BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

JUSTIN PEARSON,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1479766
	)	
MICHAEL W. FOGARTY GENERAL CONTRACTOR, INC.,	)	
	)	
	)	
Employer.	)	

DECISION ON PETITION TO TERMINATE BENEFITS

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 28, 2019, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

PETER W. HARTRANFT

VINCENT D'ANNA

Susan D. Mack, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

William Stewart, III, Esquire, Attorney for Claimant

Joseph Andrews, Esquire, Attorney for the Employer

Oliver Cleary, Esquire, Deputy Attorney General for the Workers' Compensation Fund

NATURE AND STAGE OF THE PROCEEDINGS

Justin Pearson ("Claimant") suffered a fracture to his right femur as a result of a work-related accident on November 26, 2018 while working for Michael G. Fogarty General Contractor, Inc. ("Employer"). The Employer has been paying total disability benefits at the rate of $373.33 per week, based on an average weekly wage of $560.00, since November 27, 2018. On May 8, 2019, the Employer filed a petition seeking to terminate total disability benefits. The Employer asserts that total disability benefits should be terminated and Claimant can return to work in a limited duty capacity. A hearing was held on the pending petition on October 28, 2019. This is the Board's decision on the merits of the termination petition.[1]

When the hearing on the termination petition began, Claimant's counsel moved for a continuance because Claimant Justin Pearson had not appeared for the hearing. Claimant lives in South Carolina and indicated to counsel on the morning of the hearing that he did not have sufficient funds to travel to the hearing. He had previously expressed the intention to attend the hearing. The motion for continuance was denied for the reasons discussed below. The Board also denied counsel's request to permit Claimant to testify by telephone.

SUMMARY OF THE EVIDENCE

Stipulation of Facts: The parties stipulated that Claimant Justin Pearson fractured his right femur in a motorcycle accident on March 9, 2018. On November 26, 2018, Claimant fractured his right femur again in an industrial accident. Dr. Principe, who released Claimant to light duty work on April 18, 2019, will testify on behalf of Claimant. Dr. Schwartz, who agrees that Claimant can

[1] Prior to the hearing, the Employer and the Workers' Compensation Fund reached agreement on a separate issue wherein the Employer alleged the work injury was a subsequent permanent injury subject to the provisions of 19 *Del. C.* § 2327. The parties submitted a stipulated order to the Board, which the Board agreed to sign.

work in a light duty capacity, will testify on behalf of the Employer, M.W. Fogarty, Inc. Dr. Schwartz also will testify that this case meets the requirements of a true second injury. The Employer will present the testimony of Barbara Riley of Perry and Associates, who identified twelve jobs in Delaware and South Carolina she believes to be within the restrictions of both testifying physicians. The issue for decision by the Industrial Accident Board is whether the total disability agreement currently in effect should be terminated.

Eric T. Schwartz, M.D., a board-certified orthopedic surgeon, testified by deposition on behalf of the Employer, Michael W. Fogarty General Contractor, Inc. (Employer's Exhibit 1) Dr. Schwartz testified that he examined Claimant Justin Pearson on March 21, 2019 and June 27, 2019 and also reviewed a number of medical records related to the case. Dr. Schwartz was aware that Claimant had sustained a distal right femur fracture and a left ankle fracture in a motorcycle accident on March 6, 2018. Claimant then was injured on his first day on the job with M.W. Fogarty as he was walking down a wet hill and slipped and fell. He sustained a periprosthetic fracture to the femur above the distal femoral plate that had been placed in his leg after the motorcycle accident. The nature of the work injury was documented in an Agreement as to Compensation approved by the Department of Labor on April 26, 2019.

