

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

RANDAL SALYER,

Employee,

v.

STATE OF DELAWARE,

Employer.

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Hearing No. 1336020

*Dr. Atkins cited
for intentional
failure to cooperate
w/ discovery*

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 June 14, 2010 in a Hearing Room of the Board, in Wilmington, Delaware.

PRESENT:

JOHN DANIELLO
Board Member

TERRENCE SHANNON
Board Member

Angela M. Fowler, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Jonathon O'Neill, Attorney for the Employee
William Baker, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On January 7, 2010, Randal Salyer ("Claimant") filed a Petition to Determine Compensation Due alleging that he suffered compensable occupational injuries to his head, neck, thoracic and lumbar spine while working as a mechanic for the State of Delaware ("Employer") on March 25, 2009. In the context of this petition, Claimant seeks a finding of compensability for his alleged injuries, compensation for total disability as well as payment of related medical expenses and attorney's fees. Employer denies that Claimant's condition is causally related to work.

A hearing was held on Claimant's petition on June 14, 2010. This is the Board's decision on the merits of the petition.

SUMMARY OF THE EVIDENCE

At the outset of the proceedings the parties stipulated to the following relevant facts: Pending is Claimant's Petition to Determine Compensation Due; the date of the underlying alleged injury is March 25, 2009; Claimant alleges injuries to his cervical spine, thoracic spine, lumbar spine and a contusion to the head; Employer acknowledges exacerbation of Claimant's cervical spine condition; Claimant's average weekly wage [at the time of the alleged injuries] was \$487.36 correlating to a workers' compensation rate of \$324.91 per week; Claimant was previously involved in a 1996 motor vehicle ("MVA") causing injury to his cervical and lumbar spine; Claimant was involved in a 2000 MVA causing injury to his cervical and lumbar spine; Claimant was involved in a 2005 MVA causing injury to his cervical and lumbar spine; Claimant was involved in an August 6, 1999 work accident causing injury to his left foot; Claimant was involved in an April 20, 2002 work accident causing injury to his left wrist; and, Claimant was involved in a March 9, 2006 work accident causing injury to a pinky finger. *See Joint Exhibit 1.*

Dr. William Atkins, a physician board certified in physical medicine and rehabilitation, pain management and sports medicine, testified by deposition on behalf of Claimant.¹ Dr. Atkins has served as Claimant's treating physician both before and after Claimant's alleged March 25, 2009 industrial accident and opines that subsequent to Claimant's March 25, 2009 industrial accident, Claimant suffered severe aggravation of his pre-existing cervical, thoracic and lumbosacral spine conditions that was directly related to the industrial accident. Furthermore, the evaluation and treatment that Claimant has received since March 25, 2009 has been reasonable, necessary and causally related to this work accident. As a result, Claimant has been unable to do work of any kind since April 20, 2009 and continues to be totally disabled presently by the aggravating injury that he suffered in this underlying work accident (though he has been released to two hours per day of sedentary duty just such that he might qualify for retraining with vocational rehabilitation services).

¹ Employer levied an objection to the admission of Dr. Atkins testimony based on what Employer characterized as Dr. Atkins intentionally evasive conduct in the discovery process. Specifically Employer argued that despite numerous requests for production of Claimant's entire medical file (as maintained under Dr. Atkins care), Dr. Atkins provided Claimant's records in a piecemeal fashion including the production of 117 pages of medical records just minutes before execution of Dr. Atkins deposition. Employer further argued that even as of this hearing Dr. Atkins has failed to produce all of his records noting that the only prescription medication records thus far produced for Claimant cover only the period of time up to March 30, 2009.

In response Claimant asserts that he should not be penalized for a clerical error on Dr. Atkins part in the discovery process. Claimant maintains that he did not encourage nor has he benefited in any way from Dr. Atkins untimely disclosure of records. Claimant further argues that the records eventually provided to Employer are handwritten and essentially illegible anyway and as such Employer suffered no significant prejudice in not receiving these records sooner. As it were, Employer received the records prior to the deposition of his own expert, Dr. Kalamchi, and could have asked Dr. Kalamchi questions regarding the records had they been of any use.

Having heard the objections of the parties the Board is satisfied that while Dr. Atkins seemingly intentional failure to cooperate with the discovery practices of this Board are inappropriate and should be considered unacceptable in future litigation, to disallow his testimony in whole for this Claimant would create not only an undue hardship for Claimant but essentially eviscerate Claimant's ability to move forward on this action at all. In this capacity, the burden of punishing the misconduct of Dr. Atkins would fall squarely on the shoulders of this Claimant creating an even greater prejudicial effect for Claimant than that already suffered by Employer.

