BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

DOUGLAS BURRIS,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1386306
	)	
TOP FLIGHT FLAGGING, LLC,	)	
	)	
Employer.	)	

DECISION ON PETITION(S) TO DETERMINE COMPENSATION DUE AND 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 Workers' Compensation Board on June 26, 2013, in a Hearing Room of the Board, in Milford, Delaware. The record was left open until July 5, 2013, to allow submission of written closing statements by the parties. Thereafter the Board concluded its deliberations on August 19, 2013.

PRESENT:

JOHN D. DANIELLO

JOHN F. BRADY

Angela M. Fowler, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Christopher Amalfitano, Attorney for the Employee

Joseph Andrews, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On December 26, 2012, Douglas Burris ("Claimant") filed a Petition to Determine Compensation Due alleging that on May 16, 2012, while working for Top Flight Flagging, LLC ("Employer"),[1] he was involved in an accident wherein he suffered compensable injury to his head, neck thoracic spine and left shoulder. Claimant subsequently, on January 10, 2013, filed a separate Petition to Determine Additional Compensation Due seeking payment of related medical expenses as well as compensation for total disability stemming from these compensable injuries. Employer, however, disputes that the accident occurred and maintains that there is no basis to support the treatment or period of total disability that Claimant seeks.

A Hearing was held on June 26, 2013, to address these issues. After conclusion of the Hearing, the record was left open until July 5, 2013, to allow the parties an opportunity to submit written closing statements. Thereafter the Board concluded its deliberations on August 19, 2013. This is the Board's decision on the merits of Claimant's petition.

SUMMARY OF THE EVIDENCE

Claimant, called in the context of Employer's case-in-chief,[2] testified that he was injured while working for Employer on May 16, 2012. Subsequent to this industrial accident, Claimant completed a Petition to Determine Compensation Due alleging injury to multiple body parts including a head contusion, injury to his upper back, neck and left shoulder.[3] Claimant confirmed that correspondence dated January 23, 2013, was thereafter exchanged between his attorney and Employer's attorney regarding Claimant's assertion that he could not work in any

[1] *See* Joint Exhibit 1 (Stipulation of facts); the parties were able to stipulate to only one fact – that Claimant was employed by Employer on the date of his alleged injury.
[2] The parties stipulated that Employer would proceed first in the presentation of evidence in the interests of minimizing time spent waiting to testify by the several fact witnesses present on Employer's behalf.
[3] *See* Employer's Exhibit 1 (December 18, 2012 Petition to Determine Compensation Due).

capacity, among other things;[4] a contention that Claimant again renewed via written correspondence to the Board on May 28, 2013.[5] Claimant, in fact, maintained that he had not worked in any capacity from May 17, 2012 to the present despite the presence of an Access Labor Services payroll record indicating that payment was made to Claimant on June 3, 2012 for five hours of work.[6] Claimant further indicated that Dr. Ganesh Balu's treatment record from July 26, 2012, for which Claimant confirmed his signature on the document and which reflects full-time employment for Claimant, must have been a mistake.[7]

Claimant acknowledged that he received unemployment insurance payments from August 8, 2012 through December 17, 2012,[8] at which time his benefits were terminated because he had not completed job logs as are required by the Division of Unemployment Insurance.[9] Claimant indicated that he looked for work during this time but simply did not complete the job logs. He admitted that it was the day immediately following this termination of unemployment benefits that he filed his initial Petition to Determine Compensation Due against Employer. Claimant confirmed that this was not the first time he had received unemployment insurance benefits and acknowledged that by accepting those benefits he was, at least in theory and through the fraud liability statement, certifying his ability to work as specified in the Division of Unemployment Insurance's Guides.[10] Claimant further confirmed that Dr. Balu's office note for him from November 26, 2012, reflects Dr. Balu's documentation that Claimant desires to

[4] *See* Employer's Exhibit 2 (January 23, 2013 letter).
[5] *See* Employer's Exhibit 3 (May 28, 2013 letter to amend Claimant's pre-trial memorandum).
[6] *See* Employer's Exhibit 4 (Access Labor Services Payroll records).
[7] *See* Employer's Exhibit 5 (July 26, 2012 record of Dr. Balu).
[8] *See* Employer's Exhibit 6 (records of the Division of Unemployment).
[9] *See* Employer's Exhibit 9 (Division of Unemployment Insurance records re: absence of Claimant's job search logs).
[10] *See* Employer's Exhibit 7 (Unemployment Insurance Handbook for Employees) and Employer's Exhibit 8 (Guide to Unemployment Insurance Benefits).

continue receiving unemployment insurance until the weather improves and he can return to flagging.[11]

Claimant admitted that on September 10, 2012 he tested positive for cocaine when tested at Dr. Balu's office. Claimant indicated that he told Dr. Balu that he was positive from handling or bagging cocaine rather than using it[12] despite his present admission that he had actually used cocaine the day of his drug test or the day before. Claimant indicated that he thought the lie to his physician would be confidential. Claimant acknowledged that he was similarly found to be cocaine positive after a drug screening conducted by Dr. Balu on December 26, 2012, at which time he admitted use of the drug because for whatever reason he no longer felt compelled to lie as he previously had. On this second occasion, Claimant, in fact, admitted to Dr. Balu that he had used cocaine rather than just handling it. Claimant could provide no explanation as to why he no longer felt compelled to lie about his illicit use in December 2012 as he had in September 2012.

In regards to his work and experience as a road crew flagger, Claimant acknowledged that in addition to being a certified ATSSA flagger (as is required by the state of Delaware) he had been instructed on the safety protocols specific to Employer.[13] Claimant confirmed that in the training he received in this profession, it was instilled in him that a flagger must be able to move quickly and receive and communicate instructions effectively.[14] He admitted that anyone performing the job should not be intoxicated. Despite having lied about his use of cocaine under other circumstances including the pain history questionnaire that he completed for Dr. Balu on July 23, 2012, wherein he indicated that his condition and symptoms were not work related,[15]

[11] *See* Employer's Exhibit 11 (Dr. Balu's November 26, 2012 office note).
[12] *See* Employer's Exhibit 10 (Dr. Balu's documentation of cocaine positive result and Claimant's explanation).
[13] *See* Exhibit 12 (Employer's safety protocols).
[14] *See* Employer's Exhibit 13 (ATSSA Flagger workbook, p. 5, p. 23).
[15] *See* Employer's Exhibit 14 (July 23, 2012 record of Dr. Balu – pages 1 and 6 of seven total).

Claimant denied being intoxicated on the job when he was injured but admitted that he tested positive for cocaine in his system on May 18, 2012 when tested at Kent General Hospital. Claimant maintained that Employer did not ask him to be tested until two days after the work accident.

Claimant testified that on the day of his industrial accident he was flagging on a roadside job site when he was hit by a dump truck that backed up into him. Jesse Davis was the foreman on the job site. Claimant confirmed that he had his back to the dump truck that hit him in the head. Claimant reaffirmed that he has not worked since that day and noted that he has intermittent numbness and tingling in his left arm that has been present since the work event.

Claimant recalled meeting with Dr. Evan Crain for a defense medical examination in this matter. Claimant indicated that he told Dr. Crain about a 1997 motor vehicle accident that he was involved in noting to Dr. Crain that he never had treatment for that accident. Now, however, Claimant acknowledges that he did, in fact, receive some treatment with Dr. DuShuttle; a re collection that Claimant testified simply escaped him given the period of time elapsed. Claimant did recall that he was out of work for a period of time following that motor vehicle accident leading him to seek indemnity benefits from the related insurance carrier for injuries sustained to his neck, back and shoulder.[16]

Claimant admitted executing a release of medical records form to allow his attorney to review his hospital records on May 20, 2012. He denied, however, that the date of service for which he was seeking release was correct. Claimant indicated that while he listed May 14, 2012 as the outpatient date for which he was seeking the release of information that was simply a

[16] *See* Employer's Exhibit 15 (Allstate Insurance application for indemnity benefits).

mistake as he had not been treated on that date and was only seen in the hospital on May 16, 2012, following his work accident.[17]

Claimant denied being scheduled to appear in Superior court for a Violation of Probation hearing on May 16, 2012.[18] Claimant further denied that full-time employment was a term of his probation but admitted that when he did appear in Court on this VOP that the amount of his monthly restitution payments was reduced because of his pending workers' compensation claim.[19]

Claimant acknowledged that on May 18, 2012, just two days after the alleged work accident with Employer, he was medically released to return to work on light-duty. He informed Employer via a conversation with Mike Clark. Mr. Clark told Claimant that he would be placed on a job site on Route 8 but that never happened. Claimant confirmed that he later received a letter of termination from Employer indicating that he was informed on May 18, 2012 that he was scheduled to work on Monday, May 21, 2012 but had failed to report as scheduled.[20] Claimant denied knowledge of the May 21, 2012 scheduling but admitted that in speaking with Mr. Clark on May 21, 2012, he asked for a few more days off due to injuries he sustained in a fight over the preceding weekend. Claimant admitted that but for that fight, he was able and willing to return to work on May 21, 2012.

