

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

NABOR SANTOS,)
)
 Employee,)
)
 v) Hearing No. 1301901
)
 CITISTEEL USA, INC.,)
)
 Employer.)

DECISION ON PETITION TO DETERMINE ADDITIONAL COMPENSATION DUE

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause, by stipulation of the parties, came before a Workers' Compensation Hearing Officer on September 5, 2008, in a Hearing Room of the Board, in New Castle County, Delaware. The record was left open until October 16, 2008, in order for the parties to supplement the record with Memoranda of Law regarding whether the Fifth or Sixth Edition of the *AMA Guides to the Evaluation of Permanent Impairment* should be utilized in determining the permanency rating. An extension of time for issuance of the decision was taken pursuant to DEL. CODE ANN. tit 19, § 2348(k).

PRESENT:

DEBORAH J. MASSARO
Workers' Compensation Hearing Officer

APPEARANCES:

Gary S. Nitsche, Attorney for the Employee

Christopher T. Logullo, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Nabor Santos ("Claimant") injured his right foot in December of 2006 while he was working for Citisteel USA, Inc., ("Employer"), as a metal technician. In a decision dated October 30, 2007, the Board found that Claimant's injury was compensable and awarded a closed period of total disability, and medical expenses. Claimant's wage at the time of the incident was \$620.40 per week, resulting in a compensation rate of \$413.60 per week

On March 12, 2008, Claimant filed a Petition to Determine Additional Compensation Due seeking a ten percent permanent impairment to his right lower extremity, as determined by Dr. Stephen J. Rodgers based upon the *AMA Guides to the Evaluation of Permanent Impairment* ("*the Guides*"), Fifth Edition. Employer maintains that Claimant's permanency rating is one percent based on the Sixth Edition of *the Guides*.

The parties stipulated that this case could be heard and decided by a Workers' Compensation Hearing Officer, in accordance with title 19, section 2301B(a)(4) of the Delaware Code. When hearing a case by stipulation, the Hearing Officer stands in the position of the Industrial Accident Board. *See* DEL. CODE ANN tit. 19, § 2301B. A hearing was held on Claimant's petition on September 5, 2008 and the record was left open until October 16, 2008 so that the parties could supplement the record with Memoranda of Law regarding whether the Fifth or Sixth Edition of *the Guides* should be utilized in determining Claimant's permanent impairment. This is the decision on the merits of Claimant's petition¹

¹ Normally, decisions are to be issued within fourteen days of a hearing. *See* DEL. CODE ANN tit. 19, § 2348(k). Because of workload demands and other time restraints, it was necessary to take an extension of time to issue this decision in accordance with title 19, section 2348(k) of the Delaware Code.

SUMMARY OF THE EVIDENCE

Dr. Steven J. Rodgers, a physical medicine and rehabilitation specialist, testified at the hearing on behalf of Claimant. He examined Claimant on February 7, 2008 and reviewed the pertinent medical records. He opines that Claimant sustained a ten percent permanent impairment to his right lower extremity as a result of the cumulative effect of his work with Employer as a metal technician.

By way of medical history Claimant's treating doctor, Dr. W Scott Newcomb, diagnosed Claimant with pain in the right foot, plantar fasciitis and tarsal tunnel syndrome. Plantar fasciitis is an inflammation of the connective tissue of the heel. Dr. Newcomb prescribed prostheses, or shoe inserts, injections and medications. Claimant also underwent an EMG on May 10, 2007 which suggested right tarsal tunnel syndrome. A right foot MRI revealed an unrelated abnormality, but there was no mass lesion in the tarsal tunnel.

An August 15, 2007 note by Dr Newcomb lists the above diagnoses, and states that Claimant was improving. So Dr. Newcomb did not perform another injection, but he was concerned that Claimant's improvement was related to the fact that he was no longer working and only walking minimally. At Claimant's most recent visit with Dr. Newcomb on May 6, 2008 the listed diagnoses remained the same and Dr Newcomb offered a Cortizone shot, home physical therapy exercises, and massage. The shoe insert was fitting well and providing support.

At the time of his examination with Dr. Rodgers in February of 2008 Claimant complained of constant aching and pain in the right foot. There was a burning sensation in the right foot, with the pain being worse in the heel area. When it is cold Claimant feels like a bone is going to crack. At times Claimant limps. He takes Ibuprofen. Claimant was performing sedentary type work.

