BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

DONNA M. D'ONOFRIO,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1405900
	)	
BANK OF AMERICA,	)	
	)	
Employer.	)	

DECISION ON PETITION TO DETERMINE ADDITIONAL COMPENSATION DUE

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause by stipulation of the parties came before a Hearing Officer of the Industrial Accident Board on July 28, 2014, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

CHRISTOPHER F. BAUM
Workers' Compensation Hearing Officer

APPEARANCES:

Frederick S. Freibott, Attorney for the Employee

Paul V. Tatlow, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Donna M. D'Onofrio ("Claimant") was involved in a compensable work accident on November 1, 2012, while working for Bank of America ("Employer"). She tripped and fell on both of her knees.

On December 11, 2013, Claimant filed a Petition to Determine Additional Compensation Due seeking a finding that certain medical treatment, including specifically a total knee replacement performed on October 28, 2013, is causally related to the November 2012 work accident.

The parties stipulated that this case could be heard and decided by a Workers' Compensation Hearing Officer, in accordance with title 19, section 2301B(a)(4) of the Delaware Code. When hearing a case by stipulation, the Hearing Officer stands in the position of the Industrial Accident Board. *See* DEL. CODE ANN. tit. 19, § 2301B(a)(6). A hearing was held on Claimant's petition on July 28, 2014. This is the decision on the merits of the petition.

SUMMARY OF THE EVIDENCE

Richard J. D'Onofrio, Claimant's husband, testified that Claimant underwent an arthroscopic procedure to her right knee in August of 2012. He took her to a follow-up appointment in September of 2012 and she appeared to be doing much better. Claimant did not go to the next scheduled follow-up appointment because she was getting around much better and could do everyday tasks like cooking, cleaning, shopping and yard work. She could climb stairs with only slight pain.

Mr. D'Onofrio stated that, on November 1, 2012, he received a call from Claimant at her work. Claimant was brought home and had a lot of pain in her leg. She told him that she had fallen hard. Claimant is "not good with pain" and she complained a lot. The knee swelling was

worse. It was twice the size that it had been prior to the fall. She could walk up stairs, but only very slowly. Claimant received treatment over the next several months, including drainage, a knee brace and viscosupplementation. Claimant had not had such a brace after the August procedure nor did she need viscosupplementation after the August procedure. Claimant's need for pain medication increased after the November fall. Claimant wore the knee brace for several months (from three to five). She did not improve and finally she received a total knee replacement and therapy. Since then, Claimant is now almost back to the way that she was before her fall.

Mr. D'Onofrio agreed that, in 2013, Claimant had actually returned to her regular duty work prior to having her knee replacement surgery.

Claimant testified that she is 54 years old and works for Employer. In November of 2012, she was working as a market analyst for Employer, a job that involves sitting all day.

Claimant acknowledged that, in 2011, she fell and struck her right knee in a church parking lot. She had pain and discomfort, but it was tolerable. In 2012, it got worse and, on August 17, 2012, she underwent a right knee procedure performed by Dr. Matthew Handling. In September, she felt pretty good but still had some knee swelling and slight pain (although Claimant agreed that Dr. Handling's September 13, 2012 note states that she had "increasing" pain and swelling). She did not go to an October follow-up appointment because she felt "good to go." She was back at work and was able to do her normal activities. She still had some discomfort in the right knee, but that went away.

Claimant explained that, on November 1, 2012, she took a bad fall at work, landing on a thin carpet covering a concrete floor. She felt excruciating pain in her right knee. She was in so much pain that she could not get down into her car. She was driven home by a friend. The right

knee swelled like a balloon and was painful. She iced the knee and took Advil. On November 13, was finally able to get in to see Dr. Handling. The doctor drained the knee at every visit and a knee brace was prescribed after an x-ray was taken and the doctor said that the knee was growing crooked. Claimant was more stable and comfortable with the brace on. She wore it for six or seven months after the fall. Dr. Handling also injected a viscosupplement into the knee and increased her pain medication.

Claimant testified that she was off of work for about three months and returned to work in late January of 2013.[1] She had a sedentary job, but she still had to get up periodically to keep her knee from stiffening up. Eventually, she was referred to Dr. Johnson who recommended a total knee replacement. That surgery was done on October 28, 2013. Claimant feels that the surgery was worth it, but she will always have pain.

Dr. Matthew Handling, an orthopedic surgeon, testified by deposition on behalf of Claimant. He has provided medical care to Claimant since December 23, 2011. In his opinion, the treatment Claimant received since November 13, 2012, including the total knee replacement, was reasonable, necessary and causally related to the November 2012 work incident.

