

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

STEPHANIE KELLEY,)
)
 Employee,)
)
 v.) Hearing No. 1461578
)
 AARON'S SALES & LEASE,)
)
 Employer.)

DECISION ON PETITION TO DETERMINE 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 October 19, 2018 in the Hearing Room of the Board in Dover, Delaware.

PRESENT:

MARY DANTZLER

PATRICIA MAULL

Heather Williams, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Walt Schmittinger, Esq., Attorney for the Claimant

Joseph Andrews, Esq., Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Stephanie Kelley (“Claimant”) alleges injuries as a result of a work accident on May 10, 2017, while she was working for Aaron’s Sales & Lease (“Employer”). On August 10, 2017, Claimant filed a Petition to Determine Compensation Due, which was heard on October 19, 2018.

Claimant seeks a determination of compensability of her work related injury, an award of medical expenses, and total disability benefits, from the date of surgery (November 6, 2017 to present and ongoing). Employer disputes the occurrence of the work injury and contests Claimant’s Petition. This is the Board’s decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. William Pfaff, board certified in orthopedic surgery, testified by deposition on Claimant’s behalf. After reviewing Claimant’s pertinent medical records, Dr. Pfaff began treating Claimant on August 23, 2017, when Claimant reported she was suffering from low back pain that extended down her leg. Claimant reported that she had been moving washers and dryers at work on May 10th and had experienced back pain since that time. Claimant reported she had participated in physical therapy, which had worsened her symptoms, and was prescribed Meloxicam and Gabapentin. Claimant had sustained a coccyx fracture years prior to the alleged work injury and had treated for that injury. Dr. Pfaff testified that the treatment Claimant sought from August 23, 2017 forward was different in nature than her previous problems that predated the alleged work injury and the coccyx injury treatment appeared to taper off in 2015. Following the alleged work injury, Claimant received physical therapy and trigger point injections.

When Dr. Pfaff examined Claimant on August 23, 2017, he found her to have limited range of motion of her lumbar spine secondary to pain. Claimant’s July 12, 2017 MRI results

indicated an acute L5-S1 disc extrusion and Dr. Pfaff diagnosed her with an annular tear, for which he recommended an epidural injection and prescription hydrocodone to help alleviate her pain. Claimant's September 29, 2017 EMG results indicated acute right L5 radiculopathy, which Dr. Pfaff reported were consistent with Claimant's subjective complaints. When Claimant saw Dr. Pfaff on October 4, 2017, she reported improved symptoms, with right sided pain in the low back traveling down the right leg into her ankle and foot aggravated by daily activities. Upon physical examination, Dr. Pfaff found Claimant to have continued diminished range of motion of the lumbar spine, no neurological deficits and disabling low back pain and right leg pain. Dr. Pfaff reported that Claimant had undergone six months of failed conservative care and was considering surgical treatment, which Dr. Pfaff recommended a non-fusion microdiscectomy or a fusion.

On November 6, 2017, Claimant had an L5-S1 transforaminal lumbar interbody fusion with instrumentation. Dr. Pfaff reported that Claimant experienced some problems with the hardware because of her small body habitus. When Claimant returned for a post-operative visit, on November 16, 2017, she had an x-ray, which showed stable hardware, and she reported that her leg pain was gone. Claimant returned to Dr. Pfaff on December 21, 2017 and reported decreased pain with relief from the bone stimulator and prescribed medications. Claimant's range of motion remained limited and she received a trigger point injection. When Claimant returned to Dr. Pfaff on February 9, 2018, she reported pain from the initial work injury, as well as irritation from the screw heads on the left side. Claimant reported continued back pain and was released to sedentary work, with no standing for more than 15 minutes at a time. When Claimant returned to Dr. Pfaff on March 1, 2018, she reported pain from the protruding screws as well as nerve pain, which she rated as 10 out of 10. Upon physical examination, Dr. Pfaff

found Claimant to have tenderness at the lumbosacral junction bilaterally and at the screwheads and painful range of motion. Dr. Pfaff administered trigger point injections bilaterally and recommended that Claimant continue with physical therapy. Claimant's no work restriction continued after that visit. When Claimant returned to Dr. Pfaff on April 4, 2018, she reported her pain level to be a 6 out of 10 and noted a screw was protruding from her back.

