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Re: Dennis Flynn Decision CC: _____

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

DENNIS FLYNN,)	
)	
Employee,)	
)	
v.)	Hearing No. 1390796
)	
J. MICHAEL'S PAINTING, INC.,)	
)	
Employer.)	

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 13, 2013, in a Hearing Room of the Board, in Wilmington, Delaware.

PRESENT:

MARILYN J. DOTO

OTTO R. MEDINILLA, SR.

Susan D. Mack, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Sheldon S. Saints, Esquire, Attorney for the Employee

Andrew M. Lukashunas, Esquire, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On December 6, 2012, Dennis Flynn ("Claimant") filed a Petition to Determine Compensation Duc, alleging that he injured his left shoulder on December August 24, 2012 as a result of a work-related accident while working for J. Michael's Painting, Inc. ("Employer"). Claimant seeks a finding of compensability for the alleged injury, a limited period of total disability, and medical expenses. The Employer denies that Claimant was injured in a work-related accident.

A hearing was held on Claimant's petition on May 13, 2013. This is the decision on the merits of the petition.

SUMMARY OF THE EVIDENCE

Stipulation of Facts: The parties stipulated to the following facts. Claimant Dennis Flynn was employed as a painter by J. Michael's Painting, Inc. from June 2012 through August 2012. Claimant alleges that he injured his left shoulder on August 24, 2012 while in the course and scope of his duties for the Employer. This injury resulted in arthroscopic surgery with Dr. Michael Axe and medical care from Christiana Hospital, ATI Physical Therapy, and First State Orthopaedics. The total unpaid medical expenses he allegedly incurred for his accident-related medical care is about \$25,000. Claimant's total disability rate would be \$308.00 per week based on an average weekly wage of \$462.00 per week at the time of injury. Claimant seeks total disability benefits from August 24, 2012 through December 1, 2012. The parties stipulate to the authenticity of the surveillance report and video but not to its relevance.

Claimant Dennis Flynn testified that he is 42 years old and resides with his mother. He has an 11 year old child. Claimant has been employed as a painter with J.C. Bibb, a general contractor, since March 2013. Claimant began working for J. Michael's Painting in June 2012

and last worked there a few days after he was injured in August 2012. Claimant claims he was fired a few days after the injury occurred.

Claimant acknowledged a motor vehicle accident in 2009 in which he injured his right shoulder and underwent surgery for a SLAP tear with Dr. Galinat. Claimant later experienced some left shoulder pain beginning in December 2010 and saw Dr. Galinat about a month later for these symptoms. The doctor provided physical therapy and a cortisone shot. These did not help. Claimant's last visit to Dr. Galinat was in February 2011. Claimant did not return to Dr. Galinat after that because the shoulder pain resolved about two months later.

Claimant described an incident on August 24, 2012 when he was painting a deck with Rick Frisch, Lewis Butler, and an Hispanic coworker whose name he could not recall. Lewis was in the truck doing paperwork at the time of the incident. Rick tossed Claimant a bottle of water, and as Claimant stepped back to catch it, he tripped over a small step and landed on his buttocks and his two elbows. Claimant's shoulders were jammed into his neck and he instantly felt pain in the left shoulder. Claimant told Rick that he was hurt. Rick asked if he could finish the job, so Claimant stayed to the end of the day to finish the work. The accident occurred on a Friday. Claimant did not work on Saturday or Sunday. On Monday, Claimant worked all day. On Tuesday, Claimant became worried he was having a stroke because of severe left arm pain. He went to the emergency room and was diagnosed with a left shoulder injury. Subsequently, Claimant received an injection to his left shoulder from Dr. Bley. Claimant told Dr. Bley about the slip and fall incident and also about an earlier incident with a paint bucket. The latter occurred in July 2012 when Claimant pulled his left shoulder as a paint bucket came down too fast. Claimant did not seek medical care or miss any work after that incident. He did tell Rick that it occurred. Claimant also went to see Dr. Axe after the August 2012 accident. Dr. Axe sent

him for physical therapy at ATI. Claimant attended therapy for about a month, but there was no resolution in his pain. Claimant underwent an MRI with contrast, and thereafter Dr. Axe performed shoulder surgery on October 16, 2012. Dr. Axe kept Claimant out of work throughout his treatment. Claimant used a sling and a TENS unit after he was injured. Claimant's last visit to Dr. Axe was on November 9, 2012. Claimant denied any additional treatment since that time.

Claimant acknowledged a visit to the ER when his neck got "stuck," but he attributed this to a neck problem, not his shoulder. He did not require any further treatment after the ER visit. Claimant also received medical treatment for a fractured pinky finger on his left hand. He explained that a ball hit his left pinky finger while his left arm was in a sling. This did not affect his shoulder injury or lengthen the treatment required.

Claimant worked "here and there" in January and February 2013. He began working fulltime for J.C. Bibb in March 2013. He is not seeking partial disability benefits.

