SECOND INJURIES

THE STATE OF NEW HAMPSHIRE,
SPECIAL FUND FOR SECOND INJURIES

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(Oral argument waived)

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STATEMENT OF THE CASE AND FACTS

A. Special Fund for Second Injuries

RSA 281-A:55 establishes the Special Fund for Second Injuries ("Fund"). The Fund was created to encourage employers to hire and retain employees with permanent impairments by reducing the employer's liability for the increased disability that previously impaired individuals may incur due to a work-related injury. *Appeal of CNA Insurance Companies*, 143 N.H. 270, 272-73 (1998). The Fund is capitalized through annual payments by insurance carriers pursuant to RSA 281-A:55, III, and those funds are held in trust by the State Treasurer for disbursement to eligible insurance carriers or employers. RSA 281-A:55, I, II. Disbursements are made to reimburse employers or insurance carriers for a portion of eligible disability compensation payments made to employees injured in the course of their employment. RSA 281-A:54, I.

In order to qualify for reimbursement from the Fund, an employer or insurance carrier must demonstrate that it paid disability compensation to an employee who had:

> …a permanent physical or mental impairment, as defined in RSA 281-A:2, XIV, from any cause or origin [and] incurs a subsequent disability by injury arising out of and in the course of such employee's employment … 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…

RSA 281-A:54, I. (brackets added)

Additionally:

> 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 the employee was hired or at the time that the employee was retained in employment after the employer acquired such knowledge.

RSA 281-A:54, III.

The Department of Labor Commissioner's authorized representative administers the Fund and must conserve its assets. RSA 281-A:55. An insurance carrier or employer may appeal an adverse decision by the Fund to the Compensation Appeals Board ("Board") pursuant to RSA 281-A:43. Any party aggrieved by a decision of the Board may appeal to the Supreme Court pursuant to RSA 541. RSA 281-A:43, I(c).

B. The Claimant was injured at work on January 10, 2016.

The Board found the following facts: Barbara Krajewski ("the Claimant") was a laborer and machine operator employed by Summit Packaging beginning on August 8, 2005. AA 111.[1] On January 10, 2016, she was handling a spool of tubing that she believed to weigh about sixty-five pounds. *Id.* The spool slipped from her hands. *Id.* She attempted to catch it, pulling her left shoulder. *Id.* On January 13, 2016, the Claimant sought medical treatment at the Bedford Occupational Acute Care Center. *Id.* She reported radiating pain in her left arm with numbness and tingling in her left index finger. *Id.* She also reported neck pain. *Id.* The Claimant denied any neck or left arm complaints prior to the January 10, 2016 incident. *Id.* Her worker's compensation claim was accepted by her workers' compensation carrier. *Id.*

Due to ongoing pain, the Claimant had a magnetic resonance imaging ("MRI") scan on January 29, 2016. *Id.* The MRI revealed disc degeneration, spondylolisthesis, facet hypertrophy, and foraminal stenosis at C5/6 and C6/7 vertebrae. *Id.* She was referred to Doctor Vladimir Sinkov, MD ("Dr. Sinkoff"), who administered trigger-point injections for cervical nerve impingement. *Id.* The Claimant continued to work for Summit Packaging with job modifications and continued her treatment. *Id.*

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[1] Citations to the record are as follows:
"AA___" refers to the Appellant's Appendix submitted with Petitioner's Brief and page number.
"AB ___" refers to the Appellant's Petitioner's Brief and page number.

On September 12, 2016, Dr. Sinkov performed cervical surgery on the Claimant. *Id.* After a period of recovery, she returned to full-time, light-duty work at Summit packaging. *Id.*

Since the initial January 10, 2016 incident, the Claimant suffered no new accident or injury. *Id.*

C. Procedural history of the case

Summit Packaging, and its third-party administrator, The Lawson Group, a workers' compensation insurance carrier ("the Carrier") appeal a decision by the Board denying the Carrier's application for reimbursement from the Fund pursuant to RSA 281-A:54. AA 109.

The Carrier requested reimbursement from the Fund in a letter dated August 24, 2018. AA 147. The submission included a Second Injury Fund Certification by Physician form, also known as Exhibit Q, completed by Doctor Andrew Forrest, MD ("Dr. Forrest") in 2018. AA 169. Dr. Forrest identified the Claimant's preexisting permanent impairment as "C6-7 radiculopathy" which caused "pain and weakness…" in her left arm. AA 169.

