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BEFORE THE INDUSTRIAL ACCIDENT BOARD  
OF THE STATE OF DELAWARE

CF \_\_\_\_\_ IAB \_\_\_\_\_  
MF \_\_\_\_\_ REHAB \_\_\_\_\_  
MD \_\_\_\_\_ FACT \_\_\_\_\_

OCT 4 2013

RALPH BURKOVICH, )  
 )  
Employee, )  
 )  
v. )  
 )  
HAINES FABRICATION AND MACHINE, )  
 )  
Employer. )

ENCL \_\_\_\_\_ LT \_\_\_\_\_  
TAPE DATE \_\_\_\_\_

Hearing No. 1360672

**DECISION ON PETITION FOR REVIEW TERMINATION**

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 September 25, 2013, in a Hearing Room of the Board, in Milford, Delaware.

**PRESENT:**

VICTOR R. EPOLITO JR.  
JOHN F. BRADY

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

**APPEARANCES:**

Samuel Pratcher, III, Attorney for the Employee  
Andrew Lukashunas, Attorney for the Employer

## NATURE AND STAGE OF THE PROCEEDINGS

Ralph Burkovich (“Claimant”) was injured on the job while working for Haines Fabrication and Machine (“Employer”) on September 1, 2010. As a result of the compensable injury to his low back suffered in this industrial accident, Claimant has received certain workers’ compensation benefits including compensation for total disability.

On March 1, 2013, Employer filed a Petition for Review Termination seeking to end Claimant’s entitlement to compensation for total disability. In support of this petition, Employer asserts that Claimant is no longer totally medically disabled. Claimant, however, maintains that he continues to be totally disabled, asserting that even if the Board were to find him physically capable of working in some capacity, he is a *prima facie* displaced worker and therefore still entitled to total disability compensation.<sup>1</sup>

A Hearing was held on September 25, 2013, to address these issues. Claimant has continued to receive total disability benefits via the Workers’ Compensation Fund during the pendency of Employer’s Petition. This is the Board’s decision on the merits of Claimant’s petition.

## SUMMARY OF THE EVIDENCE

Claimant, called to testify in Employer’s case-in-chief, indicated that he was working for Employer as a welder/metal fabricator at the time of his September 1, 2010 industrial accident. Now 54 years old, Claimant testified that he has worked in this capacity since he was a child, noting that it is the only work he has ever done. In this professional capacity for Employer, Claimant performed specialty welding and fabricating services in both a commercial and residential context. His daily work assignments varied and would be provided to him by Employer either in person or by phone.

Claimant testified that his current treating physicians are Dr. James Galuardi and neurosurgeon, Dr. Kennedy Yalamanchili. In seeing these doctors, Claimant receives the date and time of his next appointment at each visit and then simply relies on the appointment card to know when he is to return to each respective physician.

Claimant confirmed that on September 1, 2010, he was working for Employer when he was electrocuted and suffered injury in the impact to his back. Claimant also confirmed that he did not actually seek medical care for a period of approximately two weeks after the accident. Thereafter, Claimant had surgery for his back in November 2011. He treated with Dr. Galuardi both before and after this surgery noting that this treatment never left him pain free. Claimant explained that while the Oxycodone and Hyrdocodone prescribed by Dr. Galuardi helped control and reduce his pain, as it does now, it never relieved it completely. Claimant specified that on medication his pain is a four out of ten while without medication is an eight out of ten. According to Claimant, the medication allows him to function to some degree.

On cross examination Claimant testified that he completed the 12<sup>th</sup> grade in high school and had three years of vocational training in welding. He reiterated that he has done metal fabrication his entire life.

In specifying the mechanism of his work-related injury, Claimant explained that he was welding inside a metal box on a very hot day when he was sweaty and there was moisture all about the scene. The heliarch, a high frequency welder, he was using arched causing Claimant to sustain 350 amps of alternating current through his body. This threw Claimant out of the box causing him to injure his back. The low back injury eventually took Claimant to a low back surgery with Dr. Ronald Sabbagh in November 2011 which has unfortunately not relieved his symptoms and may have been performed incorrectly.

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<sup>1</sup> See Joint Exhibit I (Stipulation of Facts).

Claimant testified that he wants to go back to welding but does not think that he is physically capable of doing it given the ongoing back related symptoms he still has. In this same regard, Dr. Galuardi has kept Claimant on total disability awaiting a possible second surgery for his low back. Claimant acknowledged, however, that with use of his prescribed medications four or more times a day he is able to perform the activities of daily living. He can drive but tries not to when using his medication. Instead he relies on his son to provide him transportation. In fact, Claimant indicated that his son drove him the hour's distance to this Hearing during which, even as a passenger, Claimant had to stop twice to stretch and reposition because of symptoms in his back.

