JOSUE POLANCO, Employee,
v.
PORT TO PORT INTERNATIONAL,
Employer.

INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

Hearing No. 1431892

Mailed Date: November 30, 2018
November 28, 2018

DECISION ON PETITION TO DETERMINE ADDITIONAL COMPENSATION DUE AND PETITION TO TERMINATE BENEFITS

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 October 23, 2018, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

GEMMA BUCKLEY

ROBERT MITCHELL

Susan D. Mack, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Cynthia H. Pruitt, Esquire, Attorney for the Employee

Joseph Andrews, Esquire, Attorney for the Employer

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NATURE AND STAGE OF THE PROCEEDINGS

Josue Polanco ("Claimant") filed a Petition to Determine Additional Compensation Due ("DACD") on May 25, 2018 seeking a finding that proposed neck surgery with Dr. Eskander is reasonable, necessary, and causally related to an acknowledged, work-related accident that occurred on August 24, 2015. The Employer, Port to Port International, previously agreed that Claimant injured multiple body parts including the neck in a work-related accident that date, and the Employer paid for medical benefits related to the case. The Employer disputes the current claim for cervical spine surgery as unnecessary and unrelated to the 2015 work accident.

On June 22, 2018, the Employer filed a termination petition seeking to terminate total disability benefits. The Employer has been paying total disability benefits at the rate of $428.18 per week, based on an average weekly wage of $642.27, since August 25, 2015. The Employer asserts that total disability benefits should be terminated and Claimant can return to work without restrictions. Claimant contends that he continues to be totally disabled from work.

A hearing was held on the petitions on October 23, 2018. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

The parties stipulated to the following facts: Claimant Josue Polanco receives total disability at the rate of $428.18 per week based on an average weekly wage of $642.27. An Agreement as to Compensation approved on October 6, 2017 indicates that disability began on August 25, 2015. In addition, the Agreement specifies that Claimant injured his neck, right chest wall and ribs, low back, right hip, left knee, right knee, and right shoulder in an accident on August 24, 2015 when a truck Claimant was driving became unstable and toppled onto its left side. The issues presented to the Board are (1) whether the proposed ACDF surgery at C5-6 is reasonable, necessary, and causally

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related to the August 24, 2015 industrial accident, and (2) whether the employee is able to return to full duty work without restrictions in his prior

capacity as a truck driver so as to terminate total disability.

Mark Eskander, M.D., an orthopedic spine surgeon, testified by deposition on behalf of Claimant Josue Polanco. (Claimant's Exhibit 1) Dr. Eskander initially saw Claimant in the fall of 2015 and then Claimant returned again on September 7, 2017 after receiving a favorable IAB decision. That visit focused mostly on the lumbar spine, but Dr. Eskander also discussed Claimant's cervical complaints such as difficulty lifting his arm overhead and symptom aggravation with twisting motions. A neurologic examination showed deficits in the right deltoid biceps and wrist extensor. Claimant also had some decreased sensation in the right C6 pattern. Dr. Eskander noted decreased right rotation of the cervical spine. He ordered X-rays and an MRI of both the lumbar and cervical spines. Dr. Eskander was concerned about the source of the cervical radiculopathy in the right upper extremity. A cervical MRI was performed on September 8, 2017. Dr. Eskander went over the results with Claimant on October 3, 2017. The MRI showed some osseous spurring and hypertrophy of the posterior aspect of the left facet joint at C5-6. The radiology report questioned whether there were posttraumatic findings and recommended further investigation. Dr. Eskander noted a facet cyst seen on the MRI. X-rays showed normal anatomy of the spine. Dr. Eskander then ordered a CT scan to obtain more information about the posttraumatic findings, which could be from a facet joint fracture. Dr. Eskander also administered a right C4 injection for diagnostic purposes.

