BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

DAVID HAMILTON,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1222906
	)	
INDEPENDENT DISPOSAL SERVICE,	)	
	)	
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 on October 30, 2015 in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

JOHN D. DANIELLO

ROBERT MITCHELL

Deborah J. Massaro, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Kyle F. Dunkle, Attorney for the Employee

Joseph Andrews, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Dave Hamilton ("Claimant") injured his low back in a compensable work accident on November 7, 2002 while working for Independent Disposal Service ("Employer"). Employer accepted the low back injury as compensable and workers' compensation benefits including medical expenses and total and partial disability have been paid. Claimant's average weekly wage at the time of the work accident was $437.94 resulting in a workers' compensation rate of $291.97.

Claimant filed the current petition to Determine Additional Compensation Due on March 3, 2015 seeking compensation for an L5-S1 anterior lumbar fusion surgery performed by Dr. James Zaslavsky on December 5, 2014 which he alleges is causally related to the work accident. Claimant seeks an award of medical expenses and a period of total disability. Employer agrees that all of Claimant's medical treatment was reasonable and medically necessary, but disputes causation of Claimant's injury.[1]

A hearing was held on Claimant's petition on October 30, 2015. This is the Board's decision on the merits.

[1] No Pre-trial Memorandum was provided by either party until the day of the hearing. In practice, it is the responsibility of the moving party to initiate the Memorandum. Here Claimant provided his section of the Memorandum at the hearing, only upon request of the Board after its admonishment of the parties. The Memorandum and lack of notice of certain of Claimant's arguments is discussed further in the Findings of Facts and Conclusions of Law section of this decision.

SUMMARY OF THE EVIDENCE

Dr. James Zaslavsky, orthopedic surgeon, testified at the hearing by deposition on Claimant's behalf (Claimant's Exhibit No. 1). He began treating Claimant in June of 2014 and reviewed the pertinent medical records. In his opinion Claimant's issues at L5-S1 are related to the 2002 work accident.

Dr. Zaslavsky reviewed Claimant's history after the work accident. Claimant had undergone physical therapy, chiropractic therapy, injections and testing for his low back problem at L5-S1 over the years. He had substantial treatment after the November 7, 2002 work accident which occurred while he was working with the collection of waste materials for Employer.

Dr. Zaslavsky reviewed Claimant's MRI, discogram, CAT scan and EMG in determining that the compression of the nerve that comes out between L5 and S1, or the L5 nerve root. Dr. Zaslavsky determined that an anterior/posterior spinal fusion at L5-S1, with decompression of the nerves was medically necessary.

Dr. Zaslavsky relates Claimant's need for surgery to the November 7, 2002 work accident. To the best of his knowledge Claimant did not have any previous back problems. He sustained an injury that was compatible with the mechanism of injury, lifting a heavy can over his head and twisting with it, hearing a pop in his back, which is very synonymous with a disc tear or disc injury. He tried to treat this conservatively for quite some time and lived with it. His symptoms continued to worsen with the collapse of the disc. He got more problems with radicular pain which became a problem for him because as the disc collapses it pushes on the nerves that come out of the opening between the two bones where the disc is collapsing. This causes a nerve pain and weakness In the muscles that are innervated by that nerve, thus leading to a worsening function and deterioration of his ability to walk, stand, sit, lift his grandkids and

do all the things in normal, everyday life. The condition at L5-S1 was not noted in the early 2002 MRI. Still Dr. Zaslavsky relates the issues at that level to the work accident because, as he explained, often when there is a disc injury and a pop is heard an MRI done immediately afterward may not show a completely collapsed disc. The disc is like a tire with a pinhole leak in it which is going to become worse over time because the large tear that is in the disc is incompetent in holding the disc material where it should be. This material continues to dry out over time until the point that the two collapse on each other, and it squeezes the nerve in between. This can happen over the course of five to twelve years or longer. Claimant was intricately involved with a significant amount of physical therapy and injections and this held him off on feeling the symptoms so severely to the point that he required surgery in order to achieve a higher level of function. Thus, the need for surgery in December of 2014 is causally related to the November 7, 2002 work injury.

After the procedure Claimant has done well with therapy, medication and injections. The plan is to progress him into a work conditioning type of program. Overall, he has improved significantly and his old pain in his back is gone. Dr. Zaslavsky opines that his treatment has been reasonable and necessary. Claimant is going to continue to need a conditioning program for his back and leg muscles. He will likely need an injection at times to alleviate the pain of an acute exacerbation. His condition is a little more guarded than most because he has had a significant amount of deterioration of his muscle mass and his overall conditioning of his back muscles because of the length of time he has been out of commission with his back problem. He also has some significant damage to his hips, or avascular necrosis.

On cross-examination Dr. Zaslavsky confirmed that he graduated medical school in 2005 and started practice in 2011 after a residency and fellowship.

By way of Claimant's history he confirmed that when he first saw Claimant on June 11, 2014 he found significant disc space narrowing at L5-S1. A September 6, 2012 discogram showed a large annular tear at the same level. On October 8, 2014 Dr. Zaslavsky noted severe L5-S1 disc degeneration, annular tear and foraminal stenosis. He agrees that foraminal stenosis can be caused by aging, but notes it can also be caused by an injury to the disc. He agrees that surgery is indicated if there is pain, and the pain is because there is compression of the L5-S1 nerve. Dr. Zaslavsky explained again that there are two reasons for the pain, first because that L5-S1 disc is like a flat tire and the bones are hitting each other. Also, the compression of that disc and the flattening out of the disc bulges into the foramen and can cause pressure on the nerves.

When confronted with the December 6, 2002 lumbar spine MRI which showed the L5-S1 disc to be unremarkable, Dr. Zaslavsky explained that this is what an annular tear looks like acutely, a normal disc, which is why a discogram is done. So if Claimant had an annular tear at the time of the accident he would not expect it to show up on MRI. He agrees that about five years later, on March 22, 2006 Claimant's MRI was still negative for disc herniation or stenosis, or focal nerve root effacement at that same level. He notes that an annular tear may not show up on MRI for quite some time. He states that this is in the literature. He agrees that an annular tear is seen on MRI on August 18, 2014, twelve years after the original injury. There was no S1 nerve injury or compromise found on EMG that same date. However, Dr. Zaslavsky notes that it did show significant L5 injury, which is exactly what happens with foraminal stenosis at L5-S1. He would not expect S1 nerve compression.

Dr. Zaslavsky ordered another EMG on March 3, 2015, and Claimant informed Dr. Swaminathan that he never underwent an EMG before, which is refuted by the fact that Claimant

underwent one in October of 2003 which was normal. Dr. Zaslavsky felt that this explains everything even further because right away when the tire still has some air in it, there should not be any pressure on the nerves. It all goes together. This is what happens with an annular tear. Typically after twelve years he would expect to see some changes from the annular tear.

