BEFORE THE INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

DONNA V. JOHNSON,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1460177
	)	
STANDARD PIPE SERVICES, LLC	)	
	)	
	)	
Employer.	)	

DECISION ON PETITION FOR DETERMINATION OF COMPENSATION DUE

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on April 13, 2018 in the Hearing Room of the Board, New Castle County, Delaware.

PRESENT:

PETER W. HARTRANFT

IDEL M. WILSON

Kimberly A. Wilson, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Joel H. Fredricks, Attorney for the Employee

Joseph M. Andrews, Attorney for the Employer/Carrier

NATURE AND STAGE OF THE PROCEEDINGS

On July 26, 2017, Donna V. Johnson ("Claimant") filed a petition alleging that she suffered compensable injuries to the neck (also "cervical spine"), low back (also "lumbar spine"), right upper extremity (also "right arm"), right knee and abdomen in relation to a work accident that she sustained while working for Standard Pipe Services, LLC ("Employer" or "SPS"). Claimant seeks acknowledgement of these injuries as well as payment of her related medical treatment. She also seeks a closed period of total disability from June 11, 2017 to October 12, 2017.[1]

SPS disputes that Claimant suffered a work accident; in the alternative, SPS denies that any of Claimant's conditions causally relate to the work accident that she alleges.

A hearing was held on Claimant's petition on April 13, 2018. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant, thirty-two, testified first. She was employed by SPS as a flagger on June 10, 2017, the date she was involved in a work accident. Claimant parked her car at the SPS parking lot, and drove with coworkers to Camden, Delaware, about 45 minutes away.

After working for most of the day at a construction site near AstraZeneca on June 10th, the work was ready to move further down the road. The crew was preparing to move about three right lights, or two to three miles away, from where they were. The traffic in this location was

[1] Employer objected to the request for total disability, because there was no pre-trial memorandum completed, despite the fact Employer's counsel alleges it requested such from Claimant various times. Employer argues that Claimant has waived her right to claim total disability, as Employer had no idea that it was sought. The Board reserved decision on the objection, pending the Board's review of the medical experts' opinions on total disability.

traveling at about 65 miles per hour. The box truck was parked in the median in the middle of the highway. Preparing for the move, Claimant went to put her flag into the back of the box truck.[2] She planned to ride in the front of the box truck to the next location, as it would also be moved. She stepped up and was in the back of the box truck putting her flag in the back, when her manager, James Magner, drove the box truck off of the median and into ongoing traffic. There was nothing really to hold onto, and the doors of the truck were open, so Claimant fell out of the truck onto the ground. Claimant was seven months pregnant at the time; so, when she fell, she held onto her stomach. She ended up scraping her hand, and her right knee hit the ground hard. Claimant yelled "Hey! Help!" As she got up off of the ground, she saw Mr. Magner look into the rearview mirror, so she thought he had heard her yell and had seen her on the ground. Mr. Magner was trying to pull out fast onto the road in order to get out into traffic. He had stopped very briefly after she yelled, but traffic was really moving, so she thought that maybe he had to keep going.

After this, Claimant got into a separate truck with another coworker, Mark Amonte, and then had a phone discussion with her mother about what had happened. She told her mother that she needed to get to the hospital as soon as possible because she had just fallen out of a truck. Claimant also thought that Mr. Amonte must have seen the incident because of the positioning of the truck, and because Mr. Amonte would have been waiting for the truck to move so that he would know the location of the next stop.

At the next stop, Claimant had a conversation with the other employees about what had happened. She told them that Mr. Magner had seen her fall, because he was looking her right in the eyes in the rearview mirror when he pulled off into traffic.

[2] Claimant testified that there is equipment and utilities in the back of the truck that are needed to do the job.

Claimant presented to the emergency room ("ER") the day of the incident. The incident occurred at about 1:00 p.m., and Claimant went to the ER after her shift ended. Her shift ended around 5:30 p.m., and Claimant got to the ER around 5:45 p.m. or 6:00 p.m. She finished her shift, as she was relying on the company truck to get her back to her car.

At the ER, Claimant noted that her hand was scraped up and her right knee was swollen. She felt that her low back was thrown out, and she was having contractions on both sides of the lower pelvis. Claimant was diagnosed with an injury at the ER, and taken out of work.

