

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

COREY BERRY,)
)
 Employee,)
)
 v.) Hearing No. 1485440
)
 MITRA QSR KNE LLC,)
 dba KENTUCKY FRIED CHICKEN,)
)
 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 30, 2020, via videoconference, pursuant to the Industrial Accident Board COVID-19 Emergency Order dated May 11, 2020.

PRESENT:

MARY DANTZLER

GREGORY FULLER, SR.

Julie G. Bucklin, Workers' Compensation Hearing Officer

APPEARANCES:

James R. Donovan, Attorney for the Claimant

Joseph Andrews, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDING

Corey Berry ("Claimant") alleges he was injured in a compensable industrial accident on April 24, 2019, while employed by Mitra QSR KNE LLC, dba Kentucky Fried Chicken ("KFC"). KFC acknowledged that Claimant was injured at work on April 24, 2019, while throwing out the trash. Claimant earned \$127.03 per week at the time of the accident and has a compensation rate of \$127.03 per week. Claimant returned to work after the accident and was terminated later for reasons unrelated to the industrial accident. The parties stipulated that KFC is entitled to a credit against future benefits in the amount of \$9,840.17 for overpayments made between May 7, 2019 and June 15, 2019.

Since the parties could not reach an agreement on the nature or extent of Claimant's injuries, KFC filed an initial Petition to Determine Compensation Due on October 24, 2019, seeking acknowledgement that Claimant sustained only a cervical spine sprain and strain and a right shoulder sprain and strain and that Claimant did not sustain further injury to the cervical spine or right shoulder and did not injure his lumbar spine, right lower extremity, or head related to the industrial accident.

There is also a dispute regarding the length of Claimant's total disability period. KFC requests a ruling on Claimant's total disability period, arguing that Claimant was no longer totally disabled as of May 7, 2019. Claimant argues that he remains totally disabled related to the industrial accident.

A cervical spine fusion from C4 through C7 has been proposed for Claimant. KFC argues that the proposed surgery is unreasonable, unnecessary, and unrelated to the industrial accident. Claimant wants to undergo the proposed surgery. KFC requests a ruling on the compensability of the surgery and the other medical treatment provided and at issue.

On June 30, 2020, the Board entertained a hearing via videoconference on KFC's petition and this is the Board's decision.

SUMMARY OF THE EVIDENCE

Corey Berry, forty-eight years old, testified about his industrial accident and his condition since the accident. Claimant worked at KFC as a "Clean Captain" five days per week, starting at 8:30 a.m. His job duties included putting away the deliveries, emptying the trash, cleaning the grounds outside of the building, sweeping and mopping in the lobby and back lines, wiping tables and chairs, cleaning bathrooms, and changing light bulbs.

Claimant provided his resume when he applied to KFC. Claimant has work experience as a safety and security officer, sales associate at a shoe store, sales/cashier at a convenience store, bouncer at a bar, security manager at Club Kids, fencing and construction work, and customer service. He has a long list of work experience in multiple areas of employment and a lot of experience working with people and as a manager.

Claimant was injured at work on April 24, 2019. He slipped and fell while taking out the trash. He hit his head on the door and his shoulder on the floor when he fell. No one was near Claimant when he fell, but a new employee came around the corner and saw Claimant trying to get up and asked if he was okay. The new employee called for Mike, the manager, and Claimant went to Mike's office to explain what happened. Mike told Claimant to go to home or to the walk-in medical center and Claimant said he planned to go to the emergency room at Kent General Hospital.

The emergency room records indicate that Claimant only complained of hitting his right shoulder and there is no mention of head or neck complaints. Claimant testified that the emergency room focused on the shoulder, but he told them about hitting his head too. He was

put into a machine that checked his shoulder and his neck. Claimant was sent home with a sling on his arm and a note to return to work in three days.

On May 7, 2019, Claimant followed up with his primary care physician and asked to be released to work in a full-duty capacity because he thought he was okay. The doctor would not let Claimant return to work in a full-duty capacity at that point. When Claimant returned to work, it was in a light duty capacity. He was terminated later for reasons unrelated to the industrial accident.

On August 30, 2019, Claimant reported to his physical therapist that he had fallen off of a cooler at his friend's house. He had been sitting on the cooler and leaned back and fell, hitting his back onto the ground. While sitting on the cooler, he was less than a foot from the ground. He did not feel any additional neck pain when he fell. Although the physical therapy notes state that Claimant's neck hurt worse after the fall, he does not recall saying that.

On September 4, 2019, Claimant reported to his physical therapist that he turned his neck to talk to his wife and his neck hurt worse. On October 1, 2019, Claimant reported to the physical therapist that his neck felt better, but his main concern was his back and right hip. Claimant's neck pain has worsened over time and has never gotten better. He has a hard time swallowing now because of his neck pain. Claimant does not recall having any neck problems or treatment at Kent General Hospital in 2008.