At the first DME on March 21, 2019, Claimant complained of diffuse pain in his right lower extremity and was unable to weight bear without the use of a cane. He could not leave his house due to the inability to walk more than five minutes without needing to sit down. His pain was an eight to nine on a pain scale of one to ten. Dr. Schwartz saw Claimant again on June 27, 2019. Claimant continued to rate his pain level as an eight to nine and indicated he was unable to weight bear without the cane and was homebound due to his ambulatory restrictions. Dr. Schwartz

noted that Claimant had a fracture that was slowly healing over time, according to Dr. Principe. Dr. Schwartz further opined that Claimant's complaints should also get better over time, but they were not. He felt that Claimant's symptoms were out of proportion to his injury. Dr. Schwartz viewed the surveillance and saw no outward manifestations of pain, though he did observe that Claimant was using a cane and had a limp. If Claimant had pain levels of eight to nine, Dr. Schwartz would expect to see some loss of motion and significant atrophy of the quadriceps upon examination as well as X-rays showing nonunion of the fracture. Dr. Schwartz testified that the X-rays do not show the injury to be nonhealing. At the March 21, 2019 exam, Dr. Schwartz found no atrophy of the right thigh compared to the left and found knee range of motion to be relatively normal, with no ligament instability or effusion in the knee. He did note some crepitus with motion of the knee. The examination on June 27, 2019 was similar. Dr. Schwartz acknowledged that the right knee flexion was a little less than normal. The range of motion in the knee would allow Claimant to walk with no gait abnormality. Claimant's subjective complaints of diffuse right lower extremity pain were similar at both exams. Dr. Schwartz again opined that he would expect that Claimant's subjective complaints would improve between March and June 2019 as the fracture healed, but they were similar. An MRI did not show any knee pathology. Dr. Schwartz testified that six to seven months after femoral rodding, as Claimant had had done, he would expect the patient to have minimum pain complaints of two to three and not need a cane for walking.

Dr. Schwartz opined that Claimant would have been able to work fulltime in a sedentary job at the time of the initial DME on March 21, 2019, taking Claimant's subjective complaints into account. Dr. Schwartz further opined that Claimant was capable of, at a minimum, fulltime, sedentary duty work when he examined Claimant a second time on June 27, 2019. Dr. Schwartz

reviewed the labor market survey by Perry & Associates that identified jobs in Delaware and South Carolina. He felt that Claimant was capable of performing all of the jobs in the survey. Dr. Schwartz reviewed Dr. Principe's deposition. Dr. Principe had admitted that Claimant could perform light duty work as of April 18, 2019 if such work was available. Dr. Principe also stated Claimant was still capable of light duty work on June 26, 2019. Dr. Schwartz noted that Dr. Principe actually released Claimant to work at a higher level than he had.

Dr. Schwartz concluded that Claimant would not have sustained any significant injury on November 26, 2018 if not for the original distal femur supracondylar fracture and surgery that was associated with the motorcycle accident. He explained that Claimant was a healthy 39-year-old male with normal bone density. If Claimant had slipped and fallen without the prior distal femur fracture and plate, Dr. Schwartz thought it likely that Claimant would not have injured himself significantly. He noted that the fracture Claimant sustained in the fall at work was located above the proximal end of the plate from the motorcycle accident. The proximal end of the plate creates a stress riser so that even a simple injury could produce a fracture immediately above the plate. Dr. Schwartz therefore concluded that, without the first injury, Claimant would never had sustained the second injury. Dr. Schwartz confirmed his opinion that the original motorcycle injury in conjunction with the subsequent industrial accident caused the need for Claimant's total disability after the work accident. He further opined that the earlier fracture from the motorcycle accident was a permanent injury that would have warranted a permanency rating.

