BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

LACI NASH, Employee, v. MEDICAL MANAGEMENT INTERNATIONAL, Employer.	)	Hearing No. 1320555

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 November 21, 2008, in the Hearing Room of the Board, New Castle County, Delaware. Pursuant to Del. Code Ann. tit. 19, § 2348(k), the hearing officer required an extension of time to complete the written decision.

PRESENT:

JOAN SCHNEIKART
Workers' Compensation Hearing Officer

APPEARANCES:

Joseph W. Weik, Attorney for the Employee

H. Garrett Baker, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On May 30, 2008, Laci Nash n/k/a Laci Schaible ("Claimant") filed a Petition to Determine Compensation Due seeking compensability for injuries to her skull, jaw and teeth occurring on May 15, 2008, when she fainted while performing work as a veterinarian for Medical Management International ("MMI") at the Banfield Pet Hospital in Wilmington. Claimant seeks a finding of compensability, which MMI disputes, contending that the fainting episode causing her injuries was idiopathic, not the result of a work condition. Therefore, she has not suffered a work injury.

Pursuant to Del. Code Ann. tit. 19, §2301(B), the parties stipulated to having the matter decided by a workers' compensation hearing officer.

SUMMARY OF THE EVIDENCE

Claimant, age twenty-six, testified she began working for MMI in October 2007 as a licensed veterinarian at the Banfield Pet Hospital. As the senior surgeon, she performed surgeries 65% of the time. She had completed over 200 animal surgeries there. Her health was excellent and she was taking no medications.

On May 15, 2008, Claimant was performing a surgery in the operating room, which was eight by ten feet in size, without a window. The door to the operating room was normally closed for aseptic purposes. There was a ventilation outlet in one corner, but no way to control the temperature. Within the last eight months, she had previously contacted the MMI medical director and field director about the high temperature in the operating room. On May 15, the temperature was in the mid to high 80's. Due to the heat, she slipped off her shoes and put a cold wet towel with an ice pack on her feet. She began feeling light-headed when she started overheating. She was wearing short sleeved scrubs and an undershirt. Her surgical gown, cotton

over plastic, went from her neck to her ankles. She had snug sterile gloves on up to a few inches from her elbow. Her hair was pinned up under a surgical hat. There was also a light above the operating table, with eight incandescent light bulbs, and a heating pad on the table, which help to keep the animal warm. Claimant had performed three of seven surgeries scheduled on that date, which was a stressful schedule. She changes surgical gowns between each surgery outside of the operating room. She had not had breakfast, but that was her normal practice.

At approximately noon to 12:30 p.m., she was about 45 minutes into the abdominal surgery on a large breed dog. She had asked for a fan and for the operating room door to be opened about 10 minutes earlier. A nurse anesthetist was the only other person in the room with her. Claimant smelled the anesthesia gas on intubation, which is not uncommon, and backed away from the operating table because she felt light-headed. She then fell forward, hitting her head on the open door knob. She hit the cement floor and was unconscious for about two minutes, then awoke to pain and blood. She had never fainted before during a surgery.

After her fiancé, John, arrived, who is also a veterinarian, he drove her to the hospital at the University of Pennsylvania. Claimant vomited after regaining consciousness. Her teeth had been knocked up into her face and she had a cracked left temporomandibular joint. It hurt to open her mouth to talk. At the triage center, she described problems with fainting about ten years previously, when she was fourteen, due to heavy menstrual periods. She experienced three to four episodes of fainting back then, and was diagnosed with anemia, after which, the problem resolved with iron supplements and other medication. In August 1990, she was also thrown while riding a horse, receiving a concussion and hairline fracture of the skull, but she was released, provided stabilizing treatment and made a full recovery.

After the fall at work, she returned to the Banfield Pet Hospital and resumed her duties about six weeks later on June 28, 2008. She continued to work there until mid August 2008, when she relocated to the MMI pet hospital in Allentown. She had no other fainting episode while working for MMI, although air conditioning had been installed at the operating room in the Wilmington facility.

On cross examination, Claimant explained she did not know that she could cancel or postpone surgeries. She was an associate in the practice, not a partner, and the practice had financial goals to meet. The nurse anesthetist is not required to wear the same surgical garb as the doctor. Claimant later reported that she smelled anesthesia gas before fainting, but there was no confirmation of a leak in the endotrachial tube afterwards. Before the fainting incident, she had scheduled servicing for the anesthesia machine to take place in June 2008.

