

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

CHERYLE HAIRSTON,)
)
Employee,)
)
v.)
)
CHRISTIANA CARE HEALTH SERVICE,)
)
Employer.)

First Decision of
IAB on Appeal
Hearing No.: 1285568 *From*
Utilization Review

**DECISION ON PETITIONS TO TERMINATE BENEFITS AND
DETERMINE ADDITIONAL COMPENSATION DUE
AND APPEAL FROM UTILIZATION REVIEW**

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 September 1, 2009, in the Hearing Room of the Board, New Castle County, Delaware.

PRESENT

TERRENCE SHANNON

MARILYN J. DOTO

Lydia C.F. Anderson, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Gary S. Nitsche, Esquire, for the Employee

Anthony Frabizzio, Esquire, for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Cheryle Hairston ("Claimant") sustained injury on April 20, 2006, while working at Christiana Care Health Services ("Christiana Care"). Pursuant to an Agreement as to Compensation, Christiana Care has been paying workers' compensation benefits for total disability at the compensation rate of \$ 434.68, based an average weekly wage of \$652.00. On May 11, 2009, Christiana Care filed a Petition for Review, seeking to terminate compensation for total disability as it believes Claimant is capable of working with restrictions.

On June 1, 2009, Claimant filed a Petition to Determine Additional Compensation Due seeking recognition of additional injury arising from the work accident, and payment of associated medical expenses. Christiana Care disputes the addition of a low back injury, arguing that Claimant had prior lower back complaints and degenerative disc disease.

In addition, as some point, Claimant lodged an appeal from Utilization Review, pursuant to 19 *Del. C.* § 2322F (j), for unpaid medical expenses that were denied in an earlier review.

A hearing on the matter was held on September 1, 2009. This is a decision on the merits.

SUMMARY OF THE EVIDENCE

Christiana Care offered three depositions by Dr. Ali Kalamchi.¹ Dr. Kalamchi is certified in orthopaedic surgery and spine surgery. He examined Claimant on three occasions, January 15, 2007, July 5, 2007, and September 25, 2008. In conjunction therewith, he reviewed pertinent medical records. In *Kalamchi III*, Dr. Kalamchi opined that Claimant sustained soft tissue injures to the lumbar spine which were temporary and did not aggravate of accelerated any underlying degenerative condition. In records by Christiana Care and Dr. Biasotto, Claimant complained of lumbar spine pain following the April 20, 2006 work accident. Claimant did have

¹ Employer's Exhibit No. 1-A, *Transcript of Deposition by Dr. Ali Kalamchi*, March 25, 2008 ("*Kalamchi I*"). Employer's Exhibit No. 1-B, *Transcript of Deposition by Dr. Ali Kalamchi*, July 7, 2009 ("*Kalamchi II*"), and Employer's Exhibit No. 1-C, *Transcript of Deposition by Dr. Ali Kalamchi*, August 11, 2009 ("*Kalamchi III*").

a fairly long history of lower back complaints prior to the work accident. The episode that she had after the work accident appears to be similar to what she had before. Claimant's symptoms in Dr. Kalamchi's initial examination were nonspecific and the lumbar spine was essentially normal. Claimant's prior complaints to the lumbar spine were significant enough to require an MRI in 2003. The October study showed hypertrophic facet arthritis at L4-5, but no disc herniation. It also showed subtle loss of minimal height and signal intensity indicating some desiccation. With progression over the next five to ten years, one can expect more desiccation, narrowing, facet arthritis, and bulging at each disc.

Another MRI taken May 15, 2006, a month after the work accident, showed the natural progression. There was desiccation and progression to a small bulge at L1-2, meniscal left lateral protrusion at L2-3, small central broad based protrusion at L3-4, small disc bulge osteoarthritis at L4-5, and a small disc bulge at L5-S1. The MRI did not show an acute disc herniation. These changes did not occur since the injury. Dr. Kalamchi did not believe that the work event would have caused the bulges at the multiple levels.

In Dr. Kalamchi's January 15, 2007 report, he referenced complaints described by Claimant as an ache in the lumbosacral region and occasionally in her legs. She did not have numbness and she felt that her lower back pain was tolerable. Claimant's history was consistent with on and off back pain. A third MRI, taken May 1, 2007, showed a small disc protrusion at L4-5 with facet disease and the small disc protrusion at L3-4. The radiologist noted sagittal images of small intraspongy herniation at the superior end plate of T-12. Rather than a traumatic event, this is one of development. Small nodules result from a disc making a hole in the other end plate, which is unrelated. A November 2008 MRI showed five levels again with a little bit of progression. There were bulges and facet arthritis at every level, and significantly a disc

extrusion at L1-2. Extrusion means that the disc herniation busted through the wall of the annulus. This is part of the natural progression of the disease. It was located at a higher level than where Claimant's main complaints were in the lower back. So, the MRI showed ongoing multi-level degenerative arthritis and demonstrated an excellent and classic study of progression over ten years.

