

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

CHRISTOPHER NED,)
)
 Employee,)
)
 v.) Hearing No. 1379818
)
 GARDA CASH LOGISTICS,)
)
 Employer.)

DECISION ON PETITION TO DETERMINE COMPENSATION DUE

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board ("Board") on July 27, 2012, in a Hearing Room of the Board in New Castle County, Delaware.

PRESENT:

TERRENCE SHANNON

OTTO MEDINILLA, SR.

Julie Pezzner, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Michael Silverman, Attorney for the Employee
Nathan Gin, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Mr. Christopher Ned ("Claimant") contends that on December 14, 2011 and on December 15, 2011 he sustained two work accidents during the course and scope of his employment at Garda Cash Logistics ("Employer"). His injury is specifically to his cervical spine although he also has radicular complaints and pain complaints involving his left arm. At the time of the work accidents, Claimant's average weekly wage was \$506 yielding a weekly compensation rate of \$337.33. Claimant was placed on total disability as of December 15, 2011.

On February 9, 2012 Claimant filed an initial Petition to Determine Compensation Due in which Claimant seeks an acknowledgement of the compensability of his work injury to his cervical spine and an acknowledgement that Dr. Rudin's proposed surgery is reasonable and necessary. Initially, Employer challenged the compensability of Claimant's work injury and disputed the reasonableness and necessity of the proposed surgery. A hearing was held on Claimant's petition on July 27, 2012. However, on the day of the hearing, Employer's counsel learned that Employer has been regularly paying Claimant ongoing total disability benefits as a result of Claimant's reported work accidents.

At the end of opening statements, Claimant's counsel moved for a directed verdict on the issue of compensability of the work injury. Despite Employer's informal acknowledgement that Claimant sustained a work injury by its continued payment of total disability benefits, a formal Agreement as to Compensation has never been filed. The Board granted Claimant's Motion for Directed Verdict. An agreement as to the compensability of Claimant's work injury has been "implied in fact" based on the fact that employer or its carrier has been making ongoing total disability payments under a feeling of compulsion by the Workers' Compensation Act. *William Kinder v. Securitas, Inc.*, IAB # 1334263, p. 4 (July 6, 2009) (ORDER).

The remaining issue for the Board was the issue of reasonableness and necessity of the proposed surgery by Dr. Rudin. Deliberations on the latter issue did not conclude until August 29, 2012. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant testified on his own behalf. He is thirty-two years old. He has a high school diploma and is currently in his last year of school. He is pursuing a degree in organizational dynamics. At the time he worked for Employer, he also worked an additional job counseling youth. He is six foot five and weighs approximately three hundred seventy pounds. He acknowledged that his body structure is such that he has a big neck.

Claimant testified that he was involved in two work accidents while working for Employer. The first work accident occurred while he was riding as a passenger in an armored car. When the car drove over a bump, he struck his head on the ceiling of the car. He experienced neck pain and experienced shooting pain and numbness going into his left arm. The second work accident involved experiencing pain his left arm while he was lifting bags of coins. Claimant testified that Employer has been paying him total disability benefits as a result of both work accidents and continues to pay Claimant total disability benefits to present.

Claimant stated that because of his work injury, he has had consistent neck pain with symptoms of shooting pain from underneath his left arm going down to his fingertips. He has constant numbness and pain. He typically holds his arm bent at a ninety degree angle and resting against his torso. He will massage the area around his elbow and his collar bone for mild relief. He no longer is able to lift one hundred pounds. His work restrictions prevent him from being able to return to his former job at Employer although he is able to continue working in some capacity at his second job as a youth counselor.

Claimant rated his pain on the day of the hearing at an eight on a ten-point pain scale. On an average day, he would rate his pain over a ten on a ten-point pain scale. He stated his pain is unbearable sometimes. Claimant testified that his pain interrupts his sleep and his concentration. He cannot play with his children in the manner he did prior to the work accidents. Claimant takes Motrin almost daily. He also has been prescribed Percocet and an anti-inflammatory medication.

Claimant would like to pursue the surgical route. Claimant testified that the surgery Dr. Rudin is proposing is scheduled on September 4, 2012. It had been scheduled earlier but the adjuster denied coverage two weeks prior to the previously scheduled date. Claimant stated that his attorney referred him to Dr. Rudin.

Claimant denied having a neck injury prior to the work accident. Claimant acknowledged injuring his back in a motor vehicle accident in 1999.

