



## INTRODUCTION

Employer-Appellant Dutton Bus Service, Inc. (“Dutton”) appeals the decision of the Industrial Accident Board (“the Board”). On August 12, 2020, Employee-Appellee Tina Garrison (“Garrison”) filed a Petition to Determine Additional Compensation Due (the “Petition”) with the Board seeking compensation related to a work accident. On March 8, 2021, the Board granted the Petition and awarded Garrison total disability benefits, attorney’s fees and medical witness fees.<sup>1</sup> Dutton filed a Motion for Reargument requesting reduction of the attorney’s fee award, which was denied by the Board in a May 6, 2021 Order.<sup>2</sup> This Court extensively reviewed the record and has determined for the foregoing reasons that the Board decision should be **AFFIRMED**.

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<sup>1</sup> *Garrison v. Dutton Bus Services, Inc.*, No. 1476000 (Del. I.A.B. Mar. 8, 2021) [hereinafter “Board Decision”].

<sup>2</sup> *Garrison v. Dutton Bus Services, Inc.*, No. 1476000 (Del. I.A.B. May 6, 2021) [hereinafter “Board Order”].

## FACTUAL AND PROCEDURAL BACKGROUND

On March 19, 2018, Garrison was injured in a work accident.<sup>3</sup> Garrison was standing inside a moving bus performing work duties when the bus driver abruptly applied the brakes causing her to fall.<sup>4</sup>

Prior to the work accident, Garrison was diagnosed with cervical spine osteoarthritis and was treated for neck issues.<sup>5</sup> The last medical treatment record prior to the accident in question was dated March 15, 2017 (approximately one-year before the accident) and that record made no mention of neck issues.<sup>6</sup>

Following the work accident, Garrison was initially diagnosed with a low back contusion and neck sprain.<sup>7</sup> Garrison's treatment from March 28, 2018 to June 11, 2018 focused on her lower back and leg pain.<sup>8</sup> Garrison testified before the Board that neck symptoms were present from the time of the accident onward, but her low back symptoms "took over."<sup>9</sup> Garrison was initially prescribed Naproxen, steroids, muscle relaxers and referred to physical therapy.<sup>10</sup>

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<sup>3</sup> Board Decision at 2.

<sup>4</sup> *Id.* at 10.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 10.

<sup>8</sup> *Id.* at 2–3.

<sup>9</sup> I.A.B. Hr'g Tr. 02/23/2021, at 37:16–22 [Hereinafter "Hr'g Tr. at \_\_\_\_"].

<sup>10</sup> Board Decision at 10.

According to physical therapy records, Garrison was treated for low back and neck complaints from April 19, 2018 to August 14, 2018.<sup>11</sup> Garrison's July 2018 medical records indicated neck pain improvement.<sup>12</sup>

Dr. James Zaslavsky, an orthopedic surgeon who later testified as an expert on behalf of Garrison,<sup>13</sup> first examined Garrison on June 20, 2018 (approximately three months after the incident).<sup>14</sup> During their first appointment, Garrison did not report any neck symptoms.<sup>15</sup> However, on the office intake form Garrison checked off left sided neck pain, left sided shoulder pain, left neck pain radiation, and shoulder pain radiation.<sup>16</sup> The treatment provided by Dr. Zaslavsky from June 20, 2018 to September 12, 2018 focused on lumbar spine symptoms.<sup>17</sup>

At her September 12, 2018 visit with Dr. Zaslavsky, Garrison reported low back and neck symptoms that radiated to her left shoulder.<sup>18</sup> Based on that examination, Dr. Zaslavsky referred Garrison for a cervical spine MRI and diagnosed her with cervical radiculopathy.<sup>19</sup> Garrison received an MRI on

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<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.* at 14.

<sup>13</sup> Because Appellant has attached Dr. Zaslavsky's deposition transcript to their Opening Brief as Appendix A, the Court cites it using "A" citations.

<sup>14</sup> *See* Board Decision at 11.

<sup>15</sup> *Id.* at 9.