Dr. Zaslavsky disagrees with Dr. Piccioni who testified that if the EMG states the L5 level, it means the L4-5 level. He notes that between L4-5, the L4 nerve root comes out and any foraminal stenosis at L4-5 can only cause L4 lumbar radiculopathy. Injury to the L5-S1 disc that causes foraminal stenosis at L5-S1 can only cause L5 radiculopathy.

Dr. Zaslavsky agrees that his permanency report for this case dated November 7, 2015 indicates that there has been no intervening injury since November of 2002. Claimant did not inform him that he was involved in any other incidents involving his back in the interim thirteen years. Dr. Zaslavsky says he would not have asked him about that for a variety of reasons. Dr. Zaslavsky agrees that the records reveal that the day before his slip and fall on ice on December 5, 2002 Claimant informed Delaware Back Pain and Sports that he was markedly improved with regard to his low back.

Claimant did not tell Dr. Zaslavsky about an incident wherein he was struck three times by an automobile and flung into the air over a clothes line until he landed on the ground and reinjured his back on December 15, 2002. Dr. Zaslavsky agrees that it is possible that being hit by an automobile could cause a disc herniation. He does not think any of the records support it as a disc herniation would cause immediate leg pain which Claimant did not complain of afterward. Dr. Zaslavsky testified that by definition when a disc herniates it compresses a nerve root. Dr. Zaslavsky did not answer the question of whether Claimant told him about the May 5,

2009 incident wherein he was carrying a casket and suddenly started to experience ten out of ten back pain.

Dr. Zaslavsky explained that despite these other incidents that could have caused injury to the L5-S1 area he does not believe that happened, rather he opines that it all goes back to the November 7, 2002 work accident. This is primarily because Claimant's pain settled down every time, back to his baseline condition where it was prior to these injuries. This is what occurs with a patient who feels a pop in his back and tears the annulus, and notices a significant change in his ability to function. His treatment never really changed. After each of those times, after appropriate intervention Claimant settled his symptoms back down to baseline where they had been prior to the re-aggravation. This is despite the notation on December 5, 2002 wherein Claimant stated he was markedly improved. Dr. Zaslavsky says this does not mean Claimant was back to baseline because patients with these types of injuries go up and down with pain all the time. It is not uncommon to feel markedly improved. He agrees that after December 5, 2002 Claimant continued to complain of an increase in pain. Claimant also did not inform Dr. Zaslavsky that he hurt his back again when he tried to lift his grandson on September 10, 2010.

With respect to Dr. Piccioni's DME report, Dr. Zaslavsky agrees that it indicates that five months after surgery Claimant informed Dr. Piccioni that his back pain was worse and had increased by fifty percent. Dr. Zaslavsky indicates that this is in conflict with his own record.

Dr. Zaslavsky is working on a reevaluation to get Claimant back to kind of a light duty. He has a significant hip issue which keeps him out of full function, but in terms of his back, he does very well. From Dr. Zaslavsky's notes Claimant is doing very well. He has always been very compliant with all of his office visits and accurate in his descriptions of his symptoms. He is eager to return to work. He is not a symptom magnifier.

Today Claimant is able to stand and sit, but he has to break up those times every half hour or so. He is helping take care of his grandkids and volunteer working with the fire company in a sedentary to light duty capacity. He does mostly clerical and light duty work. He is involved in truck alarms, but Claimant says it is minimal physical duty for him. Dr. Zaslavsky has informed Claimant of his precautions for his back and Claimant assures him that he is compliant. Claimant has a hip problem requiring replacement, so that will limit him more than his back. In terms of his back he is very close to being ready to start something light duty progressing to heavier duty.

Dr. Zaslavsky agrees that a fall, and about two dozen other things, would be enough to cause an annular tear. Lifting, such as in the work accident, is probably the most common way to cause an annular tear. Dr. Zaslavsky agrees that lifting a casket, being hit by a vehicle, or being flung up in the air and landing on your back could all be causes of an annular tear. The reason Dr. Zaslavsky does not believe that these subsequent incidents caused the tear is because the pain location did not change. It stayed in the same location and there was no new radiculopathy. So this means that it is the same pain that existed before, just re-aggravated because of an acute insult to the back. Also, his motion never improved immediately after the injury and then all of a sudden it deteriorated. He never returned to work. He does have good days and bad days. When he reported the improvement he could have been having a better day which is understandable. It has to stay better consistently for it to be a significant improvement and Claimant never had that after his work injury.

Dr. Ganesh Balu, pain management and rehabilitation physician, testified at the hearing by deposition on Claimant's behalf (Claimant's Exhibit No. 2). He first saw Claimant in 2003

and reviewed the pertinent medical records. In his opinion Claimant's L5-S1 injury is work related.

Claimant was referred to Dr. Balu by Dr. Godfrey for lumbar discograms. He had injured his lower back while emptying trash at work. He was getting medication and had tried treatment from Drs. Upadhyay and Dr. Schwartz. Dr. Rowe, an orthopedic surgeon, was the referring physician. Dr. Balu explained that when a patient presents with chronic low back pain, sometimes the surgeon will have performed MRIs and somehow the clinical picture is not consistent with the MRI. It is a diagnostic study which attempts to look at possible discogenic pain generators. The objective is to see if pain can be elicited that is concordant with the level being tested. Dr. Balu testified that patients who have experienced pain for a certain length of time are looking for answers and sometimes the answers are not clear. The MRI might show a bulging disc or a normal disc and a patient is told there is nothing wrong with the back. Often when a physician performs a discogram the course of the disease it is not changed, but a definitive answer is given to the patient. It helps with prognosis, diagnosis and segregating treatment for different patients.

An October 27, 2003 discogram was performed to test L3-4; L4-5 and L5-S1. Claimant reported pain as eight out of ten at the L3-4 level; two out of ten at the L4-5 level and no pain at L5-S1. There was questionable concordance at L4-5 and discordant at L5-S1. The post-discogram CT scan showed an annular tear, grade one to two at L3-4; the L4-5 and L5-S1 levels appeared unremarkable. Dr. Balu agrees with Dr. Zaslavsky that it is possible to have a small annular tear that could not be appreciated on this post-discogram CT study. He notes that ten or fifteen years ago a discogram was not that popular and the MRI facility was the only place that used to read discograms. The skill of the radiologists in reading discograms at the time was not

what it is now. At any rate, no surgery was being recommended and Dr. Balu administered intra-discal injections beginning December 29, 2003 at L3-4 based on the discogram results. This did not provide any relief.

Claimant did not treat with Dr. Balu again until February 2006 as he was treating with Dr. Godfrey. His complaints were the same as what he presented with in 2003. Dr. Balu opines that at the time Claimant's symptoms were an outgrowth of his work accident. In addition to his low back pain he was complaining of radicular pain at that time. In February of 2006 he had tenderness at L4-5 and S1. He also had paraspinal spasm, decreased range of motion and an antalgic gait. He was treated with medications at that time. From this time forward Dr. Balu saw Claimant monthly.

