BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

PAUL A. WALKER,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1426678
	)	
CASTLE RIDE TRANSPORTATION,	)	
LLC,	)	
	)	
Employer.	)	

DECISION ON PETITION TO DETERMINE COMPENSATION DUE

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on June 7, 2018, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

IDEL M. WILSON

MARK A. MUROWANY

D. Massaro, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Sean P. Gambogi, Attorney for the Employee
Joseph M. Andrews, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On February 6, 2017, Paul A. Walker ("Claimant") filed an initial Petition to Determine Compensation Due, alleging that on March 27, 2015 he sustained head, neck, bilateral shoulder, bilateral lower extremity and low back injuries when involved in a motor vehicle accident while working for Castle Ride Transportation, LLC, ("Employer").

At the hearing Claimant sought acknowledgement for cervical and lumbar spine injuries and total disability starting the date of the incident through October 19, 2015. Claimant alleges an average weekly wage of $500.00. Employer disputes the extent of injury, total disability and alleges an average weekly wage of $350.48.

A hearing was held on Claimant's petition on June 7, 2018. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant testified at the hearing on his own behalf. He is forty years old. At the time of the work accident he was working as a driver transporting patients to medical appointments. Occasionally, he would open the door for a client. He received his assignments from his boss, Kwame Miller. He only worked for Employer four weeks, from February 27, 2015 until March 27, 2015.

Claimant agrees that he received paychecks biweekly through Paychex, (See Paychex Employee Earnings Record, Claimant's Exhibit No. 1). He was under the impression that he earned $500 per week. For the first week starting February 27, 2015 Claimant agrees that he earned $153. He does not remember why this check was less, but he believes that Mr. Miller was working him to obtain his taxi license. Mr. Miller was waiting on something to clear so that Claimant could drive. For next two weeks he was only paid $500, because he was on vacation. Then the following two week period next is consistent with a wage of $500 a week.

On March 27, 2015 Claimant was involved in a work related motor vehicle accident on Governor Printz Boulevard with a client in his car. His head was turned to the right speaking with the client and he felt a jolt to the vehicle while sitting there. He was startled and asked the client if she was okay. He exited vehicle to see what happened. The lady driving the vehicle behind him apologized. He got her information in case there was an issue. Then his biggest concern was the client.

Claimant testified that he and Mr. Miller had a relationship before the job so Claimant, who did not feel anything break, was concerned about the small company he worked for and getting the client to her residence. His body moved in the collision. He took a brief look at

vehicle and did not see a dent. He reported the accident to his Employer. He delivered the client to her home and then called Mr. Miller.

Claimant does not recall severe pain at the accident scene. His head was turned when it happened and he was jolted forward. He told Mr. Miller that he was feeling pain. He sought treatment for his neck and back later.

Claimant agrees that he had neck and back injuries prior to the work accident. He had worked as a Sales Consultant for AT&T and also delivered pizza. He did not miss any time from work due to his back pain.

With respect to the back Claimant does not recall when or what was his prior injury. It occurred while he was in the military from 1998 until 2001. He was a patient at the Veteran's Administration, ("VA"), and recalls being given Motrin for pain. He last underwent physical therapy for the back prior to the work accident in 2012.

As to his prior neck complaints, Claimant testified that he was pulled over by Police Officers on June 27, 2013, taken from his car, beaten, tased and choked on the ground. He complained about his neck at that time. Afterward he did not get much treatment. He was taken to the ER because as it was explained to him, he had been tased and needed to be checked out. Claimant was then taken to Gander Hill Prison for eighteen days. While there he reported pain to a medical person, but they did not do much. Then he went to the VA Hospital to be examined afterward. He had no other treatment for his neck. He did not have any continuing symptoms with his neck after his release from Gander Hill Prison.

After the March 27, 2015 work accident he first was seen by a medical provider that day at the VA because he is a disabled veteran. He complained of neck and back pain. He was seen at Christiana Care Hospital in the ER the next day for the same issues.

Claimant complained of neck pain because when he tried to turn his neck he heard a click and felt pain. So he decided to report it. The neck pain went into his arms and sometimes into the shoulders and fingers. He had headaches He had pain in his back after this work accident. He had some preexisting back complaints.

As far as symptoms after the work accident Claimant testified that sleeping was difficult for him due to back pain. The intensity of the back pain was worse after the work accident. Things he could do easily in the past, such as carrying groceries, was difficult. He had to use two hands. Sitting for long time without changing positions became difficult.

Claimant agrees that he was seen at the VA on April 1, 2015. He described the motor vehicle accident and that he continued to experience neck pain particularly with flexion. It radiated into shoulders, etc. Claimant testified that he never had that in the past.

After being seen at the VA he planned to see Dr. Atkins and had made an appointment which was initially set for the week before his second motor vehicle accident on April 9, 2015, however, Dr. Atkins' office called and changed it to April 9, 2015. Claimant was in a second motor vehicle accident on April 9, 2015 when he was on his way to Dr. Atkins' office from his mother's house. He was at a yield sign entering route 13 northbound to get on I – 495 and he was struck from behind again. His body moved and his vehicle was totaled. His symptoms did not change. He felt pain similar to what he felt when he was struck the first time. Dr. Zaslavsky treated him after that.

After this second motor vehicle accident Claimant initially had treatment with ATI Physical Therapy and it was good. He felt like he was progressing and a few months later he was released. Dr. Atkins had him out of work for six months. Claimant wanted to return to work so he went to the Department of Labor and took a class in order to obtain his commercial driver's

license. Then he went to work as a truck driver, however, he felt pain and it was difficult to sit and drive for eleven hours a day. He requested more therapy and treatment. He underwent acupuncture because he prefers a holistic approach.

Claimant testified that the pain has gotten worse, despite therapy. Prior to the March 27, 2015 work accident he had never undergone acupuncture or chiropractic treatment. Claimant has missed some work and now returned to work as a truck driver, but sitting for a long time bothers his neck and back. Claimant did not have this problem before work accident. For the pizza delivery job he drove a vehicle and lifted sodas, etc.

Dr. Atkins referred Claimant to Dr. Zaslavsky for treatment. Testing revealed cervical and lumbar herniations. Dr. Zaslavsky offered injections and surgery was a consideration. After conservative measures did not help Claimant he then underwent the steroid injections in his back, which were recommended by Dr. Zaslavsky. He also considered having injections in the cervical spine, but ultimately decided not to do so because of the risks involved.

Today Claimant still has neck and back pain that he attributes to the work accident. He cannot turn to right or left and he still feels a click in his neck. He had difficulty sleeping until he purchased a memory foam bed. If he finds a comfortable position he is at peace. He takes 800 mg of Ibuprofen every day, which can make him drowsy so he only takes it once or twice a day.

Claimant has been prescribed oral steroids for neck pain and if this is not effective, he will consider an injection. He is not undergoing any physical therapy, chiropractic treatment or acupuncture at this time, nor is he planning on surgery.

On cross-examination Claimant agrees that his job with Employer was as a driver. He primarily drove and it did not involve much loading or unloading. He was not carrying patients. He had worked with other employers as a driver in the past. He testified that after the March 27,

2015 work accident sitting was difficult over a long time. He also testified that he did not have these problems in the past. On cross-examination Claimant testified that it had been quite a while since he experienced this type of pain. Claimant did not dispute that his September 27, 2011 record with the VA indicates that he was complaining of chronic back pain which was worse at night and also with driving because he was a taxicab driver. It also refers to degenerative disc disease at L5 – S1.

Claimant testified that he has not undergone much treatment for his neck after his June 2013 altercation with Police Officers. He was asked about VA medical records from 1998 which show neck, shoulder and back treatment every year through November 2014. Claimant testified that he does not recall treating for the neck much after June of 2013. Claimant was also asked about complaints from July of 2013 regarding the neck and back involving clicking and popping when he turns his neck. He was also asked about a CAT scan of the neck around that same timeframe. Claimant recalls complaints of pain. The records show that by December 2013 he was still complaining of back and upper arm pain. By June of 2014 Claimant was also complaining of chronic neck pain and pain in both shoulders, as well as chronic low back pain for facet hypertrophy. When asked about November of 2014 VA records that discuss disability of the cervical and lumbosacral spine, Claimant agreed that he is a sixty percent disabled veteran. He received the disability due to a fractured wrist; ankle and severe sprains to his ankles and also fallen arches. He recalls an injury in Korea. He was on Motrin at the time.

Claimant testified that he had physical therapy at the VA for some time prior to the work accident, up until about 2012. He testified that all stopped because he had gotten to a point where he was okay and able to function and do things. When read a record that indicates he was discharged from therapy because of sexual harassment of a physical therapist Claimant denied

the charge. Claimant states he had never heard of that charge until he was discussing his case with his attorney. Claimant testified that if he had known he would have taken care of the matter. He did not pursue it when he learned of it because he had other issues going on.

When asked how he got to Dr. Atkins, Claimant testified that he learned about him through his research and then his attorney referred Claimant to him. Claimant is not sure exactly when he first saw his attorney. Claimant testified that when speaking with Mr. Miller on March 27, 2015 there was a discussion about how a worker's compensation claim could interfere with his business. Mr. Miller was a friend and it was difficult for Claimant because Mr. Miller was a small business owner, but at the end of the day he said he had to look out for his own best interests.

Claimant testified that his vehicle was totaled in the April 9, 2015 motor vehicle accident, per the appraiser. As of now he is a truck driver and he takes Ibuprofen for pain.

Upon questioning by the Board Claimant clarified that after the work accident he was out of work for six months and then he worked for Snyder, a trucking company. Since October 2015 he has had a commercial driver's license.

The last time he had physical therapy was three months ago. He stopped because he has a full-time job which is over the road with Buck Run Transport. He is able to drive every day now, with frequent stops. He is allowed to drive eleven hours a day, or seventy hours within eight days. He struggles and takes medication daily. He has no medical restrictions in terms of amount of time that he is allowed to be driving a vehicle.