On cross-examination, Claimant testified that he has worked as a painter since he was 17 years old. He has never worked as a mover. Claimant agreed that Dr. Galinat ordered an MRI for his shoulder in February 2011. Claimant never had the MRI done, because his shoulder improved and he needed to return to work. The injection in January 2011 helped his shoulder a little bit; he only had one injection at the time. During the accident on August 24, 2012, Claimant was holding a paint bucket and tried to catch a water bottle that was thrown a little high. He fell back onto hard dirt. An injury report was not done that day, because Rick wanted to get the job finished and Claimant agreed to keep working. Claimant returned to work on August 27, 2012 and worked a full day. He did not report the accident or tell anyone his arm was hurt. He did not recall any issues about a reprimand from his boss that day. He also denied telling anyone he was not coming back to work. Claimant sought treatment at Dr. Galinat's

office, and saw Dr. Bley when Dr. Galinat was unavailable. Claimant was not happy with his treatment there, so he changed to Dr. Axe. His attorney gave him Dr. Axe's name. Claimant recalled telling Dr. Axe about the incident with the paint bucket that occurred in July 2012 at a Catholic school job. The first visit to Dr. Axe took place on September 5, 2012. Three days earlier, Claimant went to the emergency room after being punched in the neck. He was given a heating pad and ice. It took three or four days to recover from this incident. On October 1, 2012, Claimant's neck "locked up" while he was painting a door jamb for his mother. He was unable to finish painting. Claimant was using a sling for his left arm at the time. Claimant agreed he did not attend physical therapy very long; he did get some exercises to perform at home. Claimant told Dr Friedman that he had begun working the day before the DME; Claimant explained to the Board that he did not do any fulltime work between August 27, 2012 and March 2013, but he did work occasionally before March 2013.

Under questioning by the Board, Claimant testified that he is ambidextrous but more dominant with the right hand. He paints with his right hand at first and then switches to the left hand when the right tires.

Dr. Michael J. Axe, an orthopedic surgeon with a subspecialty in orthopedic sports medicine, testified by deposition for Claimant Dennis Flynn. (Claimant's Exhibit 1) Dr. Axe began treating Claimant on September 5, 2012 when Claimant presented with left shoulder pain. Claimant provided a history of tripping backwards over an object at work on August 24, which caused him to land on both elbows and drove his shoulder upward. Claimant experienced severe left shoulder pain and decreased range of motion in the shoulder after the accident. Claimant went to the emergency room on August 28 for X-rays and an evaluation. The hospital recommended he follow up at Delaware Orthopaedics, where Claimant had previously treated

with Dr. Galinat for a right shoulder problem. Claimant actually saw Dr. Bley and received a steroid injection. He was then released back to unrestricted duty work. Claimant subsequently decided to see Dr. Axe because he was unable to perform his work duties due to his shoulder injury.

Dr. Axe reviewed various medical records prior to his testimony. In March 2009, Claimant was treated for a motor vehicle accident in which the car rolled over. Claimant complained of right shoulder pain at the hospital. He saw an orthopedist and then underwent an MRI, which showed a prominent tear of the superior labrum. On October 30, 2009, Dr. Galinat performed surgery on Claimant's right shoulder to repair a SLAP lesion. Claimant returned to his job as a painter. In August 2010, Claimant complained of neck pain and was prescribed Oxycontin and Soma, a muscle relaxer. Claimant's medical records also revealed a history of chronic low back pain. More recently, Claimant slipped and fell on ice on January 12, 2011 and was treated for low back pain at Christiana Care on January 13, 2011. Claimant returned to Dr. Galinat on January 17, 2011 with a new complaint about his *left* shoulder. Claimant reported noticing the symptoms first in December 2010. He was concerned the shoulder pain was related to the MVA two years before. Dr. Galinat provided an injection to the AC joint in the left shoulder and restricted Claimant from pushing, pulling, and lifting. At a return visit on February 14, 2011, Claimant indicated the injection had not helped him significantly. He also told Dr. Galinat about some intermittent paresthesia when he was working overhead as a painter. Dr. Galinat's exam showed Claimant was able to move his shoulder freely and did not have any tenderness in the AC joint. Dr. Axe confirmed that there were no medical records after February 14, 2011 regarding any treatment for the left shoulder. Claimant did seek treatment in early 2012 for a jammed finger and some neck and back pain.

Dr. Axe then reviewed records related to the alleged August 24, 2012 incident at work. Claimant went to Christiana Hospital on August 28, 2012 with a left shoulder injury. The history Claimant provided referred to two injuries, the first in July when he injured his left shoulder while carrying a paint bucket and then a fall on his upper extremities on August 24, 2012. Dr. Axe agreed there were no records that Claimant ever received medical treatment for the July incident with the paint bucket, and Claimant continued to work afterwards. Also, Dr. Axe believed the paint bucket incident would have been a pulling/stretching injury to the arm, whereas the fall backwards onto the arms in August 2012 would have jammed Claimant's arms up and his shoulder forward. The August 28 hospital record indicated Claimant was complaining of pain and clicking in his left shoulder. Claimant next sought treatment on August 30, 2012 with Dr. Bley. Claimant again described two incidents, though Dr. Bley did not record that they occurred on different days and months. The first incident occurred when Claimant was carrying a heavy paint bucket and he tried to catch it when it slipped out of his hand. He felt immediate pain. In the second incident, Claimant tripped and fell backwards, landing on his elbows, and developed sharp pain in his left shoulder. Both incidents occurred at work. Claimant presented to Dr. Bley with numbness in the lateral aspect of his deltoid and pain in the left shoulder. Dr. Bley noted positive impingement signs upon examination. Dr. Axe explained that when the rotator cuff area is swollen, a person will have pain. Dr. Axe believed these symptoms were consistent with his understanding of the mechanism of injury, which was a jamming of the shoulder. Dr. Bley performed a subacromial injection to relieve the pain and to assess Claimant's rotator cuff. The medical records also show Claimant went to Christiana Hospital on September 2, 2012 complaining of neck pain. He reported that he was punched in the back of his neck, saw stars, felt pain, and was unable to move his hands due to the punch. A

CT scan of the neck showed no acute injury, but his muscles were in spasm. The hospital records did not refer to a left shoulder injury or involvement of the left shoulder.