Dr. Forrest identified the subsequent work-related injury as "C5 – C7 fusion." AA 170. The Claimant's functional limitation was identified as neck pain and cervical spine range of motion ("ROM"). *Id.* The Carrier's submission to the Board effectively asserted that the first work-related injury occurred on January 10, 2016 at Summit Packaging, and the second work-related disability by injury was the September 12, 2016 surgery to treat the January 10, 2016 injury.

By letter dated February 15, 2019, the Fund denied the Carrier's request for reimbursement for failure to meet the statutory elements of RSA 281-A:54. AA 116.

The Carrier submitted the record to the Board for review on appeal. There were two Board hearings.

The first hearing was conducted on March 16, 2020. Following the hearing, the Board denied the Carrier's claim on April 29, 2020. AA 97. On May 22, 2020, the Carrier filed a motion for reconsideration. On June 17, 2020, the Board granted the Carrier's motion.

The rehearing was held on December 18, 2020. Following the rehearing, the Board issued a decision on March 2, 2021 denying the Carrier's claim. AA 109. The Carrier again filed a Motion for Reconsideration on March 30, 2021. AA 66. The Fund issued a decision denying the motion on May 12, 2021. The Carrier's appeal followed.

SUMMARY OF THE ARGUMENT

The Board's Decision is just, reasonable, and free of errors of law. However, the Carrier argues that the Board committed legal error by:

a) Failing to properly analyze RSA 281-A:2 XIV's definition of "permanent physical or mental impairment" at the time the Claimant was retained in employment by her employer. AB 18.
b) Requiring a "heightened burden of proof" to establish written documentation of the "employer knowledge" criteria than required pursuant to RSA 281-A:54, III. AB 26.
c) Requiring medical evidence to establish a "permanent" condition. AB 31.
d) Requiring 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. AB 32.
e) Determining that the Carrier "failed to meet the 'subsequent disability' by injury requirement". AB 34.
f) Denying reimbursement due to "lack of candor to the fund" as a result of a missing page in a record submitted by the Carrier. AB 40.
g) Violating the Carrier's Constitutional due process rights to a fair and impartial hearing. AB 41.

The Carrier's arguments are without merit. The Board conducted a full review of the evidence presented, and in its March 2, 2021 Decision, the Board explicitly lays out its reasons for upholding the Fund's denial of reimbursement. Specifically, (1) a failure to meet the written documentation requirement of employer knowledge, (2) a failure to show that the Claimant had a subsequent disability by injury, and (3) a failure to show that the Claimant had a prior permanent injury.

Under RSA 281-A:54, all three requirements must be met. A failure by the Carrier to meet its burden of proof on any one would be a basis for denial. In this case, the Board reviewed the entire record and made three, independent findings that the Carrier failed to meet its burden of proof on each of those requirements. The Board's Decision was just, reasonable, and free of errors of law.

The Board's March 2, 2021 Decision should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review on an appeal from a decision of the Board is set forth in statue:

> [T]he burden of proof shall be upon the party seeking to set aside any order or decision of the [Board] to show that the same is clearly unreasonable or unlawful, and *all findings of the [Board] upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable*; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.

RSA 541:13 (emphasis and brackets added); *see also In re Rose*, 146 N.H. 219, 220 (2001) ("We will overturn the board's decision only for errors of law, or if we are satisfied by a clear preponderance of the evidence before us that the order is unjust or unreasonable.") (citation omitted). In reviewing the board's findings, "[the Court's] task is not to determine whether [it] would have found differently than did the board, or to reweigh the evidence, but rather to determine whether the findings are supported by competent evidence in the record." *Appeal of Sutton*, 141 N.H. 348, 350 (1996) (citations omitted, brackets added).

The Court reviews issues of statutory interpretation *de novo*. *In re Hartford Ins. Co.*, 162 N.H. 91, 93 (2011). "On questions of statutory interpretation, this court is the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole," and the Court interprets "legislative intent from the statute as written and will not consider what the Legislature might have said or add language that the legislature did not see fit to include." *Appeal of Jenks*, 158 N.H. 174, 177 (2008) (citations omitted).

II. THE COMPENSATION APPEALS BOARD CORRECTLY FOUND THAT THE CARRIER DID NOT ESTABLISH THAT THE CLAIMANT HAD "PERMANENT PHYSICAL OR MENTAL IMPAIRMENT" AT THE TIME SHE WAS RETAINED AS REQUIRED BY RSA 281-A:54, I.

