

NATURE AND STAGE OF THE PROCEEDINGS

Presently before the Industrial Accident Board (the "Board") is a Petition to Determine Additional Compensation Due, filed by Janette Lowman, the widow and Executrix of the Estate of John Lowman ("Claimant"), on December 20, 2002, against Conectiv Power Delivery Systems ("Conectiv"). Claimant seeks compensation for permanent impairment pursuant to title 19, section 2326 of the Delaware Code, for impairment to the teeth, cervical spine, blood, lungs, bones and brain. The parties subsequently reached an agreement as to permanent impairment in the lungs prior to the hearing date.

A second petition, filed on May 23, 2003, seeks compensation for death benefits and funeral expenses pursuant to title 19, sections 2330 and 2331 of the Delaware Code. Conectiv opposes both petitions, except as to compensation for funeral expenses. By earlier agreement, the parties agreed to a compensation rate of \$491.57 per week.

The above-captioned matter came before the Board on October 8, 2003. The Board concluded deliberations of October 16, 2003. What follows is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

A death certificate from the State of Pennsylvania identified Claimant's date of death as April 14, 2003.

Dr. Martha Hosford, a board certified oncologist, testified on Claimant's behalf. She opined that Claimant suffered the following permanent impairments as a result of his metastatic cancer: sixty percent to the brain; fifty percent to the venous system; and twenty-five percent to the cervical spine.

Dr. Hosford originally began treatment of Claimant in 1999. As his treating oncologist, she saw Claimant approximately one hundred times before his death in April 2003. She described the cancerous condition Claimant had as one that originated in the lungs and subsequently spread throughout his body. Her description of the cancerous condition included how the cancer destroyed the bone and caused substantial pain and weight loss in Claimant. Diagnosis of the disease included a bone scan, in January of 2001, which identified cancer in Claimant's ribs, L-5, and cervical vertebrae. Although the bone scan identified to some extent the nature of the disease, she believes the bone scan underestimated the degree of cancer present.

A subsequent MRI identified a fracture in Claimant's cervical spine as a result of the cancer. Furthermore, objective measurements indicated a decreased range of motion in Claimant's neck of approximately thirty degrees to each side. From her observations, by November of 2002 Claimant could neither sit nor stand due to cord compression on his spine. She believed the conditions all related to the metastatic cancer.

She stated "[while] it is difficult to place a number on his disability, [sic] all of [his] disabilities are considered severe." Based on the diagnostic exams, her opinion Claimant suffered bone pain, and her opinion that bones are a significant organ in the body, she assigned Claimant a twenty-five percent permanent impairment rating to his entire bone structure. She further opined that the amount of permanent impairment attributed to the cervical spine totaled twenty-five percent. This impairment was based on the reduced mobility in the neck, the identified fracture, and resulting surgical procedure performed in November 2002.

As to the permanent impairment to the blood system, Dr. Hosford opined that Claimant suffered a fifty percent permanent impairment based on her diagnosis of a deep venous thrombosis ("DVT") and reduction in the capacity of the right lung. She termed the right lung as

non-functional given the effects of radiation therapy. The DVT, identified in Claimant's inferior vena cava, produced a clot which resulted in a reduction of blood supply throughout the body. As a result, Claimant's legs became inflamed and swelled to approximately three times their normal size. Due to this inflammation, Claimant remained bedridden for the last five months of his life.

Dr. Hosford rated Claimant with sixty percent permanent impairment to the brain. She reached this rating by considering the history and nature of the cancer in Claimant's brain. Initially, tests revealed the existence of cancerous lesions in his brain which were destroyed through radiation treatment. Six new cancerous spots appeared thereafter and Claimant underwent further radiation treatment. As a consequence of the treatment and medications, Claimant developed blood leakage into his brain which caused swelling around the lining of the brain. The swelling led to intense headaches and caused some seizure activity. As either a result of this swelling or the cancerous lesions, Claimant's visual acuity decreased measurably.

