INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DELAWARE SIDING CO., Employer,	)	
v.	)	I.A.B. NO. 1392207
MAIKOL ZUNIGA, Employee.	)	

ORDER

Pursuant to due notice of time and place of hearing served on all parties in interest, this matter came before the Industrial Accident Board on February 20, 2017 in Wilmington, Delaware. Delaware Siding ("Employer") filed this petition on behalf of itself and the Workers' Compensation Fund ("Fund") seeking to have the Board review two separate compensation Agreements into which Employer entered with Maikol Zuniga ("Claimant"). The parties entered into the first Agreement on July 8, 2013 ("2013 Agreement") and entered into the second Agreement on September 24, 2015 ("2015 Agreement"). Both Agreements pertain to I.A.B. No.: 1392207.

Employer asks the Board to void the 2015 Agreement *ab initio* by finding that Claimant fraudulently induced Employer to enter into that Agreement. Employer asks the Board to review and revise its holding in *Zuniga v. Delaware Siding Co.*, No. 1392207 (Del. I.A.B. Mar. 17, 2014) due to fraud it discovered Claimant committed against Employer and the Fund on the 2013 Agreement. Finally, Employer asks the Board to order Claimant to reimburse Employer $104,000.00, reimburse the Fund $11,142.90 per 19 *Del. C.* § 2396(b) and refer this matter via 19 *Del. C.* § 2344(b)(4). Employer relies on the Board's authority under 19 *Del. C.* §§ 2349 and 2344(b), *Comegys v. Chrysler Corp.*, C.A. No. 83A-SE-5 (Del. Super. 1984), *Conner v. Boulden Buses*, C.A. No. 92A-06-020 (Del. Super. 1993), *Skinner v. Barbutes*, No. 1380681 (Del. I.A.B. Sept. 11, 2012) and *Beebe Hosp. v. Norwood*, No. 823156 (Del. I.A.B. Nov. 27, 2013).

SUMMARY OF THE EVIDENCE

On November 12, 2012 Claimant injured his left knee in an industrial accident when he twisted his body to escape the path of a falling ladder. On July 8, 2013 the parties entered into an open Agreement to accept a left knee injury and pay total disability at the rate of $500.03 per week based on his average weekly wage of $750.00. Pursuant to 19 *Del. C.* §§ 2344(b)(1) and (b)(3), the Agreement expressly provided the following fraud notice directly above Claimant's signature line:[1]

> Benefits for total/partial disability (lost wages) shall require you to advise the named carrier/self-insurer-third party adjustor of any change in employment status and/or disability. Failure to notify a change in status is punishable pursuant to title 18, Delaware code, chapter 24, and/or title 11, Delaware code, section 913.

Employer paid Claimant on a weekly basis retroactive to November 13, 2012. Per 19 *Del. C.* § 2344(b)(2), Employer consistently printed the following mandatory fraud notice immediately below where Claimant was to sign for each check:

> Your acceptance of this check for total or partial disability is a representation by you that you are legally entitled to such payment and a false representation is punishable under Federal and State laws. By endorsing this check / draft for payment the payee certifies they are entitled to payment. Any attempt to defraud an insurance carrier or other issuer may result in criminal prosecution of the payee for fraud.

Claimant signed each check immediately above or below these fraud notices, copies of which were provided to the Board for the record.[2]

On August 5, 2013 Employer received a Physician's Report of Workers' Compensation Injury form from Dr. Mark Boytim, Claimant's treating physician, which released him to return to medium duty work.[3] In reliance on that, Employer completed a Modified Duty Availability Report, offered a modified duty job to Claimant within his restrictions and submitted it to Claimant's physician for approval that same day.[4] From then through October 9, 2013 Employer's counsel

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1 Employer's Exhibit 1.
2 Employer's Exhibit 2.
3 Employer's Exhibit 3.
4 Employer's Exhibit 4.

attempted to have Dr. Boytim review and sign the Modified Duty Availability Report multiple times to no avail. This ultimately culminated with Dr. Boytim's staff personally telling Employer's counsel that Dr. Boytim "has no duty to review the Modified Duty Form," which led Employer's counsel to file a motion with the Board to compel Dr. Boytim to do just that on October 10, 2013.[5] In response to the motion, Dr. Boytim finally completed the Modified Duty Form and agreed that Claimant could perform the job Employer had been offering since August. When Claimant still refused to accept the job, Employer filed a petition to terminate total disability.[6]

