BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

ERWIN BROWER, JR.	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1448954
	)	
PRO LAWN, INC.,	)	
	)	
Employer.	)	

DECISION ON PETITION TO DETERMINE ADDITIONAL 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 ("Board") on April 11, 2019 in the hearing room of the Board, in New Castle County, Delaware.

PRESENT:

MARK MUROWANY

PETER HARTRANFT

Julie Pezzner, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Joel Fredricks, Attorney for the Claimant
Joseph Andrews, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On August 8, 2016, Mr. Erwin Brower, Jr. ("Claimant") sustained a compensable injury to his lumbar spine during the course and scope of his employment at Pro Lawn, Inc. ("Employer"). Claimant's average weekly wage at the time of the work accident was $520 resulting in a weekly workers' compensation rate of $346.67. On July 9, 2018, Claimant filed a Petition to Determine Additional Compensation Due in which he contends that he sustained a fourteen percent permanent impairment of his lumbar spine. Employer does not challenge the degree of permanent impairment but rather challenges the causal relationship of the permanent impairment to the work accident and challenges the ripeness of Claimant's claim.

On April 10, 2019, Claimant filed a Motion in Limine to exclude Dr. Robert Smith's testimony that discusses his opinion that the force from the motor vehicle accident was not sufficient to cause an injury. During the Motion in Limine that preceded the hearing on the merits, Employer objected to the admissibility of photos from the work accident that Claimant intended to introduce to refute Dr. Smith's testimony regarding the impact or force from the motor vehicle accident. The Board sustained Claimant's objection because Dr. Smith is not a biomechanical engineer/expert. Claimant withdrew his attempt to introduce the photos of the scene of the motor vehicle accident.

A hearing was held on Claimant's petitions on January 24, 2018. Deliberations concluded on July 29, 2019. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant testified on his own behalf. He is fifty-seven years old. He continues to be employed by Employer. He has worked for Employer as a landscaper for four years. He described his job responsibilities. This is Claimant's first workers' compensation claim.

On August 8, 2016, Claimant was driving a truck hauling a trailer that was carrying three commercial driving mowers. A coworker sat in the passenger seat. As they were talking, he saw a flash of headlights behind him and then heard a "big boom". His truck spun around.

Claimant did not experience symptoms at the time of the accident. However, he subsequently developed symptoms. The majority of his pain was in his back, but his neck became stiff. He worked a half-day to three quarters of the day. Then he and the passenger coworker treated at the emergency room.

Claimant's back and neck pain became constant. A week-and-a-half to two weeks after the work accident, Claimant started feeling pain extending down his right leg. The pain felt like lightning starting at the center of his back that went down the right side of the outside muscle of the right leg and down to his foot.

Claimant treated with Dr. Ennis. He underwent physical therapy. He underwent acupuncture. He performed stretches and exercises. He had an injection from which he benefitted for a week. The shot was supposed to provide relief up to three months. Thereafter, his symptoms returned but were worse than they were before the injection.

On March 21, 2017, Claimant visited Dr. Matthew Eppley for the surgical consultation per Dr. Ennis' referral. Dr. Eppley recommended surgery. Dr. Eppley explained that Claimant had a disk leaning on his nerve. Dr. Eppley wanted to remove the disk and then replace it. Claimant was worried about becoming paralyzed from surgery, so he asked for an alternative option. Dr. Eppley said he could shave the disk. Such option should help but would not solve the problem.

Claimant proceeded with surgery. Claimant testified that immediately after surgery, he felt good. He did not feel direct pain. He moved better. His pain has returned but he is better than he was prior to surgery.

Claimant has returned to work and Employer has been accommodating. During the week of the hearing, he worked eighteen hours. His hours were limited due to the season, not to his work limitations. He worked a few hours the morning of the hearing. His job is weather dependent. He is unable to work when it rains so when the weather is nice, he works longer hours to make up for the lost time.

Claimant characterized the day of the hearing as a good day. He rated his pain at a five on a ten-point pain scale. He represented that two to three times per week, his pain would escalate to a seven or an eight. He took three Aleve on the day of the hearing. Aleve is the only pill he currently takes, and he takes it as needed. Claimant is diabetic and takes insulin and other medications to treat his diabetes. Hence, he does not want to take extra medication pursuant to his work injury because medications are hard on the kidneys.

