

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

JOEL WELBON,

Employee,

v.

BALTIMORE AIRCOIL,

Employer.

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Hearing Nos. 1501185 & 1515620

**DECISION ON
PETITIONS TO TERMINATE BENEFITS**

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 October 14, 2022, in the Hearing Room of the Board, in Dover, Delaware.

PRESENT:

MARY DANTZLER

PATRICIA MAULL

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

APPEARANCES:

Walt F. Schmittinger, Attorney for the Employee

Linda L. Wilson, Attorney for the Employer

Lynn A. Kelly, Attorney for the Workers' Compensation Fund

NATURE AND STAGE OF THE PROCEEDINGS

On July 9, 2020, Joel Welbon (“Claimant”) sustained a laceration to his head resulting in a diagnosis of trigeminal neuralgia, while working for Baltimore Aircoil. This is **IAB Hearing No. 1501185**. On September 16, 2021, Claimant injured his right foot in a compensable work accident while working for Employer. This injury is **IAB Hearing No. 1515620**.

With respect to the September 2021 foot injury, Employer filed a Petition for Review on February 22, 2022, alleging that Claimant was physically able to return to work.

With respect to the July 2020 head injury, Claimant filed a Petition for Review on May 2, 2022, alleging that Employer had erroneously terminated Claimant’s receipt of partial disability benefits based on an incorrect assumption concerning Claimant’s applicable average weekly wage. On June 22, 2022, Employer filed a Petition for Review alleging that Claimant had returned to work and that his entitlement to partial disability benefits had terminated or diminished.

With respect to both injuries, Employer filed a motion alleging overpayment of benefits.

All these matters were consolidated to be heard by the Board on October 14, 2022. By the time of the hearing, **the parties have agreed to the following:**

(1) Claimant was injured in a compensable work accident on July 9, 2020, and was entitled to compensation for total disability from July 9, 2020, through and including March 2, 2021. For purposes of the present motion only, the parties agree that Claimant was entitled to partial disability compensation for the 2020 injury from March 3, 2021, through June 30, 2022. There is a dispute concerning the proper compensation rate for these periods of disability (see below).

(2) On September 16, 2021, Claimant sustained a second work injury and went out on total disability. On February 22, 2022, Employer filed a Petition for Review seeking to terminate Claimant’s receipt of disability benefits in connection with the 2021 injury. Claimant, in fact,

returned to work on March 16, 2022, albeit still with the work restrictions from the earlier 2020 injury. There is a dispute concerning the proper compensation rate for the 2021 injury's period of disability (see below).

(3) For purposes of this motion, the parties agree that Claimant continued to be entitled to partial disability compensation from the 2020 injury from March 16, 2022. Employer filed a Petition for Review on June 22, 2022, seeking to terminate Claimant's receipt of those partial disability benefits. Claimant in fact returned to work full-duty without restrictions on July 1, 2022, and Claimant does not seek wage replacement benefits beyond that date.

(4) It is agreed that the Workers' Compensation Fund ("the Fund") paid total disability benefits with respect to the 2021 injury from February 22, 2022, through and including April 7, 2022. It is agreed that, for the period from March 16, 2022 (when Claimant returned to work) through and including April 7, 2022, Claimant was overpaid \$2,351.91, and Claimant owes this much in reimbursement to the Fund.

The parties dispute the following:

(1) With respect to the 2020 injury, Claimant's average weekly wage ("AWW") was calculated as being \$1,073.65, with an associated compensation rate for total disability of \$715.80 per week. It is agreed that this AWW is incorrect and is too high. However, the parties disagree as to what the proper AWW should have been for the 2020 injury. Employer argues that the proper AWW is \$1,001.33 (total compensation rate: \$667.55). Claimant maintains that the correct AWW is \$1,029.36 (total compensation rate: \$686.24).

(2) With respect to the 2020 injury, for partial disability, there was a period when Claimant was restricted to four hours of work per day. Based on their respective calculations for the 2020 AWW, Employer maintains the correct partial rate for this period would be \$333.78 per week;

Claimant maintains the correct rate should be \$343.12 per week. There was also a period when Claimant was restricted to working six hours per day. Employer maintains that the correct partial rate for this period should be \$166.89 per week; Claimant maintains that the correct rate should be \$171.56 per week.

(3) With respect to the 2021 injury, total disability benefits were paid by Employer based on the same AWW as was being used for the 2020 injury (namely, \$1,073.65). It is agreed that this is an incorrect AWW and both parties agree that the AWW for the 2021 injury would be less than the correct AWW for the 2020 injury. Employer argues that the correct AWW for the 2021 injury should be \$490.15 (total compensation rate: \$326.77 per week). Claimant argues the correct 2021 AWW is \$576.08 (total compensation rate: \$384.05 per week).

