

BEFORE THE INDUSTRIAL ACCIDENT BOARD  
OF THE STATE OF DELAWARE

KENNETH MODE, )  
 )  
 Employee, )  
 )  
 v. )  
 )  
 VALMONT STRUCTURES, )  
 )  
 Employer. )

Hearing No. 1281396

*Dr. Helmons Rating  
prevails under  
AMA Guide  
6th Edition;  
in this case  
preferred  
over 5th Ed.*

**DECISION ON PETITION TO  
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 Industrial Accident Board on April 13, 2009, in the Hearing Room of the Board, in Milford, Delaware. An extension of time for issuance of the decision was taken pursuant to 19 *Del. C.* § 2348(k).

**PRESENT:**

VICTOR R. EPOLITO, JR.

ELAINE BOWEN

Julie G. Bucklin, Workers' Compensation Hearing Officer

**APPEARANCES:**

Andrea G. Green, Attorney for the Employee  
Eric D. Boyle, Attorney for the Employer

## NATURE AND STAGE OF THE PROCEEDINGS

On October 20, 2008, Kenneth Mode ("Claimant") filed a Petition to Determine Additional Compensation Due. Claimant alleges that he has thirty-three percent permanent impairment to the lumbar spine due to a compensable industrial accident that occurred on February 1, 2006, while working for Valmont Structures ("Valmont"). Valmont argues that Claimant has nineteen percent permanent impairment to the lumbar spine related to his industrial accident. On April 13, 2009, the Board conducted a hearing on Claimant's petition. This is the decision on the merits of the case.<sup>1</sup>

## SUMMARY OF THE EVIDENCE

Claimant, forty-three years old, testified about his industrial injury at Valmont and medical condition. Claimant worked as a certified welder at Valmont, which makes heavy metal signs for highways.

On February 1, 2006, Claimant was injured when he was carrying pieces of metal and felt a sharp pain in the low back and down the left leg. The steel plates weighed about ninety-five pounds and Claimant was lifting it by himself. Claimant never felt pain like that before and told his supervisor about it. He finished his workday and the next day, his employer took him to Dr. Roy Cragway in Ocean City, Maryland. Claimant had conservative treatment initially and then underwent surgery in March 2007 with Dr. Pawan Rastogi.

The surgery was performed in order to alleviate Claimant's pain and to restore feeling in his left leg, as his leg and foot was numb and tingling and he was always tapping his foot to "wake it up." The surgery did not help Claimant's back and legs. He still feels uncomfortable.

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<sup>1</sup> Normally, decisions are to be issued within fourteen days of a hearing. *See* 19 *Del. C.* § 2348(k). Because of workload demands and other time restraints, it was necessary to take an extension of time to issue this decision in accordance with 19 *Del. C.* § 2348(k).

His right leg has the same symptoms as the left leg, but not as severe. Claimant's treatment now is with Dr. Ganesh Balu and consists of medication only.

Claimant has a GED and lives in Greenwood in a trailer on a wooded acre. He has worked in construction and welding his entire life and has always performed heavy duty work. Before the industrial accident, Claimant took care of the property and house. He took care of his large vegetable garden every year. He owned a vehicle and fixed it himself because he is mechanically inclined. For recreation, Claimant played on a softball team, played horseshoes, went fishing, and liked being outdoors. Claimant has not had any other injuries since the industrial accident. Now, Claimant is uncomfortable, has low back pain, his left leg feels like it is asleep constantly, and sometimes his left leg feels hot and sometimes it feels cold, but it is not actually hot or cold. Claimant cannot stand or sit comfortably for very long. He was moving positions in the witness chair in order to find a comfortable position, but could not find one. Getting to sleep is difficult and uncomfortable and it takes a long time to fall asleep. Claimant takes oxycodone every six hours and Valium at bedtime. His medication reduces his pain, but it does not take it all away. His pain level at the hearing was a seven out of ten on the pain scale.