Dr. James Zaslavsky, orthopedic surgeon, testified at the hearing by deposition on Claimant's behalf. He began treating Claimant on May 30, 2017, or two years after the work accident and opines that Claimant's ongoing medical treatment for his neck and back is

reasonable, necessary and sixty percent related to the work accident and forty percent to an April 9, 2015 motor vehicle accident which occurred when Claimant was on his way to see Dr. Atkins for the injuries.

Dr. Zaslavsky agrees that after the work accident Claimant sought treatment at the VA hospital the same day reporting that he had neck and low back pain as a result of a motor vehicle accident that occurred on March 27, 2015. The next time he was seen at the VA hospital was April 1, 2015 for follow-up of low back pain. Claimant was also seen at Christiana Care ER on March 28, 2015 reporting neck discomfort and low back pain after a motor vehicle accident the day before. He reported that the impact was light and he felt that he was injured after the accident so he did not report it to the police or EMS. He explained that he had some previous neck injuries from an assault and he was noticing increasing neck and low back discomfort on March 28, 2015. An out of work note was given, as well as some anti-inflammatory and muscle relaxer medications.

Dr. Zaslavsky agrees that Claimant was scheduled for care with Dr. Atkins on April 9, 2015, but he was involved in a second motor vehicle collision that day. After that point in time Claimant had treatment to address the increase in his neck and back pain.

After the March 2015 work accident Claimant had gone through some chiropractic care and acupuncture. He does not want to take a considerable amount of medication or proceed with anything that is invasive. He had gone through some physical therapy with Dr. Atkins and ATI. He has also changed his career path. He went from a heavier lifting job and obtained a CDL license so that he could do more driving and avoid the heavier lifting situations.

Dr. Zaslavsky believes that this treatment plan was reasonable and necessary. He notes that Claimant has some past medical history of neck and back pain. He had previous injuries. He

was in the military and had treated for neck and back symptoms. He was working at a very heavy duty job and functioning without symptoms at the time of his first motor vehicle accident on March 27, 2015. Overall, Claimant was not complaining to doctors at that time. He was not seeking treatment at the time of his work accident and overall was living with the aches and pains without any significant dysfunction.

After the March 27, 2015 motor vehicle accident he developed progressively worsening symptoms in his neck and low back. He had some progressive radiculopathy into his arms, numbness in his fingers, difficulty with fine motor tasks, and some shooting pain into his right buttock and right thigh from his low back. After two years he realized that his symptoms were not improving and he saw Dr. Zaslavsky to determine if there was anything that could improve his situation.

Claimant and Dr. Zaslavsky concluded that surgery was not for him. He is functional and working. He is doing things that he needs to do around the house, although he pays for it at times. Dr. Zaslavsky does not believe that Claimant would get significant improvement with surgery. If his symptoms worsen in a few years he may be a candidate for surgery. Injections were a possibility, but being against it at first a more conservative route was tried. Eventually, Claimant agreed to try an injection from which he obtained temporary relief. It did not improve his condition permanently. An injection for his neck was offered, but Claimant was reluctant to proceed. Overall, Claimant continues to deal with the symptoms even two years after the accident. He is still seeking care and trying invasive procedures. Dr. Zaslavsky imagines that when Claimant gets flare-ups he will return to be seen.

Dr. Zaslavsky opines that the injury in Claimant's low back is a combination of a bulging disc at L5-S1 which is at the lowest level and some joint inflammation at L4-5. This is based on

an April 20, 2015 MRI which showed a bad disc at L5-S1 and an acute synovitis and inflammation at L4-5 on the left sided joint. Dr. Zaslavsky notes that this finding is acute. The inflammation has not been there for five or even ten years. It is something that happened recently, in the last couple of weeks that caused an acute inflammation and swelling of that joint. Dr. Zaslavsky opines that what happens to inflammation over time is that it will dissipate if there was joint damage that caused the inflammation. If the inflammation was caused by cracked cartilage that joint will degenerate before its time, meaning premature degeneration and arthritis which is seen in Claimant's later MRI from June 26, 2017. That MRI shows facet arthritis with ligamentum hypertrophy at L4-5. So the joint that used to be swollen is now arthritic. There is swelling of the ligament and growth of the ligament that's trying to compensate for a weak joint with that much cartilage and a painful area in the low back. That change over two years shows what happens to an acute injury of a facet joint. It starts off as inflammation and swelling within the joint with the synovitis which is documented on the first MRI, and progresses to an actual arthritic problem in the back. This is a permanent injury for Claimant and he may require more treatment including therapy, possible injections and surgery. The bulging disc is stable. Dr. Zaslavsky believes that what is causing Claimant's symptoms is probably more damage to his facet joint than his bulging disc at L5-S1, but both are injuries that are seen after his motor vehicle accident on March 27, 2015.

Claimant has a herniated disc in the cervical spine at C5-6. Dr. Zaslavsky concedes that it is harder to pinpoint when this herniation occurred as Claimant was under treatment for his neck prior to the work accident. However, he was asymptomatic before the work accident. Afterward he developed increasing pain in his neck which progresses to shooting pain down his arms. He eventually gets numbness and tingling in his hands and starts to wake up in the middle of the

night. He is also starting to develop fine motor dexterity issues, such as opening tight water bottles and jars. Overall, his symptoms have been stable and because he has been able to change his career path and avoid heavy lifting he is able to avoid surgical procedures. Claimant is more likely than not to require further treatment down the line. He is more likely than not to continue with flare-ups of his neck and back problems.

Dr. Zaslavsky agrees with Dr. Atkins who disabled Claimant from work on March 27, 2015 for two days and then starting on April 15, 2015 when he saw Dr. Atkins he was disabled through October 19, 2015. Dr. Zaslavsky opines that this is reasonable and necessary. His treatment for pain management and therapy from April through October 2015 was a reasonable approach. Acupuncture to treat his neck and back pain was also reasonable. He notes it is a good option to medication. Physical therapy from June 3, 2015 through July 31, 2015 was reasonable as well. Chiropractic treatment with Dr. Eucrainyc from September 1 through January 8, 2018 is a reasonable approach as well.

Dr. Zaslavsky reviewed Dr. Atkins' notes wherein he indicated that he felt that Claimant's need for care was sixty percent related to the March 27, 2015 work accident and forty percent related to the April 9, 2015 motor vehicle accident. He agrees with this apportionment. Dr. Zaslavsky agrees that from the records that he reviewed between March 27, 2015 and April 9, 2015 Claimant's symptoms are consistent with what he found in the MRIs in April and June of 2015. Dr. Zaslavsky states that is significant to indicate that the first motor vehicle accident was consequential, contributing toward his symptoms that have progressed over time

On cross-examination Dr. Zaslavsky agrees that he did not see Claimant until over two years after the work accident. When asked to explain what his understanding was for this two-

year delay Dr. Zaslavsky states that Claimant is a guy who would rather live with his symptoms than proceed with anything like surgery or injections. He is holistic.

At Claimant's first visit he complained that his pain was at nine on a ten point scale. Dr. Zaslavsky is aware that Claimant returned to work in 2015 and had been continuing to work full-duty without restrictions. Dr. Zaslavsky understood that Claimant was working in a heavy duty position for Employer. His understanding is that the reason Claimant got his CDL license was because he was not tolerating the lifting and bending it in his old job. Now he understands that Claimant was driving a car and was rear-ended in his job with Employer. He did not know that Claimant's job was to drive passengers. He states this would not surprise him though.

Dr. Zaslavsky states that at his first visit Claimant discussed his back and that at his second visit he discussed his neck. He states that the reason for this is that they focus on one thing at a time. On May 30, 2017 Dr. Zaslavsky notes that Claimant had done very well after treatment that was noted in the VA records for his back problem in 2012. He states that at the time of the work accident he was asymptomatic.

Dr. Zaslavsky was not aware that on January 26, 2005 Christiana Care diagnosed Claimant with neck and back injuries subsequent to an automobile accident. At that time Claimant denied prior injury to his neck and back which and Dr. Zaslavsky was not aware of.

Dr. Zaslavsky was asked to focus on Claimant's VA records. Dr. Zaslavsky agrees that Claimant was complaining of pain in his arms and shoulders for a good portion of the time from 1998 to 2006. Dr. Zaslavsky was not aware that on February 18, 2010 Claimant was treating for chronic back pain. The note indicates that he was overweight and obesity would ultimately lead to low back arthritis. Dr. Zaslavsky would not call Claimant obese, but he agrees that he has only seen Claimant since 2017 and does not know what Claimant weighed in 2010. On April 15, 2010

Claimant was complaining of a traumatic head injury when he was involved in a fight and hit with a piece of furniture in 2001 and from that point on he complained of frequent headaches. Dr. Zaslavsky was not aware of the head injury although he knew that Claimant had frequent headaches in the past.

Claimant had complaints on May 15, 2018 when he was seen at Christiana Care after a motor vehicle accident with airbag deployment for which he was given a diagnosis of neck injury and contusion to the right elbow after he was T-boned. Dr. Zaslavsky was not aware of this record. He was not aware that on the same date Delaware Basic Life Support reported that Claimant had complained of pain from the right shoulder going down his entire right side.

Dr. Zaslavsky agrees that a March 25, 2010 note refers to a confrontation nine years previous when Claimant was in the military in which he sustained a head injury. Dr. Zaslavsky was not aware of a head injury. In April there is reference to Claimant being hit with a piece of furniture during a fight in 2001 and from that point on he complained of frequent headaches. Dr. Zaslavsky was not aware that Claimant's frequent headaches in the past came from being hit by a piece of furniture. Again, in September of 2010 Claimant's VA records refer to a history of chronic back pain and flare-up which Dr. Zaslavsky concedes he was not aware of. He was not aware of a history of chronic back pain, as well as a right arm fracture that occurred in the service while Claimant was playing basketball.

