Kenneth English v. Reed Trucking, C.A. 215A-05-007 PRW (7/6/2016)
The claimant sought 13% permanency to his right shoulder per Dr. Rodgers. He underwent a rotator cuff repair. Dr. Gelman rated Claimant with 8% based upon the Fifth Edition and 5% using the Sixth Edition. The Board awarded 5% pursuant to Dr. Gelman's opinion. The Board noted the Sixth Edition rating was based upon the specific injury sustained and adjusted for range of motion and other factors while a portion of "Dr. Rodgers' rating 'was based upon the use of an analogous procedure listed in the Fifth Edition.'"

Charles Walls v. David G. Horsey & Sons, No. 1289219 (8/28/2009)
The claimant demanded a 35% permanency rating to his lumbar spine following a single level fusion surgery. Dr. Rodgers placed him in the DRE V category using the Fifth Edition. Dr. Rodgers testified the Fifth Edition is the standard for rating this type of injury, the Sixth Edition yields significantly lower ratings for similar conditions, and the Fifth Edition is consistent with past edition while the Sixth Edition is different without support for the lower ratings. Dr. Piccioni rated the claimant with 19% permanency using the Sixth Edition. Dr. Piccioni testified the Sixth Edition is more diagnosis and functionally based, which better assists in rating the lumbar spine as compared to the Fifth Edition. Dr. Piccioni opined that for the claimant to 35% permanency using the Sixth Edition, he would need another level of disc impairment, a second level of fusion, and other factors. The Board found the 19% rating more appropriate considering the claimant's level of function and overall condition. The Board cited the claimant being released to medium duty and working full-time. The Board found the 35% excessive and pointed to Dr. Rodgers' testimony that a terrible surgical outcome would yield a 37% rating.

Christopher Taylor v. RGS Electrical, Inc., No. 1322587 (8/12/2011)
Dr. Rodgers rated the claimant with 11% permanency to his cervical spine using the Fifth Edition. Diagnostic studies suggested herniations but the claimant did not undergo surgical intervention. Dr. MacEwen, the employer's expert, rated the claimant with 6% permanency using the Sixth Edition. He did not use a conversion factor as he testified the rating was already regionalized. Dr. MacEwen placed Claimant in the DRE I category. The Board accepted Dr. MacEwen's opinion that Claimant was in the upper range of the DRE I category. The Board wrote that the Sixth Edition was more appropriate to use in rating multiple level herniations in the spine and noted the Fifth Edition yielded too high a rating considering the relative mild nature of the injury. However, the Board found Dr. MacEwen failed to convert the rating from whole person to regional impairment and awarded an 8% rating using the 0.75 conversion factor testified to by Dr. Rodgers.

Bruce Bogia v. Contractors Materials, LLC, No. 1283653 (10/27/2009)
The claimant was seeking 30% permanency to his left leg as rated by Dr. Bandera using the Fifth Edition. He initially underwent a patellar tendon repair surgery, developed an infection, and had four subsequent procedures to the knee. Dr. Gelman used the Sixth Edition and rated the claimant with 12% impairment. Dr. Gelman testified the Fifth Edition does not include a diagnosis-based estimate for a patellar tendon rupture; however, the Sixth Edition lists a knee tendon rupture as a Class 1 problem and provides an impairment range of 1% to 13%. The Board found issues with both experts' ratings but awarded the 30% rating because it was more consistent with the fact he underwent five surgeries. The Board disagreed with Dr. Bandera's use of the table for "cruciate *and* collateral ligament laxity" rather than "cruciate *or* collateral

ligament laxity" considering the diagnosis and Dr. Gelman's conclusion that the tendon rupture would not fall into the moderate or Class 2 injury.

Ashley Smack v. Big Lots, No. 1352703 (3/5/2012)
The claimant filed for 25% permanency to her lumbar spine. She had returned to regular duty until being terminated and was then placed on total disability by a subsequent provider following an unrelated domestic violence incident. Dr. Rodgers testified on behalf of the claimant. He found herniations at L3-L4 and L4-L5 and used the range of motion assessment of the Fifth Edition. Dr. Rodgers testified the DRE method was not appropriate because it focuses on single level problems and the claimant has a two level injury. Dr. Piccioni testified on behalf of the employer and rated the claimant with 9%. He used the Sixth Edition because it was more reliable and focuses on function. Dr. Rodgers agreed with Dr. Piccioni that the claimant fell into Class 1 of the Sixth Edition. The Board accepted Dr. Piccioni's opinion and application of the Sixth Edition. The Board specifically noted the claimant's level of function as a factor in its decision.

Gerald Morgan v. McFoy Refrigeration, Inc., No. 1273096 (4/21/2011)
The claimant filed for 15% permanency to his left lower extremity. He was recommended for ankle surgery but did not proceed. Dr. Bandera used the Fifth Edition and relied upon the section on use of an ankle/foot orthosis. Dr. Bandera did not consider the claimant's prior conditions such as gout in his assessment. Dr. Gelman preferred the Sixth Edition for its clear functional diagnostic application. He rated the claimant with 5% permanency and the Board agreed. The Board noted Dr. Bandera's rating was based on gait derangement but he did provide specific rationale in his report, as required by the Fifth Edition. The Board rejected Dr. Bandera's opinion that a 15% rating from the Fifth Edition would fit in the Class 2 of the Sixth Edition - permanency range of 14% to 18% - as Dr. Bandera used a whole person rating and Class 2 was regional impairment ratings. The Board also questioned if partial loss of tendon function would meet the Class 2 category.

