KIERAN SNIADOWSKI, Employee,
v.
PULTE HOMES, Employer.

INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

Hearing No. 1208092

Mailed Date: October 12, 2015
October 9, 2015

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 came before the Industrial Accident Board on August 12, 2015, in the Hearing Room of the Board, New Castle County, Delaware. Pursuant to Del. Code Ann. tit. 19, § 2348(k), the Board required an extension of time to complete the written decision.

PRESENT:

LOWELL L. GROUNDLAND

OTTO MEDINILLA

Joan Schneikart, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Michael I. Silverman, Attorney for the Employee

Amy Brown, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On March 9, 2002, Kieran Sniadowski ("Claimant") sustained compensable injuries to the lumbar spine while working for Pulte Homes ("Pulte"). After two compensable lumbar surgeries in 2003, his diagnosis was for failed back syndrome. As a postsurgical complication, Claimant sustained the loss of a testicle, which was acknowledged by the employer. Under an agreement of the parties from September 2003, Claimant continues to receive total disability benefits at the compensation rate of $469.10 per week.[1]

On December 30, 2014, Claimant filed a Petition to Determine Additional Compensation Due seeking compensability for additional medical expenses including a penile pump to help with a loss of sexual function that developed from having only one testicle, and for dental care related to tooth problems from continued narcotics usage.

Pulte contends that neither the penile pump nor the dental services are compensable medical expenses.

The parties submitted a joint Stipulation of Facts into the record, pursuant to *Rules of the Industrial Accident Board of the State of Delaware* ("I.A.B. Rules") Rule 14(A).

SUMMARY OF THE EVIDENCE

David J. Cozzolino, M.D., an urologist with a specialty in erectile dysfunction and infertility, testified by deposition on behalf of Claimant. The doctor began providing treatment to Claimant for a testicular loss following a work injury in March 2002. Dr. Cozzolino opined that Claimant's loss of a testicle is a contributing factor in his sexual dysfunction and erectile

dysfunction. He has recommended a penile pump as reasonable, necessary and causally related to the work accident.

Dr. Cozzolino explained that the two major issues in his treatment of Claimant have been a lower testosterone level and erectile dysfunction. The doctor confirmed that the loss of his testicle plays a part in Claimant's erectile dysfunction which results in a degree of sexual dysfunction. The doctor provides ongoing testosterone

replacement and ongoing treatment for erectile and sexual dysfunction. Having a low testosterone level causes sexual dysfunction, a decrease in libido and erectile function, as well as fatigue, a decrease in energy and bone mineralization that can lead to osteoporosis with aging.

The doctor currently prescribes Testopel, an implantable testosterone pellet that releases testosterone over a four month period. He sees Claimant every four months for insertion of the pellet into the hip or buttock area. Claimant has reported that the medication implant has assisted to some degree with Claimant's erectile and sexual dysfunction issues, but has not provided a complete solution. As a result, Dr. Cozzolino has recommended a penile pump.

Claimant has been on medical therapy for erections using Cialis and Viagra alone but they are no longer effective for him. The penile pump is a vacuum erection device that assists the user in maintaining an erection, while still using Viagra and Cialis.

Dr. Cozzolino agreed that an orchietomy, or the surgical removal of a testicle, results in the drastic reduction of the production of androgens or testosterone. After the removal of his testicle, Claimant received a saline-filled testicular implant for cosmetic purposes. But it has no function.

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Following the work accident in 2002, Claimant has a testosterone count of 140 which is on the very low side. The doctor is not aware of any preexisting problems that Claimant had with erectile dysfunction and/or sexual function before the work accident.

On cross examination, Dr. Cozzolino agreed that Claimant is also on many different medications including antidepressants, painkillers and thyroid medication, all of which can produce a side effect of erectile dysfunction. The specific sexual dysfunction issues that Claimant is having include loss of libido or sex drive and difficulty maintaining an adequate erection. Claimant is in his 40s and the doctor has been providing treatment for him for five years or more. Claimant already had the orchietomy when he became the doctor's patient, and he was not happy with his care from another urologist.