On August 25, 2011 Claimant's VA records indicate that he was complaining of pain in his neck, right shoulder, back and wrist which he was rating at a seven out of ten which Dr. Zaslavsky was unaware of. As well, on September 6, 2011 the VA physician contacted Claimant and advised him that he had degenerative changes in arthritis at L4 to S1 based upon his x-rays. Again, Dr. Zaslavsky was not aware of that. He was unaware that on August 31, 2011 Claimant

underwent a CAT scan of his lumbosacral spine as he was complaining of pinching sharp pain in his low back toward the right side. Dr. Zaslavsky was not aware that the scan showed asymmetric left-sided facet arthropathy at L4; slight hypertrophy at L5-S1; mild disc narrowing at L1 and L2 and L2-L3; degenerative changes at L4 - S1 that were slightly asymmetric and spinal curvature that may or may not be positional. Dr. Zaslavsky was not aware that Claimant had sustained a pit bull injury.

Upon further review of the VA records, Dr. Zaslavsky was not aware of the following: on September 6, 2011 Claimant indicated that he was taking Flexeril for pain and degenerative arthritic changes are noted at L5 to S1. The records indicate that Claimant complained of chronic back pain going back to 1998 which he said was worse at night and with driving. Claimant was diagnosed with chronic back pain due to facet hypertrophy at L4, L5 and S1. Claimant had complained in October of 2011 of numbness in both legs and pain with sitting and back pain wherein he feels crunched up. From October to November 2011 there were multiple records and physical therapy at the VA for low back and lumbosacral pain which Dr. Zaslavsky again, did not review. Claimant did not report that he had prior physical therapy for lumbosacral pain. Dr. Zaslavsky testified that he did not ask Claimant about that. Nor was Dr. Zaslavsky aware that on February 11, 2012 Claimant again treated for the low left sided back pain with radiation down the leg and tingling from his pelvis down his left groin to the great toe in the left leg, which he complained of having for six months.

As far as Claimant's altercation with the police he told Dr. Zaslavsky that he was choked at that time and injured his neck. He also informed Dr. Zaslavsky that the symptoms were transient and had improved over a short period of time. Dr. Zaslavsky was aware that on July 17, 2013 Claimant informed the VA doctor that ever since the incident he had left shoulder pain,

especially when he elevated his arm and carried things on that side. Dr. Zaslavsky agrees that the CAT scan at that time did not show any fractures. He also agrees that there was straightened cervical lordosis, which he interprets as a muscle spasm. Dr. Zaslavsky was aware of July 26, 2013 radiographs of the left shoulder which found osteoarthritis. Dr. Zaslavsky was also aware that on December 23, 2013 Claimant was seen at the VA for low back pain and pain in his bilateral upper extremities. At that time Claimant reported that he had experienced back pain for several years and by that point he rated it at six out of ten and indicated that even sneezing could exacerbate pain. The impression was chronic low back pain due to the facet hypertrophy of L4 through S1.

Dr. Zaslavsky did not see a VA note in June of 2014 wherein Claimant was treated for ongoing headaches after he was hit in the head one year earlier. Claimant was complaining of chronic neck pain with severe headaches. Dr. Zaslavsky believes that sounds more like a headache than a head injury. The record also showed that Claimant's left shoulder was resting several inches lower than his right shoulder. Dr. Zaslavsky did not observe this, but he notes that that is very common.

At that time it was noted that Claimant continued to complain of low back pain, but also of pain in his bilateral upper extremity that made it difficult for him to open bottle caps. Dr. Zaslavsky agrees that although Claimant had indicated to Dr. Zaslavsky that his prior neck pain had resolved, or returned to baseline, after his altercation with the police in June 2013, the record reveals that a year later he was still complaining of chronic neck pain. Dr. Zaslavsky testified that he does not know if it was coming from the furniture injury where he was hit in the head with a piece of furniture. Dr. Zaslavsky agreed that it is inaccurate for Claimant to represent that by the time he saw Dr. Zaslavsky his neck pain had resolved.

Continuing with the VA records, on November 6, 2014 the record reveals that Claimant indicates that sixty percent of his complaints, including lumbosacral and cervical, were related to his service in the Persian Golf War which Dr. Zaslavsky was unaware of. He also was not aware of a May 16, 2014 note from the VA wherein Claimant was complaining of low back pain, right greater than left, and issues with prolonged standing, sitting, walking long distances and lifting from a ground level.

Dr. Zaslavsky did see the VA note from March 27, 2015, the date of the work accident. He agrees that Claimant continued with his complaints of neck and back pain, but he denied numbness, tingling, weakness or bowel and bladder incontinence. The only diagnosis for that day was soft tissue neck and low back pain. He also admitted to the VA, that there was no damage to his car in the accident. He had no other complaints that day and was noted not to be taking medication for the incident.

Dr. Zaslavsky again reviewed the March 28, 2015 Christiana Hospital record and agrees that the severity of pain is noted to be mild. Physical examination of the neck showed normal range of motion and there was no evidence of trauma of the head or neck. There was no CVA tenderness or vertebral tenderness of the back. The extremities were atraumatic and had normal range of motion. He ambulated without assistance and without any change of gait or obvious signs of discomfort.

Dr. Zaslavsky agrees after this review of the records that Claimant had a long pre-existing history of neck and back symptoms going up to less than a year before the work accident. He opines, however, that the initial MRI on April 20, 2015 shows acute synovitis of the right L4-5 facet joint. Dr. Zaslavsky believes that this is an acute finding, meaning that whether or not Claimant had some pre-existing problems at L4-5, the swollen joint is acute. This

progresses to an MRI finding of degenerative disease in that joint and Claimant continues to have pain in his back to this day and it is worse than before the accident. The same is true of his neck. He has had persistent symptoms in his cervical spine as well that limit his ability to perform activities of daily living. Dr. Zaslavsky believes that Claimant is living with limitations. He does not believe that Claimant requires surgery at this time, but he opines that he is a candidate for injections for an acute flare-up of his injuries. He does not doubt that Claimant had chronic problems before the work accident. Dr. Zaslavsky believes that Claimant's pain is more consistent at this time and more limiting to his active lifestyle.

Dr. Zaslavsky agrees that the ER placed Claimant on a no work note for three days after the incident. He agrees it was not done on a Worker's Compensation note. He notes that typically this indicates that a re-evaluation is necessary prior to releasing the patient to return to work, whether it was on the Worker's Compensation form or not. Dr. Zaslavsky agrees that the ER note indicates that Claimant represented that the impact was light and he felt that he was uninjured after the motor vehicle accident. He did not report it to the police or EMS and drove himself to the ER the next day. He was ambulatory at the scene of the motor vehicle accident and interviewed the offending car and felt that nobody was injured. He left the scene after the drivers provided information to each other. Claimant reported no obvious injuries after the accident, just distal to the neck and back. Dr. Zaslavsky testified that many times symptoms are not felt until the next day which was when Claimant was seen in the ER.

Claimant had a second motor vehicle accident on April 9, 2015 on the way to see Dr. Atkins. That is after the three days that he was out of work.

Dr. Zaslavsky reviewed Dr. Smith's DME report, but did not review Dr. David Stephens' DME report from July of 2015. He is not aware that Dr. Stephens found the same as Dr. Smith,

and agrees that July of 2015 is closer in time to the work accident than his own first visit with Claimant two years afterward. Dr. Zaslavsky does not agree that Claimant sustained a mild myofascial strain of the cervical and lumbar spine. He points to the acute synovitis of the facet joints at L4-5 and states that doesn't happen from a myofascial strain. Rather it occurs from a cartilage injury or some type of internal damage within the joint itself. For a joint to blow up with fluid and develop a synovitis something has to happen to damage the joint itself and he believes it is most likely that a cartilage injury to the joint caused the synovitis. He testified that arthritis could also cause this, however it is not seen in multiple joints throughout the lumbar spine. Although Claimant had problems at L4-5 before, now he has an acute worsening of his symptoms from both the March 27 and April 9, 2015 motor vehicle accidents that potentiate a more persistent problem and change his active lifestyle significantly.

When asked to specifically focus on March 27, 2015 Dr. Zaslavsky concedes that he does not have any imaging from right after that accident, nor did he have a chance to evaluate the Claimant at that time. Thus, Dr. Zaslavsky concedes that it is very difficult for him to give any significant opinion with a reasonable degree of medical probability for that accident alone. He believes a certain portion of Claimant's symptoms are related to the March 27, 2015 work accident and he would apportion it as slightly higher than the April 9, 2015 motor vehicle accident. He would apportion the March 27 accident at sixty percent causation in agreement with Dr. Atkins. Dr. Zaslavsky points to the fact that Claimant went to the ER after the March 27, 2015 work accident and radiographs were taken of his neck and back. Dr. Zaslavsky opines that Claimant can perform full-duty functions at this time. He should avoid heavy lifting and repetitive bending.

On redirect examination Dr. Zaslavsky reiterated that he is aware that Claimant had prior complaints of neck and back pain, he was just not aware of all the details delineated in the VA records. He agrees that the VA records for March 27, 2015 indicate that after the work accident Claimant reported pain over the left shoulder, neck and low back. He reported that he felt more pain with movement and denied any numbness, weakness or problems with bowel and bladder control. Then on April 1, 2015 when Claimant was seen at the VA he reported continuing neck pain, particularly with flexion; that sometimes radiated into the shoulders. He also reported an occasional headache and a pinching sensation in the neck, which worsened with turning his head to look left while driving. Thus, Dr. Zaslavsky agrees that Claimant was exhibiting some complaint with his neck and back in between the two accidents. Dr. Zaslavsky agrees that is consistent with a herniation at C5-6. Dr. Zaslavsky reiterated that the synovitis is acute, and not related to Claimant's prior events.