Dr. Kalamchi opined that the work accident did not cause these findings, the herniation or the progression of pre-existing degenerative disc disease. This was a natural progression. Dr. Kalamchi also did not believe that the work accident aggravated preexisting conditions or accelerated the changes. On the other hand, Claimant's pre-existing cervical complaints were aggravated by the work accident. She had preexisting herniation at two levels but she was back to being asymptomatic and working for awhile. When Dr. Kalamchi saw Claimant initially, she had acute symptoms and evidence of aggravation that persisted some eight months later. Eight months after the accident, at Dr. Kalamchi's first examination, Claimant had nonspecific minimal symptoms. There was no clinical finding to say that her preexisting nonspecific pain became so severe that there was definitely an aggravation and a continuation some eight months later. Even in Dr. Kalamchi's last examination, Claimant's complaints were essentially the same and she had no clinical evidence of radiculopathy. Dr. Kalamchi would still call it nonspecific back pain secondary to multi-level degenerative disc disease.

Reviewing Claimant's treatment, Dr. Kalamchi noted that Dr. Bandera's treatment to the cervical and lumbar spine, including the narcotic medication, was reasonable. Dr. Bandera's treatment began on January 22, 2008 and continued through December 18, 2008, essentially one year. Dr. Kalamchi, however, did not believe that the injections would help. For nonsurgical related therapy, the practice guidelines mentioned 24 treatments, with a focus on active treatment

and limited passive modalities. Claimant had five months of physical therapy after the four-level cervical fusion and, if she did not get any better, there was no reason to continue therapy. Dr. Kalamchi would have stopped at three months. A couple months of therapy especially with a four-level fusion are sufficient, as Claimant's range of motion will not improve. Also, you do not want more therapy when there is a concern for a nonunion, as here. A referral was made to Dr. Rudin and therapy was contraindicated. Claimant had a second surgery and physical therapy was indicated after swelling decreased for six to eight weeks. Work hardening comes after completion of the regular therapy. This is most likely three to four months after surgery of the cervical or lumbar spine. If surgery is progressing well, Dr. Kalamchi would let the patient return to work in a desk or light duty or medium lift job. Work hardening would be utilized to move the patient up to the next stage. Claimant was not working, not going any home exercise program, so work hardening was a waste of time. Work hardening is to improve strength and, since Claimant is not working, the work hardening program was not really effective. Furthermore, doing the same old therapy and calling it work hardening is not helpful.

In September 2008, Dr. Rudin did a hip injection for trochanteric bursitis. The flare-up around Claimant's hip was nonspecific and common in her age group. Such an injection is used more for an acute event, not three years after an injury.

With regard to work status, Dr. Kalamchi opined that there is no reason why Claimant, who has nonspecific residual lumbar spine complaint, cannot do sedentary work. A functional capacity evaluation ("FCE") on November 1, 2007 confirmed that she was capable of working at a sedentary level. A January 7, 2009 FCE noted sub-maximal effort. The issue was sub-sedentary work and that meant that lifting was reduced from ten pounds to six pounds. In Dr. Kalamchi's three examinations, he noted symptom exaggeration and positive Waddell's signs.

Most of Claimant's complaints are subjective and unsubstantiated by positive EMG or major disc herniation. This coincides with her sub-maximal effort in the FCE. Dr. Kalamchi believed that Claimant could work full-time in the sedentary jobs identified in the labor market survey, as they did not require lifting more than five pounds.

On cross-examination, Dr. Kalamchi commented on the later MRI finding of annular fissure, which was not mentioned earlier. With degenerative changes, you get fissuring, desiccation, narrowing, facet arthritis and bulging. These are all part of the same. Fissure was not noted on the prior studies, but it is part of the progression and does not tell anything different. Dr. Kalamchi diagnosed a sprain and strain of the lower back, which would have resolved within months of the work injury. Dr. Kalamchi's January 2007 report specifically stated, "The work injury obviously aggravated her preexisting degenerative cervical and lumbar disc pathology."² At that time, Dr. Kalamchi believed that treatment was reasonable, necessary and related to the accident. In a July 2009 report, Dr. Kalamchi noted that the patient may have had aggravation or soft tissue injuries to the lumbar spine that should have responded well with rest and conservative treatment.

Alison Barkley, an employee of C.H. Hedricks & Associates, testified on behalf of Christiana Care. Her company handles claims for Christiana Care. Ms. Barkley has handled Claimant's claim from its inception. Claimant initially participated in disability benefits for the first six months. Then, she had periods of intermittent total and partial disability until October 2006, when she went out of work. Claimant had cervical spine and lower back complaints. In the fall of 2006, she was referred to Dr. Bose, who focused on her cervical spine. She had surgery and completed an FCE in November 2007

² *Kalamchi III*, at 45.

Ms. Barkley commented on Dr. Bandera's medical bill. Between January and May 2008, Claimant had complaints and problems associated with the neck and the low back. It is impossible to determine from the medical bills which treatment was for the acknowledged neck injury as opposed to the disputed back injury. Hedricks & Associates asked Dr. Bandera to differentiate the treatment but he did not. In May 2009, the matter was submitted to Utilization Review, which denied the hip injection as unrelated and right shoulder treatment, based on Dr. Kalamchi's opinion. Certain medication was paid, but not that connected to lumbar complaints.

On cross-examination, Mr. Barkley stated that a Rule 4 notice was sent to Claimant indicating that the insured would not pay for certain services. She agreed that the First Report of Injury and agreements and receipts indicated neck and back strain; but, a defense medical examination, eight months after the work accident, did not support that conclusion.

