

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

JOSEPH WILSON,)
)
 Employee,)
)
 v.) Hearing No. 1215102
)
 GINGERICH CONCRETE,)
)
 Employer.)

MOTION IN *LIMINE*

&

DECISION ON PETITION TO DETERMINE ADDITIONAL COMPENSATION DUE

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause, by stipulation of the parties, came before a Workers' Compensation Hearing Officer on January 13, 2021, via video conference pursuant to the Industrial Accident Board COVID-19 Emergency Order, dated May 11, 2020.

Heather Williams, Esquire
Workers' Compensation Hearing Officer

APPEARANCES:

Walt Schmittinger, Esq., Attorney for the Claimant

Gary Baker, Esq., Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Joseph Wilson (“Claimant”) was injured in a work accident on August 1, 2002, while employed by Gingerich Concrete (“Employer”). On October 1, 2020, Claimant filed a Petition to Determine Additional Compensation Due seeking compensability of medical treatment with Dr. Bose, including a February 22, 2021 cervical spine surgery. Employer disputes that Claimant’s treatment with Dr. Bose is compensable because Dr. Bose was not a certified provider from August 31, 2019 to March 29, 2021. On April 16, 2021, Employer filed a Motion in *Limine* requesting a decision as to the expenses’ compensability, given Dr. Bose’s certification lapse. The parties stipulate that the treatment expenses at issue are reasonable and necessary treatment, but dispute their compensability. A hearing was held on Employer’s Motion and Claimant’s Petition on April 23, 2021. This is the decision on the merits.

SUMMARY OF THE EVIDENCE

As indicated above, the parties stipulate that Dr. Bose’s treatment is reasonable and necessary, but disagree as to the treatment’s compensability, given Dr. Bose’s certification lapse and the lack of a pre-authorization. The parties stipulate that Dr. Bose was originally certified on April 30, 2008, was recertified four times through August 11, 2017, and had a lapse in certification from August 31, 2019 to March 29, 2021.

Dr. Bikash Bose, board certified in neurosurgery, testified by deposition for Claimant. He confirmed that Claimant began treating with him in 2014 in connection with a work injury, and began treating for cervical spine complaints in 2019. On February 22, 2021 Claimant underwent cervical spine surgery at C2-C5, with hardware updates at C2-C6.

The doctor confirmed that the carrier had paid Claimant’s medical bills from 2014 to July 2019, when Claimant had a prior cervical spine surgery, but it had not paid for the 2021 surgery.

Dr. Bose concluded that Claimant's 2021 surgery was reasonable and necessary and related to his work accident.

On cross examination, Dr. Bose testified that he is certified under the Delaware Workers' Compensation Practice Guidelines. When questioned about his removal from the certification list, Dr. Bose reported that he had submitted paperwork the week prior (March 2021) to the deposition to renew his certification. He testified that he has "...been certified all along, but with COVID there was some problem with communication from their office email and all that and....it fell through the cracks...and it came to our attention, then we filled out the paperwork and submitted it to them." Dr. Bose Deposition 28:20-24; 29:1-2 (April 7, 2021).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Motion in *limine*

Delaware statutory law requires certification "...for a health-care provider to provide treatment to an employee...without the requirement that the health-care provider first preauthorize each health-care procedure, office visit or health-care service to be provided to the employee with the employer or insurance carrier... . The provisions of this subsection shall apply to all treatments to employees provided after the effective date of the rule... ." 19 *Del. C.* § 2322D. The statute sets forth the requirements for provider certification and allows for one office visit or single instance of treatment without requiring the carrier's pre-authorization. 19 *Del. C.* §2322D(b). Finally, the statute indicates that it applies to "...all treatments to injured employees provided after the effective date of the rule provided by subsection (c) of this subsection... ." *Id.* In addition to statutory law, Delaware's highest court has determined that "...[w]here...the provider is neither certified nor preauthorized, compensation for medical treatment is generally not available, with narrow exceptions for care provided on the first visit to the provider and for care provided in the

emergency unit of a hospital or in a pre-hospital setting.” *Wyatt v. Rescare Home Care*, 81 A.3d 1253, 1263 (Del. 2013). Thus, both the legislature and courts have concluded that uncertified providers who fail to obtain pre-authorization for treatment are not entitled to compensation.

