BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

MARIA MARTINEZ-LOPEZ,	)	
	)	
Claimant,	)	
	)	
v.	)	Hearing No. 1421704
	)	
CHAPMAN HOSPITALITY 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 August 5, 2015, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

JOHN D. DANIELLO

MARILYN J. DOTO

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

APPEARANCES:

Tabatha L. Castro, Attorney for the Claimant

Joseph Andrews, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On December 16, 2014, Maria Martinez-Lopez ("Claimant") filed a Petition to Determine Compensation Due, alleging that she was injured in a compensable work accident on July 31, 2014, while she was working for Chapman Hospitality Inc. ("Employer"). Claimant alleges that she injured her right lower extremity. Employer disputes compensability and the extent of the alleged injury.

It is agreed that Claimant's average wage at the time of the alleged injury was $320.00 per week, and her resultant compensation rate, if there is compensable injury, would be the legal minimum rate of $221.86 per week.

A hearing was held on the merits of Claimant's petition on August 5, 2015. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. Joseph Mesa, who is board certified in orthopedics, testified by deposition on behalf of Claimant. He began to provide treatment to her on October 30, 2014. In his opinion, Claimant's ankle problems are related to a July 2014 work injury.

Dr. Mesa understood that Claimant's work accident happened on July 31, 2014, and that Claimant had gone to MedExpress on that same day, complaining of having fallen down three steps, heard a crack and then her ankle was painful and swollen. She was given an air cast. The diagnosis was of a mild ankle sprain and she was restricted to no more than three hours of pushing, pulling and walking. Otherwise she was unrestricted. A week later, on August 7, she returned to MedExpress stating that the ankle was no better and that the air cast was hurting her. The medical note indicated that she could return to work on August 10 with no restrictions. There is no evidence that MedExpress ever took Claimant completely off of work.

Dr. Mesa stated that, on October 30, 2014, Claimant presented to him with sharp pain, weakness and numbness in her right ankle. She also had pain in the back of her right thigh. She stated that she had been at work in housekeeping at a hotel and, when walking down stairs, when she was on the third stair, her ankle rolled and she fell down. On examination, Dr. Mesa noted tenderness of the anterior talofibular ligament. There was no swelling. X-rays showed no sign of fracture. His impression was that Claimant had sustained a right lateral ankle sprain. He prescribed an ankle splint and physical therapy for range of motion and strengthening. He recommended that she be restricted to sedentary duty, six hours per day. The idea was to prevent re-aggravation of the ankle.

Dr. Mesa next saw Claimant on December 3, 2014, after she had had physical therapy. Claimant continued to have ankle and foot pain despite the therapy and home exercises. She did not mention having any other fall since the work accident.[1] On examination on December 3, she continued to have ankle joint pain, pain to palpation of her talus with plantar flexion, numbness of the lateral three toes, and tenderness to the Achilles tendon and the heel. The doctor recommended an MRI to see if there was a chondral injury to the talus. He took Claimant out of work pending the MRI.

Dr. Mesa saw Claimant again on January 7, 2015. The MRI showed some thickening of the anterior tibiofibular ligament as the sequela of a prior injury. She also had edema and signal alteration of an intact anterior talofibular ligament, which was probably from a prior injury as well.[2] No talar lesion was identified. There was no damage to the bone or cartilage. The doctor

[1] If there had been a second fall, Dr. Mesa speculated that it may have been secondary to the weakness in the ankle from the July event. However, Claimant never mentioned any such incident to him. On cross-examination, the doctor agreed that a November 19 therapy note mentions that she had rolled her ankle on the stairs two days earlier.
[2] Although the testimony is somewhat unclear, it appears that the "prior injury" that Dr. Mesa is referring to is the July 2014 work event.

recommended that Claimant resume physical therapy to strengthen the ankle. He returned her to sedentary-duty status for eight hours per day.

Dr. Mesa next saw Claimant on February 19, 2015, at which time she reported that her condition was worsening, and she was getting pain in her knees and back. She had persistent tenderness of the anterior talofibular ligament with a slightly positive anterior drawer and inversion test. The additional therapy had again failed to provide benefit. Because conservative measures had not succeeded, he proposed a surgical procedure to stabilize the ligament.

Dr. Mesa stated that an inversion lateral ankle sprain could potentially cause injury to the anterior talofibular ligament. However, the MRI also showed injury to the anterior tibiofibular ligament, implying an external rotation component to the injury as well. Prior to the MRI, there was no sign of Claimant having any tibiofibular ligament stretching. That tibiofibular ligament injury is a sign of a high ankle sprain, not the low ankle sprain of an inversion (or, for that matter, eversion) sprain. The "ankle rolling" accident described by Claimant would not typically result in the tibiofibular ligament problem seen on the MRI. That sort of accident is more consistent with the talofibular problem (*i.e.*, a low ankle sprain).

