CHESTER STALLINGS, Employee,
v.
ARROW LEASING, Employer.

INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

Hearing No. 1431665

Mailed Date: April 29, 2016
April 25, 2016

DECISION ON PETITION TO DETERMINE COMPENSATION DUE

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on February 18, 2016, 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

MARILYN DOTO

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

APPEARANCES:

Susan Ament & Steven L. Butler, Attorneys for the Employee

Kristen Swift, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On August 31, 2015, Chester Stallings ("Claimant") filed a Petition to Determine Compensation Due alleging he sustained injuries to various body parts following a motor vehicle accident on July 18, 2015, while he was working as a driver for Arrow Leasing. The parties now stipulate that a work accident occurred on July 18, 2015, from which Claimant sustained injuries to the scalp, neck at C5-6, vertebral artery, right hemothorax, right pneumothorax and fractured ribs (4th through 6th). The parties further stipulate that Claimant was disabled from all work for a period from July 18 to October 6, 2015. However, Claimant further seeks total disability benefits ongoing from October 7, 2015, and medical expenses for physical therapy for

the low back and right arm. The employer disputes the claim for ongoing total disability benefits and the nature and extent of the work injuries, specifically, and medical expenses for physical therapy for the low back and right upper extremity. The employer also contends that Claimant showed a deliberate and reckless indifference to danger, and consequently, his benefits are subject to forfeiture pursuant to Del. Code Ann. tit. 19, §2353(b).

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

SUMMARY OF THE EVIDENCE

Claimant, age forty-one, testified his job duties for Arrow Leasing included driving a truck and picking up portable toilets. He normally worked from 7:00 a.m. until 3:30 p.m. on weekdays, but sometimes worked later for which he received overtime pay. His overtime was usually for 10 to 20 hours per week. He also worked one week-end per month. He identified a statement of his job duties (Claimant's Exhibit No. 1). The employer provided him with a

mobile phone to call into the office, contact customers and to use for GPS directions. He also had a personal mobile cell phone.

On Saturday, July 18, 2015, Claimant arrived at work before 7:15 a.m. He clocked in, received his paperwork and warmed up his truck. He was assigned five stops to make that day, located from Dover to Wilmington. After leaving the Richardson Park area, Claimant was proceeding to the next location, driving on I-95, using the GPS system on the employer's phone. There was heavy traffic and he was traveling about 45 miles per hour. As he glanced at the GPS screen, the vehicle in front of him slammed on the brakes. Claimant veered to the left, as it was too late to straighten the truck out. The back of his vehicle then swiped the back of the car in front. Claimant's truck went through the guard rail and flipped over. He was wearing a seat belt but his head hit the windshield. There was shattered glass all over. He did not lose consciousness and was able to climb out of the truck by himself. He was taken by ambulance to Christiana Care. His head was bleeding, his neck was injured and his lung had collapsed causing difficulty breathing. At the hospital, a chest tube was inserted and he was immediately taken into surgery for the neck.

A police officer later visited Claimant in the hospital and issued traffic citations to him for driving while his license was suspended or revoked, for following too closely in traffic, and for inattentive driving. Claimant was not aware that his license had been suspended due to a Family Court summons involving a prior fine. He later paid the fine on Monday after his release from the hospital. He was not prosecuted for the other citations (Claimant's Exhibit No. 2)

Claimant remained in the hospital for four days. Upon discharge, he was to follow up with Dr. Rastogi, who performed the surgery, and with Dr. Damon Cary for physical therapy. Claimant continued to have pain and symptoms in his neck, back, left arm and head. He had

blurred visions and headaches. He wore a hard collar for three to four months, followed by a soft collar until the end of October or November. He saw Dr. Cary for physical therapy between August and November 2015 and then received more physical therapy at Dynamic Physical Therapy. He was also taking muscle relaxers and Percocet. Dr. Rastogi and Dr. Cary, whom he last saw two months ago, have both continued to restrict him from all work and lifting over 20 pounds.

Claimant wants to return to work at Arrow Leasing. He was not terminated following the motor vehicle accident. His current symptoms include his neck pain at the level of 9 on a ten-point scale, left arm numbness and knee complaints. He was told he had a concussion from the work accident, and he still gets dizzy. He is right hand dominant.

The work accident has caused other negative effects. He had not been able to work, lost his home, his bills backed up, and his mental disposition changed causing him to forget things.

Claimant agreed that the night before the work accident, he went with a friend to Atlantic City where he had some drinks and gambled at the slot machines. They left there at approximately 4:30 a.m. using a designated driver. Claimant slept on the drive back until he was dropped off at his home at 6:00 a.m. He then took a shower, ate breakfast and was dropped off at work, as normal. He felt fine when he arrived at work at 7:15 a.m.

Claimant has an eleventh grade education from Newark High School, and previously worked for Dole at the Port of Wilmington, for Laz-y-boy as a furniture technician, and in a barbershop. He started working for Arrow Leasing in October 2013. He currently is the primary caretaker for two children living with him; one is a son with asthma.

