ROBERT STRONG, Employee,
v.
ALLEN HARM FOODS LLC, Employer.

INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

Hearing No. 1401489

Mailed Date: June 17, 2014
June 12, 2014

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 May 29, 2014, in the Hearing Room of the Board, Milford, Delaware.

PRESENT:

WILLIAM HARE

JOHN BRADY

Julie G. Bucklin, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Nicholas M. Krayer, Attorney for the Claimant

H. Garrett Baker, Attorney for the Employer

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NATURE AND STAGE OF THE PROCEEDING

Robert Strong ("Claimant") alleges that he was injured during an industrial accident on July 22, 2013, while employed by Allen Harim Foods LLC. On November 27, 2013, Claimant filed a Petition to Determine Compensation Due seeking payment of medical expenses and total disability benefits. Allen Harim Foods argues that Claimant forfeited any potential workers' compensation benefits, because he disregarded a safety policy to not operate a machine without locking it first. There was no dispute that Claimant amputated the tip of his right index finger and injured his right middle finger while working for Allen Harim Foods during the course and scope of his employment on July 22, 2013. There was also no dispute regarding the medical evidence, so no medical testimony was presented. The parties agreed that Claimant's medical treatment has been reasonable, necessary and causally related to the accident. His average weekly wage was $509.84 and his compensation rate is $339.91 per week. The only dispute presented to the Board was the issue of forfeiture pursuant to 19 *Del. C.* § 2353(b). On May 29, 2014, the Board conducted a hearing on Claimant's petition and this is the Board's decision.

SUMMARY OF THE EVIDENCE

Claimant testified about his work and the industrial accident. Claimant worked in the sanitation department in the marination department on the night shift. His job duties included tearing down machines, washing them and reassembling them to get ready for the USDA inspections.

On July 22, 2013, Claimant was working with a new and inexperienced supervisor, named Harold Shrieves. Mr. Shrieves worked in a different department in Allen Harim Foods previously, so Claimant was showing him what he did in that department and why one particular machine took a long time to clean and reassemble. Mr. Shrieves worked in Claimant's

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department for one week. Claimant had taken a machine apart to clean it and was showing Mr. Shrieves how to reassemble it in order to be ready for the USDA inspection later on that Monday morning. The accident occurred around 2:00 a.m. Claimant got his right hand caught inside of a machine and it took off part of his right index finger and injured the middle finger.

There is a locking mechanism that is discussed at numerous safety meetings. The machines are supposed to be locked while cleaning it. The lock was not on the machine when Mr. Shrieves came up to Claimant at the machine. Claimant explained why it takes a lot of time to clean and reassemble that machine. Claimant thought that Mr. Shrieves put his lock on the machine when he climbed under it to demonstrate how it is reassembled because Mr. Shrieves had his lock in his hand. Claimant put his hands in the machine, the machine turned on, his right hand was pulled into the machine, and he got stuck. Prior to getting under the machine, Claimant thought that Mr. Shrieves put his lock on it because a supervisor's lock overrides his lock. Claimant would not have gotten under the machine if he knew that Mr. Shrieves had not locked it. While under the machine, Claimant could not see whether Mr. Shrieves locked the machine. Once Claimant got caught in the machine, he could not lock it or turn it off. Mr. Shrieves must have turned on the machine while Claimant was demonstrating how to feed the belt back into it, Claimant got caught, and then Mr. Shrieves called the medical department for help. No one else was there, so it had to be Mr. Shrieves who turned on the machine.

Claimant was in shock and in pain. He took the blame for the accident because Mr. Shrieves has a wife and kids to support and Claimant did not want Mr. Shrieves to get in trouble or fired too. Claimant told Deborah Richards and James Lewis at Allen Harim Foods that the accident was his fault because he should have put his lock on the machine and not trusted the supervisor to lock it, but really, the supervisor should have locked it.

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Claimant and Mr. Shrieves were terminated because of the accident. The notice of termination form indicates that Claimant was terminated because of the violation of a safety regulation. Claimant worked at Allen Harim Foods for a year without any safety issues. He surmised that Mr. Shrieves was fired because of this accident. He never spoke to Mr. Shrieves about the accident or the terminations. Claimant loved his job at Allen Harim Foods and, in hindsight, he blames the accident on an inexperienced supervisor. He now realizes that he should not have trusted the supervisor to lock the machine and it has cost him his finger.