Claimant testified that his back is in constant pain. Approximately two to three times per week he experiences the shooting pain down the side of the right leg. He was not experiencing the radiating pain extending down his leg on the day of the hearing.

Claimant's pain has altered how he performs activities. It takes him longer to do things. There are some activities he used to do prior to the work accident that he will either hire someone to do for him or not have them done at all. He chooses to take the path of least resistance. For example, he will try to avoid steps and instead walk around. Navigating steps increases his symptoms. Tying his shoes and putting on socks can be challenging. At one time, Claimant's wife helped him putting on his socks and shoes, but she has since gotten tired of helping. Claimant asked to stand during part of his testimony because sitting was uncomfortable.

Claimant testified that he did not have back pain prior to the work accident although he did have back stiffness and achiness especially if he worked a lot. He described the stiffness as resembling fatigue. Sometimes his right thigh area would hurt but it would not interfere with his ability to work. The difference is that his work injury caused a radiating pain down the right leg to the foot. Prior to the work accident, Claimant treated with Biofreeze. He did not undergo an MRI or have a surgical consultation. He could touch his toes prior to the work accident. Since the work accident, he cannot always touch his knees. He used to walk for miles especially in his former job.

Claimant represented that both defense medical examinations were five minutes. Two of the five minutes involved the examination. Dr. Smith asked him to turn and twist. Dr. Smith measured Claimant's range of motion.

On cross-examination, Clamant acknowledged that he treated with a wellness doctor, Dr Beth Razulli on November 9, 2011 for what she documented was chronic low back pain. According to her medical records, Claimant had waxing and waning low back pain and recently developed mid back pain. It was weak and wonky. Claimant thinks Dr. Razulli was referring to his fatigue from work. The medical notes stated that she prescribed Flexeril. Claimant could not recall the prescription but stated that he treated with Biofreeze.

Claimant was asked about an April 21, 2105 medical note indicating that Claimant presented with low back pain and his sciatica was acting up. Claimant responded that he does not know what sciatica means so he did not understand the notation to comment.

Claimant acknowledged that Dr. Eppley and Dr. Eskander advised him that eventually he will need another surgery. Claimant wants to avoid it. He is very scared and nervous to undergo

surgery. However, if his shooting pain down the leg starts to become close to constant then he might consider pursuing surgery.

Dr. Matthew Eppley, a neurosurgeon and a certified provider under the Delaware Workers' Compensation Healthcare Payment System testified by deposition to a reasonable degree of medical probability on behalf of Claimant. He first saw Claimant on March 21, 2017 and diagnosed Claimant as having lumbar radiculopathy. He opined that as a result of the work accident, Claimant sustained a large fragmented disk causing pressure on the L5 nerve root per MRI resulting in a fourteen percent permanent impairment of the low back. He additionally opined that the surgery and medical treatment was reasonable, necessary and causally related to the work accident.

On August 8, 2016, Claimant was involved in a work-related motor vehicle accident. On the day of the collision, Claimant treated at the emergency room where he complained of pain in his neck, his shoulders, his mid back and his low back.

On August 22, 2016, Claimant treated with Dr. Ennis at which time Claimant complained of pain in his neck, in the mid back and in the low back. According to Dr. Ennis' records, Claimant was a restrained driver of a vehicle that was struck from behind at a time Claimant had been increasing his speed up to sixty-five miles per hour. The vehicle that had struck Claimant's vehicle was moving in excess of sixty-five miles per hour. The airbag did not deploy. Claimant was looking straight at the time of impact. He did not hit his head. He did not lose consciousness. The vehicle sustained moderate visual damage.

Claimant underwent an MRI of the low back on November 17, 2016. Dr. Eppley reviewed the report and the films. According to the report, the MRI demonstrated a moderately severe spinal stenosis from a disk herniation at L4-5 and probably a superiorly migrated fragment at that level.

He had smaller changes, a central herniation at L3-4 and some degenerative changes at L4-5 and at L5-S1.