(4) The Fund paid total disability benefits to Claimant with respect to the 2021 injury from February 22, 2022, at the admittedly incorrect rate of \$715.80 per week. Between February 22, 2022 (when Employer's termination petition was filed), through and including March 15, 2022 (when Claimant returned to work), the Fund paid Claimant \$2,249.66. While the Fund is willing to waive reimbursement for the payment of total disability benefits for this period, it maintains that Employer should reimburse it for any overpayment (as determined by the correct AWW) for that period. If the Employer's calculation of the 2021 AWW is correct, the Fund asserts it is due reimbursement of \$1,222.67; if Claimant's calculation of the 2021 AWW is correct, the Fund asserts it is due reimbursement of \$1,207.01.

Accordingly, the parties seek the following:

- (1) Determination of the correct AWW for the 2020 injury;
- (2) Determination of the correct AWW for the 2021 injury;

(3) Employer seeks an order granting termination of Claimant's receipt of disability wage replacement benefits with respect to the 2021 injury as of February 22, 2022;

(4) The Fund seeks reimbursement from Employer for overpayment of benefits paid from February 22, 2022, through and including March 15, 2022, based on the corrected AWW for that date of injury;

(5) The Fund seeks an order that Claimant reimburse the Fund \$2,351.91 for overpayment for the period from March 16, 2022, through and including April 7, 2022;

(6) Determination of whether Claimant owes any additional reimbursement amounts to either the Fund or to Employer.

This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant testified that he has been an employee of Employer for over ten years.¹ He was injured in July of 2020 when a sheet of metal slashed him on the head. This injury kept him out of work for 8 or 9 months. Employer began to receive workers' compensation benefits fairly quickly after the injury (by July 24, 2020). He signed the tendered Agreement as to Compensation and it was intended that the agreement would pay him at the proper rate. Claimant did not get an attorney to represent him until August of 2020.

Claimant stated that he returned to work from the July 2020 injury in March of 2021. He was still medically restricted and was limited both in the number of hours per week and also in the physical demands. He was placed in a new position that paid him at the same level or hourly rate as he was earning in 2020, but he continued to receive some workers' compensation wage

¹ Claimant was originally questioned during Employer's case in chief, and then subsequently questioned by Claimant's counsel during the presentation of Claimant's case. For the reader's clarity and comprehension, the Board has combined the information from these two periods of questioning in this summary.

replacement benefits because he was restricted to part-time hours. His pay rate did increase periodically after that based on Cost Of Living Adjustments (COLA).

Claimant stated that, in September of 2021, he was working for Employer operating a forklift. The forklift ran over his foot. This put him out of work again. Carrier tendered him an Agreement as to Compensation for this injury directly and did not send it through the attorney that represented him with respect to the 2020 injury. Claimant began to receive workers' compensation benefits from the carrier pursuant to this 2021 Agreement. He assumed the carrier was paying him at the correct rate and had no reason to think the rate was incorrect. The pay was to compensate him for both the loss of his paycheck and the loss of his partial disability compensation.

Claimant returned to work following the 2021 foot injury in March of 2022, but he still remained restricted from the 2020 injury and returned to receiving partial disability compensation. Claimant acknowledged that there was a time after he returned to work where he was getting a paycheck and was being paid workers' compensation benefits from both Employer's carrier and from the Fund.

Claimant stated that he has since been released back to full-time work. His job duties are still the modified duties that he was doing when partially disabled, but now he is working full time again and is not seeking wage replacement benefits after that date, as stated in the Stipulation of Facts.

Claimant understood that his attorney had been seeking a copy of his wage history from Employer since late 2020. The data for prior to the July 2020 injury was finally provided in May of 2021. Claimant explained that there were different forms of pay reflected on Employer's paystubs (*see* Employer's Exhibit 3). For example, the pay date for July 10, 2020 reflects \$181.84 for "Holiday Pay" for Independence Day. He did not work that day, but he got paid for holidays.

Similarly, there was Holiday Pay in April of 2020. For the check with a pay date of March 20, 2020, he received vacation pay (\$179.84) for a period when he did not work but used his earned vacation time. He received vacation pay periodically. The pay dates of January 17, 24 and 31, 2020, show compensation classified as "HSA Earning." Claimant explained that was a benefit provided by Employer. Similarly, on pay date May 1, 2020, Claimant's wages carry a description "Paid Non-work." That also was a benefit payment and did not reflect actual work hours.

Similarly, Claimant reviewed paystubs for the period prior to his 2021 injury. Once again, sometimes he received Holiday Pay, Vacation Pay and "HSA Earning." The April 16, 2021 paystub also reflects some pay labeled "STD 100" (\$371.68). The May 28, 2021 paystub refers to pay labeled "S&A 65" (\$241.59). Claimant again identified these as an employment benefit.

