

BEFORE THE INDUSTRIAL ACCIDENT BOARD  
OF THE STATE OF DELAWARE

ALEXIS CLEVELAND,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1474956
	)	
CHILD INC.,	)	
	)	
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 (“Board”) on August 21, 2019 in the hearing room of the Board, in Wilmington, Delaware.

**PRESENT:**

PETER HARTRANFT

ANGELIQUE RODRIGUEZ

Julie Pezzner, Workers’ Compensation Hearing Officer, for the Board

**APPEARANCES:**

Leroy Tice, Attorney for the Employee

Joseph Andrews, Attorney for the Employer

## **NATURE AND STAGE OF THE PROCEEDINGS**

On June 20, 2018, Ms. Alexis Cleveland (“Claimant”) was a passenger in a vehicle that was rear-ended within the course and scope of her employment at Child Inc. (“Employer”). Her average weekly wage at the time of the work accident was \$725.85 yielding a weekly compensation rate of \$483.90. Claimant was placed on temporary total disability and returned to full-time work at Employer on December 3, 2018.

On August 20, 2018, Claimant filed an initial Petition to Determine Compensation Due, alleging that as a result of the work accident she sustained a concussion, a neck injury and a back injury, none of which have resolved. She also contends that her injuries have caused her to be totally disabled from June 26, 2018 through September 1, 2018. Employer disputes any concussion or head injury. Employer also contends that any injury to the neck or back would be limited to a strain and sprain that have since resolved.

A hearing was held on Claimant’s petition on August 21, 2019. This is the Board’s decision on the merits.

## **SUMMARY OF THE EVIDENCE**

Dr. Bruce Grossinger who has several board certifications including in psychiatry, neurology and pain medicine and who is a certified provider under the Delaware Workers' Compensation Healthcare Payment System testified live to a reasonable degree of medical probability on behalf of Claimant. He is a national expert on brain injuries and spends time with NFL players addressing the issue of chronic traumatic encephalopathy. Dr. Grossinger opined that Claimant sustained a neck injury and a lumbar spine injury, both having radicular components as well as a concussion as a result of the work accident. Dr. Grossinger represented that a multi focal brain injury and a concussion can be synonymous. He additionally opined that Claimant was

totally disabled until September 1, 2018 as a result of the work accident and that the medical treatment has been reasonable and necessary.

Claimant was involved in two motor vehicle accidents prior to the work accident. The first motor vehicle accident occurred in September 2007 when Claimant's car struck a parked car. She injured her liver and her kidneys. She did not have any musculoskeletal or brain injuries from this accident.

The second motor vehicle accident occurred in October 2008 when someone rear-ended her car. She treated for neck complaints. A 2009 MRI of the cervical spine revealed minimal disk bulges without impingement. An EMG demonstrated C8-T1 radiculopathy. Over time, Claimant's neck improved.

On October 25, 2011 while pregnant with her second child, Claimant had pre-term contractions after taking a walk. She has a history of requiring treatment for pre-term contractions associated with each of her pregnancies.

On June 20, 2018, Claimant was involved in the work accident. She was approximately seven months pregnant. She treated at Johns Hopkins where she complained of headaches and of blurry vision. She denied contractions but reported cramps. They were concerned about the viability of her fetus and her premature contractions, especially due to her history of pre-term contractions. They admitted her into the hospital to monitor the viability of the fetus throughout the night. Dr. Grossinger testified that during Claimant's hospital stay, they focused on her pregnancy to the exclusion of her headache, neck and back complaints.

According to the emergency room records, there were no signs of a neck or back injury. Her musculoskeletal examination was normal. Dr. Grossinger suspected they conducted a templated examination. She was discharged the next day.

On June 26, 2018, Claimant treated with her family doctor, Dr. Pahwa, pursuant to the work accident. To Dr. Pahwa, Claimant reported that the day after the work accident she developed neck and back pain. Dr. Grossinger added that the day after the work accident, Claimant complained of pain that was worse on the left side, of mid-back pain, of mild headaches, of frontal headaches, and of blurred vision. Dr. Pahwa documented head problems, concussion, neck problems, and back problems.

Dr. Grossinger acknowledged that the June 26, 2018 medical records were the first medical records to document complaints of headaches and of blurred vision. Dr. Grossinger stated that the fact such records are from six days after the work accident does not necessarily mean that Claimant did not have such symptoms at the time of the work accident. Often patients initially try to “tough it out” for a couple days to see if the symptoms decrease before seeking medical treatment. He concluded that is what occurred with Claimant.