On cross-examination, Dr. Hosford admitted that she had not previously testified before the Board, had no previous experience rating permanent impairment, and never used the AMERICAN MEDICAL ASSOCIATION'S GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT, 5TH EDITION (the "Guides"). Instead, she based her estimates of permanent impairment through comparison of Claimant's then-present condition against her impression of his "normal" state. She read the report and deposition of Dr. Jeffrey Meyers, the defense medical expert, and disagreed with his opinion that Claimant was ambulatory. As of March 2003, she described Claimant as non-ambulatory given his bedridden condition.

Dr. Dennis Carr, a board-certified dentist, testified on Claimant's behalf. Dr. Carr, Claimant's primary dentist, treated Claimant over eighteen years, from 1984 through 2002.

Based on this history, Dr. Carr opined that Claimant suffered a significant permanent impairment to his teeth following chemotherapy treatment.

In April 2002, Dr. Carr examined Claimant and identified "major tooth decay." He noted that Claimant suffered damage to ten teeth as a result of chemotherapy. In his opinion, chemotherapy is documented to cause oral infections, salivary dysfunction, and bleeding gums. Of the ten teeth identified, three were dead and seven were restorable, although damaged. None of the ten teeth showed any decay prior to this appointment. Given Claimant's physical health at the time of the exam, he could not fix the damaged teeth.

On February 11, 2003, he assigned Claimant a fifty percent permanent impairment rating to his teeth. He reached this number using the ratio of damaged teeth, ten, to the total amount of teeth Claimant had prior to the exam, twenty-one. A normal set of teeth totals thirty-two teeth. The three lost teeth comprised Claimant's lower left molars. He opined that the loss of the teeth would cause some pain and present difficulty chewing.

On cross-examination, Dr. Carr stated that nothing specifically in the AMA Guides covered permanent impairment to the teeth.

Jeanette Lowman, Claimant's wife of forty-two years, testified by deposition. She stated that she remained married to Claimant throughout the duration of the forty-two year relationship. Claimant worked for Conectiv, and its previously named corporations, since May 1960. He voluntarily retired in February 1994. After his retirement, Claimant received a monthly pension check and health benefits. The pension benefit reduced by fifty percent upon Claimant's death. The health benefits terminated in May 2003. She now pays approximately \$1,000.00 per month

for Medicare and secondary insurance, whereas Conectiv's benefits previously cost only \$5.00 per month. She did not receive additional monetary benefits as a result of Claimant's death.¹

She described Claimant's condition during the last year of his life. His teeth broke off and began decaying. He experienced vision difficulty and frequent headaches. During his final six months of life, Claimant remained bedridden and without the use of his extremities.

On cross-examination, she identified the value of an IRA to which Claimant contributed as worth \$38,454.55.

Dr. Jerrold Abraham testified by deposition on Claimant's behalf. Dr. Abraham opined that, within a reasonable degree of medical probability, Claimant suffered from lung cancer as early as 1993. He reached this conclusion based on his experience that lung cancer takes approximately five to ten years before it is detectable on x-ray.

There was no cross-examination of this witness.

Suzanne Lowman, Claimant's daughter, also testified. She testified that, in addition to her mother, she provided a substantial amount of care-giving for Claimant. In November 2002, Claimant collapsed after he experienced difficulty walking. He underwent surgery the day after Thanksgiving. Between December 2002 and January 2003, he appeared in considerable pain and discomfort. He could not feed himself and required the assistance of family members in daily living activities. In her opinion, Claimant never appeared the same after the surgery.

There was no cross-examination of this witness.

Dr. Meyers, a board-certified physiatrist, testified for Conectiv by deposition. From his review of the medical records in this matter, Dr. Meyers opined the following: Claimant suffered twenty-four percent impairment to his spine; a fourteen percent impairment to his brain based on the seizure activity; an eight percent impairment to his lower extremities caused by the DVT; and

¹ See Deposition of Jeanette Lowman, at 20.

zero percent impairment to his teeth. Although he never actually examined Claimant, he based his ratings on the notes of Dr. Hosford in conjunction with the applicable chapters from the Guides. According to Dr. Meyers, no specific rating appeared in the Guides for the entire venous system, nor could he identify a specific rating for the alleged damaged teeth.

