BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

RODNEY NESMITH,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1324506
	)	
SERVICE MASTER,	)	
	)	
Employer.	)	

DECISION ON PETITION TO TERMINATE BENEFITS

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 18, 2009, in the Hearing Room of the Board, in New Castle County, Delaware. An extension of time for issuance of the decision was then taken pursuant to DEL. CODE ANN. tit. 19, § 2348(k).

PRESENT:

LOWELL L. GROUNDLAND

ALICE M. MITCHELL

Christopher F. Baum, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Gary S. Nitsche, Attorney for the Employee

H. Garrett Baker, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Rodney Nesmith ("Claimant") was injured in a compensable work accident on July 23, 2008, when he was attacked by a dog while he was working for Service Master.[1] Claimant underwent surgery to his left hand and left shoulder. Service Master acknowledges that Claimant hurt his neck, left shoulder and left hand in the accident, but denies that Claimant hurt his low back in that incident. Claimant's wage at the time of injury was $507.59 per week.

On March 25, 2009, Service Master filed a Petition to Terminate Benefits alleging that Claimant is capable of returning to work in a light duty capacity. Disability benefits have been paid to Claimant by the Workers' Compensation Fund since the filing of the petition, pending a hearing and decision.

Claimant also seeks payment of certain medical expenses. These expenses went to Utilization Review ("UR") in March of 2009, when Claimant was represented by another attorney. Claimant's current counsel maintains that Claimant never saw the UR determination. Service Master's counsel asserts that the decision was sent to Claimant's former counsel, that there is a limited time to appeal from a UR determination and that that time period has expired.

A hearing was held on Service Master's petition on November 18, 2009. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. John B. Townsend, III, testified by deposition on behalf of Service Master. He has examined Claimant on four occasions from September 1, 2008, through October 9, 2009. He also reviewed pertinent medical records. In his opinion, Claimant can work with sedentary restrictions and some of his ongoing medical treatment has not been reasonable.

[1] The employer was referred to in the hearing by various names, including TruGreen and ChemLawn. However, Service Master appears to be the umbrella name for the organization and will be used in this decision.

Dr. Townsend understood that Claimant was injured at work in July of 2008 when he tried to climb a fence to get away from some dogs and fell. Claimant alleged that he injured his neck, left shoulder, left thumb and mid-back in the fall. A cervical MRI showed moderate disk bulges at C4-5 and C5-6. An MRI of the left shoulder showed a partial tear of the supraspinatus tendon and some subdeltoid bursitis. An MRI of the left thumb showed a tear of the medial collateral ligament and flexor tendon.

On September 1, 2008, Claimant complained to Dr. Townsend of pain in the left shoulder, left thumb and neck. The neck pain was described as constant and rated as a seven or eight on a ten-point scale. He did not mention any low back complaint. On examination on September 1, Claimant had diminished range of motion in his neck with tenderness. There was also tenderness at the left shoulder, but no atrophy or spasm. Impingement sign was equivocal on the left. There was also tenderness at the base of the thumb. Because Claimant had no low back complaints, Dr. Townsend stated that he did not examine the low back on September 1, although he admitted on cross-examination that he did measure Claimant's low back motion and found that it was diminished. In Dr. Townsend's opinion, on September 1, 2008, Claimant could work in a light duty capacity with no lifting over twenty pounds, avoiding overhead work and avoiding repetitive grasping with the left hand.

Dr. Townsend noted that, on September 4, 2008, Claimant went to Dr. Bruce Grossinger for treatment. On September 8, an MRI was taken of the low back which the radiologist read as showing herniations at L4-5 and L5-S1, with an annular tear.[2] An EMG of the upper extremities was read as indicative of bilateral C5 radiculopathy. An EMG of the lower extremities was read

[2] Dr. Townsend noted that Claimant was later seen by Dr. Bruce Rudin, who thought that there was only a single level of herniation, and a June 2009 discogram would identify only the L4-5 disk as a pain generator.

as positive for a mild left S1 radiculopathy. In December of 2008, Claimant had surgery on the left thumb.

