

**BEFORE THE INDUSTRIAL ACCIDENT BOARD  
OF THE STATE OF DELAWARE**

ORRIN WHITE,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1498813
	)	
UNITED WAY OF DELAWARE,	)	
	)	
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 October 27, 2020 via video conference pursuant to the Board's COVID-19 Emergency Order dated May 11, 2020.

**PRESENT:**

MARK A. MUROWANY

ANGELIQUE RODRIGUEZ

Kimberly A. Wilson, Workers' Compensation Hearing Officer, for the Board

**APPEARANCES:**

Tara E. Bustard, Attorney for the Employee

— Joseph M. Andrews, Attorney for the Employer/Carrier

## NATURE AND STAGE OF THE PROCEEDINGS

On December 6, 2019, Orrin White (“Claimant”) was injured in a work accident while working for United Way of Delaware (“United Way” or “Employer”). United Way acknowledges that Claimant suffered a lumbar strain and muscle spasm in relation to this incident.

On April 23, 2020, Employer filed a Petition to Determine Compensation Due (“DCD”) seeking a finding that any low back injury that Claimant suffered in the work accident has since resolved; in the alternative, Employer maintains that Claimant does not have a radiculopathy condition. Claimant argues that he has an ongoing lumbar spine condition in relation to the December 2019 work accident, to include radiculopathy.

A hearing was held on Employer’s petition on October 27, 2020. The parties submitted a joint stipulation of facts for the hearing. This is the decision on the merits of the petition.

## SUMMARY OF THE EVIDENCE

Claimant was called as Employer’s first witness. On December 6, 2019, he was at a work event at Howard High School when he sat on a chair and the entire chair gave out. All of Claimant’s weight went down on his low back. Claimant felt shock and pain and had to be helped to his feet.

Claimant treated at MedExpress within a few hours of the work accident. The exam there was very brief. He was taken out of work for a few days. Claimant had numbness going down his legs. He initially had pain on one side of his back that began to radiate to the other side and to the top of his backside. He admitted that the MedExpress note may have stated “no lower extremity symptoms, no weakness, numbness or saddle anesthesia.” Claimant had shared how he was

feeling the day of the work accident, but it was much worse the next day. He had a lot of shock at first and had not had a back injury before.

Claimant returned to MedExpress on December 9, 2019. He disagrees with the medical record mentioning that his low back was very tight but that he had no neurologic symptoms including pain or numbness down either leg. Claimant had told them about these symptoms and they had referred him out for treatment elsewhere.

Claimant presented to the Injury Care Center (“ICC”) on December 12, 2019. That note also mentioned that Claimant denied radiating pain, tingling or numbness into the lower extremities. Claimant testified that he told them that he had pain from the right side of the back to the left as well as pain in the buttocks. He did not feel pain down to his knees. The pain went from the lower back through to the buttocks; however, movements would extend the pain down his legs. He estimated that the pain would go from the back into the buttocks and into the hamstrings. If the records stated that Claimant denied radiating pain, it would be because he denied pain going all the way to the feet.

Dr. Piccioni examined Claimant as part of a defense medical examination (“DME”) about seven months after the work accident. The exam was about ten minutes long. He could not recall his ankle reflexes being tested. He had to stand up for Dr. Piccioni and his back was touched a few times. Claimant had reported that his pain was 0 out of 10 on that date; however, his pain fluctuated from day to day. It is possible that he did not have back pain on the day of the DME. He told Dr. Piccioni that he was improving and that his diet, exercise and physical therapy (“PT”) had all helped, but he still had limitations. For example, he has a one-year-old that he cannot really pick up or put down.

On the day of the hearing, Claimant's back pain was about 2 out of 10. The weather has been good and Claimant was able to walk before the hearing. His pain still fluctuates.