"The second injury 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." *CNA,* 143 N.H. at 272-273.

In order to be eligible for reimbursement from the Second Injury Fund, a carrier has the burden of establishing that the employee have "…a permanent physical or mental impairment, as defined in RSA 281-A:2, XIV…" RSA 281-A:54, I.

> "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:2, XIV.

The Carrier correctly points out that the definition has two prongs; (1) the existence of a "permanent condition"; and (2) that the condition constitutes a hindrance or obstacle to obtaining employment. AB 18. The Board in its March 2, 2021 Decision found that the Carrier failed to establish that the Claimant had a permanent condition. AA 116.

A. The Board properly found that the Carrier failed to meet its burden of proving that the Claimant had a permanent condition as required by RSA 281-A:54, I.

In its March 2, 2021 Decision, the Board provided a review of the medical records and exhibits submitted by the Carrier. The Board concluded that the information in those submissions failed to satisfy the Carrier's burden under RSA 281-A:54, I. AA 113, 114.

The Carrier's submission included the Independent Medical Evaluation Report ("IME") of Doctor Kenneth Polivy, MD ("Dr. Polivy"). AA 220. The Board noted that in

that report, "…Dr. Polivy opined that as of March 24, 2016, the Claimant would fully recover from her injury." AA 113.

The Board also reviewed the New Hampshire Workers Compensation Medical Forms (75WCA-1) completed by Dr. Sinkoff and Advanced Practice Registered Nurse Karen O'Neill Wetherbee ("APRN Wetherbee"), two providers who evaluated the Claimant following her initial injury. AA 156 – 167.

The Board noted that between January and February of 2016, APRN Wetherbee documented on five occasions that the Claimant was "not at" maximum medical improvement ("MMI"). AA 113. The Board was clear that "…there is no requirement that the employee reach MMI…". *Id.* Nevertheless, the Board found that within APRN Wetherbee's forms, "…there is no suggestion that the Claimant would suffer a permanent impairment." *Id.* The Board noted that APRN Wetherbee, on her February 3, 2016 form, described the Claimant as having, "Left cervical radiculopathy, persistent." AA 114. The Board pointed out, however, that a medical provider's observation that a condition is *persistent* from one exam to another cannot be reasonably interpreted to mean that there exists a *permanent* impairment. *Id.* (emphasis added). The Board also noted that on that form, APRN Wetherbee did not select "yes" on a box asking, "Has the injury caused a permanent impairment?" *Id.* APRN Wetherbee did not check "yes" on any of the other forms she completed for the Claimant's other visits. AA 162 – 167.

Dr. Sinkoff's forms were more specific. In its Decision, the Board noted that between February and July of 2016, Dr. Sinkoff documented on four occasions that the Claimant was, "Not at MMI/Permanent Impairment undetermined." AA 113.

The Carrier argues that the 75WCA-1 forms completed by Dr. Sinkoff and APRN Wetherbee should not be given great weight because those forms were not developed specifically for use in Second Injury Fund cases. AB 21. The Board found that the Carrier failed to provide evidence to support that assertion. AA 114. The Carrier suggests that the Board's inquiry on "permanency" should focus instead on Exhibit Q because, "Exhibit Q is the only form that addresses Second Injury Fund medical criteria." AB 23.

Exhibit Q, entitled Second Injury Fund Verification by Physician, is a standard form provided by the Department of Labor to be completed by a physician and submitted with an application for reimbursement.

In this case, Dr. Forrest completed Exhibit Q on July 31, 2018, more than two years after the Claimant's initial injury and nearly two years after her surgery. AA 169. Dr. Forrest was retained by the Carrier. He was not the Claimant's medical provider and did not examine her. The standard fill-in-the-blank language on the Exhibit Q form reads, "This is to certify that _____, a licensed practicing physician for _____ years, having an office in _____examined the above named employee on _____ and finds as follows:". On his completed Exhibit Q, Dr. Forrest drew a line through the word "examined" and hand wrote on the form that he had only "reviewed the records of" the Claimant. *Id.* Dr. Forrest, then, arrived at his conclusion based on a retroactive review of the Claimant's records long after the Employer's decision to retain her. The critical period for determining permanency is *before* the alleged subsequent disability by injury.

In contrast to Exhibit Q, the forms completed by Dr. Sinkoff and APRN Wetherbee were contemporaneous records prepared by the providers who actually evaluated the Claimant in person during the period between her initial injury and surgery. AA 156 – 167. Regardless of why the forms were developed, those medical records are far more relevant than Exhibit Q in aiding the Board in its evaluation of the permanency issue.