Dr. Townsend examined Claimant again on January 15, 2009. Claimant complained of neck, shoulder, thumb, mid-back and low back pain. On examination, Claimant had decreased motion in the neck and the low back. There was no radiating pain upon supine straight leg raising. There was no evidence of nerve or nerve root injury. Dr. Townsend thought, based on Claimant's persistent subjective complaints, that Claimant could work in a sedentary capacity, with no lifting over ten pounds and avoiding overhead work.

Dr. Townsend did not consider Claimant's lumbar complaints to be related to the work injury. He did not think that Claimant mentioned any low back complaint when he went to the emergency room. At Concentra, Claimant had only intermittent complaint of mid- and low back pain, and Claimant did not mention any such complaint to Dr. Townsend at the time of the September 1, 2008 examination. There was no mention of radiating pain in the legs either. When Claimant went to Delaware Pain Management & MRI ("Delaware Pain") the initial treatment was only to the neck and shoulder, with no treatment plan for the low back. Therefore, six weeks out from the accident, Claimant was not receiving any treatment for a low back complaint.

Dr. Townsend examined Claimant once more in July of 2009. In February of 2009, Claimant had surgery on his left shoulder. In June, the surgeon released Claimant to light-duty work with respect to the shoulder alone. Dr. Townsend's findings on examination in July of 2009 were similar to the prior examination. Claimant had diminished ranges of motion in the neck and low back with tenderness. Neurological examination was once again normal. Claimant was examined again on October 9, 2009. At that time, he told Dr. Townsend that he was going

to have back surgery performed by Dr. Bruce Rudin. Dr. Townsend thought the proposed surgery was reasonable treatment, but he continued to be of the opinion that Claimant's low back condition was unrelated to the work accident.

Dr. Townsend reviewed a labor market survey that had been prepared listing available sedentary and light-duty jobs. In his opinion, the listed jobs were within Claimant's physical capabilities.

Dr. Townsend opined that Claimant's treatment at Delaware Pain had been excessive. The treatment did not follow the Health Care Practice Guidelines. Based on Claimant's reported pain scale, the treatment has not provided improvement. The Delaware Pain records reflect no real effort to show functional improvement. There was no decrease in Claimant's pain complaints. There was no decrease in his work restrictions. The records reflect no effort to return Claimant to work.

Dr. Townsend stated that, under the guidelines, if there is no improvement after six to ten visits there is no reason to continue with that form of therapy (chiropractic and multiple modalities). As of January 15, 2009, Claimant had had 71 visits for chiropractic treatment. For therapeutic exercise, Chronic Pain Treatment Guideline 6.4.11 states that the time to produce effect is two to six treatments and the maximum duration should only be 36 visits. Similarly, electronic stimulation is to produce effects after two to four treatments, with a maximum of twenty-six treatments. Guideline 6.4.12 discusses manipulations. The time to produce an effect is one to six treatments up to three times per week for the first four weeks. The maximum number of visits is 26. Massage needs to produce immediate results and is limited to a maximum of twelve visits. Ultrasound is to produce effect within six to sixteen treatments, with the

maximum number of treatments being 24. The guidelines suggest that aquatic therapy should produce effect in four or five treatments and have a maximum number of 26 treatments.

Dr. Townsend also noted that Dr. Grossinger had performed epidural injections. Three cervical epidural injections were done in November and December of 2008, while three lumbar injections were done from January through March of 2009. Under the Chronic Pain Treatment Guidelines 6.4.5, after the first injection, there should be a physical examination performed not just to measure Claimant's subjective complaints, but to document measurable functional gains (such as increased range of motion, increased strength or reduction of pain).[3] Injections should be repeated based on the patient's response to each injection. From the medical records, it does not appear that Dr. Grossinger did any sort of physical examination of Claimant between the injections or document any information regarding functional gains.

Dr. Townsend was also aware that Dr. Grossinger was doing facet injections. He disagreed with the suggestion that a set of three facet injections was a worldwide protocol. Numerous textbooks would suggest that one injection followed by a confirmatory block or rhizotomy would be appropriate. A rhizotomy would only be considered if the block produced over fifty percent improvement. Because Dr. Grossinger did not re-evaluate the patient after the first block he would have no way of knowing if there had been such improvement. Facet injections are covered under Treatment Guideline 5.3.1.2, which specifies that the injection should be repeated only if they result in documented functional benefit for at least four weeks or at least fifty percent initial improvement of pain. Neither was documented in Dr. Grossinger's records. Claimant's subjective pain scale was at seven, the same as it had been throughout his treatment.

