

**LESLIE N. IMMELL, Claimant,**  
**v.**  
**SMITTY MCGEE'S RAW BAR, Employer.**

**INDUSTRIAL ACCIDENT BOARD OF THE  
STATE OF DELAWARE**

**Hearing No. 1384571**

**Mailed Date: September 2, 2014  
August 29, 2014**

**DECISION ON PETITION TO DETERMINE  
COMPENSATION DUE**

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on May 30, 2014, in the Hearing Room of the Board, in Milford, Delaware.

**PRESENT:**

MARY MCKENZIE DANTZLER

JOHN F. BRADY

Christopher F. Baum, Workers' Compensation  
Hearing Officer, for the Board

**APPEARANCES:**

Leroy A. Tice, Attorney for the Claimant

Anthony N. Delcollo, Attorney for the Employer

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**NATURE AND STAGE OF THE  
PROCEEDINGS**

On November 25, 2013, Leslie N. Immell ("Claimant") filed a Petition to Determine Compensation Due, alleging that she was injured in a compensable work accident on June 12, 2012, while she was working for Smitty McGee's Raw Bar ("Employer"). Employer acknowledges that Claimant fell from a keg, suffering a left fifth metatarsal fracture and sprained ankle. Employer

disputes Claimant's alleged other injuries to her left hip, low back and sciatic nerve.

A hearing on the merits of Claimant's petition was held on May 30, 2014. This is the Board's decision on the merits.

**SUMMARY OF THE EVIDENCE**

Claimant testified that she is currently enrolled in nursing school, but that she started working for Employer on April 19, 2012. She was an assistant manager. The job involved a lot of walking and standing. At times, she needed to maneuver beer kegs and change them at night. The kegs were stored in a cooler. On June 12, 2012, she was moving items in the cooler to make room. She stepped on a keg to move containers of Bloody Mary mix out of the way to clear the way to the bread racks. Because she is short, she cannot just step over the kegs, so she had to step on them. While doing this, she slipped. Her left foot got stuck in a crevice and she fell backwards onto her left side and back. She felt immediate left foot pain.

Claimant phoned and reported the accident to Dawn McGee (the owner of Employer) and to the general manager. Ms. McGee came and Claimant then went to the hospital. An x-ray showed that she had a fifth metatarsal fracture. She was given a hard cast and sent to Dr. Philip Spinuzza.

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Claimant stated that she was injured on a Tuesday. Wednesday was her day off. On Thursday, she returned to work wearing a splint and using crutches. She was allowed to sit at the hostess stand for the dinner rush, but otherwise she walked and stood as needed. She saw Dr. Spinuzza about a week later and he confirmed that she had a fracture. She was given an orthopedic boot (CAM walker) and advised to work light duty. The boot has a sole that is about two inches thick, so it caused her left leg to be higher than her right leg. Over time, the foot pain

changed from a sharp pain to more of a burning pain.

Claimant stated that she was still using the CAM walker in August of 2012. She reported left shin pain, intensified left back pain, and pain in her buttocks. She also had a tingling in her foot that went up to the shin to the knee. She had first felt tingling and burning in her shin within a month of the accident but she had not reported it immediately because she thought it was just part of the healing process and would go away once she was out of the CAM walker. In August, she was still working eight to fourteen hours per day and Dr. Spinuzza advised that she was working too much and that that was why it was taking so long to heal. In August, she was using crutches about 25% of the time and she still had constant foot and ankle pain. Eventually, she was given a bone stimulator to use twice per day.

Claimant testified that, at some point, she told Dr. Spinuzza that she wanted to return to school to become a nurse and he advised that it would be difficult to be a nurse with a broken foot. He suggested that she get a job where she was not on her feet consistently. In October of 2012, she reported to the doctor that she had hip, back and sciatic pain. She had a burning sensation in the hip. This sensation persisted when she was off her feet, but was more prevalent when she was standing or walking. Removing the CAM walker did not provide relief. She was

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referred to another doctor for these symptoms but she did not go because those injuries had not been accepted as compensable.