Rose Corridori v. Trugreen Chemlawn, No. 1289568 (4/21/2011)
Dr. Kalamchi, testifying on behalf of the employer, utilized the Fifth Edition in rating the claimant's lumbar permanency. He testified the range of motion method was not appropriate for assessing impairment to the spine. Dr. Kalamchi cited the Sixth Edition in explaining "that ROM is no longer used because current evidence did not support it as a reliable indicator of impairment." The Board noted Dr. Kalamchi's concerns with using the range of motion method but questioned why he used the Fifth Edition DRE method, which was not intended for rating a two-level disc replacement surgery. The Board found it reasonable for Dr. Rodgers to use range of motion under the Fifth Edition and accepted his opinion.

William Jackson v. Fletcher's Heating & Plumbing, No. 1319732 (11/1/2011)
The claimant underwent lumbar spine surgery, which involved an artificial disc replacement. Dr. Rodgers rated him with 29% permanent impairment using the Fifth Edition. He rated the disc replacement as same as a fusion surgery, pursuant to *The Guides Newsletter*, which placed Claimant in the DRE IV category. Dr. Barrish utilized the Sixth Edition and rated the claimant with 7% permanent impairment. The Board accepted the employer's rating. It noted the claimant was released to full duty per a Functional Capacity Evaluation and working full-time.

The Board found the Sixth Edition more appropriate considering the claimant's functional capabilities and physical examination findings. It considered *The Guides Newsletter* to be a "stop gap" for rating disc replacements as fusions and noted the Fifth Edition "was not written with the disc replacement in mind; whereas, the [Sixth] [E]dition addresses it."

David Mahoney v. Ferguson Enterprises, no. 1386792 (7/22/2013)
The claimant underwent a cervical discectomy and disc replacement. He filed for 33% impairment to his cervical spine and 10% to the thoracic spine. Dr. Rodgers testified that the displacement surgery is considered alteration of motion segment integrity ("AOMSI") and rated the same as a fusion procedure. He explained the Fifth Edition does not discuss disc replacement surgeries but does address AOMSI. Dr. Rodgers noted the Sixth Edition states that disc replacement are to be treated as AOMSI but declined to use the Sixth because the ratings are too low. Dr. Rodgers placed the claimant in the DRE IV category for the neck and DRE II for the thoracic spine. Dr. Gelman rated the claimant with 6% impairment using the Sixth Edition. However, he did not utilize the arthroplasty section and rather rated the claimant on the theory he sustained a soft tissue injury. Dr. Gelman agreed the disc replacement section of the Sixth would yield a 10% impairment rating and the Fifth Edition would produce a 16% rating using the range of motion method. He did not find any ratable impairment to the thoracic spine. The employer made a Motion for Directed Verdict citing *William Jackson v. Fletcher's Heating and Plumbing* on the basis the Sixth Edition is required for rating disc replacements. The Board denied the motion. It explained that Delaware law does not require any text be used in rating permanency. The Board advised that "[w]hat is important is which rating from the medical experts most accurately captures the degree of impairment that the claimant had sustained as reflected by all the evidence." The Board declined to award permanency to the thoracic spine. The Board rejected Dr. Gelman's rating because it did not take into account the surgery. It noted rating a disc replacement for permanency using only loss of motion would underestimate the level of impairment just as rating it similarly to a fusion would overestimate the impairment. The Board accepted Dr. Rodgers' 33% rating as persuasive.

John Haden .v ALN Construction, Inc. No. 1381761 (10/3/2013)
The claimant underwent a single level cervical fusion prior to his work injury and had the level below fused and a disc arthroplasty on the level above as a result of the accident. Dr. Kalamchi rated the claimant with 48% permanent impairment to the cervical spine and apportioned 32% to the work accident and 16% to the previous injury. Dr. Matz rated the claimant with 20% whole person impairment and apportioned 10% to the work accident. Dr. Kalamchi utilized the Fifth Edition but opposed using the range of motion assessment and placed the claimant in the DRE V category. Dr. Kalamchi apportioned permanency in thirds as three levels were surgically repaired. Dr. Matz initially utilized the Sixth Edition but referred to the Fifth Edition in an Addendum Report to apportion permanency. He did not convert his whole person rating. The Board accepted the claimant's rating. It noted that "[a]lthough the *AMA Guides* are just "guidance" under Delaware Law, the doctor is expected to explain how he or she applied them, and if a departure is made from the prescribed formula, the doctor should be able to articular why." The Board also pointed out converting whole person impairment to regional impairment is required under Delaware Law.

James Leming v. Benjamin Stafford Stables, No. 1309270 (4/7/2009)
The claimant sought permanent impairment to his lungs as a result of "farmer's lung disease." Dr. Eliasson and Dr. Rizzo testified on behalf of the claimant. Dr. Eliasson rated him with 58% impairment to each lung using the Fifth Edition as well as Social Security Disability Ratings and his experience. He testified both methods were outdated. Dr. Eliasson had not reviewed the Sixth Edition. Dr. Rizzo rated 50% impairment to each lung based upon Dr. Eliasson's report. Dr. Meyers testified on behalf of the employer and utilized the Sixth Edition. He rated impairment at 40% per lung using the data from Dr. Eliasson's report. Dr. Meyers rated the claimant with 80% whole person impairment, split the 100% total impairment for the lungs to 50% to each lung, and divided the 80% rating in half to reach regional impairment ratings per lung. The Board accepted Dr. Meyers' rating. It noted Dr. Meyers had taken three courses on the Sixth Edition while Dr. Eliasson had not reviewed the Sixth. The Board did not find Dr. Rizzo's opinion persuasive.