After the ER, Claimant next treated with Dr. Cary, with whom she had treated extensively in the past for chronic low back and neck problems related to a motor vehicle accident ("MVA") she had had many years before. However, in relation to the MVA, Claimant was only seeing Dr. Cary once per month and getting medication refills. She had also had physical therapy. However, she was released to work after the MVA.

Claimant admitted that she still had significant pain in her neck and back leading up to this work accident. She had rated her pain at 10 on a scale from 1 to 10 in the months leading up to June 10, 2017. However, she still felt her pain was a lot worse after this incident, though she could not rate her pain higher than ten on the forms.

Dr. Cary took Claimant out of work after this incident, but then referred Claimant to Dr. Xing. He told her that it was because Dr. Xing was more of a workers' compensation doctor. However, Dr. Xing felt uncomfortable prescribing medications because Claimant was pregnant, and wanted to wait until the pregnancy was over. She ordered an MRI and physical therapy. She also kept Claimant out of work until October 12, 2017, when Claimant was released to return to work.

On cross examination, Claimant testified that she has been a flagger for about four years. A flagger job is a laboring job, and entails controlling and directing traffic.

Claimant testified that she did not have her own car onsite, and that when it is time to move, the SPS workers move together in a facility car. Claimant agreed that a flagger is supposed to stop traffic so that a work truck can move forward; however, she testified that, at some point, she also must get into a vehicle to move to the next location. She does not usually ride with Mark Amonte, she usually rides with James Magner, her supervisor.

Claimant was questioned about the ER records. She agreed that the intake was done at 6:55 p.m. at Christiana Care, which is about an hour from Dover. The ER record indicated that Claimant had fallen out of a vehicle at about 1 p.m., while putting signs back in a truck. The ER record noted that she was standing in the back when the truck driver started to pull away, and did not know she was inside. It went on to document that she said she fell out of the door and onto concrete with an outstretched right hand. Claimant testified that she is not sure why they wrote this.

Claimant agreed that she did not hit her head or lose consciousness in this incident, and that she could work afterward; she clarified that she had to work. The ER record further noted that she had a headache that was relieved after taking one Tylenol, and that she denied being off-balance or having weakness. Further, the record mentioned that she was complaining of soreness across the neck and back. Claimant admitted that she had soreness in the neck and back for years, however. She further admitted that, in relation to another case, Dr. Cary had rated her with permanent impairment of 20 percent to the neck and 11 percent to the low back. She also admitted that she continued to complain of pain she rated at 10 out of 10 after this incident. Claimant acknowledged that she was treating with Dr. Cary monthly prior to June 10, 2017.

Both on May 15, 2017 and June 27, 2017 (before and after the alleged work accident), Claimant had circled her pain ratings at 10 out of 10. She reiterated that her pain was worse after June 10, 2017, but that she had no option to rate her pain higher than ten.

Claimant denied that she told Dr. Cary on June 27, 2017 that she recently found out she was pregnant, or that he had told her he did not want to give her any more Percocet medication. She thought maybe Dr. Cary meant that he had just discovered she was pregnant. She admitted that another record indicates that "she told me she recently found out she was 7 months pregnant." Claimant also admitted that there are records to indicate that Claimant had a blood test in January 2017 that showed she was pregnant, and had an ultrasound in April 2017. She explained that this was a separate pregnancy. Claimant denied that Dr. Cary had discontinued her treatment over her narcotic medications.

Claimant agreed she first saw Dr. Xing in July 2017. She disagreed with a July 10, 2017 record that stated that her drug screen was negative for the medications prescribed by Dr. Cary. She believed the report incorrect in its statement that a drug screen was inconsistent with Dr. Cary's prescriptions in that it was negative for oxycodone and positive for HCG. Claimant also disagreed with Dr. Xing's record that stated: "told her can't prescribe while pregnant and she is very upset can't get Oxy today."

Claimant denied that it was true that she refused to be evaluated at the ER in terms of her pregnancy. Claimant further denied that while she was being pushed in a wheelchair to see an obstetrician at the ER, Claimant stated that she preferred to be discharged, despite the fact she was told that she could not be assured without an evaluation that her pregnancy was okay. Claimant explained that the next day she was evaluated by her own obstetrician. She admitted that she did not have an obstetric evaluation the night of the alleged work accident, however.