Claimant's prior medical history includes having a severe reaction to cold medicine requiring emergency room treatment in 2009. He also visited the emergency room in 2008 for

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anxiety symptoms and issues. He was prescribed Xanax, but stopped taking it in April 2010 due to side effects, but was given another medication. He had low back pain in October 2010 after lifting something at home. On July 6, 2015, before the motor vehicle accident, he was diagnosed with a strep throat and given penicillin. But he was not taking any medications on July 18, 2015, at the time of the work accident. He also did not consume any alcohol or controlled substances on that date.

Claimant's attendance at Arrow Leasing has been "pretty good" and he has a "good relationship" with his supervisor, A1 Sammons. Claimant was never provided with a safety or personnel manual while there. The employer provided a Bluetooth earpiece for the company cell phone as a holiday gift. He used the two cell phones, the company's and his own, all "hands free" while driving by using ear buds.

After the work accident, Claimant told Dr. Cary he had difficulty sleeping, memory loss, and numbness and tingling in both arms. Dr. Cary provided Percocet and Xanax initially. Claimant currently continues to take Percocet and Ambien. His current pain is an 8 on a ten-point scale. He underwent neck surgery on the day of the motor vehicle accident. His treating physicians, Dr. Rastogi and Dr. Cary, both restricted him from all work between July 18 and October 6, 2015.

On cross examination, Claimant agreed he had a "couple drinks" at two locations while partying in Atlantic City. His time card at Arrow Leasing indicated that he clocked in at 6:01 a.m. on July 18. His blood level was tested at the emergency room for alcohol at about 5 p.m. on the afternoon of July 18 and was still positive.

Claimant first saw Dr. Cary after the work accident on August 4, 2015. The doctor initially prescribed Xanax for anxiety but substituted another medication for it in December

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2015. Claimant does not remember if he lost consciousness following the motor vehicle accident, although Dr. Cary's records from August 4 reflect that he did. But Claimant did not report any loss of consciousness to the police or at the emergency room.

Claimant agreed that his personal cell phone record (Employer's Exhibit No. 1) reflects he made 50 calls on July 18, 2015, which lasted two minutes or less, and that he made five calls between 4:50 and 5:14 p.m. However, the police report lists the time of the motor vehicle accident as 5:18 p.m. Claimant confirmed that he ate twice, stopping at convenience stores, while working his shift. The last call he made was to a co-worker about getting a ride home at 6 p.m. after his final stop.

Pawan Rastogi, M.D., a neurosurgeon, testified by deposition on Claimant's behalf. The doctor first saw Claimant at the Christiana Care emergency room on July 18, 2015, when he was diagnosed with a cervical fracture/dislocation at C5-6. The doctor performed cervical spine surgery on that date, and next saw Claimant on November 18, 2015. Dr. Rastogi opined that Claimant continue to be disabled from all work following October 7, 2015, following the motor vehicle accident. He further opined that all Claimant's treatment to date has been reasonable, necessary and causally related to the work accident.

In reviewing the medical records from July 18, 2015, Dr. Rastogi noted that the emergency room staff diagnosed Claimant with a cervical fracture/dislocation at C5-6 and other life threatening secondary injuries following a rollover motor vehicle accident. A blood alcohol test was also done but there was no indication that Claimant was intoxicated. He was able to give a history to the emergency room personnel and his Glasgow Coma Scale reading was a 15, which was normal for a person awake, alert and oriented to time and place. Dr. Rastogi also reviewed the Delaware State Police report and Claimant was not charged with any driving under

the influence violations. Dr. Rastogi performed fusion surgery to correct the misalignment at C5-6. Following the procedure, Claimant had the usual neck pain and numbness and some weakness in the left arm.

Dr. Rastogi next saw Claimant on November 18, 2015, when he complained of some posterior neck pain and stiffness. He also had some upper extremity weakness and cognitive issues. Dr. Rastogi concluded Claimant sustained a concussion as a result of the motor vehicle accident since he had a head injury with lacerations, and the pre-hospital records showed a period of loss of consciousness. But he did not have any bleeding in the brain.

Dr. Rastogi confirmed that both his bill and the Christiana Care bills have been paid by the auto insurer, Harleysville Insurance Company.

The medical records show that Claimant also sought treatment with Dr. Damon Cary and attended physical therapy at his office and at Dynamic Physical Therapy following the motor vehicle accident. The doctor opined the treatment rendered by those providers was reasonable, necessary and causally related to the motor vehicle accident.

Dr. Rastogi opined that Claimant remained disabled from all work at the time of his deposition taken on February 16, 2016. He no longer wears a soft collar and is scheduled for a future follow-up visit when the doctor will make a judgment as to whether he may return to a light or sedentary duty job in terms of weakness or pain.