Claimant indicated that he does not now nor has he ever owned a computer. Moreover, he has never used one or had any training in doing so. Claimant admitted that he is not a people person suggesting that he does not have the social skills or demeanor to work with the public in a customer service capacity.

During brief re-direct examination, Claimant confirmed that he still has his driver's license. He also indicated that his medications can make him groggy. While he feels pain relief on the medication he is hesitant to use that time to exceed what he knows his limitations because as the medication wears off, he knows his underlying symptoms will be exacerbated.

Dr. Lawrence Piccioni, M.D., a board certified orthopedic surgeon, testified by deposition on Employer's behalf. Having personally assessed Claimant on two separate occasions in addition to conducting a review of Claimant's relevant medical records, Dr. Piccioni opined that Claimant is capable of working in up to a light-duty, full-time capacity.

Dr. Piccioni testified that he saw Claimant for the first time on June 26, 2012. As part of that process, he came to appreciate that on September 1 2010, Claimant was working for

Employer as a welder. That day's work was taking place in an aluminum box. One of the welds sparked in Claimant's body causing him to shoot back through the box and into a post. Claimant was having right-sided leg symptoms in a radicular type pattern. He received some conservative care for the injury but eventually went to surgery with Dr. Sabbagh in November 2011 wherein Dr. Sabbagh performed a disectomy at L5-S1 with a fusion at the same level. According to Dr. Piccioni, Claimant continued to work for the eight month period leading up to his 2011 back surgery. Following surgery, Claimant did not seem to enjoy much relief with the right leg symptoms which had been a predominant issue.

Dr. Piccioni indicated that at his first visit with Claimant, Claimant was then six months post-surgical. Physical examination of his lumbar spine showed the he was sensitive to touch on the paralumbar areas, both the right and the left. He described pain in his L5 dermatome and pain off of the top of the right foot and towards the great toe. Claimant's hip examination was normal as was his sensory motor examination. Dr. Piccioni appreciated no atrophy in Claimant's calf or quadriceps suggesting that Claimant was using the leg. There was also no significant innervation. Claimant's supine straight-leg raising test produced some back pain but no true sciatic tension signs.

Dr. Piccioni formulated a diagnosis for Claimant of post hemilaminectomy and disectomy at L5-S1 and posterior spinal fusion at the same level. While Dr. Piccioni did not feel Claimant was capable of returning to full-duty work as a welder, he did think it was possible that Claimant was capable of performing some sedentary duty.

Dr. Piccioni indicated that he saw Claimant for a second assessment on April 12, 2013. In preparing for this assessment, Dr. Piccioni reviewed interim diagnostic studies performed on Claimant following his original assessment. He reviewed a CT myelogram which confirmed the

placement of metallic hardware in Claimant's back but failed to show additional herniations, trauma or nerve root impingement. The imaging did show some minor bulging from the disc up above L4-5 which had been suggestive of degenerative changes even before Claimant's 2011 back surgery. There were no areas of impingement either centrally or around the foraminal.

According to Dr. Piccioni, Claimant's complaints at this second visit were essentially the same as he had expressed in their first meeting with perhaps a little bit of worsening. Dr. Piccioni expressed concern that Claimant's subjective complaints may be getting out of proportion to his objective presentation. Physically, Dr. Piccioni did not find any objective signs of true radiculopathy despite Claimant's right leg symptoms. His sciatic tension signs both seated and supine produced more of an exaggerated back and leg pain as opposed to true sciatic tension signs. His motor and reflex examinations were all essentially normal. While the S1 nerve was shown to be in trouble through diagnostic study, Dr. Piccioni found no clinical evidence of an S1 radiculopathy.

Following this second assessment, Dr. Piccioni found Claimant's prognosis to be fair. He reiterated his concern that Claimant's subjective presentation was out of proportion to his objective findings noting that Claimant had been out of work, getting treatment yet had absolutely no improvement. He indicated that his concern is fueled by the fact that none of Claimant's studies confirm a reason why he still has leg pain and his clinical examination fails to show any significant nerve damage or radiculopathy. Indicating that Claimant had enough treatment and despite Claimant's subjective complaints, Dr. Piccioni opined that Claimant could return to full-time work in up to a light-duty capacity.

Dr. Piccioni confirmed that at his urging following his initial assessment of Claimant, a Functional Capacity Evaluation ("FCE") was performed on Claimant in November 2012. This

study found Claimant capable of full-time, sedentary work. The study noted near full levels of physical effort findings on Claimant's part yet Dr. Piccioni maintained that he found the study less than valid. He explained that in such extended testing, the failure of an individual to raise his baseline heart rate by at least 25 percent suggests submaximal effort. In Claimant's case, his heart rate was never that elevated suggesting that he did not give his all in the performance of the various tests. Dr. Piccioni further noted that Claimant self-limited out of fear of pain for segments of the testing. As such, Dr. Piccioni opined that if, with this submaximal effort, Claimant tested out in the FCE as being capable of up sedentary duty, he feels comfortable extrapolating that Claimant is actually capable of more and could perform at light-duty levels. Having reviewed the Labor Market Survey created on Employer's behalf in this matter, Dr. Piccioni confirmed that he felt Claimant to be capable of performing any or all of the jobs identified.