Dr. Eppley testified that from his review of the films, there was a large fragment jammed underneath the L5 nerve root. The fragment had come out of the L4-5 disk and was causing pressure on the L5 nerve root. Dr. Eppley testified that such finding was consistent with Claimant's complaints of pain emanating from the back and extending down the outside of the leg in the L5 nerve root distribution.

Dr. Ennis referred Claimant to Dr. Swaminathan for an injection to the low back. Claimant underwent one injection from which he benefitted for one week. Dr. Eppley was not surprised that the injection only provided one week of benefit. He explained that if there is a big fragment and the nerve is severely compressed, putting some steroid and numbing medicine around that nerve would be temporary at best.

When Dr. Eppley saw Claimant on March 21, 2017, Claimant complained of pain in his back that extended down the right side of his right leg, laterally to the ankle. Upon physical examination, Claimant had a lot of spasm that could be palpated in the musculature of his back. He did not have any weakness on his dorsiflexion or plantar flexion of his foot that would require emergent surgery although Dr. Eppley recommended Claimant undergo surgery.

Dr. Eppley performed a right-sided L4 hemilaminectomy and microdiscectomy on May 4, 2017. Dr. Eppley testified that while he performed the surgery, he found a rather large fragment and pulled it out from beneath the nerve root which gave immediate relaxation of the nerve root. He described how he performed the surgery. Claimant was lying face down in the prone position under anesthesia. Dr. Eppley made a one-inch incision in the low back around the L4-5 area. He went down to the L4-5 between the bones and drilled away the bone covering the spinal canal on

the right side to gain access to the nerve root. Then he reached around the nerve root and found the disk herniation and fragment under the microscope. He removed very carefully the fragment, usually in one large piece by grabbing it by the corner. Then he went into the disk that already had a hole from the injury and cleaned out the inside of the disk to try to prevent further soft fragments from coming immediately out again. He still left approximately eighty percent of the disk in place, but it now had a hole in it. He closed it with dissolving stitches, awakened Claimant and sent him home the same day.

In June and July 2017 Claimant reported getting relief with regards to his low back pain and his right lower extremity pain. On September 21, 2017, Claimant referenced a flareup, a worsening of low back pain, after he was at work. His main complaint was of his back in an area a little lower than the surgical location. He did not have radicular pain.

Dr. Eppley most recently saw Claimant on January 23, 2018. Claimant reported that his leg pain was still gone. His lower extremities were working well but his back still hurt. He had pain leaning forward. Claimant reported that his back pain was worse than prior to the work accident but his leg symptoms were better. Claimant had difficulty transitioning to positions such as standing up, flexing forward and flexing backward. His motor was intact in his lower extremities. He no longer had pain arching his back. He continued to do landscaping work. He struggled with back pain daily and took Aleve on occasion.

Initially, Dr. Eppley gave Claimant a hook to do home exercises because Claimant said he did not have insurance. Dr. Eppley subsequently referred Claimant to Pivot Physical Therapy. Claimant went to Pivot from February 2018 to March 2018 for eighteen visits. Claimant treated with Dr. Ennis up through October 2018.

April 20, 2018, Claimant saw Dr. Mark Eskander for a second opinion. Dr. Eskander documented low back pain but mentioned radiculopathy, lumbar region. The record identified the chief compliant as back pain radiating to the right leg. Upon physical examination, Claimant had a negative straight leg raising test. Dr. Eppley represented that Dr. Eskander's examination findings were essentially the same as Dr. Eppley's examination findings on January 23, 2018. It appeared that Claimant's condition remained unchanged since January 2018.

Dr. Eppley recognized that Claimant had back pain before the work accident. Dr. Eppley testified that prior to the work accident, Claimant had seen his family doctor twice over several years for complaints of back pain. The most recent visit was a year-and-a-half prior to the work accident. Dr. Eppley did not see any indication in the records of Claimant having radicular complaints of significance prior to the work accident. Dr. Eppley asked Claimant how he was feeling on the day of the accident before it occurred. Claimant told Dr. Eppley that he was in his usual state of health - somewhat achy but functioning well.