On June 5, 2006 Dr. Balu performed steroid facet injections bilaterally at L3-4, L4-5 and L5-S1. One of the goals was to cut down Claimant's pain medication and try other treatment options. Dr. Godfrey was not offering a lot of spinal injections to his patients as part of their chronic pain treatment in those days. On June 28, 2006 Claimant reported that he did not get any relief from the injections. On August 14, 2006 a caudal epidural steroid injection was performed. This is commonly performed for a herniated or bulging disc, or deep seated pain in the lumbar spine. Claimant reported some relief from this procedure. On November 6, 2006 a trans-laminar lumbar epidural steroid injection was performed at L4-5 and L5-S1. Dr. Balu continued to treat Claimant and perform these injections for Claimant's chronic low back condition. By 2007 his back pain was slowly getting worse and Claimant was frustrated with the chronicity of the pain and functional limitations. He asked for a discogram and surgical re-evaluation. This second study was done in December of 2007 and showed discordant pain at four out of ten at L4-5; concordant pain at eight out of ten at L5-S1. The post discogram CT

scan showed a disc herniation at L5-S1 and an annular tear at L4-5. Claimant continued with conservative treatment, including injections, and the concordant response at L5-S1 was confirmed through his response to treatment. Through 2009 he was complaining of increased radicular pain to his lower extremities and certain therapies were ordered. He had an exacerbation of pain in May of 2009. Claimant had turned down surgery because he did not want to take the risk. So he had elected to manage his pain with injections and medications. By April of 2012 Dr. Balu had performed twelve L5-S1 injections resulting in relief for Claimant. A third lumbar discogram was performed on September 6, 2012 because Claimant was thinking about surgery again. The levels tested were L3-4; L4-5 and L5-S1. He complained of concordant pain at L5-S1 at six out of ten. He complained of leg pain as well which confirms that his pain is still at that level. The CT scan showed an annular tear at L5-S1 with extrapolation of the dye and fissures at L4-5 annular level which indicates the early onset of a tear. Claimant underwent a biacuplasty procedure for this in August of 2013. Overall, he had some partial relief, but the treatment did not help him much over the years. The chronic low back pain and associated leg pain continued. After this only nerve block injections were performed, for his radicular pain.

In December of 2014 Claimant underwent a fusion surgery at the L5-S1 level with Dr. Zaslavsky. Dr. Balu agrees that this was Claimant's pain generator given the extensive history of injections at that level and concordant pain at that level on two separate discograms. Dr. Balu agrees with Dr. Zaslavsky's causation opinion.

Dr. Balu discussed his billing procedures for workers' compensation.[2] He agrees that this process includes submitting claim forms that itemize the services or supplies that relate to the

[2] Employer placed an ongoing objection to Dr. Balu's discussion and presentation of his bills given Claimant's failure to produce the documents prior to the hearing despite Employer's numerous requests and a lack of notice of

work accident. This procedure also includes submitting the associated office records. He believes that this procedure was followed with Claimant. He reviewed a billing ledger for Claimant which includes a brief description of the procedure performed for the charges on specific days and it shows applied payments by the carrier. Many procedures are listed including the three discograms, injections and the twelve injections to the L5-S1 area which all relate to the work accident. All were paid with the exception of a July 11, 2011 L5-S1 injection. Pain that is a different kind of pain is discordant pain. He agrees that pain is subjective.

Dr. Balu agrees that at Claimant's first discogram in 2003 the pain was entirely generated by L3-4. By the time of Claimant's second discogram in December of 2007 he had fissuring of the annulus at L4-5 and the most significant change was at L5-S1 where the central contrast material now extended into a broad-based fashion to the posterior annular margin without additional extravasation. There was no significant disc herniation seen.

When asked about the December 6, 2002 lumbar spine MRI which showed that the L5-S1 disc was grossly unremarkable Dr. Balu did not have that record. He was not aware that Claimant slipped and fell on ice that day. Claimant's Delaware Back Pain and Sports record indicates that Claimant reported being markedly improved before he fell on ice December 5, 2002 exacerbating his back pain. Then on December 17, 2002 Claimant reports to the same doctor that two days earlier he was hit by a car three times. Dr. Balu agrees that the record indicates that the driver of the car intentionally ran over Claimant. He then fell to the ground and when he got up the car hit him a second time. Then Claimant landed on the hood, got up and the

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Claimant's argument that Employer has paid under compulsion for treatment at the L5-S1 level. Employer points out that no Pre-Trial Memorandum was forwarded by Claimant's counsel before the hearing and seeks a striking of the testimony or argument regarding payments made by the carrier under a sense of compulsion under the Act. Claimant maintains that Employer should have anticipated this argument and so there is no element of surprise. As well, Claimant maintains that Dr. Balu's bills were forwarded to Employer. The Board deferred decision at the hearing and also considers Claimant's Motion for Re-argument and Employer's Response regarding this issue in the Findings of Fact and Conclusions of Law section of this decision.

car was placed in reverse and hit him a third time knocking him into the air and causing him to fall on his back. Dr. Balu agrees that this would be another back injury. The diagnosis that day was low back pain acutely exacerbated from being hit three times by a motor vehicle.

Then an August 27, 2004 record of Dr. Godfrey describes Claimant helping a friend to lift a microwave when it slipped out of the partner's hands and hurt Claimant's back. Claimant received pain medication for the low back at this time. Dr. Balu agrees that this is another incident involving Claimant's back. Then on May 6, 2009 at the Comprehensive Spine Center Claimant complained of low back pain greater than ten out of ten when he injured his back carrying a casket at a funeral four days prior.

Dr. Balu agrees that all of these incidents occurred after the work accident. He also agrees that the initial discogram after the work accident on October 27, 2003 showed no injuries or any pain being generated from L5-S1 and there is no MRI to show that there was anything there. Dr. Balu notes that there were bulging discs at L5-S1 in 2003 that were not painful. He agrees it was a minor bulge, but no nerve herniation and nothing compressing on a nerve that would generate pain at that point. He conceded that this bulge was picked up after Claimant had four incidents where he injured his back that occurred subsequent to the work accident.

Overall, Dr. Balu agrees that about a month after the work accident Claimant reported being markedly improved and then he slipped and fell on ice and his back pain was worse according to his own statements at the time. Dr. Balu agrees that the 2003 discogram found pain being generated at L3-4, but not at L4-5 or L5-S1. Then in 2007 a CT scan shows a problem at L5-S1. He agrees that something happened between the 2003 and 2007 discogram which has absolved the November 7, 2002 work accident of having injured L5-S1.

Dr. Balu points out a handwritten note corresponding with the October 27, 2003 discogram which indicates that at L5-S1 there is zero pain with a question mark next to it. He says that a discogram is never absolute. The follow-up CT scan shows some bulging discs at L5-S1. So Dr. Balu says that he did not have a very strong discogram to say that Claimant did not have pain at L5-S1 which is why he put the question mark. So in the big scheme of things the discogram is sometimes indeterminate. He says that we should not take the discogram as absolute truth because there is some clinical interpretation involved. However, Dr. Balu agrees that the CT scan showed a minor bulge that was not pressing any nerve. Dr. Balu agrees that the handwritten notes were not provided to Employer, only the typewritten note which states zero and no question mark.