Upon physical examination Claimant's strength was consistently decreased in plantar flexion and dorsiflexion on the right side, compared to the uninjured side. Ranges of motion were measured using an angle measuring device, and were abnormal in dorsiflexion and eversion of the right foot. Dr. Rodgers points out that Dr. Gelman did not measure Claimant's ranges of motion, which is required by *the Guides*.

Dr. Rodgers utilized the Fifth Edition of *the Guides*, Chapter 17, Section 17.3 and Table 17.2, to rate Claimant with a ten percent permanency of the right lower extremity for the plantar fasciitis and tarsal tunnel syndrome. He considered the parameters listed in Table 17.2, and finds that Claimant falls into three categories for impairment. First, Claimant is impaired in manual muscle testing because he has a loss of strength in two parameters. Dr. Rodgers found decreased strength in plantar flexion and dorsiflexion on the right side which could be rated at approximately thirty percent, pursuant to Table 17.8. Using his clinical judgment, based on Claimant's loss of strength, which was toward the lower end, Dr. Rodgers places Claimant at approximately one third of the thirty percent scale, or at ten percent.

Claimant also has range of motion deficits. Pursuant to Table 17.11 his plantar flexion capability is beyond the range of impairment, or a seven percent impairment, and pursuant to Table 17.12 Claimant has a two percent impairment in eversion, the total of which equal a nine percent permanent impairment rating for the decrease in Claimant's ranges of motion.

Finally, Claimant has a peripheral nerve injury because he has documented tarsal tunnel syndrome based on his EMG and Dr. Newcomb's records, even though Dr. Rodgers did not elicit it clinically. Pursuant to Table 17.37 the lateral plantar nerve is the nerve affected by the syndrome and it is appropriate to allow up to five percent for motor loss; up to five percent for sensory loss; and up to five percent for dysesthesias (painful tingling). Dr. Rodgers rates the

peripheral nerve injury at below nine and below ten. He did not perform these calculations because although Claimant does have tarsal tunnel, it is not a severe case

Table 17-2 does not allow for combination of range of motion or strength testing. Section 17.3, paragraph 10, states that if there are several alternatives, use the grouping that provides the greatest impairment percentage. Thus, as mandated by *the Guides*, Dr. Rodgers picked the higher percentage for Claimant's right lower extremity permanency rating, or ten percent for loss of strength, and opines that Claimant has a ten percent permanent impairment of his right lower extremity.

Dr. Rodgers does not use the Sixth Edition for musculoskeletal diagnoses, because based on his clinical judgment the Fifth Edition is more accurate. He points to the fact that there have been fifty-four errata sheets issued since the Sixth Edition has been published and that other states are formally not using it based on legislation. Still other states have not yet implemented it. He concedes that as of August of 2008 Pennsylvania requires that the Sixth Edition be used in workers' compensation cases for permanency ratings. The Sixth Edition utilizes different methods for calculating impairment which, in Dr. Rodgers' opinion, are acceptable for non-musculoskeletal injuries, but not for musculoskeletal injuries. He contends that the editors of the Sixth Edition are all defense oriented physicians.

During the hearing Dr. Rodgers also evaluated Claimant's condition using the Sixth Edition of *the Guides*, and determined that Claimant has a nine percent permanent impairment of his right lower extremity. Dr. Rodgers arrived at this figure based on the percentage ranges for range of motion deficits, which are the same as in the Sixth as in the Fifth Edition. There are no strength assessments that are quantifiable for impairment in the Sixth Edition. Thus, Claimant's permanent impairment rating is nine percent under the Sixth Edition using Table 16.22.

On cross-examination, Dr. Rodgers indicated that he has studied the Sixth Edition and performed sample problems. He took his first formal course in March and has taken several courses related to the Sixth Edition.

He agreed that Claimant's MRI report of June 2007 revealed no masses within the tarsal tunnel, and an old tear of the anterior talo-fibular ligament, which is on top of the foot to the outside. This could mimic a medial plantar nerve, but not a lateral plantar nerve. Dr. Rodgers did not find physical evidence of tarsal tunnel syndrome. He agreed that a patient can have a positive EMG and negative clinical findings.

Dr. Rodgers agreed that on August 15, 2007 Claimant told Dr. Newcomb that he was feeling much better, the burning sensation was gone, and he had no pain in heel when he is walking during the day.