Kwame Miller, owner of Castle Ride Transportation, LLC, testified at the hearing on Employer's behalf. He moved from New York to Delaware in 2006. He came to this country from Jamaica and earned a GED. He then enrolled in a program with the University of Delaware. He formed his company Castle Ride Transportation in 2011. The business provides people, often elderly, with rides to their medical appointments. Most of his clients are on dialysis or require non-emergency doctor visits.

Mr. Miller's business works with ambulatory patients, therefore, lifting is minimal. It would be limited to lifting a walker or possibly a fold up wheelchair. Occasionally, a driver will assist a patient with a wheelchair, but they are not supposed to do that. The vans are not equipped for the handicapped. Most of his employees are small women and so the lifting is minimal.

With respect to Claimant's wage rate, Mr. Miller testified that Claimant was hired at $8.50 to $9.00 per hour. After his ninety day probationary period an assessment was to be made as to whether he could advance up to $500.00 a week, but Claimant was hired at $8.50 to $9.00 per hour. The work hours vary depending upon the appointment times, etc. It could be forty hours a week or a little more, Mr. Miller was not sure.

Mr. Miller explained that given this Claimant's average wage was $340.00 to $360.00 per week. He explained that they get paid through Medicaid and it is not a lot. To make wages they have to pick up more people and work longer hours. At times, drivers are sitting and doing nothing for two or three hours. Thus, sometimes it is more hours and sometimes it is less. Once Claimant got used to the roads, etc., then he could earn $500.00 a week.

With respect to the March 27, 2015 work accident, Claimant was driving the van and informed Mr. Miller that there was no damage. When Claimant called him to report the motor vehicle accident, Mr. Miller inquired about the condition of Claimant, his client and the other driver. Claimant informed him that they were all were fine and that the other driver was an elderly lady. He indicated that nothing happened to the car because the light just turned green and the cars only "kissed" each other.

Claimant took the client home. Mr. Miller saw the van when Claimant returned to work. Mr. Miller does not remember if Claimant transported any other people that day. He remembers that he asked Claimant if he was okay. Claimant took the van home that day because he was to return to work on Saturday. Then Claimant texted Mr. Miller late that night and indicated that he would not be coming in to work the next day. Claimant said that he went to the ER. Claimant also indicated that he was okay for Monday. Then on Sunday Claimant came by Mr. Miller's

house, to return the van and stated that he could not work on Monday because he had talked to a lawyer. Claimant indicated that he had to take care of himself right now.

There was no damage to the van. It took Mr. Miller by surprise that Claimant was not returning to work on Monday. This messed up the schedule because they did not have enough drivers. If Claimant had told Mr. Miller earlier he would not have put him on schedule.

Claimant did not ever inform Mr. Miller that he was injured. Mr. Miller asked Claimant initially if he was okay and Claimant indicated that he was, as well as the passenger and other driver.

On cross-examination Mr. Miller explained that his business is for ambulatory patients, so legally they cannot take someone with a manual scooter. Additionally, there would be no space in the car, and it would be too heavy. The job duties may include helping people in and out of vehicle.

Mr. Miller testified that when he told Claimant that the wage was $8.50 to $9.00 dollars an hour Claimant said that he could not work for that. Mr. Miller indicated that he had to start Claimant at that level. He agrees that the first week Claimant worked for eighteen hours and earned $153, which would be $8.50 an hour, (See Claimant's Exhibit No. 1). So his first week was not a full week. He agrees that Claimant took a one week vacation and that he was paid $500 the second week. Mr. Miller explained that the reason for this is because two other employees were off so he gave Claimant this flat rate of $500 a week. He reiterated that it would be ninety days before Claimant could get paid $500 a week. Despite paying Claimant $500 a week for the remaining weeks that he worked Mr. Miller testified that the agreement was actually for $8.50 an hour. The higher rate was because they were down some drivers. Once the drivers returned Claimant was going to go back to $8.50 per hour.

Mr. Miller had a relationship with Claimant before he started working for him. Mr. Miller had a foster child and Claimant would watch after the child for him at times. They also used to work together at Yellow Cab. Claimant came to Mr. Miller for a job and he took on Claimant because he wanted to help him. Before he hired Claimant he would have said that Claimant was trustworthy, but now he does not believe that. After the work accident Claimant texted Mr. Miller and told him not to worry because he was in a second motor vehicle accident after the March 27, 2015 one. Claimant stated do not worry, I got you.

When Mr. Miller talked to Claimant at the time that he returned the vehicle Claimant indicated that he was sorry, but he just had to do this because he had talked to a lawyer and he had been pushed over so many times and this time he would have to get something for it.

After the March 27, 2015 work accident Claimant said that he was going to the ER because he was a little stiff. Claimant indicated that he had to get himself checked out. He never said he had pain or that he might not work his next shift. When he returned the van Claimant did not say he was having any medical problems.

Dr. Robert A. Smith, orthopedic surgeon, testified at the hearing via depositions on Employer's behalf on August 28, 2017 and May 30, 2018 (Employer's Exhibit Nos. 1 and 2 respectively). He examined Claimant on June 26, 2017 and reviewed the pertinent medical records. In his opinion Claimant suffers from degenerative disc disease and not an acute low back injury. Claimant did not sustain any significant or lasting injury in the work accident.

At his DME Claimant reported that he was in two different motor vehicle accidents: one on March 27, 2015 and the other April 9, 2015, both of which were rear-end collisions. At this DME Claimant was complaining of pain radiating from his neck and back into the upper and lower extremities with tingling in his feet. He indicated that prolonged sitting and activities

accentuated those symptoms. Dr. Smith agrees that Claimant had been treated for neck and back pain through the VA for quite some time. He had been seen for neck and back pain since 2006. The VA records indicate that Claimant had attended treatment sessions for complaints of chronic radiating neck and back pain. It was consistent treatment over the years, even up to and including the recent March of 2015 motor vehicle accident. The records extended back to 2006, so they represent almost a decade of these types of symptoms that were similar to the ones that Claimant had following the work accident.

Dr. Smith agrees that there are numerous references in Claimant's VA records to chronic back, neck, right shoulder and wrist pain; a head injury; and frequent headaches. He agrees that the VA not only treated Claimant for these complaints, but they performed numerous diagnostic tests.

Dr. Smith believes that the March 27, 2015 VA record is critical. This is when Claimant was first seen after the work accident, so it is an important note. It occurred the same day as the work accident, later in the day. Claimant had complaints, but they were confined to his neck and back and he denied radiating numbness or tingling, any weakness or bowel or bladder involvement. He did concede that there was no damage to his car as well. He indicated he was not taking any medication for the incident and Dr. Smith notes there was no medication issued specifically for that incident.

Claimant was seen at Christiana Care the next day, March 28, 2015, at which time he had complaints of neck and back pain similar in nature to his complaints at the VA, but Claimant described the work accident. He indicated that the impact was light and that he felt uninjured after the accident so he did not report it to anybody. Claimant mentioned a prior neck injury and assault that had occurred previously and just noted that he had some increasing neck and back

symptoms that he felt were from the work accident. He stated that the symptoms were mild. Dr. Smith notes that the clinical findings in the ER were benign. There were not any significant findings of injury, either of the head or spine, or the neurological structures. Claimant had plain x-rays that did not show anything acute. Thus, Claimant was diagnosed with soft tissue strains, given some medication and then released that day.

Based upon his review of all the records Dr. Smith opines that by April 8, 2015 Claimant had recovered from any minor injury that he may have sustained on March 27, 2015 within a few days, certainly by April 8, 2015. This is based upon his review of all of the records and he notes that the record from the VA and Christiana Care from just after the work accident do not show any sign of objective injury. Claimant had complaints, was examined and some tenderness was found here and there, but no objective signs of injury. Even the mechanism of injury as described by Claimant was minor and he considered himself uninjured. Dr. Smith notes that he has probably treated 10,000 more patients after automobile accidents.

Dr. Smith testified that in cases where there is no damage to the vehicle the prognosis is invariably good because with a low impact collision serious injury is unlikely. He notes however, that there is not a strict linear correlation between property damage and personal injury, but just by physics, it is unlikely that a patient would sustain serious injury or aggravation from a minor rear-end collision without property damage. Dr. Smith has treated whiplash in thousands of patients. It occurs depending on the direction of the force, but if one is hit from behind usually the car moves out from under the occupant who is stationary because the rider is not attached to the car, and the head and neck usually go backwards first and then rebound and, forward. It would be the opposite for a head-on collision. Thus, it is an extension flexion type of injury. He notes that every orthopedist has taken a course in biomechanics because that is orthopedics,

essentially how trauma affects human tissue. If there is no evidence of damage, then the force delivered to the car would have to be very minor, as in Claimant's case.

Dr. Smith agrees that on December 23, 2013 Claimant was treated at the VA for low back pain and pain in his bilateral upper extremities and he was complaining of chronic back pain for several years. He treated for his chronic back pain and radiation to the lower extremities at the VA up through May of 2014 and then started again in March of 2015. The treatment was consistent and Claimant had ongoing treatment at the VA for his neck, bilateral upper extremities, low back and radiation to the lower extremities.

At his DME Claimant appeared muscular, fit and he had no abnormalities of the cervical spine, including those such as spasm, atrophy or trigger points. He had very satisfactory and functional range of motion. He was mildly self-limiting at the extremes because he said he had some pain, but Dr. Smith could find no rigidity or spasm in the soft tissues about the neck when he did those maneuvers. Similarly, with the back, he had no adverse soft tissue problems or deformities. He had satisfactory and functional ranges of motion of the back without adjacent spasm or rigidity in the paraspinal soft tissues. The neurologic examination was completely normal. He had no atrophy in the extremities and normal reflexes and strength. He had no specific complaints about his shoulders, which were essentially normal to exam. Basically, Claimant had a normal musculoskeletal examination at his DME, other than his subjective complaints of pain when he moved his neck. Dr. Smith agrees that his examination was the same as that of Dr. David Stephens as reflected in his July of 2015 report. The examinations were consistent with each other. Dr. Stephens performed straight leg raising bilaterally in both seated and recumbent positions which showed negative results without any focal weakness present in

either lower extremities and that the Achilles tendon and patellar tendon reflexes were symmetrically active bilaterally.