The Board notes however, that Dr. Atkins shall be placed on notice that such conduct can not and will not be tolerated in the future in this or any matter. Any further refusal on the part of Dr. Atkins to *timely* comply with a duly served request for records shall result in much stiffer penalties as this Board grows weary of such unnecessary and unprofessional tactics.

Dr. Atkins testified that he began treating Claimant in 2005 after Claimant suffered injury related to a MVA. While Claimant had some permanent residual injuries and pain from those accidents, he had been released back to work as an automotive mechanic by Dr. Sommers, a neurologist, in May 2007 without restrictions or limitations with Claimant reporting that his symptoms were not aggravated by his activities as a mechanic. Claimant did continue, after May 2007, to both work as an automotive mechanic and to treat with Dr. Atkins. Dr. Atkins testified that he had seen Claimant for a regularly scheduled office visit on February 16, 2009, just over a month prior to his most recent work injury. Dr. Atkins reported that at Claimant's February 2009 appointment, Claimant's pre-existing neck and back injuries were treated with medications including 350 milligrams of Soma, 15 milligrams of Roxicodone and 75 milligrams of Indocin.

Dr. Atkins next saw Claimant on March 30, 2009, some five days after Claimant's March 25, 2009 industrial accident. Dr. Atkins testified that this was a regularly scheduled appointment at which Claimant informed him of the most recent work related aggravation of injury to his neck, mid and low back regions. Dr. Atkins indicated that he informed Claimant that he would need to sort out the claim issues associated with a new injury but testified that he increased Claimant's medications to assist him while the administrative issues were being addressed.

Dr. Atkins testified that he next saw Claimant on April 27, 2009. At this appointment, Claimant reported being injured on March 25, 2009 while working as an automotive mechanic. Claimant indicated that he was pushing a cart under a truck, stood up prematurely and struck his forehead on the underside of the truck. In striking his head, Claimant injured his forehead in addition to jamming his neck, mid and low back regions. Claimant reported suffering immediate pain in all of these regions. Claimant received treatment that same day at the Wilmington Hospital Emergency Room where he received X-rays. Claimant attempted to return to work

after just a few days off but his pain progressed to the point where he was forced to discontinue work all together. By the time of this April 2009 visit Claimant was having severe pain over his head, neck, mid and low back regions. According to Dr. Atkins, Claimant had been dealing with longstanding, chronic pain over these areas resulting from a prior motor vehicle accident in 2005 but had severely aggravated these underlying conditions in the March 25, 2009 industrial accident as evidenced by the increased, sharp, shooting pain that Claimant was experiencing in these areas. Dr. Atkins testified that overall Claimant's mobility was poor. Claimant was having difficulty sleeping as well as radicular pain over both upper and lower extremities bilaterally.

Dr. Adkins testified that his physical examination of Claimant revealed objective findings consistent with Claimant's subjective complaints. Specifically, Claimant had markedly restricted range of motion, tenderness and diffuse spasm in Claimant's cervical spine region. Claimant had tenderness of the suboccipital regions bilaterally; tenderness from C2 through C7 posteriorly; tenderness and spasm of the bilateral trapezius muscles; tenderness over the bilateral levator scapulae muscles; tenderness over the thoracic and intrascapular regions; tenderness over the medial scapular borders; and tenderness over the bilateral rhomboid muscles. With regard to Claimant's low back region, he had markedly restricted range of motion with tenderness over the L1 through S1 region centrally and over the bilateral sacrospinalis region with spasm noted over the erector spinae muscles. Claimant's straight leg raise exam was positive at 60 degrees bilaterally and he had tenderness over the bilateral sciatic notches. Claimant's neurologic exam showed deep tendon reflexes to be hypoactive throughout and Claimant had weakness over both upper extremities.

Subsequent to this examination, Claimant was provided with additional medications including and increased dose of Roxicodone (30 milligrams as opposed to the previous 15

milligram dosage), a Medrol Dosepak (an entirely new medication to address the severity of the inflammation that Claimant was suffering due to the aggravation of his injuries) and Oxy IR (for relief of additional break through pain).² Dr. Atkins also referred Claimant for MRI evaluations of his cervical, thoracic and lumbosacral spine to be compared to Claimant's prior diagnostic studies which Dr. Atkins testified were reasonable, necessary and related to Claimant's March 25, 2009 work accident. According to Dr. Atkins, comparison of Claimant's prior cervical and lumbar diagnostic studies to these ordered in April 2009 showed similar findings though Claimant's low back showed additional disc bulges at L3-4 and L4-5 but no protrusions or herniations.