Once the Board received Employer's 2013 petition, the Fund issued a State of Delaware Workers' Compensation Fund Eligibility Certification ("2013 Certification") to Claimant for him to execute and return so that he would continue to receive his weekly benefits from the Fund until the Board issued a decision on Employer's petition. On October 18, 2013 Claimant personally completed the 2013 Certification and returned it to the Fund in order to receive Fund benefits. On the 2013 Certification he verified his name, current address in Maryland, telephone number and social security number. He also affirmed that he had not worked at all since his November 12, 2012 accident as follows: "I have not been gainfully employed due to my industrial accident." Claimant then signed the 2013 Certification directly beneath the following language that alerted him to civil and criminal prosecution for fraud:[7]

> I affirm that the facts stated above are true and accurate to the best of my knowledge and belief. I also acknowledge my responsibility to notify the Office of Workers' Compensation immediately if I return to gainful employment, change my employment status, change my mailing address or receive money from a third party action. I am aware that failure to notify the Office of Workers' Compensation of a change in my employment status while receiving Workers' Compensation Fund checks may constitute fraud and result in criminal and/or civil prosecution.

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[5] Employer's Exhibit 5.
[6] Employer's Exhibit 6.
[7] Employer's Exhibit 7.

Upon receiving Claimant's executed 2013 Certification, the Fund began to issue total disability payments to Claimant at his compensation rate retroactive to October 11, 2013. The Fund issued these checks bi-weekly to Claimant through March 7, 2014 when the parties submitted a stipulated order for the Board to sign and terminate the 2013 Agreement retroactive to the date Employer filed the termination petition.[8] In all, Claimant deposited a total of $10,500.00 in checks from the Fund between 2013 and 2014.[9] During that entire time, Claimant informed neither Employer nor the Fund of any return to work on his part.

On April 9, 2015 Claimant filed a new petition seeking Board review of the 2013 Agreement in order to recognize a right knee injury in this claim as well.[10] The only medical record Employer received in discovery at that time was dated April 6, 2015 from Dr. Handling, which provided the following, cryptic, description of accident:[11]

> The patient states that on April 5, 2015 he was walking down the stairs and left knee gave out and he landed directly on his right knee. He denies pain in the right knee previous to that injury that occurred at work.

Employer was going to deny this new claim as unrelated to I.A.B. No.: 1392207 because Dr. Handling indicated that Claimant injured his right knee while working for a new employer. Yet, Claimant repeatedly informed Employer that the medical record was a mistake, that he was not working and that he injured his right knee at home because his left knee, for which Employer paid for an ACL reconstructive surgery, had "given out." Relying solely on Claimant's statements, and with no evidence to the contrary provided, Employer assumed the claim was compensable, forwent its right to a defense medical examination, offered to enter into the new 2015 Agreement to accept a right knee injury and placed Claimant back on ongoing total disability retroactive to April 5, 2015.[12]

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[8] Employer's Exhibit 8. Despite stipulating to the order, Claimant did not return to work with Delaware Siding.
[9] Employer's Exhibit 9.
[10] Employer's Exhibit 10.
[11] Employer's Exhibit 11.
[12] Employer's Exhibit 12. Like the 2013 Agreement, the 2015 Agreement also had the same fraud language printed on it.

On December 2, 2015 Claimant's counsel informed Employer's insurer that Claimant had moved to "20356 Bluepoint Drive; Apt. 1103; Rehoboth Beach, DE 19971" and instructed Employer to mail all future total disability checks there.[13] Yet, on December 7, 2015 Claimant completed a patient intake form with ATI Physical Therapy on which he admitted that he actually injured his right knee while working for "Zuniga's Contractors" but that Delaware Siding would pay for the treatment.[14] This was only brought to Employer's attention on April 28, 2016 after Vallory Boody, ATI's nurse case manager, began to question Claimant's efforts at physical therapy, which prompted her to investigate his file, discover the discrepancy and alert Employer.[15]