Claimant agreed that she testified that she fell onto an outstretched right hand. She further agreed that she sustained scrapes and bruises on the right hand and had a swollen right knee. The ER had examined her. The ER record indicates that she was in no acute distress, her neck had no midline tenderness and no neurological deficit, and there were no other obvious signs of trauma. Her back was tender, but her right upper extremity was non-tender with full range of motion of the shoulder. Claimant disagreed with the ER report in that it had no mention of scrapes or bruises or of a swollen knee.[3]

Claimant agreed that she began a new flagger job through Performance Staffing on March 15, 2018. She no longer works for SPS.

Dr. Selina Xing, a physician specializing in pain management, physical medicine and rehabilitation, testified by deposition on behalf of Claimant.[4] She first treated Claimant on July 10, 2017, and reviewed her pertinent medical records. In her opinion, Claimant was injured in a work accident on June 10, 2017.

In the month interim between the June 10th work accident and when she first presented to Dr. Xing on July 10, 2017, Claimant treated with Dr. Cary for pain management. Dr. Xing believes that it might have related to a prior December 2015 car accident. Claimant had treated with Dr. Cary for about two years for the neck and back prior to this work incident. Claimant had in-house physical therapy with Dr. Cary and also received Percocet medication. She treated with Dr. Cary monthly up through the time of this work accident.

Dr. Xing reviewed the June 10, 2017 ER record. It indicated that Claimant fell out of the vehicle at about 1:00 p.m. She was seven months pregnant and concerned about her pregnancy

[3] Claimant's counsel objected to Employer's counsel reading from the ER record and questioning Claimant in that regard. The basis of the objection is that Claimant is not a medical expert and there are various medical terms contained within the record; the Board overruled the objection.
[4] Dr. Xing's deposition was marked into evidence as Claimant's Exhibit #1.

because of the fall. Claimant reported some soreness across her neck and back, right arm and shoulder. The ER noted findings in the neck area of bilateral trapezius tenderness to palpation, though there was no obvious trauma or focal neurological deficit. In the back area, she had bilateral middle thoracic soft tissue tenderness to palpation. The ER diagnosed Claimant with a back strain.

Dr. Xing turned to Dr. Cary's June 27, 2017 record. He documented that Claimant told him she was involved in a recent work accident. He provided her referrals for two potential doctors to treat her with regard to her work-related injuries.

On July 10, 2017, Claimant reported to Dr. Xing that she was injured in a work accident on June 10, 2017. She stated that she was working as a flagger for SPS at the time. She stated that she was placing a six-foot pole onto a truck when the truck drove off. She fell off the truck and onto the ground onto the right side of her body. Claimant noted that she had extended the right arm during the fall to protect herself. She had also attempted to protect her stomach because she was pregnant at the time. She presented to the ER the same day.

On July 10th, Claimant was mainly complaining about back and right arm pain. She indicated that because her right arm was outstretched, it was sore after the fall. She also reported that her back was sore. On examination, Claimant had tenderness to palpation in the right trapezius, the left and right-side of the thoracic and lumbar paraspinals, as well as the right buttock area. Claimant also complained of tenderness in the right knee and right shoulder joint area, although Claimant did not really complain about her knee. Dr. Xing did note that Claimant had some weakness on bilateral hand grasp, hip flexion and right-sided toe extensor. Her Spurling's test was borderline positive on the right side (a sign of radiculopathy) and she also

had a positive cervical facet loading test on the right side. Further, Claimant had decreased range of motion in the cervical and lumbar spine.

Dr. Xing's impression was that Claimant had a cervical, thoracic and lumbar spine strain/sprain injury in relation to the June 10, 2017 work accident. While she did have a preexisting cervical herniation, she did have some radicular symptoms into her right arm and right leg. Dr. Xing noted the possibility of a right-sided cervical radiculopathy and lumbar radiculopathy. She believes that Claimant had a soft tissue aggravation of her preexisting condition. Dr. Xing recommended physical therapy. She ultimately released Claimant back to work at the last visit on October 12, 2017.