Claimant agreed that she had been in a motor vehicle accident in August of 2012, but she asserts that she had already had her hip, back and sciatic pain prior to that and the motor vehicle accident did not aggravate it. She just sustained some bruising from the seatbelt.

Claimant stated that, by December of 2012, Dr. Spinuzza informed her that the fracture had

healed, but that he suspected nerve damage resulting in her burning pain. In May of 2013, she went to Dr. Jason Scopp because her hip pain increased. He recommends surgery because her femur does not fit properly and there is a leg length discrepancy. Dr. Scopp blames it on the time she spent in the boot. Surgery has not yet been performed. She has just been living with the pain.

Claimant no longer works for Employer. In January of 2013, she worked at the Blue Dog Cafe singing with the band and occasionally serving food. She also worked at Red Lobster as a server, which involved constant walking. She currently works as a bartender for Tuscan Hills Winery, which involves prolonged standing. She has no work restrictions. Her pain stays constant doing that. Without medication, the pain is about an 8 or 9 on a ten-point scale. When she takes Advil, it goes down to a 5.

Dr. Philip Spinuzza, an orthopedic surgeon, testified by deposition on behalf of Claimant. He began to provide treatment to Claimant on June 18, 2012. In his opinion, Claimant's ankle, hip and back conditions were all a natural consequence of the June 2012 work accident.

Dr. Spinuzza stated that, on June 18, 2012, Claimant reported to him that she had fallen from a keg of beer at work on June 12, and that she had injured her left foot and ankle. She stated that she had gone to 75<sup>th</sup> Street Medical Center and had an x-ray of the left ankle and foot

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and was told that she had a fracture. She had been given a splint. She stated that she continued to work.

Dr. Spinuzza reviewed the x-ray and concluded that Claimant had a fracture of the left fifth metatarsal shaft. He prescribed a "fracture walker orthosis" (CAM walker). Claimant explained that her job involved working twelve hours per day and involved primarily standing or walking. However, since she had the splint, she

was working light-duty and Employer had accommodated her. She wanted to continue working and the doctor thought that was reasonable.

Dr. Spinuzza stated that, by July 13, 2012, Claimant reported that she had less pain. A repeat x-ray showed that the fracture was still evident, but there were some signs of healing. He recommended that she continue to use the walker orthosis whenever she was outside her house. On August 3, Claimant reported that she still had discomfort with prolonged standing. If she just wore tennis shoes, she would have discomfort after several hours. Claimant had a mild left antalgic gait at that point. X-rays revealed incomplete healing and she remained tender over the fracture site. Claimant remained clinically symptomatic on September 21 and the fracture remained unhealed on x-ray. At that point, Dr. Spinuzza decided to use a bone stimulator to further the healing process and issued a new CAM walker to Claimant because the prior one had worn out. Claimant advised that she was changing her job and the doctor thought that less standing and walking would be beneficial.

Dr. Spinuzza stated that, in October of 2012, Claimant still had burning pain in the lateral border that worsened as the day went on. It sounded to him that she may have been having neurologic or neuropathic pain. In discussing that with her, she mentioned for the first time that she had also been having low back pain ever since the fall, but hadn't really thought too much about it. She was also having left hip pain and had developed left shin pain. By December of

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2012, the foot fracture itself had clinically healed. The ankle tenderness had resolved. She continued to have her low back and hip complaints.

Dr. Spinuzza was aware that Claimant sought medical care for her hip complaints from Dr. Jason Scopp. In June of 2013, Dr. Scopp noted an MRI finding of labral fraying and mixed-type femoral acetabular impingement. Dr. Scopp

indicated that, in his opinion, the hip problem (labral tear) was, more likely than not, causally related to the work accident. Dr. Scopp did not, however, specifically reference the use of the CAM walker as playing a part in the condition.