When Claimant returned to Dr. Pfaff on May 21, 2018, she complained of unrelenting pain in the left lumbar area where the screw was protruding. On June 11, 2018, Claimant underwent a hardware removal procedure. On June 26, 2018, Claimant saw Dr. Pfaff and reported a 50% improvement following the screw removal procedure and continued, but decreased back pain. Claimant's no work restriction was continued at this visit. On August 7, 2018, Claimant saw Dr. Pfaff and reported mild symptoms, with a 5 out of 10 pain level. Claimant continued to experience pain with range of motion and Dr. Pfaff ordered a functional capacity evaluation ("FCE") to assess Claimant's level of functioning. Dr. Pfaff determined that Claimant had not yet reached maximum medical improvement.

On August 23, 2018, Claimant had an FCE, the results of which indicated Claimant was capable of part-time sedentary work, which allowed for periodic changes in position. Dr. Pfaff testified that he agreed with the FCE results and noted that the results indicated Claimant cooperated with the FCE and it appeared to be a valid test. On August 29, 2018, Dr. Pfaff reviewed the FCE results with Claimant and released her to sedentary duty. On September 13, 2018, Claimant had a left facet block at L4 through S1 and a left sacroiliac joint injection with the goal of facilitating her functional progress.

Dr. Pfaff reported that the same radiologist had reviewed Claimant's 2010 and 2017 MRI results and had noted an acute central L5-S1 disc extrusion on her July 11, 2017 MRI. Dr. Pfaff concluded that Claimant has not recovered fully to her preinjury status, nor could she return to a job similar to her prework injury job at this time. Dr. Pfaff concluded that the treatment he has provided was reasonable and necessary and directly related to Claimant's May 10, 2017 work injury. Dr. Pfaff concluded further that Claimant's treatment with Dr. Barrish was reasonable and necessary and related to her May 10, 2017 work injury, including her work restrictions.

On cross examination, Dr. Pfaff agreed that a patient's subjective statements are an important part of the patient's history and if the subjective history was inaccurate it could lead to a change in the initial diagnosis. Dr. Pfaff acknowledged that he had not reviewed all of Dr. Claravall's records. Dr. Pfaff did not review Claimant's Lakeside Physical Therapy, Neurology Center of Southern Delaware, Sussex Pain Relief, Ambient Care, Nanticoke Surgical, Nanticoke Hospital, Riverview Medical Center, Your Doc's In, Peninsula Regional Medical Center, Bayside Health Care, or Work Pro medical records. Dr. Pfaff agreed that pain is inherently subjective in nature and smoking is contraindicated for patients who undergo spinal surgery as Claimant had. Dr. Pfaff testified that he concluded, based on the reading of Claimant's 2010 MRI results, that there was no evidence of disc herniation, disc degeneration or spinal stenosis. Dr. Pfaff reported that he had not reviewed Claimant's 2010 MRI films but relied on the radiologist's report from the 2010 MRI.

Dr. Pfaff acknowledged that he had not reviewed Claimant's treatment record from May 12, 2017. Dr. Pfaff agreed that he had never treated Claimant prior to August 23, 2017. Dr. Pfaff testified that Claimant had reported to him that she had performed a road flagger position over the summer, but he did not recall whether Claimant had reported being a janitor. Dr. Pfaff

denied issuing any physician's reports of injury for Claimant. Dr. Pfaff reported that he and Claimant discussed her daily restrictions more related to work than to activities of daily living and those included: being sedentary, walking often, not lifting, and using good mechanics when bending. Dr. Pfaff testified that Claimant's EMG findings showed that Claimant has a pinched nerve at the same exact location as she has a herniated disc, which means she has L5 radiculopathy coming from her back matching an L5-S1 disc herniation, which matches her subjective pain complaints. Dr. Pfaff testified that Claimant's July 2017 MRI results indicated that there was an acute injury, which occurred in the prior year. Dr. Pfaff defined a disc extrusion as either a chronic or acute event "when the disc is injured and the nucleus pulposus extrudes past the annulus." Dr. Pfaff Deposition 51:22-44 (September 28, 2018). Dr. Pfaff reported that he agreed that Claimant's 2017 MRI results indicated an acute herniation.

Claimant testified that she is 46 years old and had worked for Employer approximately three weeks as a customer service representative at the time of her alleged injury. Claimant's job duties included: dealing with customers and handling account information, but not lifting heaving objects (as far as she was aware). Claimant reported that she treated for a coccyx injury in 2010 when she was thrown and broke her tail bone. Her treatment did not require surgery, but she did receive pain management treatment as needed for approximately a year and a half. Claimant received injections and her treatment for that injury ended in 2012. Claimant had no treatment for her coccyx or lower back from early 2013 until her alleged work injury in 2017.