Dr. Bruce Rudin who is board certified in orthopedic surgery testified by deposition to a reasonable degree of medical probability on behalf of Claimant. He testified that he commenced treating Claimant on January 25, 2012 per referral of Claimant's primary physician. Dr. Rudin diagnosed Claimant as having cervical radiculopathy secondary to a neural foraminal narrowing. Dr. Rudin testified that such diagnosis was confirmed by the physical examination, by the clinical complaints, and by the MRI study.

Dr. Rudin opined that the surgery he is proposing is reasonable, is necessary, and is causally related to the work accidents. Dr. Rudin testified that his medical treatment including the proposed surgery falls within the restrictions of the State of Delaware Practice Guidelines ("Practice Guidelines") for the cervical spine. In light of such compliance, Dr. Rudin remarked that his treatment including the proposed surgery should be presumed to be reasonable and

necessary. Dr. Rudin added that Claimant is in great pain and is miserable; to delay surgery will cause Claimant more harm.

Dr. Rudin described Claimant's mechanism of injury. On December 14, 2011, Claimant was traveling in an armored car when the car ran over a bump causing Claimant to strike his head on the top of the vehicle. Claimant experienced an immediate onset of neck and of left arm discomfort. On the following day, Claimant was lifting coins and experienced an onset of left arm numbness. Claimant was seen at Concentra Medical Center, prescribed physical therapy and prescribed medications.

Claimant underwent an MRI study on January 5, 2012. Dr. Rudin testified that the MRI report prepared at Papastavros indicated that Claimant had a negative study. According to the MRI report, the study was normal and the vertebral bodies demonstrated normal height and marrow signal. There was no evidence of a disk herniation or of spinal stenosis.

Dr. Rudin testified that he reviewed the MRI film and detected left C7-T1 neural foraminal narrowing with a left C7-8 radiculopathy. Dr. Rudin stated that he telephoned the radiologist and informed the radiologist of Dr. Rudin's discovery. Dr. Rudin testified that the radiologist acknowledged that the quality of the MRI image was not necessarily good enough to see the neural foraminal narrowing at C7-T1 but upon another review of the MRI film, the radiologist agreed with Dr. Rudin's positive findings. The radiologist indicated that he was going to amend the report to indicate the presence of a left C7-T1 neural foraminal narrowing. Dr. Rudin handwrote on the MRI report that there was a positive finding for left C7-T1 neural foraminal narrowing as well as left C7-8 radiculopathy. Dr. Rudin testified that such finding is consistent with Claimant's complaints of radiating pain into the C8 distribution – the ulnar side of Claimant's hand from the elbow down.

At Claimant's initial visit with Dr. Rudin, Claimant had symptoms referable to a C8 radiculopathy. Dr. Rudin's notes indicated that Claimant had no deformity, no spasm, no scars, a normal range of motion, and a weakness in wrist flexion. Claimant cradled his arm and reported pain in the front of his chest from the nerve root. Dr. Rudin prescribed twelve days of oral steroids (prednisone) and prescribed a different type of physical therapy.

Claimant returned on February 15, 2012 and reported having no improvement; Claimant continued to have arm pain and numbness. Dr. Rudin did not conduct a cervical examination at this visit. Dr. Rudin testified that typically at this point, he would administer injections. Dr. Rudin testified, however, that Claimant's neck size would prevent Dr. Rudin from being able to safely administer the injections. Dr. Rudin would not be able to see under fluoroscopy where to place the needle. Because cervical injections were not an option, Dr. Rudin at this visit recommended that Claimant proceed with surgery.

Dr. Rudin testified that typically he would recommend performing an anterior cervical discectomy and fusion. However, Claimant's neck size would make the surgery procedurally difficult. Therefore, Dr. Rudin concluded that to proceed with a C7-C8 nerve root decompression on the left hand side and doing it from the back would be the safest procedure.

Dr. Rudin testified that after scheduling Claimant to have the surgery, the insurance carrier requested that Claimant undergo an EMG study. Dr. Rudin commented that he did not think an EMG would be necessary but advised Claimant to undergo the EMG to appease the insurance carrier. Dr. Anne Mack, a physician with Delaware Back Pain and Rehabilitation, performed the EMG on May 17, 2012. Dr. Rudin acknowledged that the actual EMG report was confusing in terms of representing the findings. The report indicated evidence of a left lumbosacral nerve root irritation involving the dorsal rami and yet the EMG was of the left arm

and not of the lumbar spine. The report also indicated possible evidence of innervations in the left triceps and pronator teres and possible evidence of left C7 radiculopathy. There was no evidence of left ulnar motor nerve entrapment at the elbow, peripheral neuropathy, or myopathy. Dr. Rudin testified that the findings were consistent with a pinched nerve in his neck and with his diagnosis.

