BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

LYNN HAMPTON,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1369570
	)	
COURTLAND MANOR NURSING,	)	
	)	
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 came before the Industrial Accident Board on May 9, 2012, in the Hearing Room of the Board, in Milford, Delaware.

PRESENT:

MARY MCKENZIE DANTZLER

WILLIAM F. HARE

Angela M. Fowler, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Kris Starr, Attorney for the Employee

Andrew Carmine, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Lynn Hampton ("Claimant") injured her low back while working as a certified nursing assistant (CNA) for Courtland Manor Nursing ("Employer") on May 17, 2011. On November 18, 2011, Claimant filed a Petition to Determine Additional Compensation Due seeking authorization for a proposed low back surgery to address what she believes is her compensable injury as well as related compensation for a period of total disability associated with the surgery.[1]

Employer opposes this relief asserting that Claimant's low back condition is not causally related to the May 7, 2011 work accident. Employer also argues that, without regard for causation, Claimant is not a good surgical Candidate and therefore the proposed surgery is not reasonable and/or necessary.

A hearing was held on Claimant's petition on April 9, 2012. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant, who is 34 years old, testified that she is a high school graduate presently attending college in pursuit of an Associate's degree. Claimant's prior work experience includes a background in customer service, work at a summer youth camp, employment with Clientlogic, K-Mart, Dover Downs and nine years as a CNA.

Claimant, who had no prior back injuries or complaints, testified that as of May 2011, she was working as a CNA providing hands on patient care for Employer. On May 17, 2011, while at work, Claimant slipped on a wet floor causing her to fall into a split-like position. While Claimant initially experienced pain and spasm through her entire back, the pain eventually settled in her low back. Claimant was treated on two occasions at the Doc-In-A-Box walk-in medical clinic where she was released to work in a light-duty capacity. Claimant's symptoms

persisted causing her to be referred to Dr. Ronald Lieberman for pain management services and eventually to Dr. Bruce Katz for a surgical evaluation. Claimant initiated care with Dr. Katz on July 20, 2011, at which time her treatment options were discussed. Both Claimant and Dr. Katz agreed that conservative care was the best course, leaving surgical intervention as a last resort.

Claimant continued a course of conservative care with Dr. Katz that ultimately led to Dr. Katz ordering a CT-scan to be performed by Dr. Ginsburg. This scan revealed that Claimant had two discs in her lower back that were damaged and needed to be removed. After some additional consideration, Dr. Katz proposed the surgery that is now at issue.

Claimant testified that her pain has persisted and, in fact, worsened since the industrial accident requiring her to take pain medications on a daily basis.

During cross examination, Claimant indicated that she does continue to operate a motor vehicle on occasion. Claimant resides with her sister who assists her in caring for her four children ranging in age from 14 to 5.

Claimant testified that she has been attending college since 2008 and hopes to get her degree in May of 2013. Claimant is aware that a June 2011 Functional Capacity Evaluation (FCE) found her capable of working in a full-time sedentary capacity; a recommendation that Dr. Katz has continued to follow in her case. Since that recommendation, Claimant has applied for ten or eleven jobs unsuccessfully.

Claimant admitted that she has a long standing history of depression and anxiety that was diagnosed sometime in the 2003 to 2005 timeframe.[2] Claimant has received ongoing treatment

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[1] *See* Joint Exhibit 1 (Stipulation of Facts).

[2] Claimant, by and through counsel, objected to Employer's entire line of questioning related to any of Claimant's history of mental health issues and/or treatment arguing that the subject matter was not relevant to the issues remaining for the Board's consideration and that such testimony was highly prejudicial to Claimant. Employer countered this argument proffering that testimony would be provided supporting the proposition that such collateral issues are relevant in assessing whether or not any individual is a good surgical candidate. The Board overruled Claimant's objection indicating that the information would only be considered in the very limited context suggested

for these conditions from her family physician as well as a psychiatrist with whom she meets weekly. Claimant currently takes Prozac and Wellbutrin as part of her medication regimen to address these conditions. Claimant admitted that she listed mood changes, anxiety, depression and episodes of panic when she completed the paperwork for treatment at Dr. Lyndon Cagampan's office. Claimant further admitted that Dr. Horn, her primary care physician, took her out of work completely for a time following the work accident for her depression and anxiety.