Claimant agreed that the emergency room records reflect a "history of frequent syncope" in the past, and that she did not eat breakfast that day. She normally eats a snack between surgeries but that day there were seven procedures scheduled. She can also have water between surgeries. She disagreed that she described a similar fainting episode six months before or putting a towel on her head that day, and believes she was disoriented when she regained consciousness after fainting.

John E. Schaible, III, V.M.D., testified that he married Claimant in August 2008, after meeting her about a year and half earlier. During that time, she had excellent health. He was not present at the Banfield Pet Hospital in Wilmington when the May 15 incident occurred, but had worked there previously from 2005 to 2007, performing some 1,000 surgeries. He described the single operating room as being very hot on some days, and complained to the both the field and medical directors and the chief operating officer. The temperature is controlled by a computer

system off-site. While he was there, he installed a 4,000 BTU air conditioner unit, but took it with him when he left.

On May 15, 2008, he arrived at the MMI Wilmington pet hospital about one and one-half hours after Claimant fainted, since he was coming from the MMI Allentown pet hospital. He chose to take her to the University of Pennsylvania hospital since they had a maxillofacial team on call.

Stephen Grossinger, D.O., a neurologist with a specialty in pain management, testified by deposition on behalf of MMI. He examined Claimant on September 11, 2008, and reviewed her medical records. Dr. Grossinger opined that there was no clear medical connection between Claimant's fainting episode on May 15 and her work conditions. Based on the medical records, he believed the incident was a recurrence of Claimant's prior syncope condition.

At the defense medical examination, Claimant reported that she was performing surgery as a veterinarian on May 15, 2008, when she passed out, striking her head on the door. She sustained a fracture involving the right upper jar at the alveolar gone, displacement of the right canine tooth in the upper jaw, and discomfort in the region of the left temporomandibular joint. She reported a warm temperature in the operating room and smelling anesthetic gas, which she believed were contributing factors. Claimant told the doctor about prior episodes of syncope or passing out when she was fourteen years old in association with anemia or blood loss due to her menstrual cycle. She denied any ongoing history with passing out or light-headedness.

In reviewing the eleven page record from the University of Pennsylvania medical hospital, where she was taken on May 15, 2008, Dr. Grossinger noted that an attending physician recorded that Claimant had not eaten all day and that there was a lot of blood during the surgery, which often caused her to have syncope with no etiology. Another physician at the hospital, on

that same date, recorded a history of unexplained syncopal episodes in the past, and that during long surgeries she sometimes feels light-headed and is able to avoid syncope by putting a "warm towel on her head." The last syncopal episode was more than six months ago during an "especially disgusting surgery." As a teenager, she had many episodes yearly. She was seen by physicians all over the country for these episodes when she was a child but other than attributing the cause to heavy menstrual periods, nothing was found.

Based on the University of Pennsylvania medical records, the history was not consistent with what Claimant reported to Dr. Grossinger. She did not indicate that the episodes were repeated, that she had prior problems in the operating room, or that she had a formal work-up or saw other physicians for the problem.

Dr. Grossinger confirmed that syncope can be unexplained and that testing for it can come back within normal limits. An episode can occur while doing nothing. Not eating can make an individual more susceptible based on a component of dehydration or low blood sugar.

Based on the University of Pennsylvania medical records, Dr. Grossinger opined that the episode of syncope on May 15 was a recurrence of Claimant's unexplained and prior syncope problem. The doctor could not establish a clear connection between Claimant's work and the syncope described in the emergency room records.

On cross examination, Dr. Grossinger agreed that he recorded that Claimant had been standing for about 20 minutes, wearing a cap, gown and mask, and but did not note that she was performing her fourth surgical procedure at the time of the work event. The only records that the doctor reviewed regarding any prior fainting episodes came from the emergency room report. He has not seen any primary care physician or other specialists' records reflecting a long-standing history of fainting episodes. The doctor agreed that the one reference made my

Claimant in those records describes a prior episode when she was a child, but no mention of anything when she was an adult. The "past medical history" portion in the University of Pennsylvania medical records mentions a skull fracture from a horse accident in 1991, "syncope (child)" and some reference to smoking or not smoking tobacco in the past twelve months.