Claimant believes Dr. Antony ordered her 2010 MRI, but believes there were no abnormal findings on that MRI. Claimant's work history includes waitressing and cleaning, but she did not have any problems with her coccyx injury or low back pain prior to the alleged work injury. Claimant testified that she can distinguish between the coccyx pain and the back pain

associated with the alleged work injury. Claimant worked for a commercial cleaning company and did not have problems performing those job duties. Claimant continued with the commercial cleaning job while she was working for Employer, but never sustained any injuries while working for the cleaning company.

On May 10, 2017, the day of the alleged work injury, Claimant was attempting to move washer and dryers by herself. Claimant testified that she told "Kris" she was having a hard time moving the equipment because she was not heavy enough to move them and Kris told her she could not afford to pay someone to do her job. Claimant attempted to move the equipment again and felt a "pop" in her back. Claimant reported the injury to Kris, who told her to do computer work. After she was injured, she did desk work the rest of the day. Claimant testified that she finished her shift, but continued to have pain. Claimant did not seek treatment that night, but went to her family doctor the next day.

Claimant's family doctor provided treatment for her back and then referred her for further treatment. Claimant did not return to Employer. Her family doctor removed her from work until May 27, 2017, but she was terminated. She received an injection and was "out of it" for an entire day, but notified Kris of her status as soon as she could. Claimant believes she communicated clearly to Kris about her status. She texted Kris to let her know on May 11, 2017 and May 17, 2017 to notify her. Claimant told Kris that "I told the doctor I fell so I don't lose my job." Claimant testified that she had already reported to Kris that she hurt her back moving the appliances, but she was concerned about losing the job she had only worked at for a few weeks. Claimant was eventually taken off Employer's schedule and terminated.

Claimant testified that her symptoms began to worsen and her leg began to give out when she walked. Claimant's leg pain worsened and was consistent, but not constant. Claimant did continue to work at the commercial cleaning job, but not immediately following the work accident. Ultimately, Claimant had to stop working at the commercial cleaning job because she could not stand long enough. Following the second surgery, Claimant's leg pain was alleviated totally. Claimant's back pain is not totally alleviated, but is better. Claimant testified that she never had back pain like she experienced following the work accident prior to the work accident, even with the coccyx injury.

Claimant worked as a flagger temporarily, but it was difficult for her to do because of the standing. Dr. Pfaff took her out of work on October 4, 2017. Claimant wanted a functional capacity evaluation ("FCE") because she needs to earn an income, but her FCE indicated she could only work part-time sedentary work, which is difficult to find. Claimant returns to Dr. Pfaff in November of 2018. Claimant believes she is significantly better now than she was before the surgeries.

On cross examination, Claimant admitted that she did not list every employer on her original petition because she worked for one employer for part of one day. Claimant testified that she continued to work for the cleaning company following the alleged work accident, but ultimately was terminated. Claimant denied that she was terminated because she was clocked in at jobs where she was not actually working. Claimant admitted that she was a flagger from July of 2017 to September of 2017. Claimant filed for unemployment against the flagging company, but could not collect it because she was out on medical. Claimant alleged she was told to come back in January because that is the time when flaggers are out of work. Claimant agreed that she

did not indicate she was out on medical leave when she applied in January and put that she had been laid off for lack of work.

Claimant admitted she fell on ice at some point in 2004, but did not recall injuring her lumbar spine in 2010. Claimant admitted she was discharged from pain management because she was not taking her prescribed medication.

Claimant agreed she had worked for Employer five days at the time of the alleged work injury. Claimant watched videos about reported work injuries, but did not put her report in writing. Claimant does not recall when Employer received new merchandise or when new merchandise would go to the showroom floor. Claimant does not recall whether she spoke to Kris the night of the alleged work accident.

Claimant's primary care physician, Dr. Claravall, referred her to physical therapy. Claimant admits that she checked "no" on the physical therapy form, dated May 25, 2017, because she wanted them to have Medicaid pay for it because she did not have a worker's compensation claim number.

On redirect examination, Claimant testified that she completed a physical therapy form and indicated her pain started when "lifting washers and dryers" on "May 10, 2017." Claimant testified that Medicaid has paid for everything, including her surgeries so far.