Claimant returned to see Dr. Eskander on January 26, 2018, before the CT scan was performed. The right C4 selective nerve root block had only provided two percent relief, so Dr. Eskander concluded that this was not a significant contributor to Claimant's symptoms. Claimant's neurologic findings on examination remained the same. Dr. Eskander again requested the CT scan and also requested a repeat EMG. An initial EMG on November 3, 2015 had shown some acute mild right C5-6 radiculopathy. Dr. Gottwald performed the repeat EMG on February 12, 2108. The study revealed mild right carpal tunnel but no more acute cervical radiculopathy.

Dr. Eskander then reviewed the results of the CT scan performed on March 16, 2018. The study showed an old fracture of the inferior facet of the left C5 joint with some fluid around it and some hypertrophy. These were chronic changes. Dr. Eskander felt that these results, together with the history of the mechanism of injury, indicated Claimant probably broke his neck at the time of the accident and the fracture went undiagnosed. The fracture was in the same area as the cyst seen on the MRI. He explained that the cyst is fluid forming from the facet joint or the fracture or both. He felt that the CT scan provided evidence of an old cervical fracture that did not heal properly and was developing more and more degeneration. He believed Claimant was continuing to have trouble related to this old fracture. Claimant now had posttraumatic arthritis. Dr. Eskander insisted that an MRI was a poor test when looking for fractures and pathology such as this. He testified that X-rays, an MRI, and a CT scan all need to be performed after a trauma, because each test provides different pieces of information. Without all three, a diagnosis can be missed. He believed the fracture diagnosis was missed in Claimant's case after the motor vehicle accident. Dr. Eskander "absolutely" confirmed that the increased neck pain Claimant had been complaining about can be explained by the old facet fracture. (*Id*. at 19) He cited studies indicating that patients with unilateral facet fractures do very poorly a few years later without treatment. One study suggested immediate fusion to avoid poor outcomes later such as lots of neck pain and nerve dysfunction. Dr. Eskander is now recommending that Claimant undergo an ACDF (anterior cervical discectomy fusion) at C5-6 to address the fracture, instability, the facet cyst, and the disc bulge at that level. He wants to address this problem before addressing any issues with the low back or shoulder. Dr. Mesa is treating

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Claimant for ongoing problems with his shoulder. Dr. Eskander explained that the primary issue of a broken neck needed to be treated before addressing "downstream" effects in the shoulder. (*Id.* at 23)

Dr. Eskander confirmed that his physician's assistant provided Claimant with a note in January 2018 stating that Claimant was restricted to eight hours of sedentary work. His partner, Dr. Mesa, had instructed Claimant not to work pending the surgery with Dr. Eskander. Dr. Eskander was asked what the appropriate work restriction should be. He stated that, ideally, he would have wanted to fix Claimant's neck right away and then returned him to work after his recovery. He did not think it unreasonable for Dr. Mesa to keep Claimant out of work entirely instead of restricting him to sedentary duty. Dr. Eskander commented that, with his ability to care for Claimant really limited, "maybe the right answer is to reduce the risk, keep him out of work and let him get his surgery and then we'll get him back when he's able to." (*Id.* at 26) He now recommends that, with Claimant's worsening condition, Claimant be kept out of work until the surgery is done and he has time to recover.

On cross-examination, Dr. Eskander agreed that the X-rays and clinical exam did not find evidence of segmental instability at C5-6. He confirmed that the original EMG in 2015 showed some acute mild cervical radiculopathy, but the 2018 EMG did not show radiculopathy. He commented that EMGs are not perfect and many patients with radiculopathy have negative EMG results. He would not make a surgical decision from the EMG result. The CT scan clearly showed Dr. Eskander that Claimant had suffered a fracture that was not diagnosed. Dr. Eskander concluded that Claimant was not doing well because of the aftermath from the facet fracture. The "tip off" that led him to investigate further were the facet cyst and disc bulge. (*Id.* at 31) Dr. Eskander confirmed that the only finding on the cervical MRI from September 2015 was that of mild disc protrusion at