Desmond Jones v. State of Delaware, No. 1337333 (7/23/2014)
The claimant had three lumbar spine surgeries. He filed for 40% impairment to his lumbar spine, 10% to the right leg, and 50% to the left leg. Dr. Rodgers utilized the range of motion model from the Fifth Edition to rate impairment to the legs from lumbar radiculopathy. Dr. Gelman rated Claimant with 39% impairment using the Sixth Edition. He explained the Fifth and Sixth Editions do not allow for separate leg impairment "because the evaluations of the low back subsume or include the neurologic deficits affecting the lower extremities." The Board accepted Dr. Rodgers' rating for the lumbar spine using the range of motion methodology but denied permanency for the lower extremities based upon Dr. Gelman's opinion.

John T. Boorman v. Rexam, Inc., No. 1365249 (9/6/2013)
The claimant underwent a two level neck surgery, which involved an arthroplasty at C4-C5 and a fusion at C3-C4. Dr. Rodgers rated the claimant with 26% impairment to the neck based upon the Fifth Edition and using the range of motion method. Dr. Gelman felt the range of motion method was inappropriate because the claimant's measurements were not reliable or consistent between himself, Dr. Rodgers, and the treating surgeon so he used the Sixth Edition. Dr. Gelman rated the claimant with 10% impairment to the cervical spine. The Board agreed with Dr. Rodgers and accepted his range of motion method. It noted Dr. Rodgers measure range of motion three times and his findings were consistent. The Board relied upon Dr. Rodgers' "explanation that a clinical range of motion measurement is different than a permanency measurement."

Richard Lamb v. City of Wilimington, No. 1373526 (6/23/2014)
The claimant sought permanency to his heart following a compensable heart attack. Dr. Rodgers rated him with 20% impairment using the Fifth Edition. Dr. Pennington rated the claimant with 11% whole person impairment using the Sixth Edition. He noted the Sixth Edition range for whole person impairment only goes up to 65% and agreed a 0.65 conversion factor would convert his 11% whole person rating to 17% regional impairment. The Board awarded 17% impairment to the heart. It rejected Dr. Rodgers' 20% rating in part as the claimant was "basically symptom-free for some time." The Board accepted Dr. Pennington's rating but converted it to regional impairment using the 0.65 conversion factor.

Andrew Higgins v. State of Delaware, No. 1351643 (9/25/2014)
The claimant filed for a 3% increase in permanency for his lumbar spine and a 13% impairment rating for his cervical spine. Dr. Atkins rated the claimant with 10% impairment to the lumbar spine but attributed 3% to the work accident in question as he previously rated the lumbar spine with 7% impairment from a prior injury. Dr. Atkins utilized the DRE categories of the Fifth Edition. Dr. Gelman rated the claimant with 3% to the lumbar spine and 8% to the cervical spine but did not relate such permanencies to the work accident. He consulted both editions but relied upon the Sixth for his ratings. Dr. Gelman disagreed with using the DRE method due to multiple level pathology and incidents. The Board found Dr. Gelman's methodology persuasive. The Board noted the range of motion method was preferred over the DRE categories considering the multilevel involvement. The Board found the claimant to be highly functioning and insufficient evidence of decreased function before and after the accident.

Kenneth Hopkins v. City of Wilmington, No. 1127157 (7/8/2015)
The claimant filed for increased impairment to 95% for his left leg. He had multiple surgeries and was previously paid a total of 75% permanency. Following a failed knee replacement, the claimant's options were limited to amputation or an arthrodesis (fusion) and he proceeded with the latter. Dr. Bandera rated the claimant using the Fifth Edition. He referred to the knee replacement categories and assessed a 95% rating since the knee was nonfunctional. Dr. Matz rated the claimant with 65% impairment. He argued the Fifth Edition no longer applied to the claimant after the knee replacement was removed and noted the Sixth Edition includes ratings for an arthrodesis. The Board accepted Dr. Matz's opinion. The Board found the Sixth Edition "on point" as it included a table on the fusion procedure while Dr. Bandera's use of the Fifth Edition was for knee replacements, which had since been removed.

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

WILLIAM WROTEN,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1358700
	)	
LOWES HOME CENTERS,	)	
	)	
Employer.	)	

DECISION ON PETITION TO DETERMINE ADDITIONAL COMPENSATION DUE & PETITION FOR DISFIGURMENT

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 17, 2017, in the Hearing Room of the Board, in Dover, Delaware.