Dr. Atkins testified that his impression of Claimant's condition at this point was that he had a head contusion, severe aggravation of his cervical, thoracic and lumbosacral spine syndrome as well as cervical and lumbar radiculitis/radiculopathy. Dr. Atkins testified that these diagnoses were related to the industrial accident suffered by Claimant on March 25, 2009.

Dr. Atkins testified that he issued Claimant a "no work" slip, totally disabling Claimant from any and all work effective April 20, 2009; a status that has been maintained up until March 2010. According to Dr. Atkins, despite believing that Claimant continues to be totally disabled, Claimant was released to two hours per day of sedentary work in March 2010³ so that he could qualify for vocational rehabilitation training services.

Dr. Atkins testified that Claimant underwent a brief period of physical therapy in his office but Claimant's pain was so severe that it became refractory to the therapy modalities and was stopped. After Dr. Atkins saw Claimant on May 27, 2009, Claimant returned for treatment

² While Dr. Atkins did not recall this when he initially testified regarding Claimant's current medication regimen, he did note the addition of Oxy IR later in his testimony. *See Dr. William Atkins April 28, 2010 Deposition Testimony, p. 17.*

³ Dr. Atkins initially testified that he released Claimant to two hours per day of sedentary work in February 2010 but corrected that misstatement later during cross examination wherein he indicated that it was actually March 2010.

on a monthly basis though his new medication regimen, almost double the strength of what he required prior to March 25, 2009, has been maintained. Claimant was eventually referred out for a surgical consultation with Dr. Bruce Rudin and underwent a surgical intervention for his low back.

Claimant has continued to see Dr. Atkins regularly for pain medication management with his most recent appointment occurring on April 7, 2010. At that time, Claimant appeared still having neck, mid and low back pain. Claimant struggled to walk from the waiting room to the examination room complaining of sharp shooting pain and exhibiting both mobility and functional deficits. Physical examination on April 7, 2010 revealed ongoing tenderness over the majority of Claimant's lumbar spine from L1 to S1 as well as tenderness of the bilateral sciatic notches. Claimant's diagnosis and medications have remained the same and have continued to be reasonable, necessary and causally related to the March 25, 2009 work accident.

Dr. Atkins denied ever observing any symptom magnification on Claimant's part and instead testified that he is surprised that Claimant gets around as well as he does. According to Dr. Atkins, it is his opinion that, if anything, Claimant minimizes what's going on with him. At the time that Employer's expert, Dr. Ali Kalamchi, examined Claimant, Claimant was only one month post surgery and would have been expected to be very sore. Dr. Atkins testified that while Dr. Kalamchi also reports on a second accident of sorts for Claimant in April 2009 while working with a drive shaft, it is Dr. Atkins understanding that there was no second accident; Claimant simply became unable to tolerate the pain associated with doing his regular duties as an automotive mechanic.

On cross examination, Dr. Atkins admitted that he was incorrect when he originally testified that he began treating Claimant in 2005; instead he actually began treating Claimant in

February 2003. In the seven years since he has been treating Claimant, Claimant has been prescribed Roxicodone (15 milligrams prior to his most recent accident) throughout.

Dr. Atkins admitted that he had not reviewed Claimant's March 25, 2009 emergency department medical record prior to the day of his deposition. In reviewing that record as part of his testimony, Dr. Atkins denied being able to determine who had filled out the forms or what reference the handwritten notes made. Ultimately, Dr. Atkins did concede that the records seem to indicate that Claimant was at the Hospital for care of head and neck pain with no mention of lumbar or thoracic spine evaluation or treatment. Dr. Atkins also conceded that the clinical impression of the emergency room physician appears to be that of a contusion to Claimant's forehead and cervical strain with the hospital discharge instructions also addressing care for a mild head injury and neck strain only.

Dr. Adkins admitted that he had not reviewed the records of Dr. Bernard King, Claimant's family physician, either. When presented with the records for review and questioning, Dr. Atkins refused to answer any questions related to the handwritten records indicating that he refuses to testify to handwritten notes of anyone other than himself.

Dr. Adkins testified that Claimant's radicular symptomatology and clinical findings have been down both extremities, denying that it has only been right-sided since the industrial accident. Dr. Adkins also acknowledged that in 2006 when he wrote a future medical care form for Claimant that he indicated that Claimant would be on pain medications indefinitely and in need of treatment for at least three years.

Dr. Atkins testified that while he did not see Claimant between March 30, 2009 and April 27, 2009, he used April 20, 2009 as the date upon which Claimant became totally disabled because that is the date that Claimant was no longer able to tolerate work. When questioned

about his characterization of Claimant as suffering neck, mid back and low back pain at this April 2010 visit, Dr. Atkins clarified that Claimant typically has pain from head to toe and while he may have noted all of those regions, the focus of that appointment was Claimant's low back.