Dr. Rodgers agreed that *the Guides* state that measurements for manual muscle testing should be consistent on different occasions if they are made by one examiner, and if made by two examiners they should be consistent between examiners. He pointed out though that for strength testing there can be a difference of one class. He agreed that a record from Dr. Brian Brice, Delaware Valley Physiatry, dated May 4, 2007, notes that Claimant has normal strength. Dr. Rodgers did not use any device to measure Claimant's strength.

With regard to range of motion, Dr. Rodgers measured Claimant's ROM on the left side also and it was normal. Dr. Rodgers agreed that under *the Guides* if multiple evaluations exist and there is inconsistency of a rating class between the findings of two observers then the results are invalid. He does not believe that Dr. Gelman's range of motion testing is valid because Dr. Gelman did not use a measuring device as required by *the Guides*. He agreed that there is a subjective component to range of motion testing since it is under the control of the examinee.

Dr. Rodgers agreed that under the Sixth Edition of *the Guides* in consideration of the diagnosis plantar fasciitis, Claimant would have a one percent rating

Claimant testified on his own behalf at the hearing through an interpreter. He is fifty-one years old. He has been in the United States since he was twenty-two years old. He understands some English.

His right foot pain is intense, and on a ten point scale he rates it as ranging from four to nine. He also experiences a burning sensation. Temperatures affect his condition and when it is cold his foot feels like it is going to crack. It always hurts him, but if he walks a lot the pain and burning are worse. He wears orthotics on a daily basis. He takes Ibuprofen two to three times daily. Claimant continues to see Dr. Newcomb for pain, and last saw him approximately twenty days ago.

Currently, Claimant works in an office performing more sedentary work than his previous job. It involves approximately ninety percent less walking.

When Claimant saw Dr. Gelman in June of 2008 an interpreter was not provided. Dr. Gelman did not touch his foot, and the extent of the examination included walking three steps forward and three steps backward, removing his right shoe and sock, and moving his foot forward and backward. Claimant states that at the time of his exam his foot did not hurt, but if Dr. Gelman had touched his foot it would have been painful.

On cross-examination Claimant stated that his pain comes and goes and intensifies depending on what he is doing. The temperature and other factors affect his pain. If the temperature is high he does not have to walk to feel pain. In July he told Dr. Newcomb that he was 85% improved. He states that this was because the temperature was perfect. Claimant also saw Dr. Pasquale Fucci for his foot in June of 2008.

Dr. Andrew J. Gelman, an orthopedic surgeon, testified by deposition on behalf of Employer. Dr. Gelman examined Claimant in July of 2007 and June 26, 2008, and reviewed the pertinent medical records. He utilizes the Sixth Edition of *the Guides* and opines that Claimant has sustained a one percent permanent impairment rating of the right lower extremity as a result of his compensable injury.

In June of 2008 Claimant reported that he felt good, but that various activities from time to time cause him problems about the heel area. Walking and/or standing activities cause some pain in the right heel area. He reported being able to perform household chores, driving and shopping. He periodically took prescription Ibuprofen. He also wears a shoe insert. He had undergone some injections in the past.

Dr. Gelman reviewed Dr. Newcomb's clinical examination from August 15, 2007 which showed 12 to 15 degrees of dorsiflexion with minimal pain to palpation over the plantar heel area. There was minimal effusion of the fascial origin bilaterally and there were no problems recorded with single limb heel raise on the left or the right. Standing on both legs there was some mild pronation, or flat-foot. There was some sensitivity when Dr. Newcomb placed pressure over the plantar heel area. Otherwise Claimant's examination was unremarkable.

Dr. Gelman's examination of Claimant in June of 2008 was similar to that of Dr. Newcomb in August of 2007. While there was some tenderness over the heel area, otherwise Claimant's examination was within normal limits. Upon observation of Claimant walking in and out of the examination area there was no limping or favoring of the right leg. He was observed in his work boots and walking barefoot. He had some mild discomfort with pressure on the inner bottom portion of the heel.

Dr. Gelman noted that there were electrophysiologic studies which suggest posterior tibial nerve irritability and MRI studies which were normal as far as the inner part of the ankle area. The MRI showed an old ankle sprain that would not be related to Claimant's complaints. There were no signal changes within the Achilles or the plantar fascia.

