

BEFORE THE INDUSTRIAL ACCIDENT BOARD  
OF THE STATE OF DELAWARE

ERWIN BROWER, JR.	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1448954
	)	
PRO LAWN, INC.,	)	
	)	
Employer.	)	

**ORDER**

On July 9, 2018, Claimant filed a Petition to Determine Additional Compensation Due in which he contended that he sustained a permanent impairment of the lumbar spine. On the Pre-Trial Memorandum, Claimant stated that he was seeking a permanent impairment of the lumbar spine rated by Dr. Eppley and that all treatment was reasonable, necessary and related to the industrial accident. Claimant did not specify the treatment being claimed or the purpose of such treatment.

On the Stipulation of Facts submitted at the time of the hearing, the parties stated that Claimant sustained a compensable work injury to his lumbar spine as a result of a work accident that occurred on August 8, 2016. The Stipulation of Facts did not identify the specific injury. The Stipulation of Facts also stated that “On May 9, 2018, Claimant filed a Petition to Determine Additional Compensation Due alleging 14% permanency to the lumbar spine.” The only other content provided on the Stipulation of Facts was the identification of Claimant’s average weekly

wage at the time of the work accident, the identification of Claimant's weekly compensation rate, and the identification of the expert witnesses. Employer disputed the causal relationship of the permanent impairment to the work accident and alternatively challenged the ripeness of the claim.

The Board noted that Claimant's permanent impairment rating is dependent on the Board deciding a matter that was not identified in any of the filings and particularly the Stipulation of Facts<sup>1</sup> – the compensability of an additional injury and related surgery. However, the Board recognized that even if the additional injury was not in dispute, Claimant had not reached maximum medical improvement so regardless, the Board would have to deny the permanent impairment rating. Therefore, without deciding on the compensability of an additional injury (an issue not identified in the Stipulation of Facts as an issue for the Board to decide) the Board denied Claimant's Petition to Determine Additional Compensation Due for a permanent impairment of the lumbar spine as not yet ripe.

Claimant has now filed a Motion for Clarification and Reargument in which he asks the Board to decide the causal relationship of a lumbar radiculopathy diagnosis and surgery to the work accident. Such diagnosis and the surgery had not been acknowledged by Employer. The latter is a distinctly different issue than permanency.

Under Board Rule 9(B)(5)(b), the Pre-Trial Memorandum shall contain “a *complete* statement of what the petitioner seeks and alleges.” (Emphasis added.) Under Board Rule 9(B)(5)(e), the Pre-Trial Memorandum shall contain “a clear statement of the basis for a petition under 19 *Del.C.* § 2347”. Board Rule 14 requires represented parties at all hearings on the merits to submit to the Board a Stipulation of Facts. The purpose of a Stipulation of Facts is to identify

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<sup>1</sup> Often some of the disputed issues identified on a petition and/or the Pre-Trial Memorandum resolve prior to the hearing. Hence, the Stipulation of Facts can identify fewer disputed issues than identified on the initial pleadings. It is the responsibilities of the parties to identify on the Stipulation of Facts the issues remaining for the Board to decide.

to the Board the nature and stage of the proceedings and to specifically identify the issue or issues to be determined by the Board.

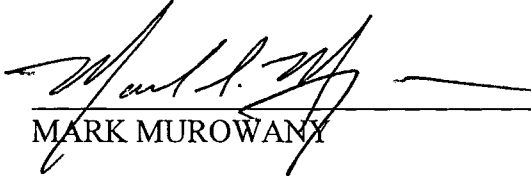
In Claimant's Motion for Reargument, Claimant essentially is asking the Board to ignore his pleadings on his petition for permanent impairment and to treat it as a Petition to Determine Additional Compensation Due in which Claimant seeks acknowledgement of an additional injury and the compensability of a related surgery. Claimant wants the Board to ignore the content of the Pre-Trial Memorandum and pretend the content reflects the latter hypothetical Petition. Claimant wants the Board to ignore the Stipulation of Facts that only identifies the issue of permanent impairment as a disputed issue and instead resolve disputed issues not identified in any fashion in the Stipulation of Facts. To do so would render meaningless the notice requirements (including notice to the Board) of identifying the disputed issues in pleadings and in the Stipulation of Facts.

It is the responsibility of the parties to identify the issues in dispute, not the Board's responsibility. Claimant failed to amend his pleadings but instead chose to circumvent the legal process by asking the Board to determine an issue of permanent impairment that indirectly acknowledges the compensability of an unacknowledged injury. If Claimant would like the Board to determine the compensability of an additional injury, Claimant should appropriately file a Petition to Determine Additional Compensation Due in which he seeks acknowledgement of the additional injury.

Wherefore, the Board affirms its decision.


IT IS SO ORDERED THIS 20<sup>th</sup> DAY OF NOVEMBER, 2019.

INDUSTRIAL ACCIDENT BOARD


  
MARK MUROWANY

  
PETER HARTRANFT

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

  
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Mail Date: 11-21-19

  
OWC Staff \_\_\_\_\_

cc:

Joel Fredricks, Attorney for the Claimant  
Joseph Andrews, Attorney for the Employer