Claimant treated with Dr. Clukey, a chiropractor, who documented a concussion, headaches, neck complaints and back complaints. Dr. Clukey had placed Claimant on total disability through August 20, 2018. Claimant treated conservatively with heat, ultrasound, myofascial care, stimulation and passive conservative physical therapy. She also underwent open MRIs of the neck and the back.

Dr. Grossinger commenced treating Claimant on August 2, 2018 per Dr. Clukey’s referral. Dr. Clukey referred Claimant to Dr. Grossinger to address Claimant’s neurologic complaints. At the time Dr. Grossinger commenced treating Claimant, Claimant had a moderate concussion. He stated that the following complaints and presentation by Claimant demonstrated hallmark signs of a concussion. Claimant had moderate headaches, photophobia and phonophobia. She wore sunglasses and kept her head down because of her photophobia. She did not appreciate Dr.

Grossinger's loud voice – because of her phonophobia. She experienced anxiety and sleeplessness. She had blurred vision and slower brain processing.

Dr. Grossinger tested Claimant for a concussion. He described some of the tests he conducted and identified the positive findings. Claimant was oriented to person and place but was not oriented to time. For example, when he showed Claimant three objects, she could not remember any of the three objects. He asked Claimant to follow a four-part command that involved simultaneously closing her eyes, sticking out her tongue, and touching her ear while doing something else. Claimant was only able to perform two of the directions. She had hesitating speech; her speech was not continuous. Claimant's reaction time was slow.

Claimant underwent ImPACT testing that involved sitting in a dark room with a dim computer screen and taking an approximate thirty-minute computerized test. In an effort to dispel myths about ImPACT testing, Dr. Grossinger represented that it is not necessary to have a baseline ImPACT test prior to sustaining a concussion to determine from a subsequent ImPACT test that a person sustained a concussion. ImPACT tests are not just used to test for concussions for sports related injuries, they can be used to test for concussions from non-sports-related injuries. The scoring of an ImPACT test is done at University of Pittsburgh by someone independent of Dr. Grossinger. The ImPACT test is constructed to identify if someone is faking so the test is valid and reliable. Dr. Grossinger prefers to use ImPACT testing to test for concussions over neuropsychological testing because ImPACT testing is significantly shorter (thirty minutes as opposed to eight hours) and is significantly cheaper than neuropsychological testing.

Claimant tested at twenty-three percent and did not demonstrate any signs of faking. She had a valid and reliable result. She had mild impairment of verbal memory – the ability to remember words in the written and spoken way. She had mild to moderate impairment of visual

memory. She was required to work with symbols and colors on the ImPACT test. Claimant's speed was significantly impaired. She was not real fast or accurate, so she was borderline with cognitive efficiency index.

Claimant also complained of radiating neck and back complaints. Upon physical examination, Claimant had objective findings of spasms demonstrated by hardness in both her neck and her back. She had weakness in the proximal shoulder girdles, subscapularis deltoids, supraspinatus and infraspinatus. She had reflex changes in her lower extremities. She had decreased patella reflexes at L4. She demonstrated sciatica into the lower extremities. She had true muscle weakness on hip girdles and the quadriceps. She had leg weakness. Dr. Grossinger remarked that if Claimant's back injury were limited to a sprain, there is no way Claimant would have true muscle weakness. She had slow postural changes in excess of what is expected from someone eight months pregnant. The diminished findings supported a focal neurological deficit. Dr. Grossinger summarized that upon physical examination, Claimant had weakness in her arms and legs, had spasms in her neck and back, and had signs of cervical and lumbar radiculopathy.

By her October 9, 2018 visit with Dr. Grossinger, Claimant's symptoms were improving. Claimant's concussion improved from moderate to mild as her headaches improved. Dr. Grossinger attributed the improvement of her concussion to the passage of time.

Upon physical examination, Claimant was fully oriented in person, place and time. Her recent memory improved from moderate impairment to mild impairment. Similarly, her weakness in her arms and legs improved from moderate weakness to mild weakness. She continued to have excessive daytime sleepiness, to have neck pain spreading to her shoulders and arms and to have back pain spreading to the hips and thighs. She was easily distracted but fully cooperative. She continued to have neck and back spasms. Dr. Grossinger concluded at this visit that Claimant: had

mild bilateral cerebral dysfunction (a concussion/multi-focal brain injury); had post-traumatic headaches that were differentiable from her migraines; had cervical radiculopathy; and had lumbar radiculopathy.