Joseph Lucey, a vocational case manager from Perry & Associates, testified on behalf of Christiana Care. He has seventeen years of experience and prepared a labor market survey,³ identifying seven jobs that meet work restrictions set forth by Dr. Kalamchi. Based on transferable skills, Mr. Lucey found cashier type jobs through cold calling, walk-ins, the internet, and newspapers, all within a 30-mile radius of Claimant's residence. The average weekly wage was \$414.00. The survey was conducted from May 11, 2009 thorough July 30, 2009. The employers indicated that they would give Claimant's application the same consideration as other applicants. Mr. Lucey personally reviewed the job duties and confirmed them with the employers. On-the-job training or some form of training is offered. The jobs do not require a high school diploma.

On cross-examination, Mr. Lucey acknowledged that Claimant has been out of work since the 2006 work accident. He relayed to the employers information regarding Claimant's

³ Employer's Exhibit No. 2, *Perry & Associates Labor Market Survey*.

physical capabilities and social and work history. Lucey did not inform of Claimant's cervical spine surgeries. Lucey thought the weight limitations set by Dr. Kalamchi was seven pounds, when he stated six pounds. Even so, while Alpha Graphics, Wackenhut, and Zenith analyses indicate lifting up to ten pounds, these are not necessarily above the weight restriction. The materials handled on such jobs are standard and include company literature, paper clips, and such. None of the jobs has a regular lifting component and the successful candidate will have an ability to change positions.

Claimant, age 54, testified that she was assisting an alcoholic patient, who was 6'1" and 200 pounds. He placed both hands on her shoulders and both fell to the floor. She was injured when she tried to break the fall. She had spasms in her back and neck and symptoms in her arms. Claimant went to Employee Health, where Dr. Biasotto examined her and referred her to Dr. Bose. She saw Dr. Bose in September 2006 and complained of neck, back and arm pain. She had spasm down both arms. He referred her to Dr. Yadhati for back complaints. At some point, between 2007 and 2008, Claimant stopped treating with Dr. Bose and saw Dr. Rudin instead for continuing pins and needles sensation down her arms and headaches.

In January 2008, Claimant saw Dr. Bandera upon her brother's recommendation. Claimant got some relief from Dr. Bandera's treatment, including heat, two-pound weights, exercise utilizing balls, and injections that took the edge off pain for a period of time. The second cervical surgery improved her condition but she still has problem turning due to the rod in her neck. Claimant did not expect limitations in her neck after the surgery. Her body was tight, but now she is able to do some house work. She needs two hours to get dressed and continues with pain at night. Her lower back is inflamed. She gets five to six hours of sleep and wake up regularly around 4:00 a.m. At times, she cannot get out of bed because of pain.

In the course of a day, Claimant will take a shower, apply the reflector patch, and take other medication, including a muscle relaxant and Percocet. Sometimes, Percocet makes her sick; the patch of medication will "kind of" burn too. Medication will also make her drowsy; hence, Claimant did not take narcotic medication on the morning because of the hearing. She did apply the patch. Her pain was at level 7.5 on a scale of 1 to 10. With medication and no activity, pain is usually at level six. Claimant spends time reading and sleeping because of the medication. She can drive up to 45 minutes. Her girlfriends faithfully pick her up. She can sit for one hour to 1.5 hours. Claimant goes to church, which lasts 1.5 to 2 hours, and then out to breakfast on Sunday. She cannot walk a long distance and cannot do yard work. She has massages and treatment to keep her mobile. She is not currently exercising, but she does heat treatment at home.

Claimant previously worked at DuPont for 19 or 20 years. She has a prior low back problem, which flares up from time to time. He had no prior problem with her neck or shoulder. Claimant also previously worked in customer service, but not in an office environment. She did telephone work.

Dr. Kalamchi's September 2008 defense medical examination lasted twenty minutes. That time included questions and answers. Dr. Kalamchi did not put his hands on her.

On cross-examination, Claimant testified that pain has subsided. Overall, she is fifty percent better. She has limitation on how long she can hold up. Her back and right arm are the same.

Claimant completed high school and some college coursework. She started in nursing, but has added management skills, behavioral science, quality control, and instrument assembly. She is currently taking classes at Wilmington University in behavioral science. She took one

hour in the fall of 2008 and has been taking two courses per semester towards a bachelor's degree. The university is five minutes away from her home.

Peter B. Bandera, M.D. is certified in the field of physical medicine and rehabilitation. He presented a statement of outstanding medical bills for services he provided to Claimant.⁴ He gave testimony by deposition ("*Bandera P*")⁵ and in person ("*Bandera IP*") on Claimant's behalf. In *Bandera I*, the testimony indicated that the first evaluation of Claimant occurred on January 21, 2008, when she gave a history of handling a heavy patient and injuring her neck and back. She initially focused on her cervical spine and underwent a fusion by Dr Bose on January 25, 2007. Over time, she was followed for an L4-5 disc dysfunction.

At Dr. Bandera's examination, Claimant was functionally poor. She had increased neck radiation, right arm weakness, and ongoing low back pain with bilateral radiation. Dr. Bandera noted muscle spasm, muscle guarding in the neck and back, and pain on facet loading. Her pain was consistent with joint inflammation. Claimant had a positive bilateral Spurling's maneuver and radiating pain indicative of nerve inflammation. Claimant also had a positive bilateral straight leg raising sign at 26 degrees. Dr. Bandera's initial impression was cervical lumbar strain and sprain and radiculopathy and cervical and lumbar intervertebral disc dysfunction. Claimant was status post cervical fusion with residual signs and symptoms. Her medications included Lidoderm, Tramadol, and Naprosyn. She also used a home TENS unit.