On cross-examination, Dr. Meyers admitted he is not an oncologist. He has limited experience in dental practices. He agreed Claimant suffered permanent impairment to his brain and cervical spine, and that a loss of teeth is a ratable injury. As for the cervical impairment, he stated that the Guides allow for some discretion. He further agreed that one can suffer vascular impairment, but that a rating for impairment is usually attributed to a specific region of the body.

Dr. Meyers also discussed the possibility of permanent impairment to Claimant's bone structure. In his opinion, the cancer spread to Claimant's bones, but that presence of cancer in the bone is not determinative of whether a permanent impairment exists. Cancer may spread to an individual bone without causing impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board is authorized to award proper and equitable compensation for the loss or loss of use of any member or part of the body. *See 19 Del. C. § 2326*. While it is important to have medical testimony, it is the function of the Board, and not the physician, to determine the degree of a claimant's impairment. *See Turbitt v. Blue Hen Lines, Inc.*, Civ. A. No. 97A-04-002, Lee, J. (Dec. 31, 1997); *Poor Richard Inn v. Lister*, 420 A.2d 178, 180 (Del. 1980).

By earlier Order in this matter, the Board determined that Claimant's cancerous condition occurred as a result of work-related asbestos exposure. It is also clear that Claimant suffered from a slow, painful condition prior to his death. The testimony of both Suzanne and Jeanette Lowman established that as of November 2002, Claimant experienced neurogenic difficulties

and underwent an emergency surgical procedure on his cervical spine. Despite this procedure, Claimant's condition continued to deteriorate. He experienced frequent headaches, required assistance for daily living, and spent the last six months of his life bedridden.

In the instant matter, the ultimate dispute concerns the amount of permanent disability present. The evidence clearly identifies that some degree of permanent impairment exists. When the medical testimony is in conflict, the Board, in its role as finder of fact, must resolve the conflict. *See General Motors Corp. v. McNemar*, 202 A.2d 803 (Del. 1964). As long as substantial evidence is found, the Board may accept the testimony of one expert over another. *See Turbitt, supra.*, see also *Standard Distributing Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993). Confronted with the conflicting opinion of two conflicting medical experts, the Board finds the opinion of Dr. Hosford more persuasive on the issue of permanent impairment. In making this finding, the Board notes that use of the Guides is not the only method to determine the degree of permanent impairment. The Board has determined that, in other matters, the Guides provide assistance in calculating the percentage of impairment, but are not the sole determining factor.

In the case *sub judice*, Dr. Hosford rendered an opinion, as to the amount of permanent impairment Claimant suffered to his venous system, cervical spine, and brain. She based her opinion on her experience with oncology and her direct contacts with Claimant over three years. The Board accepts her opinion and finds her conclusions well-supported by the medical evidence.

The testimony of Dr. Hosford established that she functioned as Claimant's primary oncologist beginning in 1999. She saw Claimant over one hundred times during this time period. Given this role, the Board believes she stood in a better position than Dr. Meyers to evaluate Claimant's condition. Dr. Meyers, a physiatrist, did not conduct an examination but instead,

relied solely on documentary evidence from Dr. Hosford and autopsy notes. Based on her direct observations and clinical examinations, Dr. Hosford described the extent of the cancerous condition and how the tumor began in the lungs, appeared in Claimant's brain, rendered the lower extremities virtually useless, and reduced the range in motion of Claimant's neck. She further noted how Claimant lost vision and suffered seizures as a result of the medication and radiation treatment. In her opinion, the medical abnormalities all arose as a direct result of the cancerous condition, whether due to the disease or the resulting treatment.

Accepting her opinion, the Board finds and concludes as follows. Claimant suffered sixty percent impairment to his brain. The evidence clearly established the existence of cancer in this organ to a degree that Claimant suffered ongoing, permanent difficulties including *inter alia*, seizures, brain swelling, and vision loss. Claimant should receive a twenty-five percent permanent rating for the cervical spine. To this end, both experts were almost identical on their testimony. Dr. Hosford rated the impairment at twenty-five percent while Dr. Meyers rated twenty-four percent. However, Dr. Meyers admitted that his opinion allowed for some discretion. Thus, given the ratings of both medical experts, the Board sufficient evidence to assign Claimant a twenty-five percent permanent impairment to his cervical spine.