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C6-7. The report indicated disc space was normal with no compression fractures. He asserted that an MRI would not always pick up a facet fracture. In diagnosing cervical issues, it was important to obtain all the relevant diagnostic tests and make sure they are done properly, according to Dr. Eskander. An MRI might miss a fracture that is then picked up in a CT scan. Dr. Eskander could only view the MRI report from 2015, not the actual films. He insisted that an MRI was not the test of choice for a cervical fracture, however. He could not say for sure when the facet fracture occurred just by looking at the diagnostic test result. He concluded that the neck was fractured in the work accident based on the history of the accident, Claimant's medical history, clinical exams, and diagnostic studies. He noted that a force was required to break the neck, not just a sneeze or cough. The cause might be debated if Claimant had a complicated history of past multiple neck traumas.

Dr. Eskander was not familiar with the details of Claimant's day to day activities over the three years since the work accident. Dr. Eskander acknowledged that, as of April 13, 2018, he had indicated that Claimant could perform sedentary work for eight hours a day; he has never taken Claimant out of all work on a certified provider form. He now agrees with Dr. Mesa that Claimant should be taken out of work so that the fracture can be fixed and Claimant's ongoing neck problems resolved. He could not say that Claimant's fracture had healed itself even improperly. He explained that fluid at the facet fracture site can prevent proper healing and cause the formation of a big chunk of bone that presses on the nerves. This is why patients with facet fracture do poorly if they are not treated with fusion. They develop more neck pain, more range of motion issues, more dysfunction, and maybe more neurological deficits. Dr. Eskander noted in 2018 exams that Claimant's neck movement was limited by pain in forward flexion and right rotation. He conceded that Claimant's complaints of pain were subjective. Dr. Eskander had reviewed Dr. Smith's DME report from April

2018. Dr. Eskander was not concerned that Dr. Smith did not find any atrophy. He insisted that

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atrophy in an extremity was fairly uncommon. He sees patients who have nerve impingement far more often than atrophy, so the lack of atrophy does not mean a patient has no nerve impingement. He has never seen a patient with atrophy in the neck itself from a cervical disc problem. Dr. Eskander agreed that the single-level fusion surgery causes a permanent loss of motion in the neck, but in his experience the patient would not notice a change in motion after the surgery, since the pain is gone.

On re-direct, Dr. Eskander concurred that the ACDF at C5-6 was reasonable and necessary treatment that was casually connected to the work accident.

Claimant Josue Polanco testified through a Spanish interpreter[1] that he was driving a jockey truck with a loaded container on August 24, 2015 when the container tilted and the jockey truck fell over. Claimant was wearing a seat belt that broke during the accident. The jockey truck ended up on its side and its windows were broken. Claimant has lived for several years with pain from the accident. He constantly has neck pain. Nothing makes the neck feel better. He denied any neck injury before the August 24, 2015 accident. In a previous ATV accident, he did not injure his neck. He has not been involved in any motor vehicle accidents or falls since the work accident. Claimant spends his days trying to deal with the pain. He watches some television and cooks for himself.

On cross-examination, Claimant testified that he is 31 years old and attended school through fourth grade. He worked for the Employer as a truck driver for one year. The only other job he could name was a three month job power washing cars. Claimant has not driven since the accident. His brother or girlfriend drive him to doctor's appointments. He got a ride to the hearing. Claimant's girlfriend does most of the cooking. Sometimes Claimant needs help with bathing. Claimant expressed willingness to learn new skills. He confirmed that he has a cell phone.

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Under questioning by the Board, Claimant testified that the current pain level in his neck is an eight or nine out of ten. He has not worked since the date of the work accident and has not looked for any work either. All of the medications he was given after the accident are now gone and he is not taking any medications currently. He has complained about his neck consistently since the work accident.