The industrial injury has affected Claimant's activities. He cannot do the same kind of work; cannot garden; taking out the trash is burdensome; feeding the dog and changing the dog's water is difficult; he cannot play with the dog very much; he cannot do much cleaning, but wiping counters and sweeping the floor in the trailer only takes about five minutes; he cannot work on his vehicle now because it requires him to lean over and get under it, which he cannot do; he cannot play horseshoes now, as he was "laid up for two days" after he tried it; and he has not tried to go fishing.

Claimant wakes up late in the morning or in the early afternoon. He takes a shower, finds a spot on the couch, and fixes food, such as cereal, an egg or something in the microwave. He rarely uses a cane or brace. He tries not to use those items because he is trying to move as much as he can. Claimant is able to drive. The industrial injury has affected Claimant in every way, as he is depressed, his friends are afraid to stop over because he might ask them to do something for him, and it has impacted his love life and his financial well-being. Dr. Rastogi did not give him any exercises to do at home. He just started back to physical therapy through Dr. Balu.

Stephen J. Rodgers, M.D., board certified in occupational medicine, testified on behalf of Claimant. Dr. Rodgers evaluated Claimant on June 17, 2008 and reviewed Claimant's medical records in conjunction with the examination. Dr. Rodgers believes that Claimant has thirty-three percent permanent impairment to the lumbar spine.

The February 13, 2006 MRI showed degenerative disc disease with retrolysthesis at L5-S1 and a herniated disc. Claimant also had radiculopathy. The MRI findings were consistent with Claimant's complaints. Claimant underwent a fusion at L5-S1 on March 26, 2007. The July 23, 2007 MRI report post-surgery showed moderate neural foraminal encroachment, granular enhancement at the left L5-S1 level and scarring at the L5-S1 nerve area. Dr. Balu noted radiculopathy in his records and the defense medical examination reports from Dr. Robert Riederman and Dr. Robert Varipapa also indicate that Claimant had a radicular process. Claimant had a continuing diagnosis of radiculopathy in his medical records.

The physical examination showed that Claimant had increased muscle tone in the low back, markedly decreased range of motion in the low back as measured by inclinometers, normal reflexes in the legs, atrophy in the left calf, the sitting root test provoked pain in the back, and strength was indistinguishable between the two sides. Range of motion is measured as part of

any assessment of the spine, even when using the diagnosis related estimates (“DRE”) method of assessment. Range of motion is not “purely” subjective, as someone cannot fake the results consistently up to six times. The injuries and surgery impact the tissue and movements. The atrophy in the left calf is due to the radiculopathy.

Dr. Rodgers relied upon the *AMA Guides to the Evaluation of Permanent Impairment*, Fifth Edition ("*Guides*") to evaluate Claimant for permanent impairment and believes that Claimant has thirty-three percent permanent impairment to the lumbar spine related to the industrial accident. Dr. Rodgers used the DRE method of assessment for rating Claimant's permanent impairment because he had a single level fusion. Claimant falls into DRE Category V for a single level fusion, which gives a permanent impairment rating between thirty-three and thirty-seven percent to the low back. In order to qualify for Category V, Claimant must meet the requirements of Categories III and IV, which include a single level fusion, abnormal studies with radiculopathy, and a history of a herniated disc at the level consistent with the area of radiculopathy; Claimant meets all of those requirements.

Dr. Rodgers reviewed Dr. Andrew Gelman's defense medical examination report. Dr. Gelman opined that Claimant has nineteen percent permanent impairment to the lumbar spine when utilizing the sixth edition of the *Guides*. Dr. Rodgers is familiar with the fifth and sixth editions of the *Guides*. He agreed with Dr. Gelman that when using the sixth edition of the *Guides*, Claimant would be rated with nineteen percent permanent impairment. ✓

Dr. Rodgers believes that the fifth edition is appropriate for rating this type of an injury because the fifth edition is still pretty much the standard and has not yet been formally supplanted by the sixth edition. With musculoskeletal injuries, the fifth edition is better for imposing ratings than the sixth edition. The sixth edition does not take into account the surgeries

and tends to have lower ratings than the fifth edition. The fifth edition is consistent with prior editions, but the sixth edition is very different and there has been no change in medical knowledge or improvements in medical care to account for the lower ratings in the sixth edition. The musculoskeletal section of the sixth edition is more diagnosis based and there is a glaring difference in the much lower ratings for the musculoskeletal section. Dr. Gelman picked the correct class for Claimant in the sixth edition and Dr. Rodgers picked the correct category for Claimant in the fifth edition.