The Board's review of the medical records of Doctors Polivy and Sinkov and APRN Wetherbee were entirely appropriate, and the Board's finding that those records failed to demonstrate a permanent physical or mental impairment was reasonable.

B. Having found that the Carrier had failed to demonstrate a permanent impairment, the Board was not required to make a finding regarding hindrance to employment.

The Carrier asserts that it also successfully established the second requirement of RSA 281-A:2, XIV; that the Claimant's permanent impairment was a "hindrance to obtaining employment" if she became unemployed. AB 23. The Board's March 2, 2021 Decision does not include a finding on the hindrance requirement. Such a finding, however, was not required. Under RSA 281-A:2, XIV, the Carrier must first establish that there was a permanent impairment. Once permanent impairment is established, the Carrier must further establish the hindrance that resulted from that impairment. The second requirement is conditioned on the first. Having found that the Carrier had failed to establish a permanent physical impairment, there was no need for the Board to determine whether the impairment would have been a hindrance to employment.

RSA 281-A:54, I requires the Carrier to demonstrate that the Claimant had a permanent physical or mental impairment at the time the Employer retained her. The Board reviewed the Carrier's submissions and made an appropriate finding that the Carrier failed to meet the statutory requirement. Accordingly, the Carrier has failed to meet its burden of proving that the Board committed an error of law or that its Decision was clearly unreasonable or unlawful.

III. THE COMPENSATION APPEALS BOARD APPLIED THE PROPER STANDARD TO THE "EMPLOYER KNOWLEDGE" REQUIREMENT OF RSA 281-A:54, III.

In addition to establishing a permanent physical or mental impairment, a carrier must also establish employer knowledge. Specifically:

> 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.

RSA 281-A:54, III.

The Carrier argues that, in this case, "The Board required a heightened burden of proof for the 'employer knowledge' criteria." AB 26. Specifically, the Carrier asserts that, "The Board required Summit to have *actual medical knowledge* of a 'permanent' impairment." *Id.* (emphasis added).

The record does not support the Carrier's assertion. Following the rehearing on December 20, 2020, the Board issued its Decision on March 2, 2021. AA 109. Nowhere in the order does the Board cite a requirement of *actual medical knowledge* of a permanent impairment, nor does it imply that such a requirement exists. To the contrary, the Board, citing the applicable statute, was unequivocal in identifying the standard that it applied:

> Among other requirements, the Carrier must show that the employer had knowledge of the employee's preexisting permanent impairment at the time 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.

AA 110.

Applying the above standard, the Board found that the Carrier failed to meet its burden to show the Employer had knowledge of the Claimant's preexisting and permanent impairment at the time she was retained by the employer. *Id.*

The Board's Decision included a detailed review of the medical records the Carrier submitted to establish that the employer had knowledge of the Claimant's permanent impairment at the time she was retained. AA 111-116. The Board concluded that those medical records failed to establish the required employer knowledge. AA 116.

The fact that the Board found that the particular medical records submitted by the Carrier in this case to be insufficient, in no way implies that the Board had raised the burden on the Carrier. The Board did not require *actual medical knowledge* of a permanent impairment on the Employer, it simply concluded that the specific medical records submitted by the Carrier failed to establish that this Employer had the knowledge

required of RSA 281-A:54, III. In the words of the order, "Based on the written employments (sic) 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." AA 112.

The Board did not impose any burden on the Carrier beyond the requirements of RSA 281-A:54, III. It properly applied the statute to the evidence presented. Accordingly, the Carrier has failed to meet its burden of proving that the Board committed an error of law or that its Decision was clearly unreasonable or unlawful.

IV. THE COMPENSATION APPEALS BOARD PROPERLY APPLIED RSA 281-A:54, III BY REQUIRING THE CARRIER TO ESTABLISH A PERMANENT CONDITION.

As discussed above in Section III of this Brief, in a Second Injury Fund claim, RSA 281-A:54, III requires that the Employer had knowledge of the Employee's permanent impairment at the time of hire or retention.

The Carrier asserts that, in addition to the statutory standard, the Board in this case imposed an additional requirement that the Employer provide "medical evidence" establishing a permanent condition. AB 31.