Employer then reassigned this to counsel to investigate the entire matter in detail. Employer's counsel discovered that the address of "20356 Bluepoint Drive; Unit 1103; Rehoboth Beach, DE 19971" was not a residential address at all; rather, it was used for business. Initially a company named DATM Stone Work LLC had registered its business at that address.[16] Yet, by November 1, 2015 one "Maicol Elizondo" along with one Sandro Elizondo and one Pablo Gomez signed a lease for "20356 Bluepoint Drive; Unit 1103; Rehoboth Beach, DE 19971."[17] Then on November 19, 2015 "Zuniga Contracting" reincorporated with Delaware's Division of Corporations as a limited liability company.[18] Following that, on December 3, 2015 this same Zuniga Contracting applied for and received a business license from Delaware's Division of Revenue and listed its headquarters as "20356 Bluepoint Drive; Unit 1103; Rehoboth Beach, DE 19971."[19]

Thus, "Zuniga Contracting" owned by "Maicol Elizondo" received a business license for "20356 Bluepoint Drive; Unit 1103; Rehoboth Beach, DE 19971" exactly one day after the attorney of "Maikol Zuniga" told Employer to mail all total disability checks to that very same address.

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[13] Employer's Exhibit 13.
[14] Employer's Exhibit 14.
[15] Employer's Exhibit 15.
[16] Employer's Exhibit 16.
[17] Employer's Exhibit 17.
[18] Employer's Exhibit 18.
[19] Employer's Exhibit 19.

When Employer's counsel investigated with the State of Maryland, he learned that Claimant renewed his driver's license with Maryland (not Delaware) on May 6, 2016.[20] Therefore, on May 27, 2016 Employer's counsel mailed the current petition for the Board to review the Agreements at issue to terminate benefits and void the 2015 Agreement for fraud via certified mail to Claimant at Zuniga Contracting's business address in Delaware.[21] Claimant himself signed the certified mail receipt. Employer's counsel then submitted a pretrial memorandum to Claimant's counsel to which he attached an eleven page addendum outlining all evidence of fraud discovered by that point; copies of which he also provided.[22]

On June 13, 2016 Claimant treated with Dr. Handling again, to whom he admitted that he "is currently working."[23] That same day, Claimant completed a new State of Delaware Workers' Compensation Fund Eligibility Certification ("2016 Certification"). As with the 2013 Certification, Claimant stated on the 2016 Certification "I have not been gainfully employed due to my industrial accident." He then listed his address as "20356 Bluepoint Drive; Unit 1103; Rehoboth Beach, DE 19971" but now admitted that his "employer" at the time of the 2015 right knee injury was "Zuniga Contractors LLC" and not Delaware Siding.[24] Again, Claimant completed this form to receive payment from the Fund on the same day he told his doctor that he was working.

When Jake Whittaker, the owner of Delaware Siding, learned of this, he informed Delaware Siding's counsel in this matter that, in addition to fraudulent inducement to enter into the 2015 Agreement and the potential for insurance fraud against Employer's insurer, he believed that Claimant defrauded Employer directly in this claim. Mr. Whittaker informed that "Sandro Elizondo" had secured subcontracting work for Zuniga Contracting with Delaware Siding

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[20] Employer's Exhibit 20. His Maryland driver's license also disclosed that Claimant's full name is "Maikol Zuniga Elizondo."
[21] Employer's Exhibit 21.
[22] Employer's Exhibit 22.
[23] Employer's Exhibit 23.
[24] Employer's Exhibit 24.

throughout the entire time at issue. According to Mr. Whittaker, Delaware Siding was led to believe that Zuniga Contracting had no relation to their former employee, Maikol Zuniga. He also confirmed that Claimant had not worked on any of the jobs that Delaware Siding had subcontracted to Zuniga Contracting as Mr. Whittaker would have recognized his former employee.

By all accounts, Claimant kept Delaware Siding unaware that "Maicol Elizondo" was actually "Maikol Zuniga" who owned and operated Zuniga Contracting with Sandro Elizondo out of "20356 Bluepoint Drive; Unit 1103; Rehoboth Beach, DE 19971" when they issued $70,171.10 worth of checks to Zuniga Contracting from December 24, 2015 through May 27, 2016.[25] During that same period, Delaware Siding's insurer AmGUARD was also unaware that Maikol Zuniga was working for his own company when he cashed an additional $12,500.75 in "total disability" benefits, which were also being mailed to "20356 Bluepoint Drive; Unit 1103; Rehoboth Beach, DE 19971" based upon his attorney's letter of December 2, 2015.[26] So too, the Fund was unaware that Claimant was working full duty when it issued an additional $642.90 to Claimant during this current petition before Employer's counsel could inform the Fund that Claimant was attempting to defraud the Fund as well. After Employer's counsel informed the Fund, the Fund made no further payments. Claimant never inquired as to the status of his Fund payments despite not receiving any additional Fund payments in the eight months between June 24, 2016 and February 20, 2017.