Dr. Rastogi reviewed Dr. Stephen Fedder's defense medical examination report which concluded that Claimant was not intoxicated and suffered a left C5-6 unilateral facet dislocation following the motor vehicle accident. Dr. Rastogi disagrees with Dr. Fedder's belief that Claimant's left-sided weakness was not described by the emergency room personnel since a unilateral facet dislocation, such as the one Claimant sustained, have a high rate of injury to the

nerve root and would have given him bicep and triceps weakness. In addition, the emergency room personnel do not necessarily perform a thorough examination. Dr. Rastogi also disagrees with Dr. Fedder's that Claimant was able to return to work in October 2015. As a result of his injuries, Claimant sustained rib fractures and had a chest tube.

In reviewing prior medical records from 2008 up to July 6, 2015, Dr. Rastogi made no findings to change his current opinions.

Dr. Rastogi opined that as a result of the motor vehicle accident Claimant will require future x-rays and a CT scan at about a year to assess for alignment, and continued physical therapy for another six months or so. He may also require some pain management treatment.

On cross examination, Dr. Rastogi agreed that the police report of Corporal Carbine reflects that Claimant was checking his GPS at the time of the motor vehicle accident. However, he was not legally intoxicated, although the blood work done does show Claimant was drinking prior to the accident. There was no testing done for other controlled substances or for cold medication. The CT scan at the hospital also showed Claimant had acute left maxillary sinusitis. The prior medical records from July 6, 2015, twelve days before the motor vehicle accident, reflect Claimant presented to the emergency room due to pharyngitis and congestion and that he had a

history for a bad reaction to cold medicine. There was no mention of loss of consciousness in the pre-hospital report or the in the emergency room records under neurological status. However, Dr. Rastogi believes that Claimant had a concussion based on the fact that he had clear trauma to the head and lacerations. The doctor conceded that if Claimant did not lose consciousness, he may not have suffered a concussion. Nevertheless, Dr. Cary's records reflect that Claimant actually reported a loss of consciousness to him although the doctor did not perform any neurological testing.

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Claimant was examined in the doctor's office on October 7, 2015, ten weeks post-surgery, by his physician's assistant. He was then given a work restriction note on November 3, 2015.

Dr. Rastogi agreed that the hospital records following the work accident did not reflect any low back injury.

On redirect examination, Dr. Rastogi agreed that none of the emergency or hospital records reflect any mention of intoxication on July 18, 2015. Claimant was not observed to have any signs of diminished capacity when observed by the trauma team or the emergency department. The records note that he was oriented and had appropriate speech.

Dr. Cary's diagnosis for a concussion in his August 4, 2015 record indicated that he performed a motor examination to assess strength and a sensory and spinal exam. Dr. Rastogi believes Claimant had an anxiety disorder predating the motor vehicle accident which may have been exacerbated by that event. Claimant sustained a significant injury and underwent significant surgery following a significant accident. Claimant's complaints to Dr. Cary as to trouble sleeping may be a consequence following his surgery. As of January 21, 2016, Claimant continued to have significant pain of 9 out of 10 without medication and 7 out of 10 with medication.

Albert Sammons, the owner of Arrow Leasing and Claimant's supervisor, testified on the employer's behalf. The company also does business Arrow Sanitary Services. Arrow provides a work cell phone to its employees with GPS, but employees are instructed not to use them while driving. While the company trucks are not "Bluetooth" enabled, employees were given a Bluetooth headset in December 2014. If an employee cannot report to work, the company will get another driver to cover for him. If Claimant had called in on the morning of July 18, 2015,

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requesting to take off, someone would have been obtained to replace him. The start time for Claimant's time card on that date was entered by the employer based on the notation.

On cross examination, Mr. Sammons agreed that Claimant has worked at Arrow for about three years. He was a good employee and had no past safety concerns. Mr. Sammons often checks the company's drivers' licenses online for random violations. Employees can work long shifts, up to 12 hours a day in the summer. On an average day, the driver delivers, picks up and services public toilets. The job required lifting a portable toilet with a dolly.

The GPS phone is provided to help employees navigate to the various sites, as well as to allow Mr. Sammons to contact them if needed. Drivers are provided information on reporting problems or work accidents. Claimant had no prior driving incidents at Arrow Leasing. There were no problems with his behavior recorded on July 18, 2015.

On redirect examination, Mr. Sammons found out about the July 2015 work accident second hand. He did not know Claimant's license was suspended at the time of the motor vehicle accident.

Corporal Susan Carbine, an officer with the Delaware State Police, testified by deposition on behalf of the employer. She has been a police officer since October 31, 2008, and is familiar with the Delaware Motor Vehicle. Her job typically involves responding to motor vehicle accidents. Often accidents occur due to use of cell phones or alcohol, whether or not the driver is legally intoxicated.

