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THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

BRYAN GATTA,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1364816
	)	
STATE OF DELAWARE,	)	
	)	
Employer.	)	

DECISION ON PETITION FOR REVIEW TO TERMINATE BENEFITS

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause, by stipulation of the parties, came before a Workers' Compensation Hearing Officer on November 25, 2014 in a hearing room of the Industrial Accident Board ("Board") in New Castle County, Delaware.

PRESENT:

JULIE PEZZNER

Workers' Compensation Hearing Officer

APPEARANCES:

James Jay Lazzeri, Attorney for Claimant

Jessica Julian, Attorney for Employer

NATURE AND STAGE OF THE PROCEEDINGS

Mr. Bryan Gatta ("Claimant") injured his neck and his low back in a compensable work accident while working for the State of Delaware ("Employer") on January 8, 2011. The injury occurred when he sat on a broken seat inside a loader. His average weekly wage at the time of the work injury was $514.58 resulting in a weekly compensation rate of $343.05. Claimant has been receiving total disability benefits as of October 1, 2013.

On June 26, 2014, Employer filed a Petition for Review to Terminate Benefits in which it asserts that Claimant is physically capable of returning to work. The parties stipulated to a Labor Market Survey completed by Mr. Joseph Lucey of Coventry. Claimant contends that he remains totally disabled as a result of a September 30, 2014 surgery ("2014 surgery") performed by Dr. Bruce Rudin that Claimant alleges is causally related to the work accident. The surgery involved an anterior cervical discectomy and fusion at C5-6 and C6-7, an anterior neurologic compression, an uncovertebral joint and uncovertebral joint decompression of the neural elements, an interbody placement of machined allograft and an application of anterior cervical plate and the removal of spinal instrumentation at disk replacement C5-6.

It is undisputed that if the Board finds that the 2014 surgery is causally related to the work accident then Claimant remains temporarily totally disabled. Claimant would be seeking an award to include payment of related outstanding medical expenses. If the Board finds that the surgery is not causally related to the work accident, Dr. Rudin on behalf of Claimant opined that Claimant is limited to returning to full-time sedentary work as a result of the work accident. Dr. Stephen Fedder on behalf of Employer opined that Claimant is capable of returning to full-time light to medium duty work. The parties stipulated that if the Board determines that Claimant is capable of returning to work that the Petition should be granted as of the date of filing.

Therefore, the issues to be decided are: 1) is the 2014 surgery causally related to the work accident; and 2) is Claimant capable of returning to work? Disability benefits have continued to be paid to Claimant by Employer so reimbursement to the Workers' Compensation Fund is not at issue.

The parties stipulated that this case could be heard and decided by a Workers' Compensation Hearing Officer, in accordance with title 19 *Del. C.* § 2301B(a)(4). When hearing a case by stipulation, the Hearing Officer stands in the position of the Board. *See*19 *Del. C.* § 2301B(a)(6). The hearing was held on November 25, 2014. This is the decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant testified on his own behalf as well as being called to testify as Employer's witness. Claimant testified that he has been compliant in treatment and never missed an office visit. Claimant had a disk replacement surgery at C5-6 on May 9, 2013 ("2013 surgery"). He initially felt better after the 2013 surgery but represented that he never had a complete resolution of neck symptoms. Eventually, his neck symptoms got worse. Claimant acknowledged that the worsening neck symptoms related to the C7 distribution.

On March 12, 2014, Claimant rated his neck pain at a four on a ten-point pain scale. By April 30, 2014, Claimant's neck pain went from mild to severe. He rated his neck pain at a seven to an eight on a ten-point pain scale. Claimant could not identify the cause of the increase of symptoms.