Andrew J. Gelman, D.O., a board-certified orthopedic surgeon, testified by deposition on behalf of Valmont. Dr. Gelman examined Claimant on December 3, 2008 and reviewed medical records in conjunction with that examination and for his addendum report issued on February 20, 2009. Dr. Gelman believes that Claimant has nineteen percent permanent impairment to the lumbar spine related to the industrial accident at Valmont.

Claimant told Dr. Gelman about his industrial accident, medical treatment and current symptoms. Claimant reported that he has ongoing pain in his low back and both legs and that the left leg is worse than the right leg. He described numbness and tingling in his legs and that at times he experienced a "fire-like" sensation in the foot, mostly on the left side.

The physical examination showed that Claimant was uncomfortable, had a level-based gait without any noticeable limp, and was able to rise up on his heels and toes. He had restricted spinal range of motion, as measured by an inclinometer. The lower extremity reflexes appeared to be present and symmetric and he had normal strength. The sciatic tension maneuvers caused some left-sided low back pain, but no radiating leg involvement. His quadriceps and hamstrings were intact, but tight. Dr. Gelman did not note any leg swelling, redness, warmth or atrophy.

The July 23, 2007 MRI showed features consistent with operative intervention. There was compromise of the neural foraminal area at L5-S1 that was attributable to the surgical intervention and residual scar formation. There were other areas of facet hypertrophy above the L5-S1 level.

Dr. Gelman's impression was the Claimant probably strained or sprained his low back as a result of the industrial accident and may have exacerbated some underlying and preexisting disc disease at the L5-S1 level. Claimant has failed back syndrome that is attributable to elements of scar or epidural fibrosis at the L5-S1 level and associated nerve root.

Dr. Gelman rated Claimant's permanent impairment under the sixth edition of the *Guides*. He found that Claimant has nineteen percent permanent impairment to the lumbar spine that is causally related to the industrial accident. The sixth edition is the most recent publication and has been available since January 2008 and Dr. Gelman felt that it would most appropriately apply to Claimant. Claimant falls into Class II for a single level problem with associated radiculopathy, with a ten to fourteen percent whole person rating. Dr. Gelman felt that Claimant had fourteen percent whole person impairment, which converts to nineteen percent for the lumbar spine. There is an example in the text at Example 17-14 that parallels Claimant's situation and supports the nineteen percent rating. ✓

Dr. Gelman reviewed Dr. Rodgers' report. The examination findings were similar to Dr. Gelman's findings. If Dr. Gelman utilized the fifth edition of the *Guides*, he does not think that Claimant would have qualified for DRE Category V because Claimant did not have significant atrophy, loss of reflexes, or significant sensory changes. ✓

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Permanent Impairment

Claimant bears the burden of proving by a preponderance of the evidence that he has thirty-three percent permanent impairment to the lumbar spine causally related to the industrial accident. Valmont argues that Claimant has nineteen percent permanent impairment to the lumbar spine related to the industrial accident. Based on the following, the Board finds that Claimant has nineteen percent permanent impairment to the lumbar spine.

When there is a conflict in medical testimony, the Board must resolve the conflict and decide which physician is more credible. *General Motors Corp. v. McNemar*, 202 A.2d 803 (Del. 1964). As long as there is substantial evidence to support its decision, the Board may accept the testimony of one physician over another. *Standard Distributing Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993). The physicians in this case had similar physical findings on examination and said that the other generally applied the *Guides* correctly, although Dr. Gelman would not have placed Claimant in DRE Category V if he had utilized the fifth edition of the *Guides*. The physicians disagree on which edition of the *Guides* is more appropriate for evaluating Claimant's permanent impairment.