Claimant was questioned by his own counsel. He is 32-years-old. Claimant's worst pain immediately after the work accident was on the right side of the back. He rated it at 9 out of 10. It then began to spread across the back. He was worse the day after the incident. He told MedExpress that his pain was shooting in nature. He returned to MedExpress on December 9, 2019 because his symptoms had not improved. His symptoms were across the back and down to the backside. His range of motion was limited and it was very difficult to do simple things such as drive. He had to have his wife drive him to his doctor's appointments. Claimant has had trouble getting out of bed and picking up his daughter. The injury changed the quality of his life; before the work accident, Claimant was healthy, other than asthma and allergy conditions. He had never treated for back pain before, or had diagnostic studies.

Claimant's treatment with ICC involved PT, massage and pain management. The treatment did help to improve his condition, but it only offered him some relief. He did not have amazing results. Claimant still has good and bad days; there are times when his pain is 5 out of 10 and other days when his pain is only 2 out of 10.

COVID-19 has affected Claimant's ability to seek treatment. There were a few months around the March 2020 timeframe where he did not treat because of the pandemic. He did not feel safe, and there was not a lot of information available. Claimant has only treated at ICC and MedExpress. He still takes medications meant to reduce his pain. He tries to limit medications that cause drowsiness, though he does not have to drive very much at present.

Claimant's job with United Way involves encouraging children to go to college. It also entails some fundraising. Statewide travel is required. Claimant lives in Philadelphia and his job

is located in Wilmington. He still works full-time for United Way because economically he had to get back to work. He has been working light duty since April 2020. United Way's work is fully remote through January 2021; thus, Claimant has predominantly been able to work in a sedentary position.

Claimant had another work injury about ten years before December 2019.

Claimant was again questioned by Employer's counsel. The December 12, 2019 ICC record indicates that Claimant complained of pain radiating upward, and that he had denied pain radiating into the bilateral lower extremities. Claimant reiterated that he answered the questions based on what he felt at the time; however, he had mentioned having lower back pain radiating to his backside. Any denials of pain to the lower extremities meant that he did not have pain to his feet and ankles.

Claimant could only recall hearing about muscle spasm at MedExpress. He had not had a charley horse type of back pain before this work accident.

The Board questioned Claimant. He takes three types of medications, including tizanidine. Claimant's medications have not been changed since the work accident. He does not recall denying numbness or tingling in either of his legs at the medical evaluations.

Claimant returned to work on a part-time light duty basis in January 2020. He was released to light duty work, eight hours per day, in April 2020.

Claimant had no prior back injuries.

Claimant's counsel questioned him again. He is pursuing a Ph.D. His classes ended in Spring 2018. He has been working on his dissertation since then. He has not taken classes since the work accident. The only thing he has left to do is finish his dissertation.

Lawrence Piccioni, M.D., an orthopedic surgeon, testified by deposition on behalf of Employer.<sup>1</sup> He examined Claimant on July 22, 2020 and reviewed the pertinent medical records. At the July 2020 DME, Claimant explained that he sat on a metal folding chair when it collapsed. He landed on his buttocks onto a wooden floor. Typically, such an event will cause some contusion, sprains and strains. Rarely, there can be fractures if there are unhealthy bones present.

The December 2019 MedExpress notes reflect what would be expected with a lumbar strain or contusion. Claimant had pain in the low back. There was some spasm and pain in the low back area, but no lower extremity symptoms such as weakness, numbness, tingling or saddle anesthesia. Claimant was normal neurologically, as he had normal motor function, tactile sensation, reflexes and a negative straight leg raise. The notes indicate that Claimant had denied tingling, numbness and weakness in the extremities. There was nothing objective or subjective to suggest neurological problems in the MedExpress records.

Dr. Piccioni next reviewed the ICC notes. He found them similar to the MedExpress records. Claimant complained of lower back pain, though he did mention that it radiated up to the thoracic area. He denied radiating pain, tingling and numbness into the lower extremities. His physical exam was normal, including his ankle reflexes in both legs. His entire neurological examination was normal.

Dr. Piccioni turned to the July 2020 DME. Claimant had not taken medication and yet had reported 0 out of 10 lumbar spine pain. He mentioned no numbness, tingling or pain down either leg. He had no subjective complaints at the DME. His examination was normal, to include the neurologic exam as well as the deep tendon reflexes of the ankle. There were no objective findings on examination.

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<sup>1</sup> Dr. Piccioni's deposition was marked into evidence as Employer's Exhibit #1.