When cross examined by his own attorney, Claimant recalled that the June 2012 pay that he Received from Access Labor Services was money paid to him for hours he had worked prior

[17] *See* Employer's Exhibit 16 (May 20, 2012, Bayhealth Release of Information form).
[18] *See* Employer's Exhibit 17 (VOP filed against Claimant). In regards to this exhibit, the Board noted that while the VOP was seemingly filed on May 16, 2012, there is no evidence that Claimant was aware as of that date or that he was required to appear anywhere on that date in reference to this filing.
[19] *See* Employer's Exhibit 18 (compilation of VOP disposition, underlying criminal plea and two pages of transcript related to the matter).
[20] *See* Employer's Exhibit 19 (Termination letter to Claimant).

to the industrial accident. This payment was made to him based on an old timesheet for work he had not previously been compensated for.

As for the day of the industrial accident, Claimant denied the use of any illegal drugs or alcohol. He testified that he was told where to position himself on the job site with his flags. He could see Bambi, another flagger, from where he was standing inasmuch as his face was looking into her back at a distance of approximately 30 to 40 feet. Claimant and Bambi were the only flaggers on their side of the dump truck that ultimately backed into Claimant. Claimant, who was the control flagger using walkie talkies for communication with Bambi and other flaggers on the site, indicated that there were lots of noises on the job site such that he did not hear the dump trucks back up alarm. Claimant reported that the truck backed up into him striking his hard hat and causing him to drop his flags. Thereafter, Claimant was transported to Beebe Hospital's emergency department. He claims that no one asked him about drugs use that day.

After being treated and released from the hospital, the following week Claimant went to Mike Clark's house to get his paycheck. Claimant admitted that his knees were scrapped up from a fight he had with another man who had stolen his bicycle. In an effort to retrieve the bike, Claimant had been thrown to the ground on some gravel.

Claimant testified that the normal routine relating to his job for Employer required that he shown up for work approximately a half and hour before his shift was scheduled and be prepared to be on his feet for at least two hours before a relief flagger arrived. Claimant testified that his initial medical release to return to work was issued on May 18, 2012 but called for light-duty up to eight hours a day with no overhead work and no standing more than 30 minutes at a time. While Claimant admitted that he wanted and intended to go back to work as a flagger despite

these restrictions, the requirements of managing the flags and standing along the roadside for his job with Employer would have technically exceeded the medical release.

Claimant, who indicated that it was his right shoulder that was previously injured in a 1997 motor vehicle accident, testified that his left shoulder has hurt him since the May 16, 2012 industrial accident with Employer.

Claimant testified that he signed up for vocational rehabilitation but missed two classes before his unemployment was terminated. Claimant noted that transportation is an issue for him as he does not drive and has no money to use public transportation.

Claimant acknowledged that his probation officer wrote in his VOP to the Court that he [Claimant] lacks the mental capacity to be successful on probation supervision. In this same regard, Claimant indicated that he does not read well despite having completed the 12th grade receiving special education services. Claimant advised that the only work he has ever done has been labor intensive, indicating that in recent years all of his employment has come through a temporary agency.

Leonard Brooks Jr., a risk manger for George and Lynch Construction, testified on Employer's behalf. Mr. Brooks indicated that he has spoken to Claimant's attorney regarding a third party action but could provide no additional details.

Jesse Davis, a six year employee of George and Lynch Construction, testified on Employer's behalf. Mr. Davis indicated that he is a prep crew foreman for George and Lynch, responsible for overseeing traffic control on highway work sites. As such, on May 16, 2012, he was involved in the planning for and placement of flaggers, including Claimant, on the job site

where Claimant was allegedly injured; an undertaking that Mr. Davis indicated was managed pursuant to Delaware Uniform Traffic Control procedures.[21]

Mr. Davis explained that on May 16, 2012, Claimant and others were involved in a roadside project using both a milling machine and dump truck. He indicated that the milling machine grinds the pavement up before putting the ground material in to a dump truck on a conveyor belt. The mechanism of this process requires the dump truck and milling machine to remain very close together while moving along the roadway. Mr. Davis indicated that every dump truck used on his work sites is inspected daily to insure that the very loud back-up alarm and flashing strobe lights are operational. He further indicated that the dump truck which allegedly struck Claimant is approximately eight feet wide, operating in a ten foot wide lane. As such, he explained that no flagger should ever be directly behind a dump truck performing this work.

Mr. Davis indicated that he was on the job site on May 16, 2012 with Claimant. While he did not observe any incident, he did see Claimant sitting quietly on the side of the road after allegedly being hit. According to Mr. Davis, an ambulance happened to be traveling through the construction zone as was flagged down to assess Claimant. Mr. Davis indicated that Claimant's physical demeanor and presentation changed appreciably once he saw the ambulance.

On cross examination, Mr. Davis indicated that he, Todd Miller and Mike Bennett walked Claimant to the ambulance. This was a daytime job and so there were no police posted at the job site and Mr. Davis does not believe that a police report was ever made regarding the alleged incident.

[21] *See* Employer's Exhibit 20 (p. 6C-3 of the Delaware Manual on Uniform Traffic Control Devices for Streets and Highways, 2011 Edition).

Mr. Davis indicated that he placed every flagger at a safe position when making the placement assignments.

Thomas McKinney, the driver of the dump truck that allegedly struck Claimant, testified on Employer's behalf. Mr. McKinney testified that he has been driving trucks since 1964 and has, during that time, been decorated for safe driving by several different employers. In fact, according to Mr. McKinney, excluding this alleged event, he has not been involved in an accident since 1996.

On the date of Claimant's alleged industrial accident, Mr. McKinney indicated he was working for Wahoo Trucking; a sub contractor of George and Lynch. He testified that all of his truck's safety equipment, including flashers, strobe lights and back up alarm was operational. When backing up on the job site, Mr. McKinney saw a female flagger about 150 feet behind him but did not see Claimant and had not seen Claimant the entire time he was on site. At some point, the milling machine was done with Claimant's dump truck and Mr. McKinney was advised to move the truck to the side of the road until needed again. Backing up slowly in reverse idol, moving at what Mr. McKinney characterized as barely a walking pace, he saw flags elevated in the air just before Claimant ran across the road and sat down on the ground. According to Mr. McKinney, Claimant only began screaming and "carrying on" when the ambulance arrived.

On Cross examination, Mr. McKinney confirmed that the dimensions of his dump truck are 12 feet high, 7.5 feet wide and 22 feet long. As such, he acknowledged that the truck does have a blind spot for things directly behind it.

During brief re-direct examination, Mr. McKinney offered his opinion that Claimant's allegation of being hit was a ruse of some sort. He testified that Claimant had no business

behind the dump truck. Mr. McKinney further testified that he could see the cones on the road as well as the female flagger way behind him. Mr. McKinney acknowledged that no police report was made regarding this event.

Michael Clark, a former manager for Employer, testified on Employer's behalf. Mr. Clark indicated that he was responsible for the oversight of projects, crew leaders and flaggers for Employer. He was, in fact, a crew leader and flagger himself. On May 16, 2012, he was serving as Claimant's direct supervisor. As such, Mr. Clark testified that Bambi Holt and Melanie Trivett were two females working on the job site. Claimant and Melanie were both flaggers moving with the operation as it proceeded down the road brining up the blacktop as part of the reclamation project. While Mr. Clark did not witness the alleged accident with Claimant, he did draft a letter to Guard Insurance Company on Employer's behalf after talking to Claimant and documenting Claimant's account of the event.