On cross-examination, Dr. Schwartz testified that he used a tape measure when evaluating whether atrophy was present in the right thigh compared to the left thigh. Despite Claimant's complaints of pain and use of a cane, Dr. Schwartz found no evidence of atrophy. Dr. Schwartz

would return Claimant to sedentary duty work initially based on his subjective complaints and then work him up to more strenuous work. He did not believe it reasonable to start Claimant at parttime work initially, because by March 21, 2019 the fracture was healing and, in his opinion, Claimant was fully capable medically to return to fulltime, sedentary duty work at that time. He insisted that a return to sedentary work was appropriate even if a complete union of the fracture had not occurred yet. He agreed that Claimant could continue seeing Dr. Principe for checkups until a complete union of the fracture had been achieved. The treatment to date had been reasonable, necessary, and related to the work accident. Dr. Schwartz had reviewed Dr. Principe's notes and thought Claimant was essentially healed at this point. He agreed that Dr. Principe had discussed a possible hardware rod removal surgery in the future. Dr. Schwartz would not recommend this surgery himself because of the risks involved, but he could not say such a surgery would be unreasonable or unrelated.

A surveillance video was admitted into evidence by agreement of the parties. (Employer's Exhibit 2) The video shows footage of Claimant on July 9, 2019 and July 14, 2019. Claimant is mostly observed standing and smoking while holding a cane in his left hand. He is also observed walking to a car and getting into the driver's seat, then driving away. He did not have any obvious difficulty walking or getting into the car.

Dr. Barbara Riley testified that she is a vocational rehabilitation expert who works for Perry and Associates. She performed a labor market survey ("LMS") based on information she was provided with on Claimant's background. (Employer's Exhibit 3) She learned from the records provided that Claimant had worked as a construction laborer and in sheet and metal fabrication jobs. He moved to Delaware from South Carolina. He was 40 years old. Dr. Riley looked for jobs

that did not require a high school diploma, because she had no information about Claimant's educational background. Her understanding was that Dr. Schwartz had concluded that Claimant could perform fulltime sedentary or light duty work. Dr. Riley identified five jobs in New Castle County and seven jobs in South Carolina near where Claimant currently lives. His residence is 21 miles from Florence, South Carolina. One SC job was located in Myrtle Beach, which is 42 miles from Claimant's residence. The other jobs were located in Florence and are 21 miles or less from his residence. Florence has public transit available. The LMS provides a representative sampling of jobs available in the marketplace. The positions identified include a service advisor, dispatcher, greeter, management trainee at Goodwill, and customer service representative. Dr. Riley personally viewed the jobs and confirmed the requirements; she flew to South Carolina to view the jobs there. Dr. Riley testified that the greeter position at Walmart would allow the employee to remain seated as they checked the receipts of exiting customers. The dispatcher position for AAA was a sedentary job in an office environment. The service advisor for Nissan in Florence, SC would be seated behind a counter on a stool that could swivel and had adjustable height. All of the jobs provide on-the-job training. Any computer work required was computer entry. Dr. Riley opined that all of the positions are within Claimant's physical and vocational capabilities. All the jobs are considered sedentary.

On cross-examination, Dr. Riley testified that she told the employers in South Carolina where Claimant lived and that he had restrictions on use of his right leg due to two prior fractures and a surgery. She told the employers that Claimant was using a cane and could perform fulltime sedentary work. She did not tell employers that Claimant had hardware in his leg or that the fracture was not yet healed. She was not aware the treating physician believes Claimant may need more

surgery. Dr. Riley testified that Claimant lives in Marion, SC, but Florence is the closest larger city and is the county seat. Marion is rural and she did not locate any jobs there. She estimated that the drive to Myrtle Beach is one hour round trip from Florence.