Dr. Grossinger performed an EMG on October 30, 2018 that identified moderate nerve damage of cervical radiculopathy at C5 and C6 correlating with the disk bulge, osteophyte, spurring and impingement per MRI. Dr. Grossinger remarked that although much of the MRI findings were preexisting, they were asymptomatic until being aggravated by the work accident. The MRI findings became clinically apparent with the occurrence of the work accident and became apparent with the EMG results. Dr. Grossinger testified that although Claimant had a positive EMG in 2009 the findings related to the C8-T1 level – a completely different location than C5-6. The injuries were qualitatively different. Dr. Grossinger's EMG showed that the C8-T1 radiculopathy had healed entirely.

Dr. Grossinger recognized that leading up to the work accident Claimant had a history of migraines. In June 2016, Claimant treated with Dr. Pahwa and reported having had three migraines that day with loss of vision in one eye. In 2017, she treated twice for migraines with blurred vision. In 2018 prior to the work accident, she treated once for migraines. Dr. Grossinger opined that Claimant's migraines are not causally related to the work accident but her headaches are.

Dr. Grossinger explained that Claimant's headaches are part of her concussive symptoms. Her headaches are different from migraines. Migraines are a specific type of headache in neurology mitigated by serotonin and calcitonin receptors in the brain. Although migraines can affect vision, they are usually one-sided (unilateral) and throbbing. On the other hand, Claimant's post-traumatic headaches were bilateral with occipital neuralgia. Claimant's headaches caused a squeezing sensation and were associated with her blurred vision. Dr. Grossinger continued that

migraines and concussive headaches do not respond to the same medications. Sleep usually alleviates a migraine whereas a concussion can cause sleep problems. While Claimant was involved in two prior motor vehicle accidents, there were no indications of a brain injury. The symptoms were new.

Dr. Grossinger testified that Claimant's neck and low back injuries were more than just sprains and strains. With respect to her neck, Claimant complained of neck pain with radicular pain spreading to her shoulders, her arms and her hands bilaterally. With respect to her back, Claimant had sciatica in her lumbar spine that radiated pain through her buttocks bilaterally and down her thighs. She had moderate weakness in her arms and her legs. She had weakness in her hip girdles. Weakness is a radicular sign.

Dr. Grossinger recognized that Claimant underwent MRIs of the cervical spine on February 3, 2009 and on June 12, 2009 that demonstrated multi-level degenerative changes. He emphasized that there were no signs of impingement or stenosis other than impingement at C8-T1 – a level unrelated to the work accident and consistent with the 2009 EMG. Although Claimant had axial neck pain prior to the work accident, her pain was not radiating nor did she present with sciatica or with radiating pain into the lower extremities.

Dr. Grossinger opined that the work accident aggravated Claimant's multi-level condition. The 2018 MRI demonstrated new findings of impingement and stenosis consistent with the 2018 EMG, consistent with radiculopathy and consistent with Claimant's radiating complaints.

Dr. Grossinger opined that Claimant has reached maximum medical improvement. She is much better now although each of her injuries has a permanent component. She has a borderline moderate to mild residual concussion. She has an aggravation of cervical multi-level degenerative joint disease with EMG proven C5 and C6 radiculopathy and supported by her pain complaints

spreading into the shoulders, arms and hands. She has an aggravation of lumbar degenerative joint disease with EMG proven lumbar radiculopathy and supported by her complaints of low back pain and sciatica.

Ms. Ashley Clark, Claimant's sister, testified on Claimant's behalf. She has spent ample time with Claimant before and after the work accident. She and Claimant spend time together three to four times per week. Ms. Clark saw Claimant immediately before the work accident. Claimant had no complaints. Claimant had no reduction in function.

Ms. Clark saw Claimant after the work accident. Claimant was in great pain in her back, her neck and her side. Since the work accident, Claimant's physical activities became limited. Claimant walks slower on their routine walks and Claimant must take breaks. Claimant has not been as interactive with the children as Claimant used to be prior to the work accident. Ms. Clark stated that although Claimant has had neck pain prior to the work accident, Claimant did not have any neck pain in the timeframe of the work accident.