Dr. Piccioni disputes that Dr. Ingram can tell that Claimant's range of motion was limited after the work accident. It would be hard to tell what is normal for Claimant, as this varies from person to person. Further, Dr. Ingram had not used goniometers or dual inclinometers to measure Claimant's range of motion.

Dr. Piccioni further disagrees with Dr. Ingram's conclusion that Claimant has radiculopathy. Under the *AMA Guides*, Sixth Edition, a diagnosis of radiculopathy requires "clinical findings such as specific dermatomal distribution of pain, numbness and/or paresthesias." No practitioner, including Dr. Ingram, MedExpress or Dr. Piccioni documented a clinical finding of a dermatomal distribution of pain, numbness or paresthesias in Claimant. Thus, Claimant does not have a true radiculopathy. Claimant's radiographic findings do not correlate with his clinical findings and, even though he has disc abnormalities in the lumbar spine, none of them are competent enough to cause a radiculopathy.<sup>2</sup> The MRI study did not show any evidence of edema or acute changes to raise the possibility of a chemical radiculopathy. These are bulges not annular tears, with no leakage of material. Therefore, there is no evidence of a chemical radiculopathy either on MRI. It is Dr. Piccioni's opinion that Claimant has never had a radiculopathy as a result of the work accident.

At the July 2020 DME, Claimant had no objective findings on examination and no subjective complaints. In Dr. Piccioni's opinion, this indicates that Claimant's work injury from seven months earlier had resolved. Thus, he disagrees with Dr. Ingram that Claimant has radiculopathy or that it would take about six to eight months for Claimant's radiculopathy to resolve.

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<sup>2</sup> Dr. Piccioni explained that the MRI showed a disc bulge at L4-5 of 2 millimeters and an L5-S1 bulge of 2 millimeters. There are 25.4 millimeters in an inch, so 2 millimeters is less than 1/12 of an inch. This would go along with the rest of the MRI reading, which showed no central or foraminal compression at either of the L4-5 or L5-S1 levels. Without any central or foraminal compression, these disc bulges would be incompetent to cause any radiculopathy.

Dr. Piccioni next addressed the EMG. His first concern is that the EMG study was not outsourced and was performed by Dr. Ingram's ICC facility; under the circumstances, there is more of a likelihood of the interpreter having a bias for anything that looks abnormal. Additionally, Dr. Piccioni does not believe the EMG findings comport with Claimant's clinical exams. The EMG indicated peripheral sensory neuropathy. The sural nerve on the left side had no response, while the nerve on the right side had a decreased response. These are sensory nerves, and the EMG indicates that the nerves cannot be picked up, yet Claimant has no complaints of numbness. The sural nerve goes from behind the lateral side of the ankle all the way to the fifth toe and to parts of the fourth toe. Claimant should have numbness from just below the knee all the way to the fifth and fourth toes based on the EMG findings. Further, even some of the other toes would likely have patchy numbness or decreased sensation, burning and tingling, based on the EMG findings. None of those symptoms were picked up on clinical examination, however. The EMG findings do not comport with any of Claimant's physical examinations. Claimant also does not have any other medical conditions, such as diabetes, which would give him a polysensory neuropathy. Dr. Piccioni questions that Claimant was simply diagnosed with radiculopathy instead of being referred out for additional testing.

The Sixth Edition of the *AMA Guides* states that once a reflex is lost due to a radiculopathy, the reflex rarely returns. Therefore, if Claimant had lost his ankle reflex because of a peripheral sensory neuropathy, he would not have gotten that reflex back. Additionally, this condition would have been present on the date of the work accident; however, he had all normal sensory motor exams of the lower extremities in December 2019.

Additionally, the EMG read as an L5 radiculopathy. Objectively, the ankle jerks or reflexes relate to an S1 nerve; an L5 radiculopathy would translate into pain on the dorsum of the



foot, numbness on the dorsum of the foot or weakness of great toe extension. None of the practitioners documented findings of an L5 radiculopathy on clinical examination.

