

THE INDUSTRIAL ACCIDENT BOARD  
OF THE STATE OF DELAWARE

MARGIE MASSEY, )  
 )  
 Employee, )  
 )  
 v. )  
 )  
 CARDINAL HEALTH, )  
 )  
 Employer. )

Hearing No. 1328853

*Anna Guido  
5th v 6th  
Board awarded  
perm based on  
dome doc's rating  
"if he were to  
place claimant  
b/w 5th &  
6th Ed  
of the  
Guides"*

**DECISION ON PETITION TO  
DETERMINE ADDITIONAL 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 April 27, 2009, in the Hearing Room of the Board, in Milford, Delaware. An extension of time for issuance of the decision was taken pursuant to 19 *Del. C.* § 2348(k).

**PRESENT:**

ELAINE BOWEN

MARY DANTZLER

Julie G. Bucklin, Workers' Compensation Hearing Officer

*5th Ed rating  
of 35%  
repeated*

**APPEARANCES:**

Andrea G. Green, Attorney for the Employee  
Christian G. McGarry, Attorney for the Employer

## NATURE AND STAGE OF THE PROCEEDINGS

On November 6, 2008, Margie Massey ("Claimant") filed a Petition to Determine Additional Compensation Due. Claimant alleges that she has thirty-five percent permanent impairment to the cervical spine due to a compensable industrial accident that occurred on February 15, 2007 while working for Cardinal Health ("Cardinal"). Cardinal argues that Claimant has twelve percent permanent impairment to the cervical spine related to her industrial accident. On April 27, 2009, the Board conducted a hearing on Claimant's petition. This is the decision on the merits of the case.<sup>1</sup>

## SUMMARY OF THE EVIDENCE

Claimant, fifty-five years old, testified about her industrial injury at Cardinal and medical condition. Claimant worked as an administrative assistant at Cardinal when she was injured.

On February 15, 2007, Claimant opened the door to the restroom and there was water on the floor. Claimant went to get the mop to dry the floor, but she fell on the wet floor in the hallway. She fell forward to the ground with a twist on the side and hit her head.

Claimant sought medical treatment with Dr. David Sopa, who performed cervical spine surgery in April 2007. After surgery, Claimant had a bad burning and stinging sensation in the back of the neck, bad migraine headaches, pain in the shoulder near the neck, and pins and needles down her arm. Before surgery, Claimant felt the burning and tingling sensation in the back of the neck and had headaches, as well as feeling like her arm was asleep and in the thumb, index and middle fingers on the right. The weather affects Claimant's pain level, but it averages to be about a six out of ten on the pain scale. After surgery, the pain was different. It feels like a

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<sup>1</sup> Normally, decisions are to be issued within fourteen days of a hearing. *See* 19 *Del. C.* § 2348(k). Because of workload demands and other time restraints, it was necessary to take an extension of time to issue this decision in accordance with 19 *Del. C.* § 2348(k).

knot in her neck, which makes “funny feelings” down the right arm and hand. Claimant’s pain level is about a four out of ten when she takes medication.

Not long after surgery, Claimant could not swallow correctly and food would not go down and would stick in the center of the collarbone in the front. Claimant saw a gastroenterologist, Dr. Burton Aronoff, to check her esophagus and was told that she had a vagus nerve injured during surgery. She now takes medication to help with digestion and reflux and she is careful of what she eats. She eats small meals and cuts food into small pieces. Claimant did not have digestive problems before surgery.

Before the industrial accident, Claimant was able to cook, clean, garden, and wash laundry. Since the injury, Claimant finds it hard to do anything because she does not have a good grip and drops things. She cannot squeeze tight enough, it is hard to work in the yard, and it hurts when she uses her arm. She can clean for fifteen to twenty minutes at a time and then has to rest for thirty minutes in order to go for a little bit longer. She cannot reach high or bend down and she cannot push a regular vacuum cleaner and has to use a light stick vacuum. Claimant does not do much now because it is not fun now. She cannot sit still long enough to watch movies like she used to do and she cannot play board games with her stepdaughter anymore.

Claimant’s medication for her neck and back include Lyrica, Percocet and Vicodin, as well as pain patches for her neck when needed. Dr. Sopa also performed surgery on Claimant’s low back.

Dr. Sopa has placed restrictions on Claimant; she is not supposed to do any strenuous work. Even a gallon of milk is almost too much for Claimant to lift. Claimant is able to tell if something is too hot or too cold. Claimant is able to use a curling iron with her left arm. She

cannot lift her right arm overhead to fix her hair, as she can only lift her right arm to shoulder height or else she gets a pulling sensation.