Dr. Spinuzza last saw Claimant in December of 2013. She still had pain when she walked. There was local tenderness in the lumbar spine. There was tenderness at the sciatic notch. There was decreased sensation in the left L5 dermatomal pattern. Stretching the sciatic nerve caused pain to radiate down the leg. He recommended that she have an MRI of the lumbar spine. The report from that MRI indicated that there was degeneration of the L5-S1 disk with a small protrusion contacting the S1 nerve root. This is consistent with Claimant's symptoms.

Dr. Spinuzza opined that, in the work fall, Claimant may have injured her back directly by twisting when she fell and she could also have landed on her buttock injuring the sciatic nerve.<sup>1</sup> However, because she broke her foot too, the acute pain from that fracture overrode the lower levels of pain so that she did not pay attention to them until the foot improved. In addition, the CAM walker altered the way Claimant walked. It prevented the ankle from moving up and down, so she developed a limp. When gait mechanics are changed like that, it can put stress and strain on other areas of the body, such as the knee, hip and back. The limping may have aggravated the underlying back or nerve injury. As far as Dr. Spinuzza knew, Claimant had not been in any other trauma or accident between her fall at work and October of 2012, when the

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hip and back complaints were first mentioned. In his opinion, Claimant's ankle, hip and back conditions were all a natural consequence of the industrial accident. She fell hard enough to fracture a bone in her foot.

Dr. Michael Mattern, an orthopedic surgeon, testified by deposition on behalf of Employer. He examined Claimant on March 19, 2014, and

reviewed pertinent medical records. In his opinion, Claimant's hip and back complaints are unrelated to the work accident.

Dr. Mattern received a history of the mechanism of injury from Claimant. She was on beer kegs and her left foot got stuck, she slipped and fell backwards. She stated that she landed on the floor. She hurt her left foot but was unaware of any other injury at the time. The records reflect that she sustained a fractured left fifth metatarsal. Records from 75<sup>th</sup> Street Medical dated June 12, 2012, stated that Claimant had moderate pain in her left foot and ankle. There are notations about the left foot, but no indication of any hip or back problem.

Dr. Mattern reviewed an MRI of the hip. There was an increase intrasubstance signal within the labrum. That probably reflects some degeneration, but does not indicate a tear. There was also a subtle osseous excrescence coming from the anterior aspect of the femoral head, which can be a finding in an impingement syndrome but was quite small. There was also minimal tendinosis. Similarly, the MRI of the low back was not very pathologic. There was a desiccated disk at L5-S1 and a very small disk protrusion that barely contacted the S1 nerve roots but did not press on the nerve. The MRI does not support any particular etiology for pain. Dr. Mattern was aware that Dr. Scopp had given a diagnosis of a labral tear of the hip for Claimant.

In Dr. Mattern's opinion, Claimant sustained a fracture as a result of the work accident, and it had a delayed union. However, it went on to heal with the help of a bone stimulator and needed no further treatment. Dr. Mattern did not think that the low back and hip issues were

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causally related to that work accident. Claimant had no apparent hip or back injury at the time of her fall. Her only complaint was of foot pain. If she hurt the back or hip in the fall, he would have expected complaints within six days of the accident. Claimant did not mention any back or

hip pain for months, until October of 2012. The foot pain at the time of injury was only classified as moderate, rather than severe, so Dr. Mattern would not have expected it to mask any other significant injuries. Thus, Dr. Mattern could not say, within a reasonable degree of medical probability, that it was the fall from a beer keg that caused those complaints. If the hip injury is a labral tear, it would not normally occur from wearing a boot or from Claimant's normal work activities. As for the low back, it can come on spontaneously. There is no reason to relate it to an event that occurred six months prior. Studies have indicated that altered gaits do not really cause other issues to come up.<sup>2</sup>

Alicia M. Courtney testified that she is an assistant manager for Employer. Claimant worked for Employer as a "relief manager." A relief manager gives the other managers days off. After Claimant's accident, Ms. Courtney worked with Claimant on Fridays and Saturdays. The relief manager basically deals with the money and directing where tables go. She never saw Claimant pulling a keg. After the fall, Claimant was on light duty and would sit in the office and count money or sit at the hostess station.

