BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

BRITNEY FOOTE,	)	
	)	
Claimant,	)	
	)	
v.	)	Hearing No. 1474693
	)	
CHILD INC.,	)	
	)	
Employer.	)	

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 June 20, 2019, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

MARK MUROWANY

ANGELIQUE RODRIGUEZ

Christopher F. Baum, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Edward H. Wilson, III, Attorney for the Claimant

Joseph Andrews, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On August 6, 2018, Britney Foote ("Claimant") filed a Petition to Determine Compensation Due, alleging that she injured her right shoulder, cervical spine, thoracic spine and lumbar spine in a compensable work accident on June 20, 2018, while she was working for Child Inc. ("Employer"). The Board has previously determined that Claimant was injured in the course and scope of her employment. *Cleveland & Foote v. Child, Inc.*, Del. IAB, Hearing Nos. 1474956 & 1474693 (March 13, 2019). Claimant now seeks a finding of compensability of the alleged soft tissue injuries and payment of medical expenses. Employer disputes what injuries were caused by the accident and asserts that any injuries that were caused have subsequently resolved.

A hearing was held on the merits of Claimant's petition on June 20, 2019. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant testified that, on June 20, 2018, she and a coworker were in a shuttle van when a car ran into the back of the shuttle. Claimant had been in the last row on the right side of the shuttle. She struck her right elbow, neck and upper back and she had radiating pain from the top of her right shoulder down. She was taken to Johns Hopkins Hospital but no diagnostic tests were performed. She complained of shoulder, neck, upper back and low back pain as well as right elbow pain. The medical note indicated that she could move her neck normally without guarding. After she returned home, she was in a lot of pain. Her pain was between her shoulders, in her upper back and she had neck pain as well.

Claimant confirmed that she then came under the care of Dr. Ross Ufberg on June 26, 2018. She reported to him that she had pain in her upper shoulders, radiating pain and elbow pain along with neck stiffness and occasional headaches. She only had low back pain with certain activities,

but the upper back pain between her shoulders was constant. Dr. Ufberg recommended physical therapy and home exercises. The therapy proved beneficial. The benefits of a therapy session would last for about a day (depending on her level of activity). She continued to see Dr. Ufberg roughly once per month. The last visit with him was on November 6, 2018.[1] She was ready to return to work. She returned to work with a new employer. She no longer had the constant pain between her shoulder blades, her shoulder pain had eased, and the neck was not as stiff.

Claimant testified that, when she does household chores, she still can get low back pain and pain in the upper back between the shoulders will come and go. She no longer has symptoms in the neck, right shoulder or right elbow. She takes ibuprofen once or twice per week for her symptoms. She is not on any prescription medications.

Claimant agreed that, prior to the work accident, in June of 2017, she was in a motor vehicle accident which resulted in a concussion, and neck and back pain. She received treatment for that into December of 2017. In February of 2015, she was struck by a bus from behind, which resulted in an upper and lower back and right triceps strain. Her medical care for that lasted until January of 2016. In February of 2012, she was in a three-car accident, which resulted in neck and upper back pain. Medical care for that ended in August of 2012. None of those incidents involved the right shoulder or right elbow. She received treatment from Dr. Ufberg with regard to all these accidents.

Dr. Ross M. Ufberg, who practices in the area of physical medicine and rehabilitation, testified by deposition on behalf of Claimant. In his opinion, the treatment he provided Claimant was reasonable, necessary and related to her June 20, 2018 motor vehicle accident.

[1] She had an appointment to see the doctor in December, but she missed it because of a bout of depression.

Dr. Ufberg stated that Claimant had previously been seen in his office with respect to a February 2012 motor vehicle accident, resulting in soft tissue injuries to her neck, shoulder slope, and mid back. Claimant's treatment for that accident ended in August of 2012. She was then seen with respect to a February 2015 motor vehicle accident. She had soft tissue injuries to her neck, back, headaches and a left triceps strain. After that, she was seen with respect to a June 2017 motor vehicle accident. She sustained soft tissue injuries (strains) to her cervical and thoracic spine and headaches in that accident. Treatment for that accident ended in December of 2017.