There is an emphasis placed on safety at Allen Harim Foods. Claimant was instructed on the lock in his safety classes and watched videos about safety. It is a very safe plant and there is a very good safety program. There is a computer-based training program regarding the lock-out tag-out program. Based on the training, Claimant knows that it is his responsibility to lock a machine on which he is working. In practice though, supervisors and the USDA inspectors put a lock on the machine that overrides Claimant's lock.

Claimant saw the video of the machine that the Board viewed. The machine in the video was a different machine than the one on which he was injured. He could not operate the machine in any way while he was under it showing Mr. Shrieves how to replace the belt. Claimant was injured on the de-clawing machine, but the machine in the video was the de-breasting machine.

Wilfredo Novo, a safety coordinator for the plant, testified on behalf of Allen Harim Foods. Mr. Novo is in charge of training employees regarding safety. Allen Harim Foods emphasizes safety. When employees are hired, they receive training on the computer-based program, which includes instructions on the lock-out tag-out policy. After the computer-based training program, the supervisor trains the employees on the actual machines. Ms. Richards trained Claimant how to lock out a machine as part of his training and she signed the certificate

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for Claimant's lock-out tag-out safety training. There are safety meetings to emphasize the lock-out tag-out policy.

Employees are supposed to lock a machine before working on it. Even if a supervisor is present with a lock in hand, the employee is responsible to lock the machine. Employees are instructed during training that whoever is working on the machine is responsible to lock it and should not rely on anyone else to lock it, not even a supervisor.

The lock-out procedure is performed very quickly. The Board viewed the video of the procedure. The actual machine on which Claimant was injured was in the video. The demonstration showed that a red lever is turned to disconnect the machine and then a lock is placed on the lever to lock the machine. Claimant has a lock and it was his duty to apply the lock at all times and he should not have relied on a supervisor to lock it. If two people are working on one machine, both of them should apply their own locks to the machine; it is not a situation where only one person locks the machine. If the USDA inspector is there with an employee and supervisor, all three of them should put a lock on the machine. In this case, Claimant was the only person working on the machine, so he should have locked it. If someone fails to lock a machine and relies on someone else to lock the machine, it violates the safety protocol, which is why Claimant was terminated.

Mr. Novo does not know why Mr. Shrieves was terminated, but he was not fired because of Claimant's accident. Mr. Novo believes that Mr. Shrieves violated the lock-out tag-out procedure on another machine on the same night as Claimant's accident, so he was terminated. Mr. Novo was not present when Claimant was injured and he heard that Mr. Shrieves was not at the machine with Claimant at the time of the accident. Mr. Shrieves admitted to failing to lock a different machine. Assuming that Mr. Shrieves was at the machine with Claimant, it was not Mr.

Shrieves' responsibility to lock that machine because he was only talking and not working on the machine. An employee can get fired for not doing what a supervisor tells him to do.

Mr. Novo agreed that Claimant could not turn on the machine while he was under it and holding the belt. The investigation that Mr. Novo and Paula Gray conducted regarding the accident revealed that the machine was already turned on when Claimant picked up the belt. The power was off, but the machine was running and the belts were rotating when Claimant put his hands in there, which is why he got caught in the machine. Mr. Novo does not know why a supervisor would turn on the machine if Claimant was underneath of it. No one else saw the accident and there is no surveillance video of the accident.

Deborah Richards, a sanitation supervisor for the plant, testified on behalf of Allen Harim Foods. Ms. Richards was the supervisor on site on the Sunday night of Claimant's accident. Mr. Shrieves was the assistant supervisor in second processing where Claimant worked that night and he was supposed to assist employees. Ms. Richards was on the plant floor when the accident was called in. Safety is very important at Allen Harim Foods.

Mr. Shrieves called in the accident and asked Mr. Lewis for help and told him to hustle. Ms. Richards heard the call and asked what happened and Mr. Shrieves said that Claimant got his hand caught in a machine. Claimant was working on the breast skinner machine in the second processing department and Ms. Richards had just left Mr. Shrieves at the chiller on the other side of the plant about five minutes earlier, so she does not think that Mr. Shrieves was with Claimant at the time of the accident because the chiller is far away from where Claimant was located. When Ms. Richards got to Claimant, his hand was stuck in the machine and Mr. Shrieves was already there.