Dr. Raymond A. DiPretoro, Jr., testified by deposition on behalf of Employer. He examined Claimant on January 24, 2022, and reviewed pertinent medical records.

Dr. DiPretoro stated that Claimant's 2021 foot injury involved a dislocation of the second and fourth toes. The dislocations were reduced and he was given a removable cast and told to stay off his foot for a week.

The doctor stated that, on examination of Claimant on January 24, 2022, Claimant's foot was neurologically intact, with no swelling or redness.² Gait was non-antalgic. Claimant appeared to have healed from the 2021 foot injury and was in need of no restrictions from that injury.

Dr. John B. Townsend, III, testified by deposition on behalf of Employer. He examined Claimant on November 12, 2020, and on March 22, 2022, with respect to Claimant's 2020 head injury.

² There was some evidence of a diabetic neuropathy unrelated to the work accident.

Following the November 20, 2020 examination, Dr. Townsend thought that Claimant was capable of light-duty work with no lifting over twenty pounds occasionally and he should not talk repetitively. The doctor also thought Claimant should avoid operating machinery.

At the March 22, 2022 examination, Claimant described his ongoing symptoms and reported that he was working six hours per day for Employer. Following the examination, Dr. Townsend opined that, while Claimant continued to have jaw and facial pain, he could work with similar restrictions as the doctor had proposed in November of 2020. In Dr. Townsend's opinion, Claimant was capable of working full time (8 hours per day/40 hours per week).

Claimant notes that he is not submitting any medical evidence because the parties have represented the periods of disability on the submitted Stipulation of Facts. Claimant acknowledges that Employer had a good faith basis to file the termination petitions but does not necessarily agree that Claimant has no restrictions from either injury at this time.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Average Weekly Wage

The parties agree that the AWWs recited on the Agreements as to Compensation in this case are incorrect. The dispute concerns (1) what is the proper AWW for Claimant's 2020 injury; and (2) what is the proper AWW for Claimant's 2021 injury. These will be discussed after a brief review of the applicable law.

A claimant's benefits under the Workers' Compensation Act ("Act") are based on the average wages received by the claimant at the time of the injury. The term "average weekly wage" is defined in part as meaning the "weekly wage earned by the employee at the time of the employee's injury at the job in which the employee was injured." DEL. CODE ANN. tit. 19, § 2302(a). The statute then gives detailed guidance on precisely how to calculate the wages earned

by the employee. If the employee has worked in the same employment for at least twenty-six weeks, then the average weekly wage is calculated “by computing the total wages paid to the employee during the 26 weeks immediately preceding the date of injury and dividing by 26.” See DEL. CODE ANN. tit. 19, § 2302(b).³ In this case, it is agreed that Claimant worked for Employer for at least 26 weeks prior to both injuries, so this is the controlling provision. The Supreme Court has clarified, though, that the divisor used may sometimes be less than 26 because only weeks where an employee actually earned wages (“actually worked”) are to be included. See *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 542 (Del. 2011).

In calculating “the total wages paid” to an employee, the statute instructs that one looks at:

the weekly wage earned by the employee at the time of the employee’s injury at the job in which the employee was injured, including overtime pay, gratuities and regularly paid bonuses (other than an employer’s gratuity or holiday bonuses) but excluding all fringe or other in-kind employment benefits.

DEL. CODE ANN. tit. 19, § 2302(a). It has been held that, therefore, by statute, employment “benefits” are differentiated from “earnings” and “benefits” are expressly excluded from the calculation of wages. See *Crouse v. Hy-Point Dairy Farms*, Del. Super., C.A. No. S14A-12-002, Stokes, J., 2015 WL 4485559, at *5-6 (July 22, 2015). “[W]ages for AWW seek to compensate an injured employee on the basis of work that was actually performed.” *Crouse*, 2015 WL 4485559, at *5. Thus, for example, if a claimant were out of work on vacation for a week, not only would that week not be included in the divisor (per *Taylor*), but the benefit received (vacation pay) would also not be included in the calculation of total wages paid because it was not pay for

³ For an employee who works less than 26 weeks but at least 13 weeks, the average weekly wage is calculated by taking “the total wage earned by the employee in the employment in which the employee was injured, divided by the total number of weeks actually worked in that employment.” See DEL. CODE ANN. tit. 19, § 2302(b)(1). In the case of employees injured prior to completing the first 13 weeks of employment, the weekly wage may be determined in a number of listed ways. See DEL. CODE ANN. tit. 19, § 2302(b)(2).

“work...actually performed.” See *Crouse*, 2015 WL 4485559, at *4. It is a “benefit,” not “earnings.”