Dr. Balu agrees that he performed an injection to L3-4 on December 29, 2003 and that was the only level that he was focusing on at that point. He agrees that the surgery was an anterior spinal fusion at L5-S1 to address severe disc degeneration at that level. There was an annular tear and foraminal stenosis at that level as well. Dr. Balu agrees that many times annular tears are caused by the aging process. He agrees that by the age of thirty most people with intervertebral discs have begun to degenerate to a certain degree. A traumatic injury can cause an annular tear. Tears can be caused by a number of things.

Dr. Balu opines that Claimant's injury began with the work accident and then the other latter incidents just exacerbated his low back problem, even though Claimant stated that he was markedly improved before the first post-work accident slip and fall on ice. Dr. Balu does not believe that Claimant was pain free, or completely off all his medications or treatments before that second fall. He does not opine that the subsequent falls are insignificant, but that these events would not have caused the pain or added a new injury. He is not able to attribute what

was caused by each injury, but he knows that Claimant was continuously having chronic back pain. Dr. Balu does not believe that Claimant's work injury distinctly stopped the day before his first slip and fall on ice.

Dr. Balu agrees that there is no record stating Claimant injured L5-S1 in the November 7, 2002 work accident. He agrees that there is nothing from November 7, 2002 to December 6, 2002 showing that L5-S1 was injured. Dr. Balu reiterates that the lower back was injured and there is no record to say L5-S1 was absolutely pain free. He agrees the December of 2002 MRI reads that the L5-S1 level is grossly unremarkable, but states that this is a matter of clinical interpretation.

Dr. Balu is aware that Claimant is a volunteer fireman, but not specifically that Claimant was involved in 54 truck alarms and 67 station alarms for the year before his surgery. Dr. Balu has encouraged Claimant to do whatever he can.

Dr. Rowe referred Claimant to Dr. Balu. Claimant underwent an EMG on October 1, 2003 with Dr. Rowe which was within normal limits. Then on March 3, 2015 an EMG indicated that there was no L5-S1 nerve injury or compromise.

Dr. Balu agrees that prior to Claimant's December 5, 2014 surgery and after the work accident he performed the three discograms. Dr. Balu explained that concordant pain means he is injecting the disc and the patient reports that the pain is the exact pain he has on a daily basis.

Claimant testified at the hearing on his own behalf. He is forty-four years old. He has lived in Delaware most of his life. He completed the eleventh grade.

As far as the 2002 work accident he was working as a laborer for Employer on the back of a trash truck, dumping trash. On the date of the accident he grabbed a toter, or trash can on wheels, and held it over his head. Something popped and he fell to the ground. The driver did

not know that Claimant had fallen until he had moved on to the next house. After Claimant felt his lower back pop he was unable to move. His supervisor advised not to call 911 and Claimant was placed into the truck for the rest of the day, unable to work. He and the driver did not return until 8:00 p.m. as Employer did not send a replacement for Claimant.

Up until he started seeing Dr. Ganesh Balu in 2003, Claimant saw Dr. Eugene Godfrey. He has also seen Drs. Richard Dushuttle, Glen Rowe and Stephen Malone who all wanted to perform surgery, but Claimant was "young and scared" so he waited.

Claimant was treating for his lower back, undergoing injections with Dr. Godfrey. He also tried chiropractic and physical therapy. Dr. Godfrey told Claimant that unless he had surgery he was only going to get worse. Prior to the work accident Claimant had no issues with his back. He worked on a farm for thirteen years without any low back problems. After the work accident he entered into a total disability agreement with Employer. The injury is described as a low back strain/sprain and does not specify the level of his injury. *See* Agreement as to Compensation dated December 13, 2002, Claimant's Exhibit No. 3.

Claimant described the December of 2002 motor vehicle accident which involved a family argument. He says his brother's girlfriend stole his father's truck and he was standing behind the truck, reading the tag and was hit at knee level which knocked him onto his bottom. He stood up and continued speaking with a 911 operator who was asking for the tag number. He went to driveway to tell her to stop the truck and she came up like she was going to hit him and caught him with the left front fender and then he was on the hood of the vehicle. Then he punched the windshield and messed up his hand and landed on the ground near a clothes line. The truck was a small truck.

When he was on the hood he became caught by a clothes line and fell off the vehicle into mud, not pavement. This was one month after the work accident. After this he did not notice any new or different symptoms or pain with his low back. The only new pain he had was his right hand because he hit the windshield.

Claimant came before the Board regarding Employer's Termination in 2003 and the Board granted Employer's petition, and awarded Claimant partial disability benefits. The parties came to an agreement for 300 weeks of partial disability. *See* Receipt for Compensation Paid dated May 11, 200, Claimant's Exhibit No. 4.

Claimant explained that the reason he did not undergo surgery until December of 2014 is because he is diabetic and has high blood pressure and he was scared so he underwent conservative treatment for thirteen years. He wants to live a normal life and hold his grandchildren. Injections had gotten to the point that they did not work and Dr. Balu indicated that Claimant needed surgery.

Then after Thanksgiving in 2014 his legs gave out on him. Claimant was cooking and he turned to do dishes and his left leg gave out causing him to fall. He had lost all feeling in the left leg. At the hospital they initially thought he had a stroke. Claimant was referred to Dr. Zaslavsky by Dr. Balu and after a CATscan he was informed it was actually his back. Comparing his pain from November of 2014 with November of 2002, the pain level was about the same as what it felt like on the back of the trash truck. Claimant was never totally symptom free and his pain would go up and down. It never went away, but he just dealt with it. He has been through many injections. He rates his pain level at about a two on a ten point scale currently after surgery. He likes Dr. Zaslavsky because he explained what would happen. Claimant recovered after eight months of therapy and is happy that he went through with the

procedure. He does not like to take pain medication because he does not want to become addicted to it.

As far as his volunteer work with the Little Creek Fire Department he says it has nothing to do with his injury. He did not start there until well after his injury. When he responds to truck alarms he might be at the station. It all depends on his assignment. He does not fight fires. He is trustee and signs checks. He responds to medical calls with his own vehicle. He is usually the first responder to arrive. He responds to fires and medical calls. He directs traffic and sometimes starts CPR until the medics arrive. He is not carrying people out of burning buildings.

On cross-examination Claimant confirmed that he only partially remembers one slip and fall on ice after the work accident. He disagrees with the medical record that indicates his low back pain increased to ten out of ten after that casket incident.

Prior to surgery his pain was miserable; afterward it is remarkable. He can manage and function right without sleep medication. He has volunteered for the fire department since 2002. He says he tried to work at Hardees or McDonalds, but they would not hire him because of his back injury.

As far as his volunteer work, when his beeper goes off he goes straight to scene of the accident. He directs traffic and sometimes is called upon to perform CPR. He agrees that he must kneel down to do so.