Claimant testified that her expectations for having the surgery proposed by Dr. Katz are focused on the hope that she will be able to do things that she cannot do presently given the severity of her pain. Claimant, in fact, rated her pain at eight to nine out of ten most days noting that on other days it is actually much worse. Claimant acknowledged that there is the possibility that surgery might not resolve her issues.

When questioned by the Board, Claimant testified that she returned to work for Employer on June 22, 2011, with sedentary duty restrictions. She worked in this capacity until she was terminated the week before Christmas for her inability to return to her regular duty as a CNA.

Claimant indicated that her depression and anxiety was stable and managed by medication for years prior to the work accident, still acknowledging that on May 23, 2010, she was treated at Bayhealth Medical for suicidal ideations.

Dr. Bruce Katz, M.D., a board certified orthopedic surgeon specializing in adult spine surgery and Claimant's treating doctor, testified by deposition on Claimant's behalf. Having reviewed Claimant's relevant medical history in conjunction with providing treatment to Claimant, Dr. Katz opined that the proposed low back surgery at issue in these proceedings is

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by Employer and noting that without a lay jury involved, the likelihood of a prejudicial impact on the Board was greatly decreased.

causally related to Claimant's May 2011 industrial accident and is also both reasonable and necessary.

Dr. Katz testified that he assumed care of Claimant as of July 12, 2011, at which time Claimant presented as a 34 year old woman formerly employed as a CNA for Employer. Claimant described to him an industrial accident that occurred on May 17, 2011, wherein she slipped on a wet floor causing her to fall into a split. Claimant noted that after treating at the Doc-In-A-Box walk-in facility on two occasions, following up with her primary care physician, an emergency room visit for severe pain and seeking pain management services with Dr. Lieberman, she was referred to Dr. Katz.

Dr. Katz documented that at his initial physical assessment of Claimant, Claimant evidenced tenderness over her lumbosacral spine. In response to Waddell Sign testing, Claimant did not exhibit recreated back pain indicating that she was not magnifying or creating false symptoms.

Dr. Katz diagnosed Claimant with a lumbar strain or sprain and the decision was made that Claimant would pursue conservative treatment including pain management and physical therapy. Claimant remained on sedentary-duty work restrictions as found to be appropriate by a June 2011 FCE. Dr. Katz testified that he believed the injuries with which Claimant presented in July 2011 were related to the fall at work that she described occurring on May 17, 2011.

Dr. Katz continued to follow-up with Claimant seeing her in August 2011, October 2011 and November 2011. Throughout this time, Claimant was taking pain medication, continuing in physical therapy and undertaking pain management services with Dr. Howard Arian. Claimant experienced no improvement in her symptoms and, in fact, by November 2011 had undergone an epidural injection with Dr. Arian that provided no relief. By Claimant's February 1, 2012

appointment with Dr. Katz she was reporting both increased low back pain as well as right leg pain. Concerned that Claimant was not improving, Dr. Katz endeavoured to attempt to locate Claimant's pain generator. A discogram was ordered with Dr. Ginsberg and took place on February 14, 2012, showing both the L4-5 and L5-S1 discs to be concordant pain generators consistent with the subjective reports Claimant had been making. A CT-scan performed on the same day demonstrated annular tears at the L4-5 and L5-S1 levels as well as at L3-4. Given the correlation between Claimant's discogram findings, the CT-scan and Claimant's subjective complaints, Dr. Katz determined that Claimant was experiencing disc pain at both the L4-5 and L5-S1 levels.

Claimant was seen again by Dr. Katz on March 7, 2012, at which time her back pain had increased. Dr. Katz testified that he ultimately determined that surgical intervention in the form of an anterior lumbar fusion would be necessary to address the issues for which Claimant had failed months of conservative care. In making this determination, Dr. Katz confirmed that he considered a variety of factors including Claimant's symptoms (which he found reliable), the existence of an anatomical reason for those symptoms, proof that the anatomical symptoms are painful and consideration of Claimant as a good surgical candidate. Dr. Katz maintained that in Claimant's case, the tests and studies support surgical intervention and Claimant desires to have such.