Dr. Piccioni does not believe that the EMG represents reasonable, necessary or causally related treatment; even if a neurologic exam had been somewhat abnormal, the EMG findings would not be useful for changing the treatment plan.

While Dr. Ingram testified that the findings on MRI correlated with Claimant's physical exam and subjective complaints, Dr. Piccioni reiterated that the abnormalities shown on MRI are not competent to cause a chemical or compressive radiculopathy. He does not believe that Claimant even had radicular symptoms; within six days of the work accident, he had three examinations, all of which showed normal neurologic examinations and no complaints on sensory motor exam in a radicular pattern. The same could be said of Dr. Piccioni's DME seven months later. Therefore, Claimant never had a radiculopathy.

On cross-examination, Dr. Piccioni testified that one has to have sensory pain, motor loss and objective findings in a dermatomal pattern in order for there to be a radiculopathy. A symptom of radiculopathy could include decreased lower extremity reflexes, shooting pain and positive straight-leg testing. If there is an SI radiculopathy, there could be a decrease in bilateral Achilles reflexes. Disc bulges do not usually cause radiculopathy, particularly lower in the lumbar spine where there is plenty of distance. In Claimant's case, a bulging disc is incompetent to cause a compressive neuropathy because there are no elements of facet hypertrophy, ligamentum hypertrophy or congenital narrowing of the spine. Dr. Piccioni could not think of any case in which a 2-millimeter bulge can cause a radiculopathy.

Dr. Piccioni admitted that Claimant has no history of back injuries or problems before the work accident. He agreed that it is not unusual for a person with a lumbar strain to have good and bad days.

While Dr. Piccioni's report indicates that the December 6, 2019 MedExpress note documents "[i]t states he reports bilateral lower extremity associated symptoms," this is an error. Dr. Piccioni explained that that was just the template on the December 6<sup>th</sup> note, and did not indicate that Claimant had actually provided that history. Claimant was not reporting any bilateral lower extremity symptoms.

The EMG, which was performed about thirty days after the work accident, shows bilateral S1 and right L5-S1 radiculopathy. These are the same areas where the December 2019 MRI noted disc bulging.

Dr. Ingram had noted on exam on February 18, 2020 that Claimant had a positive straight leg raising bilaterally and decreased bilateral Achilles reflexes. Dr. Ingram again noted on August 31, 2020 that the lower extremity reflexes were decreased and rated at 1 to 2 over 4 bilaterally in the patellar and Achilles regions.

On redirect examination, Dr. Piccioni testified that he has concerns over what definition Dr. Ingram is using for radiculopathy regarding his physical examinations.

William Ingram, D.O., a physician board certified in family medicine, testified by deposition on behalf of Claimant.<sup>3</sup> Dr. Ingram reviewed Claimant's mechanism of injury as well as the treatment he received after the December 6, 2019 work accident. Dr. Ingram further reviewed the diagnostic findings after the work accident, including the MRI findings and the EMG findings indicative of a bilateral SI and right L5-S1 radiculopathy. He noted that Claimant had not had any records indicative of back treatment or injury prior to this event.

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<sup>3</sup> Dr. Ingram's deposition was marked into evidence as Claimant's Exhibit #1.

Dr. Ingram agrees with Dr. Piccioni that Claimant sustained a lumbar strain and sprain injury in the work accident. However, Dr. Ingram added that the strain and sprain injury was only part of the injuries that Claimant sustained. Claimant also had physical examination findings suggestive of radiculopathy, as well as an EMG that was abnormal. Claimant had persistent abnormalities and his specific findings were indicative of an acute radiculopathy. Claimant had a positive straight leg raising and sitting root test as well as reflex abnormalities in the form of significant decreased Achilles reflexes. The MRI findings, coupled with Claimant's clinical condition, were indications for ordering the EMG.

Dr. Ingram also disagrees with Dr. Piccioni that Claimant has sufficiently recovered to a point where he does not require any work restrictions. Claimant has persistent symptoms and physical exam abnormalities, so the reasonable thing would be for him to continue at his current level of restrictions.

Claimant's treatment has been reasonable, necessary and causally related to the December 2019 work accident.