Dr. Eppley noted that Claimant will continue to require treatment. More likely than not, at some point, Claimant will require reconstructive surgery at multiple levels although it is something they are currently trying to avoid. Dr. Eppley explained that Claimant will continue to have back pain. He had back pain prior to the work accident. Dr. Eppley continued that Claimant's back pain will probably be worse now after having the L4-5 disk blow out completely and after undergoing surgery. Dr. Eppley specifically testified: "I think he'll need surgery in the future. Luckily, he's able to work, but clearly he's still having back pain as evidenced by Dr. Eskander's last note and by his last visit to me. He's struggling . . . .", (Eppley Depo., 03/19/2019, 39:18-23). "So I think he's going to end up with surgery again in his back." (*Id.* at 40:1-2).

Dr. Eppley had "no doubt" that the fragment was "clearly" caused by the work accident. (*Id.* at 14:1-20.) Claimant had issues with degeneration predating the work accident which made it prone to breaking. Dr. Eppley stated that is would shock him if the fragment pre-existed the work accident as Dr. Robert Smith contends.

Dr. Smith inaccurately summarized Dr. Eppley's operative report. Dr. Smith in his October 29, 2018 report stated that according to the operative report, the right lateral recess stenosis at L4-5 appeared to be predominantly due to a thickened yellow ligament and a hypertrophic facet joint. Dr. Smith indicated there was no mention of a disk herniation causing nerve root compression.

Dr. Eppley responded that in his operative report, he clearly discussed the disk herniation and having to navigate the disk herniation to decompress the L5 nerve root. He specifically stated in his report that he had to follow the L5 nerve root past the disk herniation. Intraoperatively, he saw the fragment and the herniation.

Dr. Eppley opined that as a result of the work accident, Claimant sustained a fourteen percent permanent impairment of the lumbar spine. He relied on the sixth edition of the *AMA Guides to the Evaluation of Permanent Impairment*. He explained how he derived at his rating.[1]

Dr. Robert Smith who is a now retired[2] orthopedic surgeon testified by deposition to a reasonable degree of medical probability on behalf of Employer. He examined Claimant on February 13, 2017 and on October 29, 2018. He issued an addendum report on November 30, 2018. Dr. Smith opined that as a result of the work accident, Claimant sustained a soft tissue sprain of the low back that had resolved by the time of his February 13, 2017 defense medical examination. Hence, his opinion is that Claimant had returned to his pre-accident baseline. He

[1] Dr. Smith did not dispute Dr. Eppley's permanent impairment rating. He disputed the causal relationship of the permanent impairment to the work accident.

[2] Dr. Smith last performed spinal surgeries in the late 1990's. He stopped performing all surgeries in 2004. He retired from practice December 2018.

recognized that after his first defense medical examination, the parties entered into an agreement acknowledging only a lumbar spine soft tissue injury.

Dr. Smith ultimately did not dispute the reasonableness or necessity of the medical treatment but disputed the causal relationship of Claimant's symptoms at issue to the work accident. He opined that the MRI findings and need for treatment to include the surgery were preexisting. Similarly, he did not dispute Dr. Eppley's fourteen percent permanent impairment rating but related the permanent impairment to Claimant's preexisting condition.

Dr. Smith represented that Claimant had a history of similar symptoms prior to the work accident. He testified that he reviewed a multitude of medical records after his second defense medical examination that identified a diagnosis of low back pain with right-sided sciatica and weakness in 2011, in 2014 and in 2015. He referred to Dr. Razulli's medical records from April 15, 2014 and from April 21, 2015 in support of his representation.

The medical records from April 15, 2014 stated that Claimant had waxing and waning low back pain and more recently had mid back pain. At times it almost felt like the right leg got weak when walking. Claimant did not have foot drop or tripping. He did not have pain down the leg or numbness. The medical records from April 21, 2015 stated that Claimant's low back pain and sciatica were acting up. Dr. Smith stated that sciatica is pain shooting down the leg.