At the May 28, 2014 visit to Dr. Rudin's office, Claimant's neck pain increased to an eight on a ten-point pain scale. Claimant acknowledged that by this point, Dr. Rudin had discussed a surgical option. Despite the increasing pain, Claimant wanted to return to work. He remarked at the hearing, "I am not dead. I can still work." He represented that he has a high

pain tolerance. Claimant had found a job opportunity as a Homeland Security dispatcher that Claimant believed he would be physically capable of doing. He asked Dr. Rudin if Dr. Rudin would release Claimant to return to work at that specific job. Dr. Rudin maintained Claimant's total disability status but then issued a separate work note that released Claimant to return to the work without restrictions for the sole purpose of applying for the Homeland Security dispatcher position. Claimant intended to delay having surgery if he got hired at Homeland Security.

Unfortunately, Claimant was not hired for the Homeland Security job. His pain became unbearable. In August, Claimant not only presented with left arm symptoms but also presented with new right arm symptoms. He decided to pursue surgery, the 2014 surgery.

Approximately one month after surgery, he underwent a nerve root block at C6-7 that relieved the nerve pain in right arm and the neck area. His left arm pain is better. He wore a sling for a week that he no longer wears.

Claimant summarized his work history. He worked as an equipment operator prior to the lumbar laminectomy on May 5, 2011, Claimant's first surgery. He eventually returned to work to the same job after the surgery. Claimant underwent a second lumbar spine surgery on August 23, 2012 after which he returned to the same job. Claimant's third surgery was the 2013 surgery. Claimant returned to work after the 2013 surgery. His job involved using a jackhammer and swinging a sledgehammer; his job was a heavy duty job. Claimant subsequently underwent another lumbar spine surgery on October 29, 2013. Claimant was placed on total disability after the fourth surgery.

Claimant added that the State eliminated his job six months after the most recent lumbar spine surgery. Although Claimant is on total disability as a result of the 2014 surgery, Claimant continues to search for a job he believes he would be capable of doing. He would like to work

for the State of Delaware. Despite his job search, he does not intend to apply for any jobs until he is released from total disability.

Dr. Stephen Fedder who is a board certified neurosurgeon testified by deposition to a reasonable degree of medical probability on behalf of Employer. He examined Claimant on: March 27, 2013; on December 2, 2013; and on September 4, 2014. Dr. Fedder opined that the 2014 surgery is causally related to Claimant's preexisting condition as opposed to the 2013 surgery and ultimately the work accident. He also opined that if the Board finds that the 2014 surgery is not causally related to the work accident, that Claimant can return to full-time light duty to medium duty work as a result of Claimant's low back injury. Claimant would not require work restrictions related to the cervical spine injury; the cervical spine injury resolved.

Dr. Fedder testified that the work injury in Claimant's neck related to left C6 radiculopathy; it involved the C5-6 level. The work injury did not involve the C6-7 level. After reviewing a May 8, 2012 MRI and examining Claimant on March 27, 2013, Dr. Fedder opined that Claimant should proceed by undergoing a fusion surgery at C5-6.

Dr. Fedder acknowledged being concerned about Claimant's preexisting degenerative condition with canal restriction at C6-7. Dr. Fedder recognized that if a fusion was done at C5-6, it might set up junctional stenosis at the C6-7 level. Therefore, Dr. Fedder opined that the appropriate surgery in 2013 would involve a two-level fusion at C5-6 and at C6-7. Had Dr. Rudin performed the fusion surgery in 2013 instead of a disk replacement surgery (an arthroplasty) Dr. Rudin appropriately would have involved the C6-7 level because of its degenerative condition.

Dr. Rudin, instead, decided to perform a disk replacement surgery on May 9, 2013 ("2013 surgery"). Such surgery would not and did not necessitate involving the C6-7 level.

Claimant benefitted from the 2013 surgery. On May 22, 2013, Claimant reported to Dr. Rudin that his arm pain was gone. On September 25, 2013, Claimant denied arm pain, numbness, and tingling. Dr. Fedder concluded that the 2013 surgery resolved the neck-related complaints that related to the work accident.