On cross examination Dr. Piccioni confirmed that both of the two occasions that he saw Claimant occurred subsequent to Claimant's November 2011 surgery with Dr. Sabbagh. At the first of these, he documented that Claimant's hamstrings were tight with topliteal angle of 45 degrees on the right and 30 degrees on the left. Dr. Piccioni explained that people with back problems often cheat with their legs and particularly their hamstrings. He indicated that these findings could explain Claimant's persistent pain down the back of his leg and/or could give a false reading on a straight-leg raising test. As such, Dr. Piccioni indicated that had someone stretched Claimant's hamstrings, he might be less symptomatic and not require additional surgery. He also admitted, however, that the tight hamstrings could be indicative of someone with back pain.

Dr. Piccioni confirmed that he did not perform range of motion testing at either of his examinations of Claimant. He also confirmed that because of the consistency and persistence of Claimant's right leg symptoms, following his initial assessment of Claimant, he supported both a second opinion with a spine surgeon as well as the FCE which was eventually performed.

Dr. Piccioni confirmed that Claimant's February 14, 2012 and March 30, 2012 MRIs indicate that the lordosis, the reverse C curve of Claimant's spine, is straightened. He confirmed that this could be due to muscle spasm. These MRIS also noted edema-like signal intensity in the soft tissue around Claimant's operative site as well as a bulging disc at L4-5 causing mild lateral recess stenosis on each side and greater abnormality of the disc at L5-S1 which may be responsible for compression of the right L5 nerve root within the neuroforamina. The radiologist's interpretation of the February studies further noted anterior epidural materials resembling the extruded disc on the previous study which could represent persistence of disc material in the area of Claimant's scar tissue. According to Dr. Piccioni, this was clarified by the March 2012 study performed with contrast which showed scar tissue surrounding the L5 nerve root. Dr. Piccioni maintained skepticism regarding these findings, however, noting that clinically Claimant has never had any left-sided symptoms which would be expected with such findings. Dr. Piccioni cautioned that such diagnostics, while considered objective findings, are not always accurate.

In regards to Claimant's FCE, Dr. Piccioni confirmed that he recommended after his initial evaluation with Claimant that that testing be performed. He acknowledged that he did not receive the actual FCE report until sometime after his second evaluation of Claimant but nonetheless opined that Claimant could work in a light-duty capacity after the second evaluation; an increase from his opinion of sedentary duty only following his first assessment. He indicated



that he did allow for additional restrictions on Claimant, however, inasmuch as he did not think that Claimant could sit or stand more than two hours at a time, lift more than 20 pounds, and/or bend, squat, kneel or climb on anything more than an occasional basis.

Dr. Piccioni testified that after seeing Claimant for a second time in April 2013, he changed his initial prognosis from fair to poor for Claimant. He explained that he did so because by the time of the second evaluation Claimant was two years post surgery and still out of work. Despite continued treatment, Claimant was no better and perhaps even a little bit worse. He further supported Claimant's seeking of a second opinion from neurosurgeon, Dr. Yalamanchili, as well as undergoing a second FCE at a reputable facility to better appreciate what Claimant is actually capable of doing. Dr. Piccioni maintained, however, that while he found the current FCE invalid due to Claimant's failure to fully participate, Claimant could work in the interim in a light-duty capacity as Claimant had not experienced any further damage or new injuries and his back condition appeared stable.

During a combination of re-direct and re-cross examination, Dr. Piccioni indicated that the findings of Claimant's most recent MRIs, as previously testified to, would not in and of themselves be totally disabling. He further confirmed that while the MRI performed with contrast would be the best study to delineate scar tissue surrounding the nerve roots, that is not necessarily the case for Claimant because of the hardware installed in its back and its potential to limit the accuracy of the scan.

Ellen Locke, a vocational case manager for Coventry Health Services, testified on Employer's behalf. Ms. Locke indicated that in her professional capacity for Coventry, she performs labor market surveys and vocational evaluations and assessments for a variety of cases. In Claimant's circumstance she was asked by Employer in February 2013 to perform a

hypothetical vocational assessment and labor market survey. She completed this task and created a survey which features a total of 11 jobs and corresponding job analysis forms.<sup>2</sup>

Ms. Locke testified that with regard to the 11 jobs she identified on Claimant's Labor Market Survey, she personally visited each potential employer's job site and witnessed performance of each job to ensure the accuracy of the job analysis forms she completed. She testified that these jobs represent only a sampling of what was available in the local labor market during the period in question.

