

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

STATE OF DELAWARE, )  
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 )  
 Appellant/Employer-Below, )  
 ) C.A. No. N19A-02-004 FWW  
 v. )  
 )  
 GEORGE CALDER, )  
 )  
 Appellee/Claimant-Below. )

Submitted: July 8, 2019  
Decided: October 16, 2019

*Upon Appeal from the Industrial Accident Board:*  
**AFFIRMED**

**OPINION AND ORDER**

Susan List Hauske, Esquire, Kenneth L. Wan, Esquire, Tybout Redfearn & Pell, 750 Shipyard Drive, Suite 400, Wilmington, DE 19801, Attorneys for Appellant/Employer-Below.

Joseph J. Rhoades, Esquire, Stephen T. Morrow, Esquire, Rhoades & Morrow, LLC, 1225 King St., 12<sup>th</sup> Floor, Wilmington, DE 19806, Attorneys for Appellee/Claimant-Below.

**WHARTON, J.**

## I. INTRODUCTION

Before the Court is an appeal from a January 18, 2019 decision by the Industrial Accident Board (“Board”) granting Appellee George Calder’s (“Calder”) Petition for Additional Compensation Due to cover recommended cervical spine surgery in relation to an earlier compensable accident sustained while employed by Appellant State of Delaware (“State”).

On appeal, the Court must determine the narrow issue of whether the Board reconsidered a factual contention it previously rejected in its 2005 Decision on Petition to Terminate Benefits. Upon consideration of the pleadings before the Court and the record below, the Court finds that the Board had not previously decided whether Calder required surgery. The Court further finds that the issue of whether Calder’s work injury aggravated a preexisting degenerative condition was not fully litigated and resolved in the original proceeding. Moreover, there is substantial evidence to support the Board’s decision and its decision is free from legal error. Accordingly, the Board’s decision is **AFFIRMED**.

## II. FACTS AND PROCEDURAL HISTORY

In August 2004, Calder injured his left shoulder and cervical spine within the course and scope of his employment while lifting a K-9 cage so that he could access

a cable modem for a computer in a police vehicle.<sup>1</sup> In December 2004, the State acknowledged his injuries as compensable and the parties agreed to a period of total disability.<sup>2</sup> In January 2005, the State filed a Petition for Termination of Benefits, alleging that Calder was able to return to modified duty work.<sup>3</sup> In May 2005, the Board held a hearing on the State’s petition.<sup>4</sup>

The 2005 hearing was a total disability termination case. The issue before the Board was whether Calder was “physically capable of working.”<sup>5</sup> Dr. Conrad King testified on behalf of Calder, and Dr. Donald I. Saltzman testified on behalf of the State. Both doctors agreed that Calder suffered a soft tissue injury to his left shoulder, mid-back, and neck.<sup>6</sup> Dr. King believed that the event aggravated a degenerative spine condition and contributed to Calder’s continuing difficulties.<sup>7</sup> Dr. Saltzman disagreed and the Board gave greater weight to Dr. Saltzman’s view on that point.<sup>8</sup> Both doctors agreed that the only continuing treatment Calder needed was pain medication and monitoring.<sup>9</sup> Significantly, on the dispositive issue –

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<sup>1</sup> App. Ans. Br. Ex. A at 2 (2019 Decision).

<sup>2</sup> App. Ans. Br. Ex. E at 2 (2005 Decision).

<sup>3</sup> *Id.*

<sup>4</sup> Calder also sought payment of certain medical expenses incurred during disability. *Id.*

<sup>5</sup> *Id.* at 10.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 11.

Calder's ability to work - the Board found that the doctors' assessments did not significantly differ.<sup>10</sup> Both felt that Calder could return to work, albeit in somewhat different capacities.<sup>11</sup> Dr. Saltzman thought Calder had been capable of working fulltime in a restricted capacity since at least November 11, 2014, while Dr. King planned to release Calder to sedentary part time work on May 3, 2005.<sup>12</sup>

After the hearing, Calder continued to receive medical care related to his cervical spine injury.<sup>13</sup> An orthopedic surgeon, Dr. Bruce Rudin, recommended cervical spine surgery due to Calder's work injury.<sup>14</sup> The State denied the claim saying it was not reasonable, necessary, or causally related to the work injury.<sup>15</sup> In February 2018, Calder filed a Petition to Determine Additional Compensation Due and sought acknowledgement of the compensability of the recommended surgery.<sup>16</sup>

At the 2018 hearing, the Board found that Calder had proven by a preponderance of the evidence that the cervical spine surgery was reasonable, necessary, and causally related to the work accident.<sup>17</sup> At that hearing, the Board heard competing opinions offered by doctors testifying on behalf of Calder and the

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 10, 11.