Employer submitted video surveillance of Claimant taken June 14, 2016. The surveillance shows Claimant exiting ATI Physical Therapy without any limp or signs of injury at all, walking towards his vehicle (a white BMW with Maryland plates), realizing that he forgot something and pivoting 180° on his right leg to re-enter ATI. Moments later, he exits ATI smiling while carrying, not wearing, a knee brace he swings in his right hand before entering his BMW and driving away.[27]

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[25] Employer's Exhibit 25.
[26] Employer's Exhibit 26.
[27] Employer's Exhibit 27.

Dr. Robert Smith, a board certified orthopedic surgeon, testified via deposition for Employer. Dr. Smith examined Claimant on August 16, 2016 in preparation for this hearing and in response to a petition for review Claimant filed to have a low back injury recognized on this claim, which the Board dismissed for failing to comply with 19 *Del. C.* § 2347.[28] Dr. Smith testified that Claimant specifically admitted to him that he had been working full duty since August 2013 with another employer. Dr. Smith reviewed medical records that had not been provided to Employer prior to the current fraud petition and discovered that Claimant admitted to Dr. Handling on November 10, 2014, December 1, 2014 and February 2, 2015 that he was working "full duty." Dr. Smith verified that Dr. Handling's April 20, 2015 note definitively states that Claimant injured his right knee "while working on April 5, 2015."[29]

Employer submitted a sworn affidavit of MaryJo Cunningham, a Claims Coordinator at National Liability & Fire Insurance, into evidence.[30] She was Employer's adjustor on this claim for AmGUARD between February 2013 and January 2016. None of the evidence discussed above was provided to her prior to entering into the 2015 Agreement, despite her requests for such evidence to Claimant's attorney when she was investigating whether to accept or deny the right knee injury. Now that she has reviewed it, she believes Claimant fraudulently induced her into entering into the 2015 Agreement by withholding this vital information. Had she known then what she knows now Ms. Cunningham would never have accepted liability for the right knee, would never have entered into the 2015 Agreement on Employer's behalf and would never have issued any payments pursuant to that Agreement because another employer, Claimant's company, would have been liable.

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[28] Employer's Exhibit 28. *Zuniga v. Delaware Siding Co.*, No. 1392207 (Del. I.A.B. Aug. 25, 2016).

[29] Employer's Exhibit 29: Deposition of Dr. Smith at 18:10 to 19:19. Dr. Smith also testified that there was no evidence that Claimant injured his low back. *Id.* at 19:20 to 20:2. Finally, Dr. Smith testified that while he did not believe anyone could state what caused the right knee injury, he could testify to a reasonable degree of medical probability that it would not have been caused by the left knee giving out because of the prior ACL reconstruction. *Id.* at 29:9 to 32:2.

[30] Employer's Exhibit 30.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board has inherent authority to overturn awards and Agreements between employers and employees on the basis of fraud pursuant to 19 *Del. C.* § 2349, which states that "an award of the Board, *in the absence of fraud*, shall be final and conclusive between the parties."[31] Relying on § 2349, in *Comegys v. Chrysler Corp.*, No. 592791 (Del. I.A.B. Aug. 16, 1983) the Board laid out a five-part test a party must prove to the Board in order to void an Agreement on the basis of fraud:

(1) The defendant made a substantial, material representation respecting the transaction;
(2) The representation must be false;
(3) The defendant must have known the representation was false when he made it;
(4) The defendant made the representation with the intent to induce the plaintiff to act on it; and
(5) The plaintiff did act in reliance on the statement and was harmed as a result.

Superior Court confirmed the Board's authority in *Comegys v. Chrysler Corp.*, C.A. No.: 83A-SE-5 (Del. Super. July 20, 1984) and it has been repeatedly confirmed by Delaware's Courts ever since.[32]

Additionally, 19 *Del. C.* § 2344(b)(4) states that if the Board has "reason to believe" any person has committed an act of "insurance" fraud, it shall also notify the Fraud Prevention Bureau of the Insurance Department. To be clear, § 2344(b)(4) does not apply in all cases of workers' compensation fraud before the Board; only "insurance" fraud. E.g., it would not arise in a case of fraud against an uninsured employer although the Board's inherent authority over workers' compensation fraud would remain. Yet, when the Employer is insured then the "employer" shall include the insurer as far as practicable.[33] As such, if the Board determines that Claimant defrauded Delaware Siding under the *Comegys* test, it shall have "reason to believe" that AmGUARD may have also experienced "insurance" fraud for the Board to refer this matter to the Fraud Bureau.