Dr. Smith could not recall how many dates prior to the work accident Claimant presented with low back complaints. He categorically stated that degenerative symptoms wax and wane. The fact that Claimant mentioned such symptoms to Dr. Razulli years prior to the work accident is evidence Claimant has had long-standing degenerative disease with waxing and waning symptoms even if Claimant did not treat for it. Claimant probably also had waxing and waning symptoms involving his leg. Despite such testimony, Dr. Smith admitted that he could not recall

any medical records prior to the work accident that specifically referred to pain and numbness going down the right leg. There was no prior referral to an MRI or to have injections in the low back. There was not a diagnosis of radiculopathy prior to the work accident or any referrals to a surgical consultation.

Dr. Smith testified that he reviewed the MRI report and the films. Dr. Smith did not see a traumatically-induced fragment. All of the images appeared to be long-standing and degenerative in nature. There were no acute findings like residual hemorrhage or swelling. There was no acute herniation or free fragment. The MRI findings were degenerative. Dr. Smith noted that Claimant was in his fifties at the time of the work accident and suggested the findings were consistent with Claimant's age group.

Dr. Smith testified that the records from the emergency room and the early chiropractic records did not support a lumbar radiculopathy diagnosis. There was no mention of radiculopathy in the emergency room records or in the chiropractic records. When Claimant treated at the emergency room on the day of the work accident, his diagnosis was of a sprain. The medical notes stated that Claimant denied decreased sensation and weakness in the extremities. They did not order x-rays or imaging. Claimant next treated with a chiropractor and the chiropractor's diagnosis was of a sprain.

In Dr. Smith's first report, Dr. Smith stated that there was no acute complaints of low back pain or of radiating pain. During cross-examination, Dr. Smith admitted the emergency room records identified low back pain complaints. Dr. Smith testified that such statement did not mean that Claimant did not have any low back pain following the work accident. He just meant that Claimant's main complaints were of mid back pain and of neck pain.

At the February 13, 2017, defense medical examination, Claimant reported the mechanism of injury as follows. He was driving a company vehicle that was pulling a trailer loaded with lawn equipment. He saw a vehicle traveling at a high rate of speed coming from behind. The vehicle struck the trailer and caused Claimant's vehicle to spin and go onto the median. The vehicle did not hit anything else. There was no airbag deployment. Claimant was able to get out of the vehicle and to ambulate. He continued to work.

Claimant's complaints were of mid to low back with radiation to the right leg in no particular dermatomal distribution. Dr. Smith opined that Claimant sustained soft tissue injuries with sprains and strains from his neck, mid/low back and the shoulder girdles. Dr. Smith did not see any evidence of radicular problems or of a serious injury to the deep structures of Claimant's spine. There was no evidence of any acute disk injuries such as a blowout of a disk or a herniation.

Claimant did not demonstrate findings supportive of radiculopathy, a neurological deficit. Claimant's complaints were non-dermatomal. Claimant's physical examination findings were benign. He did not have reflex asymmetry or atrophy in his limb. He did not have muscle spasm. He was able to move his spine pretty well. Dr. Smith stated that Claimant has significant degenerative disk disease in his back. Dr. Smith concluded that Claimant's right leg complaints were related to his degenerative disease.

Dr. Smith testified that Claimant's examination findings from the second defense medical examination were relatively the same as during the first defense medical examination. Claimant had no real alarming findings of anything on his spine.

Dr. Smith disputed the existence of a free fragment and much of his testimony appeared to challenge the existence of a herniation. Dr. Smith testified that there was no mention of a free fragment or herniation in the medical records or in Dr. Eppley's operative report. Dr. Smith

remarked that in light of Dr. Eppley placing such emphasis on the presence of a free fragment, Dr. Eppley should have explicitly identified the presence of a free fragment in his operative report and in his medical records.

Dr. Smith testified that furthermore, Dr. Eppley's operative report was inconsistent with the finding of a free fragment. Dr. Eppley's operative report stated that he (Dr. Eppley) had to incise the disk in order to get the disk material. Dr. Smith explained that if there was a free fragment, the disk annulus would already be ruptured because the disk material would be out of the spinal canal. There would be no reason to incise a disk if there is already a hole due to a free fragment. Stated differently, a free fragment is produced when the covering of the disk is already ruptured and there is a hole from the rupture. The free fragment would be sitting out in the spinal canal where it is not supposed to be. If Dr. Eppley had to excise or cut the disk in order to get the disk material that would be inconsistent to the presence of a free fragment. Dr. Smith continued that Dr. Eppley did not mention in his operative report any ongoing migrating fragment, a free fragment, or a blowout of the disk that would result in a free fragment. He only discussed it in his testimony – an opportunity for embellishment.