Claimant testified that with the 2002 motor vehicle accident he had no pain after he got hit three times by the truck. His back pain did not increase because he landed in mud. His back pain was not aggravated any more than it already was hurting.

Claimant denies his medical record with Dr. Padre which states that he was repeatedly and intentionally hit by a car and fell on his back and afterward reported that his low back pain

was worse. He says the clothes line hit him across his neck. He says that he told the doctor that his back was not hurt any more than it was already hurting. He does not remember saying what is recorded.

Over objection, Employer entered into evidence as its Exhibit No. 1 the prior Board decision on its Petition to Terminate dated June 18, 2003 and the related deposition transcript of Dr. Mohammad Kamali. Given that this is a part of the record the objection was overruled. The admission of it is redundant, however, the Board allowed Employer to enter it for ease of reference.

Dr. Lawrence Piccioni, orthopedic surgeon, testified at the hearing by deposition on Employer's behalf (Employer's Exhibit No. 2). He examined Claimant on May 19, 2015 and reviewed the pertinent medical records. In his opinion the surgery in 2014 is unrelated to the 2002 work accident.

Dr. Piccioni discussed the work accident of November 7, 2002 noting that Claimant described a pop in his back and feeling of electrical pain which does not provide a full history. It could be anything from a sprain to a torn ligament or herniated disc. It is unlikely to be a fracture. Whether there are radicular symptoms down the leg is important. At his DME Claimant denied any subsequent accidents, but based upon his record review Dr. Piccioni notes the two slip and fall incidents in December of 2002 and February of 2003; an incident when he was repeatedly run over by an automobile in December of 2002; a back pull while moving a microwave in August of 2004 and complaints of ten out of ten pain after carrying a casket in May of 2009. As well, September 10, 2010 medical records show that Claimant complained of a back injury when he bent over to pick up his grandson.

Dr. Piccioni agrees that the day after Claimant's first slip and fall on ice he reported that he had been markedly improved until he slipped and fell on the ice. Prior to that he could get around, take a shower, get dressed and do other things without much difficulty. After the slip and fall on ice he told his doctor that he was much worse.

Dr. Piccioni also reviewed the Delaware Back Pain & Sports December 17, 2002 note which indicates that Claimant was involved in some type of altercation two days previous wherein he was hit by a car three times. He was seen in the ER and referred for follow-up since he was already treating for a low back condition from a work injury. He was hit in the legs by a car and fell on his back. He got up, was hit in the left leg a second time and then hit in front a third time and landed on the hood of the car which drove away with him on top then he was caught by a clothesline which dragged him off the car causing him to land on his back and hit his head. Claimant told Dr. Piccioni that he did not recall any of the injuries or that they caused any significant pain. In February of 2003 Claimant informed Dr. Upadhyay that he had slipped on ice and injured his back.

Dr. Piccioni also reviewed the microwave incident in August of 2004; and the casket lifting incident resulting in ten out of ten pain in May of 2009. Again, on September 10, 2010 Claimant told the Comprehensive Spine Center that he hurt his back when he bent over to pick up his grandson and felt a stabbing back pain. All of these incidents were after the work accident. Claimant either denied that they occurred or that he ever recalled them injuring him that much.

Reviewing Claimant's history right after the work accident, when he was seen November 22, 2002 at Delaware Back Pain & Sports they found his SI joints nontender and he had a normal neurological examination. His diagnosis was lumbar strain and as previously noted the

December of 2002 lumbar spine MRI notes the L5-S1 disc to be grossly unremarkable without spinal canal narrowing or foraminal narrowing. Dr. Piccioni notes that a January of 2003 bone scan, which was normal, was unnecessary as it would not show anything that the MRI would not. The normal bone scan indicates that things like occult fractures, tumors, which would either show hot spots or cold spots, are not present. On March 26, 2003 an EMG done by Dr. Janine Islam showed a generalized bulge to the L5 area. Dr. Piccioni notes that the history for this testing does not include the three other acute injuries. So the positive EMG was done after the two slip and falls on ice and the motor vehicle incident when Claimant was hit three times by a truck. Moreover, Dr. Piccioni notes that the L5 area referred to in this study is not L5-S1, but rather L4-5. Despite Dr. Zaslavsky's testimony that when the generalized bulge is mentioned at L5 this actually refers to L5-S1, Dr. Piccioni opines differently, noting that the December of 2002 MRI states that there is a mild degenerative disc bulge at L4-5 and L5-S1 is grossly unremarkable. Typically, the disc involved is one above the vertebrae of the lowest number. It was simply bad terminology to refer to L5, but since that was the only bulge on the study and no other study had been performed that is why he places it at that level.

The October of 2003 EMG was normal. Then on March 3, 2015, twelve years later, a chronic L5 radiculopathy with acute axonal degeneration of the left lower extremity was found. Again, this refers to the L4-5 area because the L5 nerve is usually compromised at that level. He notes that irrespective of what the MRI shows, as clinicians, we can pick up what nerve root is involved through physical examination. Dr. Piccioni notes that Claimant denied ever having undergone an EMG before.

Dr. Piccioni disagrees that an annular tear would not appear on an MRI, but only on discogram. He explained that there are varying degrees of annular tears and many times they are

visualized on MRI. Things like a disc bulge usually are associated with an annular tear. There could be one that the MRI does not pick up, but Claimant's discogram was not positive for an annular tear at L5-S1 until 2012 and this is after all of Claimant's subsequent injuries. Therefore, the tear cannot be associated with the 2002 work accident with any degree of reasonable medical probability. Dr. Piccioni also notes that Claimant underwent a discogram on October 27, 2003, closer in time to the work accident and reported no back pain or leg pain at that level, while reporting pain at eight out of ten at L3-4. Upon his review of the discogram Dr. Piccioni notes that the pressures are good and no associated pain indicates that the disc is basically normal.

At Claimant's DME there was no SI joint tenderness. Neurologically, his lower extremities were normal. His ankle and knee jerks were symmetrical so there was no sensory or motor loss. Thus, five months after surgery Claimant has no radiculopathy down either leg related to the spine. He had very limited flexion and extension, with poor effort. An EMG was positive for the L5 dermatome, but there was no pain, weakness or sensory loss of either leg upon testing. So there was no evidence of a radiculopathy on physical examination, irrespective of the EMG result. There was no weakness in his ankle or with foot motions. He could stand on his toes and heels and walked with a normal gait. So all of the dermatomes tested were normal. There was no atrophy in the lower extremities. Straight leg raising produced pain. Dr. Piccioni notes that Claimant had very tight hamstrings which could have produced this pain. Overall, Claimant's physical examination at his DME was consistent with Dr. Islam's examination in 2003.

Dr. Piccioni notes that many times Claimant had normal physical examinations despite complaints of pain. One of the reasons that Dr. Upadhyay sent Claimant to Dr. Islam was

because he basically did not understand where Claimant's pain could be coming from. He was far enough out from the injury, had a couple of other injuries at the time, but Dr. Upadhyay could not find any specific cause for the pain. Then Dr. Islam had a fairly similar examination.