Claimant testified on her own behalf. She acknowledged that she was involved in a motor vehicle accident in 2007 when she hit a parked car. She lacerated her liver and her kidney. She did not injure her neck or back from that accident. In October 2008, Claimant was involved in another motor vehicle accident that involved a rear-end collision. She injured her neck and shoulder. She experienced radiating pain, but it only went down her left arm. She had some low back pain. In 2015 and in 2016 Claimant treated with her family doctor for low back complaints that were not related to any trauma. She did not have any radiating pain down her lower extremities. She never underwent an MRI of the low back prior to the work accident.

Claimant testified that she had difficulty with each of her three pregnancies. Throughout each pregnancy, she treated for migraines and for premature contractions. Christiana Care

Neurology Associates monitored her migraines throughout the duration of her most recent pregnancy. Hence, treatment continued into 2018. On October 25, 2011, Claimant treated at Women's First for premature contractions while pregnant with her second child. She got admitted to the hospital for monitoring.

On the day of the work accident, Claimant was stopped at a red light and got rear-ended. She experienced a headache, blurred vision and cramping in her stomach. She treated in the emergency room. She acknowledged that the June 20, 2018 emergency room records indicated that she was not in distress and that testing was normal. Claimant could not recall any tests being conducted. She stated that despite her symptoms, the focus was on her cramping and her contractions. The fetus was the main concern. She stayed in the hospital overnight so they could monitor her fetus and her contractions.

According to the medical notes, on June 21, 2018 before being discharged, Claimant was seen by a nurse. The only documented complaint was of asthma. The nurse advised Claimant to use an inhaler. Claimant questioned the accuracy of such notation; she remarked that it did not "sound right."

On June 26, 2018, Claimant treated with her family doctor, Dr. Pahwa for her work injuries. Claimant stated that she experienced neck and back pain on the day after the work accident. Dr. Pahwa referred Claimant to pain management and ordered an MRI.

Claimant testified that she was forthcoming to Dr. Schwartz during the defense medical examinations. She acknowledged that she denied to Dr. Schwartz having been involved in prior motor vehicle accidents because Dr. Schwartz's question was limited to the previous ten years. Her prior motor vehicle accidents occurred more than ten years ago. Dr. Schwartz never asked her if she had any neck or back conditions prior to the work accident.

On the day of the hearing, Claimant was experiencing a headache with blurred vision. Claimant testified that as a result of the work accident, she has memory problems causing her to have to write things down to remember the things she needs to do. She has pain in her neck that extends into her shoulders and her right arm. She has low back pain extending into the hip and the buttocks making it difficult to walk.

Claimant testified that while she had injured her neck in 2008, the neck pain she has had since the work accident is new. She did not have any neck pain in 2018. The neck pain she had in 2009 extended only into her left arm. The neck pain from the work accident extends into both arms. Similarly, the low back pain she had in 2015 did not extend into her buttocks but her low back pain since the work accident extends into her buttocks and legs. Since the work accident, she has consistently complained of and treated for neck pain, of shoulder pain, of back pain and of headaches.

Claimant returned to work full-time in December 2018. She tends to her day-to-day functions. She grocery shops for the shelter. She navigates stairs. She sits. She performs the required administrative work to include paperwork. Her job also involves interacting with typically nine children and participating in their recreational activities. The children's ages range from nine years old to seventeen years old. The children have a lot of energy.

Dr. Eric Schwartz who is board certified in orthopaedic surgery testified by deposition to a reasonable degree of medical probability on behalf of Employer. He examined Claimant on November 15, 2018 and on June 11, 2019. He opined that as a result of the work accident, Claimant at most sustained strains and sprains of the cervical and lumbar spines that resolved prior to his first defense medical examination. He added that even if Claimant continued to have subjective complaints, such complaints would not have warranted medical treatment. He did not

believe that Claimant was totally disabled at any time as a result of the work accident. She would have initially been limited to full-time sedentary duty but would not have required any work restrictions by the time he saw Claimant on November 15, 2018. Dr. Schwartz additionally opined that Claimant did not sustain a concussion, brain injury or head injury and that the EMG that Dr. Grossinger ordered was not reasonable or necessary.