Claimant is not taking any narcotics for his pain because he had an allergic reaction to oxycodone. He has not tried any injections because he is afraid of needles. He is still undergoing physical therapy for his right shoulder and neck. He has pain in the lower spine due to the neck; the sciatic nerve problems cause problems in the lower region. Only cannabis helps Claimant, but he does not have a medical marijuana card.

Claimant wants to undergo a cervical spine fusion from C4 through C7, even before trying other conservative treatment options. He completed physical therapy, but it was extended because it helps, but does not fix the problem and the problem has worsened.

Claimant does not think he can work at all because his balance is off. He almost fell in the shower before the hearing because of his loss of balance. He has trouble walking now because of his balance problems. He has pain in his hip from his neck to the lower spine and his hands cramp while eating because of pain shooting up to the shoulder. Claimant would love to work and has tried to look for work, but cannot find a job because he cannot lift more than twenty pounds. He is a big guy at 6'6" tall, so most people hiring someone of his stature are looking for an employee to lift and move items, but he can barely walk thirty yards without pain.

Claimant does not use a wheelchair. He walks with a cane or while holding his wife's hand. He did not take the cane with him to see Dr. Lawrence Piccioni because he tries not use the cane all of the time. He has used the cane at times when he sees Dr. James Zaslavsky and other medical providers, depending on how he feels each day.

Claimant spends his days sitting in his room, smoking cannabis, and playing videogames on his phone or gaming device. Sometimes he walks across the street with his wife to the store.

Claimant reviewed the deposition of Dr. Zaslavsky and the treatment described in the deposition is accurate. The only treatment option available to Claimant is surgery because his neck condition is worsening. Claimant wants to undergo the proposed surgery. If Dr. Zaslavsky recommended anything else, Claimant would try it if it would help correct the problem.

When Claimant has pain, he smokes cannabis, which helps. Cannabis makes Claimant feel almost numb for a brief period of time. He told Dr. Zaslavsky that cannabis is the only thing that makes him feel better. The chiropractor in Milford told Claimant to stop using it illegally

and to get a medical marijuana card, but he has not done so. Claimant has not tried any injections because he does not trust needles because he had a problem with needles in the past.

Lawrence Piccioni, M.D., a board-certified orthopedic surgeon, testified by deposition on behalf of KFC. Dr. Piccioni examined Claimant on March 31, 2020, and reviewed Claimant's medical records in conjunction with the examination. He believes Claimant sustained a cervical spine strain and sprain and a right shoulder sprain at most, related to the industrial accident. He believes the medical treatment and total disability period were reasonable and necessary until May 7, 2019.

Dr. Piccioni was aware of Claimant's industrial accident. The night crew left trash on the floor and as Claimant went to open the air compressor door, he slipped on the trash, struck his right shoulder and landed on his right shoulder against the door. Claimant told Dr. Piccioni that it was an unwitnessed accident, but another employee came around the corner and asked what happened. Claimant went to the supervisor's office and, after filling out paperwork, he was told to go home. Claimant told his supervisor that he was going to get treatment and he was seen at the emergency room that day. Based on what Claimant told Dr. Piccioni about the industrial accident, his right shoulder was primarily the main area of injury, as that is what struck the door.

The medical records confirm that Claimant sought treatment at the emergency room on April 24, 2019. The records show that Claimant reported having shoulder pain and back pain after a mechanical fall taking out trash at work. He fell onto the right shoulder. Claimant denied loss of consciousness or head injury. Under the history of present illness, it states that he was seen by his supervisor and directed to go to the emergency room for further evaluation.

Dr. Piccioni testified that Claimant's history to him was different from the emergency room records. Claimant reported to Dr. Piccioni that the supervisor told him to go home,

whereas the emergency room record indicates that the supervisor directed him to go to the emergency room for further evaluation.

There were no cuts requiring sutures or any broken bones noted in the emergency room record. There were no physical findings noted to indicate any radicular symptoms from the neck. There was a pain diagram Claimant filled out and pain noted in his history. Pain was noted in the right trapezial area and posterior aspect of the neck and a little bit along the anterior deltoid in the pain diagram. There was no listing of any right knee injury or lumbar spine complaints. Claimant reported right trapezial pain with no spinous process tenderness noted, which indicates there was tenderness around the trapezius muscle, which certainly can go along with a sprain/strain soft tissue injury. There was no evidence of any radicular symptoms and the pain diagram showed pain in the deltoid area, but nothing below the deltoid. Relying on Claimant's subjective complaints and the objective findings in the emergency room record on the day of the accident, Dr. Piccioni would find that Claimant sustained a neck and right shoulder sprain/strain.

At the time of the defense medical examination on March 31, 2020, Claimant reported a prominence of the right hip and pain in the right hip due to his injury and he continues to treat actively for the hip. Claimant reported that he had no prior history of neck or shoulder pain and no history of back pain. He was still attending physical therapy. As for the right hip, Claimant had no injections or surgical management. Claimant reported having right shoulder pain still. He had an MRI, which showed no tear. He was offered an injection, but refused it. He believed he was still in physical therapy for the shoulder. As for the neck, there had been no injections, but surgery has been proposed. Claimant reported that he had been on light duty work, but was

terminated in July 2019 and has not worked since then. He was not on any medication at the time of the examination. He was offered oxycodone, but it upset his stomach.