Kris Brill, General Manager for Employer, testified on Employer's behalf that Employer's policy regarding work injuries is that it must be written and she must be notified immediately. Ms. Brill testified that Claimant was notified of the company's policy and was given copies of the company's policies, which she signed on May 4, 2017 when she was hired. Ms. Brill hired Claimant and conducted a post-employment offer medical inquiry. Claimant

checked that she had a prior back injury on the form. Ms. Brill testified that customer service representatives are required to lift at least 50 pounds and move furniture. New merchandise is delivered on Fridays and is removed the next day or day after. There are product technicians who stage the merchandise and load, unload and move merchandise. Ms. Brill denied that she received any appliances on May 5, 2017, but only received bedding and protective covers for both pieces. Ms. Brill testified that any appliances received prior to May 5, 2017, would have been on the showroom floor prior to May 10, 2017. Claimant was hired on May 4, 2017 and her last day was on May 10, 2017.

Ms. Brill denied that Claimant ever told her she had injured her back on May 10, 2017. If Claimant had reported any injury, she would not have been allowed to stay and would have been sent to a medical facility immediately. Ms. Brill testified that any employee who is injured is sent for treatment immediately regardless of the severity of the injury. Ms. Brill testified that Claimant left after her shift on May 10, 2017 and reported that she was going to her other job, but would see Ms. Brill the next day. Ms. Brill reported that she was confused by Claimant's text messages on May 11, 2017 and did not respond until May 12, 2017. When she spoke to Claimant, Claimant said she thought she hurt her back "with a washer," and Ms. Brill asked her why she did not report anything, but Claimant said she did not know how severe it was. Ms. Brill denied telling Claimant she was required to move appliances. Claimant never returned to work for Employer, but she returned to bring doctor's notes. Ms. Brill could have provided light duty work allowing Claimant to send emails to customers. When Ms. Brill did not hear back from Claimant, she terminated her on May 22, 2017. Ms. Brill denied that Claimant would have been unloading appliances on May 10, 2017 for any reason.

On cross examination, Ms. Brill testified that her assistant spoke to Claimant on May 11, 2017 and Claimant called out and reported she had injured her back, but Claimant was not sure how she injured herself. Ms. Brill agreed that part of a customer service representative's job duties includes moving merchandise. Employer did not request a physical examination prior to hiring Claimant. Ms. Brill testified that there are four sets of washer/dryers on site at any given time. Ms. Brill reported that the product technicians do most of the heavy lifting, but the job description requires lifting 50 pounds unassisted.

When questioned by the Board, Ms. Brill testified that she has other managers who direct employees, but she was on site all day on May 10, 2017. Ms. Brill reported that Claimant's duties on May 10, 2017 included emailing clients.

Leonor Neris, customer accounts manager for Employer, testified on Employer's behalf. Ms. Neris was not working on May 10, 2017, but while she was working on May 11, 2017, Claimant called and said she would not be at work that day because she thought she had injured her back at work. Ms. Neris reported that Claimant was not sure if she had injured her back while working for Employer or at her second job. Ms. Neris confirmed that Employer has a special team who moves furniture and Employer receives new merchandise on Fridays.

Dr. Lawrence Piccioni, board certified in orthopedic surgery, testified by deposition on Employer's behalf. Dr. Piccioni examined Claimant on November 3, 2017 and March 2, 2018. When Dr. Piccioni examined Claimant on November 3, 2017, Claimant reported that she was asked to set up three sets of washers and dryers from their delivery boxes and prepare them for display at work and while she was preparing the second set, she felt a pop in her low back. Claimant reported she believed the injury occurred around noon on May 10, 2017 and she was to

work until 7:00 p.m. that day. Claimant reported she notified her supervisor of the injury and did not continue preparing the appliances, but finished her shift. Claimant reported that she notified her supervisor that she was going to seek medical attention for her back. Dr. Piccioni reported that Claimant's report of the mechanism of injury to him was similar to her report of the mechanism of injury that Dr. Pfaff had reported. Dr. Piccioni testified that Claimant did not have back spasms at the time of her November 3, 2017 examination. Dr. Piccioni reported that the reasons for performing a fusion procedure include instability at the level of the fusion, neurologic compromise or pain that is unrelieved with long-standing conservative treatment. Upon physical examination at the November 3, 2017 examination, Dr. Piccioni found Claimant to have: no ambulatory assistive device; no problem sitting; the ability to rise from a seated position; no spasm; 7-8 out of 10 back pain level, but no report of leg pain; normal neurologic examination; reciprocating gait; intact sensory and motor examinations; no leg atrophy; normal lower extremity examination.