PRESENT:

MARY DANTZLER

PATRICIA MAULL

Heather Williams, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

James Donovan, Esq., Attorney for the Claimant

Ben Durstein, Esq., Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

William Wroten ("Claimant") injured his left upper extremity and cervical spine in a compensable workplace accident on May 31, 2009, while he was working for Lowes Home Centers ("Employer"). Claimant filed a Petition to Determine Additional Compensation Due on September 21, 2016. Claimant is seeking compensation for a twenty-three percent (23%) permanent impairment to his left upper extremity and a thirty-seven percent (37%) permanent impairment to his cervical spine. In addition, Claimant is seeking disfigurement benefits for his compensable injuries. Employer disputes the degree of impairment to both the cervical spine and left upper extremity.

Claimant's compensation rate for the purposes of a permanency claim is $481.82 per week, based on his average weekly wage at the time of the injury of $722.74.

A hearing on Claimant's petitions was held on April 17, 2017. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. Stephen Rodgers, board certified in occupational medicine, testified by deposition on Claimant's behalf. After reviewing Claimant's pertinent medical records, Dr. Rodgers examined Claimant on August 29, 2016. Dr. Rodgers reported that Claimant's medical history included: a June 22, 2010 left shoulder arthroscopic subacromial decompression and distal clavicle resection; a February 7, 2011 left shoulder arthroscopy, lateral debridement, shoulder debridement and bursectomy; a May 16, 2011 open biceps tenodesis; an August 22, 2011 left shoulder incision and drainage with closure; a November 2, 2014 removal of a C3-4 total disc arthroplasty and revision of anterior cervical discectomy and fusion, C3-4. Dr. Rodgers explained that the single level fusion Claimant underwent was important when evaluating

permanency because it qualified as a single level fusion, which allowed the DRE method to be used. Dr. Rodgers noted that Claimant's most recent diagnoses (as of June 22, 2016) were: cervicalgia or neck pain status post fusion C3-4, removal of artificial disc, dizziness, headache, long-term current use of opiate analgesics, and shoulder impingement syndrome status post-surgery times five (although Dr. Rodgers counted four surgeries). Claimant's medical records also indicate Claimant received shoulder injections and numerous diagnostic studies. Claimant's history indicated he had undergone four left upper extremity surgeries and two cervical spine surgeries.

When Dr. Rodgers examined Claimant on August 29, 2016, Claimant reported the mechanism of injury as initially occurring when he was pulling doors and then a second event occurring when Claimant was moving panels. The second event resulted in bruising on Claimant's left arm and associated areas. Claimant's treatment included: a narcotic pain relieving patch, narcotic pain medication, and a muscle relaxant. Claimant was also treating for vertigo and headaches. Claimant reported that his vertigo symptoms kept him in bed for several days at a time and prevents him being able to perform some activities of daily living. Claimant was using an ambulatory assistive device at the time of his visit with Dr. Rodgers. Claimant described his shoulder as painful and causing popping and cracking. Claimant experienced pain in his neck, which worsened with both activity and weather. Claimant described the severe pain in the left side of his neck, which triggered headaches, and decreased range of motion. Claimant was not driving and reported pain in his elbow and shoulder, numbness extending in the fourth and fifth fingers of the left arm, and the occasional sensation of pins and needles.

Upon physical examination, Dr. Rodgers found Claimant to have: increased muscle tone in the posterior cervical musculature; no tenderness to light palpation; increased muscle tone in

the neck extending to the shoulder slopes; active pain free ranges of motion of the cervical spine of forward flexion 35 degrees (moderate loss), extension of 30 degrees (moderate loss), side bending to the left 20 degrees and to the right 25 degrees (moderate loss), rotation to the left of 40 degrees and to the right of 45 degrees (moderate loss); normal upper extremity reflexes; globally decreased strength on the left compared to right; normal right arm ranges of motion; normal left wrist ranges of motion; mild loss of flexion in the left elbow; ranges of motion of the left shoulder of abduction of 100 degrees, abduction of 100 degrees, flexion of 110 degrees, extension of 30 degrees, adduction of 10 degrees, and, external and internal rotation of 50 degrees (moderate to severe losses).

Using the *American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition,* ("*The Guides*"), Dr. Rodgers calculated Claimant's cervical spine impairment to be 37% permanency causally related to the work injury. Dr. Rodgers reached his conclusion based on Claimant's single level cervical fusion, using the applicable DRE method and Category IV. Dr. Rodgers testified that Claimant qualified for Category IV because he has a loss of motion of a motion segment due to developmental fusion or successful or unsuccessful attempt at surgical arthrodesis. Dr. Rodgers noted that the presence or absence of radiculopathy was not a factor when evaluating the cervical spine. Claimant's Category IV qualification calculated to a 25 to 28 percent impairment of the whole person. Dr. Rodgers placed Claimant at the high end of the spectrum because of the severity of the problem the two procedures that were required to get Claimant to reach the level of improvement he had and converted his 28% whole person impairment to a 37% regional impairment based on that severity.

Dr. Rodgers calculated Claimant's left upper extremity impairment to be a 23% impairment based upon Claimant's history, which included a distal clavicle

excision/arthroplasty. Using Table 16-27 of *The Guides*, Dr. Rodgers determined that Claimant's distal clavicle excision isolated was valued at 10%, which when combined with Claimant's severely constricted ranges of motion, based on Figures 16-40, 16-43 and 16-46 in *The Guides*, calculated to a total of 14% for loss of motion. Dr. Rodgers then combined (using *The Guides'* formula) the 14% loss of range of motion with the 10% for the excision procedure to reach an impairment rating of 23% impairment for the left upper extremity. Dr. Rodgers confirmed that Dr. Kates' conclusion that Claimant's cervical spine symptoms were not related to Claimant's May of 2009 work injury did not impact his conclusion that Claimant's cervical spine symptoms were related to the 2009 work injury, as Claimant had consistently reported left sided neck pain. Dr. Rodgers noted that he had focused on the shoulder primarily in his calculation of the left upper extremity impairment and had "combined" the values for the shoulder impairment and elbow impairment (14% and 10% respectively) to reach a 23% impairment.