In determining which jobs would be appropriate for Claimant, Ms. Locke looked to Claimant's education, vocational history and the medical restrictions currently proffered by Dr. Piccioni. Specifically, Ms. Locke testified that she appreciated that Claimant is a high school graduate with trade school education focused on welding and metal fabrication; an industry that she characterized as highly physical. She also relied on the medical restrictions originally opined by Dr. Piccioni in June 2012 which include sedentary work only, lifting no more than ten pounds and avoiding bending, twisting, kneeling and squatting.

Noting Claimant's exclusive work history as a welder as well as his educational background and medical restrictions, Ms. Locke opined that Claimant is physically capable of performing any or all of the jobs identified in the survey. She indicated that each position offers on the job training and a probationary period. The most computer use required by any of the positions would entail basic data entry which could be taught to Claimant or any applicant upon employment.

In regards to prospective wages, Ms. Locke testified that the average weekly wage for the full-time positions she identified is \$454.90 with the low average equaling \$446.95 and the high average equaling \$462.85.

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<sup>2</sup> See Employer's Exhibit 2 (Labor market Survey).

On cross examination, Ms. Locke confirmed that she never met Claimant prior to this Hearing, did not take his treating physician's work restrictions into consideration and is not aware of any vocational experience Claimant has outside of welding.

With regard to the specific jobs identified on the Labor Market Survey, Ms. Locke confirmed that the Mountaire position identified has a preference for basic computer skills in an applicant. The Valvoline job requires greeting customers which Ms. Locke indicated Claimant could do based on his interaction with commercial and residential customers as a welder. The Plymouth Tube job requires an applicant to submit to a drug screen. While Ms. Locke did not discuss Claimant's medical condition or the prescribed medications he takes with this or any potential employer, she maintained that these screens are designed to identify illegal drug use rather than prescription medications. Ms. Lock confirmed that the Jiffy Lube position advertises that prior automotive experience is helpful but admitted that she is not aware that Claimant has any such experience. This position also requires computer use and occasional to moderate walking and standing. The Labcorp courier position requires driving and an applicant's driving record would therefore be subject to consideration for employment in that capacity. Ms. Locke confirmed that she is unaware of what Claimant's driving record looks like or whether or not it would exclude him from consideration.

Ms. Locke confirmed her belief that Claimant would likely find himself on the low average end of the weekly wage scale identified by the jobs in the survey.

During re-direct examination and questioning by the Board, Ms. Locke confirmed that all of the positions she identified in the survey allow for positional changes. She further indicated that she assessed Claimant to have a number of transferable skills from his educational background and time as a welder to include attention to detail, knowledge of specialized tools

and equipment, the ability to follow safety rules and procedures, reading comprehension, mathematical and mechanical knowledge. Specifically Ms. Locke documented in her Labor Market Study that Claimant's skills could transfer into areas of employment to include but not be limited to clerk, cashier, salesperson or dispatcher.<sup>3</sup>

Dr. James Galuardi, M.D., a physician board certified in anesthesiology and chronic pain management, testified by deposition on Claimant's behalf. Dr. Galuardi, having served as Claimant's treating physician since February 2011, testified that while Claimant may physically be capable of working in a sedentary capacity, his interactions with and observations of Claimant do not support his employability in that regard. Moreover, Dr. Galuardi has maintained Claimant on total disability since his failed 2011 back surgery, believing that a revisionary surgery may be required.

Dr. Galuardi testified that he began treating Claimant on February 4, 2011, for injuries he sustained in his September 2010 work accident with Employer, on a referral made by Dr. Thomas Beck. In treating Claimant, Dr. Galuardi came to know that Claimant's industrial accident involved electrocution while working as a welder. In the course of the electrocution, Claimant was thrown backwards and struck his right back and hip on a post.

According to Dr. Galuardi, when he initially met Claimant, Claimant was complaining of back pain radiating into his right leg. Initial physical examination of Claimant showed that when Claimant bent at the waist, the motion caused pain into his right leg while twisting to the right caused right hip pain. Dr. Galuardi explained that this is indicative of some kind of nerve compression on the right. Straight-leg raising was positive on the right for radiculopathy.

Dr. Galuardi testified that having reviewed Claimant's December 2010 MRI which showed disc herniation on the right at L5-S1 with an extruded component going into the lateral

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<sup>3</sup> See Labor Market Survey, Employer's Exhibit 2, p. 2.

recess affecting the right S1 nerve root, ligament hypertrophy causing severe right-sided foraminal stenosis impinging the right L5 root as well as a mild to moderate disc bulge at L4-5, and in light of his own clinical assessment, he determined Claimant to have a lumbar disc herniation on the right at L5-S1, spine joint arthritis, some degenerative disc disease and a right lumbar radiculopathy. He put Claimant back on Gabapentin, increased his dose of Hydrocodone, and suggested Claimant undergo injections in his spine.