Dr. Gelman notes that the tarsal tunnel finding on EMG was not correlated clinically by Dr. Newcomb, at least through the August 2007 time frame. Also, Dr. Rodgers was unable to correlate it in February of 2008 and Dr. Gelman could not correlate the tarsal tunnel findings when he examined Claimant in June of 2008.

As far as Dr. Rodgers using the Fifth Edition of *the Guides*, Dr. Gelman points out that as of February 2008 the Sixth Edition was published and available to the public. Dr. Rodgers utilized the parameters of Table 17.2 to rate Claimant's permanency, but Dr. Gelman believes that Claimant does not exhibit any of those parameters, which include the following: limb length discrepancy, gait derangement, muscle atrophy, muscle strength, range of motion, arthritis, amputation, diagnosis based estimates, skin loss, peripheral nerve injury, complex regional pain syndrome or vascular problems. Thus, Dr. Gelman opines that Claimant does not qualify for any permanency rating based on the Fifth Edition of *the Guides*. The closest category that Dr. Gelman could find for Claimant in the Fifth Edition is in Table 17-1, which is a foot deformity, but Dr. Gelman does not believe that Claimant has a foot deformity. Claimant does not fit into any described condition in Table 17-33.

Using the Sixth Edition of *the Guides*, Dr. Gelman points out that Example No. 16-2 is similar to Claimant, in that the exemplar has plantar fasciitis, severe tenderness, a limp and MRI changes. Some features in the exemplar are somewhat worse than Claimant's, because Claimant only has mild tenderness, no limp and no MRI changes. Generally speaking, the exemplar is

pretty much the same as Claimant and is rated at one percent permanency. Also, pursuant to Table 16-2, the foot and ankle regional grid, Dr. Gelman felt that Claimant qualified under Class 1, or mild for plantar fasciitis, which gives a one percent rating. In the Sixth Edition the highest rating for plantar fasciitis is two percent. Dr. Gelman opines that at most, Claimant could have another two or three percent using the adjustment grid criteria.

On cross-examination Dr. Gelman indicated that tarsal tunnel symptoms include tingling, numbness or a burning or prickly type sensation, and he had not seen Dr. Newcomb's May 6, 2008 office record which states that Claimant complained of a burning sensation. Dr. Newcomb listed three diagnoses: right foot pain; plantar fasciitis and tarsal tunnel syndrome. However, Dr. Gelman notes that the tarsal tunnel diagnosis does not correlate with Dr. Newcomb's clinical exam that day since Claimant had a negative Tinel's through the posterior tibial nerve, which runs through the tarsal tunnel.

Dr. Gelman indicated that Claimant's ranges of motion of the right and left foot were symmetric. He did not record any degrees of measurement because Claimant's ranges of motion were normal in comparison with the opposite extremity. Dr. Gelman states that if Claimant is symmetrical then there is no impairment attributable to that degree of motion, when the unaffected extremity is the normal side. Dr. Gelman agreed that on physical examination there was some discomfort on medial plantar pressure. Dr. Gelman does not believe that Dr. Rodgers compared both sides in his range of motion testing. Dr. Gelman did not find decreased strength on exam. Dr. Gelman agreed that strength and range of motion results cannot be combined pursuant to Table 17-2 of the Fifth Edition, and that when this is the case, *the Guides* indicate to use the higher of the two as the permanency rating. Dr. Gelman agreed that Claimant is not a malingerer.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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 DEL. CODE ANN. tit. 19, § 2326. While it is important to have medical testimony, 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. In this case, I find Dr. Rodgers' testimony persuasive that Claimant sustained a ten percent permanent impairment to the right lower extremity.

Fifth versus Sixth Edition of *The Guides*

The first issue to be addressed in this case is whether I, standing in the position of the Industrial Accident Board, can mandate that the parties utilize and/or adopt either the Fifth or the Sixth Edition of *the Guides* in determining their respective permanency ratings. See DEL. CODE ANN. tit. 19, § 2301B.

Claimant argues that there is no specific statutory section set forth in Title 19 of the Delaware Code that either authorizes or restricts the use of *the Guides*. Claimant maintains that the Sixth Edition has been roundly criticized as insurance company biased, and in some cases it limits permanent impairment ratings as compared to the Fifth Edition of *the Guides*. Implementation of the Sixth Edition has either been delayed or voided in several states and thus, Claimant requests that the Hearing Officer reject the use of the Sixth Edition.