Dr. Smith notes that he saw Claimant in June of 2017, or more than two years after the work accident. So if in March or April of 2015 Claimant had sustained any serious injury, which damaged the muscles, then some atrophy, fibrosis or rigidity would be expected as they are chronic findings for soft tissue problems. Claimant did not exhibit anything at his DME in June of 2017.

Dr. Smith notes that Dr. Stephens saw Claimant about four months after the work accident and at that time most soft tissue injuries, unless they are severe, will recover with or without treatment. So unless Claimant had some rupture of the muscle tissue it would not be expected to find anything four months later. Again, Dr. Stephens' examination was like Dr. Smith's in that he did not find any significant posttraumatic abnormalities or pathology. Dr. Smith notes that Claimant had certain complaints, but Dr. Smith could not find anything of significance on clinical examination that would support those complaints.

Dr. Smith opines that at worst, Claimant had a minor soft tissue injury in the work accident because of the findings, or lack thereof, from the VA hospital and Christiana Care ER a couple of days afterward and his comments about the actual mechanism of injury. Dr. Smith opines after the March 27, 2015 work accident Claimant's very minor soft tissue injuries would heal within a week to ten days or by April 8, 2015. There would not be any prolonged problem with such a minor injury. In other words, Claimant's soft tissue work injury resolved by April 8, 2015. There was no evidence from the VA or Claimant's hospital visit that there was any significant soft tissue abnormality, such as a spasm, bruising, swelling, or limited motion etc. There were no neurological deficits. The resolution would have been complete by that time

because there was not much in the way of any documented pathology. This means that Claimant returned to his baseline condition by April 8, 2015. He obviously has a lot of pre-existing symptoms so he would be back to baseline by ten days after March 27, 2015.

As far as Claimant's visit to Dr. Atkins on April 9, 2015 any symptoms would be related to his pre-existing low back, neck and upper and lower extremity radiation that he had previously for many years. His pre-existing issues are the major part of his symptoms. He had another accident on April 9, 2015, which probably resulted in a minor soft tissue injury as well. He did not see Dr. Atkins until April 15, or six days later, and Dr. Atkins found some soft tissue injuries. Dr. Atkins' findings were completely new compared to the VA and the Christiana Care ER visits after the March 27, 2015 work accident. So in Dr. Smith's opinion anything that Dr. Atkins found on April 15, 2015 would be a combination of Claimant's pre-existing condition, plus whatever minor soft tissue injury Claimant might have sustained on April 9, 2015. Nothing was related to the March 27, 2015 work accident as it resolved by April 8, 2015.

As to the assertion that sixty percent of Claimant's symptoms are due to the March 27, 2015 work accident and forty percent are due to the April 9, 2015 motor vehicle accident Dr. Smith disagrees. He believes that is completely inaccurate as Dr. Atkins does not take into account the long-standing problems that Claimant has been seen for at the VA for over ten years. That represents the bulk of Claimant's problems. If there were any apportionment it would probably be 90 percent pre-existing and 5 percent each to the minor accident that Claimant had in March and April 2015. Dr. Smith opines though that anything that arose out of the March 27 work accident resolved by April 8, 2015, given the lack of any findings at the VA or Christiana Care ER and the description of the accident by Claimant.

Claimant returned to work in September of 2015 full-duty as a truck driver. He had undergone an FCE in August of 2015, which he passed as having the ability to perform heavy-duty work, lifting up to 100 pounds. He ultimately returned to work as a truck driver in September of 2015 and has been working that job ever since. Thus, his work capacity is much greater than that in which he is working.

Dr. Smith opines that Claimant made a full and complete recovery from the work accident and he was released to work as of April 1, 2015. This is consistent with the physical capacities evaluation of Dr. Stephens, which also noted that Claimant had made a full and complete recovery.

On cross-examination Dr. Smith is not clear whether Dr. Atkins was aware of Claimant's extensive pre-existing history of low back pain when he first evaluated Claimant. He agrees that on April 15, 2015 Dr. Atkins references a past history of disabled veteran status, including post fracture of the right wrist, low back syndrome and fallen arches.

Dr. Smith reiterated that at the Christiana Care ER visit after the March 27, 2015 work accident there were no significant objective findings. Claimant had x-rays of his neck and low back, which would show a fracture, dislocation or any soft tissue swelling. Dr. Smith agrees that Claimant did not have any MRI between March 27 and April 8, 2015. He believes that Claimant's injuries from the March 27, 2015 work accident would have resolved by April 8, 2015 given the minor nature of his presentation, both at the VA and in the ER the next day. Whatever soft tissue injury he might have sustained in the March accident likely resolved by April 8, 2015. Dr. Smith did not review any photographs of damage to the car in the work accident.

In the one or two years prior to the work accident Dr. Smith believes that primarily Claimant was taking medication for his long-standing history of low back issues. He agrees that Claimant was not in physical therapy as Claimant's condition was chronic so he was mostly on medication. Claimant indicated that he was taking meloxicam, which is an anti-inflammatory. He does not recall what other medications Claimant was taking.

Dr. Smith agrees that after the April 9, 2018 motor vehicle accident Dr. Atkins found some spasm in the spinal area and he treated Claimant for a soft tissue injury. He agrees that Dr. Atkins found positive straight leg raising test results at times, but Dr. Smith notes that is not an objective finding. The test is 99 percent subjective. Dr. Smith agrees that the only medical providers who Claimant saw from March 27, 2015 to April 8, 2015 were one visit to the VA and an evaluation at Christiana Hospital ER. The only imaging performed during this timeframe were the x-rays at Christiana Hospital.

On redirect examination Dr. Smith agrees that Claimant underwent physical therapy in 2011 at the VA up until some allegation was made of sexually inappropriate comments by Claimant to the physical therapist, but Dr. Smith declined to comment on this issue. Dr. Smith agrees that the VA records indicate that Claimant was taking Flexeril, which is a muscle relaxer, and smoking marijuana on a daily basis, which Claimant may be using for palliation of his neck and low back injuries.

Dr. Smith testified that as far as the period from March 27, to April 9, 2015, he believes that if Claimant had been severely injured then the VA or the ER would have picked it up. At the ER Claimant reported no obvious injuries after the March 27, 2015 work accident, which Dr. Smith felt was important. Claimant indicated that the impact was light and he felt uninjured. That is pertinent history from his own mouth that this was a minor situation. A physical exam

yielded no evidence of trauma. Taking into account the history that he gave, it is obvious that whatever injury he had was minor. Given this history Dr. Smith does not believe that anything that Claimant was going to treat with Dr. Atkins for on April 9, 2015 was causally related to the work accident. Those statements were telling that this was a minor incident. Basically, Claimant went to the ER and admitted that he did not think he was injured and the exam turned up nothing, and it is clear that he did not have any significant injury from the March 27, 2015 work accident.

Dr. Smith was deposed a second time for his thoughts after consideration of Dr. Zaslavsky's opinions set forth in his deposition at a second deposition. Specifically, Dr. Smith first considered Dr. Zaslavsky's opinion that what caused Claimant's symptoms would probably be more related to the damage to his facet joint than the bulge at L5-S1, but both are injuries that are seen after the work accident. Dr. Smith notes that simply because there is a temporal relationship does not equate to a causal relationship. There has to be a reasonable mechanism of injury that could cause the injury and in this case, the alleged work injury is some facet arthrosis and a thickened ligamentum flavum. There must be exposure to something that would cause the injury and the contemporaneous medical records must also be considered to determine if there is any clinical finding to corroborate it. Without that, such as in this case, it is very hard to correlate an event with an MRI that was done later.

As far as Dr. Zaslavsky's opinion that Claimant was asymptomatic after the March 27, 2015 work accident as to the neck at C5-6, but now has ongoing flare-ups, Dr. Smith opines that Dr. Zaslavsky is missing that Claimant had chronic problems with his neck prior to the work accident. Claimant even informed the ER of his prior neck problem. The sixty percent apportionment of symptoms to the work accident and forty percent to the April 9, 2015 motor vehicle accident simply ignores this prior history. However, Dr. Smith notes that the March 27,

2015 mechanism of injury is that there was no damage to his car and Claimant did not even report it, while the April 9, 2015 motor vehicle accident resulted in a totaled vehicle. So the mechanism of injury in the second accident certainly had more of an impact. Thus, the assessment is inaccurate. A large part of Claimant's neck complaints are due to his pre-existing problems and based on the mechanism of injury very little is attributable to the work accident.

Dr. Smith agrees that Dr. Zaslavsky does not appear to have relied on Claimant's pre-existing records in forming his opinion. Claimant was treated through the VA because he was a veteran and he had an original injury when he was in the service, but he had chronic issues with his spine and was treated off and on at the VA for years. On March 27, 2015 Claimant was seen at the VA and he continued with his complaints of neck and back pain, but denied numbness. He denied any neurological accompaniment to his neck and back pain that day. He denied numbness and tingling, weakness or any bowel and bladder incontinence. So it involved solely complaints of pain around his neck and back which were not any much different than are seen in his VA records from 2005 through 2015. On March 27, 2015 Claimant informed the Hospitalist at the VA that there was not any damage to his car, he had no other complaints and was not taking any medication for the incident. The only diagnosis was soft tissue neck and low back pain. Again, when he was seen in the ER on March 28, 2105 he indicated that the impact was light and he felt uninjured. He also went on to indicate that he had a prior neck injury and it was not until that morning that he started to develop symptoms in his neck and back that he attributed to the work accident. He drove himself to the ER, but complained of only mild discomfort or pain. There were no objective signs of acute trauma.