In its Brief, the Carrier asserts that the Board imposed a requirement of medical evidence, but cites no part of the proceedings and no language from the March 12, 2021 Board Decision that indicates that the Board imposed such a standard. The Board did not use the term "medical evidence" in its Decision nor did it imply that such a standard had been applied.

The Carrier also points out that Department of Labor Administrative Rule (Lab) 506.04 (d) does establish that proof of eligibility for reimbursement from the Fund shall include "*[m]edical evidence* of the preexisting permanent impairment". AB 31 (emphasis added). The Carrier further points out that the Court has previously held that "[a]dministrative rules may not add to, detract from, or modify the statute which they are

intended to implement." *Id.* (citing *Appeal of Cover*, 168 N.H. 614, 621 (2016)). While *Cover* addressed a different Department of Labor administrative rule, the Carrier suggests that Lab 506.04 (d) is invalid because it impermissibly modifies RSA 281-A:54, III by adding the "medical evidence" language.

Regardless of the merits of the Carrier's legal argument, the validity of Lab 506.04 (d) is not an issue before the Court. The Carrier fails to cite anything in the record that indicates that Lab 506.04 (d) had ever been applied to the facts of this case. In its March 12, 2021 Decision, the Board did not cite Lab 506.04 (d), nor did it use any language to suggest that it had relied on the rule.

The Board did not impose any standard on the Carrier beyond the statutory knowledge requirement of RSA 281-A:54, III. The Board properly applied the statue to the evidence presented. Accordingly, the Carrier has failed to meet its burden of proving that the Board committed an error of law or that its Decision was clearly unreasonable or unlawful.

V. THE COMPENSATION APPEALS BOARD PROPERLY APPLIED RSA 281-A:54, III IN EVALUATING THE EMPLOYER'S KNOWLEDGE OF A PERMANENT PREEXISTING CONDITION AND IS NOT BOUND BY THE DEPARTMENT OF LABOR'S PUBLIC STATEMENTS.

As discussed above in Sections III and IV of this Brief, in a Second Injury Fund claim, a carrier must establish that the employer had knowledge of the employee's permanent impairment at the time of hire or retention. RSA 281-A:54, III.

In its Brief, the Carrier points out that the Department of Labor operates a website that provides information to the public. AB 32. That website includes a single page describing the Second Injury Fund and summarizing the reimbursement requirements. AA 231.

The Carrier asserts, "The information being disseminated by the Department does not mention the need for employer's knowledge of a 'permanent' impairment." AB 32.

The Carrier asserts further that because the Department of Labor's website does not include the "permanent" language, the Board is equitably estopped from requiring that an employer prove medical knowledge of a permanent preexisting condition. *Id.*

Estoppel does not shield the Carrier from its statutory burden to prove eligibility for reimbursement from the Fund. Regardless, equitable estoppel is not applicable to the facts of this case.

The Court has held that "Equitable estoppel serves to forbid one to speak against his *own* act, representations or commitments communicated to another who reasonably relies upon them to his injury." *The Cadle Co. v. Bourgeois*, 149 N.H. 410, 418 (2003) (citing *New Canaan Bank & Trust v. Pfeffer*, 147 N.H. 121, 127 (2001)). (emphasis added). The Carrier seeks here to have equitable estoppel applied not to a party's *own* representations, but representations made by a third party.

The Department of Labor and the Compensation Appeals Board are not the same entity. The distinction is established by statute. "The board shall be an administratively attached agency under RSA 21-G:10, to the department of labor, but *shall operate independently* from the department." RSA 281-A:42-a, II (emphasis added). Dissemination of information to the public by the Department does not constitute a representation by the Board.

The Carrier cites no authority supporting the proposition that an appeals board's application of a statute in a particular case could be limited by an informational posting by a state agency on its website. In this matter, the Department of Labor's website language in no way limits the Board's independent authority to review facts and apply statutes as written.

Even if equitable estoppel were possible, the Carrier is mistaken about the information provided on the Department of Labor's website. The Second Injury Fund page on the Department's website specifically states, "The worker's original impairment can be of any type or cause – work related or not – as long as it is a *permanent impairment* and is serious enough to pose an obstacle to the worker in obtaining

employment". AA 231 (emphasis added). Later, the website's description advises employers, "At the time of hire – or as soon as the information becomes known to you, make note in writing your knowledge of the employee's impairment." *Id.* That second sentence refers to "impairment" without the conditional "permanent", but at that point in the description, the text had already established that a "permanent impairment" was required. Reading the website's Second Injury Fund description in its entirety, it would be apparent to any reasonable reader that employer knowledge of a permanent impairment is required.