<sup>16</sup> *Id.* at 11.

<sup>17</sup> *Id.* at 9.

<sup>18</sup> *Id.* at 3.

<sup>19</sup> A17:1-21; A19:5-A21:9.

September 19, 2018 that “showed C5-6 and C6-7 herniations compressing both the spinal canal and nerve openings. . . .”<sup>20</sup> Dr. Zaslavsky testified by deposition before the Board that the MRI results correlated with the examination findings.<sup>21</sup>

Dr. Zaslavsky examined Garrison again on October 31, 2018. Garrison reported “continued radiating symptoms into her left shoulder, a feeling of hand swelling, worsening left hand symptoms, grip difficulty and dropping items, and ineffective lumbar spine injections.”<sup>22</sup>

At Garrison’s December 12, 2018 appointment with Dr. Zaslavsky, Garrison reported that she had received some temporary symptom relief from an injection.<sup>23</sup> The examination revealed some improvement in Garrison’s extension and range of motion and grip strength.

On March 13, 2019 and April 24, 2019, Garrison saw Dr. Zaslavsky and again reported that she received temporary pain relief from injections, but she continued to have pain down her left arm and numbness and tingling from her neck to her hand.<sup>24</sup> Garrison received chiropractic treatment for low back and neck complaints from April 2019 to January 2020.<sup>25</sup>

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<sup>20</sup> Board Decision at 5.

<sup>21</sup> A21:6–9.

<sup>22</sup> Board Decision at 4.

<sup>23</sup> *Id.* at 5.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 3.

On August 21, 2019, Garrison saw Dr. Zaslavsky and they discussed surgical treatment because Dr. Zaslavsky observed that Garrison continued to experience considerable issues.<sup>26</sup> Dr. Zaslavsky later testified that “overall she looked considerably worse than any other time we have seen her in the past. She is definitely not improving and symptoms are slowly getting worse.”<sup>27</sup> According to Dr. Zaslavsky, “progressive symptoms of weakness, numbness and fine motor changes are indicative of pressure on a nerve, which can become permanent if not treated.”<sup>28</sup>

Dr. Zaslavsky recommended another MRI, which was taken on August 26, 2019 and showed continued herniation at C5-6 and a worsening of the C6-7 herniation.<sup>29</sup> At the November 6, 2019 appointment, they again discussed surgery and Garrison decided to go forward with surgical treatment.<sup>30</sup>

Garrison underwent cervical spine surgery performed by Dr. Zaslavsky on February 13, 2020 (approximately eleven months after the work injury).<sup>31</sup> The surgery was an “anterior cervical discectomy and fusion at C5-6 and C6-7,

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<sup>26</sup> *Id* at 6.

<sup>27</sup> A26:18–21.

<sup>28</sup> Board Decision at 2.

<sup>29</sup> A28:3–16.

<sup>30</sup> Board Decision at 6.

<sup>31</sup> *See* Board Decision at 7.

intervertebral spacer placement C5-6, C6-7, allograft bone grafting, C5-6 and C6-6, and anterior plating, C5, C7.”<sup>32</sup> Garrison was totally disabled after the surgery.<sup>33</sup>

Garrison next saw Dr. Zaslavsky on February 26, 2020 and she reported some improvement.<sup>34</sup> On March 18, 2020, Garrison again reported positive developments in the condition of her neck and occasional neck pain.<sup>35</sup>

On May 22, 2020, Dr. Zaslavsky advised Garrison that she could start working part-time with restrictions.<sup>36</sup> On July 8, 2020, Garrison reported symptoms in her spine, pain in her shoulder blades and some numbness and tingling on her right side.<sup>37</sup>

On October 14, 2020, Garrison stated that she had significant cervical and lumbar relief.<sup>38</sup> Garrison was recommended to return to Dr. Zaslavsky in a year and she began working full-time.<sup>39</sup>

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<sup>32</sup> Board Decision at 7.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 8.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