[3] There are similar restrictions stated in the Cervical Treatment Guidelines, but those guidelines were not in effect until June 1, 2009. That is why Dr. Townsend focused on the provisions of the Chronic Pain Treatment Guidelines. Claimant was seeing Dr. Grossinger because of his chronic pain.

Mary Ann Shelli Palmer, a senior vocational rehabilitation consultant, testified on behalf of Service Master. She prepared a labor market survey of jobs available to a person with Claimant's restrictions and educational and vocational background. The restrictions she used were those proposed by Dr. Townsend: sedentary duty with no lifting over ten pounds, no overhead work and no repeated twisting of the neck. Ms. Palmer stated that Claimant has a high school education, served in the military, and has worked for Acme. For Service Master, he was a lawn care specialist. The survey identifies thirteen positions in such fields as customer service, security and dispatching. Claimant's military service is a plus and, in his position of lawn care specialist, he developed customer service skills. The jobs on the survey are entry level with on-job training provided. One position (security supervisor) requires a military background, which Claimant has.

Ms. Palmer stated that the survey is just a representative example of available positions. She viewed all the listed positions and confirmed that the job descriptions are accurate and within Claimant's restrictions and work history. The listed employers confirmed that Claimant was a viable candidate for the listed jobs. The average wage reflected on the survey is $431.53 per week.

Ms. Palmer acknowledged that she told the prospective employers that Claimant had shoulder and neck injuries. She did not tell them about his 2009 low back surgery. She was also not aware that Claimant had a criminal background and (obviously) did not discuss that with the prospective employers. However, a number of the listed employers (at least five) would still hire a person with a criminal background, possibly even a felony depending on the circumstances. On the other hand, at least five of the listed employers would require Claimant to pass a background check.

Dr. Bruce Rudin, a spinal surgeon, testified by deposition on behalf of Claimant. He first saw Claimant on June 29, 2009. In his opinion, Claimant injured his low back in the work accident and the treatment that the doctor has provided for the low back has been within the Health Care Practice Guidelines.

Dr. Rudin was aware that Claimant was injured after jumping a fence to escape a dog. Claimant reported an immediate onset of back, neck, shoulder and thumb discomfort. He received medical care for his shoulder and thumb and he also saw Dr. Bruce Grossinger for cervical, thoracic and lumbar spine discomfort. In June of 2009, Claimant's chief complaint was low back pain that was worse than his posterior leg pain. Claimant explained that he had been off of work since July 23, 2008.

Dr. Rudin stated that, on examination on June 29, 2009, Claimant had limited forward flexion of the low back, with a fairly significant diskogenic posture indicative of a disrupted or internally deranged disk in the lumbar spine. He was neurologically normal. An MRI showed degenerative disk disease and degenerative changes at L4-5 and L5-S1. There was a small disk herniation at L4-5.

Following the lumbar treatment guidelines under the Health Care Practice Guidelines, in light of the duration of the complaints and the failure of conservative care, in addition to the lack of any clear diagnosis, Dr. Rudin recommended a provocative discogram. The purpose of this test was to confirm if the abnormalities seen on the MRI were in fact the source of Claimant's pain. In Claimant's case, the discogram identified a single level of lumbar pain, namely L4-5. In light of this result, Dr. Rudin recommended that Claimant have total disk replacement surgery.

Claimant had the surgery on October 13, 2009. At the time of his deposition, Dr. Rudin noted that Claimant had been seen for one post-operative visit two weeks after the surgery.

Claimant was doing well and improving as expected from such a procedure. Typically, a person would be able to return to restricted duty work from six to twelve weeks following the surgery, and then possibly more strenuous work in the three to six month time frame.

With regard to Claimant's work status, Dr. Rudin stated that, until the surgery, the determination of whether Claimant could work was left with Dr. Grossinger. Dr. Rudin thought Claimant was already out on total disability when he first saw him. However, since the back surgery, Dr. Rudin has kept Claimant off of work on total disability because of the low back.