Overall, in consideration of all the records Dr. Piccioni believes that there are high subjective over objective findings. Of note, Claimant has no atrophy, no sensorimotor loss and an injury since 2002 after which he has not worked. He is on a high dose of chronic narcotics. These all comport with highly subjective complaints.

When confronted with a positive EMG result at a level not operated on, Dr. Piccioni notes that an EMG has a high amount of subjectivity. Also, it is operator dependent and requires interpretation by a clinician.

Regardless of causation, after the procedure a period of total disability is reasonable. As of his DME Dr. Piccioni found that Claimant could return to work eight hours per day, in a light duty capacity. Again, regardless of causation, in future Dr. Piccioni would give Claimant six months to make sure that the fusion is solid and then an FCE should be performed. Medical treatment has been reasonable and necessary, but not causally related.

At his DME Claimant informed Dr. Piccioni that his pain was worse since the surgery and had increased by fifty percent. Eighty percent of his pain was in his back; twenty percent in his legs and his back pain since the surgery had increased by fifty percent. Yet, there were not objective findings on physical examination of any radiculopathy prior to surgery.

Dr. Piccioni treats patients with annular tears and notes that most of them are degenerative in nature. Traumatic injuries will cause tears, but degeneration is involved in a large portion of these cases.

Dr. Piccioni opines that the November 7, 2002 work accident did not cause this ongoing degenerative condition. He agrees insomuch as there are times when an injury is not picked up on the original MRI. However, discograms are much more effective in doing so because these tests have the objective and the subjective components. Claimant's 2003 discogram cements Dr. Piccioni's opinion that there was not an occult L5-S1 injury in November of 2002. Even had the discogram never been performed there was still enough evidence that the 2014 surgery is unrelated to the 2002 work injury. Dr. Piccioni believes that the reason for the surgery may lie with one of Claimant's numerous mishaps after the work accident because the initial 2003 discogram was negative at that level and then the 2012 discogram showed changes. It could also just be normal progression and wear and tear of the lumbar spine.

On cross-examination Dr. Piccioni agrees that annular tears are more easily discernible on a discogram than an MRI.

Dr. Piccioni agrees that he did not discern any radicular components at Claimant's May 19, 2015 DME, and this was after the December of 2014 surgery designed to deal with radicular symptoms. However, he explained that the surgery should not affect the L5 nerves. It should affect the S1 nerve, and the radiculopathy was found at the L5 level on EMG. Dr. Piccioni found no radiculopathy on physical examination. He agrees that spine surgery is more reliable at relieving leg symptoms than it does back symptoms. Back surgery for back pain only is still somewhat difficult to get a successful result.

Dr. Piccioni agrees that after the car incident in December of 2002 Claimant was treated for a hand fracture by Dr. Stephen Manifold. With respect to the ten out of ten back pain described after carrying a casket, Dr. Piccioni did not know if this changed management or

Claimant's care afterward. He agrees that in a patient with chronic low back pain a feeling like this, of sharp pain, could happen.

With respect to the EMG done in March of 2015, after the spinal fusion, which showed an L5 radiculopathy, Dr. Piccioni agrees that his opinion is that the L5 nerve is usually compromised at the L4-5 level. He agrees it is conceivable that the L5 nerve root can be irritated or damaged during an L5-S1 surgery such as Claimant's.

As far as Dr. Balu's records, Dr. Piccioni agrees that there has been treatment in the form of injections to L5-S1. He notes that some of them are caudal blocks which means they are going to go up and down the epidural space. So in reality, it does not matter which disc or level is involved, it is going to get there. He notes that after the discogram in 2003 then there are many L5-S1 injections. This is after testing proved that there was nothing wrong at that level. The positive discogram was in 2012 so there is no study from the 2003 discogram until the 2006 injections at L5-S1 which showed there should be any injections at that level. He agrees that a 2011 L5-S1 injection should not have been covered because that level of injury is unrelated to work accident.

He explained again that with a caudal block the injection could be at one level above and drip the medicine down, or one level above and drip it up, depending on gravity. However, if the doctor testifies that the injection was specifically directed at L5-S1 it is not related to the work accident and should not have been paid for. He agrees that there is a little bit of an art to the injections and it is not as specific as L5-S1 surgery, for example. An injection can be of the L5-S1 disc space because it is safer and less painful for the patient than a caudal injection. That does not mean that it is being done for the L5-S1 level. It can be done for any level that is painful. Even if L5-S1 is the injected level this does not mean that this is the injured or targeted

space. Reading the body of the report would be helpful to determine as this is not easily discernible.

Dr. Piccioni clarified that even if there had been other MRIs after the December of 2002 MRI and they were normal at the L5-S1 level this still does not mean the injury at that level is work related. He agrees that he cannot pinpoint the exact etiology of the L5-S1 surgery.

On re-direct examination Dr. Piccioni agrees that a back injury can be caused by an automobile accident or fall on ice. Falling on the back can cause an annular tear. He agrees that the work accident could have caused an annular tear, but since none was picked up on the MRI or the first discogram there is not enough proof that there was a tear at the time of injury.

Dr. Piccioni explained that with the discogram everything has to correlate in order to confirm that there is pain at a certain level. He agrees that in order to narrow down the pain before surgery the adjacent vertebrae should be tested when the source of the pain is unknown. So in this situation multiple levels should be done to determine the source of pain, especially since Claimant has pain, but the objective testing is not comporting with that. In 2003 Claimant reported zero pain at L5-S1. All the pain emanated from L3-4 in that discogram early on.

On re-cross examination Dr. Piccioni agrees that when probing various levels in a discogram this includes disc material between the vertebrae, and the patient is unaware of the levels that are being probed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Delaware Workers' Compensation Act states that employees are entitled to compensation "for personal injury or death by accident arising out of and in the course of employment." 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, if there has been an accident, the resulting injury is compensable if "the injury would not have occurred but for the accident. The accident need not be the sole cause or even a substantial cause of the injury. If the accident provides the 'setting' or 'trigger,' causation is satisfied for purposes of compensability." *Reese*, 619 A.2d at 910.

Claimant's accepted work injury in 2002 was a lumbar spine strain and sprain. The issue in this case is whether his L5-S1 spinal fusion surgery twelve years later, on December 5, 2014, is causally related to the work accident. Claimant raises two theories for his argument that the procedure is related. First, he maintains that despite an initial MRI in 2002 and discogram in 2003 showing no involvement at the L5-S1 level, that there was indeed an annular tear present, but it was the size of a pinhole and could not be seen by diagnostic testing. Alternatively, Claimant maintains that Employer has paid for certain injections over the years and therefore, causation is presumed. Employer refutes Dr. Zaslavsky's medical opinion with the testimony of Dr. Piccioni that there is no evidence of any L5-S1 injury occurring in the work accident.

Employer also maintains that it did not receive Dr. Balu's medical bills which were requested prior to the hearing, and that it did not receive proper notice of Claimant's argument at hearing that Employer has paid for injections at the L5-S1 level so therefore, it has paid under compulsion and is liable for Claimant's treatment. After careful consideration of all the evidence, the Board finds that Claimant has failed to satisfy his burden of proof as to either theory that the L5-S1 fusion surgery is related to the work accident. The Board will first address the medical testimony and then the legal argument.