Dr. Rudin acknowledged that Claimant subsequently injured his low back and commenced treating with Dr. Ginsberg. Dr. Ginsberg placed Claimant on sedentary work status as a result of the new low back injury. Dr. Rudin, however, has maintained Claimant's total disability status as it relates to Claimant's cervical spine.

Dr. Robert Draper who is board certified in orthopedic surgery testified by deposition to a reasonable degree of medical probability on behalf of Employer. He examined Claimant on March 19, 2012. Dr. Draper opined that Dr. Rudin's proposed surgery is unreasonable and unnecessary. Dr. Draper explained that Claimant does not have the pathology Dr. Rudin claims exists so there is no reason to operate.

Dr. Draper's examination findings were the following. Claimant was six-foot-five and weighed three hundred eighty pounds. Claimant had some limitation of range of motion of the cervical spine. Claimant: turned to the left thirty degrees; turned to the right thirty degrees; had forward flexion of twenty degrees; had backward extension of twenty degrees; had right lateral flexion of twenty degrees; and had left lateral flexion of twenty degrees. Claimant had normal motor function at plus-five in the upper extremity. Claimant's reflexes at the brachial radialis, the wrist, the biceps, and the triceps were at plus-one and normal. The nerve roots coming out of the neck, specifically the 2, 3, 4, 5, 6, 7, T8 and T1 dermatomes were normal. Dr. Draper

diagnosed Claimant has having cervical strain. C8 radiculopathy was not documented on the day of the examination.

Dr. Draper testified that the physical examination findings do not support the diagnosis of either C7 or C8 radiculopathy. He explained that to have C7 radiculopathy, Claimant would have to have sensory deficit in the tip of the middle finger, motor deficit or motor weakness. The sensory deficit for C8 would be in the tip of the little finger on the ulnar side of the hand. Both areas were normal during the examination.

Dr. Draper testified that he reviewed the film captured on CD of Claimant's MRI as well as the MRI report. The MRI film did not demonstrate evidence of a nerve root impingement or of a herniated disk. The MRI was essentially normal. There was no evidence of C7-T1 neural foraminal encroachment. There was no evidence of a C6-7 neural foraminal encroachment or narrowing. Dr. Draper testified that he specifically looked for the positive findings Dr. Rudin claims are present on the MRI film and did not find them. Dr. Draper looked: for degenerative disk disease causing inflammation or a bulge into the area near the foramen; for osteophytes or bone spurs sticking out from the vertebral body that could press on the nerve roots. None of such findings were present. There was no evidence of osteophytes and evidence of specific narrowing in the foramen where the nerve root comes out. Dr. Draper remarked that the radiologist did not revise the MRI report to reflect Dr. Rudin's revisions to the findings. There is no documented evidence that the radiologist subsequently agreed with Dr. Rudin.

The May 17, 2012 EMG did not reveal any positive findings for C8 radiculopathy. It was normal for the muscle innervated by the C8 nerve root. The EMG indicated that there is a possible left C7 radiculopathy but such finding was not conclusive. The left C7 radiculopathy would be between the C6 and C7 vertebral bodies on the left side. Dr. Draper emphasized that

while the EMG revealed a questionable radiculopathy at C7, the physical examination findings as well as the MRI involving the C-7 nerve root were normal.

Dr. Draper testified that Claimant's symptoms are subjective and unsupported by objective findings. He stated that there is no definitive pathology present either by MRI, by EMG, or by physical findings to support C7 or C8 radiculopathy. Dr. Draper surmised that Claimant may have some inflammation of the soft tissue structures in the neck that might either be encroaching upon the nerve root and causing symptoms or some irritation of the nerve roots. Dr. Draper remarked that Claimant's injury would be a temporary manifestation that would resolve in time. Dr. Draper commented that if Claimant were his patient, he would treat Claimant with non-narcotic analgesics and possibly with injections.

Dr. Draper testified that Claimant's mechanism of injury is uncertain. According to the medical records, when Claimant treated at Concentra Medical Center on December 15, 2011, Claimant reported feeling pain in his left shoulder when he was carrying seven boxes of coins. Dr. Draper testified that the latter mechanism of injury would not produce a neck injury. Dr. Draper stated that it was not until Claimant treated with Dr. Rudin on January 25, 2012 that Claimant reported being in an armored car as a passenger and striking his head on the top of the vehicle after going over a bump.