Claimant first presented to Dr. Axe on September 5, 2012. On examination of the left shoulder, Dr. Axe noted restricted range of motion and decreased strength. Dr. Axe could feel the crepitus or popping as he moved the arm through its range of motion. The doctor opined that the symptoms described by Claimant were consistent with the reported mechanism of injury and the continuing discomfort. Dr. Axe prescribed physical therapy for the shoulder and also hoped the medication prescribed by Dr. Bley would be helpful. In addition, Dr. Axe provided Claimant with a disability slip taking him out of work from September 5 to 14. Dr. Axe also ordered an MRI for the left shoulder. The September 6, 2012 MRI results indicated fluid in the shoulder socket, where fluid would not normally be seen unless there was irritation in the joint. Claimant thereafter attended hydrotherapy at ATI, but this did not resolve his left shoulder symptoms. Dr. Axe subsequently ordered an MRI arthrogram to look for pathology within the shoulder. The test found evidence of a SLAP tear in the labrum. This would present a problem to anyone who worked overhead as a painter does.

Dr. Axe saw Claimant again on September 24, 2012 and noted painful clicking and popping that the doctor attributed to the findings on the MRI arthrogram. Based on the objective findings, Claimant's subjective complaints, diagnostic test results, and Claimant's failure to respond to therapy, Dr. Axe decided to perform surgery on the left shoulder. Arthroscopic surgery to evaluate the glenohumeral joint and rotator cuff space was performed on October 16, 2012. Dr. Axe found during surgery that the flap of the labrum was torn but the biceps attachment was intact. He removed the torn area. He also found a very inflamed area above the labrum and removed the inflamed tissue and bone that was pushing on the area. Dr. Axe

testified that the marked inflammation was consistent with a relatively new injury and the fall where Claimant jammed his shoulder. Falling on the extremities would drive the humeral up and into the bone above, with the rotator cuff in between. Dr. Axe agreed that the normal process after surgery was to provide a sling for comfort that should be worn out of the house or while sleeping. The patient would also be limited in their activities, with painting limited for a minimum of twelve weeks after surgery. The patient would also have a ten pound weight limit on lifting, no overhead lifting, and no overhead work for a minimum of twelve weeks.

Claimant followed up with Dr. Axe on October 22, 2012, a week after surgery. Claimant was sore and had limited range of motion, as was normal after surgery. Dr. Axe encouraged Claimant to take his medicine and do exercises to maintain motion. Dr. Axe indicated in his notes that the surgical findings were consistent with an axial load on a flexed elbow and a jamming of the shoulder. He explained that the shoulder was driven from below, with the rotator cuff being compressed between the arm bone and the clavicle and acromion above. The specific term was acute impingement caused by axial load. This mechanism and injury were different than an injury from grabbing or catching a paint bucket. Dr. Axe also believed the injury was unrelated to the left shoulder injury for which Claimant treated in early 2011, because at that time Claimant received an injection to the AC joint, a different area of the shoulder. The August 2012 injury was in the area of the larger glenohumeral joint.

Dr. Axe confirmed that Claimant had gone to the emergency room on October 1, 2012 because he felt a pop in his neck and his neck got stuck while he was painting. At the time, Claimant thought it might be related to the neck punch the month before. The hospital prescribed Flexeril. Claimant also fractured the tip of his left pinky finger on October 24, 2012 while attempting to catch a baseball thrown by his son. Dr. Axe opined that the finger injury and

treatment did not affect Claimant's recovery from the shoulder surgery and did not impact the lengthen of time he was out of work. He emphasized that Claimant would be out of work as a painter for at least twelve weeks regardless after his shoulder surgery, because of the demands of the overhead work.

Dr. Axe last saw Claimant on November 9, 2012. Claimant was progressing but a little bit behind expectations in his recovery. Claimant had complaints about the AC joint, which Dr. Axe explained can happen in the early phases after the surgery he had performed on the left shoulder. Dr. Axe kept Claimant out of work until he saw him again. Dr. Axe has not yet seen Claimant again.

