BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

THERESA PATILLE,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1416890
	)	
DELMARVA TEMPORARY STAFFING,	)	
	)	
Employer.	)	

DECISION ON PETITION TO DETERMINE ADDITIONAL COMPENSATION DUE

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on June 17, 2016, in the Hearing Room of the Board, in Dover, Delaware.

PRESENT:

PATRICIA MAULL

MITCH CRANE

Heather Williams, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Ran Ji, Attorney for the Claimant

Joseph Andrews, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Theresa Patille ("Claimant") injured her right upper extremity in a compensable workplace accident on August 2, 2014, while she was working for the Delmarva Temporary Staffing ("Employer"). Claimant filed a Petition to Determine Additional Compensation Due on December 28, 2015. Claimant is seeking compensation for a thirty percent (30%) permanent impairment to her right upper extremity. Employer disputes the degree of impairment and submits that Claimant has no permanent impairment to her right upper extremity.

A hearing on Claimant's petition was held on June 17, 2016. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. Stephen Rodgers, board certified in occupational medicine, testified on Claimant's behalf. After reviewing Claimant's pertinent medical records, Dr. Rodgers evaluated Claimant on December 2, 2015. Dr. Rodgers concluded that Claimant has a 30% impairment, taking into account her history, evaluation and symptoms. Claimant provided Dr. Rodgers with a history of her mechanism of injury and reported that her current right hand symptoms included: cold sensitivity, pain at base of her thumb, inability to make a fist, difficulty writing or keyboarding, and loss of digital dexterity. Claimant completed a "Quick Dash" assessment, which indicated Claimant was unable to open a jar or participate in activities where she took force to her hand; had difficulty using a knife to cut food; and had quite a bit of interference with activities of daily living. Claimant indicated she had arm and shoulder pain and mild difficulty sleeping because of pain. Dr. Rodgers testified that Claimant's symptoms were consistent with Claimant developing chronic pain syndrome from her injury.

Upon physical examination, Dr. Rodgers found Claimant to have: deep tendon reflexes obtainable at the biceps and brachioradialis; forearms measured at their greatest girth within 1 centimeter between the sides; ranges of motion of the left wrist and elbow full in all arcs; measured ranges of motion on the right at the wrist of flexion 35 degrees, extension 30 degrees, ulnar deviation 25 degrees, radial deviation 10 degrees, and supination 70 degrees. In addition, Claimant's rapid flexion and extension of the digits was much less fluid on the right than the left; swelling of the right thumb compared to the left; grip strength on one attempt on the left was 24 kg of force; and sensation by touch by whisk was different on the right than on the left.

Dr. Rodgers found Claimant's increased temperature and decreased sensitivity to be significant to his findings. Using the *American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition* ("*Guides*"), Chapter 16, Section 16.5e involving reflex sympathetic dystrophy ("RSD"), Dr. Rodgers testified that he reached the 30% rating because Claimant has chronic pain, there is a lack of unanimity of whether she has RSD in her records and Claimant does not meet the parameters for RSD in the *Guides*. Dr. Rodgers then referred to another section used to rate hand problems, section 13.8 on page 343, Table 13-22 "Criteria for Rating Impairment Related to Chronic Pain in one Upper Extremity", which lists four classes of impairments, divided into dominant and non-dominant extremities. Dr. Rodgers testified that Claimant has a painful limb with limited function. Dr. Rodgers used Table 13-22 because it is based on function, and not symptoms. He placed Claimant in Class II, because she has no digital dexterity, which is a 10-24% whole person impairment, which is a division by .6 or there is a table that provides the conversion, which between 17% and 40%. Dr. Rodgers explained that he placed Claimant at mid-range, which is 30%. Dr. Rodgers concluded that he was evaluating Claimant's function, when he calculated the permanency impairment rating of 30%. Dr. Rodgers

concluded that his rating would not change for someone with the same function findings, regardless of diagnosis. According to Dr. Rodgers, Claimant was credible in her reports of symptoms, history and effort during her examination. Dr. Rodgers disagreed with the zero percent impairment finding that Dr. Smith gave Claimant because he believes Claimant has a 30% loss of use to her hand.