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[31] As per *Conner v. Boulden Buses*, C.A. No. 92A-06-020 (Del. Super. Feb. 19, 1993), this required the Board to have held the instant hearing on the issue of fraud.

[32] E.g., *Syed v. Hercules Inc.*, 2001 WL 845653 at *3 (Del. Super.); *Conner v. Boulden Buses*, C.A. No. 92A-06-020 (Del. Super. 1993); *Donovan v. Glasgow Thriftway*, 1990 WL 105625 at *2 (Del. Super.); *Stewart v. Chrysler Corp.*, 1984 WL 553551 at *2 (Del. Super.). The Board may also terminate an open Agreement "not only for actual fraud, but also for constructive fraud." See, *Stewart* quoting with approval 3 Larson, Workmen's Compensation Law, §§ 81.41, 81.51(b). See also, *Barber v. F.W. Woolworths Co.*, 1996 WL 769221 at *5 (Del. Super.); *Williams v. Klockner USA Holdings*, No. 1421293 (Del. I.A.B. Mar. 26, 2015).

[33] 19 *Del. C.* § 2301(11).

For the following reasons, the Board finds that Employer met its burden under the *Comegys* test to prove fraud on Employer and the Fund in both the 2013 Agreement and the 2015 Agreement:

First, Claimant made many representations to the Industrial Accident Board, Employer and the Fund that he was injured, "totally disabled," has not worked in any capacity and is incapable of working. As for the 2013 Agreement, he constantly represented this each time he signed the total disability checks from Employer and the Fund, on the 2013 Certification and on the Agreement by failing to sign a Receipt to close out the 2013 Agreement by August 2013. Likewise, he represented this when he failed to inform Employer that he returned to work when Employer continually attempted to offer a modified duty position between August and October 2013. He also represented this to the Board itself when he submitted the stipulated order for the Board on March 17, 2014. Regarding the 2015 Agreement, he represented to Employer that he injured his right knee, was totally disabled and repeatedly denied that he ever worked for another Employer contrary to his later admissions. He made these same representations each time he signed total disability checks from Employer and the Fund and on the 2016 Certification to the Fund. These are all material representations to the Board, Employer and the Fund respecting whether he was entitled to total disability benefits and whether Delaware Siding should accept the right knee injury in this claim.

Second, his representations on the 2013 Certification; 2016 Certification; all total disability checks from Employer from August 16, 2013 through October 10, 2013 (on the 2013 Agreement) and from April 5, 2015 through May 27, 2016 (on the 2015 Agreement); all total disability checks from the Fund from October 11, 2013 through June 24, 2016; the 2015 Agreement itself; his repeated denials that he ever returned to work and even his statements to the Board in support of the March 17, 2014 order were false. As shown by the evidence discussed above, Employer has proven that Claimant has been working full time through his company Zuniga Contracting under the name "Maicol Elizondo" at a higher wage rate than he ever received when he worked for Employer.

Likewise, the unrebutted testimony of Dr. Smith, the only medical expert to testify for this hearing, was that he injured his right knee while working for Zuniga Contracting and that the left knee ACL reconstruction surgery would not have caused the left knee to "go out."

Third, it is clear that Claimant knew his representations that he was "totally disabled" and "not gainfully employed" were false when he made them. It is equally clear that he knew he was working for Zuniga Contracting when he injured his right knee in 2015 when he denied such in order to have Delaware Siding enter into the 2015 Agreement. He deposited total disability checks from Delaware Siding at the same time as he deposited paychecks that Delaware Siding had issued to Zuniga Contracting. He stated on the 2013 Certification and 2016 Certification to the Board that he has "not been gainfully employed" when the reality is that he has been working "full duty" since August 16, 2013. This alone has been held to be fraud in prior Board decisions.[34]

Fourth, the Board finds that Claimant made the representations with the intent of inducing Employer and the Fund to act on them. As the Board stated in *Comegys*:[35]

> We find that this is the case because he made this representation in order to get workman's compensation benefits. There is no other reason for the Claimant to have made this representation.