Dr. Axe opined that it was unlikely Claimant would have required the left shoulder treatment beginning August 28, 2012 but for the fall at work on August 24, 2012. He agreed that the treatment with Dr. Bley and himself, the medications, and the physical therapy were reasonable, necessary, and related to the August 24, 2012 fall at work. Dr. Axe disagreed with Dr. Friedman's apportionment of the left shoulder injury between a pre-existing condition, the paint bucket episode in July 2012, and the fall in August 2012. Dr. Axe believed Claimant had recovered completely from the two earlier injuries, though he acknowledged that any future treatment to the AC joint might be related to the earlier events. Dr. Axe also disagreed with Dr. Friedman on the expected recovery time from the October 2012 surgery. He insisted that the normal return to full activity without restriction for a painter would be twelve weeks. Someone who did not do overhead work might be released in a shorter time consistent with Dr. Friedman's opinion. Dr. Axe also confirmed that he would have disabled Claimant from work beginning with the date of injury. He commented that Claimant was not capable of working overhead or even using his left arm as a helper arm when he first saw him on September 5, 2012.

On cross-examination, Dr. Axe acknowledged that Claimant only provided him with a history of the falling incident in August 2012, not the paint bucket incident. He has never talked to Claimant about the incident with the paint bucket. He also agreed that it could be interpreted from the history recorded by Dr. Bley that the paint bucket incident and the falling incident occurred on the same day. In January 2011, Dr. Galinat injected the AC joint, which is the joint on the top of the shoulder. The larger glenohumeral joint is on the bottom. Claimant told Dr. Galinat that he did not improve with the AC joint injection. Dr. Galinat had planned to have an MRI done, but this did not take place. Dr. Galinat also recorded an impression of impingement versus cervical spine, degenerative change. Dr. Axe's treatment focused only on the space above the glenohumeral joint. Dr. Bley injected this space, the subacromial space between the glenohumeral joint and the bone above, in August 2012. Claimant was unhappy he did not improve after the injection, so he came to see Dr. Axe. Dr. Axe pursued therapy first to see if Claimant could improve without surgery. When Dr. Axe did perform surgery, he found that Claimant had an abnormality located in the "gristle" of the labrum, where a piece was flapping in and out, and not in the attachment to the biceps tendon as the MRI appeared to show. This labrum damage could have been degenerative. However, Dr. Axe also found that Claimant had an acute process causing inflammation in the subacromial space above the glenohumeral joint. He felt this process was relatively new and consistent with the fall in August 2012. Dr. Axe also explained that the symptoms that would occur with a stretching or bucket-carrying injury would be in the armpit and on the biceps tendon. The jamming injury from falling on the elbows would cause symptoms in the space above the rotator cuff, between the socket and the bone above. This is where Dr. Axe found offensive tissue during surgery, and an injury in this area would impact a person's ability to raise his arm above his head.

Dr. Axe acknowledged that Claimant never told him about the incident on September 2, 2012 where he claimed to have been punched in the neck. Dr. Axe would not want Claimant to perform overhead work with his joint injury. He agreed that when Claimant was painting on October 1, 2012 and his neck got stuck, Claimant was working outside of his restrictions against overhead work. However, Dr. Axe pointed out that he would have expected the shoulder to be a problem, not the neck. Dr. Axe also clarified that he did not perform a SLAP lesion repair on the left shoulder, whereas Claimant did have that done on the right shoulder in the past.

James Michael "Mike" Purvis testified that he is the president and CEO of J. Michael's Painting. Claimant worked for him for about ten weeks in the summer of 2012. Purvis was not working with Claimant on August 24, 2012, but he did work with him on the morning of Monday, August 27, 2012. Claimant did not mention any work injury or pain on August 27. Purvis recalled that Claimant was painting door frames that day and would have been working overhead. Purvis, Claimant, and the other employees were working mostly in one large area of a house. Purvis did not note any signs of injury or distress in Claimant. He specifically recalled seeing Claimant painting a door jamb with his right arm on August 27. Purvis also recalled a conversation with Claimant that day about some ongoing performance issues. This conversation occurred at about 10 a.m. in front of the other employees present. The conversation occurred on and off over a ten to fifteen minute period. Purvis and Claimant were painting on the same wall at the time. Purvis described Claimant as a non-stellar employee who talked on the telephone, needed a lot of direction, and worked slowly.

Claimant did not show up for work again after August 27, 2012. He was not fired, he just stopped coming. Purvis recalled Claimant calling him on Tuesday (August 28) or Wednesday (August 29) to tell him he was injured. Purvis told Claimant to bring in the medical paperwork.

Lewis Butler testified that he worked with Claimant at J. Michael's Painting. Butler worked with Claimant on August 27, 2012 and did not recall any complaints of shoulder pain or visible signs of injury. Butler overheard a disciplinary conversation between Purvis and Claimant about Claimant talking on the telephone. Claimant told Butler later that "he didn't need this" and would not be back. Claimant was upset that everyone was after him for talking on the telephone.

Rick A. Frisch testified that he is a supervisor for J. Michael's Painting. He worked with Claimant on August 24, 2012. The other worker on the job was Ricardo. They were painting a deck together, when Frisch tossed Claimant's beverage to him. Claimant reached over his head to catch the bottle and fell onto his buttocks. Claimant tripped over a little decorative garden fence as he went backwards. Frisch did not notice if Claimant fell on his elbows. He did not recall Claimant complaining about shoulder pain afterwards. He did remember Claimant complaining that his new tattoo was scratched up. The tattoo was located on his calf and would have been hit by the fence as he tripped over it. Frisch and Claimant laughed and joked about the fall. At the end of the day, Frisch drove Claimant back to their morning meeting place. Claimant did not mention shoulder pain. Claimant did not mention shoulder pain on Monday, either, when Frisch saw him again at their morning meeting place. Frisch recalled seeing Claimant on Wednesday when Claimant appeared with his arm in a sling. Frisch said, "This isn't about what happened on Friday?" and Claimant replied, "No, it was the bucket incident at the school." Frisch did not remember any incident with a paint bucket in July 2012. Frisch also insisted that there was no possible way Claimant could have injured his shoulder in the fall on Friday August 24, 2012.