At Dr. Fedder's defense medical examination ("DME") on December 2, 2013, Claimant described residual neck aching and weakness in the left arm. All of the neurological findings that were present in March 2013 were resolved. Dr. Fedder did not believe that the neck was an issue at this point.

In 2014, Dr. Rudin identified a C7 radiculopathy for the first time. Dr. Fedder opined that these new complaints related to Claimant's degenerative condition at C6-7. On September 30, 2014 Dr. Rudin performed the 2014 surgery. The 2014 surgery was not intended to address any C5-6 complaints that related to the work accident. Instead, the 2014 surgery involved the C5-6 level to support the unrelated problems at C6-7.

Dr. Fedder denied the probability that the C6-7 level became symptomatic as a result of a progression of adjacent segment disease caused by the 2013 surgery. The diagnostic imaging, the clinical examination findings, and the type of surgery pursued in 2013 would not support the causal relationship between the 2013 surgery and the progression of adjacent segment disease at C6-7. Dr. Fedder explained that adjacent disk disease occurs over a course of years not in a course of less than one year. Dr. Fedder reviewed the three MRI studies from 2012, from 2013 and from 2014. He represented that there was no change in progression at the C6-7 level in any of the studies. The radiologist noted stability in all three studies. Hence, based on the MRIs there was no imaging progression between 2012 and 2014.

Furthermore, clinically Claimant did not present with evidence of a progression of adjacent segment disease that would be causally related to the 2013 surgery. There was no evidence of C7 radiculopathy in terms of diffuse syndrome. There was no focal weakness in the upper extremity. There were no nerve compression signs in the upper extremity. The upper extremity examination was normal. Therefore, there was no clinical evidence of adjacent segment disease related to the work accident. Dr. Fedder added that the incident of adjacent segment disease is markedly decreased by an arthroplasty or disk replacement surgery and that is one reason why the disk replacement surgery is done as opposed to a fusion surgery. The need for the 2014 surgery is not causally related to the 2013 surgery.

Dr. Fedder testified that contrary to Dr. Rudin's opinion, the 2014 surgery was not essentially the same surgery as the 2013 surgery. Dr. Fedder explained that the 2014 surgery was radically different; it was more complicated and complex than a fusion on a virgin disk. The 2014 surgery required a lot of bone work. The surgical result was not the same either because the removal of a disk arthroplasty usually gives rise to more settling of the fusing construct and to possible other complications that are occurring in this case. To summarize: the procedures are not the same; the results are not the same; and the architectural point of view is not the same.

Dr. Fedder testified that there were some facts of this case that were either inconsistent or questionable. At Dr. Fedder's DME on December 2, 2013, Claimant reported that he could carry a gallon of milk but had difficulty picking up a gallon of milk. Dr. Fedder found such report to be inconsistent with the examination findings. It also appeared inconsistent that between March 2014 and May 2014 that Claimant neck pain level complaints increased from a four to an eight on a ten-point pain scale yet at the May 2014 visit, Claimant asked to be removed from total disability to be able to apply for a dispatcher job.

Dr. Fedder referred to his September 4, 2014 DME at which Claimant's complaints were disproportionate to the examination findings and were inconsistent with a C7 radiculopathy diagnosis. On September 4, 2014, Claimant complained of pain from the neck to the tailbone and into the upper thighs. Claimant described neck pain and numbness from the neck to the hands with involvement of the third and fourth fingers. Although Claimant described potentially focal numbness in the upper extremities, it was not accompanied by range of motion restriction in the cervical spine. Claimant described pain from the back to the upper thighs without pain beyond the level of the upper thighs. Claimant indicated that he had a great deal of pain getting out of a chair and ambulating from place to place. Claimant stood for the majority of the examination. Dr. Fedder was uncertain whether Claimant's difficulties with getting out of a chair and with ambulating were due to neck or to back complaints.

