

BEFORE THE INDUSTRIAL ACCIDENT BOARD  
OF THE STATE OF DELAWARE

CRISANTO HERNANDEZ,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1386824
	)	
KYLE HARRIGAN-FERRO and	)	
ALLSERVE, LLC,	)	
	)	
Employers.	)	

**DECISION ON PETITION TO  
DETERMINE COMPENSATION DUE**

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on January 17, 2013, in the Hearing Room of the Board, Milford, Delaware.

**PRESENT:**

MARY DANTZLER

JOHN BRADY

Julie G. Bucklin, Workers' Compensation Hearing Officer

**APPEARANCES:**

David A. Boswell, Attorney for the Claimant

Blake W. Carey, Attorney for the Employer

## **NATURE AND STAGE OF THE PROCEEDING**

On August 17, 2012, Crisanto Hernandez ("Claimant") was injured in a compensable industrial accident while employed by Kyle Harrigan-Ferro and Allserve, LLC ("Allserve"). On August 23, 2012, Claimant filed a Petition to Determine Compensation Due seeking acknowledgment that he sustained several injuries related to the industrial accident and that he is entitled to payment of medical expenses and ongoing total disability benefits beginning on August 17, 2012. Mr. Harrigan-Ferro and Allserve acknowledged Claimant's accident, injuries and total disability period, but have not paid any workers compensation benefits and do not have workers' compensation insurance.

Mr. Harrigan-Ferro and Allserve challenged the employment relationship with Claimant and the compensation rate; however, the Board granted Claimant's Motion for Default Judgment against Mr. Harrigan-Ferro and Allserve on January 9, 2013, after Mr. Harrigan-Ferro and Allserve failed to comply with two Board Orders regarding discovery requests. The Board issued those Orders on November 28, 2012 and December 19, 2012. Mr. Harrigan-Ferro and Allserve did not object to the wording in the form of order submitted for the Board's signatures on December 19, 2012 and that Order contained language indicating that the Board would grant a default judgment if Mr. Harrigan-Ferro and Allserve failed to comply with it.

On January 17, 2013, the Board conducted a brief hearing on Claimant's petition and this is the Board's decision.

## **SUMMARY OF THE EVIDENCE**

Given the pre-trial motions and Orders in this case, the parties agreed that there was no reason to present witnesses at the hearing. The only issues remaining for the Board involve the amount of the medical expenses and Claimant's compensation rate for total disability benefits.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties agreed in the Stipulation and Order to Avoid Medical Expenses that the Board signed on December 12, 2012 that that they did not need to present medical testimony at the hearing, but that they could present evidence of Claimant's medical expenses. Claimant presented a medical expense exhibit showing that his medical bills to date amount to \$80,609.00. Mr. Harrigan-Ferro and Allserve did not present any evidence.

The parties disagreed about the compensation rate; however, the language of the January 9, 2013 Default Judgment Order indicates that Claimant's wages were \$1,000.00 per week, which yields a compensation rate of \$666.67 per week. Mr. Harrigan-Ferro and Allserve did not present any evidence regarding Claimant's wage rate.

It is Claimant's burden to prove that his medical expenses are reasonable, necessary and causally related to the industrial accident. Given the default judgment that was ordered on January 9, 2013 and the medical expense exhibit, the Board finds that Claimant's medical expenses are compensable and he is entitled to payment of those medical expenses in the amount of \$80,609.00.

It is also Claimant's burden to prove his wage rate at the time of the industrial accident. Again, given the default judgment that was ordered on January 9, 2013, the Board finds that Claimant earned \$1,000.00 per week while working for Mr. Harrigan-Ferro and Allserve and that Claimant is entitled to payment of ongoing total disability benefits beginning on August 17, 2012 at his compensation rate of \$666.67 per week.

### **Attorney's Fees**

Having received an award, Claimant is entitled to a reasonable attorney's fee assessed as costs against Mr. Harrigan-Ferro and Allserve in an amount not to exceed thirty percent of the

award or ten times the average weekly wage, whichever is less. *Del. Code Ann.* tit. 19, § 2320. Claimant's counsel submitted an affidavit attesting to 66.4 hours of preparation for this case and all of the preliminary hearings. Claimant argued that this case required significant time to investigate the insurance issues because the employer is uninsured, as well as the employment relationship issue, and pretrial motions regarding discovery issues. Claimant also argued that it required diligence and skill to handle those issues competently and on an expedited basis. It was 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 August 20, 2012, 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 considering Mr. Harrigan-Ferro and Allserve's arguments regarding the attorney's fee issue, the Board finds

that one attorney's fee in the amount of \$9,675.20 is reasonable for the medical expense issue and another attorney's fee in the amount of \$9,675.20 is reasonable for the total disability issue. *Del. Code Ann. tit. 19, § 2320*. This award is reasonable given Claimant's counsel's level of experience, the nature of the legal task, and the amount of time spent to investigate this case due to the lack of workers' compensation insurance and Mr. Harrigan-Ferro and Allserve's repeated failure to respond to discovery requests. In accordance with § 2320(10)a, the attorney's fees awarded shall act as an offset against fees that would otherwise be charged by counsel to Claimant under their fee agreement.

#### STATEMENT OF THE DETERMINATION

Based on the foregoing reasons, Claimant's Petition to Determine Compensation Due is GRANTED as to the compensability of his industrial accident and injuries. Claimant is entitled to payment of medical expenses in the amount of \$80,609.00, as well ongoing total disability benefits beginning on August 17, 2012 at his compensation rate of \$666.67 per week. In addition, Claimant is entitled to two attorney's fees for a total of \$19,350.40

IT IS SO ORDERED THIS 25<sup>th</sup> DAY OF JANUARY 2013.

#### INDUSTRIAL ACCIDENT BOARD

/s/ Mary Dantzler

/s/ John Brady

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

Julie G. Bucklin  
Julie G. Bucklin  
Workers' Compensation Hearing Officer

Mailed Date:

1, 28, 13

OWC Staff