Accordingly, the Board has previously held that such things as personal time, holiday time, vacation time, sick time and vacation sell-back may be employment benefits granted by an employer and may have monetary value to a claimant, but they are not payment for time that a claimant actually performed work and, as such, are not properly included in the calculation of the AWW. See *Reichlein v. Skyetec*, Del. IAB, Hearing No. 1507615, at 44 (November 12, 2021); *Musemici v. City of Dover*, Del. IAB, Hearing No. 1468435, at 5-6 (May 25, 2018).

Informed by this review of statutory law and case law, the Board now analyzes the information provided concerning Claimant’s AWW for the two dates of injury.

July 9, 2020 Injury: The parties submitted Claimant’s paystubs for the 26 weeks prior to the July 2020 work injury (basically the paychecks covering from January 5, 2020, through July 4, 2020). From their respective submissions of their calculations, the parties basically agree as to the wages paid for 16 of these weeks.⁴

Pay Date	Amount
01/17/2020	\$1,345.99
01/24/2020	\$1,312.27
02/07/2020	\$1,716.91
02/21/2020	\$1,168.96
02/28/2020	\$1,101.52
03/06/2020	\$1,017.22 ⁵
03/13/2020	\$899.20
03/27/2020	\$1,177.39 ⁶

⁴ No paychecks (presumably because of no work) were issued for pay dates 5/8/2020; 5/15/2020; 5/22/2020; and 5/29/2020. A paycheck was issued with a pay date of 5/1/2020, but the paystub clearly lists that payment as “Paid Non-work” and, as discussed above, that should not be included in the AWW calculation. As such, in the 26 weeks prior to the work injury, Claimant did not actually work for 5 of the weeks. In accordance with *Taylor*, the proper divisor for the “total wages” paid during this 26-week period would therefore be 21.

⁵ Claimant’s calculation (Claimant’s Exhibit 7) gave the amount of \$1,018.22, but this seems to be an error. The gross pay was \$1,018.74, but that included \$1.52 attributed to “Grp Term Life.” Deducting that amount leaves one with \$1,017.22, as Employer asserts.

⁶ Claimant’s calculation (Claimant’s Exhibit 7) gave the amount as \$1,177.41. However, the gross pay was \$1,178.91. Deducting the “Grp Term Life” amount of \$1.52 results in \$1,177.39.

04/03/2020	\$1,598.89
04/09/2020	\$1,548.31
04/24/2020	\$278.44
06/05/2020	\$363.68
06/12/2020	\$909.20
06/19/2020	\$909.20
06/26/2020	\$761.46
07/03/2020	\$727.36

As such, for these 16 weeks, the parties basically agree that Claimant's total pay was \$16,836.00. The dispute centers on the five remaining paychecks.

Pay Date 01/31/2020: The gross pay was \$1,112.82. His "regular" pay was listed as \$899.20, and there was overtime pay in the amounts of \$5.62 and \$11.24. Both parties agree these are included in "wages." There was also \$1.52 attributable to "Grp Term Life" and an amount attributed to "HSA Earning" of \$15.40. Neither party includes these two amounts in their calculations as the amounts constitute employment benefits paid to Claimant. The disagreement is over \$179.84, which is listed on the paystub as "Vacation Hrs." Claimant includes this sum and comes up with "wages" of \$1,095.90, while Employer excludes vacation pay as a benefit and comes up with \$916.06.

Based on the caselaw reviewed earlier, the Board agrees with Employer that vacation pay is an employment benefit but does not equate to "earnings" for actual work performed. As such, the "wages" (as defined by statute) for this pay period was \$916.06.

Pay Date 02/14/2020: The gross pay was \$928.82. Claimant's "regular" pay was listed as \$882.34. There was a payment of \$1.52 attributable to "Grp Term Life." There was also pay for two hours of "Vacation Hrs" for \$44.96. Claimant argues the regular pay and vacation pay should be combined for a total of \$927.30. Employer maintains that just the regular pay (\$882.34) should be considered.

Again, based on the way the statute defines wages, the Board must agree with Employer that vacation pay is not properly included in the AWW calculation. As such, the “wages” for this pay period was \$882.34.

Pay Date 03/20/2020: This one is much the same. The gross pay was \$990.64. \$809.28 was attributable to regular pay, \$1.52 was paid for “Grp Term Life” and there were 8 hours of “Vacation Hrs” in the amount of \$179.84. Claimant combines the regular and vacation pay for \$989.12, while Employer asserts it should just be the regular pay of \$809.28.

For the reasons given above, the Board finds that the “wages” for this pay period was \$809.28.