Syncope, or fainting, is a loss of consciousness typically caused by a temporary loss of the brain's blood supply. It can be very transient, or a symptom of a more serious condition. Upon physical examination, the doctor did not detect any serious condition that could have caused the syncope. Fainting can have many causes, including getting up from a lying-down position rather quickly, an abnormal circulatory reflex, standing too long, environmental factors, emotional factors like stress or the sight of injury or blood, or low blood sugar, fatigue or dehydration. The doctor agreed that the last four factors were all present in the operating room on the day of Claimant's fainting spell. The doctor further agreed that if the details given in the emergency room were incorrect, it would be a consideration in reaching his conclusion that there was no clear connection between her work condition and the syncope.

On redirect examination, Dr. Grossinger agreed that the history that Claimant reported to two different physicians was consistent, and that she reported "frequent syncope, approximately four times a year." However, the doctor is not surprised that there were no recent records documenting any ongoing problems with fainting following her teen-aged years. The temperature of the operating room, and the fact that she was on her fourth surgery, was mentioned to the emergency room personnel, but there was no reference to other episodes. Dr. Grossinger believes that the consistent history given in the emergency room provided an important basis for his opinion. There were repeated references to multiple fainting episodes occurring in an unexplained fashion and a history from childhood that led the doctor to conclude

that the May 15 episode was another unexplained syncope. However, he agreed that Claimant reported that she had not eaten all day, there was a lot of blood during the surgery, she had been standing for a few hours in the operating room, and she felt hot, nauseous and was sweating. Nevertheless, during a syncope episode, an individual can feel hot and sweaty.

Claimant submitted into evidence a copy of the May 15, 2008 emergency room medical records from the University of Pennsylvania (Claimant's Exhibit No. 1).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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." Del. Code Ann. tit. 19, § 2304. Because Claimant has filed the current petition, she has the burden of proof. Del. Code Ann. tit. 19 , § 10125(c). "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).

MMI challenges compensability on the basis that Claimant's fall did not arise out of her employment. Rather, the employer argues that she fell as the result of a syncopal event having no connection to her employment. However, I find that Claimant has met her burden.

The Workers' Compensation Act ("Act") is the exclusive remedy between employer and employee for "personal injury or death by accident *arising out of* and *in the course of* employment." Del. Code Ann. tit. 19, § 2304 (emphasis added). Thus, the employment connection focuses on two aspects: whether the injury was "in the course of employment" and whether the injury arose out of that employment ("scope").

There is no dispute that Claimant's injuries to her head and face happened "in the course of employment." That term "refers to the time, place and circumstances of the injury." *Rose v. Cadillac Fairview Shopping Center Properties (Delaware), Inc.*, 668 A.2d 782, 786 (Del. Super. 1995)(citing *Dravo Corp. v. Strosnider*, 45 A.2d 542, 543 (Del. Super. 1945)), *aff'd sub nom. Rose v. Sears, Roebuck & Co.*, 676 A.2d 906 (Del. 1996). "[T]o be compensable, the injury must first have been caused in a time and place where it would be reasonable for the employee to be under the circumstances." *Rose*, 668 A.2d at 786. In this case, Claimant's injury happened in a time and place where it was reasonable for her to be under the circumstances.

The issue of "scope" (or "arising out of employment"), however, "relates to the origin of the accident and its cause." *Rose*, 668 A.2d at 786. For the purposes of this prong, it "is sufficient if the injury arises from a situation which is an incident or has a reasonable relation to the employment." *Dravo*, 45 A.2d at 544. In other words, "there must be a reasonable causal connection between the injury and the employment." *Rose*, 668 A.2d at 786. *See also Parsons v. Mumford*, Del. Super., C.A. No. 95C-09-031, Ridgely, J., 1997 WL 819122 at *3 (November 25, 1997). However, an "essential causal relationship between the employment and the injury is unnecessary. . . . [T]he employee does not have to be injured during a job-related activity to be eligible for worker's compensation benefits." *Tickles v. PNC Bank*, 703 A.2d 633, 637 (Del. 1997)(citing *Storm v. Karl-Mil, Inc.*, 460 A.2d 519, 521 (Del. 1983)).