On August 12, 2020, Garrison filed a Petition to Determine Additional Compensation Due with the Board seeking compensation for the cervical spine surgery.<sup>40</sup> The Board held a hearing on February 23, 2021.<sup>41</sup>

Dr. Zaslavsky testified that “Garrison’s surgery was reasonable, necessary, and causally related to her March 19, 2018 work accident.”<sup>42</sup> Dr. Zaslavsky also testified that radicular symptoms can be present all at once or they worsen progressively.<sup>43</sup>

Dutton relied on the expert testimony of Dr. Eric Schwartz.<sup>44</sup> Dr. Schwartz, a Board certified surgeon, testified by deposition that Garrison’s radicular symptoms and the surgery were not related to her work injury.<sup>45</sup>

Dr. Schwartz and Dr. Zaslavsky disagreed on the MRI results.<sup>46</sup> Dr. Zaslavsky opined that the second MRI findings showed that an acute injury occurred that worsened over the course of a year.<sup>47</sup> Dr. Schwartz believed that the MRIs showed chronic cervical issues that pre-existed the work accident, as well as

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<sup>40</sup> *Id.* at 2.

<sup>41</sup> *See generally* Hr’g Tr.

<sup>42</sup> A40:5–11.

<sup>43</sup> A58:11–A59:24.

<sup>44</sup> Because Appellant has attached Dr. Schwartz’s deposition transcript to their Opening Brief as Appendix A, the Court cites it using “A” citations.

<sup>45</sup> A100:6–11; A104:4–A105:9.

<sup>46</sup> A40:18–22.

<sup>47</sup> A28:10–16.



an injury that occurred soon before the second MRI that was unrelated to the work accident.<sup>48</sup>

Dr. Schwartz also testified that Garrison showed no cervical radiculopathy on March 28, 2018 and did not show any signs of cervical radiculopathy for the first several months after the incident.<sup>49</sup> Dr. Schwartz explained that cervical radiculopathy normally appears immediately following an accident.<sup>50</sup> Dr. Schwartz opined Garrison's improving neck symptoms stemming from the work accident were consistent with a strain and did not require surgery.<sup>51</sup>

On March 8, 2021, the Board granted Garrison's Petition and awarded Garrison total disability benefits from February 12, 2020 to May 22, 2020, an attorney's fee of \$11,214.90 and medical witness fees.<sup>52</sup> The Board concluded that there was sufficient evidence to support a finding that Garrison's cervical spine surgery was reasonable, necessary, and causally related to the March 19, 2018 work injury.<sup>53</sup> The Board found both Garrison and Dr. Zaslavsky to be persuasive and credible.<sup>54</sup> The Board expressly found Dr. Zaslavsky to be more persuasive

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<sup>48</sup> A86:17-89:1; Board Decision at 16.

<sup>49</sup> A70:7-17; A84:14-A85:6.

<sup>50</sup> Board Decision at 13.

<sup>51</sup> *Id.* at 15-16.

<sup>52</sup> *Id.* at 25.

<sup>53</sup> *Id.* at 22.

<sup>54</sup> *Id.* at 19.

than Dr. Schwartz.<sup>55</sup> In relation to the attorney's fee award, the Board decision briefly analyzed the factors outlined by the Delaware Supreme Court in *Gen. Motors Corp. v. Cox*.<sup>56</sup>

Dutton filed a Motion for Reargument on the ground that the award for attorney's fees was excessive and asked for reduction of the given amount.<sup>57</sup> In its Order on Reargument, the Board affirmed the award and stated that the attorney's fee award was reasonable.<sup>58</sup> The Board's Order reads in pertinent part:<sup>59</sup>

[t]he award was derived directly from the statute, and was based on both the *Cox* and *Pugh* factors, as outlined in the Decision, and, as a result of the Board's Decision, [Garrison] is entitled to significantly more benefits. Therefore, Employer's Motion for Reargument is denied.

On May 20, 2021, Dutton appealed to this Court.<sup>60</sup> Briefs were filed on September 9, September 30, and October 14, 2021.