On re-direct examination, Dr. Atkins testified that the mechanism of injury underlying Claimant's current industrial accident could have caused neck, mid back and low back injury. Dr. Atkins also testified that it is not uncommon for low back pain to surface or become worse within days after such an incident. Furthermore, in Claimant's case since this March 2009 accident, Claimant's medication regimen is 70 percent stronger than it was prior to the accident.

Claimant testified that he is 47 years old (DOB: 2/16/63). He graduated from Delaware Technical and Community College in 2007 with a certificate in automotive technologies. Claimant worked as an automotive mechanic for Employer for three years.

Prior to March 2009, Claimant testified to being involved in three separate MVAs resulting in injuries sufficient to warrant pain management care with Dr. Atkins every six to eight weeks. Prior to the industrial accident in question, Claimant testified that he was physically able to perform the duties associated with his employment as a mechanic and had never been advised that he was a surgical candidate for his low back. Prior to the March 2009 industrial accident, Claimant's pain was usually a two to three out of ten on the pain scale (with his medications) and was primarily in his low and mid back as opposed to his neck.

According to Claimant, on March 25, 2009, while working as a mechanic for Employer, he was pushing an 80 gallon oil barrel (on wheels). Believing that he had cleared the truck that he was working under, Claimant stood up prematurely striking his head on the front plow bar. Claimant testified that he was stunned by the blow and had to sit for approximately 15 minutes to recover before returning to work. Claimant reported feeling a crunch when he hit his head that

sent a shock down his back. At the end of his shift, Claimant went to the Hospital Emergency Room for treatment where he reported that he had an abrasion on his forehead and pain down his back to his beltline. The Hospital staff advised Claimant to stay out of work for five days which Claimant did.

Claimant testified that after this event, his low back pain became a five to six out of ten on the pain scale. After the five days out of work, despite ongoing pain, Claimant went to his family physician, Dr. King, to seek a medical release to return to work as he needed the job and the earnings. He was also able to get in for an unscheduled appointment with Dr. Atkins that same day. According to Claimant, at this March 30, 2009 appointment, Dr. Atkins increased his medications to address his increased pain and ordered MRIs of his entire spine.

Claimant testified that in time his head, neck and shoulder pain improved but he continued to have pain in his low back. After returning to work from the initial five days out at the end of March, he was only able to tolerate the pain associated with his regular mechanic duties for a short time before having to stop working completely. Claimant testified that he did not suffer any new injury but instead realized that the pain was simply too severe to continue. Claimant has not worked in any capacity since April 20, 2009.

Claimant testified that his treatment with Dr. Atkins has primarily consisted of receipt of prescription medication, massage therapy and physical therapy. Ultimately, he was referred by Dr. Atkins to Dr. Rudin who performed low back surgery on him on October 1, 2009. Claimant testified that prior to his March 2009 work accident he had occasional pain down his legs though the pain was constant after the accident. The surgery performed by Dr. Rudin has stopped the radiating pain down his legs but his back continues to cause him pain. At this point, Claimant regrets having undergone the back surgery.

Claimant testified that he currently takes Roxicodone (30 milligrams), Soma (350 milligrams) and an immediate release Percocet (5 milligrams). In terms of daily life activities, he primarily sits at home and watches T.V. Claimant reported that he does a few household chores but little else. Claimant denies any other injuries since March 25, 2009.

On cross examination, Claimant acknowledged that his 1996, 2000 and 2005 MVAs all caused him some amount of cervical and lumbar spine injury. Claimant admitted that, as a result of the MVAs, he had issues with his back "locking up", stiffness and radicular pain down his extremities. Claimant also admitted that Dr. Atkins June 1, 2006 letter addressing the permanency of his injuries from the last MVA confirms the existence of pre-existing, long standing radicular pain.

Claimant was unable to explain why Dr. Atkins prescription records from March 30, 2009 do not reflect an increase in his medication (Roxicodone) at that time nor was Claimant able to explain why the hospital records correlating to his initial march 25, 2009 treatment do not reflect low back pain. According to Claimant, he reported to hospital staff that he had head, neck and back pain. Claimant indicated that it is his belief that his head and neck were the focus of the hospital inquiry as they were the most obviously injured areas. While Claimant acknowledges that Dr. Atkins first wrote down complaints of his low back on April 27, 2009, Claimant maintains that he wrote down statements regarding his low back pain in his own daily work log.