Ms. Richards understands that Claimant turned the disconnect switch on in order to put the belt back on the machine. Claimant said that

he turned it on to feed the belt into the machine. He did not say that Mr. Shrieves was working with him or told him to do it and he did not say that he assumed that Mr. Shrieves would lock the machine. Claimant did not say that Mr. Shrieves turned on the machine; Claimant said that he turned on the machine to feed the belt. Claimant could have reached the disconnect button that was located on the wall. There is nothing to show Mr. Shrieves regarding the belt. If Mr. Shrieves saw Claimant turn on the machine to feed the belt, it would be a safety violation because he did not stop Claimant and Mr. Shrieves would get written up for that violation.

Claimant should have locked the machine before he put the belt on and he should put the belt on manually with the machine turned off, but he turned the machine on. Claimant violated the safety regulation because he needed to lock the machine before working on it.

While Claimant was still on the floor after the accident, he told Ms. Richards what happened. He did not say that he expected someone else to lock the machine or that someone else turned the machine on or that he was demonstrating what to do for Mr. Shrieves. After giving the report, Claimant went to the medical office.

If a supervisor is with an employee when demonstrating the lock-out tag-out procedure or when cleaning the machine, the supervisor should lock the machine if the supervisor is touching the machine. If Mr. Shrieves is at the machine and sees Claimant getting under the machine, Mr. Shrieves could put his lock on or stop Claimant and tell Claimant to put his lock on it.

Mr. Shrieves was terminated because he did not lock out another machine with Claimant on the same night. Claimant and Mr. Shrieves worked on another belt before the one when Claimant was injured. Safety violations can lead to a termination.

When Ms. Richards arrived at the scene, there was no lock on the machine even though Claimant's hand was still caught in it. Mr. Shrieves and Mr. Lewis were there, but neither one locked the machine. If a supervisor arrives at an industrial accident and the machine has not been locked, Ms. Richards does not think that the supervisor is required to lock the machine at that point. She is not sure if it was a safety violation for none of them to lock it at that point.

Ms. Richards said that the machine in the video that was shown to the Board is the same machine that Claimant was using when he was injured. The machine is in a different location in the video than it was when Claimant was injured so it is set up differently. The disconnect switch was on the wall when Claimant was injured, so the video does not accurately show the set up at the time of the accident. If Claimant was feeding the belt from underneath of the machine, he could not reach the disconnect switch, but he could reach the green button to turn it on.

James Lewis, a safety technician and EMT for the plant, testified on behalf of Allen Harim Foods. Claimant was working on the skinning machine, which was the same machine in the video, but it was in a different location at the time of Claimant's accident. The disconnect switch was in a different location at the time of his accident because there was no wall to put it on when it was moved. The green button that is on the machine powers the machine. The disconnect switch is located on the wall. Claimant could have reached the power switch while his hand was in the machine.

Mr. Lewis was working when Claimant was injured. He received a radio call from Mr. Shrieves and he went to the scene. He called maintenance to get Claimant's hand out of the machine and then he went to get his medical equipment to assist Claimant. Mr. Shrieves said that he had already turned off the machine with the green power button. Claimant was already out of the machine when Mr. Lewis returned with his medical equipment.

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As part of the investigation, Mr. Lewis found out that Claimant should not have taken off the belt from the machine. He also found out that Claimant was putting the belt on with one hand and pushed the power button with the other hand. He does not know why Claimant could not turn off the machine.

Mr. Lewis only spoke to Claimant while he was bandaging him. Claimant apologized and said that it was his fault. He did not say anything about Mr. Shrieves being in the area or turning on the machine. Claimant did not say anything about how the accident happened. Mr. Lewis knows that it was Claimant's responsibility to lock the machine before working on it based on Allen Harim Foods' policy.

The machine had to be locked out in order to get Claimant's hand out. Maintenance should have locked the machine when they got to the scene and worked on the machine to get Claimant's hand out. If the maintenance worker did not lock the machine first, he could have been written up for a safety violation. Ms. Richards was not touching the machine, so she did not have any duty to lock it. There are inner locks that would have prevented the machine from getting started again after Claimant's hand got stuck in it. Because it was an emergency situation, the machine might not have gotten locked.

Mr. Shrieves was terminated from Allen Harim Foods for not locking another machine on that same shift.