Dr. Handling stated that, in December of 2011, Claimant presented with mild right knee pain. By March of 2012, Dr. Handling's impression was that she had mild arthrosis (a degenerative process) with recurrent effusions. He opined she had osteoarthritis in April of 2012. He confirmed that, in August of 2012, Claimant had right knee pain. By then, an MRI had shown a lateral meniscus tear. Non-operative care had failed to resolve the condition. On August 17, 2012, Dr. Handling performed arthroscopic surgery to do a partial lateral meniscectomy, excise loose bodies and to do a limited synovectomy. The doctor saw Claimant

[1] Dr. Handling had released her to return to her regular job on January 3, 2013, and she actually returned to work on January 28, 2013.

in follow-up in September of 2012 and Claimant reported increased pain and swelling following the surgery, which was to be expected. An aspiration of the knee was undertaken and an injection given to the knee. Claimant did not follow up in October of 2012. Later, in January of 2013, Claimant asserted that she did not have a recurrence of fluid following the September 2012 aspiration and injection. She rated herself as 80% improved following the surgery.

Dr. Handling next saw Claimant on November 13, 2012. Claimant reported that she had fallen on November 1, landing directly on her knees. She reported significantly increased pain and swelling. The doctor aspirated a large amount of fluid from the knee, did a repeat steroid injection, and provided ice and anti-inflammatory medication. A viscosupplementation injection was administered on November 27. This is different from the steroid injections he had been giving Claimant. A second viscosupplementation injection was given on December 6, 2012. On January 3, 2013, Claimant reported increasingly severe and constant knee pain and she was found to have swelling. Dr. Handling released her to return to work on January 3, without restrictions. The doctor was aware that her normal job was sedentary in nature.

Dr. Handling stated that further aspiration was done on January 31. In May of 2013 there was another aspiration and a steroid injection. A further aspiration was done on June 6 & 18, 2013, with a steroid injection on the latter date. At that time, Claimant was referred to Dr. Johnson (in Dr. Handling's practice), for a surgical consultation. He performed a total knee replacement on October 28, 2013. The operative note indicates that Claimant had end-stage degenerative joint disease ("bone-on-bone").[2] Claimant was released to full-duty work on January 28, 2014.

[2] Dr. Handling observed that the mere fact that somebody has bone-on-bone findings does not necessarily mean that that person needs a total knee replacement.

In Dr. Handling's opinion, Claimant's November 1 accident clearly aggravated her preexisting condition, resulting in symptomatic arthrosis of the lateral compartment and recurrent effusion. She had been recovering appropriately from the August 2012 arthroscopic procedure when the November fall activated her preexisting arthritis and caused significant swelling. The November injury was more than just a contusion. If Claimant had not had that fall, Dr. Handling does not think she would have needed a knee replacement in October of 2013. The November fall aggravated the underlying condition and accelerated the need for surgery. In Dr. Handling's opinion, the treatment Claimant received, including the total knee replacement, was reasonable, necessary and causally related to the November incident.

Dr. Michael L. Mattern, an orthopedic surgeon, testified by deposition on behalf of Employer. He examined Claimant on May 5, 2014, and reviewed pertinent medical records. In his opinion, the work accident did not cause or hasten Claimant's need for a total knee replacement.

Dr. Mattern understood that, on November 1, 2012, Claimant tripped over some cords and landed on both of her knees. The floor was described as carpet over concrete. Both knees hurt at first, right worse than left. She had had arthroscopic surgery on the right knee two and a half months earlier as the result of a prior injury. That prior knee injury consisted of a partial anterior cruciate ligament tear and a meniscal injury as well. An MRI taken at that time showed a tear of the lateral meniscus and lateral degenerative changes.

Following the November 1 incident, she went to Dr. Handling and had the knee aspirated and received a steroid injection. The following week he started a series of viscosupplement injections. At some point, he fitted Claimant with an unloader brace for the knee, which is used to treat arthritis of the knee. On July 1, 2013, Claimant was seen by Dr. Johnson. After viewing

current x-rays, he thought she had end-stage arthritis (degenerative disease) of the lateral joint line with bone-on-bone changes. Claimant had a total joint replacement on October 28, 2013.

Dr. Mattern explained that the stages of degenerative disease in the knee involve cartilage breakdown, inflammation of osteophytes, pitting of the cartilage and narrowing of the cartilage before it finally gets to the point that all the cartilage is worn off the bone (bone-on-bone). Bone-on-bone is the final stage. Dr. Mattern observed that, during her arthroscopic surgery prior to the work accident, a significant area of bone was exposed as the lateral meniscus was resected, removing the cushioning from between the bones.

Dr. Mattern stated that, following the knee replacement surgery, Claimant reported improvement but with some persistent discomfort. On examination in May of 2014, Claimant appeared to have slightly less strength on the right side compared to the left. There was minimal swelling of the right knee. The range of motion of the right knee was slightly below normal compared to the left. Neurovascular status in the foot was good, but there was some mild swelling of the ankle.