In Dr. Rudin's opinion, Claimant's low back problem is causally related to the work accident. There is no evidence that Claimant had any preexisting low back problems. The work accident then happened and he complained of low back symptoms almost immediately. The complaints have been consistent and the diagnostic tests are consistent with the complaints. The L4-5 disk was bad. The mechanism of injury is consistent with the low back injury. All of this combined leads to the conclusion that Claimant's low back was injured in the work accident.

Dr. Bruce Grossinger, a neurologist and pain practitioner, testified by deposition on behalf of Claimant. He began to provide treatment to Claimant on September 4, 2008.

Dr. Grossinger had received a similar mechanism of injury as the other medical witnesses. In the incident, Claimant tore up his left thumb, injured his neck, had radiating symptoms into his shoulders arms and hands, developed mid-back pain and stiffness and had sciatica into his legs and feet. On physical examination, Claimant had tenderness at the base of his thumb with diminished motion, restricted neck motion, shoulder weakness, and trace weakness in the legs. The doctor's notes contain no specific mention of a low back exam. A cervical MRI showed protrusions at C4-5 and C5-6. The left shoulder had a partial tear of the supraspinatus tendon. The left thumb had a tear of the medial collateral ligament and the flexor

tendon. Dr. Grossinger opined that Claimant "could not engage in the rigors of a technician for Trugreen Lawn Care." *Deposition of Dr. Grossinger*, at 5. A cervical EMG was done on September 23, 2008, showing injury to the C5 nerve root. A lumbar EMG was done on October 14, 2008, which reflected a mild injury to the left S1 nerve root.

Dr. Grossinger stated that he started a series of cervical epidural injections on November 6, November 25 and December 9, 2008. Claimant had a "reasonable" response to the injections. Claimant reported significant (40%) short-term relief after the first injection, which justified doing another injection.[4] The doctor then administered lumbar epidural injections on January 27, February 26 and March 19, 2009. These did not provide any sustained improvement, although there was short-term relief after the second injection which was done at the L5-S1 level. Dr. Grossinger confirmed that the reported improvement is from Claimant's history. No actual examination was done of Claimant prior to doing the subsequent injections. Because the lumbar injections failed to give long-term relief, Claimant was referred to Dr. Rudin, who determined that, despite the lumbar EMG findings indicating an L5-S1 problem, the actual problem was at L4-5.

Dr. Grossinger last saw Claimant on September 17, 2009. Claimant still was restricted in his cervical and lumbar motion. There was "persistent scarring" of the left thumb, with restricted motion and grip compromise.

The doctor stated that, throughout his treatment of Claimant, Claimant could not return to his pre-injury job. At the time of the doctor's deposition, Claimant was just having his low back surgery, so he would not be able to work while he recuperates from that surgery.

[4] When asked what the date was of the handwritten note that allegedly documented this improvement, Dr. Grossinger suddenly was unable to locate it despite claiming that he "had it a second ago."

With respect to the medical treatment received by Claimant, Dr. Grossinger opined that it was reasonable, necessary and causally related to the work accident. With respect to Dr. Townsend's opinion that Dr. Grossinger's use of epidurals did not meet the Health Care Practice Guidelines, Dr. Grossinger opined that he is more knowledgeable than Dr. Townsend and that he was "instrumental" in writing the guidelines and the "clinical judgment" of a doctor should "always" supersede the text of the guidelines. *Deposition of Dr. Grossinger*, at 27. Dr. Grossinger insisted that three is the benchmark for such injections, although he also agreed that if the injections are not helping or hurting the patient, you would abandon doing them.

With respect to Claimant's work status, Dr. Grossinger acknowledged that it is a requirement for the physician to fill out a form stating the patient's functional capabilities. While one of the doctor's initial notes claims that he filled out the form, he was unable to find it in his file. When asked if he restricted Claimant from any sort of daily living activities, Dr. Grossinger stated only that he cautioned Claimant from "overdoing it" (although this is not documented in the doctor's report).[5] Claimant did state that on bad days, he would just lay around the house.