Dr. Katz testified that the conditions and diagnoses that he has documented for Claimant are consistent with the fall and injury that Claimant reports having suffered on May 17, 2011. Dr. Katz reiterated that the treatment that he has rendered Claimant has all been reasonable, necessary and causally related to that industrial accident noting that Clamant had no pain and no history of low back injury prior to the work fall. Dr. Katz further believes that the low back

surgery that he has proposed for Claimant is also casually related to the industrial accident and is both reasonable and necessary. As such, the period of postsurgical rehabilitation and associated period of temporary total disability that would necessarily follow the surgery would also be reasonable, necessary and causally related to the work accident.

Dr. Katz, citing the fact that Claimant had no pain until after the work fall, testified that he disagrees with defense medical examiner, Dr. Andrew Gelman's opinion that Claimant's low back pathology is unrelated to her 2011 work fall. Dr. Katz further disputed Dr. Gelman's suggestion that Claimant has exhibited symptom magnification. In this regard, Dr. Katz testified that as an active orthopedic spine surgeon, he finds himself better situated to opine as to Claimant's spinal issues than Dr. Gelman.

On cross examination, Dr. Katz confirmed that a July 6, 2011 EMG performed on Claimant was read as normal. He also confirmed that a June 9, 2011 MRI showed no gross disc herniations.

Dr. Katz maintained that at no time during his care of Claimant has he placed her on a total disability status though he believes that Claimant's primary care physician may have done so for a brief period of time to address issues of depression and anxiety following the work accident. Dr. Katz noted that he is unsure of whether or not Claimant's depression is work-related or preexisted the work injury.

Dr. Andrew Gelman, M.D., a board certified orthopedic surgeon, testified by deposition on Employer's behalf.[3] Having evaluated Claimant on two separate occasions in addition to

[3] At the outset of the proceedings, Claimant objected to Dr. Gelman's testimony asking that it be stricken in its entirety pursuant to Superior Court Rules of Evidence 403, 702, 703 as well as the case of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993) and its progeny. In summarizing Claimant's argument on this issue, the Board notes that Claimant alleges that Dr. Gelman far exceeded his level of expertise in offering opinions related to psychiatric and/or mental health issues without any reliable scientific basis to do so.

conducting a review of Claimant's relevant medical records, Dr. Gelman opined that Claimant's low back condition is neither causally related to the May 2011 industrial accident with Employer nor is surgery to address the same reasonable or necessary given that Claimant is a poor surgical candidate.

Dr. Gelman testified that he evaluated Claimant on August 22, 2011 and again on February 24, 2012. He came to appreciate from Claimant that she slipped on a wet floor at work resulting in a fall. Claimant was treated first at a local walk-in medical clinic and then had an MRI of her low back on June 9, 2011. The MRI reflected nothing of an acute nature instead showing only mild degenerative changes at L3-4, L4-5 and L5-S1. The imaging study revealed no disc herniations and no areas of compromise with regard to any of the lumbar nerve roots or the spinal cord itself. An EMG performed shortly thereafter on July 6, 2011 also showed no features of any lumbar radiculopathy. According to Dr. Gellman, Dr. Lieberman, in conducting this testing, alluded in his notes to a concern that Claimant's grimacing and moaning may be a behavioral rather than anatomic presentation.

Dr. Gelman indicated that when he saw Claimant on August 22, 2011, she reported low back pain as well as pain in both of her thighs. Physical examination revealed Claimant to be poorly conditioned and morbidly obese. Claimant had sensitivity over the trochanteric bursal areas bilaterally but otherwise, from a clinical perspective demonstrated nothing significant.

Employer, acknowledging that Dr. Gelman is not a psychiatrist or mental health professional of any kind, argued that this lack of expertise does not prevent Dr. Gelman, as an orthopedic surgeon, from calling on the opinions of other disciplines in making his own determinations as to whether or not a patient is an appropriate surgical candidate. As such, while Dr. Gelman is not qualified to diagnose Claimant with a mental health condition, he is qualified to note the importance of reliance on such disciplines in rendering appropriate determinations as to the candidacy of an individual for surgery.

Having heard the arguments of the parties, the Board is persuaded that both arguments have some degree of merit. As such, while the Board will disregard any testimony offered by Dr. Gelman suggestive of his opinion as to Claimant's specific mental health diagnosis, the Board will consider the rest and remainder of Dr. Gelman's testimony including that related to the validity of considering an individual's mental health in making general

Claimant advised Dr. Gelman that she takes care of herself and moves around during the day rather than remaining homebound or bedbound.