Mr. Clark indicated that two days after the work accident he called Claimant to see if he had been back to the doctor and whether or not he was cleared to return to work. Claimant's lawyer got on the phone during the call. As part of this process, Mr. Clark discovered that while Claimant was indicating on Tuesday that the doctor advised him to take more time off from work, Claimant had actually been released to return to work the preceding Friday. Claimant later confessed to Mr. Clark that he could not work the Monday or Tuesday following the May 16th work accident because he had been involved in a fight the weekend following the accident.

Mr. Clark testified that he did not order a drug test of Claimant on May 16, 2012 when the alleged industrial accident occurred because, while Claimant appeared visibly shaken following the event, Claimant told him he had just been tapped on the hard hat by the truck and that he was fine. The following day on May 17, 2012, however, Mr. Clark became concerned

that drugs may have been involved and attempted to get Claimant to submit to urinalysis. Claimant did not respond to the request until the next day on May 18, 2012.

On cross examination, Mr. Clark admitted that he was aware that Claimant's initial medical release to return to work was for modified duty and included restrictions that Employer could not have accommodated. Nevertheless, based on Claimant's express desire to return to work, Mr. Clark was willing to put him back on the schedule despite the restrictions.

With regard to the specifics of the placement of flaggers on the day of Claimant's alleged accident, Mr. Clark indicated that he and Jesse Davis worked together to determine the proper placement of flaggers on the road. There were eight flaggers on Mr. Clark's crew, including Claimant and ten on Bambi's crew. The shift started at 7 a.m. and Claimant's accident allegedly occurred at 10 a.m. Mr. Clark expressed the opinion that Claimant should not have been behind or close enough to the dump truck to be struck.

Stephen Ryan, an employee of MCS Group, a third party records collections and court reporters agency, testified on Employer's behalf. Mr. Ryan testified that his organization made no request for Health Insurance Claim Forms ("HICFAs") in this case and had no reason to produce them. He indicated that his agency is impartial and without the knowledge or motivation to create HICFAs under such circumstances. His agency did, however, make an initial records request on Employer's behalf in this matter on January 18, 2013.

On cross examination, Mr. Ryan confirmed that his agency does not review the records that are produced in response to one of their requests. Instead they log the records electronically. Moreover, no bills were received by MCS in this matter.

MaryJo Cunningham, a level two claims representative with Guard Insurance Group, testified on Employer's behalf. While indicating that she is responsible for 150 to 160 claims at a time, Ms. Cunningham indicated that she recalled overseeing Claimant's claim in this matter.

Ms. Cunningham explained that when claims come in, they are assigned to one of three tiers: medical only claims, lost time claims and catastrophic loss claims. For those that are medical only claims, a report is received from the employer detailing the event and the company then requests medical records corroborating the report. This process is much less detailed than is the process for the two other categories of claims which require more in depth investigation. In Claimant's case, because he was released to return back to work prior to missing three days, his claim was treated as a medical only claim. As such, Allison, Ms. Cunningham's partner, issued a medical only agreement accepting the compensability of Claimant's claim in May 2012. Claimant failed to execute this document and they had no other communication with Claimant until they heard from his attorney in December 2012.

Once evidence of Claimant's weekend fight following the alleged work accident came to light, additional investigation was undertaken by Guard Insurance Group. This led to discovery of two different sets of HICFAs[22] related to Claimant's care with Dr. Ganesh Balu; one which indicated that his treatment was employment related and one which indicated that there was another accident. Other discrepancies including Claimant's admission to working in some records and receipt of unemployment insurance in others caused Ms. Cunningham, who has taken fraud training, some concern.

On cross examination, Ms. Cunningham admitted that the medical only agreement offered by Guard to Claimant back in May 2012 acknowledges that the accident occurred and

[22] *See* Employer's Exhibit 21 (HICFAs).

that Claimant suffered a head contusion. The agreement further states an average weekly wage for Claimant of $720.00 per week.

Ms. Cunningham acknowledged that while MCS, the records collection agency involved in this claim, indicated that they never got HICFAs in this matter, some of the HICFA forms bear the MCS name on the top of them. Ms. Cunningham confirmed that she did not contact Dr. Balu or his office for clarification of the HICFAs and did not submit the bills to the Utilization Review process either. Instead, based on the noted inconsistencies and her concern that outdated forms[23] had been used for at least some of the HICFAs, the medical claims were denied. When further questioned about the HICFA forms generated for Claimant, Ms. Cunningham was unsure of why Claimant's birth date seems different on some forms.

Dr. Evan Crain, M.D., a board certified orthopedic surgeon, testified by deposition on Employer's behalf. Having assessed Claimant in addition to conducting a review of Claimant's relevant medical records, Dr. Crain opined that while Claimant likely suffered a head and neck contusion in the May 16, 2012 work accident, he received reasonable and necessary treatment for those issues leading to their resolution. Dr. Crain opined that Claimant's cervical herniation is inconsistent with the mechanism of injury related to the dump truck incident and more likely derives from his 1997 motor vehicle accident. Furthermore, Dr. Crain indicated that Claimant is capable of a full-time, full-duty release to work.

Dr. Crain testified that he met with Claimant on February 27, 2013. Claimant, at that time, presented as a 50 year old male who had previously been employed by Employer as a flagman. He indicated that he was injured on the job on May 16, 2012, when he was hit in the posterior aspect of his head by a dump truck that was backing up. Claimant advised that he was wearing a hard hat that was turned around backwards. He noted that when the dump truck hit

him, it actually impacted the hard hat causing a direct blow and pain in the posterior aspect of his head that radiated down towards his left shoulder blade. Claimant reported that it was unclear to him as to whether or not he suffered a total loss of consciousness but felt that he may have blacked out or become confused for a time after the accident. Claimant went on that day to be treated at Beebe Hospital where he complained of pain in his head and neck however X-rays of his head and neck as well as a CT scan of his thoracic spine were all negative. Claimant was diagnosed with head pain, back pain and a concussion and prescribed anti-inflammatory medication.

Dr. Crain, who indicated the importance of accurate subjective reporting by injured individuals as well as a thorough review of related medical records when making a diagnosis, indicated that there were some inconsistencies in Claimant's account of the events of May 16, 2012. For instance, in contrast to Claimant's report to Dr. Crain of how he felt following the accident, the corresponding records of the ambulance company that transported Claimant to the hospital and the hospital records themselves reflect that Claimant reported no loss of consciousness following the accident. In fact, Claimant never began to report a loss of consciousness until July 23, 2012 when he first met with Dr. Balu though Dr. Crain cautioned that Claimant may not have understood what a total loss of consciousness meant. In similar fashion, however, Claimant denied any numbness or tingling immediately following the accident as well as to Dr. Balu when he first met with him. It was not until August 6, 2012, that Claimant reported the new radicular symptom; a finding that could not be confirmed by EMG. Claimant also initially denied any prior trauma to his neck but then indicated that he had been in a motor vehicle accident some 15 years before the dump truck event for which Claimant could not recall having any testing, going to physical therapy or even seeing a doctor while his records clearly

[23] *See* Employer's Exhibit 22 (Updated HICFA forms).

reflect that he had cervical MRIs and X-rays performed and was treated by Dr. DuShuttle in 1997 and 1998 for low back and neck pain. This was in addition to treatment he received from Delaware Orthopedic & sports for his neck, shoulder and low back in 1997 and 1998 during which time he complained of neck and back pain that increased with the weather. Claimant was then seen by Dr. Varipapa where he complained of cervical and musculoskeletal pain but was found to have subjective symptomatology that did not comport with his objective examination.

With regards to objective documentation of injury following the alleged work event with Employer, Dr. Crain confirmed that the May 16, 2012 CT scan of Claimant's neck was negative. He was found on May 18, 2012 by Bayhealth to have full cervical range of motion with only mild discomfort. By May 22, 2012, Bayhelath documented that Claimant's cervical range of motion was grossly normal which was further substantiated by a negative cervical spine X-ray taken by Dr. Singh on Jun 21, 2012. According to Dr. Crain this pattern continued in December 2012 as Dr. Balu notes that Claimant had only mild cervical spine muscle spasm and then in January 2013 documented Claimant's cervical range of motion as satisfactory. While an August 1, 2012 MRI did document a small C6-7 herniation without cord or nerve compression, Dr. Crain opined that this herniation is derivative of Claimant's 1997 motor vehicle accident and not the dump truck accident. He indicated that Claimant's 2012 cervical MRI is consistent with small disc bulges at multiple levels and is not compatible with the mechanism of injury and symptoms Claimant had following the work accident. Similarly, Dr. Crain confirmed that a CT Scan of Claimant's head from May 16, 2012, was negative as was a CT scan of his thoracic spine taken the same day. Dr. Singh documented that Claimant's shoulder and scapula X-rays were read as normal and noted in her June 21, 2012 note for Claimant that he was in no acute distress.