Acknowledging Dr. Atkins August 2007 record which indicates that Claimant suffers pain while even at rest, Claimant admitted that even before March 25, 2009, he would occasionally have flare-ups of pain that caused him some difficulty in working as a mechanic.

On re-direct examination, Claimant testified that after March 25, 2009, before his pain medications were increased, his pain was at five to six out of ten with medication. According to Claimant, his low back pain is the only pain that was ultimately worsened (or did not recover) from the March 25, 2009 industrial accident. The low back pain has not even been reduced by his October 2009 low back surgery.

Dr. Ali Kalamchi, a board certified orthopedic spine surgeon, testified by deposition on behalf of Employer. Dr. Kalamchi, having reviewed Claimant's relevant medical history in addition to examining Claimant on one occasion opined that Claimant suffered a minor cervical strain as a result of the March 25, 2009 industrial accident. While some immediate evaluation and treatment (including medication, therapy and or a few days off of work) was reasonable to address this causally related injury, any care received by Claimant beyond March 30, 2009 when Claimant was released back to full duty by his primary care physician was not related to the work accident.

Dr Kalamchi testified that he examined Claimant on November 2, 2009. At that time, Claimant reported that on March 25, 2009, while working as a mechanic for Employer, he was situated under a truck that was elevated on a lift. He was leaning to pick up a drum and when straightening up thought he had cleared the truck but instead hit his head against the truck. Claimant reported feeling immediate neck and low back pain as well as right upper and left lower extremity pain. Claimant was treated at the Wilmington Emergency Room and was off of work for five days before returning to full duty. Thereafter, in early April 2009, while working on a drive shaft, Claimant's symptoms intensified and Claimant determined that he was unable to tolerate the pain associated with his mechanic duties. Claimant sought follow up medical care

with Dr. Atkins, a physician with whom Claimant has had a long standing relationship. Dr. Atkins totally disabled Claimant as of April 20, 2009.

Dr. Kalamchi testified that Claimant's history as reported is significant for several reasons. Initially, Dr. Kalamchi testified that Claimant's multiple injuries over the years involved his cervical and lumbar spine. Claimant reported that his 1996 MVA involved two cervical disc and three lumbar disc herniations and resulted in Claimant being out of work for one year. The 2000 MVA, which again caused neck and low back pain, caused Claimant to be out of work for approximately six months. The third MVA was in 2005 and caused an aggravation of the same symptoms. Claimant was out of work for a year and a half as a result of that accident. Furthermore, Claimant had continued to be symptomatic and require treatment throughout the period leading up to and beyond the March 2009 industrial accident.

In reviewing the report(s) of Claimant's previous diagnostic studies, Dr. Kalamchi testified that Claimant's March 3, 2005 cervical spine MRI revealed degenerative changes at C5-6 and C6-7 with moderate right foraminal stenosis at both levels. Claimant's August 8, 2005 lumbar spine MRI demonstrated moderate congenital stenosis at L3 to L5. At the L4-5 level, Claimant had right lateral protrusion, facet and ligament hypertrophy, and moderate stenosis as well. The most recent studies conducted in April 2009 exhibit the same findings (based upon the corresponding reports) of chronic changes at both cervical and lumbar levels. Claimant's August 12, 2009 myelogram showed hypertonic facet changes at L3-4 and spondylolisthesis with a diffused disc over the left side. At L4-5 there was facet hypertrophy and fragmentation and moderate right foraminal disc.

Dr. Kalamchi testified that at the time of his November 2, 2009 examination of Claimant, he found Claimant to be a tall individual who walked with a cane. Claimant's gait was very

guarded though with encouragement and assistance, Claimant was able to go on his heels and toes.⁴ According to Dr. Kalamchi, Claimant engaged in obvious symptom magnification expressing nearly all of the Waddell signs, responding with vocal expressions of pain during any attempt of movement of his legs while supine. In terms of Claimant's lumbar spine, the lordosis was maintained and the midline incision had healed well. Claimant refused to even attempt any movement indicating that he could not bend or move in any distribution. Dr. Kalamchi testified that he abandoned straight leg raising test maneuvers because of Claimant's resistance to any movement. While seated and distracted, however, Dr. Kalamchi indicated that he was able to perform the straight leg raising test up to 90 degrees bilaterally without any discomfort (producing a normal result). Claimant's reflexes were hypoactive and there was no sensory or motor deficit distally.

Dr. Kalamchi testified that as to Claimant's cervical spine, Claimant did not exhibit any signs of symptom magnification. Claimant freely moved his neck expressing no pain and demonstrating no spasm.