Dr. Bandera related the diagnoses with the work accident, when Claimant hurt her neck and back. She had progressive complaints after the April 20, 2006 work injury. A November 14, 2008 MRI of the low back showed significant pathology, which is consistent with the injury. Claimant has had a series of MRIs, dating back to 2003, when that MRI was negative for disc

⁴ Claimant's Exhibit No. 1, *Medical Bills*.

⁵ Claimant's Exhibit No. 2, *Transcript of Deposition by Dr. Peter B. Bandera*, July 16, 2009 ("*Bandera P*").

herniation in the lumbar spine, but showed arthritic changes of the facet joints, A May 15, 2006 MRI identified a series of disc herniations at L1-2, L3-4, and L4-5, and arthritic changes associated with the L4-5 disc at the facet level, the small joints of the back. A November 2008 MRI showed the previously cited herniations and at the L4-5 level, the disc was now considered broad-based with a fissure, the initial cracking or tearing of the envelop holding the disc. More worrisome was the L1-2 disc, which was now extruded inferiorly, meaning it was actually chipping off from its normal base and coming out. The actual size was now smaller and moving. Dr. Bandera believed that the three new herniations of November 2008 were not the normal progression of arthritic changes. Dr. Bandera stated:

Simply put, one of the disk herniations is at an area age compatible arthritis, but she also has an extruded disk at L1-2, which is not in the area of her arthritis and she also has a disk problem at L5-S1 just having some – which is associated with some mild arthritic changes, but it's certainly not in the same theme.⁶

Dr. Bandera agreed that on April 28, 2006, Claimant presented to Dr. Nicholas Biasotto with complaints of back spasms and back pain from breaking a patient's fall at work. He ultimately referred Claimant to Dr. Bikash Bose who initially saw her on September 11, 2006. Claimant complained of severe neck pain and pain radiating down the left arm as well as lower back pain and pain radiating down her legs. Claimant was also seen on September 25, 2006 by Dr. Yadhati, who noted a chief complaint of lumbar pain radiating into both lower extremities. Dr. Bose continued treatment for Claimant's cervical spine over the next two years, including a cervical fusion in January 2007. Six months later, in July 2007, Dr. Bose noted improvement, but continuing pain that radiated into the shoulder and back of the neck and the lower back. An MRI identified spondylolisthesis (bone shifting) at L4-5 and some alteration of the T2 signal intensity at L4-5 and L5-S1.

⁶ *Bandera I* at 9.

Claimant was seeing several physicians. She saw Dr. Rudin on January 23, 2008, just two days after first seeing Dr. Bandera. Dr. Rudin's focus was the cervical spine. Dr. Bandera saw Claimant on February 18, 2008 and noted that any future low back surgery was on hold pending stabilization of the neck. Dr. Rudin had recommended further neck surgery. Dr. Downing administered a cervical injection that actually caused more pain. Dr. Crain was seeing Claimant for right shoulder issues. Dr. Bandera's therapy was helpful in stabilizing basic functions, but Claimant still had problems sitting, standing, and transferring. Because of a nonunion, Dr. Rudin performed a second cervical surgery on April 15, 2008.

On September 3, 2008, Claimant presented to Dr. Rudin with complaints of neck and lower back pain. Dr. Rudin performed a left hip injection, which Dr. Bandera believes is related to Claimant's lower back problem. Often, as a direct consequence of back injury, bursitis, an inflammation of the hip, occurs in co-morbidity with back and gait problems. Claimant was also undergoing physical therapy with Dr. Bandera for lower back pain. Dr. Bandera discussed an injection program for the lower back problem, but Claimant was not cleared by the carrier for that treatment. On July 6, 2009, Dr. Bandera recorded that Dr. Rudin was sending Claimant to Dr. Crain for further orthopedic follow-up with the lower back. A discogram was pending. Therapy and injections are still on hold pending clearance.

Claimant's examination revealed spasm and positive bilateral Spurling's maneuver and straight leg raising sign. Claimant had multiple co-morbidities -- the neck, lower back, and right shoulder weakness. Dr. Bandera opined that all of his treatment has been related to the April 2006 work accident. The neck and back issues were identified within the first ten days or so of the accident. After two neck surgeries, the focus is now on her back symptoms.

Dr. Bandera has an outstanding bill of \$22, 235.40. Therapy, which started on January 22, 2008, includes traction, electrical stimulation, hot packs, hydrotherapy, and an adjustment program. He saw her three times a week.

Dr. Bandera disagreed with Dr. Kalamchi's opinion that Claimant sustained a lumbar strain and sprain injury and that the significant problems shown on MRI result from degenerative conditions that were expected to develop over the years, given Claimant's prior lower back problem. Dr. Bandera opined that the disc herniation and extrusion at L1-2 are not associated with arthritis. The other discs are associated with mild arthritis. Claimant was at a high level of function prior to the work accident and now she has significant low back complaints and going through an active surgical evaluation phase.

On cross-examination, Dr. Bandera stated that although Claimant had mild degenerative changes at L4-5 and other levels, the disc herniations and their consequent symptoms were a direct result of the work accident. He believes that the event caused a disc herniation or protrusion at three levels. The event destabilized Claimant's back. Before the work event, she had no low back restrictions. In 2003, she had some back pain and an MRI noted arthritic changes. She had low grade complaints and was doing normal activity without resistance.