Pay Date 04/17/2020: This paystub is a little different. The gross pay was \$933.45. This consisted of \$750.09 regular pay and \$1.52 for “Grp Term Life.” The remainder (\$181.84) is classified as “Holiday Pay.” Claimant testified that he did not actually work on the holiday but Employer paid him for the day. This qualifies as a “holiday bonus” which the statute expressly excludes from the calculation of the AWW.

Accordingly, the Board finds that the “wages” for this pay period was \$750.09.

Pay Date 07/10/2020: This is similar to the last one. The gross pay was \$836.92. Regular pay was \$653.49. \$1.59 was attributable to “Grp Term Life.” \$181.84 was classified as holiday pay. Again, this is expressly excluded by statute.

Accordingly, the Board finds that the “wages” for this pay period was \$653.49.

Conclusion: The parties are in agreement that for 16 weeks Claimant received wages in the amount of \$16,836.00. The five remaining paystubs add another \$4,011.26 (being \$916.06 + \$882.34 + \$809.28 + \$750.09 + \$653.49). Thus, Claimant’s total wages for the pertinent period were \$20,847.26. As discussed above in footnote 4, the proper divisor to use is 21. As a result,

Claimant's proper AWW for the July 9, 2020 date of injury is \$992.73. His proper weekly compensation rate for total disability would be \$661.82.⁷

To the extent it is needed, for the period of time when Claimant was restricted to working four hours per day, his partial disability should therefore have been paid at the rate of \$330.91 per week and, for the period of time that Claimant was restricted to working six hours per day, his partial disability rate should have been \$165.46 per week.

September 16, 2021 Injury: The parties submitted Claimant's paystubs for the 26 weeks prior to the 2021 work injury (basically the paychecks covering the time period from March 14, 2021, through September 11, 2021). From their respective submissions of their calculations, the parties basically agree as to the wages paid for 16 of these weeks.⁸

Pay Date	Amount
03/26/2021	\$ 470.41
04/01/2021	\$ 464.60
04/23/2021	\$ 464.60
04/30/2021	\$ 470.41
05/07/2021	\$ 464.60 ⁹
05/21/2021	\$ 511.06
06/18/2021	\$ 476.22
07/09/2021	\$ 638.82
07/23/2021	\$ 651.57
07/30/2021	\$ 651.57
08/06/2021	\$ 651.57
08/13/2021	\$ 663.31
08/20/2021	\$1,003.77

⁷ This AWW and compensation rate actually comes out lower than Employer had asserted. It appears that, in its calculation, Employer included the Pay Date 05/01/2020 check that was clearly labeled as "Paid Non-Work" and then used a divisor of 22. As discussed earlier, that paycheck is excluded because it was not pay for actual work.

⁸ Claimant appears to have worked all 26 weeks of this period. As such, for the 2021 date of injury the proper divisor for the "total wages" paid during this 26-week period would be 26.

⁹ Claimant's calculation (Claimant's Exhibit 7) gave the amount as \$464.80, but this seems to be a mathematical error. The gross pay was \$499.65, but that included \$2.55 attributed to "Grp Term Life" and \$32.50 attributed to "HSA Earning" which Claimant testified was a benefit provided by Employer. Deducting those two amounts from the gross pay leaves one with \$464.60, as Employer asserts.

08/27/2021	\$ 633.96
09/03/2021	\$ 704.40
09/10/2021	\$ 704.40

As such, for these 16 weeks, the parties basically agree that Claimant’s total pay was \$9,625.27. The dispute centers on the ten remaining paychecks.

Pay Date 04/09/2021: The gross pay was \$687.15. His “regular” pay was listed as \$185.84. There was \$2.55 attributable to “Grp Term Life” and an amount attributed to “HSA Earning” of \$220.00. Neither party includes these amounts in their calculations. The disagreement is over four hours of “Holiday Pay” (\$92.92) and eight hours of “Vacation Hrs” (\$185.84).

As discussed, the Board agrees that holiday pay and vacation pay are properly excluded in the calculation of wages as contemplated by the statute. Accordingly, the Board finds that the “wages” for this pay period were \$185.84.

Pay Date 04/16/2021: The gross pay was \$685.49. Regular pay is listed as \$185.84. \$2.55 is attributable to “Grp Term Life” and \$32.50 attributed to “HSA Earning.” \$371.68 was classified as “STD 100.” Claimant testified that this was a benefit provided by Employer and, indeed, the Board is aware that, on paychecks, “STD” usually refers to short-term disability. Payment for that would not be part of compensable wages and, in fact, neither Claimant nor Employer included this in their calculations. The difference of opinion between the parties was again over the proper classification of “Vacation Hrs”—in this case, 4 hours for \$92.92.

Not including such hours as part of compensable wages under the statutory language, the Board finds that Claimant’s “wages” for this pay period were \$185.84.