With respect to the June 20, 2018 work accident, Claimant first presented in Dr. Ufberg's office on June 26, 2018, with complaints of back, neck, right shoulder, arm and elbow pain. She described the motor vehicle accident and recalled being thrown forward and slammed backward by the impact. She reported that her right elbow struck something in the van but she did not strike her head. A few minutes later she noted back, neck and right upper extremity pain. She was taken to Johns Hopkins, where the initial intake form recorded right shoulder, right elbow and back pain. By June 26, she was describing having soreness and stiffness over the right side of the neck and shoulder slope; an ache over her right shoulder going down the arm with occasional numbness; tenderness and sensitivity over the right elbow; aching and stiffness across the upper and mid-back; and occasional low back symptoms with prolonged standing. Dr. Ufberg's diagnosis was of cervical, thoracic and lumbar strain, right shoulder & arm strain and right elbow trauma. She was placed in physical therapy and prescribed ibuprofen (800mg).

Dr. Ufberg stated that Claimant continued with therapy from June 27 through November 2, 2018. He also gave her home exercises to perform. By July 23, Claimant was reporting that she no longer had any right elbow pain, but she still had pain complaints to her neck, upper back and midback. In August, she noted some improvement in her neck issues, but had right shoulder

discomfort and significant pain between her shoulder blades. By the end of September, she still had pain and stiffness between the shoulder blades, occasional right shoulder tightness and rare episodes of low back pain. She reported some days of increased neck pain.

The last time that Dr. Ufberg saw Claimant on November 6, 2018, she reported having bad days with soreness and stiffness between the shoulder blades, less problems with neck pain and stiffness, only one or two headaches, and no problems in the right shoulder. On examination, Claimant had a full range of motion of the thoracic and lumbosacral spine, and only some limited right rotation of the cervical spine. She was instructed to continue with her home exercises.

Dr. Ufberg does not know how Claimant has fared since November 6, 2018. He agreed that it is possible that she might have some continuing problems related to the June 2018 accident, for which she would require additional care. Usually, with soft tissue injuries such as Claimant sustained, the majority of recovery occurs within four to six months, but it may potentially be a permanent or chronic problem if problems persist for ten or twelve months after an accident.

Dr. Andrew J. Gelman, an orthopedic surgeon, testified by deposition on behalf of Employer. He examined Claimant on October 19, 2018, and he reviewed pertinent medical records. In his opinion, Claimant's injuries from the June 2018 work accident have resolved and her treatment was excessive.

Dr. Gelman received a history of the June 2018 motor vehicle accident, substantially similar to how it was described in Claimant's testimony. By the time he examined her on October 19, 2018, the right elbow symptoms had resolved. She registered complaints between her shoulder blades and stated that she had occasional headaches. She did not mention any neck or low back complaints and stated that her right shoulder felt okay. On examination, she displayed normal gait and was able to raise on her heels and toes. She had tenderness in the midportion of her thoracic

spine musculature. She had normal strength, reflexes and sensation in her extremities. In his opinion, Claimant had reached maximum medical improvement by the time of his examination and she needed no further musculoskeletal care with respect to the June 2018 accident.

Dr. Gelman confirmed that Claimant had previously treated with Dr. Ufberg for similar body part problems (neck, mid back and low back) prior to the work accident. She had previously been involved in motor vehicle accidents on 2005, 2012, 2015 and 2017.

Dr. Gelman opined that, as a result of the June 20, 2018 accident, Claimant sustained an elbow contusion and soft-tissue strain and/or sprain injury to the cervical, thoracic and lumbar spine, all of which have resolved.[2] In his opinion, Dr. Ufberg's treatment for these injuries was unreasonably prolonged and Claimant probably plateaued after one or two months of treatment. Supervised treatment beyond that was unnecessary, excessive and self-serving by Dr. Ufberg. Claimant might have gotten better even with no therapy or under a certified therapist rather than the doctor.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Compensability

The Delaware Workers' Compensation Act ("the Act") provides that employees are entitled to compensation "for personal injury or death by accident arising out of and in the course of employment." DEL. CODE ANN. tit. 19, § 2304. Because Claimant has filed the current petition, she has the burden of proof. DEL. CODE ANN. tit. 29, § 10125(c). "The claimant has the burden of proving causation not to a certainty but only by a preponderance of the evidence." *Goicuria v.*

[2] Dr. Gelman would not attribute a discrete shoulder injury in the sense of a glenohumeral or subacromial injury. Claimant had scapular complaints that she might have referred to as the "shoulder" but that is really more a mid-back or thoracic problem.