Claimant's Medical Theory of Recovery

Claimant proffers the testimony of his orthopedic surgeon, Dr. Zaslavsky, and pain management specialist, Dr. Balu, who opine that Claimant's L5-S1 issues are related to the 2002 work accident despite not being visualized by MRI in 2002 and 2006, an unremarkable finding at that level on discogram in 2003 and a normal EMG result in October of 2003. Dr. Zaslavsky believes that an annular tear was present all along which was like a tire with a pinhole leak that became worse over time, becoming evident twelve years later. Employer's expert, Dr. Piccioni, opines that there is no evidence of any L5-S1 involvement until years after the work accident and it is not related. The Board places more weight on his opinion in this matter and finds that Dr. Piccioni provided the most persuasive opinion regarding causation of Claimant's L5-S1 fusion surgery. *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.).

The Board does not find Dr. Zaslavsky's theory of causation believable, especially given that just after the incident both a lumbar spine MRI and a discogram showed no involvement at

that level. This diagnostic testing closest in time to the 2002 work injury, and even beyond, reveals that the work injury involved L3-4 and not L5-S1. Specifically, L5-S1 was unremarkable or normal until almost twelve years later when degeneration is seen on MRI and an annular tear is noted by discogram. Previously, in 2007, a discogram had resulted in eight out of ten pain at that level, but this was five years after the work accident.

Dr. Zaslavsky does not opine that this level became symptomatic due to adjacent disc disease because it is not adjacent to L3-4, but rather that there was basically a latent annular tear that was unknown at the time of the earlier MRIs and discogram. He says that it was present all along, but not seen on MRI until twelve years later, which even he seems to consider as a long time for this dormancy. The problem with this theory is first, that it is just not believable to the Board and second, Employer's expert successfully refutes it. Dr. Zaslavsky's opinion effectively means that the early MRI and discogram testing is meaningless. All of Claimant's initial test results point to issues at L3-4 and not L5-S1. It is not until years later that issues are seen at the L5-S1 level.

At any rate, even if Dr. Zaslavsky's testimony were believable Employer could not have agreed to an L5-S1 injury in 2002 if it was not known at the time. Employer did not agree to a latent injury, but rather a low back sprain and diagnostic testing at the time showed involvement at the L3-4 level, not L5-S1. That L5-S1 disc degeneration, annular tear and foraminal stenosis is seen on an MRI twelve years later does not mean that it is related to the work accident and the Board does not find that it is.

Dr. Balu's testimony also does not persuade the Board. He agrees with Dr. Zaslavsky that it is possible to have a small annular tear that was not appreciated on the MRI or discogram. He admits that the initial MRI in 2002 was negative for L5-S1 and the initial discogram on

October 27, 2003 showed no injuries or any pain being generated from L5-S1. His testimony solidifies that the first indication of any issue at L5-S1 is not until several years after the work accident. Interestingly, in 2006, four years after the work accident, when the only indication was tenderness at L5-S1, Dr. Balu decides to start performing occasional injections in that area, about twelve over the next six year period, according to his testimony.

Claimant here argues that certain post-work accident incidents occurred before the Board granted Claimant partial disability in June of 2003 and so they could not have been the cause of the L5-S1 injury and therefore, it is all related to the original work accident. However, the focus of the prior Board's decision was whether Claimant could return to work and all testifying doctors agreed that he was capable of working in a sedentary capacity. Moreover, several incidents also occurred after the Board's 2003 decision, such as Claimant's pain after lifting a microwave in August of 2004 and the reported ten out of ten pain after lifting a casket in May of 2009. So Claimant's argument that these subsequent incidents are insignificant is not persuasive. This is a distinction without a difference, however, because the Board does not believe Dr. Zaslovsky's opinion that the annular tear was present in 2002 after the work accident and just gradually worsened for twelve years while remaining invisible during testing.

Claimant relies somewhat on an EMG reading in March of 2003 by Dr. Islam that there was a generalized bulge in the L5 area. However, the Board does not find this significant for two reasons. First and foremost, the MRI and discogram closest in time to the work accident did not show any abnormality at that level and then a later EMG in October of 2003 was normal. So this reliance by Claimant upon the 2003 EMG result is misplaced. The Board finds that this is also consistent with Dr. Piccioni's testimony, which the Board finds credible, that an EMG has a high amount of subjectivity involved. It is operator dependent and requires interpretation. So that

there was a finding on EMG of a generalized bulge at L5 in March of 2003, when considered with all the other evidence, does not support a finding that the area was injured in the work accident.

Not only do Claimant's medical experts not satisfy his burden, but the Board also finds Dr. Piccioni's testimony credible that the initial MRI is enough evidence that the L5-S1 area was not injured in the work accident and this is cemented by the 2003 discogram results which indicate that the L5-S1 area was not a pain generator. Dr. Piccioni's testimony that an annular tear would most likely be visualized on an MRI, and/or known on a discogram is believable. Dr. Piccioni concedes that there could possibly be a tear that the MRI does not pick up, although highly unlikely, but again, that Claimant's discogram was not positive for an annular tear at L5-S1 until 2012 means that it is highly unlikely that it was present in 2002 and it therefore, cannot be associated with the work accident with any degree of reasonable medical probability. The Board finds Dr. Piccioni's reasoning more balanced. He also closely reviewed the 2003 discogram noting that at L5-S1 the pressures are good and the final result of no associated pain indicates that the disc is basically normal. The Board finds this testimony comprehensive and credible. Moreover, Employer has offered alternative potential reasons for Claimant's annular tear at L5-S1 which appeared in 2012.

Under Delaware law, an employer is under no obligation to identify or prove the existence of a non-work cause of the injury. To defend against Claimant's petition, it is sufficient for Employer merely to present evidence rebutting Claimant's claim that the injury was work related. *See Strawbridge & Clothier v. Campbell*, 492 A.2d 853, 854 (Del. 1985); *Alfree v. Johnson Controls, Inc.*, 1997 WL 718669 at *7 (Del. Super Ct.). Here, Dr. Piccioni suggests possible non-work causes of injury involving Claimant's several slip and falls, being

run over by a truck; or the lifting incidents in 2004 and 2009 as possible causes. This is plausible to the Board, but his more believable opinion is that this could just be normal progression and wear and tear of the spine, unrelated to the work incident.

After careful consideration of all the evidence presented the Board finds that Claimant's medical experts have failed to satisfy his burden of proof that the L5-S1 injury and corresponding fusion surgery are related to the work accident.