In terms of self reported complaints regarding his low back pain, Claimant reported to Dr. Kalamchi constant pain in his lumbar spine radiating down his right leg. Claimant did note that the radiating pain down his leg had improved post-operatively though he maintained that his low back pain had not improved.

Dr. Kalamchi confirmed that the March 25, 2009 Hospital records including the emergency room physician record and discharge summary indicate that Claimant received treatment for an injury to his forehead and neck making no mention of any low back complaints. Furthermore, these records reflect that Claimant is noted as being non-tender and enjoying pain-

⁴ Dr. Kalamchi did note that Claimant was only one month post low back surgery at the time of his evaluation and was therefore continuing to experience some post-operative pain.

free range of motion in the lumbar region. Claimant's discharge diagnosis as evidenced in the Hospital records is that of a contusion to the head and cervical strain.

With regard to Dr. Atkins records, Dr. Kalamchi confirmed that Claimant treated with Dr. Atkins on approximately a monthly basis from 2000 on. Dr. Atkins records reflect that a year prior to the March 2009 work accident (in April 2008), Claimant was receiving treatment for low back pain and right lower extremity pain. Dr. Kalamchi also confirmed that, contrary to Dr. Atkins records, Claimant reported to Dr. Rudin, his low back surgeon, in August 2009 that the injuries from his previous two auto accidents had completely resolved. Despite Claimant's report that his symptoms completely resolved after chiropractic manipulation and physical therapy, Dr. Atkins records reflect that in 2007 and 2008 Claimant had six ongoing diagnoses: cephalgia, head contusion, cervical radiculitis, aggravation of pre-existing cervical lesion, thoracic and lumbar strain and sprain.

While Dr. Kalamchi acknowledges that a March 30, 2009 note created by the nurse practitioner at Dr. King's office reflects that Claimant injured his neck and complained of pain radiating down the neck and back, the primary focus of the note appears to be on Claimant's neck and upper back with no mention of his lumbar spine. Ultimately, the impression noted by the nurse practitioner is cervical neck strain resolved and improving.

Based upon his review of Claimant's extensive medical history (including diagnostic study reports) as well as his own examination of Claimant, Dr. Kalamchi testified that Claimant may have had a minor sprain of his cervical spine that was causally related to the March 25, 2009 work accident, from which Claimant recovered and returned to work five days later. Any additional reference to or treatment of Claimant's cervical spine is due to his chronic, pre-existing arthritis though at the time of Dr. Kalamchi's evaluation Claimant was not even

suffering symptoms from the pre-existing condition. According to Dr. Kalamchi, Claimant's back issues were chronic, pre-existing and symptomatic at the time of the March 2009 work accident. Based upon Claimant's description of his accident, Dr. Kalamchi opined that it is unlikely that Claimant injured his lumbar spine when he struck his head. Claimant's pain and need for low back surgery is related to the injuries that he sustained years ago. Had Claimant sustained additional injury to his lumbar spine on March 25, 2009, Dr. Kalamchi testified that it is highly unlikely that he would not have had significant symptoms when he was seen at the Hospital Emergency Room. Furthermore, it is even more unlikely that Claimant would have been able to return to work on the day of the injury or five days thereafter.

In terms of the treatment received by Claimant, Dr. Kalamchi testified that evaluation, treatment and some therapy as well as rest and medication was reasonable to address Claimant's acute cervical soft tissue sprain however, based upon the medical release issued by Claimant's family physician's office on March 30, 2009, any treatment after that would not be related to the work injury. Furthermore, it would not have been unreasonable for Claimant to miss the first five days of work after his injury to recover from the cervical strain.

On cross examination, Dr. Kalamchi testified that any changes in Claimant's low back condition necessitating the surgery performed by Dr. Rudin were due to chronic degeneration that would be expected given Claimant's condition. Similarly, Dr. Kalamchi testified that if Dr. Atkins believes that there are some minor changes in Claimant's MRI findings from 2005 to 2009 such as small bulges (as Dr. Atkins noted), those too would be attributable to degenerative progression.

While admitting that he did not find any evidence that Claimant had ever magnified or exaggerated his symptoms with any other physician or defense medical expert, Dr. Kalamchi

maintained that Claimant exhibited extreme symptom magnification in his examination of Claimant's low back.