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<sup>55</sup> *Id.* at 22.

<sup>56</sup> 304 A.2d 55, 57 (Del. 1973).

<sup>57</sup> Board Order at 1.

<sup>58</sup> *Id.* at 1–2.

<sup>59</sup> *Id.*

<sup>60</sup> Notice of Appeal, D.I. 1.

## PARTY CONTENTIONS

Dutton has two arguments on appeal. First, Dutton contends that the Board's holding that the surgery was related to the accident in question should be reversed.<sup>61</sup> According to Dutton, the Board's decision is not supported by substantial evidence because i) there were no complaints of cervical radiculopathy until six months after the accident, and ii) there was evidence that Garrison's neck issues improved over the months immediately following the work accident.<sup>62</sup>

Second, Dutton argues that the attorney's fee award is excessive and should be reduced.<sup>63</sup> Dutton claims that it is not enough that the Board recited the *Cox* factors. Rather, in Dutton's view, the Board was required to provide a deeper explanation as to how those factors supported its award.

Garrison contends that the Board's findings were supported by substantial evidence.<sup>64</sup> Garrison also argues that the Board did not abuse their discretion in awarding attorney's fees.<sup>65</sup>

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<sup>61</sup> Appellant's Opening Br., D.I. 9, at 10–15.

<sup>62</sup> *Id.*

<sup>63</sup> Appellant's Opening Br., D.I. 9, at 16–22.

<sup>64</sup> Appellee's Answering Br., D.I. 10, at 8–10.

<sup>65</sup> *Id.* at 10–13.

## STANDARD OF REVIEW

This Court has jurisdiction pursuant to 19 *Del. C.* § 2350.<sup>66</sup> Board appeals are reviewed to determine “whether the ruling is supported by substantial evidence and free from legal error.”<sup>67</sup> Substantial evidence is defined as “such evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>68</sup> The Court “does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions.”<sup>69</sup> Specifically, “[w]hether medical services are necessary and reasonable or whether the expenses are incurred to treat a condition causally related to an industrial accident are purely factual issue[s] within the purview of the Board.”<sup>70</sup> Furthermore, in making factual findings the Board is free to accept the testimony of one medical expert over that of another.<sup>71</sup>

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<sup>66</sup> 19 *Del. C.* § 2350(a).

<sup>67</sup> *Diamond Fuel Oil v. O'Neal*, 734 A.2d 1060, 1062 (Del.1999) (quoting *Stoltz Mgmt. Co., Inc. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992)); 29 *Del. C.* § 10142.

<sup>68</sup> *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

<sup>69</sup> *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

<sup>70</sup> *Bullock v. K-Mart Corp.*, 1995 WL 339025, at \*3 (Del. Super. May 5, 1995).

<sup>71</sup> *See Simmons v. Delaware State Hosp.*, 660 A.2d 384, 388 (Del. 1995); *see also DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 106 (Del.1982).

This Court reviews errors of law *de novo*.<sup>72</sup> When an error of law is not present, this Court’s standard of review is limited to an abuse of discretion standard.<sup>73</sup> An abuse of discretion occurs when the Board has “exceeded the bounds of reason in view of the circumstances . . . .”<sup>74</sup> Pursuant to 19 *Del. C.* § 2320(10), the Board has authority to award certain attorney’s fees.<sup>75</sup> In determining the amount of attorney’s fees to be awarded, the Board must consider the factors as set forth in *Gen. Motors Corp. v. Cox*:<sup>76</sup>

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fees customarily charged in the locality for similar legal services;
- (4) The amount involved and the results obtained;
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and length of the professional relationship with the client;
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) Whether the fee is fixed or contingent;
- (9) The employer's ability to pay; and
- (10) The fees and expenses, if any, received or to be received from any other source.

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<sup>72</sup> See *Bundy v. Corrado Bros.*, 1998 WL 283460, at \*2 (Del. Super. Mar. 25, 1998), *aff’d*, 719 A.2d 489 (Del. 1998); see also *Lehto v. Barrett Bus. Servs., Inc.*, 2009 WL 5177145, at \*1 (Del. Super. Oct. 23, 2009).