Dr. Xing testified that the treatment reflected on a bill memorandum has been reasonable, necessary and causally related to the June 10, 2017 work accident.

On cross examination, Dr. Xing agreed that Claimant rated her cervical and lumbar pain at 10 out of 10 in the months leading up to the work accident. Two months prior to the work accident, Claimant's diagnoses included the cervical spine, thoracic spine, lumbar spine and right shoulder. Dr. Xing admitted that the May 15, 2017 note indicates that while the thoracic condition was said to have resolved, the lumbar, cervical and right shoulder conditions had not; the right shoulder was also noted to be improving, but not resolved. Dr. Xing clarified that she believes that, in the work accident, Claimant had a soft tissue aggravation of her prior injuries.

Dr. Xing agreed that she has not seen Claimant since October 12, 2017; she ordered some studies at that time, but Claimant did not return. She released Claimant to full-time light duty work on that date.

James Magner, crew leader for SPS, testified on behalf of SPS. He has been a crew leader for SPS for two years. Mr. Magner testified that while his labor crew works, the flaggers direct traffic in order to keep them safe. Flaggers use no other equipment other than their flag.

Mr. Magner often interacted with Claimant. She rode with him to the job site almost every day, and the ride was about 45 minutes. They would talk during the rides. Claimant was punctual and showed up for work.

On June 10th, Claimant drove with Mr. Magner to the work site. Claimant was working as a flagger, and Mr. Magner was the crew leader onsite. That day, the work crew was cleaning storm sewers near the median of Route 13, a major roadway. The sewers are swept and cleaned, and a camera is placed inside to look at the joints for cracks. A jet truck is present holding about 2000 gallons of water to clean the sewer pipes. At the furthest point, the flagger is stationed. As a flagger, Claimant's job was to stand in the work zone and to control traffic to low speeds in order to keep the work crew safe. An inspector is present to ensure that the site is safe.

On June 10, 2017, Mr. Magner was driving the company pickup truck that has light beacons to warn traffic; also present was a box truck, a TV truck, a bread truck and a crash truck. Mr. Magner's company truck was located behind the box truck. There was a left turning lane in front of the two trucks. The jet truck was located in front of the left turn lane, about 200 feet in front of the box truck. In the left turn lane, a crash truck was located. Claimant was flagging at a location near the crash truck, about 250-275 feet away from the box truck.[5]

Mr. Magner was sitting in the box truck. When inside, he is able to see behind the truck when the back doors are open. He also can see in the back of the truck.

[5] A diagram of the placement of the trucks on the roadway, as well as Claimant's flagging location, was drawn during the hearing by James Magner. It was marked into evidence as Employer's Exhibit #1.

Mr. Magner noted that Claimant left her post at times without asking when she was supposed to be flagging. This was not safe, because she had no replacement, and then traffic would not be controlled. Claimant left her post to use the bathroom many times on June 10, 2017. Claimant is supposed to tell Mr. Magner when she needs to use the bathroom, so he can send someone to relieve her. On this day, she did not tell him. Mr. Magner was repeatedly informed by an inspector on June 10th that she kept leaving her post and that he needed to keep her stationary.

Later, the inspector returned to Mr. Magner and told him that Claimant was again missing from her post. Mr. Magner could not find her at first, usually when he could not find her, she was sitting in the air conditioning in the crash truck. However, this time, he finally saw her walking on the shoulder of the road, carrying what looked like bags of food. After that, she came around the back of the box truck, when he was in the middle of the box truck. Mr. Magner yelled at her and told her to get back out there to her post because the inspector had been complaining that no one was flagging. Claimant had not asked to leave her post to get food, and he was given no opportunity to relieve her.

About fifteen or twenty minutes after he yelled at Claimant, Mr. Magner presumed that Claimant had already returned to her flagging post. At that point, it was time for the entire crew to move to the next location. The entire crew has radios, and everyone would know that it was time to move on. Claimant was supposed to stop traffic so that Mr. Magner could drive his truck into the turn lane in order to proceed to the next location. He had no idea that Claimant was still not on her post. When he started the truck, he looked around but did not see her. She was not inside the truck with him. He looked behind the truck, and could only see his own pickup truck behind the box truck. He then moved the truck about a foot or two, when he heard Claimant

shout. He looked over his right shoulder and saw her standing behind the box truck, facing him. There was no indication that Claimant had fallen. There was no dirt on her. She had a fork in her right hand. At that point, he did not ask her if she was injured, because he did not know that anything had happened. When he saw her, he was angry, and simply asked her what she was doing because she needed to be at her post in the turning lane.