On cross examination, Dr. Rodgers agreed that he did not make a diagnosis in this case, despite the *Guides* suggestion to do so in Chapter 2. Dr. Rodgers agreed that *Guides* 5th is the standard, but he does not believe that he is required to discuss a diagnosis. Dr. Rodgers acknowledged that he began without an RSD diagnosis and moved on from there. Dr. Rodgers admitted that, upon physical examination, he did not find eight out of the eleven symptoms for RSD listed on page 496 of the *Guides*, but he found increased temperature and difficult range of motion. Dr. Rodgers confirmed that page 343 of the *Guides* indicates, "[t]o rate these conditions for impairment, diagnosis is key and is based on clinical criteria." Dr. Rodgers explained that he based Claimant's impairment on her loss of function and not on a specific diagnosis.

Dr. Rodgers explained that there are two different kinds of RSD and that usually hot or warm RSD is indicative of inflammation. On April 13, 2015, Dr. Sowa issued a return to work letter indicating Claimant was capable of returning to full duty. Dr. Rodgers admitted that he only found intrinsic tightness upon examination, and no other physician had found that, except for Dr. Townsend, who found "intrinsic tendonitis." Dr. Rodgers agreed that Dr. Smith found Claimant to have full range of motion on all planes. Dr. Rodgers agreed that he based his findings on Claimant's subjective findings compatible with her records and his findings. Dr. Rodgers explained that he used the explanation for the lower extremity and supplemented "arm" because it indicates how it is difficult to rate a limb.

Claimant testified that she was a housekeeper for Employer at the time of her injury. At the time of the injury, she was emptying recycling and she took it to the recreational vehicle and swung the tub of trash and her hand hit the latch on the vehicle. The injury did not break the skin, but it did swell. Claimant testified that, currently, there is not a day that goes by that she does not know that she has an injury to her right hand. She cannot make a fist with her right hand and she is right hand dominant. Claimant testified that the pain is like someone is sawing her bone with a serrated knife. Claimant reported that she experiences random, but rare, swelling in that hand. She takes an over the counter anti-inflammatory for pain relief. Claimant works part-time (27 hours a week since November 2015) stocking shelves at a craft store and is able to use both hands at work. Claimant reported that she is unable to use her right hand when she uses the box cutter, so she uses her left hand for that. Claimant testified that bathing, cooking, cleaning and dressing are difficult because of her limited function in her hand.

On cross examination, Claimant testified that she was capable of shifting her manual transmission vehicle while driving to the hearing in Dover from Newark, Delaware, which was approximately a forty-five minute drive. Claimant admitted that on December 17, 2014, she reported to physical therapy that she "wacked her fingers against the boxes at the house." Claimant testified that she remembers hitting her hand again in October of 2014 and that it made her "see stars." At the time of this work injury, Claimant had already turned in a week's notice of her resignation.

Dr. Robert Smith, board certified in orthopedic surgery, testified by deposition on Employer's behalf. After reviewing all pertinent medical records, Dr. Smith examined Claimant on March 7, 2016, when Claimant reported she had suffered a work injury involving her right hand when her hand was caught between a tailgate and latch on a truck. Dr. Smith explained

that, in his thirty years of experience, the diagnosis of chronic regional pain syndrome (also known as RSD) was exceptionally rare, having only occurred approximately a dozen times in his thirty years of practice. According to Dr. Smith, the *Guides* have objective diagnostic criterion for diagnosing RSD, which include: vasomotor changes of skin color changes, skin temperature changes, and edema; pseudo-motor changes of presence of skin sweat; trophic changes of skin texture changes; and trophic bone changes such as osteoporosis. Dr. Smith testified that, according to the *Guides*, a patient must demonstrate eight out of the eleven diagnostic criterion to be diagnosed with RSD. Dr. Smith reported that Claimant did not exhibit any of the diagnostic criterion upon physical examination. When Dr. Smith examined Claimant he found no evidence of: dependent rubor, swelling, skin changes, sweating differential, hair growth changes, nail changes, joint ankylosis, muscle atrophy, allodynia, nerve entrapment, vascular compromise, or limited range of motion. Claimant's physical examination showed no objective clinical signs of RSD. Claimant reported subjective symptoms of aching pain, swelling and stiffness in her hand; however, Dr. Smith reported that Claimant showed no clinical signs of any of those symptoms upon physical examination. Dr. Smith testified that he did not find any organic reason to make a diagnosis of chronic pain in Claimant's right upper extremity.