Dr. Mesa was unaware that Claimant saw her family doctor at Westside Family Health three times between July 31 and October 30, 2014. This included a September 3, 2014 annual full-body physical that found no problems and no acute distress or complaints of any musculoskeletal problem.

Claimant testified that she is twenty-two years old and has a high school diploma. In July of 2014, she was working for Employer at the Ramada hotel in Newark. She had been working in housekeeping there for about two months. On July 31, 2014, she was on the second floor and was starting to clean the rooms. She realized that she did not have the liquid cleaner used for the

bathrooms. She started walking down the stairs to the first floor and, near the bottom, she fell. She was asked at the time if she wanted an ambulance but she declined because she lacked insurance. She put some ice on the ankle. The hotel manager ("Irene") told her to go home. Claimant's sister (who works for Employer) drove her to MedExpress, where she complained about her right ankle. She was given an air cast and told that she could return to work.

Claimant believes she went back to work either the next day or the one after that. She was sent back home by her supervisor because she had an air cast on. The next week she was back at MedExpress. She thinks that they took x-rays but there was nothing else they could do and they told her to just wait until it gets better. She tried to return to work but Irene did not have her on the work schedule anymore.

Claimant agreed that she went to Westside Family Health a couple of times. She mentioned her ankle pain but, because it was a work injury, Westside did not want to deal with it. After that, she came under the care of Dr. Mesa.[3] She had about four sessions of physical therapy at Dynamic Physical Therapy ("Dynamic") and she did exercises. In November, she was walking down the stairs at her mother's house. She wore the air cast on her right ankle and was wearing socks on her left foot. She slipped and fell on her butt. She feels that she fell because she was wearing an air cast. She twisted her foot and the toes of her left foot and she went down. She did not feel like it affected her and she did not go to the hospital. The left foot was a little sore afterwards. She did call and mention it to Dynamic. She did not tell Dr. Mesa about the incident because it didn't hurt anymore.

[3] There was some testimony that, at some point in 2014, Claimant received a prescription card from the workers' compensation carrier. Claimant stated that she also received a letter with it but had thrown the letter away. She also agreed that the first time she had a prescription filled with it she had to pay money and, after that, the card was not accepted. Employer objected to this testimony on the basis that the card was not timely produced. Because the testimony does not establish that any payments were made by the carrier, the testimony concerning the card is irrelevant as to whether Claimant sustained a compensable work injury.

Claimant confirmed that she had had an MRI done and Dr. Mesa has proposed surgery. Claimant stated that her ankle swells every day, and swells more with activity. She stated that her ankle pain is at its greatest in the morning and at night. During the midday, she tries to keep her foot elevated.

Claimant denied that she has ever had a right ankle injury prior to July of 2014. While she played some soccer outside her house when she was eight or nine years old, she never hurt her body doing that. Claimant agrees that she worked at Firebirds restaurant from January to May 2014, but denies that she has continued to work there since then.

Claimant stated that she continues to take ibuprofen for her ankle pain. She has not returned to any form of work because of her pain, but she does understand that her own doctor thinks that she can work in a sedentary capacity. She was never told by Employer that there was an available sedentary position with it folding towels. She was just told that she could not work while wearing an air cast on her ankle. She has been looking for jobs. She is looking for one that does not require her to be on her feet standing all day.

Irene Flores testified that she is the general manager of the Newark Ramada. She confirmed that Claimant was working there on July 31, 2014, and an incident report was prepared concerning Claimant's fall.[4] Ms. Flores knows that Claimant went to MedExpress on that day. Ms. Flores received a note from MedExpress with work restrictions for Claimant and Ms. Flores personally offered a position at no pay loss to Claimant on August 7 that was within those restrictions.[5] She had told Claimant from the start that they would modify a position for her, but she did not get into the details of the position until August 7. The position was in the

[4] It appears that two incident reports were prepared. One is only one page and contains slightly different details from the full report. The differences are of no relevance.

[5] Ms. Flores denied that Claimant came to work on August 1. The offer was made on August 7, when Claimant was physically in front of Ms. Flores.

laundry, where Claimant could sit and fold towels. Claimant asked how she could do that job with her foot hurting her and it was explained that they would provide a chair for her to sit on. Claimant did not say whether or not she would accept the position, but she did not come in for it. After that MedExpress provided a new note indicating that Claimant could work without restriction.[6]

Dr. Lawrence Piccioni, an orthopedic surgeon, testified by deposition on behalf of Claimant. He examined Claimant on May 5, 2015, and reviewed pertinent medical records.