The doctor agreed he did not see any of Claimant's prior medical records before the orchiotomy, although Claimant told him he had no prior issues with sexual dysfunction through his life. Claimant has been receiving the pellets for a number of years, and the costs have previously been covered by the carrier for the employer.

On redirect examination, the doctor agreed that other medications Claimant takes because of his work injuries can also affect erectile dysfunction. For example, narcotic pain medications were prescribed for his back injuries and chronic pain. The antidepressants also have an effect on erectile dysfunction, but the question is why he needs them or if they are related to the work accident.

Gregg Fink, D.M.D., a dentist, testified by deposition on behalf of Claimant. He examined Claimant on July 2, 2015. He opined that Claimant's current dental condition is related to the 2002 work accident because of continuing pain medication usage that causes xerostomia, or dry mouth.

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At the most recent visit, Claimant had complaints of multiple broken teeth causing occasional pain and an inability to eat properly. Claimant reported that a 2002 work accident caused damage to his back and that he has been on some form of pain medication continuously after that time. He was previously taking Percocet and Dilaudid, but currently takes morphine, a narcotic painkiller; Lyrica; and Tizanidine, a muscle relaxant.

Upon an oral examination, Dr. Fink found Claimant's entire upper dentition, teeth numbers

3 through 14, teeth 18 through 21, 28 and 29, to be non-restorable and in need of extraction. He has decay on teeth 22 and 27, which are capable of restoration at this point. The doctor took x-rays which were consistent with the physical findings that he found.

Dr. Fink attributes Claimant's failing dentition to long-term pain medication. Such medications cause xerostomia, or dry mouth, which reduces the amount of saliva in the mouth. Saliva acts as a buffering agent and the lack of it makes it easier for decay to run rampant. Dr. Fink opined that failing dentition due to extensive narcotic pain killer use over the years is a phenomenon that's accepted in the dental field generally. He opined that Claimant's current dental condition is related to the 2002 work accident because of continuing pain medication usage.

The treatment that Dr. Fink recommends, extraction of the failing teeth and dentures, to restore his dental health, would be the very minimum to get him stable. He also recommends a much more extensive plan including implants and restoration of those implants.

A full upper denture after extractions and a lower denture would be $5,000.00, while the other option of six implants with abutments and a screw-retained prosthesis on the top and four implants on the bottom with a bridge prosthesis would be approximately $50,000.00. The

implant and restorations would restore his teeth to the functional level that existed at the time of the work accident.

Dr. Fink identified an August 16, 2012, letter from Dr. Christy, Claimant's former dentist, which also noted a history of long-term opiate usage since the work accident. Dr. Christy attributed Claimant's rampant tooth decay to xerostomia as well.

On cross examination, Dr. Fink confirmed he has never testified before the Board and did not examine Claimant before July 2, 2015. He did review charts and x-rays for him from Dr. Christy in 2011, which was three and one-half years ago. But he did not review any dental records for Claimant before 2011, and was not aware of his dental condition before that date. Dr. Fink agreed that many medical conditions can cause dry mouth, and that being pre-diabetic, as Claimant has been diagnosed, could cause minimal dry mouth. The doctor agreed that because he has not seen any prior records he could not determine when Claimant's decay began. While there can be other causes for dental decay, such as drinking sodas, and failing to brush or floss daily, in Claimant's situation, he has minimal saliva production, which is extensive and is more likely than not the result of all the medications he takes.