Dr. Kalamchi admitted that while it may have been possible for Claimant to have suffered some low back strain or sprain in the March 25, 2009 accident, the history and medical documentation do not support such a finding. Dr. Kalamchi further indicated that while it would not be unreasonable for an individual to require increased medication doses after an acute injury, Dr. Kalamchi indicated his inability to ascertain from Dr. Atkins records precisely what Claimant's pre-March 25, 2009 doses were or that the levels actually changed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Compensability

The Delaware Workers' Compensation Act states that employees are entitled to compensation "for personal injury or death by accident arising out of and in the course of employment." DEL. CODE ANN. tit. 19, § 2304. Because Claimant has filed the current petition, he has the burden of proof. DEL. CODE ANN. tit. 29, § 10125(c). The primary issue in this case is one of causation. "The claimant has the burden of proving causation not to a certainty but only by a preponderance of the evidence." *Goicuria v. Kauffman's Furniture*, 1997 WL 817889 at *2 (October 30, 1997), *aff'd*, 706 A.2d 26 (Del. 1998). The Board finds that Claimant has met his burden of proof in terms of the injury suffered to his head and cervical spine but failed to meet his burden as it relates to all other aspects of his claim.

When there has been a distinct, identifiable work accident, the "but for" standard is used "in fixing the relationship between an acknowledged industrial accident and its aftermath." *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992). That is to say, if there has been

an accident, the resulting injury is compensable if “the injury would not have occurred but for the accident. The accident need not be the sole cause or even a substantial cause of the injury. If the accident provides the ‘setting’ or ‘trigger,’ causation is satisfied for purposes of compensability.” *Reese*, 619 A.2d at 910. A pre-existing disease or infirmity, whether overt or latent, does not bar a workers’ compensation claim if the claimant’s employment aggravated that condition. *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992); *see also Blake v. State of Delaware*, Del. Supr., No. 477, 2001, Order at ¶ 4 (March 12, 2002) (surgery compensable if work accident accelerated the need for surgery even though surgery would have eventually been needed for condition that was symptomatic and objectively worsening prior to work accident).

In the instant action, Employer, for all intents and purposes, concedes that Claimant suffered an industrial accident on March 25, 2009 when he struck his head on the frame of a truck. In so doing, Employer and Employer’s medical expert Dr. Kalamchi further concede that Claimant suffered some minor injury to his forehead and strain to his neck in the context of this accident. Beyond those concessions, however, the Board is unable to find that Claimant has demonstrated by a preponderance of the evidence that he suffered an aggravation of his clearly pre-existing back condition.

Claimant alleges that he told the Wilmington Hospital Emergency Room staff that he was suffering head, neck and low back pain though nothing was noted in regards to even a low back evaluation by the hospital. Claimant alleges that he reported his low back pain to the nurse practitioner at his family physician’s office (Dr. King) but again there is no mention of even a low back evaluation in that record. Similarly, Claimant and Dr. Atkins both testified that Claimant complained as early as March 30, 2009 of a low back aggravation but Dr. Atkins records reflect no such complaint until late April 2009, over a month removed from the original

industrial accident, when Dr. Atkins finally ordered updated MRIs of Claimant's spine. Given Claimant's substantial history of injury to that area, it is unimaginable that neither his primary care physician nor his regularly treating pain management physician evaluated or noted any concerns regarding these alleged new complaints immediately after the accident.

The Board is further troubled by and finds incredible the system of documentation represented by Dr. Atkins as it relates to Claimant's treatment. While both Claimant and Dr. Atkins cite the fact that Claimant's Roxicodone had to be increased on March 30, 2009 just a few days after his industrial accident as evidence of the seriousness of Claimant's aggravated injury condition, the only prescription records produced in this case reflect no such increase; at least not as of March 30, 2009 as was represented by Dr. Atkins and Claimant. Furthermore, Dr. Atkins recorded diagnosis of and direct testimony regarding Claimant's ongoing cervical issues as recently as April 2010 are inconsistent with what even Claimant himself testified to in these proceedings. Claimant testified that his cervical issues resolved relatively shortly after the March 2009 accident though Dr. Atkins records continue to reflect and Dr. Atkins testified that Claimant suffered ongoing cervical issues as recently as April 2010. At best, the Board's assessment of Dr. Atkins records indicates a catch-all approach to diagnosing Claimant and tracking which injuries are related to which events.

There is no dispute that Claimant suffered chronic, long standing injuries to his cervical and lumbar spine resulting from three relatively serious car accidents as detailed in the Summary of Evidence above. There is also no dispute that Claimant continued to be symptomatic and require treatment (including pain management and prescription of narcotic pain medication) for those issues leading up to the time of this March 2009 industrial accident or that Dr. Atkins had already determined that narcotic medications would likely be necessary for the rest of Claimant's

life (in 2006). If there was an increase in the need for treatment or medication, evidence supporting such an increase was not produced and not made a part of this record. Dr. Atkins prescription records do not support his or Claimant's testimony. Furthermore the fact that Claimant was released to and able to return to full duty work without any documented mention of any low back pain until almost a month after the accident lends credence to Employer's argument that Claimant's low back condition (ultimately requiring surgery) was just as likely to have been related to his often symptomatic pre-existing condition as to any injury suffered on March 25, 2009. As Dr. Kalamchi testified, while it is possible that Claimant may have injured or aggravated his pre-existing back condition in his March 25, 2009 industrial accident, it is impossible to make that determination as being more likely than not based upon the medical records created at the time of the event or ultimately based upon the record created in this matter.