Dr. Fedder did not think Claimant exerted a reasonable effort into the manual muscle testing portions of the physical examination. Dr. Fedder summarized that Claimant's complaints made Claimant appear as an almost completely debilitated person. Throughout most of the examination, Claimant demonstrated a limited ability to move any of his muscle groups against resistance. However, Claimant was not deconditioned. Dr. Fedder stated that Claimant clearly had superior muscle bulk strength. Claimant's reflexes were intact. There were no lower extremity stretch signs. Claimant had full cervical range of motion.

Claimant also reported that one month prior to the 2014 DME he drove his car to an imaging facility. Dr. Fedder remarked that the activity of driving a car demonstrates that Claimant's flexibility was greater than what Claimant demonstrated at the DME. Dr. Fedder explained that to drive a car, Claimant would have to get into the car, sit down, and operate the car. Operating a car involves pectoral girdle function as well as moving the arms, the shoulders

and the hands. Claimant would also have to get out of the car and walk in and out of the facility before getting back into the car. Dr. Fedder concluded that such activities alone are not consistent with the description of diffuse debilitating symptoms described by Claimant or demonstrated by Claimant's neurologic exam.

Dr. Fedder questioned the accuracy of Dr. Rudin's assessment of C7 radiculopathy. Dr. Fedder explained that at the 2014 DME, Claimant's neurologic examination of the upper extremity was normal. The weakness Claimant demonstrated was not neurologically based. The overall pain pattern Claimant described did not support a C7 radiculopathy. Furthermore, Claimant did not benefit from the left C7 nerve injection block.

At Dr. Rudin's August 16, 2014 examination of Claimant, Claimant complained of neck pain and of left upper extremity paresthesia radiating to his third and fourth fingers. About four to six weeks prior, Claimant had an onset of new right arm pain with paresthesia to his right fourth and fifth fingers. Claimant rated his pain at a seven to an eight. Dr. Fedder noted a disparity between the left and the right side. The left side involves the third and fourth fingers whereas the right side involves the fourth and fifth fingers. That is a significant difference to a neurologist. The C7 nerve does not go to the fifth finger. The C7 nerve provides sensation to the third and fourth fingers. Dr. Fedder speculated that the neck and upper extremity complaints could be referred pain phenomenon based on the absence of nerve compression signs and the normal upper extremity neurologic examination.

Dr. Bruce Rudin who is board certified in orthopaedic surgery testified by deposition to a reasonable degree of medical probability on behalf of Claimant. He has additional training in adult degenerative and traumatic spine conditions. Dr. Rudin opined that the 2014 surgery is reasonable, is necessary, and is causally related to the work accident. Dr. Rudin appeared to

initially opine that if the Board finds that the 2014 surgery is not causally related to the work accident, that Claimant would still be totally disabled. He ultimately opined that Claimant can return to full-time sedentary work assuming the 2014 surgery is not causally related to the 2013 surgery.

Dr. Rudin testified that in 2013, Claimant had a disk herniation and significant arm pain at C5-6. Dr. Rudin represented that at that time, there were two surgical options to treat Claimant: 1) to perform a fusion surgery at C5-6; or 2) to perform a disk replacement surgery (arthroplasty) at C5-6. Dr. Rudin recognized that Dr. Fedder preferred the first option of a fusion surgery. However, in 2013, Dr. Rudin preferred the disk replacement surgical option.

Dr. Rudin explained that because of the problems at the C6-7 level, if he pursued the fusion surgery, he would also have to include the C6-7 level. Therefore, the fusion surgery would involve a two-level fusion at C5-6 and C6-7. On the other hand, if Dr. Rudin performed a disk replacement surgery at C5-6, the surgery would be limited to the C5-6 level. A disk replacement surgery was also preferable because a disk replacement allows the spine to move unlike with a fusion surgery. Therefore, on May 9, 2013, Dr. Rudin performed the disk replacement surgery at C5-6 ("the 2013 surgery").