Dr. Fink was not aware that Claimant has sleep apnea and uses a CPAP machine, and he conceded that those facts could also cause dry mouth. He also agreed he knew Claimant was taking antidepressants and was on an asthma inhaler, and has a thyroid issue, which can all also cause dry mouth. However, the hypertension medications that Claimant is on for high blood pressure did not list dry mouth as a possible side effect. Dr. Fink believes it is not typical to see this type of decay pattern in patients who are not taking all the medications that Claimant is taking. But the doctor could not give a breakdown of what medications Claimant was previously

on or for how long. Claimant simply provided the doctor with a list of medications he is currently taking and the doctor relied on his history.

Dr. Fink agreed that preventive decay measures Claimant could have taken back in 2002 to prevent or slow down his present problem may have included using fluoride appliances, similar to patients undergoing chemotherapy and radiation treatment.

Dr. Fink conceded that Claimant has multiple medical conditions that alone could cause dry mouth. However, the doctor still believes it is more likely than not that his current dental condition is from the pain medications, despite the possibility of multiple other factors.

Claimant, age forty-eight, testified he underwent two surgeries following the 2002 work accident that resulted in multiple complications. Dr. Francis Schannes, an urologist, removed one of his testicles following his second back surgery. Claimant also saw various doctors for pain management treatment. After 2011, Dr. Christy was his dentist, whom he stopped seeing because the employer's carrier stopped paying for his treatment. Claimant did not have any thyroid issues diagnosed until 2012.

Claimant currently takes the following medications related to the work accident: hydralazine, Cialis, hydrochlorothiazide, Cialis, Corag for hypertension, Cymbacort, morphine extender release, Lyrica, Arimitex, Siyanda, Levoxitin, Tzanidine, Ametiza for constipation, Wellbutrin for depression, and Proyentil. He sees Dr. Cozzolino, an urologist, for erectile dysfunction medications including Cialis and implant pellets, once every three months. The urologist has recommended a penile pump for Claimant to maintain an erection. Claimant had no sexual function issues before the work accident and already has three children between the ages of 18 and 27.

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As to his dental issues, Claimant had routine dental care and issues before the 2002 work accident. He had no teeth replacement before then. He has been taking narcotics medications since 2002 and constantly following his last surgery in April 2003. He had no problem with dry mouth before the work accident. He currently has broken or missing teeth. The problems keep him from smiling and affect his self-esteem. Dr. Christy previously pulled a couple of his teeth and provided a temporary implant with a screw. Dr. Fink has recommended further dental work and Claimant wants to undergo the treatment.

Claimant is currently receiving total disability benefits.

On cross examination, Claimant could not remember the name of his dentist prior to 2002, but sought preventative treatment every six month to one year, had cavities filled and wisdom teeth extracted. Between 2002 and 2011, he saw various dentists regularly, and then began seeing Dr. Christy in 2011 because his wife saw him. In 2007 or 2008, Claimant noticed that started to develop problems with his teeth. They were blackening where the gum met the teeth due to dry mouth. However, Claimant first noticed issue of dry mouth in 2003. He sought specific treatment in 2011. He discussed his teeth issues with one of his pain doctors, who advised him that pain medications caused dry mouth. Dr. Christy recommended certain tooth paste and mouthwashes to treat and slow down the dry mouth condition.

Natalie Sniadowski, Claimant's spouse, testified she met Claimant in 1995 and married him in 1996. They have one child together, and he has two children by a previous spouse. He had no sexual problems or erectile dysfunction before the 2002 work accident. Since that time, he has difficulty getting and maintaining an erection, a low libido and is depressed. He takes Cialis and other erectile dysfunction medications and Dr. Cozzolino has recommended a penile pump.

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Claimant does not currently use a CPAP machine. One was previously diagnosed for him for night terrors. Before 2011, Claimant saw Dr. Walter Kaminsky and a few other dentists in the Bear area every six to eight months.

Jeffrey S. Meyers, M.D., a physical medicine and rehabilitation specialist, testified on behalf of Pulte. He examined Claimant on four occasions: July 2, 2008; April 21, 2009; May 28, 2013; and most recently on April 8, 2015. Dr. Meyers opined

that Claimant's erectile dysfunction and dental issues are not causally related to the work accident because they had multifactorial etiologies.