Employer begins by pointing out that serious problems existed with prior editions of *the Guides*, which have been corrected by the Sixth Edition. Also, Employer argues that a potential

decrease in impairment ratings is not because of a conspiracy on behalf of the insurance industry, but rather related to the natural progression of, or improvements in, the art and science of healthcare. Employer also maintains that Claimant's criticisms of the Sixth Edition are without basis and misconstrue the evidence presented. For example, Employer points out that only 17 states use the Fifth Edition, 10 states use the Sixth Edition, 9 use the Fourth, and 6 use their own internal state guidelines. An expert's utilization of the Sixth Edition before the Board would not violate Delaware law. Employer relies upon Delaware case law for the premise that the Board does not interpret, rely upon or affirm the use of *the Guides* but merely accepts the testimony of an expert witness whose opinion is based on the guidelines *Salisbury v General Motors Corporation*, 1991 WL 15191, *1 (Del. Super. Ct.) Finally, Employer claims that Claimant's assertions of the American Medical Association bias and conspiracy with the insurance industry are without basis in fact and should be disregarded.

So, overall, Claimant contends that the Sixth Edition of *the Guides* is somehow flawed and not appropriate for use in determining permanency, especially regarding musculoskeletal injuries, while Employer maintains that the Sixth Edition corrects flaws in previous editions of *the Guides*. After careful consideration of the arguments of both parties I find that in accordance with *Salisbury v General Motors Corporation*, 1991 WL 15191, *1 (Del. Super. Ct.) the role of the Board is not to interpret, rely upon or affirm the use of the Guides, but rather to accept or reject the testimony of the expert witness, whose opinion is based on *the Guides*. In the absence of any case law or statutory authority to mandate which version of *the Guides* is preferable, I do not believe that the Board can either mandate or prohibit use of the most recent, or Sixth Edition, of *the Guides*. Nothing in Delaware law even requires that *the Guides* be utilized for permanency ratings, let alone any specific edition of *the Guides*. Thus, the mere fact that a

doctor uses an old edition is not a reason to reject that opinion. *See also Turbitt v Blue Hen Lines*, 711 A 2d 1214 (Del. 1998)(finding that the Board's rejection of a physician's testimony regarding permanency on the grounds that his evaluation was based on outdated guidelines, without any articulation of the specific effect that the use of such material had upon the physician's evaluation, was not supported by substantial evidence.) The specific question for the Board to consider in each case is how much weight should be given to the doctor's testimony. The Board cannot mandate which version of *the Guides* that a medical expert chooses to utilize in making his or her permanency determination. This is a professional judgment which must be dealt with on a case by case basis and flushed out by the parties through cross-examination

Permanent Impairment Rating

Accordingly, in the instant case I find Dr. Rodgers more persuasive, not based on the fact that he utilized the Fifth Edition of *the Guides*, but because he does not ignore, or discount, Claimant's symptoms. Dr. Rodgers accounted for Claimant's right foot pain level and burning sensations, which were also documented by Claimant's treating physician. Moreover, when measuring Claimant's ranges of motion, Dr. Rodgers utilized an angle measuring device. As he points out, this is mandated by *the Guides* and Dr. Gelman did not use a measuring device. Dr. Gelman simply noted that Claimant's ranges of motion were symmetrical and made no specific measurements.

Also, with regard to Claimant's alleged tarsal tunnel syndrome, Dr. Rodgers does not even perform the calculation when he considers this condition for permanency rating purposes because he states that Claimant does not have a severe case. Thus, the tarsal tunnel diagnosis does not affect his permanency rating. Therefore, Dr. Gelman's argument that the tarsal tunnel diagnosis could not be correlated clinically is mute. However, interestingly, on cross-

examination Dr. Gelman concedes that tarsal tunnel symptoms include tingling, numbness or a burning sensation, and that he was not aware that Claimant had complained of a burning sensation in May of 2008. Again, the issue is mute because Dr. Rodgers' permanency rating is not based on this particular diagnosis.