Dr. Crain confirmed that Claimant's inconsistent reporting continued with regard to his use of illicit substances. Specifically, Dr. Crain testified that on May 16, 2012, Claimant denied illicit drug use to Beebe Hospital but tested positive for the presence of cocaine on May 18, 2012. On July 23, 2012, Claimant again denied illicit drug use to Dr. Balu but then tested positive for cocaine on both September 10, 2012 and December 26, 2012. Later, on January 21, 2013, Claimant admitted to Dr. Balu, in direct conflict with his initial reports, that he was trying to cut down on his marijuana use.

Dr. Crain testified that as of his February 2013 assessment of Claimant, Claimant had no work restrictions in place. In fact, according to Dr. Crain, as of May 29, 2012, when Claimant was released to return to work, he would have been capable of full-time, full-duty work. Claimant noted to Dr. Crain at their meeting in February 2013, that he was receiving unemployment and looking for work.

As far as his own physical findings, Dr. Crain testified that Claimant had no issues with antalgia or an abnormal gait. He could walk on his heels and toes and had no difficulty in getting up on the examination table. There were no areas of palpable pain in or around Claimant's head and he had full motion of his neck. Claimant reported that at times he would have soreness on the left side of his neck from the mid neck area to the base of the neck. He had no palpable shoulder pain, scapula or lateral shoulder pain. Claimant had normal scapula thoracic motion, normal upper extremity strength and no instability. Neurovascularly he was intact. He denied thoracic or low back pain and his lower extremities were normal. All in all, Dr. Crain characterized Claimant's physical examination as entirely normal.

On cross examination, Dr. Crain confirmed that while his opinion could be changed if additional information regarding the mechanism of injury were brought to his attention, no such

information has been presented to him. He further confirmed that, based up the records related to the event, in order to have perpetrated a fraud in regards to the occurrence of this work accident, Claimant would had to have fooled his co-workers (who flagged down the ambulance at the scene of the accident), the Emergency Medical Technicians who documented evidence of trauma, Dr. Bailey (Beebe Hospital) and a certified physician's assistant at Bayhealth Hospital. As such, Dr. Crain confirmed that nothing has been brought to his attention that would convince him that the mechanism of injury did not occur.

Dr. Crain confirmed that he finds all of the treatment rendered Claimant by Dr. Balu to have been reasonable and necessary and directly related to the trauma described in Claimant's corresponding records.

In regards to Claimant's 1997 motor vehicle accident, Dr. Crain confirmed that there is no indication in the records that Claimant received any treatment for cervical, shoulder or trapezial problems after April 1998. Dr. Varipapa, in fact, documented his opinion that Claimant had reached maximum medical improvement following the 1997 motor vehicle accident and placed no limitations on his physical capacities as a result of that event. Dr. Crain maintained, however, that the cervical herniation found on Claimant's MRI is attributable to the 1997 motor vehicle accident based on Claimant's findings and symptoms following that injury. Dr. Crain opined that Claimant suffered a head contusion and a cervical spine blow/contusion in the dump truck event. He indicated that the mechanism of that injury is not consistent with the neck injury now alleged nor would it have produced the disc bulges or herniations detected by the MRI. Claimant, according to Dr. Crain, was treated for his contusions and his symptoms resolved.

Dr. Crain confirmed that on the day that he saw Claimant in February 2013, Claimant had no pain complaints at all including any relevant to his neck. Claimant advised him that he had an

injection administered by Dr. Balu but was not seeing Dr. Balu any longer as he had been discharged and was not planning any further medical treatment. Dr. Crain testified that the records reflect that Claimant received that injection on October 22, 2012, some five and a half months before being seen by Dr. Crain. Dr. Crain acknowledged that some individuals get more long-lasting relief from injections than others noting that in such cases the symptoms could return when the effects of the injection wear off.

Dr. Crain confirmed that a dump truck is a heavy piece of equipment which is certainly capable of causing trauma if it hits a person but noted that a bump by a dump truck would be expected to cause very different injury than say an individual being stuck and dragged by such a truck.

Dr. Crain, noting his lack of expertise in the area, indicated that he views substance abuse as a medical problem, a social problem, a physical problem, a personal problem and a big problem in general. He indicated his suspicion that some people may be in denial of an addiction issue but in Claimant's case specifically noted that when an individual consistently fails drug screens while denying drug use then that individual is not being truthful and questions are raised.

Dr. Crain confirmed that he never saw a job description form in any of Claimant's medical records but noted that those are rarely provided.

Dr. Crain indicated that his diagnosis of Claimant was based on his reported mechanism of injury, his history and a review of the related medical records. All of Claimant's symptoms, according to Dr. Crain, had resolved by the time he saw Claimant.

During a combination of re-direct and re-cross examination, Dr. Crain confirmed that Claimant advised him that Employer had closed down for unrelated legal issues though Dr. Crain was unsure of when that occurred. Dr. Crain also confirmed that Claimant was diagnosed as

having suffered a concussion in the work accident though he indicated he could find no evidence that concussion testing was performed.

David Leff, a forensic narcotics expert, testified by video deposition on behalf of Employer. Having assessed the language used by Claimant in his written explanation to Dr. Balu regarding the reason for his cocaine positive drug screen, Mr. Leff opined that the language is tantamount to an admission of Claimant's work as an end stage employee of a cocaine drug distribution enterprise.

Mr. Leff testified that based upon his expertise in interpreting drug slang Claimant's written statement to Dr. Balu that he tested positive for cocaine in September 2012 because, "I was handling help bagging it up, like fingers, for a freeze," when broken down provides clear evidence that Claimant was working in an end stage capacity for some organization involved in the distribution of cocaine. He explained that individuals in the drug trade consider this work employment and refer to it as such. He indicated that the term "handling" as used by Claimant relates to the use of one's hands in manipulating drugs for the purposes of bagging it up leading to the conclusion that Claimant was acting in a subordinate capacity to someone else in the packaging operation. The language "bagging it up" refers to actually placing the cocaine in a particular package such as an apple bag, a straw or a teardrop; any and all of which requires labor intensive, fine manipulation of one's hands, repetitive motions of the upper body, arms and wrists, dexterity, focus and most often long periods of standing over the product being bagged. Mr. Leff explained that the process includes many steps from unloading the bulk drug, to cutting open and adulterating the brick of cocaine with grinders but indicated his belief that Claimant was involved in the end stage packaging part of the process based upon his reference to bagging and touching the material. With regard to liking or licking one's "fingers for a freeze" as is

referenced in Claimant's hand-written letter to Dr. Balu, Mr. Leff testified that in North Jersey and New York the term a "freeze" is used to described the act of putting one's hands in the mouth for the topical numbing effect provided by the cocaine.

Mr. Leff testified that the Federal Government requires the reporting of income derived from the sale of illegal drugs as self-employment activity. He further noted that the Hobbs Act reflects the federal appreciation of the extent to which the sale and distribution of illegal drugs impacts interstate commerce. Mr. Leff testified that while often the end stage packers aren't paid in cash, they are compensated with product or drugs for their personal use which he indicated must be reported as income to the Federal government. He testified that the sale and distribution of cocaine is a multi-billion dollar business. Mr. Leff further acknowledged that during the time of prohibition in America, bootleggers injured delivering illegal alcohol to speakeasies were found by the courts to be employed for the purposes of workers' compensation under circumstances very comparable to the present day drug trade.

Mr. Leff, while acknowledging that he is not a toxicologist, indicated his knowledge that Tramadol, a non-narcotic, is treated in twelve states as a schedule IV drug because of its addictive properties and street value.

On cross examination, Mr. Leff indicated that it is his belief that pain management physicians monitor individuals that require analgesics and prescribe or provide therapy to individuals with pain issues. In Claimant's specific case, however, Mr. Leff was unaware as to whether or not Claimant had ever been prescribed Ocycodone.