Dr. Meyers is aware of Claimant's medical history since the 2002 work accident. Claimant underwent an L5-S1 discectomy in April 2003, but continued with symptoms of low back and left leg pain. He then underwent a second back surgery, a total disc replacement at L5-S1, later in April 2003. He had no relief from the second surgery and his back and left leg symptoms worsened. He underwent removal of the left testicle related to the disc replacement surgery. He continued with low back, left leg and urologic complaints. He had a spinal cord stimulator implanted for some time, but still had chronic pain. He began taking short and long acting narcotics analgesics as well as medication for neuropathic pain and depression. He was using a single point cane for ambulation outside the house and a motorized wheelchair for longer distances.

At the defense medical examination visits in April 2009 and May 2013, Claimant's condition was basically unchanged and he reported low back and left lower extremity pain, intermittent pain in the right lower extremity, and phantom pain in the left testicle and left lower abdomen. He was taking short-acting and long-acting narcotic analgesics, muscle relaxants, neuropathic pain medication, sleep and constipation medication, and erectile dysfunction low

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testosterone medication. He was wearing a shell brace and continued using a cane and wheelchair for ambulation. He had not attempted to return to work.

At the most recent defense medical examination in April 2015, Claimant reported new injuries related to the work accident, as well as continued back pain with constant radiation into both legs, left worse than right, ongoing testicular pain and intermittent left lower abdomen pain. He continued wearing a shell brace and using a cane and wheelchair for mobility. His newer complaints included erectile dysfunction and low testosterone, and significant problems with his teeth.

Dr. Meyers was aware Claimant was taking a supplement for his low testosterone condition and Cialis for erectile dysfunction. He was also having some episodes of urinary incontinence. Claimant attributed his teeth problem and need for significant dental work to his use of medications related to the work accident. He reported that ten teeth needed major work.

Upon physical examination, Dr. Meyers concluded that Claimant had failed back surgery syndrome with chronic radiating low back pain and a left testicle injury as a direct result of the 2002 work injury. However, the doctor did not conclude that Claimant's erectile dysfunction, respiratory and urinary complaints, and dental issues were related to the work accident. Dr. Meyers made no significant findings of dental decay from a brief oral examination.

Claimant had a history of sleep apnea and asthma in the past, pre-existing the work accident, for which he was prescribed an inhaler and CPAP machine. He had seen Dr. Cozzolino for his erectile complaints and low testosterone, upon removal of one testicle, but still had once testicle intact. He was also on a number of medications for non-work related complaints, including high blood pressure and hypothyroidism. Dr. Meyers believes a great deal of the new

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complaints Claimant is raising are related to treatment for some of his other conditions that are not work related.

Dr. Meyers opined that follow-up treatment for the failed back syndrome diagnosis and for the left testicle removal continued to be reasonable and necessary. But treatment for urinary incontinence and erectile dysfunction differs from

treatment for the absent testicle. As to the dental problems, Dr. Meyers concluded there are a number of risk factors for xerostomia, or dry mouth, including other medications Claimant is taking, such as antidepressants, bronchodilators for asthma, and thyroid medicines. Claimant has five or six other conditions, such as hypertension, that are contributing factors, can cause dry mouth and are not work related.

On cross examination, Dr. Meyers agreed he was familiar with the incidence of dental issues caused by patients taking certain medications. But he believes it is not common and many different medications and medical conditions can cause it. Dr. Meyers conceded according to Claimant's dental expert his dental issues stem in part from chronic dry mouth, and Dr. Meyers is not a member of the dental community. However, the doctor explained while he has treated patients with dry mouth who have been on opioid medications, dry mouth can also result from blood pressure medicines and diuretics, like hydrochlorothiazide; sleep apnea; the use of bronchodilator inhalers, such as Proventil and Symbicort; hypothyroidism and thyroid medications; and anti-depressant medication. As such, Claimant has about five other risk factors for dry mouth in addition to his opioid usage. Claimant is on medications that can cause dry mouth, but he also has other conditions, such as hypertension, sleep apnea and hypothyroidism, which of themselves can cause dry mouth with or without medications. In addition, there are medications that can cause dry mouth on their own.