<sup>73</sup> See *Lofland v. Econo Lodge*, 2009 WL 3290450 at 2 (Del. Super. 2009).

<sup>74</sup> *Floundiotis v. State*, 726 A.2d 1196, 1202 (Del.1999).

<sup>75</sup> Section 2320(10)(a) reads in pertinent part: “[a] reasonable attorneys’ fee in an amount not to exceed 30 percent of the award or 10 times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller, shall be allowed by the Board to any employee awarded compensation under Part II of this title. . . .” 19 *Del. C.* § 2320(10)(a).

<sup>76</sup> 304 A.2d 55, 57 (Del. 1973); See also *Willis v. Plastic Materials, Co.*, 2003 WL 164292, at \*2 (Del. Super. Jan. 13, 2003) (“The Court cannot exercise its function on appeal if the Board does not make an adequate finding concerning each *Cox* factors.”).

In addition to the *Cox* factors, the Delaware Supreme Court has recognized that the Board may consider non-monetary benefits to the employee in determining an attorney's fee award.<sup>77</sup>

## DISCUSSION

### A. Substantial Evidence

There was substantial evidence supporting the Board's conclusion that Garrison's cervical spine surgery was reasonable, necessary, and causally related to the March 19, 2018 work injury. The Board found that Garrison incurred neck injuries as a result of the incident. Those neck issues were treated and when the problems persisted and worsened, Garrison had surgery on her neck. Although Dutton would have preferred the Board to have placed greater weight on other facts, the Board based its decision on substantial evidence, and thus the Board acted within its purview in deciding that the surgery was necessary, reasonable, and causally related to the accident.

The Board was presented with conflicting expert opinions regarding whether Garrison's spine surgery was incurred to treat a condition causally

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<sup>77</sup> *Pugh v. Wal-Mart Stores, Inc.*, 945 A.2d 588, 592 (Del. 2008).

related to the accident. The deference given to Board decisions regarding medical treatment and expert testimony is illustrated by *Giles & Ransome v. Kalix*.<sup>78</sup> In that case, an employee was authorized to treat his pain with medical marijuana paid for by the employer. The employer argued that the employee's relatively high consumption of medical marijuana was simply drug abuse unrelated to the work injury, and therefore they shouldn't have to pay for it.<sup>79</sup> The Board ordered the employer to pay for all of the medical marijuana even though the employee's consumption sometimes exceeded what an expert testified was a reasonable amount for medical treatment.<sup>80</sup> In affirming the Board's decision, the Superior Court stated:

“This was a legitimate choice among the available explanations for Kalix's large consumption. The employer's continued attack on those findings does not negate the deference the reviewing court gives to the Board, particularly in matters involving witness credibility. . . . The fact that the Board might have concluded otherwise, or there was other evidence in opposition to the evidence credited by the Board does not negate the limited nature of appellate review of Board decisions.<sup>81</sup>

As demonstrated by *Kalix*, the Board's decision to find Dr. Zaslavsky's testimony to be more persuasive than Dr. Schwartz's and to find

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<sup>78</sup> *Giles & Ransome v. Kalix*, 2018 WL 4922911 (Del. Super. Oct. 9, 2018).

<sup>79</sup> *Id.* at \*1–2.

<sup>80</sup> *Id.* at \*2.

<sup>81</sup> *Id.* at \*3.

a causal connection between the surgery and the accident was entirely within the purview of the Board and is outside the scope of this Court's review.

## **B. Attorney's Fees**

- i. There was no error of law.

The award was within the statutory ceiling on awards of attorney's fees. The Board followed 19 *Del. C.* § 2320(10) in awarding attorney's fees, and thus the Board did not commit an error of law. The maximum award under that statute is "30 percent of the award or 10 times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller."<sup>82</sup> According to the Delaware Department of Labor, the average weekly wage in Delaware for the year including March 8, 2021 (the date of the Board's decision to award attorney's fees) was \$1,121.49.<sup>83</sup> Ten times that weekly wage equates to \$11,214.90. Thus, at the time of the Board's decision, the maximum allowable attorney's fee under 19 *Del. C.* § 2320(10) was \$11,214.90.