This is more apparent here because of the 2013 and 2016 Certifications and the great lengths to which he went to conceal his employment from Delaware Siding and the Fund while he collected total disability and medical benefits from Employer and additional total disability from the Fund.

Fifth, Employer, the Fund and the Board itself all relied upon Claimant's false representations to pay medical and indemnity benefits and enter into the 2015 Agreement and were harmed as a result. Employer has been harmed in the amount of $104,000.00 plus whatever legal costs arose out of this due to the amount of indemnity and medical benefits it paid Claimant in good

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[34] *Beebe Hosp. v. Norwood*, No. 823156 (Del. I.A.B. Nov. 27, 2013); *Aakala v. State*, No. 1287779 (Del. I.A.B. Mar. 26, 2008); *Mora v. Metal Master Food Serv.*, No. 1273764 at *8 (Del. I.A.B. June 15, 2007); *Wells v. Mitchell & al.*, No. 1240948 at *13-14 (Del. I.A.B. June 21, 2004).

[35] *Comegys v. Chrysler Corp.*, No. 592791 at *8 (Del. I.A.B. Aug. 16, 1983).

faith. The Fund was harmed in the amount of $11,142.90 due to the fact that there was never a time that Claimant was actually entitled to Fund benefits. The Board notes that although the Fund is paid for by premium dollars, the State is ultimately the Fund's guarantor; thus, a fraud on the Fund is a fraud on the State.[36]

The Board finds that Employer has met all five of the *Comegys* requirements to void the 2015 Agreement *ab initio* based upon Claimant's fraudulent inducement and to have the Board revise its March 17, 2014 order to hold that the 2013 Agreement terminated on August 16, 2013 when Claimant began to work for his own company, Zuniga Contracting. Pursuant to 19 *Del. C.* § 2349 Agreements in the presence of fraud are void *ab initio*. Therefore, the Board GRANTS Employer's Petition, voids the 2015 Agreement *ab initio* and terminates the 2013 Agreement as of August 16, 2013. Having found as above in favor of Employer, the Board has "reason to believe" that Employer's insurer may have sustained insurance fraud and therefore officially refers Claimant and this record to the Bureau of Fraud Prevention with the Delaware Insurance Department.

Finally, in *Comegys v. Chrysler Corp.*, C.A. No.: 83A-SE-5 (Del. Super. July 20, 1984) Superior Court further held that § 2349 gives the Board inherent power to negate the effect of fraud:[37]

> A party to a voluntary compensation agreement who later discovers he has been defrauded should seek relief from the Board... *the inherent power to negate the effect of fraud must rest with the Board to provide relief when it is discovered* that such an agreement was executed fraudulently.

In order to "negate the effect of fraud" the Board must put the parties back into the position they were before the fraud occurred. The effect of Claimant's fraud on Employer is that he received $104,000.00 in workers' compensation benefits to which he knew he was never entitled plus

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[36] The Board is also mindful that, had Employer's counsel not alerted the Fund to Claimant's fraud, Claimant would have defrauded the Fund out of an additional $17,286.75 for the time he would have received Fund benefits from June 24, 2016 through February 20, 2017.

[37] Emphasis added. *Comegys v. Chrysler Corp.*, C.A. No.: 83A-SE-5 at *4 (Del. Super. July 20, 1984). The Board's inherent power to "negate" the effect of fraud is distinct from the Fraud Bureau's authority to "punish" or "penalize" fraudulent acts.

whatever legal costs Employer incurred. The effect of Claimant's fraud on the Fund is that he received an additional $11,142.90 to which he also knew he was never entitled.

The Board and Supreme Court recognize that "the bad faith exception to the American Rule permits an administrative tribunal with ancillary equitable jurisdiction to award attorney's fees and costs to a prevailing litigant."[38] This is also indicated by 19 *Del. C.* § 2349; because fraud, by its very nature, is bad faith[39] and right after referencing Board awards in the absence or presence of fraud, § 2349 continues:

> Whenever an award shall become final and conclusive... the *prevailing party*, at any time after the running of all appeal periods, may... file with the Prothonotary's office, for the county having jurisdiction over the matter, the amount of the award and the date of the award. From the time of such filing, the amount set forth in the award shall thereupon be and constitute a judgment of record in such court.