If Dr. Piccioni relied solely on Claimant's subjective complaints, he would have diagnosed Claimant with a cervical spine strain/sprain and a right shoulder contusion. There was no evidence of any lumbar complaints; there was no lumbar injury specifically. Any complaints about the right knee are still absent as of the examination in March 2020. Dr. Piccioni disagrees with Dr. Zaslavsky's opinion regarding Claimant's diagnosis of worsening myelopathy from disc bulges aggravated by the industrial accident and disagrees with Dr. Zaslavsky's proposal to perform an anterior cervical discectomy and fusion from C4 through C7. If Claimant had worsening myelopathy, he would have some distressing symptoms. On March 31, 2020, Claimant reported that he had pain into the right hip, but not specifically in the low back.

Dr. Piccioni's main concern is the myelopathy of the cervical spine, which means there is compression or damage on the spinal cord in the cervical region. Typically in the cervical spine area, the issues primarily involve radiculopathy, which only affects the upper extremities. At the spinal cord in the cervical spine level, none of the nerves for the trunk or legs have come off yet, so they are at risk. Typically in a myelopathic problem, you would see lower extremity symptoms and the cord is a first nerve or it is associated with brain, brain stem, and spinal cord, and then the radiculopathy or the second nerve. There is a two-nerve system: the brain and the spinal cord. If there is myelopathy, there would need to be lower extremity symptoms that have to be explained scientifically; if it is a neck injury only, the symptoms are coming from the cervical cord and the changes in the lower extremity would be spastic.

None of the medical providers from the date of the industrial accident until Claimant saw Dr. Zaslavsky noted any evidence of signs or symptoms of myelopathy. Dr. Zaslavsky noted

multiple signs of progressive myelopathy. Then, Dr. Piccioni, who examined Claimant one month after Dr. Zaslavsky's last visit with Claimant, did not find anything objective to show myelopathy and there was nothing in the historical or subjective complaints to show myelopathy. There is obviously a significant scientific disconnect because if Claimant has a progressive myelopathy, Dr. Piccioni should have seen it and the providers before Dr. Zaslavsky should have seen it. Dr. Piccioni agrees with Dr. Zaslavsky that myelopathy can be slow and progressive, but after Dr. Zaslavsky's last examination, myelopathy would not go away; yet, Dr. Piccioni did not get any of the signs and symptoms that Dr. Zaslavsky had and Dr. Piccioni's examination comports with all the practitioners before Claimant saw Dr. Zaslavsky. In Dr. Piccioni's opinion, he did not see any evidence of myelopathy. As part of his practice as an orthopedic surgeon, Dr. Piccioni treats patients with neck and back injuries who have myelopathy or radiculopathy. Although Dr. Piccioni does not perform the surgeries for myelopathy, he knows what to look for as it comes to myelopathy or radiculopathy.

Although the MRI showed some compression in the cervical spine, there was no myelomalacia showing damage to the spinal cord. Dr. Zaslavsky described the C4-5 disc as being bilevel and acute on chronic, but the official reading of the MRI does not show any evidence of myelomalacia of the cord. Myelomalacia would be seen on the MRI, because the white matter of the cord actually starts to die back and the changes are seen on the MRI. The MRI was read by the radiologist as there being no evidence of myelomalacia.

Claimant presented for the examination without any ambulatory aids, such as a cane or walker. He did not have any spasm on examination. There was no swelling, redness, hematoma, or ecchymosis. There were no neurological issues, such as sensory loss in a dermatomal pattern down the legs or arms, or motor weakness in any dermatomal pattern; there was no

radiculopathy. There was no atrophy in the arms or legs, which indicates that Claimant is able to use the muscles in the arms and legs. If the arm is not used for eleven months, it is going to atrophy, particularly in the deltoid muscle. If Claimant truly had signs of myelopathy when he saw Dr. Zaslavsky, the signs would be the same or worse by the time Dr. Piccioni saw him. If Claimant really had a worsening condition as Dr. Zaslavsky opined, Claimant's condition would have worsened by the time Dr. Piccioni saw him.

None of the medical providers before Dr. Zaslavsky note any segmental instability or neurological deficit. Dr. Zaslavsky does not note segmental instability, but he recorded neurological deficit. Dr. Piccioni's findings are consistent with the medical providers prior to Dr. Zaslavsky. The lack of segmental instability or neurological compromise indicates that the treatment Dr. Zaslavsky proposed is unreasonable and unnecessary.

Claimant was not taking any medication when he saw Dr. Piccioni. The physical therapy notes on October 16, 2019 indicate that Claimant reported that cannabis is the only thing that helps him. Claimant does not have a prescription for medical marijuana.