On cross-examination, Dr. Ingram agreed that he documented that Claimant had reduced range of motion of the lumbar spine. He reached this conclusion in taking passive range of motion measurements and also in comparing Claimant to the hypothetical average man without anatomic abnormalities. Dr. Ingram had not used goniometers to measure Claimant's range of motion.

Dr. Ingram admitted that he first treated Claimant on February 11, 2020, about two months after the work accident. Claimant had treated with others at ICC about six days after the incident, however.

Claimant is technically considered “obese” regarding his body mass index (“BMI”). Obesity can be a comorbidity of back pain.

As for signs and symptoms of radiculopathy, Dr. Ingram looks for strength in terms of motor deficits. In the lower extremity, he looks for ankle flexion, plantar and dorsiflexion as well as knee flexion. There are other tests that involve deep tendon reflexes, so Dr. Ingram taps their Achilles or the patella area looking for reflex abnormalities and sensory deficits in a dermatomal pattern. Dr. Ingram tries to correlate objective signs with a patient’s subjective complaints. These would include reflex abnormalities and straight leg raising and sitting root test results.

Dr. Ingram agreed that Claimant’s December 6, 2019 MedExpress note indicates that Claimant denied tingling, numbness, weakness of the extremities and saddle anesthesia. Claimant had denied swelling or weakness. Neurologically, he denied numbness. He had full strength against resistance, and his lower back was normal without midline tenderness. His range of motion was full but painful. Claimant was noted to have normal lower extremity motor function and tactile sensation with normal reflexes and a negative straight leg raising on exam. Dr. Ingram explained that Claimant has not always had sensory deficits, and at times his motor exam has been normal. His physical exam also became less abnormal over time.

Dr. Ingram was also asked to review the December 9, 2019 MedExpress note. That note also pointed to a lack of numbness or tingling, like the December 6th record.

Dr. Ingram agreed that the 2-millimeter disc bulge seen on the MRI was not impacting a single nerve. There was no sign of edema or bone bruise or bleed on the MRI, which was taken about thirteen days after the work accident. There was no sign of central or foraminal stenosis. There was nothing compressing Claimant’s spinal cord. Dr. Ingram explained that nerve compression is only one reason to have radiculopathy. Patients can have a transient compression

where the force causes a traction or compression on the nerve root itself; then, there is nerve damage and the radiculopathy develops. Another cause of a radiculopathy is from a disc herniation, but it is also very common to have radiculopathy without a disc herniation compressing the nerve. Claimant had a compression or traction injury to his nerve roots because he developed radicular symptoms and then was diagnosed with radiculopathy objectively by way of EMG.

Regarding Dr. Piccioni's normal examination of Claimant at the DME, Dr. Ingram surmised that maybe Claimant was having a good day. He has had paraspinal knotting and noted to have some range of motion deficits on a bad day, but Claimant then had improvement with treatment. He may have had a negative straight leg raise on a certain day, as that is not impossible. However, Dr. Ingram pointed out that Dr. Piccioni's examination of Claimant is not consistent with the multiple examinations that Dr. Ingram has performed. Claimant presented ultimately with frank radicular symptoms, which were corroborated by an abnormal EMG. Claimant has gotten better and his range of motion was improved, his knotting was decreased, his reflex abnormalities were less abnormal. Claimant was substantially injured with multiple spinal nerve injuries and got better.

Claimant's prognosis is good in terms of making a full recovery. In Dr. Ingram's experience, the recovery time for spinal nerve injuries is between 18 and 36 months. Claimant will not likely have any residual neurologic problems six to eight months from September 2020. Functionally, it is very likely that Claimant will have made a full recovery in that timeframe.

On redirect examination, Dr. Ingram agreed that he examined Claimant the day prior to Dr. Piccioni's July 22, 2020 DME. Claimant's findings on July 21, 2020 showed his range of

motion was decreased and there was knotting of his paraspinal musculature in the low back. Knotting is evidence of muscle spasm or tightness. It is a pathologic abnormal condition.

A month prior to this, in June 2020, Dr. Ingram also noted that Claimant had ongoing but decreased paraspinal knotting and decreased range of motion in all planes. His motor exam was unchanged.