Dr. Gelman testified that he surmised from both Claimant's presentation as well as her medical history that Claimant seemed to be exaggerating her symptoms to some degree. Dr. Gelman indicated that Claimant's records reflect significant mental health issues that her primary care provider, Dr. Horn., has been addressing over the years. It was Dr. Gelman's impression that Claimant was poorly motivated, had a poor body habitus and very little in the way of objective findings. He concluded that if Claimant were his patient he would advise a conservative approach in addressing her musculoskeletal issues. This would include home exercises, weight loss and either over-the-counter or prescription anti-inflammatory medications.

Dr. Gelman testified that when he saw Claimant for the second time in February 2012, Claimant continued to level complaints similar to those that she made at their August 2011 visit though she additionally noted some occasional tingling and numbness in her legs as well. Claimant had undergone both a discogram as well as a CT-scan. The discogram identified provocative or concordant pain at the L4-5 and L5-S1 levels. The follow-up CT-scan noted elements of pathology at L3-4, L4-5 and L5-S1 including annular tearing but identified nothing specific or definite to indicate nerve or spinal cord compromise that might otherwise explain Claimant's radicular complaints. Physical examination of Claimant also failed to produce objective findings of radiculopathy while the rest and remainder of her physical examination was similar to that obtained in August 2011.

decisions regarding surgical appropriateness; an area that is clearly within Dr. Gelman's expertise as an orthopedic surgeon.

Dr. Gelman confirmed that in his review of Dr. Horn's medical records related to his care of Claimant, he discovered that Claimant has had long standing mental health issues that have gone as far as suicidal ideation. Dr. Gelman also confirmed that Dr. Horn is not a psychiatrist.

Having examined Claimant on two occasions, Dr. Gelman indicated that it was his opinion that several things should occur in terms of Claimant's ongoing treatment. First, Dr. Gelman noted that Claimant's return to work should be a priority. Secondly, Claimant's obesity should be addressed. Claimant's mental health should also be addressed by and through a psychiatrist rather than her primary care physician, Dr. Horn; and, conservative care should be continued for Claimant's musculoskeletal system issues. While admittedly unaware of the specifics of the surgical intervention proposed by Dr. Katz, Dr. Gelman maintained that he would not recommend such for Claimant. He testified that in the hypothetical, a two or even three level procedure may be appropriate to address the concordant pain response implicated at Claimant's L4-5 and L5-S1 levels and the associated internal disease process however, maintained that specifically in Claimant's case he finds Claimant to be a poor surgical candidate. Dr. Gelman testified that the likelihood of a successful surgical intervention in Claimant's case is diminished by the realty that generally, being involved in the workers' compensation arena predicts a poor surgical outcome. Mental illness, also well studied in the medical and occupational literature, is a predictor of poor surgical outcomes. Furthermore, Claimant's poor understanding of her disease combined with morbid obesity and poor conditioning are additional factors suggestive of a poor surgical outcome. Dr. Gelman opined that all of these factors in addition to diagnostic findings are imperative considerations when a physician is attempting to predict whether or not an operative procedure is going to be effective from an outcome

perspective. Considering these factors as a whole, Dr. Gelman opined that performing the proposed surgery on Claimant is neither reasonable nor necessary.

During cross examination, Dr. Gelman confirmed his earlier testimony that in his opinion losing weight and seeing a psychiatrist would positively impact Claimant's condition. He confirmed that in his opinion, Claimant has serious psychological factors affecting her status. Dr. Gelman also, however, admitted that he is not a licensed clinical social worker, a board certified psychiatrist or a licensed psychologist.

Dr. Gelman admitted that in his review of Claimant's medical records, he found no evidence that Claimant had any history of significant back trauma or injury to her back prior to May 7, 2011. Since May 7, 2011, however, Claimant has engaged a course (eight months) of conservative, non-surgical therapy. Dr. Gelman, while acknowledging that he has not completed a fellowship in orthopedic spine surgery and does not currently conduct spine surgery in his own practice, further admitted that there may be structural pathology in Claimant's back for which fusion surgery, as proposed by Dr. Katz, is recognized as a legitimate treatment alternative.