Stephen J. Rodgers, M.D., board certified in occupational medicine, testified on behalf of Claimant. Dr. Rodgers evaluated Claimant on June 20, 2008 and reviewed Claimant's medical records in conjunction with the examination. Dr. Rodgers believes that Claimant has thirty-five percent permanent impairment to the cervical spine.

The physical examination showed that Claimant had increased muscle tone in the neck. Dr. Rodgers used dual inclinometers to measure range of motion, which was decreased in the neck. The upper extremity range of motion was limited by the right-sided symptoms. The strength was decreased on the right as compared to the left as measured by the Jaymar dynamometer.

Claimant underwent surgery to the cervical spine on April 8, 2007 with Dr. Sopa. Prior to surgery, Claimant was diagnosed with a herniated nucleus pulposis at C6-7. Dr. Sopa performed a discectomy at C6-7 and interbody fusion with a cage, bone graft and application of plates at C6-7.

Dr. Rodgers believes that Claimant had complications following surgery due to normal risks of the procedure, not from medical negligence. The operation is performed near the throat, near the vagus nerve and other important nerves. The vagus nerve involves digestion and esophageal issues. Claimant has dysphagia, which is difficulty swallowing. The esophagus is supposed to move food away and Claimant had the feeling that the food was not moving. Dr. Aronoff performed tests and found an injury to the vagus nerve.

Claimant also has numbness down the right arm and three right fingers. She has residual radiculopathy in the dermatomal distribution of the lower cervical spine. An EMG showed that

there is dermatomal sensory loss at C6-7, which correlates with the tingling sensation in the three fingers.

Dr. Rodgers relied upon the *AMA Guides to the Evaluation of Permanent Impairment*, Fifth Edition ("*Guides*") to evaluate Claimant for permanent impairment and believes that Claimant has thirty-five percent permanent impairment to the cervical spine related to the industrial accident. Dr. Rodgers used the diagnosis related estimates ("DRE") method of assessment for rating Claimant's permanent impairment because she had a single level fusion. Claimant falls into DRE Category IV, which gives a permanent impairment rating between thirty-three and thirty-seven percent to the neck. To fall into Category IV, Claimant only needs to have had surgery. There are also other findings that can be found, but are not required, such as alteration of motion segment integrity due to a fusion or an attempted surgical arthrodesis. Radiculopathy is not necessary for this category. Dr. Rodgers placed Claimant at midrange at thirty-five percent permanent impairment based on the impact of the condition on Claimant's daily living and the impact on her digestion from the vagus nerve injury. He also looked at Example 15-5 on page 394 of the *Guides* as a similar example to Claimant's condition.

Dr. Rodgers reviewed Dr. John Townsend's defense medical examination report. Dr. Townsend opined that Claimant has eleven percent permanent impairment to the cervical spine in his report and twelve percent in his deposition when utilizing the sixth edition of the *Guides*. Dr. Rodgers is familiar with the fifth and sixth editions of the *Guides*. He agreed with Dr. Townsend that when using the sixth edition of the *Guides*, Claimant would be in Class 2. The difference they obtained was that Dr. Rodgers found that Claimant has eleven percent whole person impairment and Dr. Townsend found that Claimant has nine percent whole person

impairment with the sixth edition of the *Guides*. Dr. Townsend's methodology was precise with applying the sixth edition of the *Guides*.

Dr. Rodgers believes that the fifth edition is appropriate for rating this type of an injury because the fifth edition is still pretty much the standard and has not yet been formally supplanted by the sixth edition. With musculoskeletal injuries, the fifth edition is better for imposing ratings than the sixth edition. The sixth edition tends to have lower ratings than the fifth edition, but nothing has changed in medicine to cut the percentages in half.

Claimant's worst problem is the low back, not the neck. Her problems with activities of daily living are from the back more so than from the neck because the back impacts mobility and the ability to sit, stand and walk, whereas the neck impacts the arms and hands.

John B. Townsend, III, M.D., a board-certified neurologist, testified by deposition on behalf of Cardinal. Dr. Townsend examined Claimant on March 11, 2009 and reviewed medical records in conjunction with that examination. Dr. Townsend believes that Claimant has twelve percent permanent impairment to the cervical spine related to the industrial accident at Cardinal based on the sixth edition of the *Guides* or twenty to twenty-five percent when applying both editions of the *Guides* as well as his clinical judgment.

Claimant told Dr. Townsend about her industrial accident, medical treatment and current symptoms. Claimant reported that she has ongoing pain in the right side of her neck and it felt like a lump there. She explained that she had numbness that would go down the right arm and into the first three digits. She rated the neck pain as a four out of ten on the pain scale on a daily basis. She had low back pain that went into her buttock and down to the thighs, as well as numbness and tingling in her feet and toes. She rated the back pain as a six out of ten. Long rides, standing or sitting for more than twenty minutes made her feel worse.