With regard to the conclusions Mr. Leff drew from the letter written by Claimant in September 2012, Mr. Leff confirmed that there is a language that is shared between users and

dealers that is very common in those circles. He confirmed that drug users have been known to fabricate things from time to time.

Mr. Leff testified that in his experience, it is fairly easy to observe an individual and determine whether or not that person is under the influence of cocaine as there are certain signs that are typically present. He confirmed that these markers include rapid heartbeat, rapid breathing, wired, talkative, energetic, rambling speech, and dilated pupils.

Claimant, recalled as part of his own case-in-chief, testified that he was not out of place on the job site when he was struck by the dump truck. He indicated that he was moving appropriately with his post but dropped the flags when hit by the truck.

Claimant confirmed that when assessed in the ambulance immediately following the work accident and when later assessed at the hospital, his blood pressure, respirations and the condition of his eyes were all described as normal. Claimant does not recall being told that he suffered a concussion. Claimant denied the suggestion that the accident was a hoax.

After his initial hospital assessment and treatment, Claimant went the following day to Bayhealth for a second opinion. Ultimately he ended up treating with Dr. Balu, whose treatment provides short-term relief of his symptoms. According to Claimant, Dr. Balu has referred him to an orthopedic surgeon for additional assessment however, due to a lack of insurance coverage, Claimant has not followed-up on that referral.

Claimant testified that he worked for four to five years as a flagger on a road crew and was never allowed to sit on the job.

In responding to a combination of questions on cross examination and those posed by the Board, Claimant admitted that the hospital emergency department record from May 16, 2012, reflects that he suffered no loss of consciousness and was ambulatory at the scene. Claimant

nevertheless indicated that the dump truck struck him in the back of his hard hat causing him to blank out in the filed for a few seconds. Claimant further maintained that he continues to suffer pain at seven out of ten on the pain scale even today stemming from what he characterized as disc bulges in his left shoulder.

Claimant testified that he can not read well and would gauge his ability in this regard at approximately a four out of ten.

Claimant admitted that he was positive for cocaine when tested two days after the work accident and that he was subsequently positive for cocaine again on several occasions after the work injury when tested by Dr. Balu. Despite having no income, Claimant indicated that he is able to use cocaine with the assistance of friends who use and donate to his use.

Claimant testified that he is able to work and wants to work. He testified that he has looked for work but been unable to find any.

Dr. Ganesh Balu, M.D., a physician board certified in physical medicine, rehabilitation and pain management, testified by deposition on Claimant's behalf. Having served as Claimant's treating physician since July 2012, Dr. Balu opined that Claimant suffered injury to his cervical and thoracic spine as well as his head and left shoulder in the industrial accident of May 16, 2012.

Dr. Balu testified that he began seeing Claimant in July 2012 for conditions allegedly deriving from a work accident that occurred on May 16, 2012. Claimant, who was working as a roadside flagger directing traffic, reported that he was paying attention to oncoming traffic when a dump truck backed into him and struck him in the head causing his hard hat to come off from the blow. Dr. Balu indicated that a blow from such a heavy vehicle, even one moving very slowly, would be a formidable one. Claimant was transported by ambulance to Beebe Hospital

where his reports of the mechanism of injury are consistent with that reported to Dr. Balu. At the hospital, Claimant complained of neck pain, thoracic pain and a headache. X-rays and Ct scans taken at the hospital were negative for fractures. Claimant was diagnosed as having head pain, back pain, neck pain and a concussion. He was discharged from the hospital with the advice to follow-up with his primary care physician. Claimant instead followed up with Dr. Singh, an orthopedic surgeon, who released Claimant to return to light-duty work. Thereafter, Claimant came to Dr. Balu on July 23, 2012, for a second opinion.

Dr. Balu testified that despite Claimant's cocaine positive May 18, 2012 urine screen, he is unable to opine as to whether or not Claimant had used cocaine on the day of his alleged May 16, 2012 work accident or if he had done so in the days before or just after the accident. Nevertheless, Dr. Balu indicated that he finds some corroborating evidence of the mechanism of injury alleged by Claimant in things such as the ambulance report. Specifically, Dr. Balu testified that the ambulance records related to Claimant's transport from the scene of the alleged event to the hospital reflect that, after being flagged down by co-workers of Claimant's on scene, the ambulance attended to Claimant by placing him on a board for transport and assessing his vitals. The next day, Michael Clark, operations manager for Employer, wrote a letter to Employer's insurance carrier describing that Claimant was properly located in his flagging station when struck by a dump truck backing up whose driver had Claimant in his blind spot.

Dr. Balu recalled that when Claimant first presented to him on July 23, 2012, he complained of headaches, neck pain, left shoulder pain and mid back pain. His physical examination was positive for spasm in the cervical spine; he had restriction in his range of motion in the left shoulder as well as muscle spasm in the thoracic spine. Finding that Claimant's symptoms comported with his reported mechanism of injury, Dr. Balu formulated a

working diagnosis of a work-related motor vehicle accident, possible cervical sprain and thoracic sprain including Claimant's left shoulder. Dr. Balu advised Claimant to remain on light-duty and provided him with an anti-inflammatory medication as well as a muscle relaxer.

Dr. Balu confirmed that in reviewing the defense medical report generated by Dr. Evan Crain relevant to Claimant, Dr. Crain discounted a physical altercation that Claimant had in the days following the work accident as having anything to do with Claimant's neck pain. Instead, Dr. Crain opined that Claimant's neck symptoms are wholly attributable to the work event; a proposition that Dr. Balu agrees with entirely. Dr. Balu, however, indicated that his records do not even reflect that Claimant had an altercation following the work accident. Dr. Balu confirmed that on May 18, 2012, Claimant was seen by Bayhealth Occupational Medicine for continuation of treatment following the industrial motor vehicle accident but denied any knowledge of any other medical records resulting from the altercation. He further noted that while Dr. Crain feels that only Claimant's neck and head injuries are attributable to the work event, it his own opinion that Claimant's head, neck, left shoulder and mid back were injured as part of the dump truck event. Dr. Balu disagreed with Dr. Crain's assessment that Claimant's cervical abnormalities[24] are attributable to a motor vehicle accident that occurred in 1997, indicating instead that that event was too remote in time to relate the two, particularly given Claimant's acute symptomatology. In this case, according to Dr. Balu, Claimant did not have any treatment following the 1997 motor vehicle accident beyond Dr. DuShuttle's 1998 treatment after which Claimant was asymptomatic.

Dr. Balu testified that he did treat Claimant, providing him medication, physical therapy, diagnostic studies and injections. He indicated that this treatment was reasonable, necessary and

[24] Dr. Balu recited the findings of Claimant's August 1, 2012 MRI as including: a small centrally located disc herniation at C6-7 with no cervical spinal cord or nerve compression and mild ligamentum flava, hypertrophy from

connected to his work accident with Employer; an opinion that Dr. Crain indicated he shares. Moreover, Dr. Balu testified that the rest and remainder of the care that Claimant received following this work accident has also been reasonable, necessary and related to the accident. Dr. Balu detailed the following medical bills, all related to Claimant's post-work accident treatment, as outstanding and unpaid: Pain management $7820.00, Physician Dispensing Solutions $967.70, First State Imaging $1600.00, Anesthesia Providers LLC $885 and Comprehensive Spine Center $3095.00, Dr. Tooze, Easter and Manifold $390, Beebe Medical Center $4008.00, and Bayhealth medical Center $617.00.

Dr. Balu testified that Claimant's last office visit with him occurred in March 2013 at which time Claimant was encouraged to continue light-duty work, use injections on an as-needed basis, use non-narcotic pain medication on an as-needed basis and seek a second opinion from a surgeon if his symptoms worsen. Claimant is also expected to return to Dr. Balu on an as-needed basis for any of these treatment options.

On cross examination, Dr. Balu confirmed that he is the President of Comprehensive Spine Center, the CEO of anesthesia Providers, President of Pain Management and Rehabilitation, President of Physicians Dispensing Solutions and President of First State Imaging.