Randy Kitchens testified that he worked with Claimant at J. Michael's Painting. He and Claimant drove together to work on August 27, 2012. Claimant told him about falling on his buttocks on the previous Friday. He did not complain about his shoulder, but he did complain about scratching his tattoo. Kitchens worked with Claimant on August 27. Claimant was upset that day, but Kitchens did not recall him saying he was going to quit. Kitchens did remember seeing Claimant one morning with his arm in a sling. Claimant told Kitchens he had injured his shoulder and needed the sling because of the incident with the water bottle the previous Friday.

Claimant testified in rebuttal that he worked every day scheduled for J. Michael's painting and did not miss a lot of work time. He also denied having a lot of discussions about job performance with Purvis or having one on August 27. Claimant denied that Purvis was working at the same job site as he was on Monday August 27. Claimant also insisted that he told Rick on Friday August 24 that he had hurt his shoulder. Rick even offered to take him to the emergency room that day, but when Rick asked Claimant if he could stay and finish the job, Claimant agreed to do so. Claimant denied that he would talk on his telephone at work or had previous conversations about this behavior with Purvis.

Dr. Stephen Friedman, an orthopedic surgeon, testified by deposition for the Employer. (Employer's Exhibit 1) Dr. Friedman examined Claimant on March 26, 2013 at the request of the Employer. He also reviewed Claimant's medical records. Claimant provided a history of falling on his buttocks and elbows at work when his foreman tossed him a beverage and Claimant stood up to catch it. As he tried to catch the drink, Claimant stepped backwards, stumbled over a curb, and fell. He felt immediate pain in his shoulder. This event occurred on August 24, 2013. According to the records Dr. Friedman reviewed, the first date of treatment for this injury was on August 30, 2012 with Dr. Bley, an orthopedic surgeon. Dr. Bley also recorded

a history of an incident in which a paint bucket slipped out of Claimant's left arm, pulling his arm downward. No date was associated with this incident. Dr. Bley provided an injection of corticosteroids into the subacromial bursa and prescribed physical therapy. Claimant continued to have pain in the shoulder and the arm progressively worsened. He ultimately underwent left shoulder surgery with Dr. Michael Axe on October 16, 2013. The surgical report indicated Dr. Axe performed soft tissue debridement of the glenohumeral joint, the labrum, and the subacromial space. Dr. Friedman believed the mechanism of injury with the paint bucket, which was a longitudinal traction type injury, was consistent with the injury described in Dr. Axe's surgical report. It was a relatively common mechanism for a SLAP lesion.

Dr. Friedman confirmed that Claimant had previously received medical treatment for his left shoulder in January and February 2011. An orthopedist administered an injection into the acromioclavicular (AC) joint.

Dr. Friedman examined Claimant on March 26, 2013 and found healed surgical scars, no tenderness in the shoulder, good strength, and no signs of a SLAP lesion or impingement syndrome. Dr. Friedman concluded that Claimant had recovered from his injury. Dr. Friedman further testified that he attributed Claimant's left shoulder injury in equal parts to the following: the preexisting shoulder problems that may have been precipitated by a motor vehicle accident; the longitudinal traction injury caused by the falling bucket; and the upwardly directed force on the shoulder such as would occur with a fall onto the elbow. The doctor explained that any of these types of mechanisms could result in the injury repaired in the October 2012 surgery. There needed to be some kind of upper extremity force to cause the shoulder injury.

Dr. Friedman further opined that Claimant was capable of full duty work without restriction as of the date he examined him. He felt that two weeks of total disability after surgery

would be reasonable, and Claimant could have been released to full duty six weeks after surgery. Dr. Friedman explained that he would expect only two weeks of total disability after such a soft tissue debridement without any major rotator cuff repair or bony resection. Most patients could then return to light duty work and full duty work after six weeks. The recovery time varied with the individual. Dr. Friedman was aware of Claimant's October 24, 2012 visit to the emergency room for a left finger fracture sustained while playing baseball. Dr. Friedman believed this indicated Claimant had some functionality in his left arm eight days after surgery.