With respect to the incident in this case, MMI argues that the fall did not arise out of Claimant's employment because it was the result of a fainting spell unconnected to that employment. This is referred to as the "idiopathic fall" doctrine. Under this doctrine, an injury sustained in a fall caused by a condition personal to the claimant does not arise out of the employment unless the employment contributed to the risk or aggravated the injury. *See* Arthur

Larson & Lex K. Larson, *Larson's Workers' Compensation Law*, § 9.01 (internet ed., accessed July 2008; <www.matthewbender.com>). Delaware case law has recognized that idiopathic falls are not compensable. In *Lecates v. Harrison House of Delmar*, Del. Super., C.A. No. 89A-AP1, Lee, J (September 28, 1990), the claimant fainted at work while unloading a dishwasher. She had had two "near-fainting" spells in the two weeks before the accident. The claimant's doctor was not asked what caused her to faint, but the employer's doctor testified that the fainting was due to a medical condition of the claimant that was unrelated to her work. Judge Lee held that the injury from the fall was not compensable because it was uncontroverted that the cause of the fall was the faint, and it was also uncontroverted that the faint was caused by a medical condition unrelated to employment. *Lecates*, at 4.

I find there is a difference between *Lecates* and the case *sub judice*. In *Lecates*, the employer's doctor testified that the fainting was the result of a separate medical condition of the claimant that was unrelated to her employment, while the claimant's doctor did not opine as to the cause of the claimant's faint. In this case, Claimant provided no expert medical testimony as to causation of the fainting episode. Nevertheless, MMI's medical expert, Dr. Grossinger, opined that the syncope on May 15, 2008, was a recurrence of Claimant's unexplained and prior syncope problem. However, unlike the medical expert in *Lecates*, Dr. Grossinger conceded on cross examination that he did not detect any serious condition that could have caused the fainting spell for Claimant, and reviewed no medical records prior to May 15, 2008. Furthermore, he agreed that at least four of the common factors, not connected to an underlying serious condition, but capable of causing fainting, may have been present in the MMI operating room on that date. These included Claimant's standing for more than three hours performing four out of the seven surgeries on schedule that day, an operating room with a temperature in the mid to high 80s, the

wearing of surgical garb, a stressful surgery accompanied by an abundance of blood, possible low blood sugar from not eating, fatigue and dehydration. In addition, Dr. Grossinger's opinion for not relating Claimant's syncope to work focused primarily on the "past medical history" reported in the contemporaneous University of Pennsylvania emergency room medical records, rather than a review of actual past medical records or any consideration for the actual facts and circumstances in the operating room on the date of injury.

I find the testimony of Claimant and her fiancé, John, who are both medically trained in veterinary science, to be credible. Based on this testimony, there is no substantial evidence that Claimant had any preexisting medical condition that could be considered the cause of her fainting episode on May 15, 2008. At most, there is a suggestion that Claimant had a prior syncope condition more than twelve years before when she was fourteen and which resolved, along with some sketchy and inconsistent references in the contemporaneous emergency medical records to a more recent fainting event, which Claimant explicitly disavows.

Therefore, I reject Dr. Grossinger's causation opinion based on the totality of the circumstances in this case. There was no convincing independent evidence that Claimant continued with a fainting problem after her teen-aged years. I find Claimant's testimony credible concerning her work duties and the environmental conditions of the operating room, corroborated by her fiancé, who also had worked at the same facility previously. There were no employer witnesses to dispute those facts. As a result, I conclude that those conditions and Claimant's work duties were competent to trigger a syncopal event, which occurred on May 15, 2008.

Claimant does not have to prove causation to a certainty or beyond a reasonable doubt. She only has to establish that, more likely than not, her syncopal episode was causally related to

her work. Given Dr. Grossinger's concession to causation on cross examination, the probable cause of the fainting episode on May 15 was a combination of overheating and overwork. Substantial evidence from prior medical records to suggest anything else as a likely cause is lacking. Claimant reported that she had four episodes of syncope approximately twelve years ago, which was diagnosed as anemia and later resolved. The University of Pennsylvania emergency room medical records which reference a syncopal episode occurring about six months before and Claimant's feeling light-headed during long surgeries may be explained by her testimony that she was disoriented after the traumatic fall at work. The only "evidence" of some preexisting condition that might result in syncope comes from Claimant's own attempts, after the fact, to give a history to the medical providers at the University of Pennsylvania emergency room.

Finally, consistent with the Larson text cited above, even if Claimant did have a syncopal condition, it is also well established in Delaware case law that injuries sustained in an idiopathic fall can be found compensable if the employment contributes to the harm, such as by triggering the idiopathic condition. "A preexisting disease or infirmity, whether overt or latent, does not disqualify a claim for workers' compensation if the employment aggravated, accelerated, or in combination with the infirmity produced the disability." *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992). An employer takes the employee as it finds him. *Reese*, 619 A.2d at 910. "If the injury serves to produce a further injurious result by precipitating or accelerating a previous, dormant condition, a causal connection can be said to have been established." *Reese*, 619 A.2d at 910.