Claimant complains of a pain level of six out of ten on the pain scale in the trapezial area and eight out of ten on the neck. He does not have any numbness or tingling or pain down either arm when Dr. Piccioni saw him. He did not limp or list at all while ambulating and did not use an ambulatory aide at the examination. Claimant had a normal gait and normal station. The Romberg's test was negative for imbalance on examination with Dr. Piccioni. Dr. Zaslavsky testified that Claimant had balance problems when he saw him, which is another discrepancy in the examination findings. Dr. Piccioni confirmed that Claimant could stand on his toes, heels, walk in tandem, and walk with a reciprocating gait during the March 31, 2020 examination. Claimant had a negative straight leg-raising test.

Log-rolling of the hip produced some pain in the groin area, which would potentially be an arthritis of the hip or hip pain can come from the back, hip, or trochanteric area; pain in the hip with log-rolling would be something interarticular in the hip. Claimant had tenderness to palpation of the greater trochanter on the right side, but without swelling, warmth, or erythema; it could be evidence of trochanteric bursitis on the side of the hip, but it did not look like any evidence of infection or cellulitis. The sensory motor examination and deep tendon reflexes were intact in both legs without any evidence of radiculopathy or myelopathy.

Examination of the neck showed no asymmetry or torticollis. Claimant grossly limited active ranges of motion. There were no spasms, gibbous deformity, Tinel's sign over the C2 area, or any hypoesthesia, which indicates that there was no evidence of a cervical spine issue causing a headache. Claimant had a negative Lhermitte's sign and negative Spurling's maneuver. Dr. Piccioni found normal sensory and motor examinations, deep tendon reflexes, and both arms were without any focal deficits or bony loss. There was no evidence of radiculopathy or myelopathy.

Dr. Piccioni completed a Physical Capacities Evaluation Form for Claimant. He found that Claimant made a full and complete recovery from his industrial injuries. Dr. Piccioni released Claimant to work as of March 31, 2020. He reached the conclusion based on the history, records, and physical examination findings. The records show that Claimant actually requested to return to work in a full-duty capacity when he saw his family physician on May 7, 2019. The family physician wanted Claimant to finish physical therapy before returning to full-duty work. The examination with Dr. Piccioni showed no objective signs, so he felt Claimant was physically capable of working in a full-duty capacity.

A July 22, 2008 imaging record from Kent General Hospital shows narrowing disc spaces at C5-7 and Claimant was diagnosed with discogenic disease due to the imaging findings and his neck pain. The April 24, 2019 imaging records at Kent General Hospital again diagnose Claimant with moderate degenerative disc disease at C5-7. The same levels from 2008 are showing degenerative changes in 2019, but there are no acute findings on the cervical spine x-rays in 2019.

On April 24, 2019, eight hours after the industrial accident, Claimant complained to the emergency room staff about the right shoulder pain only and he denied striking his head. On May 7, 2019, Claimant followed up with his family physician and requested to return to full-duty work without any restrictions. On May 31, 2019, the cervical spine MRI showed diffuse disc desiccation with loss of intervertebral disc space from C4 to C5 and C6 to C7, but there were no acute findings to correlate any of the MRI findings to the April 24, 2019 industrial accident. On June 26, 2019, Claimant admitted to Dr. Zaslavsky that he was working thirteen hours per week at that point.

On August 30, 2019, Claimant reported to his physical therapist that he was sitting on a cooler at a friend's house when the cooler tipped over, causing him to fall onto his back. He reported no increase in neck pain after the fall, but then the therapist noted more pain after walking across the street to the store before coming to therapy, which indicates to Dr. Piccioni that Claimant could have had a new injury or an aggravation of the existing condition.

On September 4, 2019, Claimant reported that his neck felt worse after he turned his head while standing and talking to his wife and he heard a loud pop associated with the increased pain. The description of the incident indicates to Dr. Piccioni that Claimant could have a new injury unrelated to the industrial accident, which can cause an increase in symptoms.

On October 1, 2019, Claimant reported to his physical therapist that his neck was only a little sore and his primary concern was the right low back and hip pain, which increased with walking. Dr. Piccioni testified that it sounds like the neck pain was doing better and now Claimant has a problem in the lumbar area.

On February 12, 2020, Dr. Zaslavsky recommended a C4 through C7 discectomy and anterior fusion. Dr. Zaslavsky testified in his deposition that all of the injuries besides the cervical spine were all speculation on Dr. Zaslavsky's part. Dr. Zaslavsky did not examine any other area and did not have any medical records regarding any other area. Dr. Piccioni was not speculating about the hip, lumbar spine, or knee; he relied on the medical records, history from Claimant, physical examination findings, and clinical experience to opine to a degree of reasonable medical probability.

As of the March 31, 2020 examination, Dr. Piccioni believes Claimant was physically capable of working in a full-duty capacity since May 7, 2019, when Claimant requested a release to work in a full-duty capacity. Dr. Piccioni did not see anything that would change that opinion. Dr. Piccioni believes Claimant sustained a cervical spine strain superimposed on degenerative disc changes and a right shoulder contusion or sprain, which has resolved. The lumbar spine was not injured at all by the industrial accident and Dr. Piccioni does not associate it with cervical spine myelopathy as Dr. Zaslavsky speculated. Claimant did not sustain a hip or knee injury from the direct injury or associated with the cervical spine or shoulder injury. The only injuries Claimant sustained related to the industrial accident were a cervical spine strain/sprain superimposed on chronic degenerative changes and a resolved right shoulder contusion or strain. Mindful of Claimant's injuries, Dr. Piccioni still believes that Claimant could return to work in a full-duty capacity as of May 7, 2019.