Claimant is taking Percocet and Skelaxin. She started using a Flector patch in May 2009. The other medications have been used over time.

In his live testimony, *Bandera II*, Dr. Bandera confirmed his earlier opinion that Claimant's neck, back and shoulder problems all relate to the April 2006 work accident. He began treatment in January 2008 and continued until the second neck surgery in April 15, 2008. After that, Dr. Bandera did 2 ½ to 3 months of outpatient therapy with medication support. The modalities included heat, electric stimulation, and other conservative care. He sought

progressive mobilization towards work conditioning with lifting, pushing and pulling activities. Dr. Bandera built from 1 to 2 units of therapy to 4 units, with a goal of improving function. Dr. Bandera did 18 sessions and noted that the guides allow 16 to 40 sessions. After Claimant's second neck surgery, Dr. Bandera did 22 sessions of therapy with heat 21 times, as per the guides, and hydrotherapy 11 of the 12 times permitted by the guides. Dr. Bandera testified that it was difficult to parcel out treatment for the neck as opposed to the back. Claimant got some reduction of pain from the treatment.

On September 11, 2008, Dr. Bandera changed his focus to work conditioning. Claimant was apprehensive about back surgery and desired more conservative care. At that time, Claimant had neck and back spasms, limited range of motion in the right shoulder with impingement, and a positive bilateral Spurling's maneuver. She had joint inflammation. Dr. Bandera continued Claimant's no work status.

On January 13, 2009, Claimant presented with neck, back, and right shoulder pain. She was taking Percocet and Ibuprofen. She had weakness in the shoulder and residual spasms in the neck and back. She had some improvement in range of motion. Dr. Bandera continued medication support with new trials and a moderate high dosage of Percocet. He continued the no work status, as he did not believe Claimant could do sedentary work with a six pound lifting restriction on material handling within an office. In fact, Dr. Bandera noted additional restrictions relative to the right shoulder and back. Dr. Bandera's diagnoses include multi-level cervical disc fusion, multi-level disc problems in the lower back, including an extruded disc, and right shoulder impingement causing limited motion.

For treatment between February 27, 2008 and July 6, 2009, Dr. Bandera has an outstanding bill of \$24,535.40. There are no specific guides for treatment of the neck, so he

relied on low back guides by analogy. Intervention has been complicated by the co-morbidity of parts, neck, shoulder, and back. All treatment has been reasonable, necessary and related to the work accident.

On cross-examination, the testimony was that Claimant had three months of post surgical therapy before Dr. Bandera saw her. Between January 22, 2008 and April 14, 2008, Dr. Bandera did "gentle treatments" to Claimant's cervical spine. The neck did not respond to strengthening program. There were 67 visits between January 22, 2008 and December 18, 2008.⁷ There were 27 sessions before the second surgery. Dr. Bandera stopped treatment in December 2008. She would have gotten two more injections to the low back.

During the conditioning program, Claimant picked up back treatment units. Work conditioning is not temporary; it is to stabilize functional living. Dr. Bandera would like to get Claimant's back and shoulder addressed before he starts work conditioning for those areas and then follow-up with work hardening. Claimant's back and shoulder complaints indicate that she cannot return to work. An April 20, 2006 note from Christiana Care indicted spasms in the upper back and shoulder. Thus, Dr. Bandera related both to the work accident.

Bruce Rudin, M.D., a board-certified orthopedic surgeon, testified by deposition on behalf of Claimant.⁸ He first examined Claimant on January 23, 2008, when Claimant gave a history of a patient falling on her. She was seen by several doctors and had a four-level fusion on January 26, 2007. She complained of worsening neck pain. Imaging films indicted that one of the levels had not healed, the C6-7 level, and the hardware was loose. She also complained of shoulder complaints, for which Dr. Rudin referred her to Dr. Crain.

⁷ Employer's Exhibit No. 3, Physical Medicine Program of Dr. Peter Bandera.

⁸ Claimant's Exhibit No. 2, *Transcript of Deposition by Dr. Bruce Rudin*, August 25, 2009

Claimant opted to have a second surgery for the nonunion and that was done in April of 2008. By May 28, 2008, Claimant was 50% better. Most of her neck pain resolved, but she continued with right arm pain, and had difficulty raising the arm. Claimant had a four-level fusion which is never going to leave her normal. That did not leave much function in her neck, even if everything healed. Dr. Rudin followed post-operative rehab protocol with functional capacity evaluation. All of the treatment was focused on the cervical spine. It was not until September 2008 that Claimant returned for lower back complaints. Typically, conditions are prioritized and doctors treat the more reliable problems first. As between the neck and back, the neck has a faster and easier recovery than the back. They will not treat two things at the same time because recovery difficulties.

Dr. Rudin administered a hip injection for bursitis. It is very hard to know if there is a relation between trochanteric bursitis and the lower back complaints or work injury itself. While Claimant had some hip discomfort early on, it is impossible to know whether the bursitis was in fact the pain she complained of early on because nobody ever examined it. Dr. Rudin thinks Claimant's back condition is related but not the bursitis. Claimant complained of back pain immediately from the time she hurt herself and there was no significant preexisting low back history. Claimant has an occasional complaint of low back pain. There was a complaint in 2005, the first complaint in five years; then, there is none until the work accident. Assuming nothing significant in terms of missing work, going to the doctor or therapist, chronic pain, medications and all that, the medical records support a work relationship with Claimant's current back problems.