Applying this legal framework to the facts in this case, if Claimant indeed had a pre-existing syncopal condition, the conditions of her work environment in the operating room on

that date may be said to have exacerbated her latent condition causing her injuries. Thus, the incident would also be deemed compensable.

For the above reasons, I conclude that Claimant has carried her burden to establish compensability for a work-related fainting episode that resulted in traumatic injuries to her in this case.

Attorney's Fees and Medical Witness Fees

A claimant who receives an award of compensation is entitled to 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 less. Del. Code Ann. tit. 19, § 2320. The term "compensation," for the purposes of awarding an attorney's fee, refers to "any favorable change of position or benefits, as the result of a Board decision, rather than just being limited to contemporaneous financial gain." *Willingham v. Kral Music, Inc.,* 505 A.2d 34, 36 (Del. Super. 1985), *aff'd.,* 508 A.2d 72 (Del.1986).

In determining an award of attorney's fees, the Board must consider ten factors.[1] *See General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973)(applied to I.A.B. hearings by *Jennings v. Hitchens,* 493 A. 2d 307, 310 (Del. Super. 1984); *Thomason v. Temp Control*, Del. Super., C.A. No. 01A-07-009, Witham, J., *slip op.* at 5 - 6 (May 30, 2002). It is an abuse of the Board's discretion to fail to give consideration to these factors. *Thomason* at 7. When claimants seek an award of attorney's fees, they bear the burden of establishing entitlement to such an award. *Downes v. Phoenix Steel Corp.*, Del. Super., C.A. No. 99A-03-006, 1999 WL 458797 at

[1] The factors to be considered are: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill needed to perform the services properly; (2) the likelihood (if apparent to the client) that acceptance of the employment would preclude other employment by the attorney; (3) the fees customarily charged in the locality for such services; (4) the amount involved and the results obtained; (5) time limitations imposed by the client or the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation and ability of the attorney; (8) whether the fee is fixed or contingent; (9) the employer's ability to pay; and (10) whether fees and expenses have been or will be received from any other source.

**4, Goldstein, J. (June 21, 1999)(the burden of proof in a workers' compensation case is on the moving party). Since the Board must consider the *Cox* factors when reviewing a request for fees, it follows that claimants must address these factors in their applications. The failure to do so deprives the Board of the facts it needs to properly assess a claimant's entitlement to fees.

Counsel for Claimant seeks a fee up to the statutory maximum. Counsel submitted an affidavit attesting that he spent 14.75 hours preparing for the evidentiary hearing held on November 21, 2008, which lasted approximately two hours. His association with Claimant began in May 2008. Counsel has a one-third contingency fee arrangement with Claimant. He has been admitted to the practice of law in Delaware since 1979 and has extensive prior experience handling workers' compensation matters. Counsel attested that acceptance of the case, which he found to be of average complexity, precluded him from working on other cases when working on the case. He does not expect to receive compensation from any other source in this case. MMI had no comment on the request for attorney's fees. The sole issue before the hearing officer was compensability.

When dealing with an "award" for a non-monetary benefit, such as compensability, the Board must still value the award with reference to an actual monetary amount affected by the ruling, so that there is some actual number against which to apply the statutory 30% calculation. *See Scott v. E.I. DuPont de Nemours & Co.*, Del. Super., C.A. No. 97A-06-008, Lee, J., 1998 WL 283455, at **4(March 30, 1998). Since I have determined that Claimant sustained a compensable injury, which represents a favorable change in position, I must look to her resulting entitlement to workers compensation benefits related to that finding. In this case, no actual medical bills were presented into evidence. Therefore, I determine that compensability

represents the only actual contested issue at this point, and will use that factor in assessing an appropriate attorney's fee within the limits set forth in Section 2320.

Taking into consideration the *Cox* factors set forth above, I conclude that an attorney's fee award of $4,606.25 (based on 16.75 hours of attorney time) is an appropriate fee and does not exceed the statutory maximum.

STATEMENT OF THE DETERMINATION

Based on the foregoing, I hereby GRANT Claimant's Petition to Determine Compensation Due and determine a compensable work accident occurred on May15, 2008, from which she sustained injuries to the head and face. Claimant is also awarded one attorney's fee.

IT IS SO ORDERED this 23rd day of June, 2009.

JOAN SCHNEIKART
Workers' Compensation Hearing Officer

Mailed Date: 6-25-09

OWC Staff