On cross examination, Dr. Rodgers acknowledged that he had not personally reviewed any diagnostic studies for Claimant's neck or left shoulder, but that *The Guides* recommend a personal review of such studies whenever possible. Dr. Rodgers confirmed that Claimant's fusion procedure qualified him for DRE Category IV. Dr. Rodgers concluded that Claimant's level of participation in activities of daily living were instructive in determining where Claimant falls on the whole person impairment range (from 25% to 28%). Dr. Rodgers admitted that active range of motion (as he used to calculate Claimant's shoulder impairment) is a subjective element, but confirmed that Claimant's range of motion measurements were consistent with the severity of Claimant's condition, which had required four surgical interventions. Dr. Rodgers confirmed that he had placed Claimant at the higher end of the cervical spine rating because of

his functional deficits from his neck injury. Dr. Rodgers acknowledged that Claimant experiences episodes of vertigo, which also prevent him from participating in activities of daily living, but which were unrelated to his neck injury. Dr. Rodgers confirmed that Claimant's pain regimen was his functional problem relating to his neck injury.

Claimant testified that he continues to have headaches and vertigo. In 2009, Claimant was a department manager of windows and doors for Employer and was moving steel doors from the entry when he felt an "electrical shock" go through one arm, his chest and through the other side. Approximately two weeks later, he and a co-worker were restocking shelves and Claimant had "the same electrical shock" feeling in his neck and left arm. Since the second injury, Claimant has treated with numerous doctors. Claimant testified that his shoulder and elbow continue to hurt. Claimant reported that the tendonisis surgery alleviated the bicep pain significantly.

Claimant testified that he gave his full effort when he was evaluated with Dr. Kates because he wanted to get better. Claimant testified that his neck continues to hurt and when it hurts it causes headaches, which cause dizziness. Claimant reported that he continues to get the "electrical shock" feeling from time to time. Claimant reported a reduced range of motion in his neck and an inability to sleep on his left side or stomach. Claimant testified that he can no longer do yard work or the dishes, nor can he play ball with children or ride a bicycle. Claimant cannot drive a vehicle because of his medication, a lack of strength in his left arm and his inability to turn his neck.

Claimant reported that he has a scar on the front of his neck from the surgery. The scar on the front of Claimant's neck measures approximately ¾ of an inch long and approximately

1/8 of an inch wide, with an area surrounding it that is approximately ¼ of an inch. Claimant testified that he was embarrassed at first from the scar and there are sometimes people who ask him about it. Claimant reported that his wife drove him to the hearing.

On cross examination, Claimant reported that he is currently treating for his left elbow and for his shoulder. Claimant testified that his elbow has always been the most painful, but he has not had surgery for his elbow. Claimant denied that he is prohibited from driving, but reported that when he turns his head he experiences that "shock feeling" and is "out of it," so he is scared to drive. Claimant acknowledged that Dr. Rodgers concluded that his vertigo issues are not related to the work accident, but that condition does prevent him from performing some activities of daily living as well. Claimant reported that his vertigo affects his life a great deal and has even prevented him from going to the bathroom by himself for several consecutive days because he was in so much pain. Claimant reported that his medication has helped with the headaches, but he is incapable of doing yard work because of it. Claimant uses a cane to maintain his balance. Claimant did not seek treatment after the first "electrical shock" feeling, but did after the second time it occurred.

Dr. Jonathan Kates, board certified in orthopedic surgery, testified by deposition on Employer's behalf.[1] After reviewing Claimant's pertinent medical records, Dr. Kates examined Claimant on October 19, 2016 and prepared a corresponding report dated October 20, 2016. During the October 19, 2016 examination, Claimant reported that he had sustained a work injury while pulling doors off shelves onto a platform when he felt an "electric shock" going from his left hand through his arm to his shoulder and across his back. Claimant continued to work after

[1] Claimant objected to a portion of Dr. Kates' testimony involving Claimant's cervical spine impairment. The ruling on that objection is discussed later in this decision and the current summary is based on that ruling.

the initial incident. Two weeks later, Claimant experienced a similar episode of "electric shock" pain while stocking some paneling. After the second incident, Claimant noticed bruising on the front of his left arm spreading to his chest wall. Claimant reported the beginning of neck pain after the second incident.

Claimant sought treatment and underwent arthroscopic surgery of his left shoulder in 2010. Claimant reported that he did not improve after the 2010 surgery and continued to have pain in his elbow and biceps areas. Physical therapy did not improve Claimant's condition and Claimant underwent a second arthroscopic surgery of his left shoulder, which helped alleviate the grinding pain in his shoulder, but the remainder of Claimant's pain continued to worsen. Claimant underwent additional surgeries, including a detachment and reattachment of his biceps tendon to his humerus; a repair of his labrum; a 2013 neck surgery at the C3-4 level; and a 2015 neck fusion. Claimant continued to experience pain in his elbow and forearm. Dr. Kates explained that Claimant's 2013 neck surgeries included the implantation of an artificial disc, the subsequent removal of that disc and a fusion of L3-4.