Dr. Rudin disagreed with Dr. Kalamchi's opinion that the films showed a progression of degeneration. Dr. Rudin emphasized the importance of taking into account the patient's

complaints. The 2003 MRI indicated degenerative arthritis in the L4-5 facet joints, but no herniated discs. That was an age-related finding. An MRI, done on May 2006, just after the accident, showed small herniations or protrusions or bulging at multiple levels. It also showed the same degenerative changes at L4-5 and a little bit more pathology at L5-S1. The May 2007 MRI showed a progression at L4-5 that was worse. So, Claimant went from a little bit of disease in the facet joints to a fairly significant pathology. In the November 2008 MRI, the L4-5 disc appears to be stable, not too much worse. The L5-S1 disc got worse on the left side.

Claimant came in once or twice in a year for her lower back and Dr. Rudin tried to discourage treatment. Dr. Rudin would release Claimant to work in a limited sedentary job based on the functional capacity testing, which was done on January 7, 2009. Dr. Rudin would return to work on a part time basis, initially, four hours a day, five days a week, and see how Claimant tolerated the position and then gradually move her up to a higher level. Dr. Rudin's record indicated his deference to Dr. Bandera on work status, because Dr. Rudin managed the period of total disability referable to the cervical fusion and then handed off when Claimant began treatment with someone else

Dr. Rudin last saw Claimant on May 18, 2009. She was trying to live with her back problem, which is what he had recommended. Dr. Rudin has not seen any evidence of Waddell signs.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petition to Terminate Benefits: Christiana Care has the initial burden to show "that the employee is no longer totally incapacitated for the purpose of working." *Torres v. Allen Family Foods*, 672 A. 2d 26, 30 (Del. 1995). In response, Claimant may rebut by showing that she is a *prima facie* displaced worker, or submit evidence of reasonable efforts to secure employment

that have been unsuccessful because of the injury. An employer would then have the burden of showing the availability of regular employment within her capabilities. *Howell v. Supermarkets General Corp.*, 340 A. 2d 833, 835 (Del. 1975); *Chrysler Corp. v. Duff*, 412 A. 2d 915, 918 n.1 (Del. 1973). If Claimant has restrictions that may reasonably affect her earning capacity, Christiana Care has the burden of proving that Claimant is not totally or partially disabled. *Waddell v. Chrysler Corp.*, Del. Super., C.A. No. 82A-MY-4, Bifferato, J. (June 7, 1983). For the reasons set forth below, the Board finds that Christiana Care has met its initial burden of showing that Claimant is no longer incapacitated from work.

The parties rely on conflicting medical testimony and the Board is free to rely on either medical expert as long as substantial evidence can be found. *DiSabatino Brothers, Inc. v. Wortman*, 453 A. 2d 102, 106 (Del. 1982). The Board finds Dr. Kalamchi's testimony more persuasive with regard to work capability. Dr. Rudin, although he would defer to Dr. Bandera on the question, also believed that Claimant could work in a sedentary capacity. The Board accepts Dr. Kalamchi's opinion that there is no reason why Claimant can not work at that level. As early as November 1, 2007, a functional capacity evaluation indicated that she could do so. When Claimant took the January 7, 2009 FCE, Dr. Kalamchi noted sub-maximal effort. The Board need not determine whether Claimant's credibility is at issue, because it actually relies on Claimant's testimony regarding her activities to support the conclusion that Claimant is capable of working in a restricted capacity.

The Board accepts Claimant's testimony that the second cervical surgery improved her condition. While she is still having problem turning her head, the fact is that she will continue to be limited in motion because of the four-level cervical fusion. In addition, Claimant is able to engage in some outside activities. She goes to church, which lasts 1.5 to 2 hours, and then to

breakfast with her girlfriends, who faithfully pick her up. What was more revealing was the fact that Claimant is attending Wilmington University, taking one to two courses per semester toward a bachelor's degree. She has also been taking physical therapy, including work conditioning, to improve functionality and apparently to prepare for eventual work. So, despite continuing neck complaints and other ongoing complaints, the Board believes that Claimant is capable of functioning at a level sufficient enough to return to work in a sub-sedentary level, with no lifting more than six pounds, as recommended by Dr. Kalamchi.

Partial Disability: Christiana Care presented the testimony of Mr. Lucey, who prepared a labor market survey identifying seven jobs that met Dr. Kalamchi's restrictions. The Board accepts his testimony that he personally reviewed the jobs and confirmed them with the employers who offered training. The employers would also give Claimant's application the same consideration as other applications. The cashier type jobs did not even require a high school diploma; so Claimant certainly qualified in terms of educational background. She has prior experience in customer service and in working at DuPont for twenty years.