On July 18, 2015, Corporal Carbine responded to Claimant's motor vehicle accident and made contact with a witness who reported seeing Claimant's vehicle swerve to the left to avoid striking and 18-wheeler that was stopping in the lane directly in front of it. The witness stated Claimant vehicle struck this truck and then he began to lose control traveling across all lanes of

Northbound 95, through the guardrail, off the left shoulder, and overturned. When Corporal Carbine made contact with Claimant at the hospital, he reported he was travelling on Northbound 95 in the second left lane. When he looked down at his GPS and then up, he saw cars ahead of him braking, so he swerved to the left to avoid a crash but struck another vehicle (driven by John Malool) and continued across Northbound 95, through the guardrail, until his vehicle overturned. Claimant did not report that his GPS was on his cell phone or that he been drinking that day.

The pre-hospital report indicated the motor vehicle collision occurred at approximately 5:18 p.m. on July 18, 2015, and the emergency crews were notified at approximately 5:23 p.m. and arrived at the scene at 5:30 p.m.

Corporal Carbine reported that she reviewed Claimant's personal cell phone records (Employer's Exhibit No. 1) from July 18, 2015, and found five calls made between 16:50 and 17:14, which each lasted between and minute or two. The last outgoing call was placed at 17:09 and lasted approximately a minute. The last incoming call that came at 17:14 lasted approximately a minute. There were also numerous other calls made on July 18, 2015, on the same phone at other times. When she interviewed Claimant at the hospital, he did not report making or receiving a personal phone call immediately preceding the motor vehicle accident. However, Claimant stated he was looking down at his GPS just prior to the time of the collision. So Corporal Carbine cited him for "inattentive driving" since he did not see the vehicles stopping ahead of him. But she did not believe she would have changed the citation in any way had she seen his personal cell phone records at that time.

Corporal Carbine agreed that she believed that if a motorist is drinking prior to entering a vehicle, talking on a cell phone, checking their GPS and is then involved in a serious motor vehicle accident, it would amount to a reckless indifference to danger.

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On cross examination, the officer agreed she did not personally observe the motor vehicle accident involving Claimant on July 18, 2015, and was not aware of traffic conditions or the motorists' speed immediately prior to that event. She never observed Claimant at the crash scene because the "fireboard was working on getting him out of the vehicle." However, the condition of the driver on her report for him is listed as 'apparently normal." She did interview Claimant at the hospital, where she did not observe any signs that led her to believe he was intoxicated. He told her he swerved to the left to avoid striking an 18-wheeler.

While the witness, Kevin Miller, did not indicate there were any vehicles between his vehicle and Claimant's vehicle when he observed the crash, he indicated that Claimant also hit an 18-wheel tractor-trailer. But there was no driver of an 18-wheeler at the scene or anyone who called 911 to report a collision.

The officer agreed that there were no reports from witnesses that Claimant was using a cell phone at the time of the accident, but based on the cell phone records, it could be that he was. However, nothing prompted her to investigate cell phone records on her own. She conceded that it is

permissible under Delaware motor vehicle traffic laws to use a "hands free" cell phone while operating a motor vehicle. But there is no way to determine from looking at cell phone records if the calls were made "hands free."

The officer also cited Claimant for unpaid fines and an outstanding capias, which were cleared on July 21, 2015. She determined the violations against Claimant based on information obtained from witnesses, operators, and/or any evidence obtained from the scene. "Inattentive driving" is failure to give full time and attention to the operation of the motor vehicle, while reckless driving, which she does not issue frequently, is "a willful or wanton disregard for the safety of persons or property."

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On redirect examination, Corporal Carbine agreed there was no report of erratic driving in Claimant's case to her knowledge. She did not observe any signs and symptoms of intoxication when she interviewed Claimant at the hospital, but the interview occurred one or two hours after the event. The condition of the driver on her report is from a drop-down box and is listed as 'apparently normal." She also did not observe any debris at the scene, such as a hands-free device. She was not around when the truck Claimant was driving was flipped over and removed from the roadway.

Stephen L. Fedder, M.D., a neurosurgeon, testified by deposition on behalf of Arrow Leasing. He examined Claimant on October 6, 2015, and reviewed his medical records. Dr. Fedder opined that Claimant was capable of returning to work in a sedentary to light duty position at the time of his defense medical examination.

The medical records reflect that Claimant previously received treatment for shortness of breath and anxiety in December 2008; for anxiety in April 2010, including a reference to Xanax medication being stopped; for low back strain and strain in October 2010 and again in June 2015; and for spasms in the legs and inability to walk in October 2011, including a diagnosis of lumbosacral radiculopathy with right SI joint pain. The social history from an October 2011 emergency room record reflects that Claimant uses marijuana and alcohol occasionally. He also had a bad reaction to cold medicine either in December 2009 or July 2015.

As to the emergency room records following the July 18, 2015 work accident, Dr. Fedder agreed that loss of consciousness, headache and abdominal pain were specifically negated in the records. Claimant had a Glasgow coma scale of 15, which is essentially normal, for persons with a head or traumatic brain injury. The medical records reflect that Claimant

was checking his GPS while driving and did not notice the car in front had stopped right before the motor vehicle

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accident. A CT scan of the head showed scalp lacerations and hematomas, but the intercranial compartment was benign.