In Dr. Mattern's opinion, Claimant sustained a right knee contusion in the work accident. The total knee replacement was not the result of the work accident. Such a surgery would have been required anyway for her knee condition. The work accident did not hasten the need for surgery. Claimant was already bone-on-bone before then, as demonstrated by the arthroscopy in August of 2012. She had end-stage arthritis which was not the result of the work accident. Her knee condition was one of multiple aspirations, cortisone injections and viscosupplementation and, following the arthroscopy in 2012 the pattern was not any different. She would have a period of improvement and then the condition would deteriorate again. The work accident did not cause any condition that led to the joint replacement that was not already there. The work

injury was just one of a number of things that occurred that led her to the point where she needed the joint replacement. The fall was just one of the factors that increased her pain. He thought that the fall could have increased Claimant's pain and swelling temporarily, but he did not think that it caused and permanent change. The knee replacement surgery was not addressing the work injury (knee contusion) but the preexisting problem of arthritis and the conditions that go along with it (swelling, pain, impairment). The work fall did not accelerate the arthritis.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Causation

Because it is her petition, Claimant has the burden of proof. DEL. CODE ANN. tit. 29, § 10125(c). "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*, Del. Super., C.A. No. 97A-03-005, Terry, J., 1997 WL 817889 at *2 (October 30, 1997), *aff'd*, 706 A.2d 26 (Del. 1998). When there is such a distinct and identifiable work accident, the "but for" standard of causation must be applied to all resultant injuries. *See Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992). *See also State v. Steen*, 719 A.2d 930, 932 (Del. 1998)("[W]hen there is an identifiable industrial accident, the compensability of any resultant injury must be determined *exclusively* by an application of the 'but for' standard of proximate cause.")(emphasis in original). The "but for" standard does not require "sole" or even "substantial" causation. "If the accident provides the 'setting' or 'trigger,' causation is satisfied for purposes of compensability." *Reese*, 619 A.2d at 910.

Thus, to succeed on her petition, Claimant must show by a preponderance of the evidence that, but for her November 1, 2012 work accident, she would not have needed the total knee replacement surgery performed on October 28, 2013. The appropriate standard is not whether

the surgery or treatment would *ever* have been needed but for the accident. Rather, "[t]he proper standard . . . is whether the surgery would have been required *at that time* but for the accident." *Blake v. State of Delaware*, Del. Supr., No. 477, 2001, Order at ¶ 4 (March 12, 2002)(emphasis in original). I am satisfied that Claimant has met her burden of proof.

There is no dispute that Claimant had an existing degenerative knee condition prior to the November 1, 2012 work event. It was overt, in that it was known even prior to November of 2012 that Claimant had the condition. In August of 2012, Claimant underwent arthroscopic surgery that partially excised the lateral meniscus, which Dr. Mattern explained would have removed some of the cushioning between the bones of the knee (creating a bone-on-bone condition).

However, the law is well-established that a "preexisting disease or infirmity, whether overt or latent, does not disqualify a claim for workers' compensation if the employment aggravated, accelerated, or in combination with the infirmity produced the disability." *Reese*, 619 A.2d at 910. An employer takes the employee as it finds her. "If the injury serves to produce a further injurious result by precipitating or accelerating a previous, dormant condition, a causal connection can be said to have been established." *Reese*, 619 A.2d at 910. While *Reese* discusses a "dormant" prior condition, it has also been held that even when a claimant is actively symptomatic from a prior condition, compensability can still be found if a work accident aggravates or worsens that preexisting symptomatic degenerative condition. *See Hines v. Delaware Recyclable Products*, Del. Super., C.A. No. 02A-12-004, Gebelein, J., 2003 WL 22293656 at *4 (October 1, 2003).

It is this point that forms the basis for the difference of opinion between the medical experts. In Dr. Mattern's opinion, Claimant's right knee was symptomatic with pain and

swelling prior to November of 2012 and she was at end-stage arthritis (bone-on-bone) before then, noting that bone-on-bone was mentioned during the arthroscopic surgery and the partial removal of the lateral meniscus removed more of the "cushioning." In his opinion, the November work accident did not accelerate nor advance the arthritis. At most, the fall caused a temporary increase in pain and swelling but caused no permanent change. It did not hasten the need for knee replacement surgery.

By contrast, Dr. Handling opined that Claimant was doing well after the August 2012 arthroscopic surgery. There was a temporary increase in swelling following the August surgery, but that was to be expected. Claimant reported that she was fine in October. The November event, however, did result in an increase in pain and swelling which did not abate thereafter despite conservative treatment (injections, brace). In his opinion, the work event triggered a relatively asymptomatic arthritic condition, hastening the need for the total knee replacement surgery.