Claimant's average weekly wage at the time of the work accident was \$652.00. Considering that Claimant has been out of work since 2006, the Board finds that she is able to work part-time for six months before increasing to full-time work. For the first six months, the Board finds that Claimant could make one-half of the average weekly wages identified in the labor market survey, resulting in \$207.00 per week. Thereafter, Claimant could make the average weekly wage of \$414.00 identified in the survey. Hence, the Board finds that, for the first six months, Claimant would be entitled to receive compensation for partial disability at the weekly rate of \$296.68 ($\$652.00 - 207.00 \times .6667$). Thereafter, Claimant would be entitled to

receive compensation for partial disability at the weekly rate of \$158.67 ($\$652.00 - 414.00 \times .6667$).⁹

Compensability: Claimant filed a petition to recognize her low back condition, which she argues was aggravated by the work accident. The employer is bound by statute to pay compensation for personal injury or death by accident arising out of and in the course of employment.¹⁰ Christiana Care argues that Claimant has a prior back condition and her current symptoms were expected in the progression of degenerative disc disease over the years. For the reasons stated below, the Board finds that Claimant has met her burden of proof.

The Board relies on Drs. Rudin and Bandera to find that Claimant's low back complaints are more than degenerative changes and that her prior back condition was aggravated by the work accident of April 20, 2006. The evidence was that Claimant complained immediately of back pain after the fall. She was assisting a heavy male patient, who placed his hands on both of Claimant's shoulders. She was trying to hold him up before they fell to the floor. The back injury is consistent with that mechanism of injury. Christiana Care's early record and Dr. Biasotto's April 28, 2006 record noted complaints of neck and back pain. Claimant had similar complaints in Dr. Bose's September 11, 2006 examination and in Dr. Yadhati's September 25, 2006 examination. As Dr. Rudin pointed out, one must take into consideration the patient's complaints. She complained immediately, continued the complaints, and is now being reviewed for possible surgery. The Board further accepts Dr. Rudin's explanation that treatment would not begin on two areas, the neck and back, simultaneously. Treatment is prioritized and typically, the easier condition would be handled first and, in this case, that was the cervical spine, which

⁹ 19 *Del. C.* § 2326. Partial disability is paid at the rate of 66 2/3 percent of the difference between pre-injury wages and post-injury wages or earning power.

¹⁰ 19 *Del. C.* § 2304.

required two surgeries. It makes no sense to now conclude that the back injury, which was not addressed first, is now unrelated.

Looking at the question of prior back complaints, the Board relied on Dr. Rudin's testimony that he did not find significant prior lower back complaints. Claimant had one complaint in 2005 and then nothing until after the work accident. There was no history of medications and treatment taking Claimant out of work. Rather, she was able to work consistently without back restrictions. Thus, the Board finds that the prior degenerative conditions were made worse by the work accident. Even Dr. Kalamchi thought, as evidenced by his January 2007 report, that the work injury "obviously aggravated" the preexisting degenerative cervical and lumbar disc pathology. The 2003 MRI demonstrated arthritic changes but no disc herniation. The 2006 MRI, taken soon after the fall, showed small bulges and protrusions at three levels. By the 2008 MRI, the disc at L4-5 was now a broad based herniation with fissure and the L1-2 disc was extruded. The Board accepts Dr. Bandera's opinion that these findings are not the normal progression of arthritic changes. In fact, the L1-2 disc problem was not even in the area of the prior arthritic changes.

Based on the foregoing, the Board finds that Claimant's degenerative lower back condition was aggravated and accelerated by the April 20, 2006 work accident.

Medical Expenses and Appeal from Utilization Review: "During the period of disability the employer shall furnish reasonable surgical, medical, dental, optometric, chiropractic and hospital services, medicine and supplies, . . . , as and when needed unless the employee refuses to allow them to be furnished by the employer."¹¹ With respect to the cervical spine and the lower back, based on Dr. Kalamchi's opinion, the Board finds that all treatment is reasonable, necessary, and related to the work accident, with certain exceptions. Some portions

¹¹ 19 Del. C. § 2322(a).

of Dr. Bandera's outstanding bill of \$22, 235.40 or \$24,535.40 are disputed. The first exception includes Dr. Bandera's "gentle treatments" with modalities affecting the neck in the period before the second cervical surgery. He provided 27 treatments, starting January 22, 2008 and ending April 14, 2008, before Dr. Rudin performed surgery on April 15, 2008.

Under 19 *Del. C.* § 2322F, treatment and charges for health care services may be reviewed. The Health Care Advisory Panel ("HCAP") developed a utilization program for prompt resolution of issues related to treatment and/or compliance with the health care payment system or practice guidelines for claims acknowledged to be compensable. If a party disagrees with the findings of Utilization Review ("UR"), a petition may be filed with the Board for a *de novo* review.¹² Complete rules and regulations relating to utilization review are recommended and approved by HCAP. The rules and regulations are then adopted by the Department and effective no later than one (1) year after the first meeting of the HCAP.¹³

At the time of treatment, with no practice guidelines for the cervical spine, Dr. Bandera relied on the guidelines for the lumbar spine by analogy. The Board need not review the issue from the perspective of quantity of services, as it believes all of the cervical treatment from January 22, 2008 to April 14, 2008, was unnecessary and unreasonable. There was no hope for improved mobility from the four-level fusion and there was a concern for non-union at one level. Furthermore, Dr. Bandera was aware of Claimant's referral to Dr. Rudin and likelihood of a second neck surgery; yet, he pursued therapy. The Board finds that therapy for the neck was contraindicated, as opined by Dr. Kalamchi, and payment for such services must be denied.

In a second exception to reasonableness, necessity, and relatedness, the Board considered Dr. Bandera's increased therapy units for "work conditioning," starting on September 11, 2008

¹² 19 *Del. C.* § 2322F (j).