Dr. Schwartz reviewed the cervical spine MRI reports and films from February 3, 2009, from June 12, 2009 and from October 24, 2018. He reviewed the lumbar spine report and films from October 31, 2018. He was also aware of an EMG from March 10, 2009 that showed acute cervical radiculopathy in the left C8 to T1 nerve root. The February 3, 2009 MRI report identified a minimal anterior disk bulge at C4-5, a minimum disk bulge at C5-6 and a minimum disk bulge at C6-7. The June 12, 2009 MRI demonstrated at C4-5, degenerative disk disease and mild right uncovertebral joint hypertrophy. At C5-6, there was a minimum diffuse disk osteophyte bulge. Dr. Schwartz summarized that the 2009 MRIs demonstrated: degenerative changes; right uncovertebral joint hypertrophy at C3-4 and at C4-5; disk osteophyte bulging at C4-5, at C5-6, and at C6-7; and a disk protrusion at T4-5.

Pursuant to the work accident, Claimant underwent an MRI of the cervical spine on October 24, 2018. Dr. Schwartz represented that the 2018 MRI did not demonstrate any traumatic or acute findings. It demonstrated C4-5 disk bulging, right greater than left, impinging on the thecal sac and C5-6 hypertrophy at the left uncovertebral level. Dr. Schwartz stated that while there was no stenosis or significant stenosis at C4-5 or C5-6 in the 2009 MRIs, such findings in the 2018 MRI would not relate to the work accident. He explained that stenosis takes years to develop. Foraminal narrowing takes time to develop. The 2018 MRI was taken four months after the work accident. It could be expected that the 2009 findings of uncovertebral joint hypertrophy

at C3-4 and at C4-5, and the findings of osteophyte disk complexes or bulging at C4-5, at C5-6 and at C6-7 would result in stenosis nine or ten years later. In other words, if stenosis was caused by a singular traumatic event, the traumatic event would have had to occur years prior, not months.

Another reason why the 2018 MRI findings would not be causally related to the work accident is because even without comparing the 2018 MRI findings to any other MRI, the 2018 MRI findings were nonspecific and did not correlate with objective findings. Consequently, the MRI findings could not be causally related to any single acute traumatic event, including the work accident. Although hypothetically Claimant's preexisting condition could have been aggravated by the work accident, the medical evidence in this case does not support the causal relationship. There was no evidence of a new problem resulting from a months old traumatic event – there was no objective findings upon examination of a potential cervical radiculopathy.

The October 31, 2018 MRI of the lumbar spine demonstrated at L5-S1 edema in the interspinous ligaments that Dr. Schwartz remarked could reflect possible ligamentous tears. Dr. Schwartz clarified that a ligamentous tear is in a different location than the annulus. Dr. Schwartz acknowledged that a ligamentous tear could produce pain. He acknowledged that the finding of edema (swelling) is indicative of an acute finding. He emphasized that the MRI did not demonstrate a disk herniation or a finding that was pressing on the nerve. The finding was outside the neural canal. Dr. Schwartz represented that interspinous ligament strains heal and could resolve in three months.

Dr. Schwartz recognized that Dr. Grossinger conducted an EMG that was positive for radiculopathy. Dr. Schwartz challenged the reliability of Dr. Grossinger's EMG results. Dr. Schwartz explained that MRI findings are objective. However, EMG studies are not entirely

objective. Although the patient cannot manipulate the results, the EMG findings are dependent on the interpretation of the doctor conducting the EMG. Dr. Schwartz remarked that he has often seen Dr. Grossinger opine radiculopathy from an EMG that does not correlate with Dr. Grossinger's clinical examination findings. In such cases, as in this case, the EMG should be met with skepticism.

Dr. Schwartz explained why he opined that Claimant's injuries were limited to cervical and lumbar strains and sprains and did not include a concussion diagnosis. Dr. Schwartz emphasized that the medical records from Johns Hopkins on the day of the work accident did not show any evidence of a concussion, of a neck injury or of a back injury. Claimant's only complaint was of abdominal tightness. She was seat-belted during the time of impact. Claimant was admitted mainly because she was seven months pregnant and was having abdominal tenderness.

The records indicated that they conducted some form of musculoskeletal examination. They took a review of symptoms. Claimant's neck had normal range of motion. Claimant was negative for arthralgias and myalgias. With respect to the head, the medical records stated normal cephalic, atraumatic. The medical records pertaining to her discharge on June 21, 2018 – the day after the work accident – did not identify any complaint or diagnosis related to the neck, to the back, to the head, or to a concussion.

Claimant next treated with her doctor on June 26, 2018 - six days after the work accident. Among other complaints, Claimant complained of headaches and of migraines. This was the first documentation of headaches, of migraines, of neck complaints and back complaints post-dating the work accident. The doctor identified a myriad of diagnoses including: a cervical sprain; a thoracic sprain; a lumbar sprain; brachial neuritis; lumbosacral radiculitis; and post concussive syndrome.