James Zaslavsky, M.D., a board-certified orthopedic spine surgeon and a certified physician pursuant to the Delaware Workers' Compensation system, testified by deposition on behalf of Claimant. Dr. Zaslavsky began treating Claimant on June 26, 2019 for the cervical spine and he reviewed Claimant's prior medical records. Dr. Zaslavsky believes Claimant's treatment for the cervical spine, including the proposed cervical spine fusion, and the total disability period have been reasonable, necessary and causally related to the industrial accident.

On April 24, 2019, the emergency room record indicates that Claimant was there for shoulder pain. He reported falling at work when he slipped on trash and fell into a commercial grade door, impacting the right shoulder. He saw his supervisor, who directed him to go to the emergency room for evaluation. There is no indication in the record of any complaint or report that he struck his head on the door. X-rays were performed of the right shoulder and cervical spine in order to rule out any acute fractures.

On April 29, 2019, Claimant went to the occupational health office, complaining of headache on the right side of the head, shoulder pain, and neck pain.

On May 1, 2019, Claimant went to physical therapy, presenting with signs and symptoms consistent with cervical spine sprain/strain, decreased range of motion, strength, flexibility, and joint mobility. He reported that he fell at work and hit his head on the door and strained his neck and shoulder and that his shoulder bothered him.

On May 2, 2019, Claimant went to his family physician. The note indicates that Claimant went to the emergency room and denied hitting his head. Claimant returned to his family physician on May 7, 2019, and requested a release to work in a full-duty capacity.

On May 31, 2019, Claimant had an MRI, which showed a significant disc bulge at C4-5 and an annular fissure. The disc bulge had a bilevel distribution, meaning it had two colors on

the T2-weighted images. The dark black area signifies degenerative changes that have been present in the past. The lighter gray areas look like acute changes on top of degenerative findings or a new portion of disc that protruded more and became more compressive of the spinal cord itself. The annular fissure appears to be an injury that the disc herniation has protruded through and is compressing the spinal cord. There is severe central spinal cord compression with deformation of the sac and the cord itself. There is also a disc bulge at C6-7 with right more so than left neuroforaminal compression. Overall, the disc bulge at C4-5 appears to have many acute findings and is consistent with an injury such as what Claimant describes, which is a fall striking a door.

Dr. Zaslavsky first examined Claimant on June 26, 2019 for the cervical spine. Claimant reported a fall where he pushed an air compressor door after slipping on trash on the floor, injuring his right knee, right shoulder, and hitting his head on the door, injuring his cervical spine. The physical examination showed a positive Hoffman's sign bilaterally, positive right-sided Spurling's sign, limited cervical spine rotation, and palpable muscle spasms and trigger point notches in the right upper trapezial and parascapular muscles. Claimant was working thirteen hours per week at the time of the examination. They discussed the MRI results and Dr. Zaslavsky expressed concern about the large disc bulge that was compressing the spinal cord. Dr. Zaslavsky discussed the danger signs and symptoms for Claimant to look out for and they discussed the signs and symptoms of myelopathy. The plan as of June 26, 2019 was to see how Claimant did over the next six weeks. Claimant was already taking an anti-inflammatory medication, which Dr. Zaslavsky told him to continue taking.

On August 21, 2019, Claimant continued to have pain across the cervical spine region, shooting pain down his right side, trouble opening water bottles and jars, minor balance

difficulties, and continued symptoms that impaired his motor skills. At times, he had trouble sleeping at night and he could not lie on his right shoulder. On physical examination, Claimant continued to have a positive Hoffman's sign bilaterally, grip weakness, positive Spurling's test, balance deficit with tandem gait walking, severely limited right cervical spine rotation, and absent right triceps reflex. Claimant had been let go from his job by that time. The plan was for Claimant to begin physical therapy and obtain cervical spine traction. Dr. Zaslavsky asked Claimant to stay out of work, because of his worsening condition. Claimant had more weakness and balance deficits.

The physical therapy record dated August 26, 2019, indicates that Claimant struck both his right shoulder and head on the metal door. On August 30, 2019, the therapy record indicates that Claimant fell off of a cooler onto his back, but reported no increased neck symptoms.

Dr. Zaslavsky saw Claimant next on November 13, 2019 and Claimant reported having increased neck pain and right arm pain. He had numbness and tingling into his fingers, his balance was worsening, he used a cane because of a couple of near falls, he had more pain radiating into his right hand, and he was dropping items more often. Claimant reported having difficulty lifting a heavy pot from the stove, taking dishes out of the dishwasher, sleeping through the night, and driving for more than ten minutes at a time. He held onto furniture to walk through the house at times, especially in the dark. The physical examination showed that Claimant was unable to tandem gait walk without losing his balance. His balance was worse than on the previous examination in August. Claimant had palpable muscle spasms in the bilateral trapezial region, positive right-sided Hoffman's sign, and positive hyperflexia of the bilateral lower extremities.