Dr. Rudin testified that the 2013 surgery was successful; however the C6-7 level continued to deteriorate. Between January and February 2014, Claimant started to present with worsening symptomatology at the C6-7 level. Between March 2014 and April 2014, Claimant's pain complaints jumped from a four on a ten-point pain scale to a seven or an eight.

Claimant underwent a C7 nerve block and at the April 30, 2014 visit, Claimant reported that he was too sedated to be able to determine whether or not he derived any benefit from the

nerve block. Dr. Rudin discussed with Claimant repeating the C7 selective nerve block but with less sedation.

On May 28, 2014, Claimant reported only having slight improvement in his neck and in his arm pain. Dr. Rudin indicated that Claimant will at some point require a fusion surgery at C6-7. Also at the May 28, 2014 visit, Claimant informed Dr. Rudin about a job opportunity to work as a Homeland Security dispatcher that Claimant believed would be within Claimant's physical capabilities. Claimant begged Dr. Rudin to be cleared to apply for that job. Dr. Rudin did not know the specifics of the job but surmised that the job was sedentary or light duty. Later in his testimony, he stated that he assumed the job was sedentary duty.

Dr. Rudin did not question Claimant's request. He commented that Claimant has always been motivated to return to work throughout the years Dr. Rudin has been treating Claimant. Dr. Rudin maintained Claimant's total disability status but then issued a separate work note specifically to permit Claimant to apply for the Homeland Security job that released Claimant to return to work without restrictions.

On August 6, 2014, Claimant informed Dr. Rudin that he did not get the Homeland Security job. Claimant was complaining of severe left upper extremity disk parethesias in the C7 distribution – a fairly consistent complaint. Claimant also was complaining of four to six weeks of right arm discomfort in the same distribution. Claimant was worse on the left side and at this visit Claimant had relatively new right-sided complaints.

On August 12, 2014, Claimant underwent an MRI that in summary revealed damage to the spinal cord up at C3-4 , significant degenerative changes, and severe bilateral neuroforaminal narrowing at C6-7. Dr. Rudin acknowledged that the mild spinal stenosis and cord compression

that presented in the earlier MRI remained unchanged. He represented, however, that the pressure on the nerves was worse. Dr. Rudin considered the findings to be clinically different.

Dr. Rudin determined that Claimant should undergo a fusion surgery at C6-7. Dr. Rudin was concerned about fusing the C6-7 level and leaving the disk replacement at C5-6 next to the fusion site. Therefore, Dr. Rudin pursued a surgery that in essence would fuse the levels at C6-7 and C5-6.

The 2014 surgery that occurred on September 30, 2014 involved a C7 nerve decompression, discectomy, and fusion. Specifically, the 2014 surgery entailed: removing the disk replacement at C5-6 and the existing disk at C6-7; releasing pressure off of the nerve roots at C7 at both sides; inserting a bone graft at C5-6 and at C6-7; and putting in a titanium plate from the front of Claimant's spine at C5, C6, and C7 to clamp them all together. Dr. Rudin represented that the 2014 surgery essentially accomplished a two-level fusion at C5-6 and at C6-7; conceptually it is the same surgery that Dr. Fedder opined was the appropriate option in 2013. Dr. Rudin remarked that he did not understand why Dr. Fedder would now challenge the causal relationship of this surgery to the work accident. Dr. Rudin rationalized that because in 2013 performing a two level fusion at C5-6 and C6-7 would have been causally related to the work accident that the 2014 surgery would also be causally related to the work accident; the 2014 surgery conceptually involved fusing the same levels as proposed in 2013.