Mr. Magner later asked Claimant if she was injured, because Mark Amonte had come to him and said that Mr. Magner had dragged her with the truck. Mr. Magner went to his own supervisor, who said to shut the job down, get everyone together and to ask Claimant if she was hurt. He did so; but, when he asked her about what Mark Amonte had said, she said it was not true, that she had not said anything, and that she was not hurt.

Claimant worked the rest of the day, and Mr. Magner gave her a ride back to her car. During the 45-minute drive back, Claimant never said she was injured, or that she needed to go to the hospital. Claimant had also never said anything about being pregnant, and Mr. Magner did not know. She made no mention of her pregnancy or of an injury during the car ride.

Mr. Magner does not believe that what the ER documented that Claimant had said had happened – that Claimant fell out of the truck onto an outstretched hand – had actually happened.

On cross examination, Mr. Magner agreed that he was in the driver's seat, and checked his mirrors and blind spots before pulling the truck away. He felt that he could see around the entire truck, but did not see anyone. Mr. Magner testified that he would not have been able to see Claimant if she were standing on her post 250 to 275 feet away from the box truck.

Mr. Magner agreed that after he pulled the truck away, about half of a second passed before he heard Claimant yell "Yo!" He then looked over his right shoulder. He was not sure where she had come from, nothing had been there when he had looked very shortly before this.

He admitted that she must have been behind the truck. He had stopped when she yelled. He then asked her what she was doing, because she needed to be where he told her to be. She did not respond, and walked around the truck as if she was going back toward her post. Claimant was supposed to be holding a "Slow" sign toward traffic at that point. Mr. Magner then moved the truck.

Mr. Magner testified that Claimant was not supposed to drive to the next location with him. He admitted that, at times, she does ride with him. During those times, she does place her flagging pole in his truck.

Mr. Magner agreed that when he got to the next location, Mark Amonte told him that Claimant said that she was dragged by the truck. Mr. Amonte did not say that he had actually seen an incident himself. Mr. Magner then called his superintendent, who advised him to shut the job site down and go to Claimant. Claimant then denied telling Mark Amonte that she fell of the truck; she specifically said that she did not tell him that. Mark Amonte was present, as were the other employees. Mr. Amonte did not say anything at that point. Claimant also denied that she was hurt when Mr. Magner asked. An incident report was not filed because Claimant denied that she had said what Mark said she said, and also denied that she was hurt; because of this, to Mr. Magner, there was no incident. He heard for the first time at the hearing that Claimant went to the hospital later that day.

Mr. Magner had never written up Claimant for leaving the site to get food or to go to the bathroom without asking. He explained that this is because he likes her. She is a friendly person. He does not know her outside of the job. Mr. Magner also explained that she would ask sometimes when she had to go to the bathroom, or for food; it was not every time that she would just leave without telling him.

Mr. Magner does not dispute that Claimant was near his truck when she yelled "yo!," or that she had yelled it when he pulled off. He does not believe that she fell out of the truck, however, because he would have seen her inside it. Claimant was apparently eating food on the bumper of the truck. He did not see her until she yelled, and he had assumed she was back on her post.

On redirect examination, Mr. Magner agreed that in his written statement, he wrote that he asked Claimant if she was hurt, and she said she was not and that she did not need to leave work.

Mr. Magner further agreed that the turn lane was already blocked off, so Claimant did not need to be there to block the lane for the box truck. However, she was not complying with the law in being behind the box truck instead of flagging at her post at the time of these events.

Robert A. Smith, M.D., an orthopaedic surgeon, testified by deposition on behalf of Employer.[6] Dr. Smith examined Claimant on November 6, 2017 and reviewed her pertinent medical records. In his opinion, if a work accident actually occurred as Claimant contends, she suffered, at most, a back-strain injury that has since resolved.