Claimant testified that he is fifty-two years old. On July 23, 2008, he was servicing a customer's lawn. He was spraying the back yard when the customer's dogs came at him. He ran and jumped a fence to get away from the dogs, falling as he went over the fence. He landed on his left shoulder and neck. He went to Concentra for medical care on July 25, 2008, where he reported that he had symptoms in his neck, mid-back, low back, left shoulder and left thumb. He went to Concentra on three occasions and each time the Concentra records document that he mentioned a low back complaint. On July 28, he went to the Emergency Room and again recited

[5] The doctor further elaborated that such a caution was part of his usual "mantra," not that he had any independent recollection of doing it. His practice is too busy for him to take time to document such things in his records.

the events of the accident and his complaints, including the low back. This is also documented in the emergency room record. After that, he went to his family doctor, who sent him for therapy at Delaware Pain Management, who then sent him to see Dr. Grossinger. Claimant then saw Dr. Rudin, who performed surgery on the low back on October 13, 2009. As of this hearing, both Dr. Grossinger and Dr. Rudin still have kept Claimant out of work.

Claimant stated that, roughly twenty years ago (1986), he was in a motor vehicle accident in which he hurt his back, but apart from that he has had no back injuries until the July 2008 work event. The back pain from the motor vehicle accident only lasted maybe a few days. He cannot really recall.

Claimant explained that he currently is taking Percocet and Xanax for his injuries. He has some neck discomfort and left thumb pain, numbness and tingling. The shoulder has some discomfort. His current low back pain is rated as a six or seven out of ten. Around the house, he thinks that he could do a limited amount of grass cutting, washing of the car and taking the trash out.[6] He does the dishes every now and then and can make his own breakfast. He is capable of self-hygiene. His sleep is disturbed and he cannot sleep a full eight hours.

Claimant confirmed that he has a high school education, was in the army and received an honorable discharge in 1981. In the army, he received four promotions and had a security clearance to work with weaponry. However, since then he has developed a criminal record. He was incarcerated for robbery from 1993 to 1996. He was incarcerated for burglary from 1998 to 2006. In the 1980s, after his discharge from the army, he worked as a lot attendant for car dealerships, was a cook at Burger King, and a bus boy for the DelRose Café. Then he got into his legal troubles. After he was released from his last incarceration, he worked at a grocery store

[6] Later, Claimant admitted that he has not tried to cut the lawn since his accident and does not think that he could manage it.

for about six months and then he started working for Service Master. He was with Service Master for just over a month before his accident.

Claimant asserted that when he was first examined by Dr. Townsend, he told the doctor about his complaints to the neck, mid-back, low back, left shoulder and left thumb. He mentioned the low back to Dr. Townsend.

With respect to the injections that he received from Dr. Grossinger, Claimant stated that he would not say that they did not work. They helped some but the problem then came right back. He agreed, though, that at the time he reported 50% relief. Similarly, the therapy he received from Delaware Pain Management helped some.

Ms. Palmer was recalled for additional testimony by Service Master. In light of Claimant's testimony concerning his criminal record, she still believed that employers would look at him as an individual and give him a chance. In fact, Claimant by his own admission was hired by two employers (the grocery store and Service Master) after his convictions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Causation

Claimant seeks to have his low back problems recognized as being related to his work injury. Because this issue impacts the termination issue, it must be decided first. Service Master asserts that the pending petition is for termination of benefits and Claimant has not filed a petition for recognition of the low back. Certainly, that would have been the proper procedure to follow, but in this case there is no doubt that Service Master was well on notice that Claimant was going to argue that the low back was related, and all the medical witnesses were prepared to discuss the issue. In the interest of judicial efficiency, rather than force a second hearing on the same evidence, the Board will allow Claimant to assert his causation claim at this hearing.

However, it is Claimant's request to add a new injury causally related to the acknowledged work accident, so Claimant has the burden of proof. DEL. CODE ANN. tit. 29, § 10125(c). The Board finds that Claimant has met his burden.