Dr. Ingram reviewed his August 31, 2020 record. Claimant was still showing persistent lumbar spine range of motion deficits, particularly with bilateral side bending. His lower extremity reflexes were decreased and rated at 1 to 2 over 4 (2 over 4 is normal) bilaterally both in the patellar and Achilles regions. Paraspinal knotting was noted to be ongoing, but decreased. There was some pain in the lumbar spine with extension, indicative of facet arthropathy or facet joint dysfunction. In Dr. Ingram's opinion, Dr. Piccioni's exam is an anomaly in comparison to all of the other examination findings.

Dr. Ingram agreed that Dr. Joshi had concluded on December 12, 2019 that Claimant had a positive straight leg raise test on both sides as well as a positive FABER test, indicative of hip and/or sacroiliac joint pathology.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Delaware Workers' Compensation Act states that employees are entitled to compensation "for personal injury or death by accident arising out of and in the course of employment."<sup>4</sup> The primary issue in this case is the extent of the injuries that Claimant suffered in a December 6, 2019 work accident. Employer maintains that Claimant's work-related condition has since resolved or, in the alternative, that the work-related condition does not include radiculopathy.

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<sup>4</sup> DEL. CODE ANN. tit. 19, § 2304.

When there has been a distinct, identifiable work accident, the “but for” standard is used “in fixing the relationship between an acknowledged industrial accident and its aftermath.”<sup>5</sup> That is to say, if there has been an accident, the resulting injury is compensable if “the injury would not have occurred but for the accident. The accident need not be the sole cause or even a substantial cause of the injury. If the accident provides the ‘setting’ or ‘trigger,’ causation is satisfied for purposes of compensability.”<sup>6</sup> In this case, after a thorough review of the evidence, the Board concludes that Claimant suffered a lumbar spine injury with radiculopathy / radicular symptoms in relation to the December 2019 work accident. The Board further concludes that while Claimant’s work-related condition is much improved, it has not yet resolved.

Here, the parties agree that Claimant suffered a lumbar spine injury as a result of the December 6, 2019 work accident. However, they disagree as to the extent of that injury and also as to whether the injury has already resolved. Having found Dr. Ingram most convincing and Claimant credible, the Board concludes that while Claimant’s work injuries have improved significantly, they have not yet resolved. The Board found Dr. Ingram persuasive that Claimant suffered a compression or traction injury to his nerve roots, causing the development of radicular symptoms. Dr. Ingram opined that a radiculopathy was confirmed objectively by EMG and correlated with Claimant’s subjective complaints and objective findings, such as a positive straight leg raising bilaterally and decreased bilateral Achilles reflexes.<sup>7</sup> Dr. Ingram also pointed out that the EMG findings also corresponded with the same areas of the MRI that showed disc

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<sup>5</sup> *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992).

<sup>6</sup> *Reese*, *id.* at 910.

<sup>7</sup> The reasonableness and necessity of Dr. Ingram’s order for an EMG were also at issue. In that regard, the Board notes that Dr. Ingram was found to be convincing that the MRI findings, coupled with Claimant’s clinical presentation with frank radicular symptoms, were indications for ordering the EMG. This clinical presentation included a positive straight leg raising and positive sitting root test as well as reflex abnormalities in the form of significant decreased Achilles reflexes. Thus, the Board finds that the EMG represents compensable treatment. This treatment shall be reimbursed by Employer according to the fee schedule.

bulging.<sup>8</sup> The Board found Dr. Ingram convincing that Claimant has radicular symptoms / radiculopathy in relation to the December 6, 2019 work accident. While Dr. Piccioni's DME findings differed greatly, Dr. Piccioni only examined Claimant once in July 2020. His findings were very inconsistent with Dr. Ingram's from just the day before. Having found Dr. Ingram to be most persuasive, the Board rectified these differences in Claimant's favor.