Dr. Draper testified that Claimant was involved in two prior motor vehicle accidents. Claimant injured his neck and back and presented with headaches from the 1999 motor vehicle accident. Claimant injured his back and his right knee from the 2008 motor vehicle accident. Neither injury would relate to Claimant's present symptoms.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

When an employee has suffered a compensable injury, the employer is required to pay for reasonable and necessary medical services/treatment causally related to that injury. 19 *Del. C.* § 2322. “Whether medical services ... 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).

Based on the totality of the evidence, the Board does not find that the surgery Dr. Rudin is proposing is reasonable or necessary. The Board accepts the medical opinions of Dr. Draper over the medical opinions of Dr. Rudin. Dr. Rudin in this case appears to be rushing to perform risky surgery that at this time is not reasonable or necessary. Claimant has subjective complaints. According to Claimant (although Dr. Rudin testified differently), Claimant’s workers’ compensation attorney referred him to see Dr. Rudin. Dr. Rudin ordered an MRI study. The MRI report indicated a normal study.

Dr. Rudin claims that he personally reviewed the MRI film and made positive findings of left C7-T1 neural foraminal narrowing and of left C7-8 radiculopathy. Dr. Rudin contended that he informed the radiologist of the positive findings and the radiologist according to Dr. Rudin agreed and indicated that he (the radiologist) would revise the MRI report. However, the radiologist according to the evidence did not revise the MRI report. Dr. Draper also reviewed the MRI film and specifically looked for evidence of Dr. Rudin’s alleged positive findings. Dr. Draper testified that he did not find such findings. Dr. Draper agreed with the MRI report as written that the MRI was normal.

Dr. Rudin testified that the EMG also was positive to support his diagnosis and the need for surgery. However, the Board accepts Dr. Draper’s opinion that the EMG does not support

the need for surgery. In fact, the EMG was normal for C8 radiculopathy and was only suggestive of a possible not conclusive C7 radiculopathy. Dr. Draper examined Claimant and the physical examination findings did not support the diagnosis of either C7 or C8 radiculopathy. The Board accepts Dr. Draper's conclusions that the proposed surgery is not supported by objective physical findings, by the MRI or by the EMG. Dr. Draper opined that the surgery will not address Claimant's injury. He added that Claimant has not exhausted conservative treatment. The Board denies the portion of Claimant's petition with respect to the reasonableness and necessity of the proposed surgery.

Medical Witness Fees and Attorney's Fee

Under 19 *Del. C.* § 2322(e), the employer shall pay for Claimant's medical expert's fees in the event Claimant receives an award. Hence, the Board awards Claimant payment of his medical expert witness' testimony.

A claimant who is awarded compensation generally 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...." 19 *Del.C.* § 2320(10)(a). Employer has not tendered a settlement offer within thirty days of the hearing. The actual award is acknowledgement of a compensable work injury to the cervical spine. At the current time, based on Delaware's average weekly wage, the maximum attorney's fee calculates to \$9,675.20. 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). The Board is permitted to award less than the maximum fee. So long as the Board awards some fee and considers the *Cox* factors, the Board may grant a nominal or minimal fee in an appropriate case. 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 (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 evidence to make the necessary calculation. By operation of law, the amount of attorney’s fees awarded applies as an offset to fees that would otherwise be charged to Claimant under the fee agreement between Claimant and Claimant’s attorney. 19 *Del. C.* § 2320(10)(a).

Claimant’s counsel submitted an affidavit that complied with the standards. Claimant’s counsel spent 29.4 hours preparing for the hearing. The hearing lasted less than two hours. Based on the *Cox* factors as applied to the affidavit, Claimant’s counsel is awarded the lesser of \$8,700 or thirty percent of the award to be charged against Employer.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board finds that Claimant sustained a compensable injury to his cervical spine as reflected in the Nature and Stage of the Proceedings. Claimant's Petition to Determine Compensation Due is granted in part with respect to the acknowledged injury and therefore, Claimant is awarded payment of his medical expert witness fee and payment of a reasonable attorney's fee. Claimant's Petition for Compensation Due is denied with respect to the reasonableness and necessity of the proposed surgery.

IT IS SO ORDERED THIS 30th DAY OF AUGUST, 2012.

INDUSTRIAL ACCIDENT BOARD

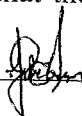

TERRENCE SHANNON



OTTO MEDINILLA, SR.

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

Mail Date:

8/31/12





OWC Staff