Pay Date 05/14/2021: The gross pay was \$685.49. Regular pay is listed as \$278.76. \$2.55 is attributable to “Grp Term Life” and \$32.50 attributed to “HSA Earning” and neither party

includes those in the calculation. The dispute between the parties is over sixteen hours of "Vacation Hrs" for \$371.68.

Not including vacation hours as part of compensable wages under the statutory language, the Board finds that Claimant's "wages" for this pay period were \$278.76.

Pay Date 05/28/2021: The gross pay was \$534.52. Regular pay is listed as \$104.54. \$2.55 is attributable to "Grp Term Life" and \$251.59 is attributed to sixteen hours of "S&A 65."¹⁰ Neither party includes those in the calculation. The dispute between the parties is over eight hours of "Vacation Hrs" for \$185.84.

Not including vacation hours as part of compensable wages under the statutory language, the Board finds that Claimant's "wages" for this pay period were \$104.54.

Pay Date 06/04/2021: The gross pay was \$478.77. Regular pay is listed as \$429.76. \$2.55 is attributable to "Grp Term Life" and neither party includes that in the calculation. The dispute between the parties is over two hours of "Vacation Hrs" for \$46.46.

Not including vacation hours as part of compensable wages under the statutory language, the Board finds that Claimant's "wages" for this pay period were \$429.76.

Pay Date 06/11/2021: The gross pay was \$380.04. Regular pay is listed as \$191.65. \$2.55 is attributable to "Grp Term Life" and neither party includes that in the calculation. The dispute between the parties is over eight hours of "Holiday Pay" for \$185.84.

As discussed earlier, "Holiday Pay" is a benefit and does not represent actual hours worked. By statute, it is not included as part of compensable wages. As such, the Board finds that Claimant's "wages" for this pay period were \$191.65.

¹⁰ Again, Claimant identified this as an employer benefit and it seems likely that it refers to "Sickness & Accident," which would be an employment benefit paid to Claimant and does not represent hours actually worked by Claimant.

Pay Date 06/25/2021: The gross pay was \$658.80. Regular pay is listed as \$284.57. \$2.55 is attributable to “Grp Term Life” and neither party includes that in the calculation. The dispute between the parties is over sixteen hours of “Vacation Hrs” for \$371.68.

Not including vacation hours as part of compensable wages under the statutory language, the Board finds that Claimant’s “wages” for this pay period were \$284.57.

Pay Date 07/02/2021: The gross pay was \$705.26. Regular pay is listed as including both \$284.57 and \$92.92 (for a total of \$377.49). \$2.55 is attributable to “Grp Term Life” and neither party includes that in the calculation. The dispute between the parties is over six hours of “Vacation Hrs” for \$139.38 and eight hours coded as “Pers Holiday” for \$185.84.

Not including vacation or holiday hours as part of compensable wages for hours actually worked, the Board finds that Claimant’s “wages” for this pay period were \$377.49.

Pay Date 07/16/2021: The gross pay was \$706.95. Regular pay is listed as \$516.56. \$2.55 is attributable to “Grp Term Life” and neither party includes that in the calculation. The dispute between the parties is over eight hours of “Holiday Pay” for \$187.84.

Not including holiday hours as part of compensable wages under the statutory language, the Board finds that Claimant’s “wages” for this pay period were \$516.56

Pay Date 09/17/2021: The gross pay was \$753.91. Regular pay is listed as \$563.52. \$2.55 is attributable to “Grp Term Life” and neither party includes that in the calculation. The dispute between the parties is over eight hours of “Holiday Pay” for \$187.84.

Not including holiday hours as part of compensable wages under the statutory language, the Board finds that Claimant’s “wages” for this pay period were \$563.52.

Conclusion: The parties are in agreement for 16 weeks Claimant received wages in the amount of \$9,625.27. The ten remaining paystubs add another \$3,118.53 (being \$185.84 +

\$185.84 + \$278.76 + \$104.54 + \$429.76 + \$191.65 + \$284.57 + \$377.49 + \$516.56 + \$563.52). Thus, Claimant's total wages for the 26-week period was \$12,743.80. Applying the divisor of 26, Claimant's proper AWW for the September 16, 2021 date of injury is \$490.15, with a resulting compensation rate of \$326.77 per week.

With regard to both the July 2020 date of injury and the September 2021 date of injury, the Agreements as to Compensation recited that Claimant's AWW was \$1,073.65 and his compensation rate for total disability was \$715.80 per week. These Agreements are incorrect. For the July 2020 injury, the AWW is \$992.73, with an associated compensation rate of \$661.82 per week. For the September 2021 injury, the AWW is \$490.15, with a resulting compensation rate of \$326.77 per week.