The Board agrees with Dr. Rudin. Certainly the mechanism of injury (jumping over fence and landing on shoulder and neck) is competent to cause injury to the low back. There is no evidence that Claimant had any prior low back pain.[7] Claimant's low back complaints were documented in Concentra records shortly after the accident. Dr. Townsend did not think that the emergency room records mentioned a low back complaint, but Claimant reviewed the emergency room report during his testimony and there is a mention of the low back. This all occurred in July of 2008. Dr. Townsend did not record any low back complaint when he first examined Claimant on September 1, 2008, and he used that as an explanation for why he did not examine the back at that time. However, on cross-examination, he admitted that he had measured the range of motion of Claimant's low back. By the doctor's own testimony, the only reason he would have done that is if there had been a low back complaint. In fact, Dr. Townsend found a diminished range of motion of the back. Claimant first saw Dr. Grossinger a few days later. While Dr. Grossinger's notes do not document that a low back examination took place, a few days later Claimant had an MRI taken of the low back. The Board is satisfied that this substantiates that Claimant did have low back complaints in early September 2008, despite the poor record keeping of both Dr. Townsend and Dr. Grossinger. The records also support that Claimant's low back complaints persisted. Understandably, with Claimant having surgeries performed on his left hand and shoulder, those injuries were receiving more attention at first.

[7] The twenty year old motor vehicle accident does not appear to have resulted in any persistent low back complaints. As such, that accident is too remote in time to have any relevance to the current issue.

Accordingly, the Board finds that there is substantial evidence that, more likely than not, Claimant also injured his low back on July 23, 2008, ultimately leading to the surgery performed by Dr. Rudin on October 13, 2009.

Termination

In a total disability termination case, the employer is initially required to show that the claimant is not completely incapacitated (*i.e.*, demonstrate "medical employability"). *Howell v. Supermarkets General Corp.*, 340 A.2d 833, 835 (Del. 1975); *Chrysler Corporation v. Duff*, 314 A.2d 915, 918n.1 (Del. 1973). In response, the claimant may rebut that showing, show that he or she is a *prima facie* displaced worker or submit evidence of reasonable efforts to secure employment which have been unsuccessful because of the injury (*i.e.*, actual displacement). In rebuttal, the employer may then present evidence showing the availability of regular employment within the claimant's capabilities. *Howell*, 340 A.2d at 835; *Duff*, 314 A.2d at 918n.1. In this case, the Board finds that Claimant's total disability status had terminated as of June 3, 2009, but that Claimant's total disability status resumed as of his low back surgery.

The starting point of the Board's analysis is with Dr. Rudin's testimony. He stated that he has had Claimant out on total disability as of the date of the low back surgery. Prior to that date, Claimant's work status was being left to Dr. Grossinger. Dr. Grossinger's testimony, however, is lacking in factual support. He testified that he thought that he taken Claimant off of work, but when pressed he could not find any such records in his file. He could not locate the form setting forth a patient's functional capacity. Even referring back to his September 2008 exam, the doctor testified that he thought that Claimant could not "engage in the rigors of a technician for Trugreen Lawn Care." *Deposition of Dr. Grossinger*, at 5. However, "total disability" has long been recognized as meaning when an employee is unable to perform any

services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. *M.A. Hartnett, Inc. v. Coleman*, 226 A.2d 910, 913 (Del. 1967). Dr. Grossinger only opined concerning Claimant's ability to perform a single position. That is not total disability. Dr. Grossinger's after-the-fact recollection that he took Claimant off of all work is simply not supported by his own records. As Dr. Grossinger admitted, he has a very busy practice, so the Board does not find his undocumented and unsubstantiated recollection about just one of his many patients to be reliable. Doctors keep notes precisely so that they do not have to depend on their memory. In this case, Dr. Grossinger's memory is at odds with his own records, suggesting that his memory is faulty.

In addition, the Board has the testimony of Dr. Townsend, who examined Claimant in January of 2009 following Claimant's thumb surgery and he opined that Claimant could work in a sedentary capacity at that time. However, Claimant then had shoulder surgery in February of 2009. Although it was not directly discussed, Dr. Townsend commented that Claimant's surgeon released Claimant to return to light-duty status (considering the left shoulder alone) on June 3, 2009. This seems to indicate that Claimant was totally disabled by his surgeon because of the compensable left shoulder surgery until June 3. Dr. Townsend then saw Claimant on July 30 and found Claimant's physical condition to be similar to how it had been in January (*i.e.*, capable of sedentary work).