Dr. Piccioni determined that Claimant had no acute or objective findings, but only subjective findings. Dr. Piccioni concluded that Claimant's x-rays showed mild degenerative changes, which were age related and her 2017 MRI findings were not specifically diagnostic of an acute disc herniation. Dr. Piccioni explained that Claimant's MRI results indicated an "acute" L5-S1 disc herniation, but there was no specific pathologic edema in that disc, which would make it acute, nor were there any significant bony changes to signify it as chronic, so it was "somewhere in between." Dr. Piccioni Deposition 18:11-24 (October 11, 2018). Dr. Piccioni testified that he had read Claimant's actual MRI films and had seen no evidence of edema on those films. Dr. Piccioni concluded that there was no objective evidence to verify Claimant's subjective complaints.

Dr. Piccioni testified that he had reviewed job descriptions for a flagging job and for a janitor job and understood that the flagging job required standing in one position for long periods outside and the janitor job required bending, stooping, and lifting. Dr. Piccioni concluded that neither jobs' duties would be tolerated well by someone with a significant disc herniation and pain. Claimant reported to Dr. Piccioni she lost the janitor job because she lost too much time from work because of pain.

When Dr. Piccioni examined Claimant on March 2, 2018, he found Claimant to have: no limp or ambulatory assistive device; no problem sitting or rising from a seated position; reported back pain of 5 out of 10 primarily in the left lumbar area; no leg pain; normal gait; prominence around the L5 area; hardware at L5 and S1; no Tinel's signs; 10 centimeter midline posterior scar; prominence from hardware at L5; no sciatic notch tenderness; intact reflexes and senses; no weakness; no sciatic tension signs; straight leg raising produced tightness in lumbar spine (which was expected due to surgery); and no atrophy. Dr. Piccioni noted that, other than the objective findings of a surgical scar and prominence of hardware, Claimant's 2017 and 2018 examinations were the same.

Claimant denied any prior lumbar injuries, but reported a prior coccyx injury for which she treated in 1990. Dr. Piccioni testified that Claimant's medical records indicate she treated from 2010 to 2012 for lumbar disc herniation, lumbar radiculopathy, lumbar disc displacement, lumbosacral spondylosis and sacroiliitis. Dr. Piccioni testified that a prior coccyx injury would not cause radicular symptoms for which Claimant treated in 2010. Dr. Piccioni confirmed that Claimant was treating for injuries similar to her 2017 to 2018 complaints in 2010 to 2012. Claimant was discharged from treatment in 2012 for noncompliance with her pain contract.

Dr. Piccioni testified that it was important to review MRI films in cases where damage at the same level was at issue to assess causation, as well as for presurgical evaluation purposes. Dr. Piccioni reported that MRI are 90% accurate in certain areas and the patient's positioning during the testing can affect the results. Dr. Piccioni had reviewed Claimant's December 14, 2010 MRI film and had compared it to Claimant's 2017 MRI film, which he had also reviewed. Dr. Piccioni characterized Claimant's 2010 findings as an L5-S1 disc bulge and the 2017 findings as the L5-S1 disc bulge being "a little bit more bulged and/or herniated, whatever the term you want to use? Yes, but it was not normal in 2010 to my appearance." Dr. Piccioni Deposition 34-35: 23-24, 1-2 (October 11, 2018). Dr. Piccioni disagreed with the 2010 MRI report findings that there was no disc herniation and noted that the MRI film showed abnormality at L5-S1.

Dr. Piccioni reported that Claimant's November 1, 2012 medical records indicate Claimant reported low back pain, which was consistent with radicular pain into her left leg and knee, for which she received sacroiliac injections. Dr. Piccioni confirmed that Claimant had multiple lumbar x-rays and lumbar imaging take on December 21, 2004, June 6, 2010 and March 21, 2013. Dr. Piccioni noted that Claimant's imaging studies prior to May 2017 were similar to her post May 2017 studies and showed no significant degenerative changes, except for age-related ones.

Dr. Piccioni testified that Claimant's May 11, 2017 records indicate Claimant complained of dull, aching lumbar pain with radiation into the left buttocks after bending, which was similar to her complaints in 2012. Dr. Piccioni confirmed that Claimant never notified her treating physician that her complaints were due to any industrial accident when she treated on May 11, 2017. Dr. Piccioni confirmed that Claimant's May 12, 2017 records indicate that Claimant did

not notify her treating physician that her complaints were related to any work accident. Claimant reported to Ambient Care on June 23, 2017 for elbow pain, but did not complain of lumbar pain at that visit. On July 5, 2017, Claimant saw her primary care physician and complained of back pain and right lower extremity pain. Dr. Piccioni explained that Claimant's report of a switch from left buttock pain to right legged pain in the time between the alleged work accident and July 5, 2017 was inconsistent and noted that Claimant did not mention her symptoms being the result of a work related accident. On August 7, 2017, Claimant reported a work injury from May 10, 2017 with back pain and right leg pain. Dr. Piccioni noted that this was the first instance in Claimant's record which documented Claimant's allegation of a work related injury.