Dr. Schwartz testified that he has treated patients who have not presented with neck or back complaints immediately following a low-impact injury. Some patients presented with such complaints a week after the event. Consequently, Dr. Schwartz is not disputing that Claimant may have strained her neck and back as a result of the work accident despite the lack of neck and back complaints on the day of and the day after the work accident.

On the other hand, a concussion is not like a muscular neck or back injury that can have a delayed onset of identified symptoms. Symptoms of a traumatic brain injury or concussion are apparent at the time of the event and resolve over time. The symptoms appear immediately so it would not make sense for concussion symptoms to appear days after the traumatic event. According to the *AMA Guides to the Evaluation of Permanent Impairment*, symptoms from a mild traumatic brain injury generally resolve in days to weeks and leave the patient with no impairment.

Dr. Schwartz noted that Claimant had a long history of headaches which under cross-examination he clarified that the history extended for at least over a year prior to the work accident. Medical records from March 2, 2017 indicated the Claimant had persistent headaches and visual changes and underwent an MRI of the brain the same day. The MRI demonstrated nonspecific white matter disease. Claimant underwent a CT scan of her head on March 23, 2017 that showed subcentimeter nodular focus. The report indicated that Claimant should undergo an MRI with gadolinium.

Claimant had a long history of headaches associated with each of her three pregnancies. Medical records from January 17, 2018 Christiana Care Neurology Specialists indicated that Claimant was concerned about her migraine headaches during her pregnancy. Dr. Schwartz emphasized that despite the history of an association of headaches with pregnancy, Claimant was

seven months pregnant at the time of the work accident and did not present with headaches on the day of or day after the work accident.

Dr. Schwartz acknowledged that Dr. Grossinger's August 16, 2018 ImPACT testing identified a mild to moderate multi-focal brain injury referable to the work accident. According to the ImPACT test, Claimant had a moderate injury with respect to reaction time, composite and percentile, and a mild injury to verbal memory. Dr. Schwartz admitted that he is not aware of any neurological treatment Claimant may have undergone prior to the work accident. Dr. Schwartz also admitted that he does not have training in neurology and does not conduct ImPACT testing.

On the day of the first defense medical examination, Claimant complained of neck pain and of back pain that she rated at a four on a ten-point pain scale. She stated she had three headaches per day since the work accident. She was able to perform all her activities of daily living.

Claimant denied having any prior motor vehicle accidents, yet Dr. Schwartz learned of the September 29, 2007 motor vehicle accident from his records review. Claimant also was not forthcoming about her headache history. She represented that her only history of headaches predating the work accident related to each of her three pregnancies. Dr. Schwartz suspected Claimant could have had headaches and migraines associated with things in addition to her pregnancies. She had been undergoing MRIs associated with her headaches. She has been treated for headaches.

Based on Claimant's complaints and the diagnoses, Dr. Schwartz would have expected upon physical examination to detect spasm, guarding, and evidence of radiculopathy. Instead, objectively Claimant's neurologic examinations of her upper and lower extremities were normal. She had normal motor strength, normal sensation, normal reflexes and no atrophy. She had

nonspecific subjective complaints in the neck and the back. She had full pain-free range of motion of the shoulders, with a normal sensory examination. She had negative straight leg raise test.

Subjectively, Claimant had mildly restricted cervical range of motion and tenderness. She had restricted lumbar range of motion. She had nonspecific subjective complaints that were not associated with any radiculopathy. While Dr. Schwartz could not say that her complaints were not real, objectively there was no evidence of any injury associated with the work accident.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

In order to be compensable, the injury must arise out of or be in the course of employment. 19 Del. C. § 2304. As this is the Claimant's Petition, Claimant has the burden to prove by a preponderance of the evidence that the injury was caused by the work accident. *Goicuria v. Kauffman's Furniture*, Del. Super., C.A. No. 97A-03-005, Terry, J., 1997 WL 817889 at \*2 (Oct. 30, 1997), *aff'd*, 706 A.2d 26 (Del. 1998). The "but for" definition of proximate cause that is used in the area of tort law is the applicable standard for causation. *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. Supr.1992). Hence, the Claimant must prove that "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 purposes of compensability." *Reese*, 619 A.2d at 910.