Service Master filed its petition on March 25, 2009. However, because of the February 2009 shoulder surgery, the Board finds that Claimant remained totally disabled until he was released by his shoulder surgeon on June 3, 2009. Claimant was then capable of sedentary work until Dr. Rudin took him back out of work because of the low back surgery on October 13, 2009.

Dr. Rudin indicated that he has kept Claimant out of work pending re-evaluation and the Board finds this reasonable.

There was no argument that Claimant was a displaced worker during the period from June 3 to October 13, 2009. In any event, even if the argument had been made, the Board finds that Ms. Palmer's labor market survey evidences the existence of suitable positions during this time period. The survey projects an expected average earning capacity of $431.53 per week. Claimant's wage at the time of injury was $507.59 per week. Thus, he had a diminished earning capacity of $76.06 per week, resulting in a compensation rate for partial disability of $50.71 per week during that period.

Medical Expenses

When an employee has suffered a compensable injury, the employer is required to pay for reasonable and necessary medical "services, medicine and supplies" causally connected with that injury. DEL. CODE ANN. tit. 19, § 2322. "Whether medical services are necessary and reasonable or whether the expenses are incurred to treat a condition causally related to an industrial accident are purely factual issues within the purview of the Board." *Bullock v. K-Mart Corporation*, Del. Super., C.A. No. 94A-02-002, 1995 WL 339025 at *3 (May 5, 1995).

Service Master challenged the reasonableness of some of Claimant's treatment.[8] Pursuant to statute, the matter was referred for UR. *See* DEL. CODE ANN. tit. 19, § 2322F(j). A UR determination was apparently issued in late March or early April of 2009. At the time, Claimant was represented by different counsel. While the UR determination was sent to Claimant, Claimant's current counsel stated that he had not seen it.[9] There is an issue of whether

[8] There is no challenge to the reasonableness or necessity of Dr. Rudin's charges with respect to the low back treatment. Service Master only challenged causation. Because the Board has found causation, those bills should be paid in accordance with the fee schedule of the Health Care Payment System.

[9] Service Master's counsel states that it also sent a copy of the determination to Claimant's former counsel, but apparently when Claimant switched attorneys the UR determination did not make the switch.

it is now too late for Claimant to appeal that determination. While the regulations now set a 45-day time limit to appeal a UR determination (*see* 19 Del. Admin. Code 1341-Section 5.5.1), that time limit was not part of the regulations until June of 2009, after the UR determination in this case was issued.

Because of the ambiguity of the time for making an appeal prior to the June 2009 change in the regulations, the Board will consider Claimant's claim for medical expenses. However, the Board agrees with Dr. Townsend that the questioned treatment is excessive and unreasonable.

Treatment by a certified health care provider that conforms with the Health Care Practice Guidelines is "presumed, in the absence of contrary evidence, to be reasonable and necessary." DEL. CODE ANN. tit. 19, § 2322C(6). The necessary corollary to this is that, if treatment is outside the guidelines, it is not presumed reasonable, although evidence can be provided to show that the treatment actually was reasonable in any particular case. When treatment is outside the guidelines, the burden of proof is on Claimant or the medical care provider to establish that the treatment was in fact reasonable. *See Meier v. Tunnell Companies LP*, Del. IAB, Hearing No. 1326876, at 6 (November 24, 2009)(ORDER).

In this case, Dr. Townsend gave a very detailed discussion as to exactly where the treatment Claimant received exceeded what is contained in the treatment guidelines. In response, Dr. Grossinger failed to identify even a single provision that he was actually in compliance with. Rather, he asserted that his clinical judgment should "always" supersede the guidelines. *Deposition of Dr. Grossinger*, at 27. This is practically an admission that the challenged treatment was outside those guidelines, as Dr. Townsend explained.

Dr. Grossinger then completely failed to provide any factual basis for why the treatment he provided to Claimant was actually reasonable despite being outside the treatment guidelines.

He stated that he was more knowledgeable about such things than Dr. Townsend, but such conclusory boasts do not provide any substantial evidence as to why treatment that is outside of the established treatment guidelines should be considered reasonable in Claimant's case. As both Dr. Townsend and Claimant observed, the treatment did not provide any significant long-term improvement to Claimant's condition.