Dr. Rudin admitted the reason for involving the C5-6 level in the 2014 surgery was not because the 2013 surgery failed. To the contrary, the 2013 surgery continued to be a success. Claimant had resolution of his C6 radiculopathy from the 2013 surgery to present. The purpose of the 2014 surgery was to address the new problem at the level below C5-6.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Causal Relationship of the 2014 Surgery

In order to be compensable, the injury must arise out of or be in the course of employment. 19 *Del. C.* § 2304. As this is the Claimant's contention per the amendment of the Pre-Trial Memorandum, Claimant has the burden to prove by a preponderance of the evidence that the injury was caused by the work accident. *Goicuria v. Kauffman's Furniture*, Del. Super., C.A. No. 97A-03-005, Terry, J., 1997 WL 817889 at *2 (Oct. 30, 1997), *aff'd*, 706 A.2d 26 (Del. 1998). The "but for" definition of proximate cause that is used in the area of tort law is the applicable standard for causation. *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. Supr.1992). Hence, the Claimant must prove that "the injury would not have occurred but for the accident. The accident need not be the sole cause or even a substantial cause of the injury. If the accident provides the 'setting' or 'trigger', causation is satisfied for purposes of compensability." *Reese*, 619 A.2d at 910.

It is undisputed that Claimant has a significant degenerative condition with canal compression at the C6-7 level that resulted in Claimant undergoing the 2014 surgery. What is disputed is whether the need for the 2014 surgery is causally related to the work injury. Based on the evidence incorporated herein, I find that Claimant's need for the 2014 surgery is not causally related to the 2013 surgery or to the work injury.

The parties agree to the following. Claimant's cervical spine injury related to the work accident involved the C5-6 level. The work injury did not involve the C6-7 level. Dr. Rudin had two surgical options in 2013 to address the injury at the C5-6 level: 1) pursuing a fusion surgery at C5-6; or 2) pursuing a disk replacement surgery at C5-6. If Dr. Rudin performed the fusion surgery, Dr. Rudin would also have to fuse the cervical spine at the C6-7 level due to the

significant degenerative condition at that level. On the other hand, if Dr. Rudin pursued the disk replacement surgery, the surgery would not have to involve the C6-7 level. The benefits of the disk replacement surgery over the fusion surgery include: the fact that the disk replacement surgery would only involve the C5-6 level; and the fact that the disk replacement surgery would allow for more movement of the cervical spine. Dr. Rudin performed the disk replacement surgery.

As stated above, it is clear that the work injury did not involve the C6-7 disk. The surgical option Dr. Rudin pursued did not involve the C6-7 disk. Both medical experts agree that the 2013 resolved Claimant's injury as it relates to C5-6. The symptoms relating to the C6-7 level are not included in the original work injury. Hence, in order for the 2014 surgery to be related to the 2013 surgery, the 2013 surgery must have had some impact to trigger the C6-7 level becoming symptomatic.

I accept the opinions of Dr. Fedder over the opinions of Dr. Rudin for the reasons Dr. Fedder described in his testimony. Dr. Fedder presented as being more credible than Dr. Rudin. Dr. Fedder explained that the C6-7 disk would not become symptomatic in Claimant's case as a result of a progression of adjacent segment disease. I accept Dr. Fedder's representation that the MRI imaging studies did not support a change in progression at the C6-7 level from 2012 (prior to the 2013 surgery) and 2014 (after the 2013 surgery). The radiologist indicated that the C6-7 was stable in each of the MRI studies. Dr. Fedder testified that Claimant's clinical examination findings did not support the occurrence of adjacent disk disease that would be related to the 2013 surgery. Dr. Fedder added that adjacent disk disease occurs over a course of years and not within months or even within one year. Furthermore, the fact that Dr. Rudin performed a

discectomy lessens the chances of adjacent segment disease occurring unlike with a fusion surgery.

I reject Dr. Rudin's argument that although the 2014 was more complicated that the surgery conceptually accomplished a two-level fusion at C5-6 and C6-7, the same surgery contemplated in 2013, that it would now be related. The 2013 surgery was successful and addressed/resolved the work-related cervical injury. By accepting Dr. Fedder's testimony, I find that Dr. Rudin's choice of surgeries would not and did not cause the progression of adjacent segment disease at the C6-7 level. I find that the need for the 2014 surgery is causally related to Claimant's preexisting condition.