Claimant reported that she did laundry at home and some other light activities, but it took longer than usual to complete those activities. Claimant's medication includes Vicodin, Percocet, Lyrica and Lidoderm patches.

The physical examination showed that Claimant had diminished range of motion in the neck and tenderness over the midline of the C7 spinous processes. Dr. Townsend did not find any spasm and there was no Spurling's maneuver noted. He did not find any weakness in the upper extremities. He found normal reflexes in the upper extremities. Claimant had some subjective radicular complaints but no objective physical findings, so she had nonverifiable radicular complaints.

Dr. Townsend rated Claimant's permanent impairment under the sixth edition of the *Guides*. He found that Claimant fits into Class 2 in Table 17-2 for motion segment lesions, as she had a known disc herniation and a single level surgery with medically documented findings. Claimant has eleven percent permanent impairment to the cervical spine for the motion segment lesions that is causally related to the industrial accident and that percentage is modified either up or down when utilizing the functional tests that are found later in the chapter. Dr. Townsend described the modifiers and how they apply to Claimant. After applying the modifiers for Claimant, Dr. Townsend determined that Claimant has twelve percent permanent impairment to the cervical spine based on the sixth edition of the *Guides*. ✓

The sixth edition is the most recent publication and Dr. Townsend felt that it would most appropriately apply to Claimant. The sixth edition is different from the fifth edition in that there is less ambiguity and it has fewer people coming up with grossly different permanencies because if the diagnosis is right, then they should be within a class where there can only be a difference of about five from the lowest to the highest percentage. The authors of the *Guides* thought that

permanency should be based on functional outcome and that is why there is a focus on how the patient does after surgery in the sixth edition.

In Claimant's case, the outcome post-surgery was that she had neck pain that she rated as a four out of ten on the pain scale and she had some complaints of numbness extending down her arm and into three fingers. Dr. Townsend believes that the twelve percent permanent impairment rating under the sixth edition of the *Guides* is an accurate representation of Claimant's permanent impairment following a one-level cervical fusion surgery.

Dr. Townsend reviewed Dr. Rodgers' report. The examination findings were similar to Dr. Townsend's findings. Dr. Rodgers utilized the fifth edition of the *Guides* and placed Claimant in DRE Category IV with a thirty-five percent permanent impairment rating.

If Dr. Townsend looked at Claimant's permanent impairment with both *Guides*, he would put Claimant in between the two ratings. By placing Claimant's rating in between twelve and thirty-five percent, that would give a more accurate representation of Claimant's actual impairment since the impairment is what sort of problems she has with her daily activities specifically related to her injury. There is not a huge amount of lost activities of daily living. She is slower, but that is also factoring in the low back probably just as much as the neck in the slowness to do certain activities. Claimant had some diminished range of motion, so that is going to have some effect. Dr. Townsend would place Claimant between twenty and twenty-five percent impairment to the cervical spine as being a reasonable representation of what was lost in the surgery and reflects Claimant's ongoing complaints and limitations based on both *Guides* and his own experience and clinical judgment.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Permanent Impairment

Claimant bears the burden of proving by a preponderance of the evidence that she has thirty-five percent permanent impairment to the cervical spine causally related to the industrial accident. Cardinal argues that Claimant has twelve percent permanent impairment to the cervical spine related to the industrial accident. Based on the following, the Board finds that Claimant has twenty-five percent permanent impairment to the cervical spine.

When there is a conflict in medical testimony, the Board must resolve the conflict and decide which physician is more credible. *General Motors Corp. v. McNemar*, 202 A.2d 803 (Del. 1964). As long as there is substantial evidence to support its decision, the Board may accept the testimony of one physician over another. *Standard Distributing Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993). The physicians in this case had similar physical findings on examination and said that the other generally applied the *Guides* correctly. The physicians disagree on which edition of the *Guides* is more appropriate for evaluating Claimant's permanent impairment.

After studying all of the testimony, the Board accepts Dr. Townsend's opinions over the opinions of Dr. Rodgers as to the permanent impairment of Claimant's cervical spine. Given Claimant's condition and level of functioning, the Board finds that the twenty to twenty-five percent rating that Dr. Townsend described is more reasonable under the circumstances of this case than a twelve or thirty-five percent rating. Permanent impairment ratings are supposed to be based on functional loss and Dr. Townsend clearly explained that when looking at Claimant's condition and applying his experience and both *Guides*, Claimant's permanent impairment rating is between twenty and twenty-five percent. The Board finds that such a rating is appropriate

under the circumstances of this case, as Claimant underwent a single level fusion at C6-7, has neck pain, migraine headaches, and radicular symptoms down her right arm and into three fingers on the right hand. However, Claimant is able to do most of her activities of daily living, just at a slower pace than before the injury. Given the range that Dr. Townsend supplied, the Board finds that twenty-five percent is a reasonable rating under the circumstances of this case.