Kauffman's Furniture, Del. Super., C.A. No. 97A-03-005, Terry, J., 1997 WL 817889 at *2 (October 30, 1997), *aff'd*, 706 A.2d 26 (Del. 1998).

The first issue is determining what body parts were injured as a result of the work accident. The medical experts are in agreement as to much of this. Both Dr. Ufberg and Dr. Gelman are in agreement that any injuries that Claimant sustained were only soft-tissue injuries. They also both attribute a right elbow contusion to the work accident. There is also agreement as to her having cervical, thoracic and lumbar strain and sprain.

Most of the dispute with regard to causation concerns the right shoulder, but even here there is rough agreement (although there is a disagreement in terminology). Claimant had symptoms in the scapular region. Claimant refers to this as the "shoulder" and so Dr. Ufberg accepts a shoulder injury. Dr. Gelman, for his part, considers the scapular area as being more a mid-back or thoracic injury rather than anything dealing with the shoulder joint itself. As such, he does not agree to a "shoulder" injury. In other words, while the doctors disagree on the use of the term "shoulder," there is agreement that Claimant had scapular symptoms. Similarly, Claimant complained of pain "between the shoulder blades" but, of course, between the shoulder blades in the back is basically the thoracic spine area. Again, both medical experts agree that there is no bony injury or disk injury, so this "between the shoulder blades" complaint is not a discrete injury to the spinal structure but is rather a strain and sprain of the thoracic muscles. Dr. Gelman accepts that Claimant had a thoracic strain and sprain as a result of the accident. As such, there really is no dispute that Claimant sustained this "between the shoulder blades" thoracic strain and sprain.

In short, although the terminology varies, there really is no major dispute that Claimant injured her right elbow, her neck (cervical spine), midback (thoracic spine, including a scapular complaint) and her low back (lumbar spine). These were all soft tissue injuries.

The next question is whether these injuries have resolved. Again, there is a large area of agreement between the parties on this. There is no dispute that the right elbow complaint resolved as early as late July. Claimant herself agrees that the neck (cervical) area no longer bothers her nor her right shoulder (scapular area). Thus, those areas have also resolved. The only real question is as to the thoracic ("between the shoulder blades") and lumbar areas.

With regard to the lumbar spine, even from the very beginning Claimant's low back complaints were at best sporadic. By the end of September, Dr. Ufberg documented that low back complaints were "rare," which is consistent with a soft tissue injury resolving. There were no low back complaints when Dr. Ufberg last saw Claimant in November and she had full range of motion. Dr. Gelman also noted that, when he saw Claimant in October, she had no low back complaints. Claimant, as the petitioner, has the burden of proof of showing an ongoing injury. From this evidence, the Board concludes that Claimant has not met her burden of showing that she has any ongoing lumbar complaint pertaining to the 2018 work accident. While she may subsequently develop other low back complaints, there is no medical evidence to link those later complaints to the work accident.

With regard to the thoracic complaint, Dr. Ufberg agreed that he has not seen Claimant since November of 2018 and he has no knowledge whether she has any continuing problems. He noted that it is "possible" that a person might have continuing symptoms more than six months after sustaining a soft-tissue injury, but he had not seen Claimant more than six months after the injury to be able to form an informed opinion as to her current status. Claimant's own testimony is that, by the time of this hearing, the pain "between the shoulders" comes and goes. The Board is not satisfied that this is sufficient to establish that such complaints are related to the work accident. If the complaints were consistently present, then a link might be made, but having

symptoms that "come and go" breaks that clear link. As noted, there is no objective structural injury to Claimant's thoracic spine that might be blamed for continuing problems or recurring aggravations of a condition.

Claimant filed this petition and bears the burden of proof. She must establish that, more likely than not, her current complaints are causally related to the work accident. A mere possibility of a causal link is insufficient. For the reasons discussed above, the Board finds that Claimant has not met her burden of showing that her injuries from the work accident are ongoing.