Dr. Smith opines that, at worst, Claimant sustained a superficial muscle strain in the work accident. None of the deep structures of his spine were affected by the work accident. Whatever

he had objectively resolved by the time he was seen in the ER. So either he had no injury in the work accident or it was a mild superficial strain that resolved. Claimant recovered by April 1, 2015. The findings on MRI are consistent with longstanding degenerative disc disease. For example, the thickened ligamentum flavum and facet joint effusion are all seen with degenerative disc disease. None of those findings are indicative of trauma. That Dr. Zaslavsky opines, two years later, these changes are related is incredible and disconcerting.

On re-cross examination Dr. Smith confirmed that at the time of his earlier deposition he had not reviewed the April 20, 2015 MRI studies as they were not available at the time. He reviewed the actual images of the MRI. He notes that no one referred Claimant for any studies between March 27, 2015 and April 9, 2015. Dr. Smith points out that there was no indication to do so. He had no clinical findings or complaints of any neurological involvement. No doctor in their right mind would order an MRI on a patient who is essentially asymptomatic and has no neurological complaints or findings. Dr. Smith reiterated that Claimant's findings on MRI cannot be dated. As to Dr. Zaslavsky's opinion that the synovitis and inflammation at L4-5 were acute, he notes that synovitis could be chronic or acute, but the images that he saw did not appear to have any acute feature to it. There was no surrounding extraarticular edema or hemorrhage to indicate such. Dr. Smith's impression was that it was all chronic. Synovitis can be with arthritis, as well as effusion and joint space narrowing. His studies looked like typical chronic arthritis. Without actually viewing the synovium fluid under a microscope, the MRI itself does not indicate whether the synovitis is chronic or acute. As well, Claimant's cervical herniation looked chronic and Claimant has had neck and back problems since the 1990s. Dr. Smith did not review any prior MRIs.

Dr. Smith indicated that he did not review any photographs of the vehicle involved in the work accident. He does not know the speed of the other vehicle.

On re-direct examination Dr. Smith agrees that in the ER record Claimant indicated that he did not report the work accident to the police because he believed that he was uninjured and that it was a two-car collision, low speed when his mini-van was rear-ended. He reported no obvious injuries afterward, just distal to the neck and back. This indicates nothing more than a soft tissue strain. Claimant was examined and came out fine.

Lastly, on re-cross examination Dr. Smith disagrees with Dr. Zaslavky that the straightening on Claimant's cervical spine radiographs indicates spasm. He notes that is a nonspecific finding and straightening of the lordosis can simply be from positioning of the head at the time of x-ray. If there had been spasm it would have been found on exam it was not.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Causation

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." DEL. CODE ANN. tit. 19, § 2304. Because Claimant has filed the current petition, he 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*, 1997 WL 817889 at *2 (Del. Super. Ct.), *aff'd*, 706 A.2d 26 (Del. 1998).

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." *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992). That is to say, when 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." *Reese*, 619 A.2d at 910. In this case, Claimant maintains that he sustained cervical and lumbar spine injuries when he was involved in a work related motor vehicle accident on March 27, 2015 resulting in the need for treatment and closed periods of total disability. Employer disputes the extent of injury. The Board finds that Claimant has not shown by a preponderance of the evidence that he sustained anything more than a strain and sprain of his lumbar and cervical spine in the work accident, which resolved by April 8, 2015 consistent with the medical expert opinion of Dr. Smith.

Claimant's medical expert, Dr. Zaslavsky, opines that as far as the lumbar spine Claimant sustained a bulging disc at L5-S1 and some joint inflammation at L4-5 in the work accident. He

also opines that Claimant has a herniated disc at C5-6, the genesis of which cannot be pinpointed because Claimant had prior neck symptoms, but after the work accident Claimant developed increasing pain in his neck that progresses to shooting down his arms causing numbness and tingling in the hands. Thus, Claimant is more likely than not to experience flare-ups and require further treatment of his neck and back in the future which Dr. Zaslavsky attributes sixty percent to the March of 2015 work accident and forty percent to an April 9, 2015 motor vehicle accident.

Dr. Smith, Employer's expert, considered Claimant's significant prior chronic low back and cervical spine issues and opines that Claimant sustained only strains and sprains in the work accident, which resolved before his second motor vehicle accident on April 9, 2015. Dr. Smith opines that, at the latest, by April 8, 2015 Claimant had returned to his baseline condition. The Board finds that Dr. Zaslavsky's testimony fails to satisfy Claimant's burden of proof, partly due to the weak foundation of his opinion given his lack of knowledge of Claimant's significant medical history with respect to his neck and back. The Board places more weight on Dr. Smith's opinion in this matter and finds that Dr. Smith provided the more persuasive opinion regarding causation and the extent of Claimant's cervical and lumbar spine issues. *See Disabatino Brothers, Inc. v. Wortman*, 453 A.2d 102, 106 (Del. 1982); *see also Standard Distributing Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993)(holding when there is a conflict between the opinions of two experts, the Board is free to choose either one and will meet the "substantial evidence" standard on review.). Thus, Claimant's petition is granted in a limited fashion, specifically with respect to treatment of cervical and lumbar strains and sprains from March 27, 2015 through April 8, 2015 and an approximate two week period of total disability, through April 8, 2015 pursuant to Dr. Smith's credible testimony.

Despite the fact that Dr. Zaslavsky is Claimant's treating physician and should be given some deference due to his familiarity with Claimant's condition, the Board notes that he did not see Claimant until two years after the work accident. *Diamond Fuel Oil v. O'Neal*, 734 A.2d 1060, 1065 (Del. 1999)(finding that treating physicians have great familiarity with a patient's condition and their opinions should be given "substantial weight."). Dr. Smith saw Claimant around the same time, but he refers to a DME performed by Dr. David Stephens closer in time to the work accident, just four months later. Dr. Zaslavsky did not review this report. Given that Dr. Zaslavsky did not see Claimant until years after the work accident and did not review Claimant's records as thoroughly as Dr. Smith the Board finds that Dr. Smith's familiarity is beyond that of Claimant's treating medical expert. The Board finds that Dr. Smith comes across as much more credible with respect to causation given his thorough knowledge of Claimant's prior records and better understanding of Claimant's condition at the time of the work injury. As well, Dr. Smith more realistically considers the medical records contemporaneous with the work accident.

Interestingly, in this case, Dr. David Stephens saw Claimant for a DME in July of 2015, or two years prior to Dr. Zaslavsky. Dr. Stephens' DME report indicates a normal musculoskeletal examination. Despite some contradiction with Dr. Atkins' record, Dr. Stephens performed straight leg raise testing bilaterally in both seated and recumbent positions with negative results without any focal weakness present in either lower extremities. As well, at this first DME Claimant's Achilles tendon and patellar tendon reflexes were symmetrically active bilaterally. Dr. Smith points out credibly that Dr. Stephens saw Claimant only four months after the work accident and at that time his examination was like that of Dr. Smith's two years later. Dr. Stephens did not find any significant post-traumatic abnormalities or pathology. Basically,

Claimant had a normal musculoskeletal examination at both of his DMEs, other than his subjective complaints of pain when he moved his neck. Dr. Smith's June of 2017 DME clinical examination of Claimant was consistent with Dr. David Stephens' findings in July of 2015. Based upon his thorough medical record review and his own examination of Claimant Dr. Smith has the same opinion as Dr. Stephens did closer in time to the work accident.

The Board finds Dr. Smith's discussion of Claimant's VA medical records credible. He notes that in 2013 Claimant treated for low back pain and pain in his bilateral upper extremities with reference to chronic back pain over several years. Records reveal that his treatment extended to November of 2014, a few months before the work accident. Claimant treated consistently for this chronic back pain and radiation to his lower extremities, as well as for the neck and bilateral upper extremities. There are numerous references in Claimant's VA records to chronic neck, back, right shoulder and wrist pain; as well as a head injury and frequent headaches. Claimant was treated and diagnostic tests were performed for these complaints.

A thorough record review was not performed by Dr. Zaslavsky, and partly as a result of this he is not convincing in his assertions regarding the extent of Claimant's work injuries. Dr. Zaslavsky was unaware of Claimant's significant specific complaints at the VA of cervical and lumbar pain with radiation in previous years. He was not aware of Claimant's medication history for his chronic back pain as far back as 1998. He did not know that the record indicates that Claimant had chronic back pain due to facet hypertrophy at L4, L5 and S1. Of note, L4-5 are the same levels that Dr. Zaslavsky pinpoints as injured in the work accident, evidenced by inflammation. Dr. Zaslavsky admits that Claimant had prior cervical complaints and that his C5-6 cervical herniation is hard to date, but he still simply glosses over Claimant's prior medical

history, and relates the majority of Claimant's current symptoms to the March 27, 2015 work accident. This weak testimony does not convince the Board.

Dr. Zaslavsky not only did not place enough weight on Claimant's prior history of neck and back problems, but he also discounts the contemporaneous medical records to some degree. For example, when Claimant was seen at the VA on March 27, 2015, the day of the work accident, the record indicates *continued* complaints of neck and back pain and that Claimant denied numbness, tingling, weakness or bowel or bladder incontinence. The diagnosis that day was soft tissue neck and low back pain. At the VA Claimant indicated that there was no damage to his car, he had no other complaints and was not taking medication. Dr. Smith's testimony is compelling that this VA record is critical. Claimant was seen the same day as the work accident, his complaints were confined to his neck and back and he denied numbness and tingling. No medication was specifically prescribed. Moreover, the evidence also shows that on the day of the work accident Claimant went on to take the client home and after working that day he took the work van home because he was planning on returning to work the next day.