Dr. Zaslavsky explained to Claimant that he had worsening myelopathy from the disc bulges that had been aggravated by the industrial accident. His symptoms were worsening, which is typical for myelopathy. As balance worsens, Claimant will become more of a surgical candidate than someone who can improve with conservative care. Dr. Zaslavsky discussed an anterior cervical discectomy and fusion from C4 to C7. Claimant understood the risks and benefits and possible complications of the surgery.

Dr. Zaslavsky saw Claimant again on January 22, 2020. Claimant continued to have a considerable amount of pain radiating into both arms, numbness and tingling into his fingers. He had difficulty lifting and trouble standing and walking for longer periods of time. Claimant felt as if his legs were getting weaker and he was eager to proceed with surgery. Claimant continued to have balance problems, use a cane, and hold onto the wall as he walks down the hallway into the treatment room area. On physical examination, Claimant continued to show a positive Hoffman's sign bilaterally, positive hyperflexia distally, and unable to tandem gait walk. He had significant disc encroachment bilaterally. The plan was to proceed with surgery.

Claimant saw the physician's assistant, Russell Queen, on February 12, 2020. Claimant's complaints were unchanged and he continued to have pain radiating down both arms. The symptoms were moderate to severe and he described the symptoms as aching and sharp.

Dr. Zaslavsky is aware of Claimant's defense medical examination with Dr. Piccioni on March 31, 2020. It appears that Claimant was very consistent with his history reporting. There was considerable difference in the physical examination findings. Dr. Piccioni did not notice a Hoffman's sign, but Claimant has a very frank Hoffman's sign in his bilateral extremities. Dr. Piccioni noticed weakness in Claimant's upper extremities and since Dr. Zaslavsky has known Claimant, he has had a considerable amount of weakness in his upper extremities that is

somewhat better or worse at times, but it always tends to be considerable. Claimant has significant balance changes and ambulates with a significantly off-balance gait pattern, but Dr. Piccioni noted a very normal gait pattern. Dr. Piccioni did not see anything that portrays myelopathy, but Dr. Zaslavsky completely disagrees, as Claimant has multiple signs and symptoms that are extremely concerning for progressive myelopathy. Dr. Zaslavsky believes Claimant's signs and symptoms, subjective complaints, objective findings, and MRI findings correlate with each other and with the mechanism of injury described.

Dr. Zaslavsky completely disagrees with Dr. Piccioni's opinion that Claimant has a strain/sprain of the cervical spine that does not warrant surgery. Claimant sustained a disc herniation at C4-5 that is compressing the spinal cord. There are acute or chronic findings on the MRI and findings on physical examination that correlate to the MRI and there are signs and subjective complaints that correlate to the MRI findings and physical examination findings that all describe a progression of cervical myelopathy. It is very common for cervical myelopathy to start mostly as neck pain and maybe headache and eventually progress to a full myelopathic picture over the timeframe of months or years. It would be very uncommon for Claimant to be injured in April and a week later present with full-blown myelopathy. Myelopathy occurs when there is compression of the spinal cord and a slow, step-wise decline. It is surgical malpractice to not address worsening myelopathy in a patient with progressive dysfunction or at least recommend surgery as the primary option for treating the symptoms.

Dr. Zaslavsky believes that Claimant's cervical spine symptoms are causally related to his fall at work. The mechanism of injury is consistent with the progressive disc bulge at C4-5 that is compressing the spinal cord. He developed a progression of cervical myelopathy, which is the expected mechanism of pathogenesis of this problem, and developed worsening

myelopathic changes of the spine after the industrial accident. All of the treatment provided and the proposed surgery are reasonable, necessary, and causally related to the industrial accident.

Dr. Zaslavsky did not evaluate Claimant specifically for a lumbar spine injury and has not ordered any imaging studies of the lumbar spine. With a high degree of medical probability, the low back pain is coming from the cervical spine. Since Dr. Zaslavsky has not evaluated Claimant's lumbar spine, he is speculating about the source of the lumbar spine pain.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Since KFC filed the Petition, KFC bears the burden of proving that Claimant's industrial injuries are limited to a cervical spine strain/sprain and a right shoulder sprain and that Claimant recovered from those injuries as of May 7, 2019. Claimant argues that he injured his cervical spine and right shoulder as a result of the industrial accident and his injuries are more severe than KFC alleges. Claimant argues that he needs a cervical spine fusion from C4 through C7, causally related to the industrial accident and that he is totally disabled related to the industrial accident. Claimant argues that the other body parts are not at issue at this time. For the following reasons, the Board finds that KFC has met its burden of proof.