Michael Principe, D.O., who is board-certified in orthopedic surgery, testified by deposition on behalf of Claimant Justin Pearson. (Claimant's Exhibit 1) Dr. Principe first saw Claimant on March 28, 2019. Dr. Principe was aware that Claimant had originally injured his right leg and left ankle in a March 2018 motorcycle accident. Subsequently, Claimant had been injured in a fall at work in November 2018. Claimant sustained a femur fracture which was treated surgically by Dr. Brady. Dr. Brady removed a previously placed plate and screws so that he could place a titanium rod in the center of the femur to stabilize the new fracture higher up in the femur. The fracture was visible on an X-ray and was a little bit displaced. After surgery, Dr. Brady provided a post-surgical injection in the knee to address Claimant's continued symptoms. Claimant sought a second opinion from Dr. Principe when he continued to have pain in his thigh. At the initial visit to Dr. Principe on March 28, 2019, Claimant stated that he had aching, burning pain that disrupted his sleep. The pain was constant. He also had intermittent swelling with weakness. The leg was giving way. Claimant also had some tingling, numbness, and stiffness in the right thigh. Claimant was using crutches to ambulate. On examination, Dr. Principe noted global tenderness to the right thigh. He thought most of Claimant's pain was located at the joint line of the knee. Claimant had pain with resisted strength testing of the knee. Dr. Principe thought the ligaments were stable and Claimant had a small amount of fluid within the joint. His impression was that Claimant was appropriate for being four months out from the surgery on the femur. He took X-rays of the fractured leg and found excellent alignment and the rod in place. He noted new

bone formation at the fracture site. Dr. Principe maintained Claimant on no work status. He based this on Claimant's work as a laborer. He testified that there was no way for Claimant to perform his job duties with his condition at that time. Dr. Principe saw Claimant next on April 18, 2019. Claimant continued to have pain. The exam was essentially unchanged. Claimant had pain with motion and ambulated with a limp. Dr. Principe could not recall if Claimant was using crutches or a cane. Dr. Principe ordered new X-rays on May 30, 2019. The X-rays still showed a visible fracture line, which indicated that the fracture was still not fully healed. The rod was in a stable position. Dr. Principe explained that as a fracture heals, callous or new bone forms around the fracture and the fracture lines disappear. He testified that a fracture that does not heal could be a cause of persistent pain and could benefit from additional surgery to repair a nonunion. Dr. Principe continued to maintain Claimant on a no work status in May and June 2019.

Most recently, Dr. Principe examined Claimant on August 14, 2019. Claimant continued to have knee pain and crepitus in the outside of the thigh near the knee. Dr. Principe thought the soft tissues were rubbing against the screws to cause the crepitus, and this was a big cause of Claimant's pain. Claimant was ambulating with a cane but still had a limp. Claimant had some weakness with knee extension and flexion, which Dr. Principe attributed to pain. Updated X-rays showed callous formation on the anterior, posterior, and medial cortices of the fracture but the lateral cortex was still open. This was objective evidence that the fracture was not completely healed. Dr. Principe testified that more than likely the lateral cortex would go on to heal since the other three cortices had callous formations. He further testified that it was not totally unexpected for the bones to take longer to heal in a patient who has multiple injuries and surgeries on the bone. Dr. Principe planned to wait three more months to give the bone additional time to heal before

deciding anything about additional surgery. He thought the fracture would go on to heal. His preference would be to wait for the fracture to heal and then surgically remove the screws. He believed Claimant would benefit by having the screws removed eventually. Dr. Principe did not believe Claimant's pain was out of proportion to his examination. Dr. Principe had reviewed the surveillance video and did not see anything unexpected. Claimant was using a cane and still had a limp. The video showed him standing a little and doing some walking. Claimant was not terribly active. He appeared similar to what Dr. Principe had seen at his office. At the August 14, 2019 visit, Dr. Principe released Claimant to return to sedentary work if a job was available. He did not believe Claimant was capable of any labor or strenuous type of job, because he thought a sedentary job where Claimant could get up and down occasionally would be appropriate. He recommended that Claimant initially return to work about four hours a day and gradually increase to fulltime within a month or two. He noted that patients' muscles are often not strong and would not tolerate an immediate return to fulltime work. Dr. Principe agreed that a functional capacity evaluation could be done. Dr. Principe thought Claimant could initially sit, stand, or walk for an hour or two at a time and then increase the time as tolerated. Claimant needed to be able to get up and down and move around during the workday.