Similarly, when Claimant was seen in the ER the next day the severity of his pain was noted to be mild. He had normal range of cervical motion and no evidence of trauma. Claimant had no vertebral tenderness of the back and his extremities had normal range of motion. Claimant indicated that the impact in the accident was light and that he felt that he was uninjured in the motor vehicle accident. He also stated that he did not report the motor vehicle accident to EMS or the police and he drove himself to the ER. Claimant reported no obvious injuries, just distal to the neck and back. Dr. Smith points out that Claimant's clinical findings were benign here as well. Plain films did not show anything and Claimant was diagnosed with soft tissue strains, given some medication and released the same day.

Later, on April 20, 2015, a lumbar spine MRI showed acute synovitis of the right L4-5 facet joint. Dr. Zaslavsky opines that this is an acute finding, and therefore related to the work accident. The MRI was performed about a month after the work accident and importantly, Dr. Smith opines credibly that just after the work accident when Claimant was seen both at the VA and in the ER he was not referred for any studies, such as MRIs, based upon his symptoms. Dr. Smith notes that there was no indication to perform such testing as Claimant was essentially asymptomatic with no neurological complaints or findings. Dr. Smith viewed the later images as well as Dr. Zaslavsky, and Dr. Smith opines that these findings at L4-5 do not appear to have any acute features, rather they appear to be typical of chronic changes. The Board accepts this testimony. Dr. Smith points out that there was no surrounding extraarticular edema or hemorrhage, which would be indicative of acute changes. Dr. Smith concedes though that the MRI itself does not indicate whether the synovitis is acute or chronic and so consideration of Claimant's history and his visits just after the work accident are critical. The Board finds, consistent with Dr. Smith's opinion, that the changes are more likely chronic given Claimant's significant prior history of low back pain and the fact that performance of an MRI was not even considered at the VA or in the ER after the work accident.

Dr. Zaslavsky believes that Claimant's back and neck pain are worse now than before the accident. However, Claimant's medical records are not consistent with this opinion. Moreover, Claimant was released to work, pursuant to an FCE performed in August of 2015, in a heavy-duty capacity, which is actually in a greater capacity than he was working at the time of the work accident. Dr. Zaslavsky seems to be under the impression that Claimant was working in a heavy-duty capacity at the time of the work accident. By all accounts he was not and this too detracts from Dr. Zaslavsky's credibility.

Importantly, Dr. Zaslavsky admits that it is very difficult for him to give any significant opinion with a reasonable degree of medical probability for the March 27, 2015 work accident alone. He bases his sixty/forty percent ratio on the opinion of Dr. Atkins, a treating doctor who saw Claimant closer in time to the work accident, but did not testify. While it is permissible to rely on records of physicians who are not testifying, it is less convincing in a situation such as this where Dr. Zaslavsky did not actually see Claimant until two years after the work accident and the contemporaneous medical records are not consistent with his opinion. It is true that the Board may consider medical records and reports of non-testifying physicians when the substance of the report is ascertained through the testimony of an expert who testified. *See Thomas v. Christiana Excavating Co.*, 1994 WL 750325 (Del. Super. Ct.), *aff'd sub nom., Thomas v. Christiana Excavating Co.*, Del. Supr., 655 A.2d 309 (1995); *Schock Brothers, Inc. v. Stacey*, 1991 WL 113329 (Del. Super. Ct.). However, under the circumstances of this case, where Dr. Zaslavsky is propounding a ratio provided by Dr. Atkins for the primary issue in this case, causation and extent of injury, it significantly weakens his opinion.[1]

Dr. Smith also points out that it does not appear that Dr. Atkins takes into account Claimant's long-standing problems that he has been followed for at the VA for over ten years. As Dr. Smith notes this represents the bulk of Claimant's problems. Here Employer has been able to cross-examine Dr. Zaslavsky, but not Dr. Atkins. Overall, the Board finds that Dr. Zaslavsky's opinion is not convincing for a number of reasons and causation is Claimant's burden to prove. Additionally, the Board finds Dr. Smith's opinion credible that anything that

[1] *See Reliable Corp. v. Sierra*, Del. Super., C.A. No. 97A-10-010, Carpenter, J., slip op. at 9 (August 31, 1999) (finding on critical medical issue cannot be based simply on one doctor reading in the report of another doctor); *General Chemical Div., Allied Chemical & Dye Corp. v. Fasano, Del. Super.*, 94 A.2d 600, 601 (1953) (letters and reports of physicians are not competent evidence when opposing party had no chance to cross-examine the preparer of the documents).

arose out of the March 27 work accident resolved by April 8, 2015 given the lack of any significant clinical findings at the VA or Christiana Care ER and Claimant's description of minimal symptoms. More importantly, the Board finds Dr. Smith's opinion credible that Claimant's condition returned to baseline, given his extensive prior medical history of chronic low back and neck symptoms as evidenced primarily by his VA records.

It must be noted that Claimant would not be precluded from recovery even given the existence of a pre-existing condition, if the work accident accelerated or aggravated the disability. "A preexisting disease or infirmity, whether overt or latent, does not disqualify a claim for workers' compensation if the employment aggravated, accelerated, or in combination with the infirmity produced the disability." *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). Importantly though, here the Board finds consistent with Dr. Smith's opinion that Claimant's symptoms are consistent with his pre-existing degenerative disc disease, both of the cervical and lumbar spine, and not related to the March 27, 2015 rear-ender motor vehicle accident. Dr. Smith's testimony is convincing that Claimant's neck and back symptoms after the work accident are a result of the natural progression of his degenerative disc disease and not the work accident. Dr. Zaslavsky's opinion has failed to satisfy Claimant's burden of proof because he is not well familiar with Claimant's significant related medical history and he discounts Claimant's clinical presentations contemporaneous with the work accident. The Board finds Dr. Smith's discussion believable regarding the chronicity of Claimant's cervical and lumbar spine condition.

The Board also notes that it finds Mr. Miller's testimony believable about events after the work accident. "The demeanor and credibility of witnesses and the weight to be accorded to their testimony is for the Board to determine..." *General Motors Corp. v. Cresto*, 265 A.2d 42, 43 (Del. Super. Ct. 1970). *See Air Mod Corp. v. Newtown,* 215 A,2d 434, 437-438 (Del. 1965); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965). Mr. Miller testified that he had a relationship with Claimant before he started working for him and they used to work together at Yellow Cab. Mr. Miller notes that when he spoke with Claimant at the time that he returned the van Claimant indicated that he was sorry, but he just had to do this because he had talked to a lawyer and he had been pushed over so many times and this time he would have to get something for it. The Board finds Mr. Miller credible and believes that Claimant appears to have a complex multifactorial motivation here. As well, Claimant texted Mr. Miller sometime after the April 9, 2015 motor vehicle accident informing Mr. Miller that he had been in a second motor vehicle accident and that Mr. Miller did not have to worry. This leaves the impression that Claimant was searching for an accident to place blame, in order to "get something for it" and undermines Claimant's believability.

The evidence presented does not support Claimant's assertion that the March 27, 2015 motor vehicle accident caused anything more than minor strains and sprains on his pre-existing lumbar and cervical spine degenerative disc disease, the symptoms of which he had been reporting for years while under the care of the VA. Given the contemporaneous medical records, Mr. Miller's testimony is believable that shortly after the work accident Claimant did not report any pain or that he might not be able work his next shift. Affirming this, Mr. Miller testified that when Claimant returned the van he did not say he was having any medical problems. As well, Dr. Smith notes that Claimant had certain complaints, but Dr. Smith could

not find anything of significance on clinical examination that would support those complaints. This further detracts from Claimant's credibility.

Claimant maintains that Dr. Smith relies upon the condition of Claimant's motor vehicle after the March 27, 2015 motor vehicle accident to correlate with his minimal injury. Claimant's arguments primarily revolve around *Davis v. Maute,* 770 A.2d 36 (Del. 2001). In *Davis,* the issue was whether, without appropriate accompanying expert testimony, photos of the plaintiff's vehicle showing minimal damage should have been admitted. The Supreme Court held that because an improper inference of little damage equals little or no injury could be created, it was improper to admit them without the appropriate expert testimony. *Id* at 41. In addition, the Court found that the trial court's failure to give a limiting instruction that the jury was to make no correlation that minor damage implied minor injury was in error. *Id.*

Claimant's reliance on *Davis* is misplaced here. Essentially, the *Davis v. Maute* court held that a party may not make, in the absence of expert testimony, a direct argument correlating the damage to a vehicle with the extent of injury. Dr. Smith is not relying on photographs of the minivan to make an assertion regarding Claimant's injuries. Specifically, Dr. Smith testifies that there is not a strict linear correlation between property damage and personal injury. Dr. Smith is basing his medical expert opinion on Claimant's DMEs and his clinical presentations after the work accident at the VA Hospital and Christiana Care ER. In his discussion of the motor vehicle accident Dr. Smith is merely relying on Claimant's own assertions, both at the VA and in the ER shortly after the work accident wherein he stated that there was no damage to his vehicle, the impact was light and he felt uninjured after the accident so he did not report it to the police or go to the ER. Dr. Smith stresses the benign clinical findings at both of Claimant's examinations closest in time to the work accident, as well as his negative radiographs. Thus, Dr. Smith's

discussion of the flexion and extension type of injury that occurred here does not detract from his opinion. Dr. Smith is relying upon Claimant's own admission that he felt uninjured in the motor vehicle accident, which was *confirmed* by the benign findings at his medical visits contemporaneous with the work accident. Moreover, although *Davis v. Maute* does not specifically apply here, even if it did, the Board is not a typical jury and is able to distinguish, as does Dr. Smith, that there is no strict linear correlation between vehicle damage and personal injury.

Claimant also argues that he had not undergone physical therapy for his back since 2012, which is an indication that the symptoms were not chronic, or not necessarily present at the time of the work accident. The Board notes though that there are numerous references in Claimant's VA records indicating the chronicity of his condition with respect to the cervical and lumbar spine. That he may not have been undergoing therapy at the time of the work accident is not, therefore, dispositive.