At the defense medical examination ("DME") on November 6, 2017, Claimant complained of back and right knee pain; she did not complain of neck or right upper extremity pain. She provided a mechanism of injury of falling onto concrete out of the back of a truck. Claimant stated that she was putting some equipment away in the back of a box truck that had suddenly pulled away. She noted that even though the doors had been closed, they came open again, and she fell out. Dr. Smith noted that such a mechanism could produce some sort of soft tissue injury, or a fracture of the wrist if the person tried to break a fall.

[6] Dr. Smith's deposition was marked into evidence as Employer's Exhibit #2.

On exam, Claimant's neck was relatively normal. She had normal range of motion of the neck, and no soft tissue abnormalities about the neck, such as spasm, muscle wasting or trigger points. Similarly, in the back, she had no objective findings of spasm or other soft tissue abnormalities, though she complained of pain when she moved her back. There was no spasm or rigidity in the paraspinal soft tissues, however.

Claimant's right knee also seemed to be normal; there was no swelling, and she had full range of motion. There was no instability, abnormal clicking or popping, sign of internal derangement, or loss of motion. The neurologic examination, including strength, sensation and reflexes, was normal.

As for Claimant's right upper extremity, all peripheral joints were normal, including the shoulder, elbow and wrist.

In sum, Claimant basically had an objectively benign orthopaedic examination. She did complain of low back pain and minimally limited her back motion due to pain during the exam. Dr. Smith concluded that the limitation was subjective because Claimant stopped her back motion due to reports of pain, without any sign of spasm or rigidity in her muscles.

Dr. Smith confirmed that Claimant's records indicate that she was involved in a MVA in 2015. Claimant admitted this to Dr. Smith, but implied that she had only hurt her neck, had been treated by Dr. Cary, and got better. The records tell a different story, however. There were more body parts involved and she really did not get much better. She was treating with Dr. Cary right up to the date of her alleged work injury. She was diagnosed with strains to the cervical, thoracic and lumbar spine. Claimant regularly complained about the neck, low back, right knee and right shoulder up through a month before she alleged this incident occurred. She also was prescribed Percocet consistently.

On May 15, 2017, about a month before the alleged work accident, Claimant complained of pain she rated at 10 out of 10 regarding the cervical spine, lumbar spine and right shoulder joint; the thoracic spine condition was said to have resolved. The records indicate that Claimant consistently rated her pain at 10 out of 10 leading up to the alleged incident; no matter the treatment she had, these ratings did not decrease. In regard to the MVA, Dr. Cary rated Claimant with 20 percent permanent impairment to the cervical spine and 11 percent permanent impairment to the lumbar spine in October 2016. Thus, whatever Claimant has going on now Dr. Smith would attribute to the 2015 MVA.

Dr. Smith reviewed Claimant's first record after the alleged June 10, 2017 incident. Dr. Cary diagnosed a recurrent thoracic spine strain, and also kept the same diagnoses of the neck, low back, and right shoulder. Her pain complaints were again rated at 10 out of 10. Dr. Smith noted that the physical exam findings really did not change from the month before.

Dr. Smith addressed Dr. Cary's June 27, 2017 record. The record notes that: "[s]he also told me she recently found out she was seven months pregnant. When I questioned the patient, she said she did not know and she was still having her period."[7] Dr. Cary further notes in the record he was going to stop treating Claimant and refer her to other physicians.

Dr. Smith confirmed that a St. Francis Hospital ("St. Francis") note of January 12, 2017 indicates that Claimant was on notice much earlier that she was pregnant. Further, there is indication that Claimant had an ultrasound for her pregnancy at St. Francis on April 18, 2017. Dr. Smith confirmed that these notes do not correlate with Dr. Cary's June 27, 2017 note.

[7] Claimant's counsel objected as to the relevance of this line of questioning. Employer's counsel proffered that it goes to Claimant's credibility in terms of whether she really suffered a work accident, as there were signs that she might have displayed potential drug-seeking behavior. The Board overruled the objection; however, afforded this testimony its proper weight.

Dr. Smith also agreed that a January 6, 2017 St. Francis record indicates that Claimant did not test positive for Percocet although Dr. Cary was prescribing the medication to her at the time. Further, Dr. Xing's records indicate that she informed Claimant that her drug screen was negative for oxycodone; at the first visit, Claimant also admitted to taking her mother's medication. Dr. Smith confirmed that some of this appears to display drug-seeking behavior; further, Claimant never really had any remarkable findings from a clinical perspective, yet this did not correspond with the level of her pain complaints.