Dr. Gelman was unsure of precisely how much time he spent in physical contact with Claimant during their two assessments but maintained the opinion that Claimant engaged in symptom magnification; a condition that he has admittedly found in other defense medical examinations and also in some of his own patients.

Dr. Gelman agreed that if Claimant were to undergo the fusion surgery proposed by Dr. Katz, there would be a period of total disability and corresponding rehabilitation required.

During re-direct examination, Dr. Gelman testified that it would be appropriate to obtain a psychiatric evaluation and clearance from a professional in the mental health field before determining the adequacy of Claimant as a surgical candidate. Such an evaluation, according to

Dr. Gelman, would better predict the outcome that Claimant might experience post-surgically. Furthermore, Dr. Gelman testified that while he does not provide mental health diagnoses and does not perform spinal surgery in his own practice, he does routinely treat patients with spine disease and also routinely has to evaluate patients for their appropriateness as surgical candidates. In this capacity, he has determined in some of his own patients that surgery is not warranted given factors other than physical findings that generally relate to their appropriateness as good or poor surgical candidates.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

When an employee has suffered a compensable injury, the employer is required to pay for reasonable and necessary medical services connected with that injury.[4] The "but for" standard is used "in fixing the relationship between an acknowledged industrial accident and its aftermath."[5] That is to say, if there has been an accident, the injury is compensable if "the injury would not have occurred but for the accident. The accident need not be the sole cause or even a substantial cause of the injury. If the accident provides the 'setting' or 'trigger,' causation is satisfied for purposes of compensability."[6] "A preexisting disease or infirmity, whether overt or latent, does not disqualify a claim for workers' compensation if the employment aggravated, accelerated, or in combination with the infirmity produced the disability."[7] Claimant has filed the current petition seeking a finding of compensability for proposed low back surgery and related expenses and thus has the burden of proof.

Having heard the evidence presented, the Board is persuaded that Claimant's low back injury is compensable and related to the May 7, 2011 work accident. As a threshold matter, there

[4] DEL. CODE ANN. tit. 19, § 2322.
[5] *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992).
[6] *Id.* at 910.

is no dispute that Claimant suffered a work accident on May 7, 2011, that caused a low back injury. While Dr. Gelman has suggested that early studies showed no evidence of acute injury in Claimant, the undisputed facts support a finding that Claimant had no complaints of or treatment for low back issues prior to the May 7, 2011 accident. Since that time, however, she has consistently had complaints requiring a variety of treatment modalities as well as diagnostic findings corroborating those complaints. These diagnostic studies to include a discogram showing concordant pain at L4-5 and L5-S1 as well as a confirmatory CT-scan demonstrating annular tears at both of those levels. As such, Dr. Katz's opinion that Claimant's physical condition is not only supported by the mechanism of her injury but by the objective diagnostic testing and Claimant's own subjective complaints[8] is far more plausible and credible than the contrary opinion offered by Dr. Gelman.[9]

There also seems little dispute as to the necessity of the proposed surgery. While Dr. Gelman testified that he would continue to pursue conservative treatment for Claimant including home exercise, mental health treatment and better education, he also admitted that a fusion procedure would be a recognized alternative in circumstances such as Claimant's wherein there are documented anatomical abnormalities, confirmed pain generators and what even Dr. Gelman characterized as eight months of non-operative, failed conservative care. These admissions combined with Dr. Katz's strong affirmation that he has exhausted all reasonable modalities of treatment for Claimant excluding surgery sufficiently persuades the Board that the proposed fusion surgery is necessary from a strictly medical perspective.

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[7] *Id.*

[8] The Board is not persuaded by Dr. Gelman's opinion that Claimant exaggerated her symptoms.

[9] When there is a conflict in the medical testimony, the Board must decide which physician is more credible. *General Motors Corp. v. McNemar*, 202 A.2d 803 (Del. 1964). As long as there is then substantial evidence to support its choice, the Board may accept the testimony of one physician over the other. *Standard Distributing Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993).