<sup>13</sup> App. Ans. Br. Ex. A at 2 (2019 Decision).

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 2, 20.

State. The Board accepted the opinion of Dr. Rubin, who testified on behalf of Calder, that the work accident caused what had been a previously asymptomatic preexisting degenerative condition in Calder's cervical spine to become symptomatic warranting surgical intervention.<sup>18</sup> It found less credible, and thus rejected, the testimony of Dr. Scott Rushton, who opined that surgery was not reasonable, necessary, or causally related to the work injury.<sup>19</sup>

The State now appeals that ruling.

### III. STANDARD OF REVIEW

This Court's review of an Industrial Accident Board's decision is limited to determining whether it is supported by substantial evidence and free from legal error.<sup>20</sup> "Substantial evidence is defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"<sup>21</sup> This Court does not sit as a "trier of fact with authority to weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions."<sup>22</sup> Thus, this Court reviews the entire record to determine whether the Board could have fairly and reasonably reached its conclusion and only when there is no satisfactory proof in

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Holiday Inn Downtown v. Clark*, 1999 WL 167789, at \*3 (Del. Super. Ct. Jan. 12, 1999).

<sup>21</sup> *Streett v. State*, 669 A.2d 9, 11 (Del. 1995), *as revised* (Oct. 5, 1995).

<sup>22</sup> *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. Super. 1965).

support of a factual finding of the Board, will this Court overturn it.<sup>23</sup> Whether the Board was barred by *res judicata* or collateral estoppel raises a question of law that this Court reviews *de novo*.<sup>24</sup>

#### IV. DISCUSSION

The State contends that: (1) the Board's decision should be reversed under the doctrines of *res judicata* and collateral estoppel because the Board made a factual finding at Calder's 2005 hearing that Calder's work accident did not aggravate any degenerative condition of the cervical spine; and (2) the Board lacked substantial evidence to support its 2019 decision.<sup>25</sup> Calder argues that neither doctrine applies because the 2005 and 2019 decisions examined different issues.<sup>26</sup> The Court agrees with Calder. The 2005 decision evaluated the permanence of appellee's disability.<sup>27</sup> The 2019 decision is the first time the Board evaluated the necessity of Calder's proposed anterior cervical fusion at C4-5 and its relatedness to the originally compensable work injury. Further, the Board's 2019 decision is supported by substantial evidence in the record.

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<sup>23</sup> *Id.*

<sup>24</sup> *Betts v. Townsends, Inc.*, 765 A.2d 531, 533 (Del. 2000).

<sup>25</sup> Op. Br. at 10.

<sup>26</sup> Reply Br. at 14.

<sup>27</sup> App. to Op. Br. Ex. C at 19, (2005 Board Decision) (“[T]he Board finds that Claimant’s total disability status has terminated and he is entitled to compensation for partial disability. The State of Delaware’s petition to terminate is granted effective the date of this decision and partial disability is awarded. . .”).

### **A. The Doctrines of Res Judicata and Collateral Estoppel Do Not Apply**

The doctrine of *res judicata* prevents needless litigation by precluding parties from “bringing a second suit based on the same cause of action after a judgment has been entered in a prior suit involving the same parties.”<sup>28</sup> Similarly, the doctrine of collateral estoppel precludes relitigation of an issue of fact where a court or administrative agency necessarily has determined that same issue in the prior matter and the subsequent matter involves a party to the first case.<sup>29</sup> “Essentially, *res judicata* bars a court or administrative agency from reconsidering conclusions of law previously adjudicated while collateral estoppel bars relitigation of issues of fact previously adjudicated.”<sup>30</sup>

The Board has statutory authority, under 19 *Del. C.* § 2347, to review a prior compensatory claim “on the ground that the incapacity of the injured employee has subsequently terminated, increased, diminished or recurred.”<sup>31</sup> Under these circumstances, the Supreme Court has ruled, the doctrine of *res judicata* does not apply.<sup>32</sup> Petitions to determine additional compensation due generally fall under the scope of this review.

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<sup>28</sup> *Betts*, 765 A.2d at 534.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> 19 *Del. C.* § 2347.

<sup>32</sup> See *Betts*, 765 A.2d at 534.