The Board finds that Claimant is not credible and there were numerous examples of his lack of credibility. At the emergency room on April 24, 2019 and the occupational health office on May 2, 2019, the only complaint involved the right shoulder and then on May 7, 2019, Claimant requested a release to work in a full-duty capacity, but now claims he remains totally disabled related to the industrial accident. He did not complain about the neck until after May 7, 2019, although he specifically denied hitting his head while he was at the emergency room on the night of the accident. Also, Claimant has been self-medicating with marijuana illegally; he has not been prescribed cannabis and has not even attempted to obtain a medical marijuana card.

When Claimant testified on direct, he testified that his supervisor sent him home after the accident, but finally agreed with additional questioning that the supervisor actually told him to seek medical attention. Claimant testified that he has not tried injections because he is afraid of needles; however, the Board finds this testimony incredulous, since Claimant is willing to undergo major spine fusion surgery with numerous serious risks, but he is unwilling to even try injections. If he does not trust needles, as he testified, it does not make sense that he would rather trust undergoing such a risky, serious surgery instead. Furthermore, Claimant testified that his neck hurts, but he spends his days on his telephone and/or another device playing video games, but there is general knowledge that looking at a device for so long causes neck pain and stiffness. Claimant's testimony is inconsistent and not credible.

When there is a conflict in the medical testimony, the Board must decide which physician is more credible. *General Motors Corp. v. McNemar*, 202 A.2d 803 (Del. 1964). As long as there is substantial evidence to support the decision, the Board may accept the testimony of one physician over another. *Standard Distributing Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993). In the case at hand, the Board accepts Dr. Piccioni's opinions over Dr. Zaslavsky's opinions regarding the nature and extent of Claimant's injuries and the total disability period. The Board finds that Dr. Piccioni's opinion was more persuasive as it was consistent with Claimant's overall condition and the facts in this case.

The Board accepts Dr. Piccioni's opinion that Claimant does not have myelopathy in the cervical spine. None of the medical providers from the date of the industrial accident until Claimant saw Dr. Zaslavsky noted any signs or symptoms of myelopathy and Dr. Piccioni did not note any signs or symptoms of myelopathy on examination six weeks after Dr. Zaslavsky's last visit with Claimant. Only Dr. Zaslavsky noted any signs or symptoms of myelopathy and

since myelopathy is a progressive condition, it should have been evident on examination with Dr. Piccioni if Claimant actually has it. There is obviously a significant scientific disconnect because if Claimant has a progressive myelopathy, Dr. Piccioni should have seen it and the providers before Dr. Zaslavsky should have seen it; myelopathy does not just go away. Although the cervical spine MRI shows some compression, there was no myelomalacia showing damage to the spinal cord. If there were myelomalacia, it would be seen on the MRI, because the white matter of the cord actually starts to die and the changes are seen on the MRI. None of the physicians noted any segmental instability and only Dr. Zaslavsky recorded any neurological deficit; the lack of segmental instability or neurological compromise indicates that the surgery Dr. Zaslavsky proposed is unreasonable and unnecessary for Claimant.

As for the lumbar spine and lower extremities, Claimant had a normal gait, normal station, and he did not use an ambulatory aide at the examination with Dr. Piccioni. The tests for imbalance were negative, which was another discrepancy in the examination findings from Dr. Zaslavsky. Dr. Piccioni confirmed that Claimant could stand on his toes and heels, walk in tandem, walk with a reciprocating gait, and he had a negative straight leg-raising test. The sensory motor examination and deep tendon reflexes were intact in both legs without any evidence of radiculopathy or myelopathy.

Dr. Piccioni completed a Physical Capacities Evaluation Form for Claimant. He found that Claimant made a full and complete recovery from his industrial injuries. Dr. Piccioni released Claimant to work as of March 31, 2020, based on the history, records, and physical examination findings. The records show that Claimant actually requested to return to work in a full-duty capacity when he saw his family physician on May 7, 2019. The family physician wanted Claimant to finish physical therapy before returning to full-duty work and Claimant

testified that he finished the course of physical therapy, but it was extended so he still goes to therapy. The examination with Dr. Piccioni showed no objective signs, so he felt Claimant was physically capable of working in a full-duty capacity.

The Board finds that there are several important dates in the medical records in this case. On April 24, 2019, Claimant complained to the emergency room staff about the right shoulder pain only and he specifically denied striking his head. On May 7, 2019, Claimant saw his family physician and requested a release to return to full-duty work without any restrictions. On May 31, 2019, the cervical spine MRI showed diffuse disc desiccation with loss of intervertebral disc space from C4 to C5 and C6 to C7, but there were no acute findings to correlate any of the MRI findings to the April 24, 2019 industrial accident. On June 26, 2019, Claimant admitted to Dr. Zaslavsky that he was working thirteen hours per week at that point. By October 1, 2019, Claimant admitted to his physical therapist that his neck was only a little sore.