Dr. Galuardi indicated that Claimant eventually submitted to epidural injections in his spine but got only temporary improvement in his symptoms as a result. Claimant, thereafter, eventually went to surgery on November 8, 2011, with Dr. Sabbagh. This surgery consisted of a right-sided hemilaminectomy, right-sided facetectomy, foraminotomy and a posterior spinal fusion at L5-S1 with a nonsegmental fixation device and bone grafting at L5-S1. Dr. Sabbagh's operative notes further indicated that he did not feel the need to perform a disectomy at L5-S1. Dr. Galuardi noted that in the interim between his work-related injury and his low back surgery, Claimant was released to return to work and did so. Claimant was initially able to do the work but when one of his supervisors refused to adhere to a thirty pound lifting restriction placed upon Claimant Dr. Galuardi wrote a letter advising that further failure to adhere would result in Claimant having to again be removed from working.

Dr. Galuardi testified that after Claimant's November 2011 surgery, he continued to see and treat him. The first such post-surgical visit occurred on March 14, 2012. At that time, Claimant was still having back and right leg pain. He was using the Oxycodone during the day for pain management and Hydrocodone at night. To further investigate Claimant's ongoing symptomatology, Dr. Galuardi ordered a February 14, 2012 MRI of Claimant's low back, which ultimately revealed the presence of a fixation device that he had not been expecting and was not

familiar with. When he and Claimant reviewed the MRI on March 21, 2012, Claimant was still having issues with back swelling and pain down in his right leg. Claimant was started on a nerve pain medication, Lamictal, to address his right leg nerve symptoms and given Lidoderm patches to wear on his back. An additional MRI of Claimant's low back, this one performed with contrast, was ordered and performed on March 30, 2012. The later MRI showed scar tissue posterior to the S1 endplate as well as residual bulging disc material. This disc material is extending into the right neural foramen and is compressing the right L5 nerve root within the neural foramen; a condition that should have been taken care of with Claimant's 2011 back surgery. Dr. Galuardi confirmed that these findings are consistent with the symptoms reported by Claimant including right leg pain whenever he puts weight on his right leg.

Dr. Galuardi testified that he saw Claimant again on May 4, 2012, for issues related to an allergic reaction to one of his medications. It was documented at that time, in agreement with Dr. Sabbagh, that it would take time for Claimant's back and leg pain to get better and so Claimant was maintained on a total disability status. This was largely the pattern for the rest of 2012 and Claimant's ongoing treatment with Dr. Galuardi. Specifically, Dr. Galuardi indicated that he continued to manage Claimant with medications while attempting to get him a second opinion with another neurosurgeon. He was advised that Claimant should wait one year from the November 2011 back surgery before having such a consultation but Dr. Galuardi was able to get Dr. Gayatri Sonti, of Peninsula Regional Medical Center, to review Claimant's records. That resulted in a recommendation for a CT myelogram which was performed on February 25, 2013. This scan showed a bulging disc at L5-S1, central canal narrowing within the spine, bony narrowing of the foramina, joint arthritis and swelling of the ligament. In all, however, Dr.

Galuardi indicated that the CT myelogram was not terribly helpful in comparison to the MRI performed with contrast.

Finding that Dr. Sonti is not a certified provider under Delaware's Workers' Compensation scheme, Dr. Galuardi found another neurosurgeon, Dr. Yalamanchili, who is so certified and was willing to evaluate Claimant to determine if a revision of the surgery performed by Dr. Sabbagh would help alleviate some of Claimant's right leg symptoms. Claimant eventually was seen by Dr. Yalamanchili on August 28, 2013. Dr. Galuardi indicated that he also followed up with Claimant on August 30, 2013, after Dr. Yalamanchili's consult. Claimant, at that appointment with Dr. Galuardi, advised that he believed, after meeting with Dr. Yalamanchili, that a revision surgery with instrumentation would help his leg pain.

Dr. Galuardi indicated that he has continued to maintain Claimant on a total disability, no work status, since his November 2011 back surgery. He justified these restrictions noting that Claimant has a very hard time with prolonged weight-bearing on his right leg as well as with bending, lifting, twisting, and/or extending his spine. In terms of diagnosis, Claimant has ongoing right L5 lumbar radiculopathy, a right L5-S1 disc herniation, epidural scarring at the right of L5-S1, failed back surgery syndrome, degenerative disc disease and spondylosis at L4-5. While Claimant has not had any new injuries or accidents during the time he has treated with Dr. Galuardi, Dr. Galuardi related the L5-S1 findings to the work accident at issue and the other to a degenerative process.

Dr. Galuardi disagreed with Dr. Piccioni's reported opinion that Claimant is capable of working in a sedentary to light-duty capacity because. In regard to the light-duty status, Dr. Galuardi indicated that more weight-bearing would be required than Claimant's right leg can tolerate. For the sedentary jobs that would allow Claimant to be seated during work, Dr.