On cross-examination, Dr. Smith admitted that Dr. Eppley may have identified a herniated disk that Dr. Smith assumed was at L4-5, but Dr. Eppley did not specifically state that it was a traumatic disk herniation or a free fragment. Dr. Smith added that Claimant has degenerative herniation up and down the spine.

Dr. Smith acknowledged that the 2016 MRI report identified a superimposed central disk protrusion/extrusion that migrated approximately twelve millimeters above the level of the disk space. Dr. Smith testified that the finding of a migration does not equate to a free fragment. A

disk can migrate by spreading out like a mushroom. It does not necessarily have to migrate as a free fragment. Dr. Smith characterized the finding as a degenerative change.

Dr. Smith acknowledged that the MRI report referred to said finding as both a protrusion and an extrusion so it was unclear from the report which it was. Dr. Smith recognized that an extrusion refers to when a disk breaks apart, creating a hole in the annulus with the disk material coming out into the spinal cord. Dr. Smith testified that from his review of the MRI films, it appeared to be a degenerative protrusion. A protrusion refers to a bulging, similar to a herniation. Whatever the finding, it was superimposed on degenerative disk disease. Dr. Smith admitted that there can be a trauma from a motor vehicle accident sufficient to cause a protrusion or extrusion but opined that did not happen in this case.

Dr. Smith disputed the notion that Dr. Eppley's medical records from March 21, 2017 referenced a free fragment. He acknowledged that under the assessment section of the medical records, Dr. Eppley stated that L4-5 showed compression of the L5 nerve root from stenosis due to a superiorly-migrated fragment. Dr. Smith remarked that the latter notation does not mean a free fragment. It just means a superiorly-migrated fragment. The word "free" indicates that it is not attached to anything. It is not attached to any bone. Dr. Smith interpreted the word fragment to mean that a piece of something broke off something else.

Initially, Dr. Smith challenged the reasonableness and necessity of the surgery. He explained that the only reason to do a decompression or fusion would be the result of spinal instability or of neurologic1al deficit. There was nothing after viewing the MRI that there was any concern for spinal instability resulting from the work accident. There was no confirmed radiculopathy. There were no initial findings or complaints about instability. There was no neurological testing.

Dr. Smith acknowledged that Dr. Eppley and the MRI report mentioned compression of the L5 nerve root. He admitted that a person who has contact to the L5 nerve root can also have pain and symptoms down the leg. He testified, however, that the person with such findings could also be asymptomatic. He acknowledged that Claimant could have had pain with or without exacerbating the underlying condition. Dr. Smith testified that a surgery would not be warranted on asymptomatic findings. Dr. Smith acknowledged that his testimony was that Claimant had a normal defense medical examination.

Dr. Smith ultimately agreed that Claimant had compression of the L5 nerve root by a number of things: the ligamentum flavum; the hypertrophy facet joint; and the degenerative disk herniation. He reiterated that there was no evidence of a disk with a free fragment floating about compressing a nerve root. However, he ultimately admitted that the surgery was reasonable and necessary but only to address the preexisting condition.

Dr. Smith added that Claimant could not have blown out the disk from the work accident. Claimant would have been in substantial pain, unable to get out of the car, unable to walk around and unable to continue working. It did not appear that Claimant missed any work.

Dr. Smith acknowledged that Claimant did not demonstrate symptom magnification or exaggeration. Claimant appeared to be forthcoming. Claimant voluntarily `told Dr. Smith that he was involved in two motor vehicle accidents – one twelve years prior and one in 2015.