¹³ *Id.*

and ending December 16, 2008. Dr. Bandera did 18 sessions of work conditioning. The Board relies on Dr. Kalamchi's testimony that work hardening is used to move the patient from a level of low work level to a higher level of work, e.g. from sedentary to light or light to medium and medium to heavy. Dr. Kalamchi would have just let the patient return to sedentary work and then use work hardening to move her to the next level. Claimant was not working and there was no testimony that she was even planning to return to work around that time. Dr. Bandera made a distinction between work conditioning and work hardening, as he would follow up work conditioning with therapy for work hardening. The Board is not convinced that such a distinction can be made or that it is necessary other than to provide for more therapy. Hence, the Board finds the treatment unnecessary and agrees with Dr. Kalamchi that the work conditioning program was not effective. Work hardening is normally considered if a patient is to progress to a heavier job. This was not the plan here, when there was no apparent intent to return to work and Claimant argues that she remains totally disabled despite work conditioning.

Finally, the Board understands that Utilization Review denied payment on a hip injection for bursitis. The health care practice guidelines are developed in accordance with provisions set forth under § 2322C. In particular, the Board notes that "services rendered by any health care provider certified to provide treatment services for employees shall be presumed, in the absence of contrary evidence, to be reasonable and necessary if such services conform to the most current version of the Delaware health care practice guidelines."¹⁴ In this case, there is contrary evidence to the presumption of reasonableness and necessity. Despite Dr. Bandera's explanation that the injection is related to the lower back, Dr. Rudin, who administered the hip injection for bursitis,

¹⁴ 19 *Del. C.* § 2322C (f).

did not relate the injection to the work accident or the back.¹⁵ While Claimant had some hip discomfort early on, nobody examined it and a line of relatedness cannot be drawn. Without a relation to the work accident, there can be no reasonableness or necessity for treatment.

Medical Witness and Attorney's Fees: This successful Claimant is entitled to receive medical witness fees to be taxed against Christiana Care, pursuant to 19 *Del. C.* § 2322(e). Whenever a claimant is awarded compensation, she is entitled to payment of reasonable attorney's fee in an amount not to exceed thirty percent of the award or ten times the weekly wage as announced by the Secretary of Labor, which is currently \$9,160.00. 19 *Del. C.* §2320(10). In determining an appropriate attorney's fee, the Board considered the following factors: (1) The time, novelty and difficulty of the issues; (2) The preclusion of other employment by the lawyer; (3) The fees customarily charged; (4) The amount involved and results obtained; (5) The time limitations; (6) The nature and the length of attorney/client relationship; (7) The experience of the lawyer; (8) The fee's contingency; (9) The employer's ability to pay; and (10) Payment of fees and expenses from another source. *See General Motors Corp. v. Cox*, 304 A. 2d 55, 57 (Del. 1973).

Claimant's counsel submitted an affidavit indicating that he spent approximately 21 hours preparing for this hearing. The initial contact date was September 14, 2006. One of the issues in this case was somewhat novel. Counsel was not precluded from accepting other employment because of this case, although he could not work on other cases at the same time he was working on this case. Counsel was admitted to the Delaware Bar in 2006, and he is somewhat experienced in Workers' Compensation. His fee is contingent, but counsel did not

¹⁵ Under 19 *Del. C.* § 2322F (j), issues on treatment, charges, payment, and compliance with practice guidelines may be presented to UR when the claim has been acknowledged to be compensable. Here, Christiana Care had not acknowledged a claim for the lower back at the time the hip injection was administered. Thus, a submission to UR on the relatedness of the hip injection to the back would have been premature.

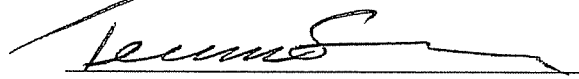
state his hourly rate. Counsel realizes that ordinary rates for general services are not applicable. The Board has found an hourly fee of \$225 for a somewhat experienced attorney in Workers' Compensation to be reasonable. Counsel does not expect to receive compensation from any other source. There was no evidence presented that Christiana Care is unable to pay an award of attorney's fee. The Board finds that a fee of \$4,725.00 (21 x \$225.00) or thirty percent (30%) of the total award, whichever is less, is reasonable.

STATEMENT OF THE DETERMINATION

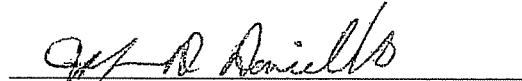
Accordingly, the Board **grants** Christiana Care's Petition for Review, **terminating** compensation for total disability from the date of the petition's filing, but **awarding** partial disability, as set forth hereinabove. In addition, the Board **grants** Claimant's Petition to Determine Additional Compensation Due, **recognizing** a lower back injury and **awarding** related medical expenses as set forth hereinabove. The Board **denies** compensation for the identified medical expenses at issue and on appeal from Utilization Review. Finally, the Board **awards** compensation for medical witness fees and attorney's fee, as set forth hereinabove.

IT IS SO ORDERED THIS 21st day of September, 2009.

INDUSTRIAL ACCIDENT BOARD



TERRENCE SHANNON



For: MARILYN DOTO

I, Lydia C.F. Anderson, Hearing Officer, hereby certify that the foregoing is a true and correct Decision of the Industrial Accident Board.



LYDIA C.F. ANDERSON, ESQUIRE

Mailed Date: 9-23-09



OWC Staff