

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

DEBORAH KREUZWIESER,)	
)	
Employee,)	
)	
v.)	Hearing No. 1466189
)	
SANDRA KITE,)	
)	
Employer.)	

ORDER ON EMPLOYER’S MOTION FOR REARGUMENT

On July 3, 2019, Claimant filed a Petition to Determine Additional Compensation Due in which she sought payment for medical expenses related to a surgery at C5-6 and C6-7¹. Employer filed a Motion to Dismiss which after a hearing on Employer’s Motion that occurred on September 19, 2019, the Board denied.

Employer filed a Motion for Reargument to which Claimant filed an opposing response. After reconsidering the evidence presented at the Motion hearing and reviewing the submissions by both counsel pursuant to Employer’s Motion to Dismiss and Motion for Reargument, the Board vacates its prior Order and grants Employer’s Motion to Dismiss.

Findings of Fact

On April 17, 2016, Claimant was leading a horse out of a stall at Delaware Park for Employer when the horse reared after becoming frightened by a chair in its path. Claimant sought treatment by Dr. Bose. Since the time of the work accident into 2017, Claimant underwent treatment and multiple diagnostic tests identifying issues at various levels of the cervical spine to

¹ According to Employer’s Brief pursuant to its Motion for Reargument, the surgery was performed on March 5, 2019 and it was a C3-7 anterior posterior cervical discectomy, decompression and interbody fusion with instrumentation.

include a nondisplaced fracture at C2 and other issues from C3 through C7. Dr. Bose's medical notes from Claimant's office visit on November 3, 2017, indicated that Dr. Bose discussed with Claimant two surgical options, one involving C5-6 and C6-7 and one involving C3-7 based on MRI findings.

On November 29, 2017, Claimant and Employer entered into an Agreement for compensation in which the parties specifically stated that "the only injuries sustained were a right shoulder biceps tendon rupture with a SLAP tear; left thumb fracture; left leg contusion; and cervical fracture of Employee's C2 vertebra." This Agreement became final and binding when approved by the Board on January 19, 2018.

On April 11, 2018, Claimant and Employer entered into a supplemental Agreement to pay for additional medical expenses that related to the identical injuries identified in the original Agreement – injuries limited to "only" a right shoulder, biceps tendon rupture with a SLAP tear; left thumb fracture; left leg contusion; and cervical fracture of Employee's C2 vertebra. This second Agreement became final and binding when the Board approved it on June 15, 2018.

Claimant contends that under 19 *Del. C.* §2344 and §2347, she has a statutory right to petition the Board to review the previous agreement between her and Employer on the grounds that her condition has changed. Claimant did not waive her right to petition the Board for additional compensation due under either Agreement. Claimant added that the second agreement did not identify the specific treatment it covered but rather indicated that Employer agreed to pay additional medical expenses related to the work accident. Claimant contends that the surgery at C5-6 and C6-7 qualifies as additional treatment under the second Agreement because it was reasonable, necessary and causally related to the work accident.

To clarify the Board's decision denying Employer's Motion to Dismiss, the Board did not find that the terms of either Agreement with respect to the acknowledged injuries were ambiguous. The terms were clear. However, based on the representations of Claimant's counsel at the hearing on Employer's Motion to Dismiss, the Board was under the impression that her contended injuries causing the need for surgery at C5-6 and C6-7 arguably were new – she had a changed condition resulting from the original work injury that the causal relationship of such injury would more appropriately be decided after a hearing on the merits.²

However, after reconsideration of this matter, the Board finds that this is not a situation in which Claimant's condition changed or a situation in which after the execution of the Agreements, a new injury developed through a progression caused by the initial work injury. The surgery at issue did not address C2 nor did it address a C2 fracture (the specific accepted injury). Claimant discussed with Dr. Bose the exact surgery at issue³ prior to entering the first Agreement – an agreement that limited the cervical aspect of Claimant's injury to C2. The need for this surgery was ongoing before and after the execution of the second Agreement. Claimant explained in her response to Employer's Motion to Dismiss that she did not pursue the surgery at issue initially because she was grieving the passing of a family member. Thereafter, Dr. Bose left the country. Essentially, the delay was the result of scheduling issues. Claimant did not proffer such explanation at the hearing on Employer's Motion instead, Claimant represented that such condition was unknown – a misrepresentation. Claimant had the opportunity to include other cervical levels addressed in the surgery as compensable injuries when she entered into either Agreement but instead, limited the cervical aspect of her injuries to C2.

² Employer at the hearing on its motion contended that the alleged injuries were not new but rather known leading up to the time the parties agreed to limit the cervical spine injury to C2.

³ Dr. Bose discussed with Claimant the options of proceeding with the surgery Claimant identified in her Petition to Determine Additional Compensation Due and the surgery Employer indicated Claimant underwent on March 5, 2019.

The Board rejects Claimant's argument that the fact that the additional treatment pursuant to the second Agreement was not specifically identified leaves open the opportunity to recognize the compensability of treatment directed to cervical levels in addition to C2. The second Agreement makes clear that the cervical injury is limited to C2.

WHEREFORE, Employer's Motion is for Reargument is GRANTED and the Board's Order denying Employer's Motion to Dismiss Claimant's Petition to Determine Additional Compensation Due is vacated. The Board grants Employer's Motion to Dismiss Claimant's Petition for Additional Compensation Due.

IT IS SO ORDERED this 3 day of FEBRUARY, 2020.

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.

Mailed Date: 2-6-20

[Signature]

[Signature]
OWC Staff

Leo Boyle, Attorney for Claimant
Joseph Andrews, Attorney for Employer/Carrier