In conclusion, Dr. Zaslavsky's expert testimony has failed to satisfy Claimant's burden of proof that his ongoing cervical spine and lumbar spine issues involving a bulging disc at L5-S1 and some joint inflammation at L4-5, are related to the March 27, 2015 work accident after April 8, 2018. The Board finds Dr. Smith's testimony credible that the work accident caused minor strains and sprains of Claimant's cervical and lumbar spine, which returned to baseline, at the latest, by April 8, 2015. As well, the Board accepts Dr. Smith's opinion that Claimant was totally disabled for this less than two week period, from March 27, 2015 until April 8, 2015.

Average Weekly Wage

Given that the Board has awarded one week of total disability, it must next consider the parties' arguments regarding Claimant's average weekly wage. Employer argues that Claimant

was hired for an hourly rate of $8.50 to $9.00, or $350.48[2] a week, relying upon the testimony of Mr. Miller. Claimant maintains that he was hired to work for $500.00 per week. The Board finds, consistent with Claimant's testimony, that his expected average weekly wage was $500.00.

First, the Board considers the wording of the statute itself. Title 19, section 2302(b)(1) and (2) of the Delaware Code reads as follows:

> (b) The average weekly wage shall be determined by computing the total wages paid to the employee during the 26 weeks immediately preceding the date of injury and dividing by 26, provided that:
>
> (1) If the employee worked less than 26 weeks, but at least 13 weeks, in the employment in which the employee was injured, the average weekly wage shall be based upon 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;
>
> (2) If an employee sustains a compensable injury before completing that employee's first 13 weeks, the average weekly wage shall be calculated as follows:
>
> > a. If the contract was based on hours worked, by determining the number of hours for each week contracted for by the employee multiplied by the employee's hourly rate;
> >
> > b. If the contract was based on a weekly wage, by determining the weekly salary contracted for by the employee; or
> >
> > c. If the contract was based on a monthly salary, by multiplying the monthly salary by 12 and dividing that figure by 52; and
> >
> > d. If the hourly rate of earnings of the employee cannot be ascertained, or if the pay has not been designated for the work required, the average weekly wage, for the purpose of calculating compensation, shall be taken to be the average weekly wage for similar services performed by other employees in like employment for the past 26 weeks.

To apply a statute the fundamental rule is to ascertain and give effect to the intent of the legislature. 73 Am.Jur.2d *Statutes* § 146 (1974). If the statute as a whole is unambiguous, there is no reasonable doubt as to the meaning of the words used and the Court's role is then limited to an application of the literal meaning of the words. *See Delaware Solid Waste Authority v. The News-Journal Co.,* 480 A.2d 628 (Del. 1984). However, when a statute is ambiguous and its

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[2] Pursuant to the parties' Stipulation at paragraph four.

meaning may not be clearly ascertained, the Court must rely upon its methods of statutory interpretation and construction to arrive at what the legislature meant. *Carper v. New Castle County Bd. of Ed.*, 432 A.2d 1202, 1205 (Del. 1981).

A statute is passed by the General Assembly as a whole and not in parts or sections. Consequently, each part or section should be read in light of every other part or section to produce a harmonious whole. *Philbrook v. Glodgett,* 421 U.S. 707, 95 S.Ct. 1893, 1898, 44 L.Ed.2d 525 (1975), *Mastro Plastics Corp. v. National Labor Rel. Bd.,* 350 U.S. 270, 76 S.Ct. 349, 359, 100 L.Ed. 309 (1956), *Murphy v. Board of Pension Trustees,* 442 A.2d 950, 951 (Del. 1982).

On its face Section (b)(2)(b) refers to an employee who has worked less than thirteen weeks and whose contract was based on a weekly wage. The average weekly wage shall be calculated by determining the weekly salary contracted for by the employee. Claimant worked for Employer four weeks before the work accident occurred. The Board finds that the evidence supports Claimant's assertion that he was hired for $500.00 a week, because the Paychex records indicate that the last two weeks he worked he was paid at that wage. Despite Mr. Miller's testimony that he hired Claimant for the lesser amount, the payroll records suggest otherwise because at least two of the four weeks that he worked for Employer he was paid $500.00 a week. Thus, for the less than two week period that Dr. Smith testified warrants a total disability award, Claimant's average weekly wage shall be calculated at $500.00 per week and he is to be compensated based upon the resulting in a compensation rate of $333.33.

In conclusion, with respect to the medical testimony, for the reasons set forth above Dr. Zaslavsky's expert testimony has failed to satisfy Claimant's burden of proof that his cervical and lumbar spine issues after April 8, 2015 are related to the work accident. Moreover, the

Board finds Dr. Smith's testimony credible that the work accident caused only minor strains and sprains of Claimant's cervical and lumbar spine, which returned to baseline, at the latest, by April 8, 2015. Thus, Claimant's treatment during that time period is compensable. The medical bills at issue are to be paid in accordance with the fee schedule pursuant to title 19, section 2322(b) of the Delaware Code. Also, consistent with Dr. Smith's opinion Claimant is entitled to less than two weeks of total disability from March 27, 2015 until April 8, 2015. As such, Claimant's petition is granted in part, specifically as to lumbar and cervical strains and sprains from March 27, 2015 to April 8, 2015 and a corresponding period of total disability.

Attorney's Fee & Medical Witness Fee

A claimant who is awarded compensation is entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller." DEL. CODE ANN. tit. 19, § 2320. At the current time, the maximum based on Delaware's average weekly wage calculates to $10,304.90. 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. *See Heil v. Nationwide Mutual Insurance Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, 1996 WL 527213 at *6 (Del. Super. Ct.). 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.

Reasonable attorney's fees are mandatory and must be awarded by the Board to a successful claimant. *Jepsen v. State,* 2005 WL 578801,*6 (Del. Super. Ct.). While the fees are mandatory, the Board does retain broad discretion in determining the reasonableness of the attorney's fees requested. *Id.*

A written settlement offer was tendered by Employer with respect to Claimant's partial disability. This offer was not viewed by the Board until after a decision on the merits had been reached. The settlement offer is less than the Board's award with respect only to the total disability period. An award of attorney's fees is appropriate in this case.

Claimant's counsel submitted an affidavit stating that he spent eighteen hours preparing for this hearing, which lasted for three and a half hours. Claimant's counsel was admitted to the Delaware Bar in 2010, and is experienced in workers' compensation litigation. His firm's first contact with Claimant was in March of 2015. Thus, Claimant has been represented by counsel or his firm for over three years. This case was of average complexity involving no novel issues of fact or law. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances, although he naturally could not work on other cases at the same time that he was working on this litigation. There is no evidence that accepting Claimant's case precluded counsel from other employment. Counsel's fee arrangement with Claimant is on a contingency. There is no evidence that counsel expects 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 *Cox* factors set forth above, the Board finds that an attorney's fee in the amount of $400.00 is reasonable and appropriate. The Board is also satisfied that this fee adequately reflects the value of any non-monetary benefit arising from this decision. *See Pugh v. Wal-Mart Stores, Inc.*, 945 A.2d 588, 591-92 (Del. 2008).

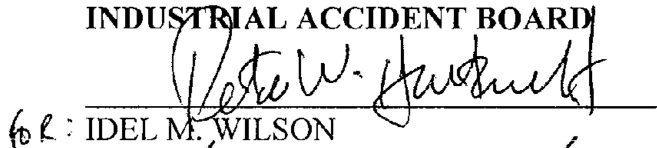
Medical witness fees for testimony on behalf of Claimant are awarded to Claimant, in accordance with title 19, section 2322(e) of the Delaware Code.

STATEMENT OF THE DETERMINATION

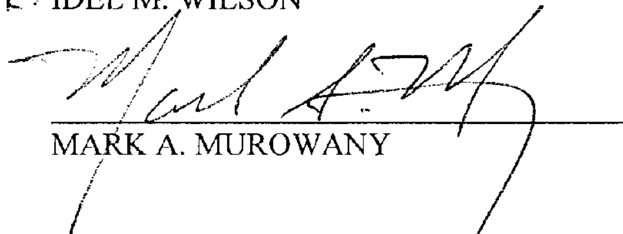
For the reasons set forth above, the Board finds that Claimant has failed to satisfy his burden of proof that he sustained an aggravation of his cervical spine condition involving a disc herniation at C5-6 causing ongoing flare-ups, joint inflammation at L4-5, and a disc bulge at L5-S1in the March 27, 2015 work accident. Dr. Zaslavsky's opinion that Claimant's injuries are sixty percent attributable to the work accident is not convincing. The Board finds, consistent with Dr. Smith's credible opinion, that Claimant sustained lumbar and cervical strains and sprains in the March 27, 2015 work related motor vehicle accident and that, at the latest, by April 8, 2015 his condition for both body parts returned to baseline. He is granted an approximate two week period of total disability consistent with Dr. Smith's testimony. The Board also finds that his average weekly wage is $500.00, resulting in a compensation rate of $333.33. Claimant is awarded a reasonable attorney's fee in the amount of $400.00 and payment of his medical witness fee.

IT IS SO ORDERED THIS 7th DAY OF AUGUST, 2017.

INDUSTRIAL ACCIDENT BOARD

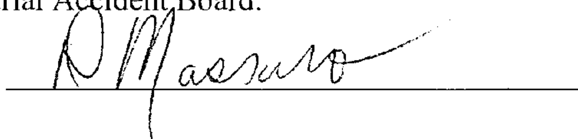


for: IDEL M. WILSON



MARK A. MUROWANY

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



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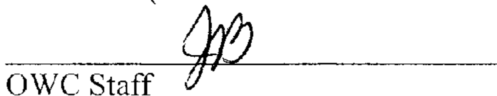

OWC Staff