In relation to the alleged accident, according to the medical records, Dr. Smith testified that he might be able to support a back-strain injury, as this was primarily diagnosed at the ER based on her symptomatology. He clarified that this would only be the case if the incident happened as she described; if so, she could conceivably have had a soft tissue injury of the back. However, he feels that there was no evidence in the record of an acute injury to her neck, knee or shoulder. These symptoms only came later, and there were no physical findings in the treating doctors' notes of any significant objective finding of injury to those body parts.

Dr. Smith confirmed that following the November 6, 2017 evaluation, he wrote that Claimant had made "a full and complete recovery." He felt that any soft tissue injuries she may have sustained in this work incident had recovered by that time; there was no physical evidence on clinical exam that she had any ongoing injury or impairment from the work incident. The vast majority of soft tissue injuries will completely recover, and she was back to her baseline condition. Dr. Xing had noted some concern about radiculopathy; however, Dr. Smith noted that there was never any finding by Dr. Cary or Dr. Xing (or Dr. Smith) of any objective neurological deficit associated with this work accident.

On cross examination, Dr. Smith agreed that if the mechanism of injury as described is correct and the incident actually happened, it is possible and probable that Claimant suffered an exacerbation of her underlying condition that necessitated some treatment. He acknowledged that Claimant's version of the work accident has been consistent with the ER records. Claimant had told him that she went to the ER by ambulance on the day of the incident.

Dr. Smith agreed that the ER records indicated that Claimant was complaining of some soreness across her neck, back, right arm and right shoulder relating to the work incident.

Dr. Smith disagreed that tenderness is an objective finding. He explained that this means that if someone touches you, you have a reaction and tell the doctor: "that bothers me."

Dr. Smith agreed that because it was noted that the thoracic condition had resolved prior to the work incident, if her thoracic spine was injured in the work incident, he would consider that an acute strain injury.

On redirect examination, Dr. Smith confirmed that there was nothing objective on Dr. Cary's June 27, 2017 note, such as bruising, swelling, muscle spasm or any neurological deficit.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Delaware Workers' Compensation Act states that employees are entitled to compensation "for personal injury or death by accident arising out of and in the course of employment."[8] If there has been an accident, the injury is compensable if "the injury would not have occurred but for the accident. The accident need not be the sole cause or even a substantial cause of the injury. If the accident provides the 'setting' or 'trigger,' causation is satisfied for

[8] DEL. CODE ANN. tit. 19, § 2304.

purposes of compensability."[9] "A preexisting disease or infirmity, whether overt or latent, does not disqualify a claim for workers' compensation if the employment aggravated, accelerated, or in combination with the infirmity produced the disability."[10] Because Claimant has filed the current petition, she has the burden of proof.[11] In this case, after a thorough review of the evidence, the Board finds that Claimant has not met her burden of proof to show that she was injured in a work accident. Having so concluded, the Board notes that it found Dr. Smith's opinion to be most convincing and also did not find Claimant to be credible.

First and foremost, the Board notes that it did not find Claimant to be credible that she suffered a work accident that caused her any injury. While clearly she was behind the box truck that Mr. Magner was driving, and she had yelled out when it began to move, the Board was no more convinced that it was because of an accident and injury than the Board was convinced that she had yelled out because her lunch had been spilled by the sudden movement of the truck. Beyond Claimant's presentation later the same day to the ER, the Board found that there was little evidence of any actual incident or injury. Mr. Magner's testimony was that Mark Amonte told him that Claimant had stated that there was an incident with the truck; however, Mr. Magner was credible that she had denied that she ever said so when he specifically asked her amongst a gathered group of employees, including Mr. Amonte. Claimant had denied to Mr. Magner that she told Mr. Amonte about being involved in an incident, and had also denied that she was hurt. The Board believed Mr. Magner that Claimant had also made no mention to him of an accident or injury on their 45-minute ride back to her car at the end of the shift, and that he only learned at

[9] *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992).