Dr. Piccioni stated that, on examination on May 5, 2015, Claimant gave him a history of her July 31, 2014 injury. She stated that she tripped coming down stairs, falling, and she injured her right ankle and low back. She stated that she went to MedExpress that day complaining of both her low back and right ankle. Dr. Piccioni observed that the actual records from MedExpress for July 31, 2014, only recorded ankle complaints. Claimant also stated that MedExpress told her to stay out of work for six weeks, but that also is not supported by the actual records.

Dr. Piccioni confirmed that the July 31 MedExpress records state that Claimant was in no acute distress and had a normal (non-antalgic) gait, normal stance and normal ankle range of motion. No swelling was found and no tenderness to palpation.[7] Claimant returned to MedExpress on August 7, 2014. There was a finding of right anterior talofibular ligament tenderness to palpation. An x-ray of the ankle found no fracture, but some soft tissue swelling. A note was issued releasing Claimant to full-duty work. Dr. Piccioni also confirmed that

[6] Ms. Flores stated that she subsequently put the modified duty job offer in writing. This form was completed on October 9, 2014, and states that the job was offered to Claimant on "September 1." Ms. Flores agreed that was an error and it should have read "August 1" even though a specific offer had not been made on that date either.

[7] On cross-examination, the doctor agreed that, while the note stated that no swelling of the ankle was noted on examination, it also stated that there was abnormal right lateral malleolus soft tissue swelling and pain proximal to the fifth metatarsal.

Claimant was seen by her family doctor at Westside Health three times between July 31 and October 30, 2014. Those records contain no notation of any ankle problem, not even during Claimant's annual physical on September 3, 2014. She had no musculoskeletal complaints of any kind that day.

Dr. Piccioni was aware that Claimant went to Dr. Mesa on October 30, 3014, although Dr. Piccioni did not see any record of an actual physical examination being done that day. Claimant had physical therapy on November 14 and 19, 2014. At the second appointment, it was noted that she had fallen down steps three days earlier (November 17) and rolled her right ankle, falling to her knees. Claimant then saw Dr. Mesa again on December 3 and had an MRI performed on December 15.

With respect to the MRI, Dr. Piccioni stated that it identified a signal alteration and thickening of the anterior tibiofibular ligament. That ligament is more associated with "high" ankle sprains, which tend to be more disabling. That it was thickened on the MRI shows that, at one time, it was injured, had healed and healed in a thickened state. By history and examination, Claimant did not sustain such a high ankle sprain in the July work event or the November home event. It must be from an injury at some other time.

Dr. Piccioni agreed that the MRI also found mild edema and signal alteration of the anterior talofibular ligament. That ligament is associated with "low" ankle sprains, such as twisting the ankle. The presence of edema would relate it back to the November time frame rather than the July injury. Edema from an injury is usually gone in three to six weeks.

Dr. Piccioni noted that Claimant again had physical therapy in February of 2015. Although she reported ankle pain, she was reported able to do heel-and-toe walking and CKC exercises without any reported increase in pain.

Dr. Piccioni stated that, when he examined Claimant on May 5, 2015, she walked with an antalgic gait. There was no evidence of swelling. There was no atrophy by measurement. If she was truly having a lot of pain and needing to limp and using braces, atrophy would normally occur within weeks. That she had no atrophy that many months out from the July 2014 accident suggests that she has been using her right leg normally. The doctor also found no evidence of ligament laxity. Claimant's passive range of motion was good, but on active motion she complained of difficulty.

In Dr. Piccioni's opinion, the November 17, 2014 fall was separate and unrelated to any work event in July. There was no instability from the July incident that would have led to another fall. Dr. Mesa's examination after November 17 showed different symptoms than what Claimant had displayed prior to November 17.

Dr. Piccioni also opined that Claimant was never totally disabled from her work event. She was seen the day of the injury and was released to modified duty, with restrictions only on walking more than three hours and pushing/pulling over three hours. She was released to full duty work effective August 10. Subsequent work restrictions following the November fall are unrelated to the work injury.

Mary Ann Shelli Palmer testified that she conducted a labor market survey (attached to Dr. Piccioni's deposition). Five of the nine jobs listed on the survey remained available at the time of this hearing. Nobody had applied for them.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Compensability

The Delaware Workers' Compensation 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. 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).

There is no real dispute that Claimant was involved in a work accident on July 31, 2014. It was reported to Employer and she went to MedExpress that same day. The Board is satisfied that, more likely than not, an accident happened.