Accordingly, the Board finds that Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable injury to his head in the form of a contusion as well as a compensable strain to his cervical spine as a result of his March 25, 2009 industrial accident. Claimant has otherwise failed, however, to demonstrate the causal relationship of any other of his injuries or conditions to the work accident.

Medical Bills

Based upon the testimony presented, the Board substantially adopts the opinion of Dr. Kalamchi while also allowing some additional consideration for reasonable care with regard to medical treatment for Claimant's compensable injuries. Specifically, the Board awards Claimant payment of costs associated with the treatment that Claimant received from the Hospital Emergency Room on March 25, 2009, Claimant's follow-up appointment with Dr. King's office on March 30, 2009, treatment with Dr. Atkins through the end of May 2009, the costs associated

with therapy for Claimant's neck during this time and the cost of the diagnostic studies ordered by Dr. Atkins in April 2009. Employer is directed to make payment on said bills in accordance with the State of Delaware Health Care Payment System as provided for by Section 2322B(3) of the Worker's Compensation Act.⁵

Disability

The parties have stipulated that, to the extent that any award for payment of disability is to be made pursuant to this Decision, the average weekly wage for Claimant at the time of his injury was \$487.36 producing a workers' compensation rate of \$324.91 per week.

Claimant seeks temporary total disability from March 26, 2009 through March 30, 2009 (five days) and then from April 20, 2009 through the present (and ongoing). In support of this request, Claimant asserts that he was totally disabled by the Wilmington Hospital staff from March 26, 2009 for five days and then by his treating physician, Dr. Atkins, from April 20, 2009 ongoing. Employer's medical expert agreed that the first five days that Claimant was out of work in March 2009 were reasonable in light of Claimant's cervical strain. As such, Claimant is awarded payment for those five days of lost wages.

Given that Claimant himself testified that the cervical strain resolved quickly, however, and Claimant was medically cleared to return to work from the cervical strain by his family physician, the period of time from April 20, 2009 onward is not supportable. It appears from both Claimant and Dr. Atkins testimony that the primary issue requiring Claimant to be totally disabled was his lumbar spine. Given that the Board has herein determined that Claimant has failed to meet his burden in demonstrating that the low back injury is related to his March 25,

⁵ "The maximum allowable payment for health care treatment and procedures covered under this chapter shall be the lesser of the health care provider's actual charges or the fee set by the payment system." DEL. CODE ANN. tit. 19, § 2322B(3).

2009 industrial accident, the period of total disability from April 20, 2009 forward is denied as compensable.

Attorney's Fee and Medical Witness Fees

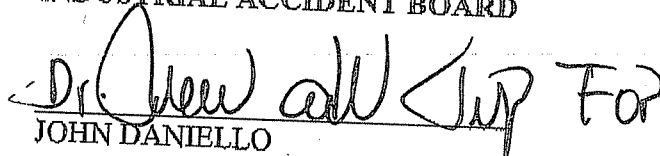
A claimant who is awarded compensation is entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller." DEL. CODE ANN. tit. 19, § 2320. Attorney's fees are not awarded, however, if, thirty days prior to the hearing date, the employer gives a written settlement offer to the claimant that was "equal to or greater than the amount ultimately awarded by the Board." DEL. CODE ANN. tit. 19, § 2320. A written settlement offer was tendered by Employer with respect to Claimant's petition, and was for more than what the Board awarded. Thus, an award of an attorney's fee is not appropriate in this case.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Claimant's request for a finding of compensability as it relates to his March 25, 2009 industrial accident is GRANTED in part and DENIED in part. The Board finds that Claimant suffered a compensable injury to his forehead and neck. Claimant failed, however, to prove any other compensable injury. As such, Claimant is entitled to payment of total temporary disability for five days dating from March 26, 2009; payment of medical bills as described above made pursuant to the Health Care Payment System; and payment of medical witness fees.


IT IS SO ORDERED THIS 17 DAY OF JUNE, 2010.

INDUSTRIAL ACCIDENT BOARD



JOHN DANIELLO


TERRENCE SHANNON

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


ANGELA M. FOWLER
Workers' Compensation Hearing Officer

Mailed Date: 6-22-10


OWC Staff