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<sup>82</sup> 19 *Del. C.* § 2350(a).

<sup>83</sup> Del. Dept. of Labor, *Workers' Compensation Rate Chart (2021)*, available at <https://laborfiles.delaware.gov/main/dia/owc/Workers%20Compensation%20Rate%20Chart.pdf> (last visited Dec. 2, 2021).



In awarding attorney's fees in the amount of "\$11,214.90 or 30 percent of the award, whichever is less,"<sup>84</sup> the Board derived the award of attorney's fees directly from 19 *Del. C.* § 2320(10). Therefore, there was no error of law.

ii. The award of attorney's fees was not an abuse of discretion.

The Board's decision to award the attorney's fees was not an abuse of discretion because the Board expressly considered the *Cox* factors. While consideration of the *Cox* factors was brief and it would undoubtedly be helpful to this Court if the *Cox* factors were discussed at greater length, every *Cox* factor was considered. Dutton does not cite any case that held a Board's award of attorney's fees exceeded the bounds of reason when the Board considered all of the *Cox* factors. In *Willis v. Plastic Materials*, the Superior Court held that the Board abused its discretion in awarding attorney's fees when the *Cox* factors were discussed in a single paragraph and some factors were missing from the analysis.<sup>85</sup> The current matter can be distinguished from *Willis* because every *Cox* factor was considered, albeit briefly.

Delaware Courts do not appear to require the Board's *Cox* factor analysis to be abundantly detailed. In *Short v. Reed Trucking Co.*, the Court upheld a Board's

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<sup>84</sup> Board Decision at 24.

<sup>85</sup> 2003 WL 164292, at \*2 (Del. Super. Jan. 13, 2003).

award of attorney's fees "where the Board simply listed the *Cox* factors and stated in a 'conclusory fashion' it had considered them. . . ." <sup>86</sup> Later in *LaRue v. Steel*, the Court expressly found that merely stating the *Cox* factors in a conclusory fashion was not an abuse of discretion by the Board. <sup>87</sup>

The current case is similar to *Short v. Reed Trucking Co.* Here, the Board briefly applied the *Cox* factors. <sup>88</sup> The Board acknowledged that Garrison's counsel spent at least 15 hours preparing for the two-hour hearing and the Board determined that "this case involved no difficult of factual or legal issues." <sup>89</sup> The Board also found no evidence that Garrison's counsel was precluded from accepting other employment because of this representation. The Board decision stated that the fees customarily charged in the locality for similar legal services was taken into consideration. The Board acknowledged that the period of representation was approximately two and a half years as of the date of the Board's decision, that Garrison's counsel had extensive experience and specialization in workers' compensation law, that the fee arrangement was on a contingency basis, that there was no evidence that Dutton lacked the ability to pay, and that Garrison's

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<sup>86</sup> *LaRue v. Steel*, 2016 WL 537614, at \*6 (Del. Super. Feb. 10, 2016) (quoting *Short v. Reed Trucking Co.*, 2012 WL 1415595, at \*1 (Del. Super. Feb. 14, 2012) *aff'd* 72 A.3d 502 (Del. 2013)).

<sup>87</sup> 2016 WL 537614, at \*6 (Del. Super. Feb. 10, 2016).

<sup>88</sup> Board Decision at 23–24.

<sup>89</sup> *Id.* at 23.

Counsel did not receive compensation from any other source. Accordingly, the Board did not abuse its discretion.

## CONCLUSION

For the foregoing reasons, the Decision of the Industrial Accident Board in this matter is **AFFIRMED**.

**IT IS SO ORDERED.**

*/s/ Mark H. Conner*  
Mark H. Conner, Judge

cc: Prothonotary