I accept the opinion of Dr. Handling over that of Dr. Mattern. There is no doubt that Claimant had the bone-on-bone condition in the knee prior to November 2012, but clearly a bone-on-bone condition in itself does not mandate surgery. It might make it extremely likely that the patient will need a knee replacement surgery at some point in the future, but it cannot be predicted when such surgery would be needed. There is no medical dispute on this point.[3] Dr. Mattern opined that Claimant's symptoms remained the same after the November work event as they were prior to that event. I disagree. After her August arthroscopic surgery, Claimant may have had some swelling and pain, but Dr. Handling (who saw it contemporaneously) stated that

[3] Indeed, there would be no point to doing a meniscectomy if, by removing the "cushioning" in the knee, a patient then immediately needed a knee replacement. Obviously, something more than merely having a bone-on-bone condition is necessary. A patient must also have *symptoms*.

it was just the expected post-surgical pain and swelling. Claimant did not even return for further treatment in October. There is some confusion as to whether Claimant had an October appointment and skipped it, or whether she never even bothered to schedule a further appointment, but the end result is the same: Claimant had no scheduled appointment to see Dr. Handling again at the time of her work accident. That Claimant had the work accident is not disputed and Dr. Mattern agreed that it could have increased her pain and swelling (the sort of symptoms that eventually led to the knee replacement surgery). After that accident, Claimant arranged to see Dr. Handling again and he not only aspirated a large amount of fluid and administered a steroid injection, but he also prescribed anti-inflammatory medication. This is indicative of a worsening of Claimant's condition, as she was not on such medication just prior to the work accident. Claimant then saw Dr. Handling regularly until she was referred for knee replacement surgery. During that time, Claimant received repeated injections of both steroids and viscosupplementation but also continued to complain of severe pain. There is no credible evidence that her knee condition after November 1, 2012, ever again settled down to her pre-accident condition. Employer observes that Claimant was released to return to her normal job in January of 2013, but that is not indicative of any substantial improvement in her condition. Her normal job was sedentary in nature. A knee injury would not be expected to totally disable a person from a sedentary job.

For these reasons, I agree with the opinion of Dr. Handling that the November 2012 work accident caused a worsening in Claimant's condition in that it made the degenerative condition more symptomatic and unresponsive to conservative treatment. It was because of this increased symptomatology that Claimant needed the total knee replacement surgery that was performed in October of 2013. I accept the opinion of Dr. Handling over that of Dr. Mattern and find that, but

for the November 1, 2012 work accident, Claimant would not have needed the October 2013 knee replacement surgery *at that time*. In other words, the work accident hastened the need for the surgery.

Accordingly, I find that Claimant's medical treatment for her right knee following the November 1, 2013 work accident, including the October 2013 knee replacement surgery, was reasonable, necessary and causally related to the work accident.[4] As always, the charges for the treatment are limited by the fee schedule established by the Health Care Payment System. "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).

Attorney's Fee and Medical Witness Fees

A claimant who is awarded compensation is generally 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 $9,983.50. 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 (August 9, 1996). A "reasonable" fee does not generally mean a generous fee. *See Henlopen*

[4] There was no dispute by Dr. Mattern as to the reasonableness of the treatment. The only dispute was as to causation.

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.

In this case, Claimant has established that treatment for her right knee since November 1, 2012, including the October 2013 total knee replacement surgery, is causally related to her compensable work accident. Claimant's counsel submitted an affidavit stating that he spent over 25 hours in preparation for this hearing, which itself lasted about 1.5 hours. Claimant's counsel was admitted to the Delaware Bar in 1989 and he is very familiar with workers' compensation law, a specialized area of litigation. His initial contact with Claimant was in August of 2013, so Claimant has been represented for over a year. 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 actually precluded counsel from accepting other clients, although naturally he could not work on other matters at the same time as he was devoting time to this case nor would he have been able to represent employer or its carrier if employment had been offered. Counsel's fee arrangement with Claimant is on a one-third contingency basis, but counsel represents that his normal hourly fee for a non-contingency case is $275.00 per hour. He 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, I find that a fee in the

amount of $7,000.00 is reasonable in this case and does not exceed thirty percent of the value of the award once one 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 also 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, I find that Claimant's medical treatment for her right knee following the November 1, 2013 work accident, including the October 2013 knee replacement surgery, was reasonable, necessary and causally related to the work accident. Claimant is also awarded an attorney's fee and the payment of her medical witness fees.

IT IS SO ORDERED THIS 3rd DAY OF OCTOBER, 2014.

INDUSTRIAL ACCIDENT BOARD

CHRISTOPHER F. BAUM
Workers' Compensation Hearing Officer

Mailed Date: 10-7-14

OWC Staff