Dr. Balu confirmed his familiarity with Delaware Workers' Compensation regulations Section 4.3.2 which provides that the fee schedule defers to the CPT code guides and descriptions to establish correct classification for services. Section 4.1.1 of these regulations specifically requires board certified physicians to adhere to the instructions for the CMT 1500s (a/k/a HCFA forms). Dr. Balu otherwise testified that he is relatively unfamiliar with specific

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C4 to C5 through C6 and C7. Dr. Balu explained that hypertrophy is often associated with early degenerative conditions and is often present in individuals who have been involved in manual labor.

billing questions or whether or not there are multiple versions of the HCFA forms required for various insurance providers. He confirmed that the forms contain language that as the treating physician, he is certifying the information contained in each form to be true, accurate and complete. Dr. Balu indicated that he is unsure in either case but conceded that there may have been a mistake on Claimant's initial forms wherein he may not have ever been classified as a new patient with corresponding new patient codes. Dr. Balu confirmed that HCFAs were submitted to Guard Insurance relevant to Claimant's workers' compensation claim and treatment of his related injuries. Dr. Balu denied any knowledge of his office ever sending HCFA forms to a court reporting agency but indicated that with regard to the two sets of HCFA forms (those provided originally to Guard Insurance and those eventually provided through Claimant and or his counsel), someone asked to reprint the documents could have inadvertently selected the wrong document for re-print leading to some inconsistencies in the forms.

Dr. Balu confirmed that both an accurate subjective history and review of one's medical records are important elements in providing both treatment and an opinion as to causation of a condition yet he admitted that he did not review the 1997 through 1998 records for Claimant from Delaware Orthopedic and Sports until several weeks before his deposition, at which time he learned that Claimant received treatment for similar injuries to the same body parts implicated in the present action. He has also since reviewed Dr. DuShuttle's records for Claimant during the 1997 through 1998 time frame which suggest that he was treated for cervical and lumbar strains and eventually referred to Dr. Varipapa for further assessment. Dr. Balu confirmed that he was unaware that Claimant tested positive for the rheumatoid factor after which he followed up with South Side Family Practice between 2008 and 2011.

Along these same lines and more specifically related to the accuracy of the reports made by Claimant, Dr. Balu admitted that the accounts from onlookers on the scene when Claimant was allegedly struck by the dump truck as well as Claimant's own reports to medical providers (ambulance attendants, hospital staff and follow-up care with Bayhealth) reflect that Claimant suffered no loss of consciousness; a story which subsequently changed when Claimant reported to Dr. Balu on July 23, 2012 in his patient history questionnaire that he had lost consciousness as part of the work accident. On this same questionnaire, Claimant underlined "no" with regard to questions about whether or not his condition was work-related; a phenomenon that Dr. Balu attributes to Claimant not being diligent in completing paperwork as evidenced by other instances in the same paperwork where Claimant indicates the injuries have been accepted as a workers' compensation claim. While Claimant reported that he was struck by a dump truck on May 16, 2012 as a result of which he suffered injury to his neck, upper back and head, at Claimant's July 26, 2012 visit with Comprehensive Spine Center he signed off on paperwork indicating his work status as full-time. Later on November 26, 2012, Claimant advised Dr. Balu that he would like to continue receiving unemployment until the weather improved such that he could return to flagging. On January 21, 2013, Dr. Balu's notes reflect that Claimant was continuing to receive unemployment.

Dr. Balu conceded some inconsistency in Claimant's report of radicular pain as well. In this regard, Dr. Balu confirmed that Claimant denied any numbness or tingling when treated by the hospital immediately following the alleged accident. On July 23, 2012, when Claimant initiated care with Dr. Balu, he reported no radicular pain yet in an August 6, 2012 note, Dr. Balu documented Claimant's new report of left upper extremity radicular pain. Dr. Barrish, however,

was unable to verify a true radicular problem in Claimant when he conducted his EMG on December 4, 2012.

Dr. Balu confirmed that Claimant denied his 1997 motor vehicle accident as part of his initial care.

As for Claimant's neck condition, Dr. Balu confirmed that the CT scan performed of Claimant's neck on the day of the injury was negative. Two days later on May 18, 2012, Kent General Hospital staff documented full cervical range of motion with only mild discomfort. By May 22, 2012, just six days removed from the accident, Kent General staff documented Claimant's cervical range of motion as "grossly" normal. Dr. Balu confirmed that an August 1, 2012 MRI documented a cervical herniation but revealed no nerve root or spinal cord compression. Thereafter, Dr. Singh's August 16, 2012 X-ray of Claimant's neck noted a normal cervical spine. Dr. Balu conceded that even he found a satisfactory cervical range of motion in Claimant as part of his January 21, 2013 assessment.

Dr. Balu testified that a CT scan of Claimant's head was negative as were CT scans of his thoracic spine and a June 21, 2012 X-ray of his left shoulder. At that same June 21, 2012 visit with Dr. Singh, Dr. Singh documented that Claimant was in no acute distress and had both a normal gait and posture. Similarly, an August 16, 2012 X-ray of Claimant's left scapula was read as normal.

With regard to use of cocaine and the rate at which it metabolizes, Dr. Balu reiterated that he has no expertise in that area and no basis upon which to offer an opinion as to whether or not there is any medical evidence sufficient to determine, with his background, whether or not Claimant used cocaine on the day of the alleged dump truck incident. He testified that while Claimant denied drug use to hospital staff after the accident, he tested positive for the presence

of cocaine in his system just two days later. Claimant also, despite denying cocaine use to Dr. Balu, tested positive for the presence of cocaine on at least two occasions while under Dr. Balu's care; the first of which Claimant attributed to handling and bagging cocaine and the second of which he admitted use of the drug. Claimant also admitted to Dr. Balu making efforts to cut down on his marijuana use.

Dr. Balu admitted that it can be dangerous to use opiods with cocaine. He acknowledged that despite Claimant's illicit drug use he has continued to prescribe Claimant medications including Tramadol. While recognizing the danger, Dr. Balu testified that failing to treat an individual like Claimant who is in pain with prescribed medications could force an increase in self-medication with illicit substances. As such, Dr. Balu indicated that he accepts the inherent risks associated with Claimant's illicit drug use when balanced by the monitoring procedures he has in place in his practice. At present, Dr. Balu has ceased the prescription of all narcotics to Claimant and has issued him instead a prescription for Ultram which he believes is the safer alternative.

With regard to Claimant's work status, Dr. Balu acknowledged that there is no medical record suggesting that Claimant was ever placed on total disability. In fact, Dr. Balu admitted that Claimant has advised him that he is capable of working but simply has been unable to find a job. In that same vein, Dr. Balu admitted that he has not ever restricted Claimant's activities of daily living in light of his physical condition. Dr. Balu testified that he believes that Claimant is capable of light-duty work and may even be capable of an eventual return to full-duty with additional treatments like injections.

During brief re-direct examination, Dr. Balu confirmed that his opinions have not changed. He further confirmed that Claimant testing positive for the rheumatoid factor does not

prove or disprove whether or not Claimant has rheumatoid arthritis. Moreover, the arthritic condition Claimant appeared to be treating for with his family physician was in peripheral joints including his ankles, feet and wrists. Dr. Balu also confirmed that when Claimant treated with Dr. DuShuttle in 1997 and 1998, there was no mention of injury to or treatment for his shoulder or thoracic spine.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Motion *in Limine*: Claimant renewed an earlier Motion *In Limine* seeking to exclude the testimony of Dr. Sajjad Savul which was being offered by Employer as a basis to establish that Claimant forfeited his right to workers' compensation benefits by using cocaine while at work. Prior to the Hearing, the Board refused to grant Claimant's motion, opting instead to hear the factual basis for the opinions offered by Dr. Savul before reconsidering Claimant's request.

In this regard, Dr. Savul, a graduate of Kyber Medical College in Pakistan, holding a masters degree in aerospace medicine and boosting extensive experience in both family practice, occupational medicine, and drug screening review, testified that based upon the result of Claimant's May 18, 2012 urinalysis, he is able to say to a reasonable degree of medical probability that Claimant used cocaine sometime on May 15 or May 16, 2012. Because of variations in human excretions of the chemicals he could not narrow the timeframe of Claimant's use more specifically and could not say to a reasonable degree of medical probability that Claimant was "high" or impaired by this cocaine use at the time of the alleged work accident on May 16, 2012.

Based, therefore, upon Dr. Savul's candid admission that he could not specify that Claimant was intoxicated by cocaine use at the time of the alleged industrial event on May 16,

2012, and there being no other corroborating evidence suggestive of this proposition, the Board granted Claimant's Motion *In Limine*, striking the testimony of Dr. Savul.