Dr. Piccioni confirmed that Claimant's July 11, 2017 MRI films showed a disc extrusion, but noted that it was a very small herniation, which did not touch any nerve roots and "...causes no central canal stenosis, no lateral recess stenosis, or any foraminal narrowing..." Dr. Piccioni Deposition 46:5-7 (October 11, 2018). Dr. Piccioni explained that the lack of nerve root displacement means the disc is not competent to cause radiculopathy, nor was there any evidence of edema or acute synovitis. Dr. Piccioni noted that there were no bony changes surrounding L5 or S1 in the 2017 studies, which would make it appear chronic, but that did not necessarily make it acute. Dr. Piccioni determined that there were no bony changes at L5-S1 in Claimant's 2012 MRI films. Dr. Piccioni concluded that there had been some progression between the 2012 and 2017 MRI results, but noted that the 2017 herniation was small and not touching any nerve root or causing any central stenosis.

Dr. Piccioni testified that Claimant's medical records did not contain any workers' compensation certified provider forms taking her out of work, as are required to be used for industrial accidents. Dr. Piccioni testified that any L5-S1 herniated disc should cause an S1

radiculopathy, not an L5 radiculopathy. Dr. Piccioni noted that Claimant's 2017 film indicates the L5-S1 disc points to the left and that disc is incompetent to impinge on the nerve root or cause an L5 radiculopathy.

Dr. Piccioni concluded that there was insufficient evidence that Claimant sustained a work injury on May 10, 2017 based on Claimant's medical records, and Claimant's symptomatology. Dr. Piccioni determined that, if Claimant had sustained any injury on May 10, 2017, it would have been a lumbar sprain, superimposed on her previous chronic lumbar spine condition. On March 2, 2018, Dr. Piccioni determined that Claimant was capable of working an eight hour day in a light duty capacity, with minor restrictions relating to sitting, standing, walking, and driving, irrespective of causation. Dr. Piccioni agreed that Claimant would be capable of sedentary duty 6 to 12 weeks following surgery and full capacity six months following surgery if the fusion is solid.

On cross examination, Dr. Piccioni, acknowledged that Claimant had also treated for sacrococcygeal complaints in 2010, along with the lumbar treatment. Dr. Piccioni agreed that Claimant reported the mechanism of injury to be removing three sets of washers and dryers from delivery boxes and preparing them for display, which Dr. Piccioni also agreed would be difficult for someone of Claimant's size to do alone. Dr. Piccioni agreed that the activity of removing appliances and preparing them had the potential to cause a herniated disc in the lower back. Dr. Piccioni agreed that Claimant had reported feeling a pop in her back while removing and preparing the appliances.

Dr. Piccioni acknowledged that Claimant's 2010 MRI report read that there was no disc herniation, stenosis, canal or nerve root compromise detected, but he had personally reviewed the

MRI films and described a bulge at L5-S1. Dr. Piccioni agreed that the bulge could be characterized as subtle. Dr. Piccioni acknowledged that Claimant's 2017 MRI report indicated Claimant had an acute central L5 disc extrusion. Dr. Piccioni explained that central disc extrusions normally do not cause leg pain and only cause back pain, unless they are large, which Claimant's was not.

Dr. Piccioni agreed that Claimant complained of symptoms from May 10, 2017 forward and his November 3, 2017 examination did not result in any objective findings to support her subjective complaints. Dr. Piccioni agreed that Claimant was not having right leg symptoms on the day of his examination, but she had experienced right leg symptoms prior to that examination and those symptoms had changed from what she had reported initially. Dr. Piccioni acknowledged that the absence of objective findings from his examination does not disprove Claimant's symptoms and complaints. Dr. Piccioni agreed that there were no other reported events in Claimant's record to explain the onset of her symptoms in May of 2017.