The discharge diagnoses from the hospital were for a right fourth through sixth rib fracture, right hemothorax, right pneumothorax, left superior C6 facet fracture, minimal anterior subluxation of C5 on C6, left transverse process fracture and ligamentous injury to C5 through C7. The lab results from July 18, 2015 were positive for alcohol at 57 milligrams.

Dr. Fedder noted that Dr. Cary's records from August 14, 2015, document Claimant lost consciousness, which differed from the emergency room records. Claimant also did not report any current or present substance abuse to Dr. Cary, or pre-existing injuries to the low back or problems walking, or concussive symptoms. Dr. Cary's diagnoses were status post anterior cervical spine surgery, thoracic spine strain and sprain, right elbow sprain and contusion, post-concussive syndrome and anxiety reaction. Dr. Cary also restricted Claimant from all work through October 7, 2015. Claimant complained to Dr. Cary of memory loss and significant anxiety on November 6, 2015, but there was no mental status exam performed.

In reviewing Dr. Rastogi's records, Dr. Fedder noted the surgeon had performed an instrumented fusion at C5-6 on July 18, 2015. At a follow-up on October 7, 2015, Dr. Rastogi found diffuse upper extremity weakness, four plus over five in intact sensation and intact or normal deep tendon reflexes. Dr. Fedder regarded those weakness findings as non-neurological. There was no work status listed on that note, but Claimant was still receiving physical therapy and transitioning from a hard to a soft collar. Dr. Rastogi provided the first formal work restriction note on November 3, 2015, reflecting that Claimant was totally disabled.

At the defense medical examination in October 2015, Claimant reported a prior undated motor vehicle accident associated with low back pain that had resolved. He did not report prior

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treatment for low back pain or bilateral lower extremity weakness rendering him unable to walk. Dr. Fedder's history for the motor vehicle accident was "an amalgamation of the police report and the Christiana records" indicating Claimant was the driver of a 2006 Peterbilt truck that struck the left rear of

a Subaru Legacy. His vehicle turned over onto its left side. He was extricated from the vehicle and brought by ambulance to the emergency room, where he complained of neck pain with radiation to the right shoulder, numbness and tingling in the hands, and chest pain.

Based on the medical records contemporaneous with the motor vehicle accident, Dr. Fedder opined that Claimant sustained scalp lacerations and contusions, a left C5-6 unilateral facet fracture dislocation, a left vertebral artery dissection, right hemothorax and right pneumothorax with fourth through sixth rib fractures. The defense doctor did not believe that Claimant had sustained a concussion or traumatic brain injury from the work accident as there was no loss of consciousness recorded and no record of dysfunction in terms of information processing. He never had any cognitive deficits records and had a Glasgow coma scale of 15. However, he may have had an anxiety diagnosis but there was documentation history leading up to the work accident for emergency room evaluations in 2008, 2009 and 2010 to support that diagnosis.

Upon physical examination, Dr. Fedder concluded his injuries were essentially resolved with the exception of residual pain from the cervical fracture and surgical reduction, and pain from the chest tube placement site. The doctor believed that Claimant could be transitioned out of his hard collar to a soft collar and go back to work in a sedentary or light duty capacity. Such a release was consistent with his ability to go to physical therapy utilizing public transportation and a normal neurological examination that the doctor assessed.

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On cross examination, Dr. Fedder agreed that he had reviewed no medical reports available to him that Claimant had been involved in other prior motor vehicle accidents.

Dr. Fedder agreed that Claimant's history of low back pain did not bear on the July 2015 work accident as there was no evidence to support any kind of significant lumbar injury. The doctor was unsure if the right elbow strain and sprain reflected in Dr. Cary's notes were related to the work accident as they were not referenced in the emergency room records.

Dr. Fedder agreed that the care and treatment Claimant had received up through his defense medical examination had conformed to the Delaware Practice Guidelines for the related injuries.

Dr. Fedder agreed that Claimant was involved in a significant motor vehicle accident, and underwent significant surgery for a fractured dislocation to the neck.

Dr. Fedder believes that Claimant was a truck driver at work and that his job probably involved some degree of loading and offloading trucks. But he was unclear as to what he moved or if such activities involved lifting, pushing or pulling.

Dr. Fedder agreed that Claimant probably had trouble sleeping after cervical spine surgery and a chest tube placement, which problems could last from four to six months.

On redirect examination, Dr. Fedder confirmed that he did not believe Claimant demonstrated 10 out of 10 pain when he saw Dr. Cary four days before the defense medical examination because persons with that level of pain are generally not able to take public transportation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On a Petition to Determine Compensation Due, Claimant carries the burden of proof and must demonstrate, by a preponderance of the evidence, but for his work activities on July 18,

2015, he would not have sustained injuries to multiple body parts. *See Reese v. Home Budget Center,* 619 A.2d 907 (Del. 1992)(defining the "but for" standard of causation). To that end a claimant must produce expert testimony relating the causation of his medical condition to his or her employment. *Anderson v. General Motors Corp.,* 442 A.2d 1359 (Del. 1982). A pre-existing disease or infirmity, whether overt or latent, does not disqualify a claim from workers' compensation benefits if the employment aggravated, accelerated, or in combination with the infirmity produced the disability. If the injury serves to produce a further injurious result by precipitating or accelerating a previous, dormant condition, a causal connection can be said to have been established. *Reese* at 910. *See also* 1A Arthur Larson, *Workmen's Compensation Law* §12.21.