For the venous and/or vascular system, the Board accepts Dr. Hosford's rating at fifty percent permanent impairment. The evidence established that Claimant lost function in his right lung, suffered DVT which reduced his blood supply, suffered a pulmonary embolism in his left lung, and experienced swelling in his legs up to three times their normal size as a result of the DVT. She opined that the reduction in blood supply rendered the lower half of Claimant's body Claimant's virtually unusable. Furthermore, she opined that these injuries, all permanent in

nature, resulted directly from either the cancerous condition or the subsequent treatment. Accordingly, the Board awards permanent impairment benefits consistent with these ratings.

The Board also accepts the testimony offered by Dr. Carr. The testimonial evidence regarding the nature of degenerative condition to Claimant's teeth is largely un rebutted. Claimant suffered the loss of three teeth following his chemotherapy treatment. Based on this condition, Dr. Carr rated Claimant with a fifty percent permanent impairment, which included all ten damaged teeth. Dr. Meyers agreed to some extent, stating that the loss of teeth is ratable.

However, the Board disagrees with Dr. Carr's opinion insofar as he rated a fifty percent permanent impairment. In the opinion of the Board, Claimant suffered a ten percent permanent impairment, or the equivalence of the three lost teeth from the original thirty-two. According to Dr. Carr, the other seven teeth identified as "damaged" could have been repaired had he proceeded with treatment. But, in light of Claimant's condition, he believed that course of treatment was not in Claimant's best interest. Thus, based on the loss of the three teeth, the Board awards permanent impairment benefits at the rate of ten percent permanent impairment.

The Board declines to find permanent impairment to the bone system. Claimant presented little, if any, evidence that the cancer caused a permanent *impairment* to the bone structure. The evidence included testimony that cancer entered the bone structure, and that the bones produce marrow, an essential requirement for blood cell production. From that information, Dr. Hosford opined that the permanent impairment reached twenty-five percent of Claimant's bone structure. However, Dr. Hosford failed to identify what formed her basis for the rating. She did not identify which bones were impaired, nor did she identify how the amount of impairment equated to fifty percent of the entire bone structure. Any attempt by this Board to award benefits without further evidence of the extent or nature of permanent impairment goes

against the requirements of Title 19, section 2326 of the Delaware Code. Thus, the Board denies an award for such benefits.

Based on the above-findings, the Board awards the following permanent impairment benefits. In making this determination, the Board utilized the three hundred week statutory maximum rate as fair and equitable compensation for the permanent impairment Claimant suffered to his spine, vascular system, and brain, prior to death. The Board finds eighty weeks as a fair and equitable compensation for the lost teeth. See *U. S. Dismantlement Corp. v. Connelly*, Civ. No. 97A-07-001, Graves, J. (October 5, 1998). The compensation totals:

- 1). Vascular and/or venous structure: $300 \text{ weeks} \times \$491.57 \times 50\% = \$73,735.00$
- 2). Teeth: $80 \text{ weeks} \times \$491.57 \times 10\% = \$3,932.56$
- 3). Cervical Spine: $300 \text{ weeks} \times \$491.57 \times 25\% = \$36,867.75$
- 4). Brain: $300 \text{ weeks} \times \$491.57 \times 60\% = \$88,482.60$

Death Benefits

Claimant seeks compensation for death benefits pursuant to Title 19, section 2330 (d), of the Delaware Code. Conectiv opposes such a request. From the evidence provided, the Board finds and concludes that the Estate is entitled to such benefits.