Finally, the Board found Dr. Ingram's opinion to be more convincing than Dr. Piccioni's that Claimant's work-related condition, although much improved, has not yet resolved. The Board also found Claimant to be credible in this regard. At his last visit with Dr. Ingram before the hearing, in August 2020, Claimant was still showing persistent bilateral lumbar range of motion deficits. His lower extremity reflexes were also still decreased bilaterally in the patellar and the Achilles regions. Claimant's paraspinal knotting was decreased, but still present. Claimant was also still experiencing lumbar spine pain with extension. The Board notes that there was no indication that Claimant had a preexisting lumbar condition prior to the December 2019 work accident; thus, believing that he remains symptomatic relative to the lumbar spine, the Board concludes that his work-related condition has not yet resolved.

Dr. Ingram opined that Claimant's prognosis indicates that he will make a full recovery within 18 to 36 months of the work accident, to include his neurologic problems. Based on the evidence presented, Claimant does appear to be well on the road to recovery; however, for the aforementioned reasons, the Board was not convinced that Claimant had fully recovered from his work-related injuries as of the time of the October 2020 hearing.

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<sup>8</sup> Dr. Ingram testified that the EMG, which was performed about thirty days after the work accident, shows bilateral S1 and right L5-S1 radiculopathy. Notably, these are the same areas where the December 2019 MRI displayed disc bulging.



### 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."<sup>9</sup> At the current time, the maximum based on Delaware's average weekly wage calculates to \$11,214.90. The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55 (Del. 1973). Less than the maximum fee may be awarded and consideration of the *Cox* factors does not prevent the granting of a nominal or minimal fee in an appropriate case, so long as some fee is awarded.<sup>10</sup> A "reasonable" fee does not generally mean a generous fee.<sup>11</sup> Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation.

Such attorney's fees are not awarded, however, if 30 days prior to the hearing date the employer gives a written settlement offer to Claimant or Claimant's attorney which is "equal to or greater than the amount awarded." Employer tendered a timely settlement offer to Claimant which was not "equal to or greater" than Claimant's award from the Board. Therefore, Claimant is entitled to an attorney's fee taxed as a cost against Employer pursuant to title 19, section 2320(10) of the Delaware Code.

Claimant's counsel submitted an affidavit stating that at least 15 hours were spent preparing for this hearing. The hearing itself lasted about 2.5 hours. Claimant's counsel was admitted to the Delaware Bar in 2006, and is very experienced in the area of workers'

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<sup>9</sup> DEL. CODE ANN. tit. 19, § 2320.

<sup>10</sup> See *Heil v. Nationwide Mutual Insurance Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, No. 96A-01-005, 1996 WL 527213 at \*6 (Del. Super. Ct., August 9, 1996).

<sup>11</sup> See *Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966).

compensation litigation, a specialized area of the law. Claimant's first contact with counsel was in April 2020, so counsel has represented Claimant for less than 1 year. This case was of average complexity, involving no unusual question of fact or law. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances. There is no evidence that accepting Claimant's case precluded counsel from other employment. Counsel's fee arrangement with Claimant is on a contingency basis. Counsel does not expect a fee from any other source. There is no evidence that the employer lacks the ability to pay a 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 \$5,250.00 is reasonable.<sup>12</sup> Having been successful in his petition, Claimant is also entitled to have his medical witness fees taxed as a cost against United Way pursuant to title 19, section 2322 of the *Delaware Code*.

#### **STATEMENT OF THE DETERMINATION**

For the reasons set forth above, the Board finds that Claimant suffered lumbar spine injuries in relation to the December 6, 2019 work accident to include radiculopathy / radicular symptoms. The Board further finds that Claimant's work-related lumbar spine condition has not yet resolved.

Having received an award, Claimant is entitled to a reasonable attorney's fee in the amount of \$5,250.00 and his medical witness fees.

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<sup>12</sup> See *Pugh v. Wal-Mart Stores, Inc.*, 945 A.2d 588, 591-92 (Del. 2008).

IT IS SO ORDERED THIS 21<sup>st</sup> DAY OF DECEMBER, 2020.

**INDUSTRIAL ACCIDENT BOARD**

Mark A. Murowany / ca  
MARK A. MUROWANY

Angelique Rodriguez / ca  
ANGELIQUE RODRIGUEZ

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



Mailed Date:

OWC Staff

12/22/20  
CMW