When Claimant saw Dr. Kates in October of 2016, Claimant continued to receive injections, which were providing him with limited pain relief and he continued to see a neurologist for headaches and to treat for left arm pain. Claimant was receiving dry needling treatment and guided injections to his left upper extremity, which was to treat radiculopathy. At the time of the visit, Claimant reported his symptoms to include: left sided neck soreness, headaches, dizziness, "shock" arm pain, and range of motion pain in his left upper extremity. Claimant described his activities of daily living to include: difficulty dressing, and an inability to drive, open jars, wash dishes, perform other household chores, play guitar or participate in sports. Upon physical examination, Dr. Kates found Claimant to: use an ambulatory assistive

device; hold his left upper extremity close to his side as he walked; have an unsteady gait; have tenderness in the left trapezius and left side of his neck; have decreased range of motion of his cervical spine; have weak grip, but normal finger and wrist strength; have a centimeter of atrophy in his left arm compared to his right; have diffuse atrophy of his left deltoid muscle, as well as limited left shoulder range of motion; be without scapular substitution on attempted adduction or forward flexion of his left shoulder; have marked guarding when passive range of motion testing; and, have tenderness to light touch on the front of his elbow. Dr. Kates explained that Claimant had an objective decreased range of motion of his cervical spine, which would be expected after a cervical fusion; however, he did not find Claimant's left shoulder decreased range of motion to be a reliable finding due to self-limitation and lack of scapular substitution. Dr. Kates found Claimant's reaction to palpation of the cervical spine to be an exaggerated response. Based upon his examination, Dr. Kates diagnosed Claimant with a sprained left shoulder, a partial tear of the rotator cuff, and a sprained left forearm or elbow with a partial tear of the medial collateral ligament of his elbow, due to the May 31, 2009 work injury. Dr. Kates explained that, while he understood that Employer had accepted the current cervical spine condition as compensable, he did not find it to be causally related from a medical perspective because he did not find it to be consistent with the mechanism of injury, like Claimant's shoulder injury was.

Using *The Guides*" 5th Edition, Dr. Kates concluded that Claimant's permanent impairment rating for his left upper extremity was fourteen percent (14%) for his left upper extremity because Claimant received 10% for his resection arthroplasty and twenty percent (20%) for his elbow instability, both of which convert to fourteen percent (14%) for the left upper extremity. Dr. Kates did not use range of motion due to his finding that Claimant's range

of motion results were unreliable. Dr. Kates referenced Tables 16-27, 16-23 and 16-18 when calculating Claimant's rating. Dr. Kates explained that a mild finding on Table 16-23 would be if the examiner is holding the patient's elbow and pushing the forearm outward causing a slight amount of laxity. Dr. Kates determined Claimant had a 20% joint impairment combined with the twenty percent (20%) for the proximal radial ulnar, which constituted a twenty percent (20%) impairment of the upper extremity in Table 16-18. Dr. Kates concluded that Claimant's elbow impairment of four percent (4%), combined with his shoulder impairment of ten percent (10%), resulted in a fourteen percent (14%) upper extremity impairment rating.

On cross examination, Dr. Kates admitted that he had not included a permanency rating to the cervical spine in his October 19, 2016 report, nor was the cervical spine rating addressed in an addendum to that report. Dr. Kates admitted that his October 19, 2016 report incompletely explained his permanency rating for Claimant's left upper extremity as well.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Evidentiary Issue

Claimant objects to Dr. Kates' testimony as to the cervical spine rating because Dr. Kates did not rate the cervical spine in his first report, nor did he provide a cervical spine rating an addendum to his report. Claimant argues that, while Dr. Kates did explain Claimant's cervical spine rating at the time of his deposition, it was too late for Dr. Rodgers to respond at that time. Claimant objects to Dr. Kates' testimony regarding the cervical spine rating only, but not to his left upper extremity rating. Employer was aware, prior to Dr. Rodgers' testimony, that Claimant objected to a portion of Dr. Kates' testimony.

Employer acknowledges that, from a common practice perspective, it would have been better for Dr. Kates to have included the cervical spine rating in his report. Employer

acknowledges that there was no rating in the report, but argues that Claimant had time to object beforehand. Employer argues that the Board routinely accepts alternate ratings using different editions of *The Guides* and both doctors placed Claimant in the same category for the cervical spine rating. Additionally, Employer submits that there is no prejudice to Dr. Rodgers because he was asked why he calculated a higher rating during his deposition and Dr. Kates did address both the upper extremity and cervical spine calculation in his deposition. Employer admits that Dr. Kates had determined that the cervical spine injury, from a medical perspective, was "not related" to the work injury; and therefore, he did not include a cervical spine permanency rating in his initial report, nor did he include a cervical spine rating in the addendum to that report.