The next issue is whether this correction of the respective AWWs should be applied prospectively only or made retroactive. By the Board's calculations, Claimant would have received an overpayment of almost \$16,000.¹¹ If the corrected AWW is applied retroactively, Employer would seek a credit or reimbursement in the amount of the overpayment.

Retroactivity/Credit

It has been held that, when reforming an agreement, "the Board must exercise its discretion and decide whether or not the modifications will be retroactive or prospective in effect." *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96C-01-005, Cooch, J., 1996 WL 527213 at *8 (August 9, 1996). In *Ohrt*, the claimant was injured on June 2, 1992. The injury was acknowledged and the

¹¹ Between the carrier (\$58,639.74) and the Fund (\$4,601.57), Claimant was paid a total of \$63,241.31 in disability benefits. Under the Board's calculation of the total and partial disability rates, Claimant should have been paid \$45,086.31. Claimant acknowledges that he needs to reimburse the Fund \$2,351.91 for an overpayment made after March 16, 2022. Thus, the net overpayment would be \$15,803.09.

claimant was put on an open agreement for total disability. The agreement, prepared by the employer's carrier, contained an inaccurate average weekly wage and a corresponding inaccurate compensation rate. The error was not discovered by either party until January of 1994. At that time, the employer sought reformation. *See Ohrt*, 1996 WL 527213, at *1. The Board denied reformation on the basis that it was a unilateral mistake by the carrier. The Board also observed that, because of the time that had elapsed since the total disability agreement had started, it would be inequitable to permit the employer to recover the overpaid funds retroactively. *See Ohrt*, 1996 WL 527213, at *7-*8. On appeal, the Court disagreed with the Board about a "unilateral" mistake, finding that it was a mutual mistake and that, therefore, the Board should have reformed the existing agreement so that future benefits were paid at the legally correct rate. *See Ohrt*, 1996 WL 527213, at *8. However, the Court also held that the question of whether to make the modification retroactive was committed to the sound exercise of the Board's discretion. *Id.*

The Board has considered this issue in a variety of circumstances over the years. In general, the Board looks at the degree of respective fault of the parties. The Board has declined to make the change retroactive (and thus declined a credit) when the employer/carrier was primarily responsible for the error and the claimant's mistake was only in assuming that the employer/carrier had checked the accuracy of its calculations. *See Hall v. Wilmington Housing Authority*, Del. IAB, Hearing No. 1302219, at 4 (April 24, 2009)(ORDER). On the other hand, the Board awarded a full credit when the claimant was also co-owner of the employer and was the one who provided incorrect payroll information to the carrier for determining the AWW. *See Simms v. Luxe Communications*, Del. IAB, Hearing No. 1381043, at 11-12 (October 24, 2013)(ORDER). However, even when a claimant clearly should have realized that she was being paid incorrectly (because she was being paid more in workers' compensation benefits than she would have received

if she had never been injured in the first place), the Board has declined issuing a credit because the employer/carrier delayed too long in bringing a motion challenging the rate. *See Cruz v. Star Building Services, Inc.*, Del. IAB, Hearing No. 1318869, at 13-14 (July 19, 2011)(ORDER),

In this case, the original Agreement (for the 2020 injury) was prepared solely by Employer's workers' compensation carrier, which then presented it to a then-unrepresented Claimant, who signed it. The carrier is a sophisticated professional organization which does such calculations as a regular part of its business. The fault for the incorrect calculation rests entirely with Employer/carrier. With regard to the 2021 injury, once again, an Agreement was prepared by Employer/carrier and presented to Claimant directly.¹² Thus, despite this being literally its business, the carrier managed to tender not one, but two incorrect Agreements as to Compensation to Claimant. Claimant's only fault was in not catching that a professional organization made mistakes in its calculations. To add to this, there is also some evidence that Claimant's counsel tried to get payroll information from Employer/carrier to check the calculations, and there was delay by the Employer/carrier in providing that information. Thus, the fault lies primarily with Employer/carrier rather than with Claimant or Claimant's counsel.

The Board is, therefore, satisfy that, vis-à-vis Employer and Claimant, the corrected AWW and compensation rates for the two injuries will be applied prospectively only. Employer's request for a credit for its own mistaken overpayments is denied.

¹² While Claimant had legal counsel for the 2020 injury at this time, because the attorney had not yet entered his appearance for the 2021 injury, Employer/carrier treated Claimant as unrepresented and dealt directly with him.

Termination Petitions

On February 22, 2022, Employer filed a petition to terminate Claimant's receipt of total disability benefits as they pertain to the 2021 foot injury. Based on the testimony of Dr. DiPretoro, that petition is granted as of date of filing.