Dr. Piccioni reported that Claimant's 2017 surgical records indicate Claimant's nerve root at the L5-S1 level appeared erythematous and edematous, which meant swollen, red and irritated, which was an objective finding. When Dr. Piccioni saw Claimant in March of 2018, she reported no pain in her leg and decreased back pain, which was an improvement from prior to the surgery. Dr. Piccioni reported that Claimant's fusion to become solid within six months if she healed properly. Dr. Piccioni testified that Claimant was given a bone stimulator and reported that she was using it as directed. Dr. Piccioni agreed that he found prominence of Claimant's hardware during his examination, which could require removal at some point. Dr. Piccioni was unaware whether Claimant had the hardware removed as of the time of his October

11, 2018 deposition. Dr. Piccioni agreed that Claimant's FCE results indicated the results were valid, but disagreed that Claimant is only capable of performing part-time sedentary work.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPENSABILITY

Claimant seeks to establish the compensability of injuries alleged to have occurred on May 10, 2017. The Delaware Workers' Compensation Act provides that employees are entitled to compensation "for personal injury or death by accident arising out of and in the course of employment." 19 *Del. C.* § 2304. Because Claimant has filed the current petition, she has the burden of proof. 29 *Del. C.* § 10125(c). Claimant has the burden to establish that the alleged injuries occurred. *Morris v. Gillis Gilkerson, Inc.* Del. Super., C.A. No. 94A-09-006, Lee, J. (Aug. 11, 1995) at 8, citing *Grays Hatchery & Poultry Farm v. Stevens*, Del. Super., 81 A. 2d 322, 324 (1950). "The claimant has the burden of proving causation not to a certainty but only by a preponderance of the evidence." *Goicuria v. Kauffman's Furniture*, Del. Super., C.A. No. 97A-03-005, Terry, J., 1997 WL 817889 at *2 (October 30, 1997), *aff'd*, 706 A.2d 26 (Del. 1998). Claimant has an obligation to prove that an injury occurred, as well as when that injury occurred. *General Motors Corp. v. Ciccaglione*, Del. Super., C.A. No. 91A-05-10, Toliver, J. 1991 WL 269935 (December 10, 1991). "Furthermore, the practicalities of all compensation cases require sufficient findings of fact by the Board so that the parties can calculate what monetary benefits are owed. *Id.* at *4.

Evidence that the accident in question accelerated the condition that required Claimant to need treatment/services is sufficient for the Board to infer that the accident proximately caused the need for treatment. *Blake v. State of Del.*, Del. Supr., C.A. No. 01-A-01-018 (March 12, 2002). A pre-existing condition does not, in and of itself, prevent a Claimant from being

compensated if the conditions of the employment precipitated an acceleration of that condition. *General Motors Corp., Inc. v. McNemar*, 202 A.2d 803, 807 (Del. 1964).). In considering whether a work injury necessitates a medical procedure, Delaware's Supreme Court has already determined that "[t]he proper standard . . . is whether the surgery would have been required *at that time* but for the accident." *Blake v. State of Delaware*, Del. Supr., No. 477, 2001, Order at ¶ 4 (March 12, 2002)(emphasis in original)("Blake II"). When the evidence is in conflict, the Board is free to accept the opinion of one expert over the opinion of another. *DiSabitino Brothers, Inc. v. Wortman*, 453 A.2d 102 (Del. 1982).

In this case, Claimant has failed to prove that her alleged injury is causally related to her work activity. The evidence was inconsistent and does not support a finding that Claimant's injury was causally related to her work for Employer. Specifically, Claimant's own testimony regarding her medical history and the events alleged to have occurred on May 10, 2017 was inconsistent with the other evidence provided and detracts from her credibility to the point where Claimant cannot sustain her burden of proof. First, Claimant first testified that she had been employed for approximately three weeks at the time of her alleged injury, but then on cross examination admitted that she had only worked for Employer for five days at the time of the alleged injury. Ms. Brill confirmed that Claimant was hired on May 4, 2017 and never returned to work after May 10, 2017. Claimant's inability to recall the amount of time she was employed prior to the alleged work accident detracts from her credibility.

Second, Claimant testified that she notified Ms. Brill that she had sustained an injury on May 10, 2017, immediately after the alleged work injury occurred; however, Ms. Brill denied that Claimant reported any injury to her on May 10, 2017. Furthermore, Ms. Brill testified that if Claimant had reported any injury, she would have been sent Claimant for medical attention

immediately. Claimant admitted, and her records confirm, that she did not seek treatment until the following day.