After studying all of the testimony, the Board accepts Dr. Gelman's opinions over the opinions of Dr. Rodgers as to the permanent impairment of Claimant's lumbar spine and the application of the sixth edition of the *Guides*. Given Claimant's condition and level of functioning, the Board finds that the nineteen percent rating is more reasonable under the circumstances of this case than a thirty-three percent rating. Claimant's condition parallels that of the Example 17-14 in the sixth edition of the *Guides*, which supports a rating of nineteen

percent. Dr. Rodgers agreed that Claimant would be in Class II with a nineteen percent rating if the sixth edition is utilized. ✓

Permanent impairment to the lumbar spine is an unscheduled loss and, therefore, the maximum recovery is three hundred weeks of compensation. *Del. Code Ann.* tit. 19, §2326(a). Therefore, the Board awards Claimant \$16,157.79 for fifty-seven weeks (nineteen percent of three hundred weeks) of benefits at his compensation rate (\$283.47 per week) for the permanent impairment of the lumbar spine.

Based on the foregoing, Claimant's Petition to Determine Additional Compensation Due is granted. Claimant is entitled to payment of \$16,157.79 for nineteen percent permanent impairment to the lumbar spine.

#### **Attorney's Fee and Medical Witness Fees**

Having received an award, Claimant is entitled to a reasonable attorney's fee assessed as costs against Valmont in an amount not to exceed thirty percent of the award or ten times the average weekly wage, whichever is smaller. *Del. Code Ann.* tit. 19, § 2320. Claimant's counsel submitted an affidavit attesting to fifteen hours of preparation for this two-hour hearing. This case was not novel or difficult, nor did it require exceptional legal skills to try properly. It was not argued that acceptance of this case precluded other employment by Claimant's counsel. The Board considered the fees customarily charged in this locality for similar legal services, the amounts involved and the results obtained. The Board also considered the argument that this case posed time limitations upon Claimant's counsel, the date of initial contact on March 2, 2006, and the relative experience, reputation, and ability of Claimant's counsel. It was argued that the fee was contingent, that Claimant's counsel does not expect to receive compensation from any

other source, and that the employer is able to pay an award. *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973).

The Board must consider the ten factors enumerated in *Cox* when considering an attorney's fee award or else it would be an abuse of discretion. *Thomason v. Temp Control*, Del. Super. Ct., C.A. No. 01A-07-009, Witham, J., slip.op. at 5-7 (May 30, 2002). Claimant bears the burden of establishing entitlement to an attorney's fee award and must address the *Cox* factors in the application for an attorney's fee. Failure to address the *Cox* factors deprives the Board of the facts needed to properly assess the claim. The *Cox* factors were addressed in the Affidavit Regarding Attorney's Fees.

In the case at hand, based on the results obtained, information presented and Valmont's failure to argue that an attorney's fee award is not appropriate, the Board finds that one attorney's fee in the amount of \$4,125.00 is reasonable. *Del. Code Ann. tit. 19, § 2320*. This award is reasonable given Claimant's counsel's level of experience and the nature of the legal task. In accordance with § 2320(10)a, the attorney's fee awarded shall act as an offset against fees that would otherwise be charged by counsel to Claimant under their fee agreement.

As there is an award, medical witness fees are taxed as costs against Valmont. *Del. Code Ann. tit. 19, § 2322(e)*.

#### **STATEMENT OF THE DETERMINATION**

Based on the foregoing reasons, Claimant's Petition to Determine Additional Compensation Due is GRANTED for \$16,157.79 for nineteen percent permanent impairment to the lumbar spine. As there is an award, Claimant is also entitled to payment of medical witness fees and an attorney's fee in the amount of \$4,125.00.

IT IS SO ORDERED THIS 10<sup>th</sup> DAY OF AUGUST 2009.

**INDUSTRIAL ACCIDENT BOARD**

/s/ Victor R. Epolito, Jr.

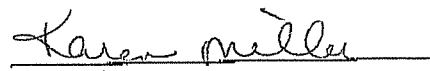
/s/ Elaine Bowen

I hereby certify that the above is a true and correct decision of the Industrial Accident Board.



Julie G. Bucklin  
Workers Compensation Hearing Officer

Mailed Date: 8-11-09

  
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OWC Staff