The Board accepts Dr. Piccioni's summary of Claimant's injuries and work capability. Claimant was physically capable of working in a full-duty capacity since May 7, 2019, when he requested a release to work in a full-duty capacity. Dr. Piccioni did not see anything that would change that opinion. Dr. Piccioni explained that Claimant sustained a cervical spine strain superimposed on degenerative disc changes and a right shoulder contusion or sprain, which has resolved. The lumbar spine was not injured at all by the industrial accident and Dr. Piccioni does not associate it with cervical spine myelopathy as Dr. Zaslavsky speculated. Claimant did not sustain a hip or knee injury from the direct injury or associated with the cervical spine or shoulder injury. The only injuries Claimant sustained related to the industrial accident were a cervical spine strain/sprain superimposed on chronic degenerative changes and a resolved right

shoulder contusion or strain. Mindful of Claimant's injuries, Dr. Piccioni still believes that Claimant could return to work in a full-duty capacity as of May 7, 2019.

Based on the foregoing, the Board finds that KFC has met its burden of proof. The Board finds that but for the April 24, 2019 industrial accident, Claimant would not have needed medical treatment for his neck and right shoulder or a period of total disability. *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992). The Board finds the medical treatment from April 24, 2019 through May 7, 2019 to be reasonable, necessary, and causally related to the industrial accident. Claimant is entitled to payment of his medical expenses for treatment to the neck and right shoulder pursuant to the Delaware Workers' Compensation Fee Schedule, as well as total disability benefits from April 24, 2019 through May 7, 2019 at his compensation rate of \$127.03 per week. Claimant returned to work in a light duty capacity at KFC and was later terminated for reasons unrelated to the industrial accident.

Attorney's Fee and Medical Witness Fees

Having received an award, Claimant is entitled to a reasonable attorney's fee assessed as costs against KFC in an amount not to exceed thirty percent of the award or ten times the average weekly wage, whichever is smaller. *Del. Code Ann. tit. 19, § 2320*. However, when the employer submits a settlement offer to Claimant or Claimant's counsel at least thirty days before the hearing that is equal to or greater than the Board's award, the Claimant is no longer entitled to receive an award of attorneys' fees. *Id.* At the conclusion of the hearing, KFC submitted a settlement offer that was sent to Claimant's counsel before the hearing. The settlement offer was less than the award; therefore, Claimant is entitled to an attorney's fee award in this case.

Claimant's counsel submitted an affidavit attesting to twenty-two hours of preparation for this two-hour long hearing. This case was not novel or difficult, nor did it require exceptional

legal skills to try properly. It was not argued that acceptance of this case precluded other employment by Claimant's counsel. The Board considered the fees customarily charged in this locality for similar legal services, the amounts involved and the results obtained. The Board also considered the argument that this case posed time limitations upon Claimant's counsel, the date of initial contact on July 31, 2019, and the relative experience, reputation, and ability of Claimant's counsel. It was argued that the fee was contingent, Claimant's counsel does not expect to receive compensation from any other source, and the employer is able to pay an award. *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973).

The Board must consider the ten factors enumerated in *Cox* when considering an attorney's fee award or else it would be an abuse of discretion. *Thomason v. Temp Control*, Del. Super. Ct., C.A. No. 01A-07-009, Witham, J., slip.op. at 5-7 (May 30, 2002). Claimant bears the burden of establishing entitlement to an attorney's fee award and must address the *Cox* factors in the application for an attorney's fee. Failure to address the *Cox* factors deprives the Board of the facts needed to properly assess the claim. The *Cox* factors were addressed in the Affidavit Regarding Attorney's Fees.

In the case at hand, based on the results obtained, information presented, and the fact there is no dispute that an award of an attorney's fee is due, the Board finds that one attorney's fee in the amount of thirty-percent of the award or \$7,200.00, whichever is less, is reasonable. *Del. Code Ann.* tit. 19, § 2320. This award is reasonable given Claimant's counsel's level of experience and the nature of the legal task. In accordance with § 2320(10)a, the attorney's fee awarded shall act as an offset against fees that would otherwise be charged by counsel to Claimant under their fee agreement.

As there is an award, medical witness fees are taxed as costs against KFC. *Del. Code Ann. tit. 19, § 2322(e).*

STATEMENT OF THE DETERMINATION

Based on the foregoing, KFC's Petition to Determine Compensation Due is GRANTED as to the compensability of Claimant's April 24, 2019 industrial accident with sprain/strain injuries to the neck and right shoulder only. Claimant is entitled to payment of medical expenses for the neck and right shoulder pursuant to the Delaware Workers' Compensation Fee Schedule from April 24, 2019 through May 7, 2019, as well as total disability benefits from April 24, 2019 through May 7, 2019 at his compensation rate of \$127.03 per week. In addition, Claimant is entitled to payment of medical witness fees and one attorney's fee in the amount of thirty-percent of the award or \$7,200.00, whichever is less.


IT IS SO ORDERED THIS 9th DAY OF JULY 2020.

INDUSTRIAL ACCIDENT BOARD

/s/ Mary Dantzler

/s/ Gregory Fuller, Sr.

I hereby certify that the above is a true and correct decision of the Industrial Accident Board.


Julie G. Bucklin
Workers' Compensation Hearing Officer

Mailed Date:

C.R. 7-14-2020
OWC Staff