Paula Gray, the Safety, Health and Risk Manager for the plant for twelve years, testified on behalf of Allen Harim Foods. Ms. Gray knows the safety regulations at Allen Harim Foods. All authorized employees are instructed on the lock-out policy and Claimant completed his training on the lock-out procedure on the machines.

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Ms. Gray spoke with Claimant about the industrial accident as a follow-up to the original investigation. Claimant turned on the machine to replace the belt and he did not lock the machine, which are both safety violations. Claimant said that he turned on the machine and fed the belt so the sprocket would catch it. She cannot recall whether she asked him if he was working alone, but she believes that he was working alone. Claimant violated the lock-out tag-out policy because he did not lock the machine before he touched it. He was terminated for violating the lock-out tag-out policy. Mr. Shrieves was also terminated for violating the same policy. Ms. Gray became aware of Mr. Shrieves' violation from Claimant regarding another machine earlier in the night.

Each employee must lock out his or her own machine. If Claimant and Mr. Shrieves were working on the same machine, both of them must lock out the machine. No one can lock out for another employee. If Mr. Shrieves locked out for Claimant, it still violates the regulation. Claimant acknowledged that he knew that he did not lock out the machine.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Forfeiture

Since there was no dispute that Claimant was involved in a work-related accident or about the reasonableness or necessity of the medical treatment or total disability period, the burden shifts to Allen Harim Foods regarding the defense of forfeiture. For the following reasons, the Board finds that Allen Harim Foods has not met its burden of proof with respect to the forfeiture defense.

Allen Harim Foods argues that Claimant forfeits his workers' compensation benefits because he failed to follow the safety policy of locking a machine before working on it. Failure to follow a safety policy is a specific reason for forfeiture stated in 19 *Del. C.* § 2353(b).

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Claimant operated the machine without locking it first, despite the safety policy against it, and the policy was created because of the danger involved.

Claimant argued that violating a safety policy is not cause for forfeiture. The statute only protects the employer if the claimant intentionally injures himself and Claimant did not intentionally cause the accident or intentionally injure himself. Negligence is barred as a defense.

An employee is prohibited from recovering workers' compensation benefits for injuries resulting from his willful failure or refusal to use a reasonable safety appliance. The workers' compensation statute states:

> If any employee be injured . . . because of the employee's deliberate and reckless indifference to danger, because of the employee's willful intention to bring about the injury or death of the employee or another, because of the employee's willful failure or refusal to use a reasonable safety appliance provided for the employee or to perform a duty required by statute, the employee shall not be entitled to recover damages in an action at law or to compensation or medical, dental, optometric, chiropractic or hospital service under the compensatory provisions of this chapter. The burden of proof under this subsection shall be on the employer.

19 *Del. C.* § 2353(b). "A willful act is done intentionally, knowingly, purposely, and without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. *Stewart v. Oliver B. Cannon & Son, Inc.,* 551 A.2d 818, 823 (Del. Super. 1988), *citing Lobdell Car Wheel Co. v. Subielski,* 125 A.2d 462 (Del Super. 1924).

After studying the testimony, arguments and the statute, the Board finds that Claimant did not forfeit his workers' compensation benefits when he failed to lock the machine and injured his hand. Claimant may have acted carelessly or thoughtlessly, but not intentionally, knowingly, purposely and without justifiable excuse. The Board finds that Claimant is credible and accepts Claimant's testimony that Mr. Shrieves was with him at the time of the accident. The Board finds that Claimant had a justifiable excuse for failing to lock the machine before

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demonstrating how to reassemble the belt on the machine. The Board finds that Claimant's actions of not locking the machine because he thought that his supervisor locked it was reasonable and justifiable and did not rise to the level of "deliberate and reckless indifference to danger." 19 *Del. C.* § 2353(b). In Claimant's experience working at Allen Harim Foods, when a supervisor was present, the supervisor locked the machine instead of him because a supervisor's lock supersedes his lock.