On re-direct, Claimant confirmed that Dr. Eskander or Dr. Mesa has maintained him on total disability status the entire time since he was injured. Claimant's neck has worsened over the past year.

Robert A. Smith, M.D., an orthopedic surgeon, testified by deposition for the Employer, Port to Port International. (Employer's Exhibit 1) Dr. Smith testified that he used to operate on the neck and back but has not done spinal surgery since the early 2000s. He is a general orthopaedist. He is aware that one issue here is whether the proposed ACDF surgery is reasonable and related to the work accident. Dr. Smith testified that an ACDF surgery is performed to relieve pressure on neural elements that are causing long tract signs or radiculopathy or for instability at a segmental level. He further testified that segmental instability can be determined objectively by clinical exam, and neurological compromise can be determined objectively through electronic diagnostic testing.

Dr. Smith examined Claimant on April 25, 2018 at the request of the Employer. An interpreter was present. Claimant described an accident on August 24, 2015 in which Claimant was driving a loaded tractor-trailer and the load shifted, causing the cab and trailer to roll. Claimant's seat belt came undipped and he was thrown from the cab. Claimant denied hitting his head or neck or losing consciousness. After the

accident, an ambulance transported Claimant to Christiana Hospital for examination. Claimant underwent multiple imaging studies and was released after 23

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hours. Claimant thereafter saw Dr. Mesa and then Dr. Eskander for followup care. Claimant also underwent physical therapy and diagnostic studies and attended a consult with Dr. Xing.

At the DME, Claimant complained of pain and stiffness in his neck, back, and right shoulder. Dr. Smith reviewed a cervical MRI from September 22, 2015 that found a mild broad-based disc bulge at C6-7 without evidence of fracture in any of the cervical vertebrae. He conceded that very minor fractures may not show up on X-rays or MRIs, but a broken bone causes bleeding and swelling that would show up on an MRI about a month later. Dr. Smith insisted that the absence of bleeding, swelling, or a fracture line would rule out any fracture of the spine caused by the work accident. He thought it highly unlikely that Claimant had a neck fracture if swelling and bleeding were not present. Claimant also underwent X-rays of the neck in 2015 and 2017 that did not show any fracture or residual from a fracture. Dr. Smith has reviewed some of the images from the CT scan on March 16, 2018. The films showed a small cyst, which is unlike edema because a cyst has a sharp edge. The cyst was adjacent to a degenerative facet joint. Dr. Smith's impression was that the degenerative cyst was coming from the degenerative facet joint rather than a fracture or residual of a fracture. The large osteophyte on the facet joint was consistent with degenerative disease. Dr. Smith did not believe the cyst was a residual of a fracture. He did not see evidence of a fracture on the 2018 imaging, and he did not believe the MRI in September 2015 was consistent with a fracture. Dr. Smith also did not believe the work accident in 2015 aggravated Claimant's degenerative condition and led to the degenerative cyst formation. He would expect to see edema or some hemorrhage in the September 2015 MRI if this were the case. Dr. Smith was asked about the impression in the March 2018 CT scan report that there was an old fracture of left inferior facet of C5 with marked hypertrophy, but otherwise it was a normal cervical spine MRI with no evidence of disc herniation or

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spinal stenosis. Dr. Smith agreed that the lack of spinal stenosis visualized by the CT scan, combined with the normal neurological examination indicated, there was no nerve irritation at C5-6.

Dr. Smith had reviewed the results of the upper extremity EMGs performed in 2015 and in 2018. He agreed that whatever radiculopathy was present on the 2015 test had resolved by the time of the 2018 EMG. Dr. Smith also denied finding anything on clinical examination that indicated segmental instability in Claimant's neck. He also found no objective signs of ongoing or previous injury to the neck such as spasm, atrophy, trigger point tenderness, or deformity. There was no sign of a gait issue emanating from the neck. Dr. Smith's exam found that Claimant's active range of motion in the neck was self-limited due to pain rather than from an objective reason such as muscle spasm. Dr. Smith questioned the level of pain given the absence of any adverse soft tissue problem. A neurological examination of the extremities was objectively normal with symmetrical reflexes and no muscle atrophy. Dr. Smith did not believe Claimant gave full effort on strength testing and thus had subjective signs of weakness. Dr. Smith's impression was that of significant symptom magnification by Claimant.