Galuardi testified that his observations of Claimant support the conclusion that Claimant simply does not have the skills necessary to perform those kinds of jobs nor does he have the intellect to develop those skills. Dr. Galuardi specified that Claimant has no computer skills whatsoever. He indicated that Claimant lacks phone skills and knowledge of proper phone etiquette as well; a condition that Dr. Galuardi indicated is evident when one speaks with Claimant on the phone. Moreover, having seen Claimant many times over the last two to three years, Dr. Galuardi indicated his observation that Claimant is not suitable for any kind of interaction with customers. Dr. Galuardi indicated that Claimant is an ideal welder inasmuch as he can use his motor skills to accomplish the job without much need to have contact with anyone. He indicated that this is why he has been pushing so hard to get Claimant to a point where he can do that work again; he simply doesn't think that Claimant is suited for anything else. In this same vein, Dr. Galuardi testified that he reviewed the Labor Market Survey completed on Employer's behalf and, for all the reasons previously testified to, does not believe that Claimant could perform any of them.

Dr. Galuardi testified that Claimant has always been compliant with his treatment recommendations and indicated that he has never seen any evidence of symptom magnification on his part. In fact, Claimant's complaints have been consistent with the diagnostic studies performed.

Dr. Galuardi noted his belief that there is a 60 to 70 percent chance that revision surgery performed by Dr. Yalamanchili could be successful in relieving Claimant's symptoms.

On cross examination, Dr. Galuardi confirmed that he was certified under Delaware's Workers' Compensation system until sometime in the last year when he voluntarily let that certification lapse. He indicated that he was simply inundated by paperwork and could not maintain the status.



Dr. Galuardi confirmed that his initial physical assessment of Claimant on February 4, 2011, revealed a positive straight-leg raising finding though he did not document the degree at which Claimant reached this positive. He admitted that he did not measure it with a goniometer. Dr. Galuardi documented that Claimant's pain was a ten out of ten but reduced to zero out of ten with medication which included Hydrocodone three to four a day and Oxycodone at night. Dr. Galuardi confirmed that he writes Claimant's prescriptions for the hydrocodone once a month and Claimant seems to use them all. He does not, however, always use all of the Oxycodone prescribed for nighttime use.

Dr. Galuardi confirmed that he has seen Claimant every one to two months since his November 2011 surgery with Dr. Sabbagh. Throughout these visits, Claimant's reported pain while off and on the medications did not vary from his initial assessment of him in February 2011.

Dr. Galuardi confirmed that he has reviewed Claimant's November 2012 FCE; a tool that he uses in his own pain management practice. He understands that the FCE indicated that Claimant could perform full-time sedentary-duty, wherein he is primarily seated but permitted to occasionally walk or stand. Dr. Galuardi acknowledged that he does not have any dispute with the findings of the FCE in terms of Claimant's physical ability to sit at a desk but maintained that mentally, educationally and training wise, he absolutely does not think that Claimant is capable of such work. Dr. Galuardi admitted that he does not have any specific vocational rehabilitation training and that his assessment of Claimant's abilities or deficits as the case may be is based on his own personal interactions with him. He noted that he did try to get Claimant to use his computer at one of their visits and Claimant would not touch it.

During a combination of re-direct and re-cross examination, Dr. Galuardi confirmed that if Claimant were forced to attempt sedentary duty work, it would not be unreasonable to start him off in a limited capacity and titrate that up. He maintained, however, that to the extent that any employer were able to train Claimant to perform sedentary duty work, he will be headed for a second back surgery anyway. He confirmed that he saw Claimant one month after the FCE was completed and Claimant was reporting that his back and right leg were getting worse though his physical exam findings and subjective complaints have otherwise remained the same. He noted that Claimant's first back surgery did not help and so his presentation has been post-surgically unchanged.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### **Total Disability**

In a total disability termination case, the employer is initially required to show that the claimant is not completely incapacitated (*i.e.*, demonstrate "medical employability") from any and all work.<sup>4</sup> In the present case, while Claimant's treating physician, Dr. Galuardi, has maintained him on total disability, he acknowledged in his testimony that Claimant is probably physically capable of sitting at a desk and working in some sedentary capacity. That medical opinion is consistent with the FCE conducted on Claimant and, despite some differences regarding the degree of physical capability, also consistent with Dr. Piccioni's medical release of Claimant to return to work. As such, there seems to be no dispute that even now, in the face of a possible second back surgery, Claimant is physically capable of working in some capacity and is therefore no longer medically, totally disabled.

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<sup>4</sup> *Howell v. Supermarkets General Corp.*, 340 A.2d 833, 835 (Del. 1975); *Chrysler Corporation v. Duff*, 314 A.2d 915, 918n.1 (Del. 1973).