On cross-examination, Dr. Friedman testified that he performs surgery in his practice and primary focuses on the upper extremity. Dr. Friedman confirmed that Claimant actually first treated after the August 24, 2012 work incident when he visited the emergency room on August 28, 2012. He reviewed the ER record and agreed that it reported a fall on Friday August 24 in which Claimant hurt his left shoulder and also an incident in July in which he hurt his shoulder while carrying paint. Claimant was diagnosed with a shoulder strain at the ER and was unable to abduct above 90 degrees. The previous left shoulder treatment documented in medical records occurred in January and February 2011. Claimant saw Dr. Galinat with a new complaint of left shoulder pain that began in December 2010. Claimant thought it might be related to a car accident back in 2009 in which he had injured his right shoulder. Dr. Galinat did not indicate the left shoulder pain was related to the MVA. Dr. Galinat's impression was AC joint degenerative joint disease, and he administered a steroid injection to the AC joint. Claimant was given some work restrictions. At the return visit in February 2011, Claimant reported no significant benefit from the injection. An exam showed near full range of motion but tenderness to palpation of the AC joint. Claimant mentioned intermittent paresthesia. Dr. Galinat's impression at the second visit was impingement syndrome versus cervical spine issues; Dr. Friedman thought this

suggested Dr. Galinat was now leaning away from the AC joint as the source of pain. Dr. Galinat recommended an MRI of the left shoulder. There is no evidence in the records that Claimant got the MRI or received additional left shoulder treatment until August 2012.

Dr. Friedman explained how he related the left shoulder injury equally to three separate events. A deceleration injury could have occurred in the 2009 MVA in which the glenoid labrum was damaged or weakened to some degree. The paint bucket incident involved a downward traction-type injury and was significant enough for Claimant to report it to Dr. Bley as a primary cause of his pain. The downward traction could further compromise the labrum. The fall on the elbow in August 2012 could then have substantially torn the weakened labrum. “[H]e reaches this critical threshold where now his symptoms are substantial enough that . . . he really needs more intervention.” (*Id.* at 31) Dr. Friedman agreed that the fall on the elbow in August 2012 appears to have been substantial and “pushed him over the edge,” though the paint bucket incident was also significant and might have been enough to lead to further shoulder treatment. (*Id.* at 33) It was very difficult to sort out how much each event caused the shoulder problem. Dr. Friedman acknowledged that there was no medical evidence in the records that Claimant injured his left shoulder in the 2009 MVA. Claimant did injure his right shoulder. The paint bucket incident could have just caused a strain and then the fall where Claimant jammed his shoulder into the joint actually caused the injury requiring treatment. Dr. Friedman agreed that Claimant told Dr. Bley that he had continued to work after the bucket incident, until he slipped and fell on his elbows. Claimant then developed a sharp pain in his left shoulder and had pain with any movement, particularly overhead.

Dr. Friedman agreed that it would be unusual for someone to try to catch a baseball with the arm that was operated on one week before. The finger injury might have occurred in a knee-

jerk response to the ball coming towards Claimant. Nonetheless, Dr. Friedman thought this injury showed Claimant was feeling relatively well post-surgery to be out playing catch rather than sitting at home in a chair.

Dr. Friedman confirmed his opinion that Claimant's treatment to date had been reasonable and necessary. He also confirmed that the treatment and surgical procedures were in part causally related to the August 24, 2012 work injury, assuming the history provided by Claimant was accurate. Dr. Friedman would allow a patient to use the left arm as tolerated two weeks post-surgery. He would limit lifting to twenty pounds and expect the patient to use the other hand for heavy work. He agreed it would take more than two weeks for a painter to be able to perform two-handed tasks such as an overhead roller. He would expect the patient to become more comfortable between two and six weeks post-surgery with performing two-handed tasks and then with using the left arm alone for tasks. Dr. Friedman would not restrict a patient for sixteen weeks after a simple arthroscopic debridement procedure.

Video surveillance DVDs and report were admitted as Employer's Exhibit 2. An investigator conducted surveillance of Claimant on two days in January 2013 and two days in February 2013. Claimant was observed using his left arm to steer his vehicle, gesture, carry a grocery bag, smoke a cigarette, carry a child's backpack, hold a caulk gun, and hold a door open. On February 8, 2013, Claimant was observed outside a residence in white painting clothes and kneepads and holding a caulk gun. The back of his vehicle contained folded white cloths and a large bucket.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Compensability

Claimant Dennis Flynn seeks a finding of compensability for a left shoulder injury he alleges to be related to an accident that occurred on August 24, 2012 while he was working for J. Michael's Painting, Inc. He also seeks payment of medical expenses and compensation for a limited period of total disability that he alleges to be related to the work injury. The Employer denies that Claimant suffered a left shoulder injury at work on August 24, 2012. Because this is Claimant's petition, he has the burden of proof on the issue of causation. 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).

In determining causation in an identifiable industrial accident, the Board applies the "but for" standard of causation. See *Stare v. Steen*, 719 A.2d 930, 932 (Del. 1998); *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992). "The accident need not be the sole cause or even a substantial cause of the injury. If the accident provided the 'setting' or 'trigger,' causation is satisfied for purposes of compensability." *Reese*, 619 A.2d at 910. Furthermore, "[a] preexisting disease or infirmity, whether overt or latent, does not disqualify a claim for workers' compensation if the employment aggravated, accelerated, or in combination with the infirmity produced the disability." *Id.*

After weighing the available evidence, the Board finds that Claimant has proved by a preponderance of the evidence that he injured his left shoulder in a work-related accident on August 24, 2012 and this injury resulted in the need for medical treatment, including surgery

with Dr. Axe in October 2012, and a limited period of total disability. The Board accepts the causation opinion of Dr. Axe and finds it to be the most consistent with the witness testimony about the accident, the clinical examination and surgical findings, and diagnostic test results.