The Board agrees that Claimant should have followed Allen Harim Foods' safety policy because he could have possibly avoided the accident, but by carelessly ignoring the policy, he still did not forfeit the workers' compensation benefits according to 19 *Del. C.* § 2353(b). If every employee who carelessly ignored a safety policy forfeited his or her workers' compensation benefits, there would be countless forfeitures in this state. "In order to invoke the forfeiture provision, the employer has the burden of proving by a preponderance of the evidence that the violation of the statute was willful, intentional, and deliberate, and not just careless and inadvertent." *Stewart,* 551 A.2d at 824, *citing Carey v. Bryan & Rollins,* 117 A.2d 240 (Del. Super. 1955). Since the practice at Allen Harim Foods was for a supervisor to lock a machine when present rather than for the employee to lock the machine, and not for both of them to lock it, the Board finds that Claimant's failure to lock the machine could be considered to be careless, but

not willful, intentional, deliberate and without justifiable excuse.

The Board finds that the testimony from Allen Harim Foods' witnesses was inconsistent with the policy in that all of the witnesses said that whoever is working on the machine must lock it, but no one locked the machine when getting Claimant's hand out of it. The witnesses' testimony was also inconsistent with each other. Mr. Novo testified that Claimant could not have turned on the machine while lying underneath of it with the belt in his hand; whereas Ms.

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Richards and Mr. Lewis sais that Claimant could have turned it on from that position. Furthermore, the video of the machine that was shown to the Board was riot the same machine on which Claimant was injured and it was in a different location. The Board finds that witnesses testifying about the machine on the video were not credible because they were misleading the Board regarding the machinery and the location of the lock and power button.

Based on the foregoing, the Board finds that Allen Harim Foods has not met its burden of proof with respect to the forfeiture defense. The Board finds Claimant's industrial accident is compensable and Claimant is entitled to payment of outstanding medical expenses and total disability benefits.

Attorney's Fee

Having received an award, Claimant is entitled to a reasonable attorney's fee assessed as costs against Allen Harim Foods in an amount not to exceed thirty percent of the award or ten times the average weekly wage, whichever is smaller. *Del. Code Ann.* tit. 19, § 2320. Claimant's counsel submitted an affidavit attesting to twelve hours of preparation for this approximately three-hour hearing. This case was not novel or difficult, nor did it require exceptional legal skills to try properly. It was not argued that acceptance of this case precluded other employment by Claimant's counsel. The Board considered the fees customarily charged in this locality for similar legal services, the amounts involved and the results obtained. The Board also considered the argument that this case posed time limitations upon Claimant's counsel, the date of initial contact on August 19, 2013, and the relative experience, reputation, and ability of Claimant's counsel. It was argued that the fee was contingent, that Claimant's counsel does not expect to receive compensation from any other source, and that the employer is able to pay an award. *General Motors Corp. v. Cox,* 304 A.2d 55, 57 (Del. 1973).

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The Board must consider the ten factors enumerated in *Cox* when considering an attorney's fee award or else it would be an abuse of discretion. *Thomason v. Temp Control,* Del. Super. Ct., C.A. No. 01A-07-009, Witham, J., slip.op. at 5-7 (May 30, 2002). Claimant bears the burden of establishing entitlement to an attorney's fee award and must address the *Cox* factors in the application for an attorney's fee. Failure to address the *Cox* factors deprives the Board of the facts needed to properly assess the claim. The *Cox* factors were addressed in the Affidavit Regarding Attorney's Fees.

In the case at hand, based on the results obtained, information presented and Allen Harim Foods' failure to argue that an attorney's fee award is not appropriate, the Board finds that one attorney's fee in the amount of thirty-percent of the award or $6,000.00, whichever is less, is reasonable. *Del. Code Ann.* tit. 19, § 2320. This award is reasonable given Claimant's counsel's level of experience and the nature of the legal task. In accordance with § 2320(10)a, the attorney's fee awarded shall act as an offset against fees that would otherwise be charged by counsel to Claimant under their fee agreement.

STATEMENT OF THE DETERMINATION

Based on the foregoing reasons, Claimant's Petition to Determine Compensation Due is

GRANTED. Claimant is entitled to payment of medical expenses and total disability benefits for the injuries to his right hand. Claimant is also entitled to payment of an attorney's fee in the amount of thirty-percent of the award or $6,000.00, whichever is less.

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IT IS SO ORDERED THIS 12th DAY OF JUNE 2014.

INDUSTRIAL ACCIDENT BOARD

/s/_____
William Hare

/s/_____
John Brady

I hereby certify that the above is a true and correct decision on the Industrial Accident Board.

/s/_____
Julie G. Bucklin
Workers' Compensation Hearing Officer

Mailed Date: 6-17-14

/s/_____
OWC Staff