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Dr. Meyers opined that Claimant has multiple medical conditions which alone can cause dry mouth, and he is also taking at least three to five medications that can cause dry mouth. So it is impossible within a reasonable medical probability to sort out specifically which factor is causing the dry mouth. The condition is multifactorial. Dr. Meyers conceded that some of the medications that Claimant is taking are related to his work injury, but other medications he is using may also cause it. It is not possible to sort out the likelihood of which medications are more specific as to the cause of the dry mouth since there are so many contributing factors.

Dr. Meyers agreed that Dr. Cozzolino is treating Claimant for sexual and urinary function issues stemming from his testicular injury. In reviewing the medical history, Dr. Meyers noted that Claimant had problems conceiving for a number of years and was diagnosed with erectile dysfunction since before 2005. However, the defense doctor has not reviewed any records before that time or before the 2002 work accident. Dr. Meyers opined that erectile dysfunction, incontinence, and low testosterone are not necessarily related to the fact that he now has one testicle. Many men with a single testicle are able to conceive and have erections.

Dr. Meyers defers to Dr. Cozzolino as to the recommendation for a penile implant as a reasonable approach to erectile dysfunction even though it is an invasive treatment. He agreed that nerve function referable to failed back syndrome is a known risk factor for loss of sexual function, but it is very uncommon. The defense doctor does not believe that Claimant's urinary incontinence a few times a month is related to his failed back syndrome and the cause could be multifactorial. The medical records show that Claimant underwent sleep studies in 2006 for which the trial for a nasal CPAP was recommended and he had a history of asthma.

Claimant testified on rebuttal that when he saw Dr. Meyers in April 2015, the doctor just asked him to smile and did not look inside his mouth.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

On his Petition to Determine Additional Compensation Due, Claimant has the burden of proof, and must demonstrate, by a preponderance of the evidence, that but for the work accident of

March 2002, he would not have developed erectile and sexual dysfunction necessitating a penile pump or dental issues requiring restorative care. *See Reese v. Home Budget Center,* Del. Supr., 619 A.2d 907 (1992)(defming the "but for" standard of causation

"Whether medical services are necessary and reasonable or whether the expenses are incurred to treat a condition causally related to an industrial accident are purely factual issues within the purview of the Board." *Bullock v. K-Mart Corporation,* Del. Super., C.A. No. 94A-02-002, 1995 WL 339025, at **3 (May 5, 1995); *see Keil's Wholesale Tire v. Marion,* Del. Supr., No. 174, 1986, Moore, J. (October 27, 1986)(Order).

As to causation of the medical treatment in dispute, Claimant must demonstrate that the medical expenses are the "direct and natural consequences" of the acknowledged 2011 work injuries. *Robert Barkley v. Johnson Controls,* Del. Super., C.A. No. 02A-01-003-JTV, Vaughan, J., 2003 LEXIS 21 at *9 (January 27, 2003)(Opinion)(Absent either negligent or intentional misconduct on the part of the claimant, a weakened condition stemming from a compensable injury may be deemed the cause of an aggravation of the injury occurring in a subsequent non-work related accident).

When the medical testimony is in conflict, the Board or hearing officer, in its role as the finder of fact, must resolve the conflict. *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. *Standard Distributing Company v. Nally,* 630 A.2d 640, 646 (Del. 1993).