Dr. Principe agreed that all the treatment Claimant received was reasonable and related to the work injury. He did not see any evidence that Claimant's pain was out of proportion.

On cross-examination, Dr. Principe was asked to review the workers' compensation forms he had filled out. He agreed that the April 18, 2019 note indicated Claimant would need light duty work. He meant that Claimant could work light duty as of that date if such work was available. Dr. Principe's note on June 26, 2019 stated that, if light duty was available, Claimant could work a

desk job. On August 14, 2019, Dr. Principe wrote that Claimant could work a sedentary job if one was available. Dr. Principe had not reviewed the labor market survey identifying sedentary jobs in Delaware and South Carolina. Dr. Principe concurred that Claimant can work in a sedentary job and could have done so on April 18, 2019. He recommended that Claimant begin parttime and increase to fulltime.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Motion for Continuance

At the opening of the scheduled hearing on the termination petition, Claimant's counsel moved for a continuance of the hearing due to Claimant's absence. Counsel represented that Claimant had contacted him and stated he had not traveled from South Carolina for the hearing, because his Fund check for total disability benefits had not arrived the previous Friday or Saturday and he therefore had insufficient funds to travel to the hearing. Claimant gets Fund checks twice a month. Claimant seeks a short continuance until Claimant receives and cashes his Fund check and the parties are able to find a mutually acceptable date to re-schedule the hearing. Claimant's counsel further represented that Claimant has an appointment with Dr. Principe within a couple of weeks and plans to travel to Delaware for that visit.

Counsel for the Fund represented that the Department of Labor send checks *en masse* on Mondays, and Claimant has been routinely receiving and cashing his Fund checks in South Carolina on the Thursday or Friday after they were issued and sent by the Department. Counsel offered copies of several recent checks showing the dates they were cashed by Claimant. (Fund exhibit) The Fund expressed doubt about the stated reason for Claimant's nonappearance at the hearing and opposes any continuance of the hearing. The matter was already continued once before

because Claimant relocated to South Carolina and the labor market survey had to be supplemented by Dr. Riley.

After hearing arguments from counsel, the Board denied the request for continuance. Claimant was long aware of the date for the hearing and should have made appropriate plans for attendance accordingly. The case was continued once before to accommodate Claimant's post-filing decision to relocate to South Carolina. Extraordinary circumstances must exist to extend a hearing date more than 180 days past its filing date, which would likely occur if a continuance were granted here. In addition, the Fund must continue paying total disability until the Board issues an Order terminating the benefits, so any further delay in the hearing would financially benefit Claimant while burdening the Fund and the Employer. The parties have stipulated that both medical experts agree Claimant can return to work in some capacity. When this fact was considered along with the evidence that Claimant has had no problem receiving and cashing his Fund checks in a timely manner over the past two months, the Board found Claimant's stated reason for his nonappearance not believable and a pretense. Any prejudice to Claimant by proceeding without him was minimized because his counsel was present to proffer Dr. Principe's medical testimony and to cross-examine the Employer's vocational expert. Based on the preceding, the Board denied the motion for continuance.

Motion for Claimant to Testify by Telephone

In light of the Board's decision to deny a continuance, Claimant's counsel requested that Claimant be permitted to testify by telephone. The Board denied this request. The Workers' Compensation Act allows for telephonic testimony by medical experts. 19 *Del. C.* § 2348(i). Otherwise, it is within the Board's discretion to determine whether testimony other than live

testimony will be permitted in a particular case. IAB Rule 10 specifically allows for the possibility of deposition testimony by fact witnesses if the Board approves but does not address testimony by telephone. The Board is aware of few occasions where a fact witness has been permitted to testify by telephone, for example, where the witness is physically unable to travel and telephone testimony is preferred by the Board over a deposition. The Board cannot fully evaluate the credibility of a fact witness who does not appear live before it, so the Board will rarely allow it. Such extraordinary circumstances are not present in this case.