Although I find Dr. Rodgers' testimony persuasive, and he relied upon the Fifth Edition of *the Guides*, importantly, once again, I do not find that Dr. Rodgers' testimony is persuasive specifically because of this reliance, but rather because of his assessment of the Claimant in arriving at his ultimate opinion in this case. Specifically, Dr. Rodgers' explanation and consideration of Claimant's symptoms and his range of motion and strength measurements are more believable to me than Dr. Gelman's explanation for how he arrived at his opinion. Dr. Gelman utilizes an exemplar in the Sixth Edition to form the basis of his opinion. The exemplar of plantar fasciitis, with severe tenderness, a limp and MRI changes does not describe Claimant. Dr. Gelman even points out that the majority of features in the exemplar are worse than Claimant's condition stating that Claimant only has mild tenderness, no limp and no MRI changes. Yet, Dr. Gelman believes that this example is similar to Claimant. Thus, Dr. Gelman fails to consider Claimant's actual symptoms but utilizes significant symptoms, such as MRI changes, in his exemplar to form the basis of his opinion. His analysis does not make sense in this particular instance.

It is for these reasons that Dr. Gelman is simply not convincing in his testimony, and Dr. Rodgers is believable that Claimant ultimately sustained a right lower extremity injury which resulted in a permanent impairment rating of ten percent is appropriate. *See Disabatino Brothers, Inc. v. Wortman*, 453 A.2d 102, 106 (Del. 1982); *see also Standard Distributing Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993)(holding when there is a conflict between the opinions of

two experts, the Board is free to choose either one and will meet the "substantial evidence" standard on review).

Thus, for all of the foregoing reasons, I find that Claimant has met his burden of proof that he sustained a ten percent permanent impairment to his right lower extremity in this case.

Attorney's Fee & 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 Delaware's average weekly wage calculates to \$9,077.30. The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55 (Del 1973). Less than the maximum fee may be awarded and consideration of the *Cox* factors does not prevent the granting of a nominal or minimal fee in an appropriate case, so long as some fee is awarded. See *Heil v Nationwide Mutual Insurance Co*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v Kentmere Home*, 1996 WL 527213 at *6 (Del. Super Ct.) 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.

A written settlement offer was tendered by Employer. This offer was not viewed by me until after a decision on the merits had been reached. The settlement offer is less than the Hearing Officer's award of a ten percent permanent impairment to the right lower extremity, so an award of attorney's fees is appropriate in this case. Claimant has been awarded a total of 25 weeks, or 10% of 250 weeks, of benefits for permanent impairment of the right lower extremity

At Claimant's established compensation rate (\$413.60 per week), this equates to an award of \$10,340.00. As such, the thirty percent cap applies, and the maximum attorney's fee that can be awarded is \$3,102.00.

Claimant's counsel submitted an affidavit stating that he spent approximately 14 hours preparing for this hearing, which itself lasted for approximately 2 hours. Claimant's counsel was admitted to the Delaware Bar in 1988, and he is experienced in workers' compensation litigation, a specialized area of the law. His or his firm's first contact with Claimant was in April of 2007. Thus, Claimant has been represented by counsel or his firm for almost two years. This case was of average complexity involving no novel issues of fact or law. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances, although he naturally could not work on other cases at the same time that he was working on this litigation. There is no evidence that accepting Claimant's case precluded counsel from other employment. Counsel's fee arrangement with Claimant is on a contingency basis. There is no evidence that counsel expects a fee from any other source. There is no evidence that the employer lacks the ability to pay a fee.

Taking into consideration the fees customarily charged in this locality for such services as were rendered by Claimant's counsel and the factors set forth above, I find that an attorney's fee in the amount of \$3,102.00 is reasonable in this case, or thirty percent of the value of the award, whichever is smaller.

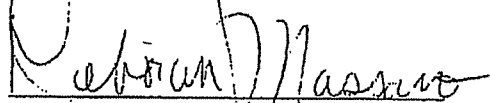
Medical witness fees for testimony on behalf of Claimant are awarded to Claimant, in accordance with title 19, section 2322(e) of the Delaware Code.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Hearing Officer finds that Claimant has sustained a ten percent permanent impairment of his right lower extremity. An attorney's fee in the amount of \$3,102.00 is reasonable in this case, or thirty percent of the value of the award, whichever is smaller. Claimant is entitled to payment of his medical witness fees.

IT IS SO ORDERED THIS 26th DAY OF FEBRUARY, 2009

INDUSTRIAL ACCIDENT BOARD



DEBORAH J. MASSARO

Workers' Compensation Hearing Officer

Mailed Date: 2-27-09