In this case, while Dr. Bose testified that his lapse in certification was due to an administrative error and/or due to the Covid pandemic, the parties stipulated that the doctor’s lapse in certification began on August 31, 2019 and continued until March 29, 2021, a period of more than eighteen months. I note that the Covid pandemic did not begin until 2020. Furthermore, as recently as February 22, 2021, Dr. Bose performed surgery on Claimant, which was more than a full year after the lapse of his certification. While I am sympathetic to inevitable administrative errors that can occur with professional certification processes, the duration of Dr. Bose’s lapse in certification is significant, especially given the fact that he performed surgery on the Claimant without verifying his certification or seeking pre-authorization. Therefore, I find that the medical treatment is not compensable due to Dr. Bose’s lack of certification at the time the treatment was provided.

Medical Treatment

When an employee has suffered a compensable injury, the employer is required to pay for reasonable and necessary medical “services, medicine and supplies” causally connected with that injury. 19 *Del. C.* § 2322. In this case, the issue is whether Claimant’s left shoulder surgery, is reasonable and necessary treatment for his work injury. “Whether medical services are necessary and reasonable or whether the expenses are incurred to treat a condition causally related to an industrial accident are purely factual issues within the purview of the Board.” *Bullock v. K-Mart Corporation*, Del. Super., C.A. No. 94A-02-002, 1995 WL 339025 at *3 (May 5, 1995) “The law is clear that disputes about the reasonableness of medical expenses are factual questions for the

Board to decide.” *Kovach v. Churchman’s Village/Health Care*, Del. Super., C.A. No. 98A-02-018, Barron, J., 1998 WL 960777 at *2 (October 5, 1998).

In determining whether or not the proposed treatment is reasonable and necessary, Delaware’s Supreme Court has stated that the Board must decide “whether the treatment is reasonable for that specific claimant and not whether the treatment is reasonable generally for anyone with the claimant’s condition.” *Brittingham v. St. Michael’s Rectory*, 788 A.2d 520, 523 (Del. 2002). When evaluating “reasonableness” the Board should consider various factors, including: claimant’s age, prior surgical experience, general physical condition, likelihood of success, risk of worsening the condition, or risk of death from the offered treatment. *Brittingham* at 524-25. When the evidence is in conflict, the Board is free to accept the opinion of one expert over the opinion of another. *DiSabitino Brothers, Inc. v. Wortman*, 453 A.2d 102 (Del. 1982).

As detailed above, because I have already concluded that Claimant’s treatment is not compensable based on Dr. Bose’s lack of certification, Claimant’s Petition is denied.

Attorney’s Fee & Medical Witness Fee

A claimant who is awarded compensation is entitled to payment of a reasonable attorney’s fee “in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller.” 19 *Del. C.* § 2320. At the current time, the maximum based on Delaware’s average weekly wage calculates to \$11, 214.90. The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55 (Del. 1973). The Board is permitted to award less than the maximum fee and consideration of the *Cox* factors does not prevent the Board from granting a nominal or minimal fee in an appropriate case, so long as some fee is awarded.

See Heil v. Nationwide Mutual Insurance Co., 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96A-01-005, Cooch, J., 1996 WL 527213 at *6 (August 9, 1996). A “reasonable” fee does not generally mean a generous fee. *See Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966). Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation. By operation of law, the amount of attorney’s fees awarded applies as an offset to fees that would otherwise be charged to Claimant under the fee agreement between Claimant and Claimant’s attorney. 19 *Del. C.* § 2320(10)a.

In this case, Claimant has not established that his medical treatment is compensable; therefore, he is not entitled to an attorney’s fee.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, I find Claimant's medical expenses are not compensable due to Dr. Bose's lack of certification and/or failure to obtain pre-authorization for those expenses. Therefore, Claimant's Petition is denied.

IT IS SO ORDERED THIS 6th DAY OF MAY, 2021.

INDUSTRIAL ACCIDENT BOARD



Heather Williams, Esq.
Hearing Officer

Mailed Date:

CL 5-16-21 CL
OWC Staff