To merit total disability benefits, a Claimant must show that he or she was actually, totally incapacitated from earning wages. *M.A. Hartnett, Inc. v. Coleman,* 226 A.2d 910, 913 (Del. 1967).

When the medical testimony is in conflict, the Board, 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).

Since the filing of Claimant's petition, the parties have stipulated that a work accident occurred, as alleged, on July 18, 2015, from which Claimant sustained injuries to the scalp, neck at C5-6, vertebral artery, right hemothorax, right pneumothorax and fractured ribs (4th through 6th), and he was disabled from all work for a period from July 18 to October 6, 2015. However, Claimant seeks continuing total disability benefits ongoing from October 7, 2015, which Arrow Leasing disputes. In addition, the employer contends that Claimant showed a deliberate and

reckless indifference to danger, and consequently, his benefits are subject to forfeiture pursuant to Del. Code Ann. tit.19, §2353(b).

Based on the evidence, the Board concludes that Claimant has carried his burden to show a continuance of total disability entitling him to benefits related to the acknowledged work accident. However, the Board finds the employer has not carried its burden to show any forfeiture of benefits based on Del. Code Ann. tit.19, §2353(b).

Total Disability Ongoing from October 7, 2015 / Nature and Extent of Injuries

The Board finds the expert medical testimony of Dr. Pawan Rastogi on Claimant's present work capacity to be more convincing than the opinion of Dr. Stephen Fedder in this case. While both experts are neurosurgeons, Dr. Rastogi performed immediate cervical fusion spine surgery on Claimant for a fractured dislocation to the neck as a result of the work accident. He then followed up with him post-surgery and referred him to Dr. Damon Cary for subsequent rehabilitation, pain management, and physical therapy. On the other hand, Dr. Fedder has only seen Claimant one time in October 2015. Treating physicians have great familiarity with a patient's condition and their opinions should be given "substantial weight." *Diamond Fuel Oil v. O'Neal,* 734 A.2d 1060,1065 (Del. 1999).

The Board agrees with Dr. Rastogi's conclusions that Claimant sustained significant injuries for which he underwent emergency surgery following the motor vehicle accident. While Claimant's recovery from the C5-6 fusion surgery has progressed to the stage that he no longer requires even a soft collar, he continues with significant pain (9 out of 10 without medication and 7 out of 10 with medication) according to Dr. Cary's treatment records of January 2016. At the time of Dr. Rastogi's deposition,

he believed Claimant remained disabled from all work due to the nature and extent of his injuries resulting from the motor vehicle accident on July 18, 2015.

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Both treating physicians have restricted Claimant from all work and from lifting more than 20 pounds. Dr. Rastogi concluded that Claimant will continue to require additional physical therapy and possibly pain management treatment for another six months.

Based on the medical records and the nature and extent of the acknowledged work injuries, the Board finds Claimant credible that he continues to require Percocet and Ambien for a current pain level averaging an 8 on a ten point scale. Although he no longer needs to wear a hard or soft neck collar, he continues with neck pain, left arm numbness and tingling, knee complaints, some numbness in the right dominant arm, difficulty sleeping, dizziness and memory loss. While there is some factual dispute as to whether Claimant lost consciousness as a result of the motor vehicle accident, the mechanism of his injury for a clear trauma to the head with lacerations is uncontested. Dr. Rastogi conceded if Claimant did not lose consciousness, he may not have suffered a concussion. Claimant testified he extricated himself from the vehicle following the motor vehicle accident. In addition, the trauma team and emergency room records do not support any signs of immediate diminished capacity, and he was observed to be oriented with appropriate speech as well by Corporal Carbine. Nevertheless, months after the work accident, Dr. Rastogi did not find it unusual that Claimant continued to have pain and trouble sleeping as a consequence of his neck surgery.

The Board rejects the opinion of Dr. Fedder that Claimant was capable of returning to work in a sedentary to light duty capacity as of October 6, 2015. The defense doctor conceded that the care and treatment Claimant had received up to the date of the defense medical examination had conformed to the Delaware Practice Guidelines. But he believes Claimant's injuries were essentially resolved with the exception of residual pain from the cervical fracture and surgical reduction, and pain from the chest tube placement site. The defense doctor further

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conceded that Claimant's probably had trouble sleeping after the cervical spine surgery and chest tube placement and that such problems could last for four to six months. The Board finds Dr. Fedder's work capacity opinion overall to be to be inconsistent with the medical records of Dr. Cary for the

intervening six months and the underlying basis for Dr. Rastogi's belief that Claimant continues to be restricted from all work related to the motor vehicle work accident.