Accordingly, Claimant has failed to meet his burden of proof that the treatment that is outside of the Health Care Practice Guidelines was reasonable. Service Master is only required to pay for that treatment that Dr. Townsend identified as being within the Health Care Practice Guidelines. Payment for treatment that he identified as being outside those guidelines is denied as unreasonable.

Attorney's Fee & Medical Witness Fee

A claimant who is awarded compensation is entitled to payment of 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 smaller." DEL. CODE ANN. tit. 19, § 2320. At the current time, the maximum based on Delaware's average weekly wage calculates to $9,160.00.[10] The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55 (Del. 1973). Less than the maximum fee may be awarded and consideration of the *Cox* factors does not prevent the granting of a nominal or minimal fee in an appropriate case, so long as some fee is awarded. *See Heil v. Nationwide Mutual Insurance Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96A-01-005, Cooch, J., 1996 WL 527213 at *6

[10] Attorney's fees are not awarded if, thirty days prior to the hearing date, the employer gives a written settlement offer to the claimant that is "equal to or greater than the amount ultimately awarded by the Board." DEL. CODE ANN. tit. 19, § 2320. A settlement offer was tendered by Service Master, but it was for less than what has been awarded by the Board. Therefore, an award of attorney's fees is appropriate.

(August 9, 1996). A "reasonable" fee does not generally mean a generous fee. *See Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966). Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation. By operation of law, the amount of attorney's fees awarded by the Board applies as an offset to fees that would otherwise be charged to Claimant under the fee agreement between Claimant and Claimant's attorney. DEL. CODE ANN. tit. 19, § 2320(10)a.

Claimant has successfully established a compensable low back injury and, for the most part, has successfully defended against Service Master's termination petition. Claimant's counsel submitted an affidavit stating that he spent at least twenty-two hours in preparation time for this hearing, which itself lasted just under three hours. Claimant's counsel was admitted to the Delaware Bar in 1988 and he is very experienced in workers' compensation law, a specialized area of litigation. His initial contact with Claimant was in May of 2009, so Claimant has been represented for roughly half a year. Current counsel is Claimant's second attorney to handle this matter. This case was of average complexity involving no novel issues of fact or law. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances. There is no evidence that accepting Claimant's case precluded counsel from accepting other clients. Counsel's fee arrangement with Claimant is on a one-third contingency basis. Counsel does not expect a fee from any other source. There is no evidence that the employer lacks the ability to pay a fee.

Taking into consideration the fees customarily charged in this locality for such services as were rendered by Claimant's counsel and the factors set forth above, the Board finds that an attorney's fee in the amount of $7,000.00 is reasonable in this case. In the Board's estimation,

this fee adequately takes into account the value of non-monetary benefits arising from this decision. *See Pugh v. Wal-Mart Stores, Inc.*, 945 A.2d 588, 591-92 (Del. 2008).

Medical witness fees for testimony on behalf of Claimant are awarded to Claimant, in accordance with title 19, section 2322(e) of the Delaware Code.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board finds that Claimant's low back injury is causally related to the July 2008 work accident. He remained total disabled until June 3, 2009. From June 3 through October 12, 2009, Claimant was entitled to compensation for partial disability at the rate of $50.71 per week. Claimant then resumed total disability status on October 13, 2009 and remained totally disabled as of the date of the Board's hearing. Service Master shall make appropriate reimbursement to the Workers' Compensation Fund, in accordance with title 19, section 2347 of the Delaware Code.

Claimant's request for payment of medical expenses is denied to the extent that the submitted treatment is outside of the Health Care Practice Guidelines as identified by Dr. Townsend.

Finally, Claimant is awarded an attorney's fee and the payment of his medical witness fees.

IT IS SO ORDERED THIS 21 DAY OF DECEMBER, 2009.

INDUSTRIAL ACCIDENT BOARD

Lowell L. Groundland
LOWELL L. GROUNDLAND

Alice M. Mitchell
ALICE M. MITCHELL

I, Christopher F. Baum, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

Christopher F. Baum

Mailed Date: 12-22-09

OWC Staff