Termination of Total Disability

The Employer, Michael W. Fogarty General Contractor, Inc., argues that Claimant Justin Pearson is no longer totally disabled from work and his total disability benefits should therefore be terminated. *See* DEL. CODE ANN. tit., § 2347. In a total disability termination case, the employer is initially required to show that the claimant is not completely incapacitated. In response, the claimant may rebut that showing, show that he or she is a *prima facie* displaced worker, or submit evidence of reasonable efforts to secure employment that have been unsuccessful because of the injury. The employer would then have the burden of showing the availability of regular employment within the claimant's capabilities. *Howell v. Supermarkets General Corp.*, 340 A.2d 833, 835 (Del. 1975); *Chrysler Corporation v. Duff*, 314 A.2d 915, 918 n.1 (Del. 1973).

The Board first considers Claimant's physical capacity to work in the competitive marketplace. Both medical experts testified that Claimant could have returned to work in a sedentary capacity prior to May 2019. The only discernable point of difference in their opinions is whether Claimant should start with parttime hours and increase to fulltime over a period of one to two months or if Claimant can work fulltime right away. After weighing the testimony, the Board

finds Claimant is capable of working fulltime in a sedentary capacity with the ability to change positions during the workday. Dr. Principe expressed a preference for his patients to return to work parttime and ramp up to fulltime, but he did not specify what specific physical limitations Claimant currently has that would prevent him from immediately working fulltime in a sedentary job. As of August 2019, Claimant was still using a cane and walking with a limp, but he was able to get up and move around as needed. His only area of injury and limitation is the right leg. The video surveillance conducted in July 2019 confirmed that Claimant can stand comfortably for a period of time with a cane and can walk and drive a car. The Board is satisfied that the limitation to sedentary work provides sufficient accommodation for Claimant's physical limitations without the need for a one to two month period of parttime work before working fulltime. This is especially true where Claimant has been capable of working in some capacity at least since April 2019, according to his doctor's own disability notes and testimony. Claimant could have returned to limited duty work months ago in a parttime capacity to improve his stamina, if that were an issue, but chose not to do so.

The Board has found that Claimant is physically capable of working in a restricted duty capacity; however, a person can still be considered "totally disabled" economically while only partially disabled physically. *Huda v. Continental Can Co.*, 265 A.2d 34, 35 (Del. 1970); *Ham v. Chrysler Corporation*, 231 A.2d 258, 261 (Del. 1967). Such a worker may be "displaced" from employment. Claimant has the burden to show displacement either on a *prima facie* basis or through a failed good-faith job search. The Board finds no evidence that Claimant is a *prima facie* displaced worker due to Claimant's mental capacity, education, training, and age. *Duff*, 314 A.2d at 916-917; *Facciolo Paving & Construction Co. v. Harvey*, 310 A.2d 643,644 (1973); *Franklin*

Fabricators v. Irwin, 306 A.2d 734, 737 (1973). Claimant did not argue he was totally disabled on the basis of being a displaced worker. Even if he had, the argument would not be successful, because he has not presented any evidence of a job search. In addition, the Employer has produced evidence of jobs available within his physical restrictions through the testimony of Dr. Riley and the labor market survey. This evidence effectively rebuts any argument of displacement from the workforce. Accordingly, the Board finds that Claimant is not a displaced worker.

Based on the foregoing, the Board finds that Claimant is no longer totally disabled from work and could return to fulltime, sedentary duty work as early as April 2019. Claimant's total disability benefits are therefore terminated as of the date of filing.

Partial Disability

The Board has determined that Claimant is capable of working in a fulltime, sedentary duty position with restrictions that are causally related to the compensable work accident. In *Waddell v. Chrysler Corporation*, Del. Super., C.A. No. 82A-MY-4, Bifferato, J., 1983 WL 413321 (June 7, 1983), the Superior Court held that, when there is evidence that a claimant has a continuing disability that could reasonably affect earning capacity, the employer filing a petition to terminate benefits must not only show that the employee is no longer totally disabled, but also show that there is no partial disability. *Waddell*, 1983 WL 413321 at *3. Partial disability is based on the difference between an injured worker's wages before and that worker's "earning power" after a work-related injury. DEL. CODE ANN. tit. 19, § 2325.