Ms. Courtney thinks that Claimant wore the boot for about a month after the fall. She never heard Claimant complain about any back or hip pain, nor did Ms. Courtney see any signs of it. She does not recall seeing Claimant limp after the boot came off. Near the end of September she saw Claimant jump up on the back of one of the cooks and ride him "like a cowboy."

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Dawn M. McGee testified that she owns Employer. Claimant was a manger for Employer. She had been hired as a relief manager and also functioned as a front manager. Ms. McGee stated that she has seen bar-backs and delivery men drag kegs but none of the managers do that.

Ms. McGee stated that, originally, Claimant describe her accident as grabbing wine in the cooler rather than moving kegs. She stated that

she was standing on a keg, slipped and twisted her foot. She did not mention falling or striking her hip or back. After the accident, Claimant was assigned to count money and sit at the hostess stand (light duty). At least, that is what Ms. McGee saw her doing although, of course, Ms. McGee did not watch her all the time.

Ms. McGee estimated that Claimant wore a boot on her foot for three or four weeks. When she took the boot off, Claimant wore regular shoes and Ms. McGee noticed no limp. Ms. McGee never heard Claimant complain about her hip and back. She did complain about the crutches that she used for a time.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Compensability

The Delaware Workers' Compensation Act provides that employees are entitled to compensation "for personal injury or death by accident arising out of and in the course of employment." DEL. CODE ANN. tit. 19, § 2304. Because Claimant has filed the current petition, she has the burden of proof. DEL. CODE ANN. tit. 29, § 10125(c). "The claimant has the burden of proving causation not to a certainty but only by a preponderance of the evidence." *Goicuria v. Kauffman's Furniture*, Del. Super., C.A. No. 97A-03-005, Terry, J., 1997 WL 817889 at \*2 (October 30, 1997), *aff'd*, 706 A.2d 26 (Del. 1998).

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As a preliminary matter, the parties stipulated that, on June 12, 2012, Claimant fell from a keg and sustained a left fifth metatarsal fracture and sprained ankle. There is, therefore, an acknowledged industrial accident. The reason this is important is that there was some discussion in the depositions about a "cumulative detrimental effect" injury (which normally would require work to be a "substantial" cause of a problem, *see Duvall v. Charles Cornell Roofing*, 564 A.2d 1132, 1136 (Del. 1989)). This is, however, not the appropriate causation standard. The "but

for" standard is used "in fixing the relationship between an acknowledged industrial accident and its aftermath." *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992). That is to say, if there has been an accident, an injury, whether physical or psychological, is compensable if "the injury would not have occurred but for the accident. The accident need not be the sole cause or even a substantial cause of the injury. If the accident provides the 'setting' or 'trigger,' causation is satisfied for purposes of compensability." *Reese*, 619 A.2d at 910. "[W]hen there is an identifiable industrial accident, the compensability of any resultant injury must be determined *exclusively* by an application of the 'but for' standard of proximate cause." *State v. Steen*, 719 A.2d 930, 932 (Del. 1998)(emphasis in original).

The issue, therefore, is whether, "but for" the June 2012 work accident, Claimant would not have developed her hip/low back/nerve problem. All that is necessary to establish the required causal link is for the work accident to have provided the "setting" or "trigger" for the subsequent problems.

It is not disputed that the first documented complaints of low back and left hip pain came in October of 2012, roughly four months after the work accident. Claimant mentioned to Dr. Spinuzza that she had been having these complaints since the fall but had not thought much about it. In fact, she did not disclose these complaints until questioned further by the doctor as

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he investigated her mention of "burning" pain. Because Claimant mentioned a "burning" pain, the doctor thought that there might be a neurologic or neuropathic element to it.