Dr. Smith concluded that Claimant had reached maximum medical improvement and there was no evidence in Claimant's medical record to support a finding that Claimant had any chronic pain condition that would require any additional treatment or testing. Dr. Smith determined that Claimant no longer suffered from any ongoing problems as a result of her work accident. Because Dr. Smith found Claimant to have totally normal clinical and diagnostic results, he did not find Claimant to have any permanent impairment. Dr. Smith explained that "impairment" means that there is some sort of measurable defect, but if the patient's objective

examination shows no measurable sign of defect, then there can be no impairment rating assigned. Dr. Smith concluded that Claimant had no impairment, or 0%, because there was no demonstrable pathology in her right upper extremity when he examined her, she had no clinical signs of any condition, and there were no diagnostic test results that were ratable.

Dr. Smith noted that there was no documentation in Claimant's medical records to show that Claimant had been determined to have a majority of the symptoms required by the *Guides* to support a diagnosis of RSD. Dr. Smith explained that while Dr. Rodgers found Claimant's ranges of motion to be limited, his examination had found her ranges of motion to be normal. Dr. Smith explained that there is a strong subjective component to a range of motion examination because range of motion is controlled by the patient. Dr. Smith noted that Dr. Rodgers did not document that Claimant met any of the criterion for RSD in his evaluation of her and there was no clinically-diagnostic testing that confirmed an RSD diagnosis. Dr. Smith concluded that Dr. Rodgers' examination findings were not sufficient to make the diagnosis of CRPS 1, CRPS 2, RSD or causalgia in her right upper extremity and there was no objective evidence upon which to find Claimant had a thirty percent impairment to her right hand.

Dr. Smith explained that Dr. Rodgers had erroneously used the chart in the *Guides* to calculate a permanency rating solely on Claimant's subjective symptoms and without first making a valid diagnosis. Dr. Smith confirmed that the *Guides* indicate that there should be a finding of the presence of eight out of the eleven objective findings present for there to be a valid CRPS or RSD diagnosis. According to Dr. Smith, Table 13-22 in the *Guides* is based on subjective factors, but the correct way to use the *Guides* is to provide a confirmed diagnosis first, then refer to Table 13-22 once there is a diagnosis. Dr. Smith did not believe the table should be consulted without an objective diagnosis. Dr. Smith reported that there was nothing in

Claimant's medical records, nor in her examination findings that indicates her activities of daily living are restricted.

On cross examination, Dr. Smith confirmed that permanency ratings should be based primarily on the patient's clinical examination findings. Dr. Smith acknowledged that he did not perform passive range of motion tests on Claimant because they were not necessary when she demonstrated normal active range of motion. Dr. Smith acknowledged that Dr. Yadhati's records revealed Claimant had experienced some swelling and stiffness in her right hand in the year leading up to his examination. Dr. Smith explained that those findings would not change his opinion as to Claimant's lack of permanency impairment because the symptoms Dr. Yadhati noted were purely subjective and the truly objective findings were always normal. Dr. Smith confirmed that Claimant's injury had fully resolved with conservative treatment by the time he evaluated her. Dr. Smith testified that, on the date of his examination, Claimant had "absolutely no pathology in her hand or upper extremity on the right side" and she "demonstrated good function of her hand, basically normal function." (Smith Deposition at 67.) Dr. Smith noted that he found it somewhat surprising that Claimant continued to complain of symptoms from an injury that was lacking in severity (no laceration, bone injury or soft tissue injury) and totally lacking in clinical or diagnostic findings. Dr. Smith reported that while he found Claimant to be cooperative during the examination, he did not find her to be credible in continuing to report symptoms for which there were no supporting objective findings. Dr. Smith confirmed that Claimant did not have any identifiable pathology in her right hand caused by the work accident to warrant a permanent impairment rating.

Melissa Joseph testified on Employer's behalf that Claimant said "I'm going to get what's due me and I'm going to get an attorney" when Claimant saw a physician.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Permanent Impairment

The Delaware Workers' Compensation Act provides for proper and equitable compensation for the loss or loss of use of any member or part of the body. *See* DEL. CODE ANN. tit. 19, § 2326. It is the function of the trier of fact, and not the physician, to determine the degree of a claimant's impairment. *Turbitt v. Blue Hen Lines, Inc.*, 711 A.2d 1214, 1215 (Del. 1998); *Poor Richard Inn v. Lister*, 420 A.2d 178, 180 (Del. 1980). The burden of proof rests with Claimant. The medical witnesses do not agree whether Claimant has a permanent impairment to her right upper extremity. Dr. Rodgers calculated Claimant to have a 30% permanency impairment and Dr. Smith calculated Claimant to have a 0% or no permanency impairment. In this case, the Board finds that Claimant has a zero percent (0%) impairment or no impairment to her right upper extremity causally related to the work accident.