Equitable estoppel does not apply to the facts of this case. As such, the Board is not restricted from requiring the Carrier to establish employer knowledge of permanent impairment under RSA 281-A:54, III. Accordingly, the Carrier has failed to meet its burden of proving that the Board committed an error of law or that its Decision was clearly unreasonable or unlawful.

VI. THE COMPENSATION APPEALS BOARD PROPERLY DETERMINED THAT THE CARRIER FAILED TO MEET THE SUBSEQUENT DISABILITY BY INJURY REQUIREMENT of RSA 281-A:54, I.

Fundamental to reimbursement from the Second Injury Fund is the existence of a subsequent disability by injury. In order to be eligible for reimbursement from the Fund, a carrier must establish that the employee "…incurs a subsequent disability by injury arising out of and in the course of such employee's employment…" RSA 281-A:54, I.

The Carrier takes the position that the Claimant's subsequent disability was the period following the surgery undertaken to address her initial injury. The Carrier asserts:

> In this case, the two periods of disability are, 1) the initial disability stemming from the C6-7 persistent radiculopathy in which D. Sinkov's work restrictions of February 4, 2016, were so cumbersome that 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.

AB 36.

A. The Board properly applied RSA 281-A:54, I in determining whether the Claimant suffered a subsequent disability by injury arising out of and in the course of her employment.

Even if the Claimant had been disabled by the surgery, that surgery was part of her treatment for the original injury. There is a distinction between subsequent disability by *injury* and a subsequent disability by *treatment*. The statute requires "…a subsequent disability by injury arising out of and in the course of such employee's employment…" RSA 281-A:54, I. Here, any disability the Claimant may have suffered because of the surgery is not a *subsequent* event arising out of and in the course of her employment.

The Board, in its March 2, 2021 Decision, found that the Carrier failed to meet the "subsequent disability by injury" requirement of the statute. AA 111. The Board identified the date of the initial disability as the workplace incident that injured the Claimant on January 10, 2016. It found:

> 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.

AA 111-112.

In essence, the Board found that the Claimant's injury and subsequent surgery to address that injury constituted a single "continued uninterrupted" disability. AA 111.

The Carrier argues that that the Board improperly required a subsequent *injury* rather than a subsequent *disability*. The Carrier points out that the Court has held that RSA 281-A:54, "…does not require that the injured employee suffer a new and discrete injury before reimbursement from the fund becomes possible". AB 34 (quoting *CNA*, 143 N.H. at 273-74). The Court was, at that time, interpreting the language of RSA 281:47-a, which was the repealed predecessor to the current statute, RSA 281-A:54. *CNA*, 143 N.H. at 270. Both statutes, however, have the identical requirement of a "subsequent disability by injury."

The Carrier's argument, then, is that in the language of RSA 281-A:54, I, "subsequent" does not modify both "disability" and "injury" - only the disability needs to be subsequent, not the injury. The Carrier asserts, "A subsequent disability can arise from the original injury". AB 35.

Regardless, the Board did not base its decision solely on the Carrier's failure to identify a subsequent injury. In its March 2, 2021 Decision, the Board did observe that the Carrier had failed to establish that the Claimant had experienced a subsequent *injury* following her initial January 10, 2016 accident. The Board noted that, "There was no new event which would qualify as an injury." AA 111.

That, however, did not end the analysis. The Board also made an independent finding on the issue of whether the Carrier had established a subsequent *disability*. The Board was clear, "There was no 'subsequent' period of disability." *Id.* The Board continued, "The fact that the Claimant's medical treatment changed from conservative therapies to surgery does not create a new or subsequent period of disability." AA 111-112. The Board applied the proper standard consistent with *CNA*.

B. The Board fully considered the evidence submitted by the Carrier related to its claim of the existence of a subsequent disability.

The Carrier asserts that the Board did not fully consider the evidence that it submitted to establish a subsequent disability. Specifically, the Carrier argues that the

Board "declined" to review Exhibit Q. AB 39. Exhibit Q is the Second Injury Fund Certification by Physician form, completed in this case by Dr. Forrest and submitted to the Fund. AA 169-170. The document was completed on Department of Labor form WCSIF-1b (12/1996). According to the Department of Labor administrative rules, the form is used to satisfy the requirement that a carrier demonstrate "…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." Lab 506.04 (d)(4).