Dr. Spinuzza proposes two possible causal links, which are not mutually exclusive. The first is that Claimant actually injured her hip and low back directly in the fall at work, but that the acute pain from the fractured foot overrode the hip and low back symptoms such that she did not report

them to him until October of 2012. The other theory is that Claimant's wearing of the CAM walker for such a prolonged time led to an aggravation of an underlying degenerative condition and rendered the hip and back symptomatic. Dr. Scopp, whom Claimant saw for her hip, indicates in his office notes that he attributes the problem to the 2012 work accident.

Dr. Mattern, on the other hand, opined that Claimant's foot pain was not so severe as to mask pain from the hip or back if they were injured in the fall, especially after treatment started and the pain level of the foot decreased. He also does not think that an altered gait can cause other problems to develop.

The Board's analysis starts with the nature of the hip and low back condition. MRIs reflect degenerative conditions in both. The labral fraying in the hip and the disk abnormality at L5-S1 in the back were both degenerative findings. There is no evidence of a direct traumatic injury to either. The issue for the Board to decide, then, is whether these degenerative conditions were rendered symptomatic as a result of the work accident. If so, that is sufficient under *Reese* to make the conditions compensable.

This leads to an analysis of the accident itself. Employer points out that Claimant's initial description of the event did not contain any specific description of a direct impact to the hip or low back. However, the Board does not find that to be of much significance. Claimant was standing on kegs, she slipped and her left foot got caught and she fell with sufficient force to

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cause a fracture in the foot. There is no way for this to have happened without at least jarring or twisting the rest of the body. That twisting would be sufficient to render an asymptomatic degenerative condition symptomatic. Even Dr. Mattern agreed that the mechanism of injury was competent to cause an aggravation of the hip and low back.

However, this leads to the next issue. While the described accident *could* cause hip and low back symptoms, the question is whether, more likely than not, it actually did. Employer points out that Claimant did not report any hip or back complaints at the time. The first direct reporting of such complaints was not until October of 2012. Claimant stated at that time that she had been having these complaints since the accident but that she had not thought to mention them. There is some direct evidence to support Claimant on this. Even in October, when the hip and back pain was first mentioned, Claimant did not volunteer these complaints. They were only mentioned because of questioning by Dr. Spinuzza who was trying to get more details about her complaints of a "burning" sensation. Clearly, then, Claimant was (as she testified) simply not paying attention to these other complaints. The Board finds Claimant to be credible on this point.

The other factor to be considered is Claimant's prolonged use of the CAM walker. There was conflicting testimony as to whether Claimant was required to do prolonged walking at work after the injury and whether she was wearing the CAM walker at work, but there is simple objective evidence to resolve this dispute. Dr. Spinuzza testified that, in September of 2012, Claimant's CAM walker had to be replaced because the first one had worn out. This contradicts the argument that Claimant was not using it. The evidence of the worn-out walker shows that she was doing a lot of walking with the boot on. The boot itself put the left foot at a different level of the right foot, requiring an alteration in Claimant's gait. Thus, there can be no doubt that

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Claimant had an altered gait for a prolonged time after the work accident. The non-union resulted in a longer than usual use of the boot.

There is a dispute between the two medical experts as to the effect of this. Dr. Spinuzza testified that changing a person's gait mechanics places different stresses and strains on other parts

of the anatomy, including the hip and low back. These stresses can trigger or aggravate an underlying degenerative condition, resulting in pain complaints in those other body parts. Dr. Mattern does not believe that an altered gait can have such an effect. He bases this on a study that reflected that an altered gait because of an injury in one leg does not cause problems in the other leg. He agreed that he was just extrapolating from this to conclude that it also could not cause problems in the same leg (even though that is not what the study addressed).