Claimant can, however, demonstrate an ongoing entitlement to total disability compensation if he can prove that he either conducted a reasonable job search that was unsuccessful as a result of his physical injury or that he qualifies as a *prima facie* displaced worker. There was no evidence presented suggesting that Claimant looked for work at all and so there is no evidence of actual displacement.

On the issue of *prima facie* displacement, the Board notes that “[a] displaced worker is a partially disabled claimant who is deemed to be totally disabled because he is unable to work in the competitive labor market as a result of a work-related injury.”<sup>5</sup> Generally elements such as the degree of obvious physical impairment coupled with the claimant’s mental capacity, education, training, and age are considered.<sup>6</sup> As a practical matter, to qualify as a *prima facie* displaced worker, one must normally have only worked as an unskilled laborer in the general labor field.<sup>7</sup>

In Claimant’s case, his uncontroverted testimony was that he has worked as a metal fabricator and welder for his entire life. Beginning at age 12, it is the only trade or industry he has ever studied or engaged. While he completed high school through the 12<sup>th</sup> grade with associated vocational training in welding, welding and metal fabrication is the only experience he has educationally or vocationally. He indicated that he does not deal well with people and has never owned or used a computer. Supporting Claimant’s self-assessment, Dr. Galuardi testified that, while he is without the credentials to offer a formal cognitive evaluation of Claimant, his many interactions with Claimant over the last two to three years have demonstrated to him that Claimant is wholly lacking the skill set that one typically expects in sedentary lines of duty. He

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<sup>5</sup> *Watson v. Wal-Mart Associates*, 30 A.3d 775, 777 (Del. 2011).

<sup>6</sup> *Duff*, 314 A.2d at 916-17.

<sup>7</sup> See *Vasquez v. Abex Corp.*, Del. Supr., No. 49, 1992, at ¶ 9 (November 5, 1992); *Guy v. State*, Del. Super., C.A. No. 95A-08-012, Barron, J., 1996 WL 111116 at \*6 (March 6, 1996); *Bailey v. Milford Memorial Hospital*, Del. Super., C.A. No. 94A-03-001, Graves, J., 1995 WL 790986 at \* 7 (November 30, 1995).

explained that he has tried to get Claimant to use his own computer without success. In speaking with Claimant on the phone he has found him to be entirely lacking in proper phone etiquette. Moreover, his observations of Claimant suggest that Claimant lacks the skills to work with people or in any customer service capacity. Even beyond that, however, in his interactions with Claimant he has come to believe that Claimant is un-trainable in those areas.

Ms. Locke, a vocational rehabilitation specialist testifying on Employer's behalf, indicated her belief to the contrary. Ms. Locke characterized Claimant's work as a welder as skilled labor, noting what she believes to be a number of transferable skills that could help Claimant transition to a less physically demanding work environment. She testified that the 11 jobs identified in the Labor Market Survey are but a sampling of the work that Claimant would be qualified to perform. She further reiterated her opinion after meeting and hearing Claimant speak for the first time in this Hearing.

While recognizing that neither Claimant nor Dr. Galuardi are experts in the field of vocational rehabilitation as Ms. Locke has herein been qualified, the Board still cannot discard their lay observations and testimony, particularly given that it tracks so closely with the Board's own observations of Claimant. Dr. Galuardi, unlike Ms. Locke, has had the benefit of seeing Claimant on an every one to two month basis for almost three years. Ms. Locke did not get to meet with or talk to Claimant on any level nor did she have the opportunity to interact with him on the telephone. This is not to suggest that personal interaction is always necessary or somehow serves as the benchmark for evaluating an individual's employability; that has not been the Board's experience. Finding that distinction noteworthy in Claimant's case is, however, an acknowledgement that not every individual is easily categorized by relying on paper descriptions of what the individual should or should not be capable of. One of the benefits that the Board has

in seeing and evaluating the credibility of witnesses is the opportunity to make observations of both the tangible and intangible aspects of that individual's presentation. Making such in Claimant's case, the Board did find Claimant's mannerisms and speech to be evidence of some social limitations and suggestive of the fact that while Claimant may be very good at his trade, after 40 years of working in the same capacity, whatever transferable skills he may have on paper have not been sufficiently cultivated to plausibly suggest that he is fit for an entirely different genre of work. The Board notes that Claimant is much younger than the traditional retirement age and does not evidence particularly visibly obvious physical remnants of his industrial injury however, the Board is persuaded that Claimant has worked his entire adult life in one trade and evidences little in his presentation suggestive of a realistic ability to be hired and perform in other capacities at this point. His options for future employment are far more limited if he remains unable to perform the demanding work that he has done for the last 40 years. The Board thus finds that there is strong evidence by way of Claimant's testimony, that of Dr. Galuardi and the observations of the Board suggesting that Claimant is displaced on a *prima facie* basis.