"Prevailing party" is more expansive than provisions limiting certain awards to the "employee."[40] By using "prevailing party" in the same section that grants the Board "inherent power to negate the effect of fraud," the Board has previously issued a "*Barbutes* award" and ordered reimbursement to the prevailing parties dollar for dollar.[41] This is not a penalty; it merely negates the effect of Claimant's fraud by placing the parties into the position they would have been had the fraud never occurred. A similar *Barbutes* award is appropriate under the circumstances of this case. This particular *Barbutes* award is further supported by 19 *Del. C.* § 2354(b) as the Board finds that Claimant injured his right knee while working for himself and not Delaware Siding so that he, as the responsible Employer, must indemnify Delaware Siding and the Fund for all benefits they paid.

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[38] *Smith v. General Motors Corp.*, No. 1203901 at *5 (Del. I.A.B. Dec. 17, 2002); see also, *Brice v. Dep't of Corr.*, 704 A.2d 1176, 1179 (Del. 1998).

[39] *Beebe Hosp. v. Norwood*, No. 823156 (Del. I.A.B. Nov. 27, 2013). *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 231 (Del. Ch. 1997); aff'd by *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542 (Del. 1998).

[40] E.g., 19 *Del. C.* § 2320(10). This also corresponds with the Fund's explicit authority to be reimbursed. 19 *Del. C.* § 2396(b).

[41] The name comes from *Skinner v. Barbutes*, No. 1380681 (Del. I.A.B. Sept. 11, 2012) where the Board ordered an employer who defrauded both a claimant out of a higher compensation rate and an insurer into paying on a claim that it had never actually insured to reimburse the parties dollar for dollar. In *Beebe Hosp. v. Norwood*, No. 823156 (Del. I.A.B. Nov. 27, 2013) the Board ordered a claimant to reimburse the Fund and an Employer $114,119.31 for collecting total disability for fifteen years while she had actually been employed as a dean of an academy in Pennsylvania.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board GRANTS Employer's petition to review in its entirety. The Board VOIDS the 2015 Agreement *ab initio* due to Claimant's fraudulent inducement. The Board also REVISES its March 17, 2014 order to state that the 2013 Agreement terminated as of August 16, 2013 when Claimant returned to work. As Employer is insured, and as the Fund was also defrauded, the Board will also refer Claimant to the Bureau of Fraud pursuant to 19 *Del. C.* § 2344(b)(4) for the reasons stated. Finally, pursuant to 19 *Del. C.* §§ 2349, 2320(8), 2348(c), 2354(b) and the authorities referenced above the Board ORDERS Claimant to reimburse Employer $104,000.00 along with costs to negate the effects of his actions and to reimburse the Fund $11,142.90.[42]

IT IS SO ORDERED this 20TH day of FEBRUARY, 2017.

INDUSTRIAL ACCIDENT BOARD

Robert J Mitchell
ROBERT MITCHELL

Gemma Buckley
GEMMA BUCKLEY

Christopher F. Baum, Hearing Officer for the Board
Joseph Andrews, Esquire for Employer
Brian Lutness, Esquire for Employee
Oliver Cleary, Esquire for the Fund

[42] See, *Jacobs v. Am. Manganese Steel Co.* (Del. I.A.B. July 10, 1930), Vol. 1, Delaware Workmen's Compensation Law Decisions (1918-1937), pp. 396-397. This would include legal costs incurred. Pursuant to 19 *Del. C.* § 2349 the Fund and Employer may convert their awards into judgments with the Prothonotary of New Castle County at the appropriate time.

INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Delaware Siding Co., *Employer*,	)	
vs.	)	I.A.B. No.: 1392207
Maikol Zuniga, *Employee.*	)	

EXEMPLIFICATION

The Honorable Mark Murowany, Chairman of the Industrial Accident Board of the State of Delaware, hereby certifies the following:

1. That the attached is a true copy of the Industrial Accident Board's original decision entitled *Delaware Siding Co. v. Zuniga*, No. 1392207 (Del. I.A.B. Feb. 20, 2017); and

2. That Robert Mitchell and Gemma Buckley were Members of the Industrial Accident Board fully authorized under the laws of Delaware to issue decisions on behalf of the Board.

I have hereunto set my hand as Chairman and the Seal of the Industrial Accident Board of the State of Delaware this 9th day of December, A.D. 2019.

INDUSTRIAL ACCIDENT BOARD

Mark L. Murowany

MARK MUROWANY, CHAIRMAN

INDUSTRIAL ACCIDENT BOARD SEAL DELAWARE