The next issue, though, is what injury resulted from this accident. When, as here, there is alleged a distinct and identifiable work accident, the "but for" standard of causation must be applied. *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992). *See also State v. Steen*, 719 A.2d 930, 932 (Del. 1998)("[W]hen there is an identifiable industrial accident, the compensability of any resultant injury must be determined *exclusively* by an application of the 'but for' standard of proximate cause.")(emphasis in original). The "but for" standard does not require "sole" or even "substantial" causation. "If the accident provides the 'setting' or 'trigger,' causation is satisfied for purposes of compensability." *Reese*, 619 A.2d at 910.

The medical records are clear. Claimant went to MedExpress on July 31, 2014. The diagnosis was only of a mild ankle sprain. It was not significant enough to take Claimant totally out of work, but restrictions on prolonged walking and prolonged pushing and pulling were given (no more than three hours per work day). When Claimant was seen again on August 7, a note was issued stating that Claimant could return to work with no restrictions at all on August 10. This is all consistent with the finding of a mild ankle sprain.

Claimant did not seek any medical help with respect to her ankle for the rest of August, all of September and almost all of October, until she went to Dr. Mesa on October 30, 2014. More importantly, Claimant did seek medical help for other problems, going to Westside Family Health three times during that period. There is no documentation of any ankle complaint, not even during a full physical conducted on September 3. Claimant suggests that Westside did not want to deal with her ankle because it was a work injury. That, however, is not a credible explanation for why Westside did not even record any ankle complaint, particularly when doing a full-body physical when all complaints would be expected to be documented. The whole point of a physical is not treating a problem but simply documenting that it existed.

The clear conclusion, more likely than not, is that the reason for the lack of medical treatment for the ankle for over two months after August 7 and the lack of any ankle complaints in the records of Westside is that Claimant's July 31 ankle injury had resolved.

This does not mean that Claimant did not have an ankle injury when she saw Dr. Mesa on October 30. The Board, however, does not find that that condition is causally related to the mild ankle sprain she sustained on July 31. The December MRI did reflect two distinct injuries. One was thickness to the anterior tibiofibular ligament, indicating a prior ankle injury to that ligament. Both Dr. Mesa and Dr. Piccioni are in agreement that that injury is a sign of a "high ankle" sprain and would not typically be associated with the type of accident Claimant described in July of 2014.[8] They also agree that the injury does not match up with the fall at home that Claimant had on November 17. Thus, there is objective evidence that, despite Claimant's denials, at some point she did have another ankle injury that was from neither the July nor the November events. The other finding on the December MRI of an anterior talofibular ligament

[8] In addition, the MedExpress findings on July 31 and August 7 do not match such a high ankle injury.

injury is consistent with the November home event. As Dr. Piccioni testified, the MRI found edema, which is more consistent with the November injury than the July injury. If there had been edema connected to the July fall, it would have been gone by September and would not have appeared on the December MRI.

Employer does not need to identify a non-work cause of an injury. The burden of proof rests with Claimant. *See Strawbridge & Clothier v. Campbell*, 492 A.2d 853, 854 (Del. 1985); *Alfree v. Johnson Controls, Inc.*, Del. Super., C.A. No. 97A-04-005, Goldstein, J., 1997 WL 718669 at *7 (September 12, 1997). In this case, the evidence supports only that Claimant had a work accident on July 31 that resulted in a mild low ankle sprain that then resolved in early August (and certainly no later than September 3, 2014). Claimant's medical treatment at MedExpress on July 31 and August 7 is compensable. Claimant has not met her burden of proof as to the existence of any compensable injury after that point. Her treatment with Dr. Mesa from October 30 onward is not causally related to the work accident.

In addition, Claimant has not met her burden of proof that she was ever totally disabled as a result of this work injury. MedExpress did not take her completely out of work at any time. She was just given some brief work restrictions. The Board finds it credible that Employer was willing to accommodate those minor restrictions. Claimant's testimony to the contrary is not credible.

Attorney's Fee and Medical Witness Fees

A claimant who is awarded compensation is generally 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. However, 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. In this case, Employer did make a written settlement offer more than thirty days prior to the hearing and that offer was equal to or greater that what has been awarded by the Board. Accordingly, no award of attorney's fees is appropriate in this case.

Medical witness fees for testimony on behalf of Claimant are 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 Claimant was involved in a compensable work accident on July 31, 2014, resulting in injury to her right ankle, namely a mild ankle sprain which subsequently resolved. Claimant is awarded payment of her medical witness fees.

IT IS SO ORDERED THIS 16th DAY OF NOVEMBER, 2015.

INDUSTRIAL ACCIDENT BOARD

JOHN D. DANIELLO

MARILYN J. DOTO

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

Mailed Date: 11-17-15

OWC Staff