While Claimant initially testified that her activities of daily living were restricted because of pain in her hand, she also testified that she was able to work 27 hours a week in a crafts store stocking shelves. Claimant admitted that the only work activity that was limited was using a box cutter. While Claimant testified that cooking and dressing were difficult because of her work injury, she also admitted that she was able to drive a manual transmission using her injured hand for forty-five miles (each way) to the hearing. Finally, Claimant admitted, and the experts' testimony confirmed, that the initial work injury, which was nearly two years prior to the hearing, did not involve a laceration, bone injury, or soft tissue injury, all of which would

indicate a more severe and long lasting injury. Thus, Claimant's own testimony raises questions as to the credibility of her subjective complaints, which were the basis for Dr. Rodgers' permanency rating.

Dr. Rodgers based his permanency rating on Claimant's range of motion findings and subjective complaints. According to Dr. Smith, while Dr. Rodgers found Claimant's ranges of motion to be limited, Dr. Smith's examination of Claimant found her ranges of motion to be normal. Dr. Smith noted that there is a strong subjective component to a range of motion examination because range of motion is controlled by the patient. Dr. Rodgers agreed that Dr. Smith found Claimant to have full range of motion on all planes, which was a different finding than during his examination. Dr. Rodgers acknowledged that his findings were based primarily on Claimant's subjective reports and findings and not objective findings.

Dr. Smith testified that there was no evidence in Claimant's medical history of the symptoms required by the *Guides* to support a diagnosis of RSD, CRPS 1, CRPS 2, or causalgia and there was no objective evidence upon which to find Claimant had a thirty percent impairment to her right hand. Dr. Smith noted that, according to the *Guides*, a patient must demonstrate eight out of the eleven diagnostic criterion to be diagnosed with RSD and that Claimant did not exhibit any of the diagnostic criterion upon physical examination. While Dr. Rodgers agreed that the *Guides* section he used to find a 30% impairment indicates, "[t]o rate these conditions for impairment, diagnosis is key and is based on clinical criteria," Dr. Rodgers admitted that Claimant did not have a diagnosis related to chronic pain and that he based Claimant's impairment on her loss of function, and not on a specific diagnosis. Dr. Smith testified that, without an initial diagnosis, Table 13-22 should not be used, and Dr. Rodgers testified that he had used Table 13-22, despite Claimant's lack of valid diagnosis of any

condition. Both experts agreed that that Section 13.8 indicates that "diagnosis is key" for rating impairments using that section, and Claimant did not meet the requirements for, nor did she have a diagnosis associated with chronic pain specified in that section. Therefore, there was no basis for Dr. Rodgers' using that particular section of the *Guides*, or for making a finding of an impairment at all, based on the lack of objective findings.

The evidence supports Dr. Smith's conclusion that Claimant had reached maximum medical improvement and Claimant no longer suffers from any ongoing problems as a result of her work accident. Dr. Smith concluded that Claimant had no impairment, or 0%, because there was no demonstrable pathology in her right upper extremity when he examined her, she had no clinical signs of any condition, and there were no diagnostic test results that were ratable. The Board finds Dr. Smith's conclusions to be more appropriate based on Claimant's lack of objective clinical findings, questionable credibility of her subjective complaints and medical history. The Board accepts the opinion of Dr. Smith over that of Dr. Rodgers and finds Claimant has no permanent impairment to her right upper extremity causally related to the work accident.

Attorney's Fee, Medical Fees and 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." DEL. CODE ANN. tit. 19, § 2320. At the current time, the maximum based on Delaware's average weekly wage calculates to $10,194.40. 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. DEL. CODE ANN. tit. 19, § 2320(10)a.

Claimant has failed to meet her burden of proving that she has sustained a permanent impairment to her upper right extremity. Therefore, she is not entitled to an attorney's fee.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board finds that Claimant has a zero percent (0%) or no permanent impairment to her right upper extremity causally related to the work accident. Therefore, Claimant's Petition to Determine Additional Compensation Due is Denied.

IT IS SO ORDERED THIS 30th DAY OF JUNE, 2016.

INDUSTRIAL ACCIDENT BOARD

/s/Patricia Maull
PATRICIA MAULL

/s/Mitch Crane
MITCH CRANE

I, Heather Williams, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

HEATHER WILLIAMS

Mailed Date: 7.1.16

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OWC Staff

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