[10] *Id; See also State v. Steen*, 719 A.2d 930, 932 (Del. 1998)("[W]hen there is an identifiable industrial accident, the compensability of any resultant injury must be determined *exclusively* by an application of the 'but for' standard of proximate cause.")(Emphasis in original); *Page v. Hercules, Inc.*, 637 A.2d 29, 33 (Del. 1994).

[11] DEL. CODE ANN. tit. 29, § 10125(c).

the hearing that Claimant had later presented to an ER. All of this preliminarily called Claimant's credibility into question regarding whether this incident actually happened. Had she been involved in an incident with the truck, and by her own testimony believed that Mr. Magner (and potentially Mr. Amonte) had witnessed it, there is no reason to believe that she would have denied that the incident happened when asked. Additionally, she would have at least made some mention of it during the ride with Mr. Magner back to her car, particularly given the fact that she apparently reported to the ER fairly shortly afterward. The Board did believe Mr. Magner over Claimant in regard to these events.

Further problematic, the medical records do not support any real sign of injury or change in condition following this incident. While Claimant was technically "diagnosed" with a back-strain injury at the ER, there really was no indication of a change in her condition regarding the neck or back or other body parts in relation to this alleged incident. There was no mention of in the ER record of any obvious signs of trauma, such as bruises or scrapes, nor was there a mention of Claimant having a swollen knee, as she contends. After this incident, there was notably also no mention of any of these findings in Dr. Cary's June 27, 2017 record.

Additionally compelling, it was clear that Claimant was consistently treating for the neck, low back and right shoulder leading up to the work accident; in fact, at the May 15, 2017 appointment, about a month before the work accident, she complained of 10 out of 10 pain in that regard. Claimant had clearly complained about the neck, low back, right knee and right shoulder less than a month before she alleged being involved in this incident. Further notable, Claimant was rated for 20 percent permanent impairment regarding the neck and 11 percent regarding the low back in October 2016. She also was consistently prescribed Percocet leading up to the alleged work accident.

Claimant's credibility in this case, which was very relevant given Mr. Magner's believable testimony, was also lacking. The Board was concerned that the records were suggestive that Claimant was not entirely forthright with her treatment providers, or with the Board. There was some indication of drug-seeking behavior, which is certainly of concern when an accident or injury is alleged. Certain records were indicative that drug screens were not consistent with the medications prescribed to Claimant, and others mentioned that she was very upset that her narcotic medication prescriptions were stopped due to her pregnancy.

Further, Dr. Cary's records following the work accident were inconsistent with Claimant's testimony. His June 27, 2017 record indicated that Claimant told him that she had just found out that she was seven months pregnant. However, this was contrary to what Claimant testified before the Board; Claimant testified that her June 2017 pregnancy was a separate pregnancy, and that the earlier 2017 records referenced a different pregnancy that had not been carried to term. Claimant explained to the Board that she believed that Dr. Cary meant that *he* had just discovered that she was pregnant in June 2017, but this is not supported by the record itself. The record mentioned that Claimant provided Dr. Cary an explanation of why she remained unaware of the pregnancy until the seven-month mark. The Board notes that the timeframe itself belies Claimant's testimony that this was a separate pregnancy, and the Board was left wondering why she was not being truthful. The Board found that Claimant was just not credible regarding these records, and felt that the records suggested that Claimant also was not forthright with her treatment providers, possibly because she was concerned about the continuation of her narcotic medication prescriptions. However, in any case, Claimant was not credible to the Board in that she simply denied that anything negative contained in the medical records was true, which was the case with more than one treatment provider.

Finally, Dr. Smith was convincing that only if the Board were to accept that there was a work accident as Claimant described, would he ascribe a minor soft tissue back injury to the incident that had since resolved, in consideration of the November 2017 DME. However, for the aforementioned reasons, because the Board was not convinced that there was a work incident; or, in the alternative, was not convinced that Claimant was actually injured in relation to any such incident, the Board must deny Claimant's petition.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Claimant's petition is **DENIED**.

IT IS SO ORDERED THIS 17th **DAY OF JULY, 2018.**

INDUSTRIAL ACCIDENT BOARD

PETER W. HARTRANFT

for Robert Mitchell
IDEL M. WILSON

I, Kimberly A. Wilson, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

Mailed Date: 7/18/18

OWC Staff