Termination Petition

In a total disability termination case, the employer, not the employee, has the initial burden to show that "the employee is no longer totally incapacitated for the purpose of working." *Torres v. Allen Family Foods*, 672 A.2d 26, 30 (Del. Supr. 1995). Only if the employer meets this burden does the burden shift to the employee to demonstrate either that the employee is unemployable as a result of the work injury despite a reasonable job search or that the employee is a *prima facie* displaced worker. *Id.*; *Chrysler Corporation v. Duff*, 314 A.2d 915, 917 (Del. Supr. 1973). If the employee fails to meet this burden, total disability benefits will be terminated. If the employee meets this burden, the burden returns to the employer to demonstrate the availability of work within the employee's capabilities. *Torres*, 672 A.2d at 30.The argument of a displaced worker is not at issue.

Employer admitted a labor market survey to which Claimant stipulated that identified five light duty jobs and three sedentary jobs that Mr. Joseph Lucey opined are within Claimant's: age, education, vocational training, experience, physical capabilities and geographical area. The

positions were: two customer service associate positions; one customer service advisor; one dispatcher/logistics position; one dispatcher position; one service advisor position; one parts counter position; and one production position. As Claimant's C5-6 injury resolved, I accept Dr. Fedder's opinion that Claimant physical capabilities would not be limited by his cervical spine injury. Dr. Fedder opined, however, that Claimant would require work restrictions based on the lumbar spine surgeries and would limit Claimant to working full-time in a light duty to medium duty job.

I do not find that Claimant is totally disabled and that he can certainly work in a sedentary capacity as related to the work accident. Claimant acknowledged that he believed he could work as a dispatcher at Homeland Security in May 2014 that Dr. Rudin released Claimant to apply for such job. Such job was not a specially created job. At the time of Dr. Rudin's release to return to work, Dr. Rudin was not certain if the job was sedentary or light duty although Dr. Rudin's presumption favored a sedentary job.

As I previously stated, I accept Dr. Fedder's opinions over Dr. Rudin's opinions. The labor market survey identified sedentary and light duty jobs. It did not identify medium duty jobs. Giving Claimant the benefit of the doubt, in light of the fact that Dr. Fedder provided a range of light duty to medium duty work, I find that Claimant is capable of returning to at least light duty work. I accept the positions identified in the labor market survey as being representative of Claimant's earning capacity. The actual identified wages range from $440 to $600. I attribute the low average weekly wage to be more representative of Claimant's earning capacity and therefore, find that Claimant's weekly earning capacity is $469.50. Claimant is entitled to partial disability benefits in the amount of $30.05.

Medical Witness Fees and Attorney's Fee

Under 19 *Del. C.* § 2322(e), the employer shall pay for Claimant's medical expert's fees in the event Claimant receives an award. Although Employer's Petition for Review to Terminate Benefits is granted, Claimant will continue to receive partial disability benefits. Therefore, I award Claimant payment of his medical expert witness' fees.

A claimant who is awarded compensation generally is entitled to payment of "a reasonable attorney's fee in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller...." 19 *Del.C.* § 2320(10)(a). Attorney's fees are not awarded, however, if, thirty days prior to the hearing date, the employer gives a written settlement offer to the claimant that is "equal to or greater than the amount ultimately awarded by the Board." DEL. CODE ANN. tit. 19, § 2320. Employer tendered a settlement offer that was equal to the award of this Hearing Officer. Claimant is not entitled to an award of an attorney's fee.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Employer's Petition for Review to Terminate Total Disability Benefits is GRANTED as of the date of filing. Claimant is awarded payment of partial disability benefits in the amount of $30.05 per week and payment of his medical witness' fees.

IT IS SO ORDERED THIS 12th DAY OF MARCH, 2015.

INDUSTRIAL ACCIDENT BOARD

JULIE PETTZNER
Workers' Compensation Hearing Officer

Mailed Date: 3/16/15

OWC Staff

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