Did an Accident Occur: 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."[25] One issue of contention in the present action is a dispute regarding whether or not an accident occurred as alleged by Claimant. Employer has argued that it is virtually impossible for the accident to have occurred as alleged by Claimant and has suggested through the testimony of witnesses that Claimant either embellished or made up the event for self-serving purposes. Because Claimant has filed the current petition, he has the burden of proof in establishing that such a circumstance exists.[26]

Claimant, working as a roadside flagman on May 16, 2012, testified that he was struck from behind by a dump truck that was backing up on the job site. He indicated that when the truck hit his hard hat it caused him to drop the flags he was holding and flee to the other side of the road to compose himself. Employer offered the testimony of several witnesses including Michael Clark, Thomas McKinney and Jesse Davis who all agree that such an accident would have been impossible had Claimant been stationed where he was supposed to be. Outside of speculation and doubt, however, none of these witnesses could say definitively that Claimant was not struck by the truck. Mr. McKinney, the driver of the dump truck involved in the alleged accident, indicated that he never saw Claimant behind his truck but admitted that he saw the flags go up in the air just before Claimant ran to the other side of the road. Mr. McKinney further admitted that due to the size of the vehicle he was operating he has a large blind spot for things directly behind his truck. Mr. Davis, who testified that he is primarily responsible for the

[25] DEL. CODE ANN. tit. 19, §2304.
[26] DEL. CODE ANN. tit. 29, §10125(c).

placement of roadside flagmen on his job sites, indicated that he did not witness the event and without something specific to reference the exact locations of driveways along the route where the accident occurred could not specify where Claimant should have been standing such that he could not have been struck as he claims. Michael Clark, who was also away from the site of the alleged accident, indicated that Claimant should never have been directly behind the truck based on the moving nature of the operation. Notably, however, Mr. Clark drafted a letter to Employer's insurance carrier immediately following the accident which specified, just as Claimant reported, that he was struck from behind by the truck as it backed up despite being properly positioned. Given the specificity of this report, it seems hard to imagine that such an event was so incredible as to not even be possible and yet Mr. Clark, as the supervisor of this road crew, took no issue with making the report to the insurance company of the alleged event. This leaves the Board wondering why Mr. Clark's suspicions were not raised as soon as the event occurred.

Based upon these facts, the Board is persuaded that Claimant has demonstrated that some accident involving the dump truck did occur. None of Employer's witnesses were present on scene at the time of the alleged event and their present skepticism is not easily reconciled with their conduct on the day of the accident. For example, there is no dispute that Claimant's co-workers flagged down a passing ambulance to assess and transport him to the hospital following the accident. Mr. Davis testified that he was one of three men who actually assisted Claimant to the ambulance. While the onlookers, including Mr. McKinney, Mr. Davis and Mr. Clark may be of the opinion that Claimant acted differently once the ambulance was on scene such that their observations may reflect on Claimant's overall credibility in the context of the severity of his injuries, such observations say nothing of whether or not the accident actually occurred. In

concurring with the same conclusion reached by Claimant's treating physician, Dr. Balu, even Dr. Crain, the defense medical examiner in this case, found nothing that suggested to him that this accident did not occur. Given therefore, Claimant's testimony regarding the event, the facts and circumstances surrounding the ensuing response, and the respective opinions of both Drs. Balu and Crain, the Board is persuaded that Claimant has demonstrated by a preponderance of the evidence that Claimant was struck by the dump truck.

Forfeiture: Employer has argued that even to the extent that the Board is persuaded that an accident involving Claimant occurred, Claimant has forfeited his right to workers' compensation benefits by virtue of his own disregard for safety on the job site and/or through cocaine intoxication. The Board, however, is unable to find evidence of either of these circumstances or any other related element that would warrant a forfeiture of Claimant's entitlement to benefits.

Specifically, while Claimant's co-workers who testified indicated that it should have been impossible for him to be behind the dump truck such that he was when he alleges he was hit, Claimant's supervisor, Mr. Clark, took no such issue with Claimant's account of the events of the accident in the hours and days immediately following the accident. In fact, as previously noted, he wrote a letter to the insurance carrier indicating that Claimant was struck by the dump truck despite being properly placed on the job site. In light of this and the other testimony, there is simply no substantial evidence that Claimant somehow exhibited reckless disregard for his own safety in causing this accident.

Moreover, there is no evidence that Claimant was impaired by cocaine or any other substance at the time of the accident. As discussed in the Motion *in Limine* section of this Decision, there is no medical evidence sufficient to establish that Claimant used or was impaired

by cocaine at or about the time of the accident. There is also no corroborating evidence suggesting that anyone witnessed Claimant using drugs at or about the time of this event. To the contrary, while Mr. Leff testified that there are any number of physical indicators indicative of chemical impairment, the medical evidence including that obtained by the ambulance crew that transported Claimant to the hospital as well as the hospital's records fail to show any observation of those many physical indicators that Mr. Leff testified make it easy to pick someone who has been using out of a crowd.

As such, the Board cannot find that Claimant acted in any way consistent with a forfeiture of benefits pursuant to 19 Del. C. § 2353.

Injuries and Medical Care Established as Compensable: 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."[27] 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."[28] "A preexisting disease or infirmity, whether overt or latent, does not disqualify a claim for workers' compensation if the employment aggravated, accelerated, or in combination with the infirmity produced the disability,"[29]

Dr. Balu testified that in his opinion Claimant suffered injury to his head in the form of a concussion as well as cervical and thoracic sprains including Claimant's left shoulder. Dr. Balu, unaware that Claimant was involved in a physical altercation in the days following the work accident, discounted that fight as well as a 1997 motor vehicle accident Claimant had as the basis

[27] *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992).
[28] *Reese*, 619 A.2d at 910.
[29] *Id.*

for the injuries he observed in Claimant when Claimant came to him in July 2012. Dr. Balu notes instead that Claimant had been asymptomatic prior to being struck by the dump truck and that Claimant immediately reported cervical, thoracic and head complaints following the work accident that could not have been the product of a later fight. Dr. Crain, on the other hand, opined that while Claimant likely suffered a contusion to his head and cervical spine in the work accident, the accident did not cause the cervical abnormalities observed in Claimant's later MRI nor is there any evidence that it caused a thoracic or left shoulder injury. Nevertheless, in concurrence with the opinions offered on the topic by Dr. Balu, Dr. Crain indicated his belief that the treatment that Claimant has received in the aftermath of this accident has all been reasonable, necessary and related to the accident.

Based upon these competing and somewhat supporting medical opinions, the Board is persuaded that Claimant has demonstrated by a preponderance of the evidence that, as a result of the industrial accident of May 16, 2012, he did, in fact, suffer injury to his head in the form of a contusion as well as a cervical strain. The Board is not persuaded, however, that there is any evidence that Claimant suffered injury to his thoracic spine or his left shoulder. In reaching these conclusions, the Board notes that both Drs. Balu and Crain have confirmed that Claimant is not a reliable historian or reporter as he has repeatedly offered contradictory and/or clearly false reports regarding the circumstances of his condition immediately following the accident and thereafter. He has changed his story regarding whether or not he lost consciousness after being struck by the truck, been dishonest about his use of illicit drugs, admitted to lying to Employer about his medical release to return to work following the accident, failed to acknowledge the extent of his medical care following the 1997 motor vehicle accident and, at times, denied having any care following that event at all. As noted, however, at least with regard to his neck and head

complaints following the May 16, 2012 event, Dr. Crain agrees with Dr. Balu that Claimant suffered injury in the form of a strain or sprain. The Board is not persuaded that the evidence supports a finding that Claimant's cervical herniation or other cervical abnormalities are the result of the work accident as Dr. Crain persuasively testified they are inconsistent with the mechanism of the work accident, but is persuaded that the symptoms that Claimant has experienced in his neck since the work event are the result of being struck by the truck. As such, while the work accident did not likely cause these cervical abnormalities, it seems clear that Claimant was asymptomatic prior to the event work leading to the conclusion that the work accident exacerbated the preexisting cervical condition. In that regard, treatment for that exacerbation is attributable to the industrial accident and therefore to Employer.