Employer can still rebut Claimant's showing that *prima facie* displacement is enough to maintain his total disability status by presenting evidence of the availability of regular employment within Claimant's capabilities.<sup>8</sup> In this regard, Ellen Locke testified as a vocational expert who identified 11 jobs which she opined were within Claimant's educational, vocational and physical abilities. In reviewing these positions, however, the Board is persuaded that each requires some degree of performance that Claimant is unable to satisfy. Salisbury University, Home Depot, Sears, Penn Technical, Staples, Mountaire Farms, Valvoline and Jiffy Lube all emphasize the need for experience in customer service or at least effective communication skills

and performance in areas related to direct customer service; skills that the Board is satisfied that Claimant does not have. Sears, Home Depot, and Plymouth Tire require frequent standing which, based upon the medical opinion of Dr. Galuardi and Claimant's FCE, the Board is persuaded Claimant is incapable of doing.<sup>9</sup> The Mountaire Farms position requires an applicant to have basic computer skills and be familiar with use of a mouse and keyboard; all things that Claimant has credibly denied knowledge of and which are seconded by Dr. Galuardi. The Lab Corp position would require Claimant to drive all day long despite his credible testimony that he tries to avoid driving while on his medications. It would thus appear that a job requiring constant driving would require Claimant to either go without his medications and have his pain increase to ten out of ten or drive in what he considers to be less than a coherent state. Even as a passenger, Claimant testified he had to make two stops on the way to today's Hearing. The only remaining job on the survey is the Allied Barton position which indicates that military experience is helpful; another skill set and experience that Claimant does not have.

In summary, the Board simply finds the Labor Market Survey in this case insufficient to overcome the Board's concerns regarding Claimant's *prima facie* worker status. Given Employer's failure to show by a preponderance of the evidence that there is regular employment within Claimant's capabilities in the local labor market, the Board finds that Claimant was and is

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<sup>8</sup> See *Howell*, 340 A.2d at 835; *Duff*, 314 A.2d at 918n.1.

<sup>9</sup> Dr. Piccioni testified that after his second assessment of Claimant, he increased his opinion with regard to Claimant's work capabilities from his previous assessment of sedentary to up to light-duty. At the same time, however, he testified that Claimant's condition and prognosis was worse when he saw him a second time. It is difficult to reconcile how Dr. Piccioni reached his recommendation given that inconsistency alone. Moreover, however, the Board is persuaded by the testimony of Dr. Galuardi that Claimant's diagnostic findings at both the L4-5 and L5-S1 levels correlate to his ongoing symptoms and the fact that he is not better following his initial surgery.

Accordingly, the Board accepts that Claimant's physical limitations are as stated by Dr. Galuardi and the FCE: sedentary.

*prima facie* displaced. Claimant, despite being medically capable of working in a sedentary capacity, is therefore entitled to total disability compensation for this period and ongoing.

### **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."<sup>10</sup> 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.<sup>11</sup> A "reasonable" fee does not generally mean a generous fee.<sup>12</sup> Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation.

Claimant has successfully defeated Employer's Petition for Review.<sup>13</sup> Claimant's counsel submitted an affidavit stating that she spent a total of approximately 26 hours preparing for this hearing which itself lasted approximately two hours. Claimant's counsel was admitted to the Delaware Bar in 2009 and has represented injured workers in workers' compensation litigation, a specialized area of the law, since his induction. Counsel or his firm's first contact with Claimant was in March 6, 2012. Thus, Claimant has been represented by counsel or his firm for approximately a year and a half. This case was of average complexity involving no

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<sup>10</sup> DEL. CODE ANN. tit. 19, § 2320.

<sup>11</sup> See *Heil v. Nationwide Mutual Insurance Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrst v. Kentmere Home*, Del. Super., C.A. No. 96A-01-005, Cooch, J., 1996 WL 527213 at \*6 (August 9, 1996).

<sup>12</sup> See *Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966).

<sup>13</sup> Employer made an offer of settlement to Claimant more than 30 days in advance of this Hearing however, that offer was for less than the Board has herein awarded. Claimant is thus entitled to an award of attorney's fees in this matter.

novel issues of fact or law. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances, although he naturally could not work on other cases at the same time that he was working on this litigation. There is no evidence that accepting Claimant's case precluded counsel from other employment other than 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 \$5,600.00.

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.

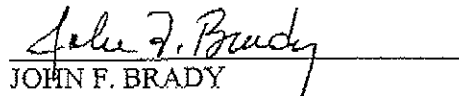
#### STATEMENT OF THE DETERMINATION

For the reasons set forth above, Employer's Petition for Review Termination is DENIED. Claimant is awarded payment of attorney's fees in the amount of \$5,600.00 and payment of medical witness fees.

IT IS SO ORDERED THIS 2nd DAY OF <sup>October</sup>~~SEPTEMBER~~, 2013.

#### INDUSTRIAL ACCIDENT BOARD

  
VICTOR R. EPOLITO JR.

  
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: 10-2-13

Karen Meeker  
OWC Staff