There remains the issue of medical treatment. Dr. Ufberg provided treatment to Claimant from June 26 to November 6, 2018. Dr. Gelman believes that this treatment was excessive and unnecessary. In his opinion, Claimant only required treatment for one or two months (or basically to the end of August at the latest).

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. DEL. CODE ANN. tit. 19, § 2322. "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).

Employer reviewed Dr. Ufberg's course of treatment following Claimant's various accidents. Following the 2012 motor vehicle accident, he provided 24.5 weeks of care. Following the 2015 accident, he provided about 48 weeks of care. Following the 2017 accident, Claimant received 23.3 weeks of care. For the 2018 work accident, the treatment lasted for just over nineteen weeks. Employer argues that Dr. Ufberg has a pattern of overtreatment. The Board expresses no opinion concerning the prior periods of treatment but, with respect to the 2018 work accident, the

Board is satisfied that the records from Dr. Ufberg establish that Claimant's symptoms did persist beyond August of 2018 and she continued to receive improvement from Dr. Ufberg's care. As such, the Board finds the treatment Claimant received up to November 6, 2018, was reasonable and necessary care causally related to the work accident.

As always, to receive payment of medical bills, a proper "clean claim" with the required documentation must be submitted and the charges for the compensable treatment are limited by the fee schedule established by the Health Care Payment System. "The maximum allowable payment for health care related payments covered under this chapter shall be the lesser of the health care provider's actual charges or the fee set by the payment system." DEL. CODE ANN. tit. 19, § 2322B(3).

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." DEL. CODE ANN. tit. 19, § 2320.[3] At the current time, the maximum based on Delaware's average weekly wage calculates to $10,888.40. 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);

[3] Attorney's fees are not awarded 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. A settlement offer was tendered by Employer in this case. Reviewing the offer, the Board is satisfied that it is not equal to or greater than the Board's award. As such, an award of attorney's fees is appropriate in this case.

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 established the nature of her compensable injuries and the compensability of her limited medical treatment. The Board does not find that any of the injuries are ongoing. As such, no further treatment is anticipated. Claimant's counsel submitted an affidavit stating that ten hours were spent preparing for the hearing (including estimated hearing time, which ran just over 1.25 hours). Claimant's counsel was admitted to the Delaware Bar in 2012 and he has experience in workers' compensation litigation, a specialized area of law. His or his firm's initial contact with Claimant was in July of 2018, so the period of representation had been for about one year at the time of hearing. This case involved no difficult or unusual question of fact or law and it required only average skill to present the case properly. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances, although naturally he could not work on other matters at the exact same time as he was working on this one. There is no evidence that counsel was actually precluded from accepting other employment because of his representation of Claimant. Counsel's fee arrangement with Claimant is on a one-third contingency basis. Counsel does not expect to receive compensation from any other source with respect to this particular litigation. There is no evidence that the employer lacks the financial ability to pay an attorney's fee.

Taking into consideration the fees customarily charged in this locality for such services as were rendered by Claimant's counsel and the factors set forth above, the Board finds that an attorney's fee in the amount of $3,000.00 is reasonable in this case and does not exceed thirty percent of the value of the award once the value of any non-speculative future and non-monetary benefits that may arise from this decision are taken into consideration. *See Pugh v. Wal-Mart Stores, Inc.*, 945 A.2d 588, 591-92 (Del. 2008).

Medical witness fees for testimony on behalf of Claimant are also awarded to Claimant, in accordance with title 19, section 2322(e) of the Delaware Code.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board finds that, as a result of the June 2018 work accident, Claimant sustained soft-tissue injury to her right elbow, neck (cervical spine), midback (thoracic spine, including a scapular complaint) and low back (lumbar spine). None of these are ongoing. Claimant's medical treatment from the work accident up to November 6, 2018, was reasonable, necessary and related to the work accident. Claimant is also awarded an attorney's fee and payment of her medical witness fees.

IT IS SO ORDERED THIS 29th DAY OF OCTOBER, 2019.

INDUSTRIAL ACCIDENT BOARD

Mark Murowany /bc
MARK MUROWANY

Angelique Rodriguez /bc
ANGELIQUE RODRIGUEZ

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

Chris Baum

Mailed Date: 10-30-19

bc
OWC Staff