Dr. Smith was asked to comment on a DME report authored by Dr. Stevens on December 8, 2015. Dr. Stevens indicated Claimant had flexion and extension of 40 degrees, bilateral rotation of 80 degrees, and bilateral bending of 30 degrees in the neck. Dr. Stevens found no guarding, spasm, tenderness, or neurological deficit. Dr. Smith commented that these results could indicate any fracture had healed by then.

Dr. Smith opined that Claimant had made a full and complete recovery from his work injuries and could return to fulltime, full duty work without restriction. He found nothing on examination or in the medical data that would prevent Claimant from returning to work, including in the same type of job he held before as a truck driver. He felt Claimant exhibited a lot of nonphysiologic behavior

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on examination and that Claimant had recovered from soft tissue sprains, strains, and contusions that occurred in the work accident. Dr. Smith further opined that he saw no indication of residual injury that would necessitate cervical spine surgery. He saw no evidence of progressive neurological deficit or instability, the two bases on which he would find surgery reasonable and necessary.

On cross-examination, Dr. Smith stated that Claimant denied any problems with his spine prior to the work accident. Dr. Smith had no medical records that pre-dated the accident. He believed that Claimant suffered soft tissue injuries from the accident. He was aware of a lumbar spine MRI dated September 11, 2015 that showed a central annular fissure with disc protrusions at L3-4 and L4-5 and bilateral facet arthritis. In addition, the cervical spine MRI from September 11, 2015 showed a mild broad-based disc bulge at C6-7. The CT scan on March 16, 2018 showed an old fracture of the left inferior facet of C5 with marked bony hypertrophy. He agreed these diagnostic test results were objective findings.

On re-direct, Dr. Smith opined that all the diagnostic test findings represented degenerative disease. Such disease was not common in persons in their 20s, but Dr. Smith could not find any reason to causally connect the findings or an aggravation of the pathology to the work accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Compensability of Proposed Cervical Spine Surgery

Claimant Josue Polanco seeks a finding that a proposed cervical spine surgery with Dr. Eskander is reasonable, necessary, and related to an acknowledged work accident that occurred on August 24, 2015. The IAB found in a previous decision that Claimant injured multiple body parts, including the cervical spine, in a work-related accident that day, and the Employer, Port to Port International, has paid subsequently for related medical and disability benefits. The Employer disputes that the surgery proposed by Dr. Eskander would be reasonable, necessary, and related to

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the work-related neck injury. Because this is Claimant's petition, he must prove his claims by a preponderance of the evidence. *See Lomascolo v. RAF Industries*, No. 93A-11-013, 1994 WL 380989, at *2 (Del. Super. Ct. June 29, 1994).

Under Delaware law, an employer is obligated to pay for reasonable and necessary medical expenses related to a work injury. *See* DEL. CODE ANN. tit. 19, § 2322; *Turnbull v. Perdue Farms*, C.A. No. 98A-02-001, 1998 WL 281201, at *2 (Del. Super. Ct. May 18, 1998), *aff'd*, 723 A.2d 398 (Del. 1998). In determining causation in an identifiable industrial accident, the "but for" standard of causation is applied. *See State v. Steen*, 719 A.2d 930, 932 (Del. 1998); *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992). "The accident need not be the sole cause or even a substantial cause of the injury. If the accident provided the 'setting' or 'trigger,' causation is satisfied for purposes of compensability." *Reese*, 619 A.2d at 910.