FINDINGS OF FACT AND CONCLUSIONS AT LAW

In order to be compensable, the injury must arise out of or be in the course of employment. 19 *Del. C.* § 2304. As this is the Claimant's Petition, Claimant has the burden to prove by a preponderance of the evidence that the injury was caused by the work accident. *Goicuria v. Kauffman's Furniture*, Del. Super., C.A. No. 97A-03-005, Terry, J., 1997

WL 817889 at *2 (Oct. 30, 1997), *aff'd*, 706 A.2d 26 (Del. 1998). The "but for" definition of proximate cause that is used in the area of tort law is the applicable standard for causation. *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. Supr.1992). Hence, the Claimant must prove that "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.

The Board has the statutory authority to award compensation "for the loss of any member or part of the body or loss of use of any member or part of the body...." 19 Del. C. § 2326(g). It is the Board and not the physician who determines the degree of a claimant's impairment. See *Turbitt v. Blue Hen Line, Inc.*, 711 A.2d 1214, 1215 (Del. 1998). To make such determination, the Board is free to choose between conflicting medical expert opinions so long as there is substantial evidence to support the finding. *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992); *Scarberry v. Chrysler Corp.*, Del. Super., C.A. 96A-07-003 Herlihy, J. slip op. at 2 (Dec. 12 1996). Furthermore, the Board "may use its experience and expertise as a tool for evaluating the evidence presented." *Michael Garnett v. Curbs, Etc., Inc.*, IAB No.: 1205977, DigiLaw2 (citing *Turbitt*, 711 A.2d at 1215).

Claimant contends that he has a fourteen percent permanent impairment of the low back as a result of the work accident due to a lumbar radiculopathy diagnosis. The degree of permanent impairment is not in dispute. To date, the parties have only agreed to the compensability of a lumbar spine soft tissue injury. Employer has not accepted the compensability of a lumbar radiculopathy diagnosis. Employer disputes the causal relationship of the lumbar radiculopathy diagnosis to the work accident and alternatively disputes that Claimant has reached maximum medical improvement.

After considering the totality of the evidence incorporated herein, the Board finds that Claimant failed to meet his burden of proof that he has reached maximum medical improvement regardless of causation. Claimant relied on Dr. Eppley's testimony that Claimant's condition and examination findings were the same during Claimant's visits to Dr. Eppley on January 23, 2018 and to Dr. Eskander on April 20, 2019 as evidence of maximum medical improvement. However, Dr. Eppley never specifically opined that Claimant has reached maximum medical improvement.[3] Therefore, Claimant did not present a medical opinion that Claimant had reached maximum medical improvement.

Furthermore, the preponderance of the evidence does not support that Claimant had reached maximum medical improvement. Dr. Eppley performed the surgery on May 4, 2017. Claimant and Dr. Eppley testified that initially Claimant was doing well after the surgery. His radicular complaints have improved but his back pain progressively returned and worsened. Dr. Eppley most recently saw Claimant on January 23, 2018 – less than eight months after surgery – and recognized that Claimant will likely need additional surgery. Claimant saw Dr. Eskander on April 20, 2018 for a second opinion. Claimant testified that Dr. Eskander was in agreement with Dr. Eppley's opinion. Dr. Eppley testified that the anticipated need for additional surgery relates to this work accident.

The Board recognizes that Dr. Eppley did not specifically state that Claimant requires surgery now. The Board also recognizes that Claimant testified that he wants to avoid pursuing additional surgery for as long as possible. However, Claimant testified if his radicular symptoms become more frequent, he might consider surgery. Claimant's symptoms wax and wane. The Board is not satisfied that Claimant's condition has plateaued. It is also not clear to the Board how

[3] (Eppley Depo. At 27:17-24).

soon additional surgery would become reasonable and necessary especially considering a surgical option is being discussed by two surgeons less than one year after the first surgery.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board DENIES Claimant's Petition to Determine Additional Compensation Due.[3]

IT IS SO ORDERED THIS 24th DAY OF JULY, 2019.

INDUSTRIAL ACCIDENT BOARD

MARK MUROWANY

PETER HARTRANFT

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

Mail Date: 7/30/19

OWC Staff

[3] Should Claimant choose to pursue this claim again when it becomes ripe, he either ought to resolve the compensability of the lumbar radiculopathy diagnosis and correlating medical treatment prior to filing or include such matters in his petition.