Third, Ms. Neris testified credibly that Claimant called out on May 11, 2017 and reported that she was injured, but was unaware whether she had injured herself while working for Employer or her second job for another company. Thus, immediately following the alleged incident, Claimant was unsure as to the where or when she had sustained the alleged injury. Furthermore, this testimony conflicts with Claimant's testimony that she reported the incident to her supervisor, Ms. Brill, immediately after it occurred because if Claimant had reported the incident immediately, as she alleged, there she would have been sure of how and when the alleged injury occurred and could have confirmed that information to Ms. Neris when she called on May 11, 2017.

Fourth, Claimant's text message to Ms. Brill, dated May 11th, at 9:25 p.m., indicates that, "...sorry just now texting...I told Dr [sic] I fell so I don't lose my job." (Claimant's Exhibit #2). The Board finds it incredible that Claimant would mislead her treatment provider out of fear of losing her job, if she had, in fact, sustained a work injury while working for Employer, and reported that injury to Ms. Brill immediately after it happened, as Claimant alleged. In addition, Dr. Piccioni noted that Claimant's records indicated that Claimant had treated for back pain and elbow pain on at least four occasions (including May 11, 2017, May 12, 2017, June 23, 2017 and July 5, 2017), but had failed to mention her alleged injury/symptoms were the result of an industrial accident until August of 2017. The Board finds that Claimant's admitted willingness to mislead and/or fully inform her treatment providers detracts further from her credibility.

Fifth, Claimant testified that she continued to work a second job for a cleaning company after the alleged work accident, but not immediately following the alleged accident; however,

Ms. Brill testified that Claimant reported that she was going to work at her second job on the evening of May 10, 2017 and Ms. Neris testified that, on May 11, 2017, Claimant called Employer and reported she was unsure of whether she had injured herself at that second job. Claimant's inconsistent testimony regarding her continued work for the additional employer also detracts from her credibility.

Sixth, Claimant admitted that she had misrepresented that she had been laid off from a flagging job when applying for unemployment benefits when she actually left the flagging job for medical reasons. In addition, Claimant admitted that she denied that her injury was work related on her May 25, 2017 physical therapy form, but claimed she desired to have Medicaid insurance pay for the treatment instead of worker's compensation insurance. Like Claimant's misrepresentation to her treatment providers regarding the mechanism of injury, Claimant's misrepresentations regarding the reasons for her unemployment and her injury are equally as detracting from Claimant's credibility.

Seventh, Claimant denied being able to recall treating for lumbar symptoms in 2010; however, Dr. Piccioni testified that Claimant's treated for from 2010 to 2012 for lumbar symptoms. Claimant was able to recall in detail treating for a coccyx injury in 2010 and the Board finds it unlikely that Claimant could not recall treating for a lumbar injury in that same time period. This inconsistency is another detraction from Claimant's credibility.

Finally, the Board finds Dr. Piccioni's testimony to be more persuasive than Dr. Pfaff's. Dr. Piccioni confirmed that he had reviewed Claimant's actual MRI films from 2010 and 2017 and determined that Claimant had a subtle herniation in 2010 and a similar small herniation in 2017, with no bony changes at L5 or S1 to categorize it as chronic in nature, but it was not necessarily acute in nature either. Dr. Pfaff admitted that he had not reviewed many of

Claimant's prior records and could not recall whether he had discussed her employment as a janitor. While Dr. Pfaff testified that Claimant's 2017 MRI report indicated there was an acute herniation, he admitted that the herniation could have occurred at some point in the preceding year. Thus, there is no evidence to substantiate a date of May 10, 2017 while Claimant was working for Employer, other than Claimant's allegation, the credibility of which has already been diminished.

While the Board does note that Employers' witnesses' testimony was vastly different than Claimant's, Claimant has the burden of proof and because of the inconsistencies in her testimony, Claimant could not sustain that burden. Based on all of the above, the Board finds there is insufficient evidence that a work accident or injury occurred as Claimant alleged. Therefore, Claimant's Petition is denied.

STATEMENT OF THE DETERMINATION

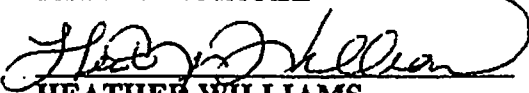
For the reasons set forth above, the Board finds that Claimant has not her burden of proving that she sustained a compensable work injury. Therefore, Claimant's Petition is denied.

IT IS SO ORDERED THIS 2nd DAY OF NOVEMBER, 2018.

INDUSTRIAL ACCIDENT BOARD

/s/ Mary Dantzler
MARY DANTZLER

/s/ Patricia Maul
PATRICIA MAULL


HEATHER WILLIAMS
Workers' Compensation Hearing Officer

Mailed Date: 11-2-18



OWC Staff