On June 22, 2022, Employer filed a petition to terminate Claimant's receipt of wage replacement benefits as they pertain to the 2020 head injury. The parties stipulated that Claimant was entitled to partial disability benefits through June 30, 2022. Accordingly, Employer's petition is granted as of July 1, 2022, the date of Claimant's return to full time work.

Fund Reimbursement

As noted earlier, it is stipulated that the Fund paid total disability benefits to Claimant with respect to the 2021 injury from February 22, 2022, through and including April 7, 2022. Based on the Agreement as to Compensation that was filed for this injury, the Fund paid benefits at the rate of \$715.80 per week. This rate is recognized as being incorrect.

It is agreed by the parties that, for the period from March 16, 2022 (when Claimant returned to work) through and including April 7, 2022, Claimant was overpaid \$2,351.91 by the Fund, and Claimant owes this much in reimbursement to the Fund.

For the period from February 22 through and including March 15, 2022, the Fund paid \$2,249.66 to Claimant. The Fund maintains that, while it is willing to waive reimbursement for what should have been the correct disability benefits to Claimant, it is owed reimbursement for any overpayment of benefits it made in reliance on the incorrect Agreement on file. The Fund notes that it is not at fault for the incorrect rate being on the Agreement but, under the statute, it had no choice but to pay the rate as reflected on the Agreement after Employer filed its termination

petition. Employer argues that, in the three weeks in question, the Fund could have reached agreement with Claimant to reduce the payments to some extent.

The Board agrees with the Fund. For reasons previously stated, the Board, in the exercise of its discretion, finds that Claimant should not bear the onus of repaying the overpayment of benefits to Employer. Along the same lines, if there is any party even less at fault for the incorrect AWW on the Agreement as to Compensation for the 2021 injury, it is the Fund. It also should not bear the onus of the overpayment. The overpayment is the fault of Employer/carrier. As such, Employer/carrier should reimburse the Fund for the amount of overpayments made by the Fund. Because the Board has accepted Employer's calculation of the correct AWW for the 2021 injury, the parties in their stipulation calculate that the amount of reimbursement due the Fund would be \$1,222.67.

Attorney's 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 \$12,340.40.

While Claimant's AWW and compensation rates have been adjusted downward for the Agreements as to Compensation for the 2020 and 2021 injuries, Claimant successfully argued that the revision should be applied prospectively only. As discussed in footnote 11, the possible amount of the credit would have been \$15,803.09. This is the benefit obtained by Claimant

through this decision. Thirty percent of this amount would be \$4,740.93, which the Board finds would be the maximum allowable attorney's fee.

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's counsel submitted an affidavit stating that 31.3 hours were spent preparing for the hearing. The hearing itself lasted for roughly 2 hours. Claimant's counsel was admitted to the Delaware Bar in 1995 and he is very experienced in workers' compensation litigation, a specialized area of law. His initial contact with Claimant was in August of 2020, so the period of representation had been for about two and a half years. This case involved mildly unusual issues of fact, law and mathematics. It required moderate 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 offered employment because of his representation of Claimant, although naturally he would have been unable to represent Employer or the insurance carrier if they had sought legal advice. 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 maximum allowable amount of \$4,740.93 is appropriate in this case, being thirty percent of the value of the award to Claimant.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board finds:

- (1) that Claimant's proper AWW for the July 9, 2020 date of injury is \$992.73. His proper compensation rate for total disability would be \$661.82 per week;
- (2) that Claimant's proper AWW for the September 16, 2021 date of injury is \$490.15, with a resulting compensation rate of \$326.77 per week;
- (3) that these revisions of the AWW for the Agreements as to Compensation for the respective injuries are to be applied prospectively only and no credit is awarded to Employer;
- (4) that Employer's February 22, 2022 Petition for Review with respect to the 2021 foot injury is granted as of the date of filing;
- (5) that Employer's June 22, 2022 Petition for Review with respect to the 2020 head injury is granted as of July 1, 2022, the date of Claimant's return to full time work;

- (6) that Claimant shall reimburse the Fund \$2,351.91 for overpayment of benefits from March 16, 2022 (when Claimant returned to work) through and including April 7, 2022;
- (7) that Employer shall reimburse the Fund \$1,222.67 for the overpayment of benefits resulting from the incorrect AWW on the Agreement as to Compensation for the 2021 injury;
- (8) that Claimant is entitled to payment of an attorney's fee in the amount of \$4,740.93.

IT IS SO ORDERED THIS 6th DAY OF FEBRUARY, 2023.

INDUSTRIAL ACCIDENT BOARD

Mary Dantzyler / OWS
MARY DANTZLER

Patricia Maull / OWS
PATRICIA MAULL

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

Christopher F. Baum

Mailed Date: February 8, 2023

JRS
OWC Staff