The question of whether or not the proposed surgical procedure is reasonable, however, is a more difficult analysis. In this regard, the Board acknowledges that Dr. Gelman is not a mental health provider of any kind and is therefore unqualified to diagnose Claimant with a specific mental health condition. The Board is, however, persuaded by Dr. Gelman's logic that an individual with long term mental health issues may require additional consideration in the multitude of factors that contribute to a finding of whether or not one is a good surgical candidate; a characterization that Dr. Katz also embraced in his testimony though he did not specifically address the factors that aide in making such a determination. Claimant has, however, freely admitted in these proceedings, and to all of her treatment providers, the long standing history that she has with depression and anxiety that clearly predates the work accident. Claimant also testified that she has felt less stable in terms of her mental health since the work accident. To this extent the Board has some reservations about Dr. Katz's seeming lack of familiarity with Claimant's mental health history.

Dr. Katz acknowledged that while he is aware that Claimant has a working diagnosis of depression and anxiety, he is unsure of whether or not those conditions were the product of the work accident or if they predated that event. Given Claimant's own testimony that these diagnoses and her related treatment predate the work event by years, it would appear as though Dr. Katz did not thoroughly examine this aspect of Claimant's viability as an appropriate surgical candidate. While the Board is not persuaded that a necessary medical procedure should be foreclosed simply because an individual was injured on the job or is overweight or has mental health issues as Dr. Gelman suggested in the remainder of his opinion, the Board does give credence to the fact that there was no medical opinion offered by a mental health professional either in these proceedings or presumptively to Dr. Katz that suggests that Claimant's mental

health is not, as Dr. Gelman has opined, a significant factor affecting the reasonableness of moving forward with the proposed surgery.

Accordingly, while the Board does find the surgery proposed by Dr. Katz both causally related to the May 7, 2011 industrial accident and necessary in light of Claimant's objective findings, subjective complaints and failed course of conservative care, the Board has some lingering doubt as to the reasonableness of the procedure as it relates to Claimant's mental health. As such, finding the proposed procedure reasonable in all other aspects, the Board provides a conditional approval for the surgery and its related expenses including a reasonable period of total disability providing that Claimant's treating psychiatrist, having been informed of this Decision as well as the medical and physical ramifications of the proposed surgery, provides Claimant psychiatric clearance to move forward.[10]

Attorney's Fee and Medical Witness Fees

A claimant who is awarded compensation is generally 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."[11] At the current time, the maximum based on Delaware's average weekly wage calculates to $9,330.80. 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). Less than the maximum fee may be awarded and consideration of the *Cox* factors does not prevent the granting of a nominal or

[10] In fashioning this caveat, the Board desires to eliminate any period of lengthy delay and obviate the need for Claimant to re-file this Petition if psychiatric approval is, in fact granted. To the extent that Claimant's treating psychiatrist, with whom she meets weekly, approves of her moving forward with the surgery as it relates to her mental health and the ability to cope with post-operative circumstances, the Board presumes that no additional litigation will be necessary.

[11] DEL. CODE ANN. tit. 19, § 2320.

minimal fee in an appropriate case, so long as some fee is awarded.[12] A "reasonable" fee does not generally mean a generous fee.[13] Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation.

Claimant has achieved a finding of compensability as to hr present low back condition as well as a conditional approval to move forward with the low back surgery proposed b Dr. Katz. Claimant's counsel submitted an affidavit stating that he spent in excess of 30 hours preparing for this hearing; the hearing itself lasting approximately one and a half hours. Claimant's counsel was admitted to the Delaware Bar in 2000 and is experienced in workers' compensation litigation. Counsel or his firm's first contact with Claimant was on June 15, 2011. Thus, Claimant has been represented by counsel or his firm for approximately one year. 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 other then potential representation of Employer. 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, the Board awards an attorney's fee in the amount of the lesser of either $8,000.

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

[12] *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).
[13] *See Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966).

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board finds that Claimant's low back condition is causally related to the May 7, 2011 industrial accident. Claimant is granted a conditional approval to proceed with the proposed back surgery to the extent that she receives psychiatric clearance from her treating psychiatrist to do so. To the extent that the surgery does go forward, Claimant is also entitled to associated medical expenses and reasonable costs related to lost wages. Claimant is further awarded a reasonable attorney's fee in the amount of $8,000.00 as well as the payment of her medical witness fees.

IT IS SO ORDERED THIS 10 DAY OF MAY, 2012.

INDUSTRIAL ACCIDENT BOARD

MARY MCKENZIE DANTZLER

For

WILLIAM F. HARE

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

Angela Fowler, Esquire
Hearing Officer

Mailed Date: 5-10-12

Karen Miller
OWC Staff