The Board accepts the opinion of Dr. Spinuzza over that of Dr. Mattern. The Board agrees that the force of the initial accident (sufficient to fracture the foot) and the added stress of the altered gait caused by the prolonged use of the CAM walker was more than sufficient to trigger Claimant's existing degenerative conditions in the low back and hip so as to make them symptomatic. The Board finds it believable that Claimant had low level pain complaints in the hip and low back following the work accident but did not consider them important compared to the more serious pain in her foot. The Board also finds it credible and reasonable that part of the reason she did not mention the complaints sooner was that she expected them to resolve after she was no longer using the CAM walker. Accordingly, the Board finds that, more likely than not, Claimant's low back and left hip complaints are causally related to the June 2012 work accident and compensable. Claimant's reasonable and necessary medical treatment for these conditions is compensable.

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### **Attorney's Fee & Medical Witness Fee**

A claimant who is awarded compensation is entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller." DEL. CODE ANN. tit. 19, § 2320. At the current

time, the maximum based on Delaware's average weekly wage calculates to \$9,983.50.

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). The Board is permitted to award less than the maximum fee and consideration of the *Cox* factors does not prevent the Board from granting a nominal or minimal fee in an appropriate case, so long as some fee is awarded. 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). A "reasonable" fee does not generally mean a generous fee. See *Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966). Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation. By operation of law, the amount of attorney's fees awarded applies as an offset to fees that would otherwise be charged to Claimant under the fee agreement between Claimant and Claimant's attorney. DEL. CODE ANN. tit. 19, § 2320(10)a.

Claimant has established that she has other compensable injuries beyond the recognized foot and ankle injuries. This entitles her to certain workers' compensation benefits, including receiving medical treatment for these other injuries. Claimant's counsel submitted an affidavit stating that 30 hours were spent preparing for the hearing. The hearing itself lasted for just under 4 hours. Claimant's counsel was admitted to the Delaware Bar in 2008 and he is familiar with

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workers' compensation litigation, a specialized area of law. His initial contact with Claimant was in July of 2013, so the period of representation had been for just over one year. This case involved no difficult or unusual question of fact or law and it required only average skill to present the case properly. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances, although

naturally he could not work on other matters at the exact same time as he was working on this case. There is no evidence that counsel was actually precluded from accepting other employment because of his representation of Claimant. Counsel's fee arrangement with Claimant is on a one-third contingency basis. There is no evidence that counsel expects to receive compensation from any other source with respect to this particular litigation. There is no evidence that the employer lacks the financial ability to pay an attorney's 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 finds that an attorney's fee in the amount of \$8,500 is reasonable in this case and does not exceed thirty percent of the value of the award once the Board takes into account the value of the non-speculative future and non-monetary benefits that arise from this decision. *See Pugh v. Wal-Mart Stores, Inc.*, 945 A.2d 588, 591-92 (Del. 2008).

Medical witness fees for testimony on behalf of Claimant are also awarded to Claimant, in accordance with title 19, section 2322(e) of the Delaware Code.

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#### STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board finds that Claimant's left hip and low back symptomatology is causally related to the June 2012 work injury. Claimant is awarded an attorney's fee and payment of her medical witness fees.

IT IS SO ORDERED THIS 29<sup>th</sup> DAY OF AUGUST, 2014.

#### INDUSTRIAL ACCIDENT BOARD

/s/ Mary Dantzler  
MARY MCKENZIE DANTZLER

/s/ John F. Brady  
JOHN F. BRADY

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

/s/ \_\_\_\_\_

Mailed Date: 9.02.14

/s/ \_\_\_\_\_

OWC Staff

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Notes:

<sup>1</sup> The most common cause for sciatica in Claimant's age group would be a disk problem in the back, but it can also be caused by a direct blow to the sciatic nerve by falling on her buttocks.

<sup>2</sup> The doctor clarified that the study he was referencing was looking at an injury in one lower extremity causing problems in the other lower extremity. He agreed that he was extrapolating from that to suggest that additional problems would also not be caused in the same extremity.

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