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The Board finds the causation opinion of Dr. Cozzolino on the issue of the proposed penile pump to he more convincing than the opinion of Dr. Meyers in this case. There is no dispute that Claimant sustained the loss of one testicle as a complication of a prior compensable back surgery related to the 2002 work accident. The Board accepts Dr. Cozzolino's belief that as a result he has developed erectile dysfunction and low testosterone levels for which medications alone, such as Cialis and Viagra, are no longer effective. The doctor has recommended a penile pump in order for Claimant to maintain an erection. The doctor also explained other medications that Claimant takes, such as anti-depressants and pain killers, which may also affect erectile function, are also necessary for him because of the work injuries.

The Board finds Claimant credible that he had no sexual dysfunction issues before the work accident. He already has three children between the ages of 18 and 27. His spouse testified he had no sexual problems or erectile dysfunction before the 2002 work accident, and that he has difficulty getting and maintaining an erection, along with a low libido and depression since then.

The Board rejects the opinion of Dr. Meyers that Claimant's erectile dysfunction issues are not causally related to the 2002 work accident due to other possible factors and causes. There is no dispute between the parties that Claimant has failed back syndrome with chronic radiating low back pain and underwent an orchiectomy losing his left testicle as a result of the work accident. While it is true that Claimant takes a number of medications for non-work related complaints, such as high blood pressure and hypothyroidism, which can also cause erectile dysfunction, the Board concludes based on the opinion of the treating urologist, Dr. Cozzolino, the loss of the left testicle is the primary reason for current sexual dysfunction. There was no medical evidence to show that Claimant had erectile dysfunction prior to the work

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accident. Dr. Meyer's general belief that simply because Claimant has one testicle, he may still be able to maintain erections and conceive does not consider the factual circumstances arising in this case that have been documented in Claimant's medical records.

Finally, Pulte through its carrier has previously recognized Claimant's sexual and erectile dysfunction and paid for its treatment by Dr. Cozzolino for the last five years, and before that period acknowledged and paid for the orchiectomy. Dr. Meyers concedes that the recommendation of the penile pump at this time is reasonable and necessary as well as consistent with the prior treatment that has been provided. Thus, the Board determines that the defense doctor's opinion as to causation, or lack thereof, of the erectile and sexual dysfunction, is inconsistent, untimely and not reliable.

As to the dental treatment issue, the Board finds the opinion of Dr. Fink, a dentist, to be more persuasive than the opinion of Dr. Meyers. To begin with, Dr. Fink is a doctor of dental medicine, with specialized expertise in dentition, while Dr. Meyers is a doctor with a specialty in physical medicine and rehabilitation. There is no contest that the medical evidence supports that Claimant continues with failed back syndrome and chronic pain as a result of the 2002 work injury, which has required him to take some form of narcotic pain killer medication for twelve years since his two back surgeries in 2003. He previously took Percocet and currently takes morphine medications.

Dr. Fink provided a full dental examination of Claimant with x-rays and concluded that he currently has failing dentition for more than 17 teeth, some of which are non-restorable and in need of extraction. Dr. Fink attributed Claimant's failing dentition to long-term usage of pain medications which cause xerostomia, or dry mouth. Xerostomia reduces the amount of saliva in the mouth that acts as a buffering agent for tooth decay. The Board accepts the doctor's opinion

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that this phenomenon and causation of decay is generally accepted and recognized in the dental field.

While Dr. Fink agreed that other medical conditions, such as poor oral hygiene, hypothyroidism, sleep apnea, diabetes, and taking anti-depressant medication, can also cause xerostomia, it is more likely than not the cause of failing dentition in Claimant's case results from the continuous use of narcotic medications over the last twelve years, which represents a significant factor. Although Dr. Fink did not review any dental records for Claimant before 2011, he was aware that Dr. Christy, Claimant's former dentist, in a 2012 letter, had previously noted a long-term history of opiate usage following the work accident and also attributed Claimant's rampant tooth decay to xerostomia. Based on the totality of the evidence, the Board accepts Dr. Fink's causation opinion.