While the Board may, in its discretion, disregard any rules of evidence or legal procedures, it must observe fundamental principles of justice, such as due process. *General Chemical Div., Allied Chemical & Dye Corp. v. Fasano,* 94 A.2d 600, 601 (Del. Super. 1953). Furthermore, the production of an expert witness report is necessary to provide "a full, fair, and effective adjudication of the issues by allowing a more informed cross-examination of the witness." *Eanes v. Peninsula United Methodist Homes*, Del. Super., C.A. No. 85A-NO-5, Ridgely, J., 1988 WL77728 at *4 (July 1, 1988). In this case, Employer admits that Dr. Kates did not include any permanency rating regarding Claimant's cervical spine in his report or in an addendum to that report prior to his deposition. In fact, Dr. Kates did not provide any conclusions and/or testimony regarding Claimant's cervical spine, until his deposition testimony. Thus, Claimant was unable to conduct an informed cross examination on the issue of the cervical spine impairment and was unfairly prejudiced by the exclusion of that information in the report. Therefore, the Board finds that Dr. Kates' testimony regarding Claimant's cervical spine impairment rating should be stricken from the record.

Permanent Impairment

The Delaware Workers' Compensation Act provides for proper and equitable compensation for the loss or loss of use of any member or part of the body. *See* 19 *Del. C.* § 2326. It is the function of the trier of fact, and not the physician, to determine the degree of a claimant's impairment. *Turbitt v. Blue Hen Lines, Inc.*, 711 A.2d 1214, 1215 (Del. 1998); *Poor Richard Inn v. Lister*, 420 A.2d 178, 180 (Del. 1980). The burden of proof rests with Claimant. The primary dispute between the experts is the degree or amount of the permanency rating. In this case, the Board finds that Claimant has a thirty-seven (37%) impairment to his cervical spine and a twenty-three percent (23%) impairment to his left upper extremity, causally related to the work accident.

Regarding Claimant's cervical spine, as discussed above, Dr. Kates did not provide a cervical spine rating until the date of his deposition and the Board struck that portion of his testimony. Using the applicable DRE method, Dr. Rodgers concluded that Claimant has a 37% impairment to the cervical spine based on Claimant's single level cervical fusion, which placed Claimant in Category IV. Dr. Rodgers explained that Claimant qualified for Category IV because he has a loss of motion of a motion segment due to developmental fusion or successful or unsuccessful attempt at surgical arthrodesis. Dr. Rodgers noted that Claimant's Category IV qualification calculated to a 25% to 28% impairment of the whole person. Dr. Rodgers placed Claimant at the high end of the whole person spectrum because of the severity of the problem Claimant had and converted Claimant's 28% whole person impairment to a 37% regional impairment based on that severity.

Claimant reported that he continues to have neck pain, which causes headaches. Claimant testified that he continues to get the "electrical shock" feeling from time to time and that he has a

reduced range of motion in his neck. Claimant cannot sleep on his left side or stomach. Claimant testified that he cannot do yard work or the dishes, play ball with kids, or ride a bicycle. Claimant cannot drive a vehicle because of his medication, a lack of strength in his left arm and his inability to turn his neck.

Regarding Claimant's left upper extremity, Dr. Rodgers calculated Claimant's left upper extremity impairment to be a 23% impairment based upon Claimant's history, which included a distal clavicle excision/arthroplasty. Dr. Rodgers concluded that Claimant's distal clavicle excision (valued at 10%), combined with Claimant's severely constricted ranges of motion, calculated to a total of 14% for loss of motion. Using *The Guides* formula, Dr. Rodgers then combined the 14% loss of range of motion with the 10% for the excision procedure to reach an impairment rating of 23% impairment for the left upper extremity.

Claimant testified that he cannot sleep on his left side and that his activities of daily living are restricted because of his left sided weakness and pain. Dr. Kates acknowledged that Claimant had limited range of motion in his left shoulder. Dr. Kates concluded that Claimant sustained a sprained left shoulder, with a partial tear of the rotator cuff, and a sprained left forearm or elbow with a partial tear of the medial collateral ligament of his elbow, due to the May 31, 2009 work accident.

Based on all the above, the Board finds Dr. Rodgers' testimony to be more persuasive than Dr. Kates' and concludes that Claimant has a thirty-seven percent (37%) impairment to his cervical spine and a twenty-three percent (23%) permanent impairment to the left upper extremity, both of which are causally related to the work accident.

Disfigurement

The Board may award "proper and equitable compensation for serious and permanent disfigurement to any part of the human body up to 150 weeks, provided that such disfigurement is visible and offensive when the body is clothed normally." 19 *Del. C.* § 2326(f). Factors that the Board should consider in determining the number of weeks of compensation are (a) the size, shape and location of the disfigurement, (b) the social and psychological impacts suffered by the claimant, (c) the comparative severity of the disfigurement and (d) other relevant matters. *Colonial Chevrolet, Inc. v. Conway*, Del. Super., C.A. No. 79A-FE-13, Longobardi, J., slip op. at 2 (April 28, 1980); *see Murtha v. Continental Opticians, Inc.*, Del. Supr., No. 395, 1997, Walsh, J. (January 16, 1998)(Order)(adopting the *Colonial Chevrolet* formulation). Evaluating the impact and severity of a disfigurement is inherently subjective and not amenable to measured calculation. *Roberts v. Capano Homes, Inc.*, Del. Super., C.A. No. 99A-03-013, Del Pesco, J., 1999 WL 1222699 at *3 (November 8, 1999).