First, the Board accepts the version of events on August 24, 2012 as described by Claimant Dennis Flynn, that is, he tripped and fell backwards over a small obstruction and landed on his buttocks and elbows after trying to catch a water bottle thrown by his foreman, Rick Frisch. Claimant's description of the accident was mostly corroborated by Rick Frisch, although Frisch could not say if Claimant fell onto his elbows or just his buttocks. Claimant also told another co-worker, Randy Kitchens, about the fall while they were driving to work together on Monday August 27. A similar history of events was provided to the medical personnel at Christiana Hospital whom Claimant saw on August 28, 2012, and again to Dr. Bley, Dr. Axe, and Dr. Friedman. The Board acknowledges that Claimant also described another incident to both the emergency room personnel and Dr. Bley, telling them that he also hurt his shoulder in July 2012 while carrying a heavy paint bucket. These statements about a July 2012 incident at work do not necessarily undermine the credibility of Claimant's testimony regarding the August 24 event at work, because Claimant described both incidents to the ER and Dr. Bley in the week after August 24. If anything, it shows openness in sharing multiple incidents that might have contributed to his complaints.

Witnesses for the Employer testified that Claimant did not complain about his shoulder on August 24 or on August 27, 2012, the first day back at work after the incident. Claimant also was observed to work all day on August 27 on a painting job without any apparent difficulty or complaint. The company president, Mike Purvis, insisted that Claimant had ongoing performance issues and these were discussed with Claimant on August 27, the day before he

presented to the emergency room with the shoulder injury. He did not provide documentation of disciplinary issues with Claimant, however. Another employee, Lewis Butler, claimed to have overheard the discussion of performance issues on August 27 and also was told by Claimant that day he would not be back to work. Claimant disputed the testimony from the Employer's witnesses, stating that he complained about his shoulder to Rick Frisch on August 24 and agreed to finish the job that day at Rick's request, despite the injury. Claimant denied having performance issues and insisted that Purvis did not even work with him on August 27, 2012. One of the Employer's witnesses, Randy Kitchen, acknowledged that he saw Claimant later in the week with a sling and Claimant told him he needed it because of the incident the previous Friday. Purvis also agreed Claimant called him on Tuesday or Wednesday to tell him about the injury. The Board also notes that Purvis observed Claimant painting with his right hand on August 27, not his left, so Claimant may very well have been able to paint that day by using primarily his right hand. Claimant testified that he is ambidextrous with a preference for using his right hand. Nonetheless, standing alone, the testimony from Claimant's boss and co-workers would raise doubts about whether Claimant actually injured his shoulder on August 24. However, other evidence tends to support Claimant's account of the incident and injury on Friday August 24.

In particular, the Board notes again that Claimant's story was mostly corroborated by Frisch, and the statements Claimant made to his medical providers about his shoulder symptoms and the work incident were consistent over time, beginning with the ER visit on August 28, 2012. This lends credibility to his story. Most importantly, Claimant sought medical treatment within several days of the work accident, and he was found to have objective support for his symptoms and the mechanism of injury by multiple medical providers. The doctor at the ER on

August 28, 2012 found that Claimant could not abduct his left shoulder above 90 degrees and diagnosed Claimant with a shoulder strain. Claimant was provided with a sling for his left arm. Two days later, Claimant sought treatment with an orthopedic surgeon, Dr. Bley. After evaluating Claimant, Dr. Bley injected Claimant's subacromial bursa with corticosteroids, prescribed medications, and prescribed physical therapy for the left shoulder. This treatment is consistent with a significant shoulder injury. In contrast, Claimant had been working fulltime as a painter at least since June 2012 when he began working for J. Michael's Painting, and there is no evidence he was limited in the use of his left arm or shoulder or sought medical treatment for a shoulder injury between June 2012 and August 24, 2012.

Dr. Axe's testimony further supported the claim of a shoulder injury on August 24, 2012. Dr. Axe began treating Claimant on September 5, 2012 and confirmed that a significant injury occurred. Dr. Axe noted restricted range of motion, decreased strength, and popping in the left shoulder that he believed to be consistent with the reported mechanism of injury and Claimant's subjective complaints. An MRI performed the next day showed the presence of fluid in the shoulder socket consistent with irritation in the joint and a later MRI arthrogram suggested additional shoulder pathology in the labrum. The Board found Dr. Axe's findings during surgery particularly significant. Specifically, Dr. Axe noted a very inflamed area above the labrum and removed inflamed tissue and bone that was pushing on that area. Dr. Axe believed this inflammation was consistent with a relatively new injury and the fall Claimant described on August 24 in which he jammed his shoulder. Dr. Axe explained that the surgical findings were consistent with an axial load on a flexed elbow and jamming of the shoulder as Claimant fell on the elbow. This type of jamming injury would cause symptoms in the space above the rotator cuff, the same space where Dr. Axe found offensive tissue during surgery. He insisted this

mechanism and injury were different in character from an injury caused by grabbing or catching a paint bucket, which would cause a pulling or stretching to the arm and symptoms in the armpit and the biceps tendon. Dr. Axe also differentiated this area of injury from the AC joint which Dr. Galinat had treated back in early 2011. He explained that Claimant's 2012 injury and surgery were in the area of the larger, glenohumeral joint, not the AC joint. The Board notes that, even if Claimant did have some degenerative changes in the labrum that dated back to 2011, this would not preclude him from worker's compensation benefits related to the injury in August 2012. *See Reese*, 619 A.2d at 910. There is no evidence Claimant sought any treatment for his left shoulder between February 2011 and August 2012 or was unable to work as a painter during this time, so the Board concludes that any preexisting problem he had with his left shoulder was not significantly symptomatic.