Claimant's Legal Theory of Recovery

Claimant has failed to show scientifically that his injury is work related, therefore the Board will consider Claimant's legal theory that Employer is liable by virtue of the fact that it has paid for injections at the L5-S1 level starting around 2006 according to Dr. Balu's testimony. Essentially, Claimant argues that Employer is estopped from disputing causation of injury at the L5-S1 level because it has paid for treatment starting in 2006 without argument, or in other words it has paid under compulsion. *Starun v. All American Engineering Co.*, 350 A.2d 765 (Del. 1975) (finding that where a carrier had paid claimant benefits for more than three years after the work accident, the only reasonable conclusion was that the carrier considered itself obliged to do so under the Workers' Compensation Act and, since claimant had accepted those payments, the parties had reached an agreement in regard to compensation, within limitation statute. Thus, claimant's claim was not barred by the two-year statute of limitations.) Therefore, Claimant maintains that Employer's conduct constitutes an implied agreement that his issues at L5-S1 are causally related to the work accident.

Employer, on the other hand, maintains that despite its numerous requests prior to the thirty day deadline, it did not receive a copy of Dr. Balu's billing for the timeframe in question. Most importantly, Employer asserts it was unaware that Claimant intended to raise this argument

at the hearing until Dr. Balu's deposition just a few days beforehand, and as such, Claimant's argument amounts to unfair surprise.

Subsequent to the hearing and before a written decision ensued Claimant submitted a Motion for Re-Argument and Employer filed its Response regarding this issue. The Board considers these submissions in determining whether to include the medical bills as evidence or Claimant's legal argument.

In his motion Claimant maintains that the billing ledgers referred to by Dr. Balu during his deposition testimony were indeed timely produced to Employer before the hearing. Claimant maintains that as early as March of 2015 the billing records of Dr. Balu were produced. Specifically, Claimant's exhibits include the following: a letter dated March 6, 2015 referring to medical records and billings which are not attached to the exhibit; a letter dated September 29, 2015 referring to records and billing surrounding a September 28, 2015 lumbar injection, including an operative report which does not indicate at what level the injection is placed, and updated invoices from 2013 to 2015 which do not delineate at what level injections or treatment was performed; and a letter dated October 23, 2015 referring to the September 29, 2015 letter and enclosures which, again, are not included. Although Claimant fails to address in the motion Employer's contention that there was not advance notice of his argument, at the hearing Claimant maintained that Employer should have known because it paid these bills.

In its Response Employer argues that it did not receive the correspondence attached to Claimant's motion. Employer notes that there were no billing statements in Claimant's production responses, despite numerous requests, and that even after Dr. Balu's deposition and Employer's objection, there was still no production or indication that Claimant would make an issue out of payments allegedly paid by the carrier. Employer points out that Claimant did not

submit a Pre-Trial Memorandum in this case until the day of the hearing which reiterates that Employer had no notice of his argument. Employer argues that Claimant's attempt to admit these documents into evidence now amounts to unfair prejudice as it is trial by surprise, especially after Employer's specific requests for these bills went unanswered prior to the thirty day deadline. Employer asks that the Board dismiss and deny Claimant's Motion for Reargument and reject his attempts to submit additional documents into the record that were not produced previously.

The Board agrees with Employer that Claimant's handling of this matter has resulted in unfair surprise. While technical rules are relaxed in administrative hearings, fundamental rights, such as the right to cross-examine witnesses effectively, remain. *General Chemical Div., Allied Chemical & Dye Corp. v. Fasano,* 94 A.2d 600, 601 (Del. Super. Ct. 1953). Trial by surprise is not favored in Delaware and not endorsed by this Board.

First, as to Claimant's argument that because Employer ultimately paid the bills it knew of, or should have anticipated, Claimant's argument that Employer paid under compulsion, the Board does not agree. Claimant has an obligation to notify Employer of his contentions at the hearing. Notice is a fundamental principle of law and as discussed in more detail below Employer has been deprived of any meaningful ability to defend this aspect of the case given the lack of notice by Claimant.

Significantly, by not providing notice of his argument Claimant has lost the right to present it. Claimant cannot raise an argument at the last minute having to do with paid medical bills and expect Employer to be able to meaningfully defend. Employer had no opportunity to prepare and proffer witnesses from the carrier who might have knowledge of the billing

procedures. Employer has also been denied the opportunity to effectively cross-examine Dr. Balu since the first time it was possibly aware of this argument was at Dr. Balu's deposition.

In the same way, had Employer raised a statute of limitations argument, for example, just a few days before the hearing Claimant would not be expected to refute this given such late notice. Here, Employer's assertion that this lack of notice amounts to unfair surprise prevails and so the Board does not consider the billing evidence during final deliberations.

Supportive of this finding is the fact that no Pre-Trial Memorandum was submitted prior to the hearing, which confirms that there was no prior notice of Claimant's argument. Typically, in practice the moving party has responsibility for initiating the Pre-Trial Memorandum. Here that would be Claimant. Importantly, even the Pre-Trial Memorandum that was presented, tardily, to the Board at hearing does not set forth Claimant's argument that Employer paid medical bills under compulsion for the L5-S1 level. There is no identification of this issue under Claimant's contentions, paragraph 14, or anywhere on the neatly typed, but unsubmitted, Pre-Trial Memorandum. Employer did not receive notice of Claimant's argument and so the Board finds in its favor with respect to the exclusion of Dr. Balu's billing and more importantly, Claimant's argument that Employer's payment for injections at L5-S1 is an admission that injury at this level is related to the work accident. Therefore, Claimant fails to satisfy his burden of proof under both of his purported theories.

The Board also notes that even if it were to consider Dr. Balu's testimony and the submitted billing it does not provide sufficient evidence to satisfy Claimant's burden here anyway. The bills include a vast amount of unbundled charges without specifying which level of the lumbar spine is being injected and Dr. Balu's testimony that he "believes" the medical records were sent to the carrier along with the bills is not definitive. Importantly, the medical

records that were enclosed with Claimant's Motion for Re-Argument do not specify a level either. The one 2015 operative report that was submitted with Claimant's Motion for Re-Argument does not delineate any level for the injections. This is not enough evidence to show that the carrier knew that it was paying for treatment to L5-S1.

So is not clear whether the specific levels injected were made known to the carrier given that the only evidence proffered at the hearing and afterward were copies of Dr. Balu's bills dating back to 2006 with no demarcation of level. Ultimately, the documents produced do not necessarily show that Dr. Balu's occasional L5-S1 injections, twelve over a six year period which started four years after the work accident, were identified clearly to Employer. Additionally, Dr. Piccioni's credible testimony casts serious doubt on whether these injections were targeted. Thus, in the end Claimant's argument would more likely than not fail on a factual basis as well.

In conclusion, Claimant has failed to satisfy his burden of proof regarding causation for his L5-S1 issues and as such his petition is denied.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board finds that Claimant's L5-S1 spinal fusion surgery performed twelve years after his initial November of 2002 work injury is not causally related and as such his petition is **DENIED**.

IT IS SO ORDERED THIS 21st DAY OF JANUARY, 2016.

INDUSTRIAL ACCIDENT BOARD

JOHN D. DANIELLO

ROBERT MITCHELL

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

Mailed Date: 1-26-16

~~OWC~~ Staff