The Carrier asserts that information that Dr. Forrest provided in Exhibit Q helped establish the subsequent disability and alleges that the Board declined to consider it. AB 39. The Carrier correctly points out that the Board's March 2, 2021 order states, "The Panel will not consider medical records that were not part of Exhibit P of the Second Injury Application." AB 39, AA 114. The Carrier, however, misinterprets the scope of the Board's words.

The Carrier made an Exhibit P submission that included medical records pertinent to the claim. AA 154-167. The Board's statement that it would not consider "medical records" that were not part of Exhibit P does not mean that the Board did not independently consider the Carrier's Exhibit Q, because Exhibit Q is not a medical record. Unlike the provider records in Exhibit P, Exhibit Q was not a contemporaneous record generated by one of the Claimant's medical providers.

Exhibit Q, identified as a "certification," is a standard form utilized by the Department of Labor for the specific purpose of aiding the evaluation of carriers' Second Injury Fund claims. This is made clear on the form itself in its instruction to the physician completing the form: "Your medical evaluation, provided below, will help determine the validity of these contentions." AA 169. In this case, Dr. Forrest completed the form without examining the Claimant. *Id.* His conclusions were based only on a review of records. *Id.*

In its March 2, 2021 Decision, the Board made no statement suggesting that it did not consider information from Exhibit Q. The Board's statement that it would not

consider medical records that were not part of Exhibit P in no way means that it did not also consider the information provided on Exhibit Q and give it appropriate weight.

The Board's Decision was based on an evaluation of the evidence submitted by the Carrier. Based upon that evaluation, the Board found that the Carrier failed to meet the subsequent disability requirement of RSA 281-A:54, I. Accordingly, the Carrier has failed to meet its burden of proving that the Board committed an error of law or that its Decision was clearly unreasonable or unlawful.

VII. THE COMPENSATION APPEALS BOARD'S DECISION NOTED THE EMPLOYER'S "LACK OF CANDOR TO THE FUND," BUT THAT WAS NOT THE SOLE BASIS FOR THE BOARD'S DENIAL OF REIMBURSEMENT PURSUANT TO RSA 281-A:54, I.

Included with the Carrier's submission for reimbursement from the Fund was an IME from Dr. Polivy. AA 220. The IME is three pages in length. The Carrier included two copies of the report in its submission, but one copy, included in Exhibit P, was missing its final page. AB 40. On that final page, Dr. Polivy made comments not favorable to the Carrier's position that the Claimant suffered a permanent physical impairment as a result of her accident. AA 222.

In its March 2, 2021 Decision, the Board noted the incomplete report and wrote, "Apparently, the Employer was in fact in possession of Dr. Polivy's complete report when it filed for Second Injury benefits. The lack of candor to the Fund, is an independent basis to deny the Employer's claim." AA 115.

The Carrier asserts that the missing page was an "error in copying." AB 40. The Carrier alleges that the Board sought to "find a way" to deny the claim and argues that it was improper for the Board to deny the claim on the basis of lack of candor to the Fund. *Id.*

In its March 2, 2021, the Board made clear that it had seen both the complete and incomplete copies of Dr. Polivy's report. The Board observed:

> 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 or three months.

AA 115.

The Board's observation that the information on that third page may have been detrimental to the Carrier's claim may have led to the assumption that the page was left out intentionally.

Assuming that the missing page was a copying error, and assuming further that the Board was mistaken in interpreting the missing page as a lack of candor, the Carrier is mistaken in concluding that this was the Board's reason for denying the claim. The Board simply concluded that a lack of candor is "*an* independent basis" for denying the claim. *Id.* (emphasis added). The Board did not state that lack of candor was *the* basis for denying the claim. In fact, the Board cited a separate independent basis for denying the claim – that the Carrier had failed to submit sufficient evidence. The Board concluded, "There were no other records submitted with the Carrier's Second Injury Fund Application which would in anyway (sic) suggest that the Claimant had suffered a permanent impairment prior to her surgery." *Id.*

Even if the Board was mistaken in assuming a lack of candor by the Employer, it was harmless error because the Board made an independent finding that the Carrier failed to provide sufficient evidence to meet the permanent impairment requirement of RSA 281-A:54, I. Accordingly, the Carrier has failed to meet its burden of proving that the Board committed an error of law or that its Decision was clearly unreasonable or unlawful.