Dr. Friedman actually agreed with Dr. Axe that Claimant's left shoulder injury was related, at least in part, to the August 24, 2012 work incident, assuming the history provided by Claimant was true. ~~Dr. Friedman believed Claimant had a pre-existing injury to the left shoulder, but he testified that the fall on the elbow could have pushed Claimant "over the edge" and led him to seek further shoulder treatment. (Employer's Exhibit at 33)~~ As noted earlier, a pre-existing injury does not preclude Claimant from receiving benefits related to the most recent injury, ~~if the latest injury, in Dr. Friedman's words, pushed Claimant "over the edge" and aggravated his shoulder such that he was taken out of work and required significant medical intervention. The Board concludes that more likely than not the treatment and surgery with Dr. Axe would not have been required "but for" the accident on August 24, 2012.~~

The ER visit for a neck injury on September 2, 2012 might raise a question of an alternate causative event in this case, except that Claimant had already sought and received significant

treatment for his shoulder prior to this ER visit. There is nothing in the record from the ER to indicate any shoulder injury on September 2, 2012. The Board discounts any significance of this event to the shoulder injury alleged in this case.

To summarize, the Board finds that Claimant suffered a left shoulder injury as a result of a work accident at J. Michael's Painting on August 24, 2012. Claimant is entitled to compensation for reasonable and necessary medical expenses related to the incident, including his treatment with Christiana Care, Dr. Bley, Dr. Axe, and ATI Physical Therapy.

Claimant also seeks total disability benefits from August 28, 2012 to December 1, 2012. Dr. Axe testified that he would have taken Claimant out of work as of the date of injury, and he provided Claimant with disability notes while he was treating him. He further opined that it would take at least twelve weeks for someone employed as a painter to fully recover from the surgery he performed on October 16, 2012. He disagreed with Dr. Friedman's insistence that only two weeks of total disability followed by four weeks of light duty would be needed for post-surgical recovery. The Board chooses to rely on Dr. Axe's testimony to find that Claimant was totally disabled from August 28, 2012 (the first regular work day Claimant missed after August 24, 2012) to December 1, 2012. Dr. Axe was treating Claimant during most of that time and the Board defers to his first hand knowledge of Claimant's condition and progress after surgery. Dr. Friedman did not examine Claimant until March 2013 when he was fully recovered from surgery and back to full duty work. Claimant is not seeking disability benefits past December 1, 2012, so the total disability benefits will be terminated after that date.

Attorney's Fee and 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 the average weekly wage calculates to \$9,675.20. Claimant requests a fee of \$4,720.00.

The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973). An award of less than the maximum fee is permissible 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. See *Hell 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). 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 established that he injured his left shoulder in a compensable accident on August 24, 2012, and he is therefore entitled to compensation for certain medical expenses and a limited period of total disability. Claimant's counsel submitted an affidavit stating that he spent approximately 16 hours preparing for the hearing. Counsel was admitted to the Delaware bar in 1982 and has almost 30 years experience practicing in the area of Delaware workers' compensation law. Counsel's first contact with Claimant occurred on August 29, 2012. There is no evidence that counsel represented Claimant in anything other than a workers' compensation context. The case was of average complexity and required average skill to litigate properly. There do not appear to have been any unusual time limitations imposed by either Claimant or the circumstances. There is no evidence that counsel was precluded from accepting other employment because of working on this case. The fee agreement attached to the affidavit shows that the fee agreement with Claimant is contingent on recovery. Counsel represents that he

charges \$295 for hourly work. There is no suggestion that the employer is incapable of paying an attorney's fee.

Taking into consideration the factors set forth above and the fees customarily charged in this locality for similar services, the Board finds that an attorney's fee in the amount of \$4500 or thirty percent of the medical bills, whichever is less, is reasonable in this case.

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

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Claimant's Petition to Determine Compensation Due is GRANTED by the Board. The Board finds that Claimant suffered a left shoulder injury as a result of a work accident on August 24, 2012. The Board awards compensation for medical treatment related to this injury, including treatment with Christiana Care, Dr. Bley, Dr. Axe, and ATI Physical Therapy, and compensation for total disability from August 28, 2012 to December 1, 2012 at the rate of \$308.00 per week. The Board awards an attorney's fee of \$4500 or thirty percent of the medical bills, whichever is less, and a medical witness fee.

IT IS SO ORDERED THIS 20th DAY OF JUNE, 2013.

INDUSTRIAL ACCIDENT BOARD

Marilyn J. Doto
MARILYN J. DOTO

Otto R. Medina Sr.
OTTO R. MEDINILLA, SR.

I, Susan D. Mack, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

Susan D. Mack

Trachel & Messing
OWC Staff

Mailed Date: 6/21/2013