As to ancillary medical matters that were not addressed in the joint stipulation of the parties, specifically, the alleged low back, right arm, and anxiety issues, the Board relies on Dr. Fedder's concession that the medical treatment to date had conformed to the Delaware Practice Guidelines. As such, given the mechanism of injury for a significant motor vehicle accident involving a roll-over causing injury to various body parts for which Claimant remains disabled from all work, the Board concludes that any treatment to the right upper extremity rendered prior the date of Dr. Fedder's deposition in February 2016 is causally related to the work accident. However, Dr. Rastogi also concluded that the hospital records following the work accident did not reflect any low back injury. As a result, the Board does not find any further treatment to the low back, other than whatever was rendered and previously paid prior to February, would be causally related to the work accident.

As to any anxiety issues that Claimant has described, the Board does not find that causation for a mental injury claim related to the work accident to be properly before it at this time based on the pre-trial memorandum and the joint stipulation of facts completed by the parties. With respect to any medical treatment related to an anxiety diagnosis rendered before February 2016, at which time both expert medical witnesses were deposed, the Board finds that such limited treatment would be reasonable and acceptable as to some "general anxiety" following the motor vehicle accident and the acknowledged injuries to date. However, both

medical experts agreed that Claimant had a history for anxiety disorders prior to the July 2015 work accident, and Dr. Rastogi further concluded the motor vehicle accident could have exacerbated that condition. Nevertheless, the Board's acceptance of Dr. Rastogi's opinion for this limited fact does not constitute a legal finding to establish a mental injury, in and of itself, or to provide the basis for additional future workers' compensation benefits. If Claimant seeks to pursue specific relief for such complaints related to a mental injury, he will need to file a further petition defining that claim.

Forfeiture of Benefits

In this case, Arrow Leasing seeks a suspension of Claimant's workers' compensation benefits on the basis of forfeiture, pursuant to Del. Code Ann. tit. 19 § 2353(b), "because of the employee's deliberate and reckless

indifference to danger." *Id.* It is the employer's burden to prove, by a preponderance of the evidence, a termination of benefits under forfeiture. If such a finding is demonstrated, the claimant forfeits any right to compensation for an injury or increase in injury that is attributable to such actions.

Black's Law Dictionary defines the word "deliberate" as "well advised" and "willful rather than merely intentional." While "reckless" is defined as "careless, inattentive or negligent" and evincing "disregard of, or indifference to, consequences, under circumstances involving danger to life or safety to others, although no harm was intended." Essentially, then in Delaware, the statutory forfeiture provision for a "deliberate and reckless indifference to danger" constitutes a "willful misconduct" defense.

According to *Larson's Workers' Compensation Law,* the "wilful misconduct" defense has been generally successful in only one narrow field, that of intentional violation of safety regulations, and most frequently involves questions of intoxication. However, "[i]n most

instances the ground of rejection of the defense was the absence of "wilfulness." Usually the injured employee's action, although prohibited, was instinctive or thoughtless, rather than intentional or deliberate." Cases rejecting the defense have included actions such as reaching into a moving machine, wiping oil from a machine without shutting it off, and painting moving machinery. "A condition which has been repeatedly stressed is that the employee must understand the seriousness of the consequence attending the violation of the safety rule, since otherwise the conduct can only be described as *heedless* rather than deliberate." (emphasis added) *See* 2 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law,* §§ 34.01 and 34.02 (Internet ed. Jan., 2000) < www.mathewbender.com >.

In *Johnson Controls, Inc. v. Fields,* 758 A.2d 506 (Del. 2000), the Delaware Supreme Court observed that the Workers' Compensation Act has a specific statutory provision concerning the "limited circumstances" under which a forfeiture of benefits may be invoked. *Johnson Controls,* 758 A.2d at 509. The Court held that, as a matter of policy, forfeiture of benefits should not be implied. *Johnson Controls,* 758 A.2d at 509. Thus, the only forfeitures that an employer can assert are those specifically provided for in the Act. The question, therefore, is whether Claimant's conduct falls within one of the Act's specific categories of forfeiture.

Under the circumstances of this case, the Arrow Leasing alleges that Claimant's actions in driving a truck for his job was unlawful under the

Delaware Motor Vehicle Code causing citations for "inattentive driving," "following too closely," unpaid fines from Family Court and revocation of his license, an outstanding capias and failure to carry an insurance card. However, those charges were dismissed by the Court of Common Pleas on January 19, 2016 (Claimant's Exhibit No. 2), so they are not facts that can be accepted on a *per se* negligence basis.