After weighing the evidence, the Board finds that the cervical spine surgery proposed by Dr. Eskander is reasonable, necessary, and causally related treatment for Claimant's work-related neck injury. In reaching this decision, the Board chooses to rely on the opinion of Dr. Eskander over that of Dr. Smith. *See*, *e.g.*, *Peden v.*

Dentsply International, C.A. No. 03 A-11-003, 2004 WL 2735461, at *5 (Del. Super. Ct. Nov. 1, 2004) (finding the Board is free to choose between differing medical opinions that are supported by substantial evidence).

The Board found Dr. Eskander's opinion persuasive that Claimant suffered an undiagnosed fracture of the left C5 facet joint in the August 24, 2015 work accident and requires ACDF surgery to resolve his neck symptoms. The delay in diagnosis can be attributed in part to ongoing litigation prior to the Board's decision on August 1, 2017. *See Polanco v. Port to Port Int'l*, Del. IAB, Hrg. No. 1431892 (Aug. 1, 2017) ("IAB Decision"). The Employer had disputed its liability for any injuries caused by the work event on August 24, 2015 and, as the Board noted in its August 2017

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decision, Claimant essentially received no treatment for his injuries after January 1, 2016 while he awaited a decision regarding insurance coverage for the injuries. *IAB Decision* at 39. Dr. Eskander testified that Claimant had undergone neck X-rays and a cervical spine MRI shortly after the work accident, but neither of these tests showed evidence of the facet fracture. He explained that three distinct diagnostic tests, X-rays, MRI, and CT scan, are required to properly diagnosis a cervical spine injury. In particular, an MRI is a poor test for identifying fractures and pathology such as Dr. Eskander eventually found on the CT scan. It was not until Claimant resumed treatment with Dr. Eskander in September 2017 that a repeat MRI was performed and Dr. Eskander found a cyst and bony growth at C5 that made him suspect posttraumatic findings. He investigated further by providing a diagnostic injection and recommending a CT scan of the neck. The CT scan was performed eventually on March 16, 2018 and revealed an old fracture of the inferior facet of the left C5 joint with some fluid and hypertrophy. Dr. Eskander concluded that these diagnostic test results, combined with the history of the mechanism of injury, indicated Claimant probably broke his neck at the time of the work accident and the fracture went undiagnosed. He further explained that the fracture was located in the same area as the cyst seen on the September 2017 MRI, and the cyst would form from fluid coming from the facet joint, the fracture, or both. Dr. Eskander went on to opine that the fracture did not heal properly and developed more and more degeneration, as evidenced by the bony hypertrophy in the facet joint. Dr. Eskander felt that this explained Claimant's increasing neck pain several years post-injury. He cited studies indicating patients with unilateral facet fractures do very poorly a few years later without treatment. One study suggested immediate fusion could avoid poor outcomes such as lots of neck pain and nerve dysfunction. Dr. Eskander recommended the ACDF surgery to fuse the joint and allow Claimant's neck fracture to heal properly.

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The Board finds Dr. Eskander's testimony convincing about the source of Claimant's ongoing neck complaints and the need for surgery to repair the facet fracture. Claimant is only 31 years old, so the suggestion that this was a degenerative condition unrelated to any trauma seems unlikely. In addition, there is no evidence of any neck complaints or neck injury prior to the August 24, 2015 accident. Dr. Eskander pointed out that a significant force would be required to fracture a neck, not just a sneeze or cough. The only known trauma to Claimant's neck occurred in the August 24, 2015 work accident. Dr. Eskander also contradicted Dr. Smith's neurologic exam findings in that Dr. Eskander found evidence of deficits in the right deltoid biceps and wrist extensor and decreased sensation in the right C6 pattern. Dr. Eskander was familiar with the results of the September 22, 2015 cervical spine MRI and did not express any concerns about the absence of bleeding or swelling in that study. He is an experienced spine surgeon who concluded that the facet fracture had been missed by the initial studies and then caused a cyst and bony hypertrophy to form at the same location. The Board accepts his opinion and finds that Claimant suffered a facet fracture in the August

24, 2015 work accident and now requires ACDF surgery to treat the fracture and its sequelae.