Permanent impairment to the cervical spine is an unscheduled loss and, therefore, the maximum recovery is three hundred weeks of compensation. *Del. Code Ann.* tit. 19, §2326(a). Therefore, the Board awards Claimant \$26,707.50 for seventy-five weeks (twenty-five percent of three hundred weeks) of benefits at her compensation rate (\$356.10 per week) for the permanent impairment of the cervical spine.

Based on the foregoing, Claimant's Petition to Determine Additional Compensation Due is granted. Claimant is entitled to payment of \$26,707.50 for twenty-five percent permanent impairment to the cervical spine.

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

Having received an award, Claimant is entitled to a reasonable attorney's fee assessed as costs against Cardinal in an amount not to exceed thirty percent of the award or ten times the average weekly wage, whichever is smaller. *Del. Code Ann.* tit. 19, § 2320. However, when the employer submits a settlement offer to Claimant or Claimant's counsel at least thirty days before the hearing that is equal to or greater than the Board's award, the Claimant is no longer entitled to receive an award of attorneys' fees. *Id.* At the conclusion of the hearing, Cardinal submitted a settlement offer that was sent to Claimant's counsel before the hearing. The settlement offer was less than the award; therefore, Claimant is entitled to an attorney's fee award in this case.

Claimant's counsel submitted an affidavit attesting to twenty hours of preparation for this two-hour hearing. This case was not novel or difficult, nor did it require exceptional legal skills to try properly. It was not argued that acceptance of this case precluded other employment by Claimant's counsel. The Board considered the fees customarily charged in this locality for similar legal services, the amounts involved and the results obtained. The Board also considered the argument that this case posed time limitations upon Claimant's counsel, the date of initial contact on April 9, 2007, and the relative experience, reputation, and ability of Claimant's counsel. It was argued that the fee was contingent, that Claimant's counsel does not expect to receive compensation from any other source, and that the employer is able to pay an award. *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973).

The Board must consider the ten factors enumerated in *Cox* when considering an attorney's fee award or else it would be an abuse of discretion. *Thomason v. Temp Control*, Del. Super. Ct., C.A. No. 01A-07-009, Witham, J., slip.op. at 5-7 (May 30, 2002). Claimant bears the burden of establishing entitlement to an attorney's fee award and must address the *Cox* factors in the application for an attorney's fee. Failure to address the *Cox* factors deprives the Board of the facts needed to properly assess the claim. The *Cox* factors were addressed in the Affidavit Regarding Attorney's Fees.

In the case at hand, based on the results obtained, information presented and Cardinal's failure to argue that an attorney's fee award is not appropriate, the Board finds that one attorney's fee in the amount of \$5,500.00 is reasonable. *Del. Code Ann.* tit. 19, § 2320. This award is reasonable given Claimant's counsel's level of experience and the nature of the legal task. In accordance with § 2320(10)a, the attorney's fee awarded shall act as an offset against fees that would otherwise be charged by counsel to Claimant under their fee agreement.

As there is an award, medical witness fees are taxed as costs against Cardinal. *Del. Code Ann. tit. 19, § 2322(e).*

**STATEMENT OF THE DETERMINATION**

Based on the foregoing reasons, Claimant's Petition to Determine Additional Compensation Due is GRANTED for \$26,707.50 for twenty-five percent permanent impairment to the cervical spine. As there is an award, Claimant is also entitled to payment of medical witness fees and an attorney's fee in the amount of \$5,500.00.


IT IS SO ORDERED THIS 27<sup>th</sup> DAY OF AUGUST 2009.

**INDUSTRIAL ACCIDENT BOARD**

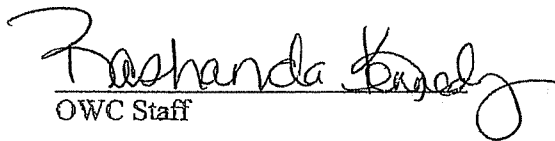
/s/ Elaine Bowen

/s/ Mary Dantzer

I hereby certify that the above is a true and correct decision of the Industrial Accident Board.

  
Julie G. Bucklin  
Workers Compensation Hearing Officer

Mailed Date: 8-28-09

  
Rashanda K. King  
OWC Staff