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Furthermore, Corporal Carbine agreed she did not observe any signs and symptoms of intoxication when she interviewed Claimant within hours of the July 18, 2015 motor vehicle accident at the hospital. She also noted that the condition of Claimant as the driver on her preliminary report was "apparently normal." She agreed that there was no report of erratic driving from any source in investigating Claimant's case. The violations she cited against Claimant were based on information obtained from witnesses, operators, and/or evidence at the scene, but she did not personally observe the motor vehicle accident. She agreed that "inattentive driving" is the failure to give full time and attention to the operation of a motor vehicle, while "reckless driving," is a citation that she does not issue frequently as it constitutes "a willful or wanton disregard for the safety of persona or property." She further agreed that there were no reports from witnesses that Claimant was using a cell phone at the time of the work accident, and that it is permissible to use a "hands free" cell phone while operating a motor vehicle in Delaware. She conceded that there is no way to determine from cell phone records is calls were in fact made "hands free."

The employer further argues that Claimant in fact was otherwise impaired while driving the truck for Arrow Leasing on July 18, 2015, which constituted a "deliberate and reckless indifference to danger." *See* Del. Code Ann. tit. 19 § 2353(b). The basis of the defense rests on the fact that Claimant testified he had been drinking the night before while partying in Atlantic City, and did not inform the employer of this factor and attempt to obtain a substitute driver. In addition, the employer argues that Claimant's making more than 50 phone calls (Employer's Exhibit No. 1) and checking his GPS cell phone in this condition constitutes a "deliberate and reckless indifference to danger."

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The Board disagrees with Arrow Leasing's argument as it does not find the evidence presented to conform to "willful misconduct" resulting in any "deliberate and reckless indifference to danger." At the time of the work accident, reported to be 5:18 p.m. on July 18 in the police records, he had been able to complete the majority of the day's delivery assignments and had

been working without difficulty for about 10 hours on the job. Claimant's testimony, which the Board accepts, is that he swerved to the left to avoid hitting the vehicle in front of him when the driver of that vehicle slammed on the brakes in heavy traffic on the I-95 roadway. While Claimant conceded he made numerous phone calls from personal and work mobile phones during the day, there is no evidence to contradict his testimony that he did not make these calls legally or on a "hands free" basis, as required by the Delaware motor vehicle laws. He testified he was traveling about 45 m.p.h. and was looking down at the GPS on his phone to find his next delivery location immediately before the motor vehicle collision occurred. Under these circumstances, the Board does not find that Claimant's activities the night before in Atlantic City, as well as on the morning he arrived at work, specifically, in failing to request a driver replacement for the day, represent "willful misconduct" rising to the level that such behavior demonstrated a "deliberate and reckless indifference to danger" sufficient to forfeit his benefits under Section 2353(b). As noted above, had the result of blood tests contemporaneously administered to Claimant following the motor vehicle accident been found positive for alcohol consumption above the legal limit or had he been convicted of the motor vehicle violations alleged, the Board's conclusions may have been different. But under the facts here, the forfeiture defense based on a "deliberate and reckless indifference to danger" must fail.

Attorney's Fees and Medical Witness Fees

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

In determining an award of attorney's fees, the Board must consider ten factors.[1] *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 she spent 25 hours preparing for the evidentiary hearing held on February 18, 2016, which lasted approximately three and one-quarter hours. Her association with Claimant began in July 2015. Counsel has a 35% contingency fee arrangement with Claimant.

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Counsel did not attest that the case was unique, novel, complex or difficult to prosecute. By taking the case, the attorney was precluded from representing other clients when working on c.ls case. Counsel has been admitted to the practice of law in Delaware since 1983 and has experience handling workers' compensation matters. Counsel attested that there is no evidence or argument of the employer's inability to pay and that no compensation is expected from other sources. The employer had no comment on the attorney fee affidavit.

The Board found the preparation and presentation for ongoing total disability and medical causation to be properly subsumed within an award for attorney's fees on the issues of defending against the forfeiture of benefits in this case. *See Simmons v. Delaware State Hospital,* Del. Supr., 660 A.2d 384, 391 at n. 5 (1995) (Board has discretion to determine the number of issues that it will treat separately for attorney fee purposes.) The Board found the case to be overly litigated by both parties in terms of the issues to be decided based on the stipulated facts.

Taking into consideration the *Cox* factors set forth above, the Board concludes that one attorney's fee award of $7,000.00 (based on the attorney fee affidavit) is appropriate and consistent with the statutory limits 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 Compensation Due and concludes he continues to be disabled from all work ongoing from October 7, 2015, related to the work accident. The Board also acknowledges causation for limited medical treatment to the right upper extremity related to the mechanism of injury, but not for any low back injuries or mental injury beyond a generalized anxiety diagnosis immediately

following the work accident. The Board further awards Claimant one attorney's fee and his medical witness fees.

The Board further DENIES the employer's allegation of a forfeiture of benefits under Del. Code Ann. tit.19, §2353(b).

IT IS SO ORDERED this 25th day of April, 2016.

/s/ LOWELL L. GROUNDLAND

/s/ MARILYN DOTO

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: 4-29-16

/s/_____
OWC Staff

Notes:

[1.] 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.