VIII. THE COMPENSATION APPEALS BOARD CONDUCTED A JUST AND IMPARTIAL HEARING IN ACCORDANCE WITH THE CARRIER'S DUE PROCESS RIGHTS UNDER PART 1, ARTICLE 35 OF THE NEW HAMPSHIRE CONSTITUTION.

Administrative hearings must be conducted in accordance with the New Hampshire Constitution. The Court, referring specifically to the Compensation Appeals Board, has held: "That a government tribunal must utilize fair procedures is elemental; and it is well established that due process guarantees apply to administrative agencies." *Appeal of Pelmac Industries, Inc.*, ___N.H. ___ (Decided October 13, 2021) (quoting *Appeal of Lathrop*, 122 N.H. 262, 265 (1982)).

The Carrier asserts that, "The Board violated the Carrier's due process right to a fair and impartial interpretation of the laws" under Part I, Article 35 of the New Hampshire Constitution. AB 41. The Carrier also alleges that, "The Board's Decision is purely result oriented 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." AB 44.

When asserting a violation of due process, it is the Carrier's burden to rebut "the presumption of regularity and impartiality attending" the actions of the Compensation Appeals Board. *Pelmac*, ___N.H. ___ (decided October 13, 2021). (quoting *Appeal of Lathrop*, 122 N.H. at 265 (1982)). The Carrier has failed to rebut that presumption.

The Carrier's due process argument is based on three assertions. First, that the Board chair referred to a Carrier witness as "our witness." Second, that the Board concluded that the employer demonstrated a "lack of candor." Third, the Board "changed" the inquiry regarding evidence it had requested from the Carrier. AB 41, 43. These assertions lack merit.

During the December 18, 2020 hearing, the Carrier called Danielle Albert, the Director of the Workers Compensation Division of the New Hampshire Department of Labor. At the beginning of his direct examination, the Carrier addressed the witness as "Director Albert." AA 383. The Board chair interrupted and said, "Let me stop you just one second. I know you said Director Albert, but for the record, Danielle Albert is our witness and she is the director. Is that correct?" AA 383 – 384. The Carrier asserts, "This

comment by the Panel Chair indicates unfairness towards the Carrier as it was the Carrier who requested the Director to be a witness." AB 42.

The Carrier assumes meaning in the words "our witness" and suggests that the witness and the Board were united parties in opposition to the Carrier. *Id.* While the Board Chair's comment does not have an obvious intent, there is a more reasonable explanation. The statement was expressly made "for the record." AA 383. The Board Chair may have simply wanted to identify that in this particular hearing, Director Albert was not a party, but a witness appearing before the Board. Regardless, the Board Chair's statement cannot be assumed to be indicative of an improper bias by the Board.

Second, the Carrier alleges that the reference to the employer's "lack of candor" in the Board's March 2, 2021 Decision indicated that the Board had unfairly denied the claim. AB 43, 44.

The Board's observation of a "lack of candor" was discussed above in Section V of this Brief. Even if the Board had made a mistaken assumption about the meaning of a missing page from a doctor's report, the Board, in its March 2, 2021 Decision, made clear that it had denied the claim for reasons independent of the "lack of candor" issue; specifically, the failure of the Carrier to meet its burden of proof. AA 116.

The Carrier's final argument relates to Department of Labor Form 75-WCA-1 and the form's relevance to Second Injury Fund claims. Completed 75-WCA-1 forms were included in the Carrier's application for reimbursement. AA 156 – 167. The Carrier's argument comprises a single paragraph:

> 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 (sic) form." The decision stated that the "Carrier did not offer evidence of Summit's understanding…" 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.

AB 42 – 43 (citations omitted)

The Carrier's argument suggests that the Board's inquiry into the origins of a form somehow precludes it from weighing evidence, or an absence of evidence, related to those forms. The Carrier alleges an improper "shift" in its inquiry. AB 42 – 43. The Carrier does not offer any authority for the proposition that a Board cannot make more than one inquiry related to any given piece of evidence.

The Carrier's three due process arguments have neither factual nor legal support, neither individually nor cumulatively. Accordingly, the Carrier has failed to meet its burden of proving that the Board committed an error of law or that its Decision was clearly unreasonable or unlawful.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State waives oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
WORKERS COMPENSATION APPEALS BOARD

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January 12, 2022

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitation set out in Supreme Court Rule 16 (11), and contains 7,605 words.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the State's brief shall be served on counsel for Petitioner, through the New Hampshire Supreme Court's electronic filing system.

January 12, 2022 *<u>/s/ John F. Brown</u>*
John F. Brown