Based the above discussion, the Board finds that Claimant has proved by a preponderance of the evidence that the cervical spine surgery proposed by Dr. Eskander is reasonable, necessary, and causally related treatment for Claimant's work-related neck injury. The Employer shall compensate Claimant for medical and surgical expenses in accordance with the applicable fee schedule.

Termination of Total Disability

The Employer, Port to Port International, argues that Claimant Josue Polanco is no longer totally disabled from work and his total disability benefits should therefore be terminated. The Employer asserts that Claimant can return to work without restriction, pursuant to the report of Dr.

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Robert Smith. *See* DEL. CODE ANN. tit., § 2347. Claimant contends that he continues to be totally disabled from work.

In a total disability termination case, the employer is initially required to show that the claimant is not completely incapacitated. In response, the claimant may rebut that showing, show that he or she is a *prima facie* displaced worker, or submit evidence of reasonable efforts to secure employment that have been unsuccessful because of the injury. The employer would then have the burden of showing the availability of regular employment within the claimant's capabilities. *Howell v. Supermarkets General Corp.*, 340 A.2d 833, 835 (Del. 1975); *Chrysler Corporation v. Duff*, 314 A.2d 915, 918 n.1 (Del. 1973).

The Board first considers whether Claimant is physically capable of working in the competitive marketplace. After weighing the evidence, the Board finds that Claimant is capable of working in at least a sedentary capacity until he undergoes surgery. The Board agrees that some restrictions are required due to Claimant's unresolved cervical facet fracture and accompanying symptoms. Dr. Eskander apparently believed Claimant could return to sedentary duty work as of January 2018 and did not change his opinion to that of total disability until he testified by deposition on October 3, 2018. He reissued sedentary restrictions on April 13, 2018, even after he became aware of the CT scan results and had diagnosed Claimant with the facet fracture. The Board is not persuaded that Claimant's condition or circumstances changed between April 13, 2018 and October 3, 2018 so as to justify Dr. Eskander's last minute opinion that Claimant was now totally disabled from all work. The change in opinion came up in the context of questions about Dr. Mesa's instruction to Claimant to remain out of work pending surgery with Dr. Eskander. Dr. Mesa is treating Claimant's shoulder, however, not his spine. The 2017 IAB decision indicated Dr. Mesa placed sedentary restrictions on the shoulder injury and issued a total disability note based on the

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neck and low back injuries. *IAB Decision* at 38, 39. There is no apparent reason for Dr. Eskander to defer to Dr. Mesa's opinion on the spine disability, since Dr. Eskander is the physician treating Claimant's spine injuries. In addition, the Board believes that Claimant was exaggerating the degree of his symptoms during his testimony and did not find his presentation at the hearing to be consistent with total disability from all work. The Board therefore concludes that Claimant is capable of returning to fulltime work in a sedentary capacity until the date of his surgery with Dr. Eskander.

Claimant is physically capable of working in a sedentary duty capacity; however, a person can still be considered "totally disabled" economically while only partially disabled physically. *Huda v. Continental Can Co.*, 265 A.2d 34, 35 (Del. 1970); *Ham v. Chrysler Corporation*, 231 A.2d 258, 261 (Del. 1967). Such a worker may be "displaced" from employment. Claimant has the burden to

show displacement either on a *prima facie* basis or through a failed good-faith job search. Claimant has not offered any evidence or argument that he is a displaced worker due to his mental capacity, education, training, and age, *see Duff*, 314 A.2d at 916-917, *Facciolo Paving & Construction Co. v. Harvey*, 310 A.2d 643,644 (1973), *Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (1973), or by demonstrating reasonable efforts to secure suitable employment which failed because of the work injury, *see*, *e.g.*, *Watson v. Wal-Mart Associates*, 30 A.3d 775, 779 (Del. 2011). Claimant admitted that he has not looked for any work since his injury. Accordingly, the Board finds that Claimant is not *prima facie* displaced from employment and has failed to meet his burden to prove displacement through reasonable efforts to secure suitable employment.