The Board accepts Claimant's testimony that he had routine dental care before the 2002 work accident and required no teeth replacements before then. Claimant noticed blackening where the gum met the teeth in 2007 and 2008, and he developed dental caries and broken teeth. In 2011, Dr. Christy recommended certain tooth paste and mouthwash for him to combat xerostomia, extracted a few of his teeth, and provided a temporary implant before 2012. Claimant also testified he had no thyroid issues diagnosed until 2012. After discussing his teeth problems with one of his pain management doctors, he was advised that narcotic pain medications can result in xerostomia. Claimant's spouse testified that he saw other dentists, including Dr. Walter Kaminsky, fairly regularly between 2002 and 2011. She also noted that Claimant no longer uses a CPAP machine, which was prescribed for night terrors, not sleep apnea. Finally, Claimant testified that Dr. Meyers did no more than look inside his mouth at the defense medical examination.

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The Board rejects the opinion of Dr. Meyers that Claimant's failing dentition is unrelated to the 2002 work accident. The doctor agreed he is not a member of the dental community, and he did not conduct a thorough examination of

Claimant's mouth other than by "brief visual inspection, or any dental examination in April 2015. His opinion that Claimant's xerostomia and its effects on tooth decay may be caused by multifactorial and non-work related conditions and other medications he is taking is speculative at best. His opinion does not address the acknowledged and known long-term narcotic usage evident in Claimant's medical history. Ultimately, Dr. Meyer's expert opinion on Claimant's failing dentition lacks credibility particularly in comparison to the testimony of Dr. Fink, an expert with a specialization in dentistry.

For the above reasons, the Board concludes that Claimant's current dental condition is related to the 2002 work accident. However, while providing a causation determination favorable to Claimant, the Board withholds making any specific medical treatment award at this time. The Board determines the issue of medical treatment expenses was not properly presented at the hearing to reach any conclusions as to what specific dental treatment is reasonable and necessary in this case. There are currently no Health Care Advisory Panel ("HCAP") Practice Guidelines applicable for such bodily injuries pursuant to Del. Code Ann. tit.19, §§ 2322A & 2322C. If the parties cannot reach an agreement as to the specific dental treatment that is necessary and reasonable in this case, Claimant may file another petition before the Board to determine those issues with a full presentation of the appropriate evidence.

Attorney's Fee and Medical Witness Fees

A claimant who receives an award of compensation is entitled to a reasonable attorney's fee in an amount not to exceed thirty percent of the award or ten times the average weekly wage

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in Delaware as announced by the Secretary of Labor at the time of the award, whichever is less. Del. Code Ann. tit. 19, § 2320.

The term "compensation," for the purposes of awarding an attorney's fee, refers to "any favorable change of position or benefits, as the result of a Board decision, rather than just being limited to contemporaneous financial gain." *Willingham v. Kral Music, Inc.,* 505 A.2d 34, 36 (Del. Super. 1985), *aff'd.,* 508 A.2d 72 (Del. 1986). Nevertheless, when dealing with an award for a non-monetary benefit, such as causation, the Board must still value the award with reference to an actual monetary amount affected by the ruling, so that there is some actual number against which to apply the statutory 30% calculation. *See Scott v. E.I. DuPont de Nemours & Co.,* Del. Super., C.A. No. 97A-06-008, Lee, J., 1998 WL 283455, at **4(March 30, 1998).

Since the Board determined that proposed penile pump for erectile and sexual dysfunction and failing dentition are both causally related to the 2002 work accident, which represents a favorable change in Claimant position, it must look to his resulting entitlement to workers' compensation benefits related to that finding. In this case, no medical bills were presented into evidence and there was no discussion of the medical treatment costs for the two issues in dispute, so the Board does not have an actual number in order to apply the 30% rule. Claimant currently continues on total disability benefits. Therefore, the Board assumes that the medical expenses will be the only possible contested issue following the substantive decision, and will consider that factor in assessing an appropriate attorney's fee within the limits set forth in Section 2320.