Here, the parties agree that Calder suffered a compensable injury in 2004.<sup>33</sup> In 2005, the Board considered the State's Petition to Terminate Benefits in which the State alleged that Calder was able to return to modified work duty.<sup>34</sup> The issue in 2005 was whether Calder was able to return to work in a modified capacity as claimed by the State. It did not determine whether Calder's compensable injury required surgery, which was the issue resolved by the Board's in its 2019 decision on the Petition to Determine Additional Compensation Due. Because the Board decided different claims at each hearing, it was not barred by the doctrine of *res judicata* from making a determination on the compensability of the recommended surgery in 2019.<sup>35</sup> Therefore, the Court concludes that the doctrine of *res judicata* does not apply to the facts of this case.

Collateral estoppel does not apply either. To determine whether collateral estoppel applies to bar consideration of an issue, a court must determine whether:

- (1) The issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the

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<sup>33</sup> App. to Op. Br. Ex. C at 2 (2005 Board Decision).

<sup>34</sup> *Id.*

<sup>35</sup> The Board's 2005 determination that Calder could return to work did not turn on resolving the disagreement between Drs. Saltzman and King concerning whether Calder's injury aggravated a preexisting degenerative spine condition, despite the Board giving greater weight to Dr. Saltzman's view.



party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.<sup>36</sup>

The first, second, and fourth factors are relevant here. Because the factual issues before the Board at the second hearing were not identical to the factual issues in the first hearing, collateral estoppel does not apply. However, even if the issues had been identical, the second factor also would prevent the applicability of the principal of collateral estoppel, because the Board did not fully adjudicate the surgery issue on the merits in the first hearing. Finally, even if the issues were identical and fully litigated on the merits, Calder did not have a full and fair opportunity to litigate the issue of surgery at the first hearing. Surgery simply was not under discussion then because Calder's doctors were not recommending it at the time.

The issue before the Board at each hearing was different. At the 2005 hearing, the issue before the Board was whether Calder could return to work and in what capacity. At the 2018 hearing, the issue before the Board was whether Calder should receive additional funds to cover the costs of a surgery he believed was necessary because of his original compensable injury.<sup>37</sup> Although both the 2005 and 2019 decisions discussed Calder's degenerative disc disease, it was discussed in different

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<sup>36</sup> *Betts*, 765 A.2d at 534.

<sup>37</sup> Decision issued January 18, 2019.

contexts. In 2005, degenerative disc disease was offered as an explanation for the chronicity of Calder's symptoms.<sup>38</sup> In 2019, it was discussed in connection with the necessity for surgery.<sup>39</sup> There was no discussion in the 2005 decision of whether surgery was an appropriate treatment. It was not an option in 2005. As a result, Calder did not have an opportunity to litigate the necessity for it, nor did the Board finally adjudicate whether the surgery contemplated in 2018 was reasonable, necessary and causally related to Calder's injury. Accordingly the first, second, and fourth *Betts* factors do not support the bar of collateral estoppel. The Board properly considered the issue of surgery and degenerative disc disease in its 2019 decision.

### **B. Substantial Evidence Exists to Support the Board's 2019 Decision**

Finally, the State argues that the Board's 2019 decision is not supported by substantial evidence because the Board was barred by *res judicata* and collateral estoppel from accepting Dr. Rudin's opinion that surgery was necessary.<sup>40</sup> Absent that required expert medical testimony, the Board's decision lacks substantial evidence for its decision. Because the Court finds both *res judicata* and collateral estoppel inapplicable for the reasons stated above, substantial evidence exists for the Board's 2019 decision in the form of Dr. Rudin's testimony.

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<sup>38</sup> App. to Ans. Br. Ex. E at 8.

<sup>39</sup> *Id.* Ex. A at 20-23.

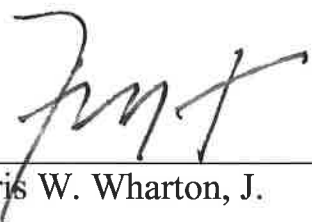
<sup>40</sup> Op. Br. at 19.

## V. CONCLUSION

The Court finds that neither *res judicata* nor collateral estoppel barred the Board's consideration of whether Calder required surgery because of his 2004 work related injury. Further, the Court finds that there is substantial evidence to support the Board's decision and its decision is free from legal error.

**THEREFORE**, the decision of the Industrial Accident Board is  
**AFFIRMED.**

**IT IS SO ORDERED.**



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Ferris W. Wharton, J.