Under sections 2328 and 2330 of Title 19 of the Delaware Code, compensation is payable for death from an occupational disease "in the same manner and to the same persons as would have been entitled thereto had the death or disability been caused by an accident arising out of and in the course of employment." In the instant matter, the Board found that, by earlier order, Claimant suffered from cancer as a result of asbestos exposure while in the course of employment with Conectiv. The un rebutted evidence of Dr. Abraham, which the Board accepts, dates the cancer as beginning as early as 1993, while Claimant worked for Conectiv. Following his retirement from Conectiv, he collected a pension which reduced upon his death. Janette Lowman continues to collect fifty percent of the original benefit, minus health insurance

coverage. Accordingly, the Board finds that this factual situation encompasses the intent of the statute, namely, to compensate a surviving spouse for the loss of support resulting from a work-related death. The Board is not aware of, nor did Conectiv assert, case law to the contrary. Thus, the Board finds and awards benefits consistent with section 2330 *et seq.*, of Title 19 of the Delaware Code.

Medical Witness Fees

Having made an award under title 19, section 2326 of the Delaware Code, the Board taxes the cost of Claimant's medical witness fees against Conectiv. *See 19 Del. C. § 2322 (e).*

Attorney's Fees

Pursuant to title 19, section 2320(g)(1) of the Delaware Code, a claimant awarded compensation is entitled to payment of a reasonable attorney's fee "in an amount not to exceed 30% of the award or \$7,602.10, whichever is smaller." Such fees are not awarded, however, unless counsel for Claimant submits an affidavit which complies with the factors listed in *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973).

In the instant matter, counsel submitted an affidavit requesting the Board award such fees. The Board reviewed the request and finds that the affidavit complies with the factors established in *Cox*. Accordingly, the Board finds Claimant is entitled to his attorney's fees taxed as a cost against Conectiv based on the factors set forth in *Cox*. The factors include:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fees customarily charged in the locality for similar legal services;
- (4) The amount involved and the results obtained;
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and the length of the professional relationship with the client;
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services;

- (8) Whether the fee is fixed or contingent;
- (9) The employer's ability to pay; and
- (10) Whether fees and expenses have been or will be received from any other source.

See *Cox*, 304 A.2d at 57. Consideration of these factors does not prohibit the granting of a nominal or minimal fee in an appropriate case, so long as some fee is awarded. See *Heil v. Nationwide Mutual Ins. Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96A-01-005, Cooch, J. (Aug. 9, 1996).

Pursuant to the factors listed in *Cox*, the Board finds as follows. Claimant's counsel submitted an affidavit reciting sixty-five hours in preparation for the hearing between both attorneys. The hearing lasted an additional five hours. The affidavit lists March 14, 2001 as the initial contact date with Claimant. The issue in this case, while not particularly novel to counsel, unquestionably required extensive preparation. Counsel was, to some degree, precluded from accepting other employment because of this case. The fee agreement is contingent. Given the case involved death benefits from a work-related injury, the circumstances dictated some priority in resolution of this matter. No evidence exists that Conectiv cannot afford to pay an award. Counsel has not received and does not expect to receive compensation from any other source in this matter.

Claimant's counsel have been members of the Delaware Bar for twenty-four years and thirteen years respectively. Janette Lowman will receive benefits in this matter because of counsel's efforts in acquiring permanent impairment disability benefits on Claimant's behalf. Taking into account these factors and the fees customarily charged in this area, the Board finds that an attorney's fee of \$7,602.10 is appropriate for counsel's services in this case.

STATEMENT OF THE DETERMINATION

Based on the foregoing, Claimant is awarded permanent impairment benefits as set forth above. Claimant is also awarded death benefits pursuant to Title 19, section 2330 of the Delaware Code. Medical witness fees and attorney's fees are taxed as a cost against Conectiv.

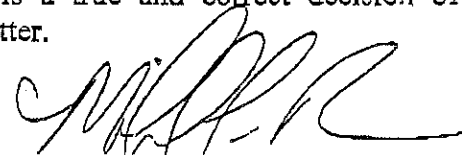
IT IS SO ORDERED THIS 30th DAY OF October, 2003.

INDUSTRIAL ACCIDENT BOARD


LOWELL GROUNDLAND


GARRETT WILSON

I, Michael L. Ripple, Esquire, Workers' Compensation Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board in this matter.


MICHAEL L. RIPPLE

Mailed Date: 10-30-03


OWC Staff