The Employer has offered the unrebutted testimony of a vocational expert, Dr. Barbara Riley, as evidence of Claimant's earning capacity within his current physical restrictions. Dr. Riley considered Claimant's vocational background and as well as the work restrictions provided by Dr.

Schwartz to prepare a labor market survey identifying positions she believed to be appropriate for Claimant. (Employer's Exhibit 3) She identified twelve jobs she believed to be within Claimant's work capabilities. Some of the jobs are located in Delaware, where Claimant lived until a few months ago, and some are located in South Carolina, where Claimant currently resides. The jobs identified are all sedentary and provide on-the-job training. Dr. Riley assumed Claimant has no high school diploma. Dr. Riley emphasized that the LMS provides only a representative sampling of the jobs available to Claimant in the regular, established job market. She visited each job and verified that a person with Claimant's limitations could be hired for the positions. Dr. Schwartz reviewed the positions in the LMS and opined that Claimant was physically capable of performing them. The jobs in the LMS have an average pay of $525.84 per week. The Board accepts the $525.84 per week average pay from the LMS as a reasonable estimate of Claimant's current earning capacity with his sedentary work restrictions. Claimant earned an average weekly wage of $560.00 prior to his injury, so his loss of earnings due to his work-related injury is $34.16 per week. He is therefore entitled to compensation for partial disability at the rate of $22.77 per week.

Attorney's Fee and Medical Witness Fee

A claimant who is awarded compensation is entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller." 19 *Del. C.* § 2320. At the current time, the maximum based on Delaware's average weekly wage calculates to $10,888.40.

In setting an attorney's fee, the Board considers the factors set forth in *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973). Claimant, as the party seeking the award of the fee,

bears the burden of proof in providing sufficient information to make the requisite calculation. The Employer has successfully argued for the termination of total disability benefits as of the date of filing; however, Claimant has been awarded ongoing partial disability benefits at the rate of $22.77 per week and has thus been awarded benefits that justify an attorney's fee award. Claimant's counsel submitted an affidavit stating that at least sixteen hours were spent preparing for the hearing. The date of initial contact with Claimant was December 7, 2018. Claimant's counsel was admitted to the Delaware Bar in 2007 and has experience in the practice of Delaware workers' compensation law. Counsel does not represent Claimant in anything other than a workers' compensation context. This case was no more complex than the usual case. Claimant's counsel represents that he has a contingent fee arrangement with Claimant. There is no evidence that Employer is unable to pay an attorney's fee.

Based on the factors set forth above, the attorneys' fees customarily charged in this locality for similar proceedings, and the statutory limits, the Board awards an attorney's fee of $2000.

A medical witness fee for testimony on behalf of Claimant is awarded to Claimant, in accordance with title 19, section 2322(e) of the *Delaware Code*.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board GRANTS the Employer's Petition to Terminate Benefits and terminates temporary total disability as of the date of filing. The Board further finds that Claimant is entitled to ongoing partial disability benefits at the rate of $22.77 per week.[2] The Board awards an attorney's fee of $2000 and a medical witness fee.

[2] The separate, stipulated order on the issue of a subsequent permanent injury states that the Workers' Compensation Fund is responsible for paying disability benefits going forward.

IT IS SO ORDERED THIS 31st DAY OF DECEMBER, 2019.

INDUSTRIAL ACCIDENT BOARD

/s/ Peter W. Hartranft

PETER W. HARTRANFT

/s/ Vincent D'Anna

VINCENT D'ANNA

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

Susan D Mack

Mailed Date: 1/6/20

TP

OWC Staff