Based on the foregoing, the Board finds that Claimant is no longer totally disabled from work and can return to sedentary duty work until he undergoes surgery. His total disability benefits shall be terminated as of the date of filing.

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Partial Disability

The Board has determined that Claimant is capable of working in a fulltime, sedentary duty position with restrictions that are causally related to the compensable work injury. In *Waddell v. Chrysler Corporation*, Del. Super., C.A. No. 82A-MY-4, Bifferato, J., 1983 WL 413321 (June 7, 1983), the Superior Court held that, when there is evidence that a claimant has a continuing disability that could reasonably affect earning capacity, the employer filing a petition to terminate benefits must not only show that the employee is no longer totally disabled, but also show that there is no partial disability. *Waddell*, 1983 WL 413321 at *3. Partial disability is based on the difference between an injured worker's wages before and that worker's "earning power" after a work-related injury. DEL. CODE ANN. tit. 19, § 2325.

The Employer has not presented any evidence to establish Claimant's earning capacity within the sedentary work restrictions. Therefore, the Employer has not met its burden of proof to show that Claimant has no loss of earning power as a result of his work restrictions. The Board will therefore award partial disability benefits at the total disability rate of $428.18 per week.

Attorney's Fee and Medical Witness Fee

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." 19 *Del. C.* § 2320. At the current time, the maximum based on Delaware's average weekly wage calculates to $10,704.80.

In setting an attorney's fee, the Board considers the factors set forth in *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973). Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation. Claimant has

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been approved for cervical spine surgery with Dr. Eskander. In addition, the Board has found that Claimant is entitled to ongoing partial disability benefits. An attorney's fee award is thus warranted in this case.

Claimant's counsel submitted an affidavit stating that she spent 11.5 hours preparing for the hearing on the pending petition. Claimant's counsel has been a member of the Delaware bar since June 2003 and has extensive experience in the practice of workers' compensation law. Her initial contact with Claimant occurred on August 27, 2015. Counsel does not represent Claimant in anything other than a workers' compensation context. This case was no more complex than the usual case. Claimant's counsel represents that she has a contingent fee arrangement with Claimant.

A copy of the fee agreement was provided to the Board. Counsel represents that no fees have been or will be received from any other source. Counsel represents that fees of $300 per hour are customarily charged in this locality for similar legal services. There is no evidence that Employer is unable to pay an attorney's fee.

Taking into consideration the factors set forth above and the fees customarily charged in this locality for similar services, the Board finds that an attorney's fee of $5000 is reasonable and within statutory limits in this case.

A medical witness fee for medical testimony on behalf of Claimant is 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, the Board GRANTS the Claimant's Petition to Determine Additional Compensation Due and approves the cervical spine surgery proposed by Dr. Eskander. The Employer shall pay for medical/surgical expenses in accordance with the appropriate fee schedule.

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In addition, the Board GRANTS the Employer's Petition to Terminate Benefits and terminates total disability as of the date of filing; however, Claimant is entitled to partial disability benefits at the total disability rate of $428.18 per week. The Employer shall reimburse the Workers' Compensation Fund as appropriate.

The Board awards an attorney's fee of $5000 and a medical witness fee.

IT IS SO ORDERED THIS 28th DAY OF NOVEMBER, 2018.

INDUSTRIAL ACCIDENT BOARD

/s/_____
GEMMA BUCKLEY

/s/_____
ROBERT MITCHELL

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

/s/_____

Mailed Date: 11-30-18

/s/_____
OWC Staff

Notes:

[1] Alejandro Franco