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In determining an award of attorney's fees, the Board must consider ten factors.[2] *See General Motors Corp. v. Cox,* 304 A.2d 55, 57 (Del. 1973)(applied to I.A.B. hearings by *Jennings v. Hitchens,* 493 A. 2d 307, 310 (Del. Super. 1984)); *Thomason v. Temp Control,* Del. Super., C.A. No. 01A-07-009, Witham, J., *slip op.* at 5 - 6 (May 30, 2002). It is an abuse of the Board's discretion to fail to give consideration to these factors. *Thomason* at 7. When claimants seek an award of

attorney's fees, they bear the burden of establishing entitlement to such an award. *Downes v. Phoenix Steel Corp.,* Del. Super., C.A. No. 99A-03-006, 1999 WL 458797 at **4, Goldstein, J. (June 21, 1999)(the burden of proof in a workers' compensation case is on the moving party). Since the Board must consider the *Cox* factors when reviewing a request for fees, it follows that claimants must address these factors in their applications. The failure to do so deprives the Board of the facts it needs to properly assess a claimant's entitlement to fees.

Counsel for Claimant seeks a fee up to the statutory maximum. Counsel submitted an affidavit attesting that he spent 19.6 hours preparing for the evidentiary hearing held on August 12, 2015, which lasted less than two hours. His association with Claimant began in May 2015. Counsel has a one-third contingency fee arrangement with Claimant. Counsel did not attest that the case was unique, novel, complex or difficult to prosecute. By taking the case, the attorney was not precluded from representing other clients. There were no time limitations imposed by the client or his circumstances. Counsel has been admitted to the practice of law in Delaware since 1991 and has experience handling workers' compensation matters. Counsel attested that

there is no evidence or argument of the employer's inability to pay. Pulte had no comment on the attorney fee affidavit.

Taking into consideration the *Cox* factors set forth above, the Board concludes that one attorney's fee award of $5,940.00 (based on the attorney fee affidavit) is appropriate and consistent with the statutory limit in this case.

Having received an award, the Claimant is entitled to have his medical witness fees taxed as costs against the employer, pursuant to Del. Code Ann., tit.19, §2322(e).

STATEMENT OF THE DETERMINATION

Based on the foregoing, the Board hereby GRANTS Claimant's Petition to Determine Additional Compensation Due for causation only. The Board finds that the proposed penile pump for erectile and sexual dysfunction and restorative care for failing dentition are both causally related to the 2002 work accident. Claimant is also awarded one attorney's fee and his medical witness fees.

IT IS SO ORDERED this 9th day of October, 2015.

/s/ LOWELL L. GROUNDLAND

/s/ OTTO MEDINILLA

I hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

/s/_____
Joan Schneikart
Workers' Compensation Hearing Officer

Mailed Date: 10-12-15

/s/_____
OWC Staff

Notes:

[1.] The Board's file reflects that by prior agreements between the parties, Claimant has also received numerous permanent impairment awards including: 105 weeks of benefits for a 35% loss of use to the lumbar spine in March 2005; 102 weeks of benefits for a 34% loss of sexual function in July 2006; 15 weeks of benefits for a 10% increase due to loss of the left testicle in July 2006; 15 weeks of benefits due to loss of the left testicle in September 2007; 150 weeks of benefits for loss of the left testicle in October 2008; and 105 weeks of benefits for a 35% loss of use to the lumbar spine in September 2009.

[2.] The factors to be considered are: (1) the time and labor required, the novelty and difficulty

of the questions involved, and the skill needed to perform the services properly; (2) the likelihood (if apparent to the client) that acceptance of the employment would preclude other employment by the attorney; (3) the fees customarily charged in the locality for such services; (4) the amount involved and the results obtained; (5) time limitations imposed by the client or the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation and ability of the attorney; (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.