It is undisputed that Claimant was involved in a compensable work accident. What is disputed is the extent of Claimant's injuries. Claimant contends that she sustained a concussion, a cervical spine injury with a radicular component, and a lumbar spine injury with a radicular component. Employer contends that Claimant's injuries are limited to cervical and lumbar sprains that resolved by the time of the first defense medical examination. Based on the entirety of the evidence incorporated herein, the Board finds that Claimant's work injuries are limited to strains

and sprains of the cervical and lumbar spines. The Board rejects the contention that Claimant's work accident-related cervical and lumbar spine injuries have radicular components. In addition, the Board does not find that Claimant sustained a concussion or a brain injury as a result of the work accident. The Board accepts the medical opinions of Dr. Schwartz over the medical opinions of Dr. Grossinger. Dr. Schwartz presented more credibly than Dr. Grossinger.

Claimant has a history of headaches and migraines particularly associated with pregnancies. She also has a history of visual changes associated with her headaches or migraines. In June 2016, Claimant complained to Dr. Pahwa of having had three migraines that day with loss of vision in one eye. In 2017, Claimant treated twice for migraines with blurred vision. She underwent an MRI of the brain and a CT scan of the head. In 2018 prior to the work accident, she treated once for migraines.

On the day of the work accident, June 20, 2018, Claimant treated at Johns Hopkins. According to the weight of the evidence, the medical records only identified abdominal tightness under complaints although Dr. Grossinger's testimony suggested complaints of headaches with blurred vision may have appeared elsewhere in the medical records.<sup>1</sup> Claimant was seven months pregnant at the time of the work accident. As stated above, she had a history of headaches with visual changes associated with her pregnancies. According to the medical records, they took a review of systems. She had a normal cephalic, atraumatic presentation. Claimant was admitted to the hospital out of concern about the viability of her fetus.

The next day, before being discharged, Claimant met with a nurse who documented complaints of asthma. There was no indication of any signs or complaints of concussive symptoms

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<sup>1</sup> At one point, Dr. Grossinger testified that the first documented headache and blurred vision complaints were on June 26, 2018 – six days after the work accident. However, at another point, Dr. Grossinger indicated that the medical records from that visit mentioned headaches with blurred vision. The latter line of testimony did not appear to suggest such notations were under the section of specific complaints.

in the Johns Hopkins medical records. There was no evidence that Claimant hit her head. Dr. Schwartz testified that concussive symptoms present immediately. The Board does not accept Dr. Grossinger's testimony that Claimant had concussive symptoms but did not report them because she wanted to "tough it out." Claimant presented with other complaints including of asthma. The Board finds that had Claimant experienced concussive symptoms, they would have been documented. The Board accepts Dr. Schwartz's testimony and is satisfied that the lack of evidence of immediate concussive-related complaints or of a head/brain injury is sufficient to break the causal relationship of her contended complaints to the work accident.<sup>2</sup>

With respect to the neck and the lower extremities, it is undisputed that Claimant did not present at Johns Hopkins with neck or back complaints.<sup>3</sup> She underwent some form of an examination. She had normal range of motion of the neck. She was negative for arthralgias and myalgia. Claimant contends that she developed neck and back complaints the next day.

Claimant has a history of neck complaints predating the work accident. Claimant was involved in a motor vehicle accident from which she injured her neck and treated for neck and radicular complaints at least into 2009. Claimant testified that her neck pain extended into her left arm whereas now it extends to both arms. She underwent two MRIs of the cervical spine in 2009 that demonstrated disk bulges at C4-5, C5-6 and C6-7 and mild right uncovertebral joint hypertrophy at C3-4 and at C4-5. Pursuant to the work accident, on October 24, 2018, Claimant underwent an MRI of the cervical spine that presented with new findings of impingement and stenosis. Dr. Schwartz testified that while stenosis and impingement did not present in the 2009

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<sup>2</sup> Under these set of facts and given Claimant's history, even if Claimant complained of headaches and blurred vision at Johns Hopkins, the Board was not be satisfied that mere complaints of headaches with blurred vision would rise to a level of sustaining a concussion without additional concussive-related symptoms.

<sup>3</sup> The Board notes that at one point, Dr. Grossinger testified that the focus at Johns Hopkins was on the viability of Claimant's fetus to the exclusion of her neck, back and other complaints.

MRIs, such findings were a progression of the 2009 findings; they take time to develop. Such findings were not traumatically related. Dr. Grossinger acknowledged that while the findings of stenosis and impingement in the 2018 MRI were new, they were degenerative changes that became symptomatic and aggravated as a result of the work accident. Hence, both Dr. Schwartz and Dr. Grossinger testified that such findings were degenerative.