The real dispute comes in regards to Claimant's thoracic spine and left shoulder. In looking to these alleged injuries, the Board notes that there is no objective evidence of injury to either area. All CT scans and X-rays have been normal and it was not until August 6, 2012, nearly three months after the accident that Claimant reported the development of radicular type pain down into his left shoulder and arm. That symptom was further evaluated but could not be correlated by EMG performed under Dr. Balu's direction. As such, the only basis to find that injury to either of these areas occurred is reliance on the heretofore established unreliable word of Claimant who, in these proceedings, indicated he has had these symptoms since the work accident. The Board finds that while Dr. Balu has opined that Claimant suffered a thoracic sprain in the work accident, his opinion is largely based on Claimant's word. That alone under the rest and remainder of the circumstances presented is insufficient for the Board to find those conditions, if any such conditions exist, compensable as against Employer.

Accordingly, and for the reasons stated herein, the Board finds that Claimant suffered injury to his neck and head in the work accident of May 16, 2012. The treatment that he has received since that time, as testified to by both Drs. Balu and Crain, has all been reasonable, necessary and related to the work accident and must therefore be paid by Employer/insurance carrier in a manner commensurate with the State of Delaware Health Care Payment System as provided for by Section 2322B(3) of the Worker's Compensation Act.[30] The Board also notes, however, that Claimant has not indulged medical care with Dr. Balu for months and had not even as of February 2013 when seen by Dr. Crain. Claimant reported at that time that he was pain free and not planning on returning to care which seems consistent with the medical records predating the Crain assessment which repeatedly document normal cervical range of motion combined with few, if any, other abnormal findings. While Claimant's testimony in this hearing was contradictory as it relates to his claims of ongoing pain, the Board is not persuaded that Claimant's injuries continue and instead adopts the opinion of Dr. Crain that Claimant's contusions/sprain have resolved entirely such that no further medical treatment is required as a result of the work-related injuries.

Total Disability

The question in this case as it relates to Claimant's entitlement to compensation for total disability has to do with what period, if any, Claimant may be entitled to compensation for lost earning capacity deriving from his work-related head and neck injuries. Claimant alleges that he should be awarded compensation for total disability from the date of the accident, May 16, 2012, forward on an ongoing basis while Employer, by stark contrast, asserts that Claimant has never been totally disabled as a result of the work-related accident.

[30] "The maximum allowable payment for health care treatment and procedures covered under this chapter shall be the lesser of the health care provider's actual charges or the fee set by the payment system." DEL. CODE ANN. tit. 19, § 2322B(3).

Interestingly, Drs. Balu and Crain, given their own respective assessments of Claimant as well as their review of the medical records of the providers who treated Claimant after the accident and before Dr. Balu became involved in July 2012, agree that no physician, excluding the two day period immediately following the industrial accident, has ever documented that Claimant is totally physically incapacitated from doing any and all work. Dr. Balu, acting as Claimant's treating physician, admitted that even he has not found Claimant to be totally medically disabled. In fact, throughout Dr. Balu's records, there are references to Claimant's reports that he has been receiving unemployment insurance payments and desired to continue doing so until the weather broke and he could return to working as a flagman. Dr. Balu confirmed that Claimant advised him when last they met that he is capable of working and hasn't returned to work because he simply hasn't been able to find employment; a proposition that Claimant again confirmed for this Board noting that he felt that he could return to his work with Employer immediately following the work accident had it not been for injuries he sustained in the physical altercation he had the following weekend.

Claimant did assert that his initial medical release was for light duty which could not be accommodated by Employer; an opinion supported by the testimony of Mr. Clark. In this regard, Claimant seemingly takes the position that he was not obligated to look for employment because he remained employed by Employer but could not be accommodated with his work-related physical limitations. The undisputed testimony however undermines this logic to the extent that Employer, almost immediately following Claimant's initial light-duty release, discovered that Claimant had lied about his inability to return to work and issued a letter terminating him. Claimant agrees to the sequence of these events and thereby acknowledges that he knew he was unemployed and displaced yet he did not look for work until forced to do so in pursuit of

unemployment compensation; the details of which Claimant has failed to document (for this Board or the Unemployment Insurance Office) or provide evidence of.

Based upon these facts, there seems little doubt that there is no compensable period of total disability for which Claimant is entitled to compensation. Claimant, who has filed this Petition and therefore has the burden of demonstrating lost earning capacity derivative of his work-related injuries, has also failed to establish any evidence suggesting that he has a diminished earning capacity resulting from the light duty restrictions he has from Dr. Balu. Moreover, Claimant provided no evidence of a reasonable job search or offers of employment which may reflect some loss in earning capacity at a time when he was still laboring under the limitations of his work-related injuries. As such, the Board is persuaded that Claimant's claim to compensation for lost wages is without merit.

Fraud Referral: Employer has requested the Board consider referring this matter and specifically Dr. Balu to the appropriate professional governing bodies for investigation of potential fraud relevant to discrepancies in two sets of HCFA forms produced in Claimant's case. Having considered this request in the context of the evidence presented, the Board is persuaded that there is an insufficient basis to find reason to believe that fraud has been committed.

Dr. Balu, who candidly admitted that he does not personally handle the reproduction and dissemination of these forms, testified that it is his opinion that a clerical error could have resulted in the irregularities between the two sets of forms at issue. While Employer is unsatisfied with that response, the Board finds no evidence suggesting the explanation as unreasonable. Of particular note in that regard is the testimony of Dr. Crain, the defense medical expert in this case, who opined that the treatment Claimant received which is the subject of these HCFA forms was all reasonable and necessary and related to the industrial accident with

Employer. Given Dr. Crain's opinion, there seems little basis to suspect some nefarious motivation for the clerical discrepancies.

As such, the Board finds no material basis to reasonably suspect that anything more than a clerical error occurred in this case. Of course, the Board's decision to forego the requested referral should not serve to prevent Employer from pursuing whatever avenues it deems appropriate in regards to its own concerns.

Attorney's Fees

A claimant who is awarded compensation is generally 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."[31] At the current time, the maximum based on Delaware's average weekly wage calculates to $9,911.90. The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55 (Del. 1973). Less than the maximum fee may be awarded and consideration of the *Cox* factors does not prevent the granting of a nominal or minimal fee in an appropriate case, so long as some fee is awarded.[32] A "reasonable" fee does not generally mean a generous fee.[33] 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 Board has herein granted Claimant's Petition to Determine Compensation Due, finding injury to Claimant's neck and head compensable as against Employer. In doing so the Board has further awarded Claimant payment of medical expenses. Claimant's counsel submitted an affidavit stating that he spent a total of 82 hours preparing for this hearing which itself lasted approximately seven hours. Claimant's counsel, who was admitted to the Delaware

[31] DEL. CODE ANN. tit. 19, § 2320.
[32] *See Heil v. Nationwide Mutual Insurance Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96A-01-005, Cooch, J., 1996 WL 527213 at *6 (August 9, 1996).

bar in 1981, is experienced in workers' compensation litigation; a specialized area of the law. Counsel or his firm's first contact with Claimant was on June 20, 2012. Thus, Claimant has been represented by counsel or his firm for approximately 14 months. This case was highly litigated and involved more than the average workers' compensation case in terms of the complexity of the litigation despite the fact that it did not involve any novel issues of fact or law. Claimant's attorney was seemingly subjected to some unusual time limitations imposed by these circumstances. There is no evidence that accepting Claimant's case precluded counsel from other employment other then potential representation of Employer. There is no evidence that the employer lacks the ability to pay a fee.

Taking into consideration the fees customarily charged in this locality for such services as were rendered by Claimant's counsel and the factors set forth above, the Board awards a total attorney's fee in the amount of $8,000.00 or 30 percent of the total award made herein, whichever is lesser.

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

[33] *See Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966).

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Claimant's petition is GRANTED in part and DENIED in part. Specifically the Board finds compensable the injury to Claimant's head and neck but rejects his claims for thoracic spine and left shoulder injuries. The Board further denies Claimant's claim for compensation for total disability. Claimant is awarded payment of medical witness fees and attorney's fees in the amount of $8,000.00 or 30 percent of the total award granted herein, whichever is lesser.

IT IS SO ORDERED THIS 22nd DAY OF AUGUST, 2013.

INDUSTRIAL ACCIDENT BOARD

JOHN D. DANIELLO

FOR

JOHN F. BRADY

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

ANGELA M. FOWLER
Workers' Compensation Hearing Officer

Mailed Date: 8-26-13

OWC Staff