The Board fully described the size, shape and location of the disfigurement in the "Summary of the Evidence," and it incorporates that description here. It is one surgical scar on the front of Claimant's neck. The scar is not very long or very wide. Claimant testified that occasionally people notice it and ask him about it. While the disfigurement is not as severe or grotesque when compared to more dramatic disfigurements, such as scarring on the face, amputations or burn scars, it is somewhat noticeable. The placement on the front of Claimant's neck makes the scar more visible than if it was on another part of the anatomy hidden by seasonal clothing, but less visible than if it was on the face.

Taking into account all the discussed considerations and rating Claimant's scars on a scale from 0 to 150 weeks, the Board awards Claimant a total of 2 weeks of benefits for the scar.

When a body part has suffered permanent impairment as well as disfigurement, the Board is required to (1) rate the number of weeks to be awarded on the standard 0 to 150 scale, then (2) calculate the number of weeks to be awarded on a scale between 0 and the number of weeks awarded for permanent impairment plus 20%, and then (3) give a disfigurement award of the higher of the two numbers of weeks. *See Bagley v. Phoenix Steel Corp.*, 369 A.2d 1081, 1083-84 (Del. 1977); *Murtha v. Continental Opticians, Inc.*, Del. Super., C.A. No. 96A-02-012, Alford, J. (August 27, 1996). In this case, Claimant received a total of 111 weeks of compensation for permanent impairment to his cervical spine (37% of 300 weeks). Applying the *Bagley* formula in this case results in the second scale being from 0 to 133.2 weeks (111 weeks of permanent impairment plus twenty percent, *i.e.*, 22.2 weeks). This is smaller than the normal scale of 0 to 150 weeks. Under this smaller scale, considering the same factors set forth above, the Board would award less than 2 weeks for Claimant's disfigurement. Because the award calculated on the larger 0 to 150 scale is higher, that is what Claimant is awarded.

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." 19 *Del. C.* § 2320. At the current time, the maximum based on Delaware's average weekly wage calculates to $10,341.80. The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55 (Del. 1973). The Board is permitted to award less than the maximum fee and consideration of the *Cox* factors does not prevent the Board from granting a nominal or minimal fee in an appropriate case, so long as some fee is awarded. *See Heil v. Nationwide Mutual Insurance Co.*, 371 A.2d 1077, 1078 (Del.

1977); *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96A-01-005, Cooch, J., 1996 WL 527213 at *6 (August 9, 1996). A "reasonable" fee does not generally mean a generous fee. *See Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966). Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation. By operation of law, the amount of attorney's fees awarded applies as an offset to fees that would otherwise be charged to Claimant under the fee agreement between Claimant and Claimant's attorney. 19 *Del. C.* § 2320(10)a.

Claimant has achieved an award of permanent impairment and disfigurement. By the Board's calculation, the total value of this award comes to $82,150.31 (37% of 300 (111) weeks of compensation for the cervical spine plus 23% of 250 (57.5) weeks of compensation for the upper extremity plus 2 weeks of disfigurement at the rate of $481.82 per week). Thirty percent of this calculates to $24,645.09, which is the maximum fee available with respect to the awards received through this decision.

Claimant's counsel submitted an affidavit stating that approximately 25 hours were spent preparing for the hearing, which itself lasted approximately 1.5 hours. Claimant's counsel was admitted to the Delaware Bar in 2009 and he is experienced in workers' compensation litigation, a specialized area of law. His initial contact with Claimant with respect to this matter was in August of 2011, so the period of representation was roughly five years at the time of hearing. This case involved no unusual or difficult question of law or fact. It required only average skill to present the case properly. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances. There is no evidence that counsel was actually precluded from accepting other employment because of his representation of Claimant, although naturally he could not work on other matters at the exact same time that he

was working on this one. Counsel's fee arrangement with Claimant is on a thirty percent contingency basis. Counsel does not expect to receive compensation from any other source with respect to this particular litigation. There is no evidence that the employer lacks the financial ability to pay an attorney's fee.

Taking into consideration the fees customarily charged in this locality for such services as were rendered by Claimant's counsel and the factors set forth above, the Board finds that an attorney's fee in the amount of $7,950.00 is reasonable in this case. The Board is satisfied that this amount adequately reflects the value of any non-monetary benefit that may potentially arise from this decision. *See Pugh v. Wal-Mart Stores, Inc.*, 945 A.2d 588, 591-92 (Del. 2008).

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

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board finds that Claimant has a twenty-three percent (23%) permanent impairment to his left upper extremity and a thirty-seven percent (37%) permanent impairment to his cervical spine, causally related to his work accident. This equates to a total of 168.5 weeks of compensation (57.5 weeks of compensation, or 23% of 250 weeks for the left upper extremity plus 111 weeks of compensation, or 37% of 300 weeks for the cervical spine). At Claimant's established compensation rate of $481.82 per week, this amounts to a total award of $81,186.67 for his left upper extremity and cervical spine permanent impairments. Claimant is awarded two weeks for disfigurement, which amounts to $963.64. Claimant is awarded a reasonable attorney's fee and the payment of his medical witness fees.

IT IS SO ORDERED THIS 28th DAY OF APRIL, 2017.

INDUSTRIAL ACCIDENT BOARD

/s/Mary Dantzler
MARY DANTZLER

/s/Patricia Maull
PATRICIA MAULL

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

HEATHER WILLIAMS

Mailed Date: 5.2.17

OWC Staff