Dr. Schwartz acknowledged that the lumbar spine MRI demonstrated acute findings noted by edema in the interspinous ligaments at L5-S1. He opined that such finding could reflect possible ligamentous tears that could resolve in three months. Dr. Grossinger did not present much evidence regarding the nature of Claimant's alleged lumbar spine injuries and why they would relate to the work accident.

Dr. Schwartz testified that soft tissue injuries can have a delayed presentation. He gave Claimant the benefit of the doubt despite the lack of immediate neck and back complaints and opined that Claimant sustained sprains and strains of the cervical and lumbar spines as a result of the work accident. Dr. Schwartz examined Claimant on November 15, 2018. Although Claimant presented with subjective nonspecific complaints involving her cervical and lumbar spines, such complaints were not supported by the objective defense examination findings and were not associated with radiculopathy. Claimant's upper and lower extremity neurologic examinations were normal. She had normal motor strength, normal sensation, normal reflexes and no atrophy. She had full pain-free range of motion of the shoulders, with a normal sensory examination. She had negative straight leg raise test. Dr. Schwartz concluded that Claimant's work injuries resolved by the time of his defense medical examination.

It is Claimant's burden to prove the extent of her work injuries. The Board is not satisfied that Claimant met her burden of proof that her cervical and lumbar injuries involve more than just sprains and sprains. Claimant did not present enough evidence to describe her cervical and lumbar spine symptoms from the time of the work accident until she commenced treating with Dr. Grossinger on August 2, 2018. It would have been helpful to hear more about Dr. Pahwa's physical examination findings on June 26, 2018. Just because symptoms either develop or worsen after a work accident does not necessarily mean such symptoms are the result of a work accident.

Claimant was not forthcoming to Dr. Schwartz about her neck injury from a 2008 work accident. Her presentation is highly subjective. Dr. Grossinger's testimony was not convincing. The Board accepts the opinions of Dr. Schwartz and finds that Claimant's injuries are limited to cervical and lumbar sprains and strains that resolved by November 15, 2018. With respect to the contended period of total disability, the Board will rely on Claimant's treating doctor and award Claimant total disability from June 26, 2018 through September 1, 2018.

#### **Medical Witness Fees and Attorney's Fee**

Under 19 *Del. C.* § 2322(e), the employer shall pay for Claimant's medical expert's fees in the event Claimant receives an award. In light of the fact that Claimant's petition is being granted in part, the Board awards Claimant payment of her medical expert witness' fees.

A claimant who is awarded compensation generally is entitled to payment of "a reasonable attorney's fee in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller...." 19 *Del.C.* § 2320(10)(a). Attorney's fees are not awarded, however, if, thirty days prior to the hearing date, the employer gives a written settlement offer to the claimant that is "equal to or greater than the amount ultimately awarded by the Board." DEL. CODE ANN.

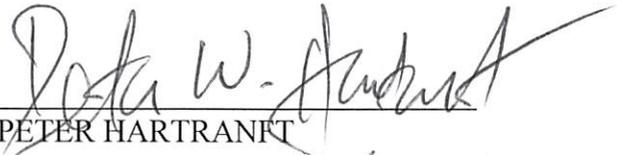
tit. 19, § 2320. Employer tendered a settlement offer that was slightly greater than the award of the Board. The Board denies an award of a reasonable attorney's fee.

**STATEMENT OF THE DETERMINATION**

For the reasons set forth above, Claimant's Petition to Determine Compensation Due is granted in part. The Board recognizes that as a result of the work accident, Claimant sustained sprains and strains of the cervical and lumbar spines as a result of the work injury. Claimant is awarded: payment of outstanding medical expenses; payment of total disability benefits from June 26, 2018 through September 1, 2018; and payment of her medical expert witness' fee.

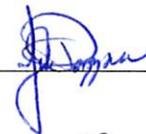
IT IS SO ORDERED THIS 22<sup>nd</sup> DAY OF NOVEMBER, 2019.

**INDUSTRIAL ACCIDENT BOARD**

  
\_\_\_\_\_  
PETER HARTRANFT

  
\_\_\_\_\_  
ANGELIQUE RODRIGUEZ

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

  
\_\_\_\_\_  
TP

Mail Date: 11/26/19

OWC Staff