

BEFORE THE INDUSTRIAL ACCIDENT BOARD  
OF THE STATE OF DELAWARE

AMANDA CRUMPLER, )  
 )  
 Employee, )  
 )  
 v. ) Hearing No. 1348570  
 )  
 KEN-CREST SERVICES, )  
 )  
 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 March 5, 2012, in the Hearing Room of the Board, in Milford, Delaware.

**PRESENT:**

MARY MCKENZIE DANTZLER  
Board Member

WILLIAM F. HARE  
Board Member

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

**APPEARANCES:**

James Donovan, Attorney for the Employee

Andrew Carmine, Attorney for the Employer

## **NATURE AND STAGE OF THE PROCEEDINGS**

Amanda Crumpler ("Claimant") suffered a compensable work injury to her lumbar spine while working for Ken-Crest Services ("Employer") on January 20, 2010.<sup>1</sup> As a result of this injury, Claimant has received certain workers' compensation benefits including compensation for lost wages and medical treatment.

On June 29, 2011, Claimant filed an appeal of a Utilization Review ("UR") Determination denying certification for implantation of a peripheral nerve stimulator as proposed by Dr. Lieberman. Employer opposes the relief sought by Claimant in this action maintaining that the procedure was properly noncertified by the UR panel as inconsistent with the Delaware Healthcare Practice and Treatment Guidelines. Employer further asserts that the procedure is unreasonable and unnecessary in Claimant's case.

A hearing was held on Claimant's petition on March 5, 2012. This is the Board's decision on the merits.

## **SUMMARY OF THE EVIDENCE**

Dr. Ronald Lieberman, D.O. a board certified physical medicine, rehabilitation and pain management physician, testified by deposition on behalf of Claimant. Dr. Lieberman indicated that he served as one of Claimant's treating physicians prior to her recent pregnancy. In that capacity, Dr. Lieberman determined that Claimant's failure with conservative care warrants the implantation of a peripheral nerve stimulator to address her work related symptoms. Dr. Lieberman further indicated that the psychological examination and report issued by Dr. John Dettwyler confirms that Claimant is emotionally suited for this procedure.

Dr. Lieberman testified that he first saw Claimant on May 27, 2010, on a referral from Dr. Bruce Katz. At this initial meeting Claimant presented as a 32 year old female who was

injured while attempting to stop a patient from falling at Employer's skilled nursing facility. Claimant reported that when she attempted to break the patient's fall, she experienced a sudden onset of low back pain which developed into radiating pain into her buttock. Claimant was initially treated at Kent General Hospital and then released to her primary care physician, Dr. Vineet Puri, for follow-up. Claimant's primary care physician referred Claimant to Dr. Lyndon Cagampan who eventually sent Claimant to a chiropractor. Claimant noted that the treatments she had received before coming to Dr. Lieberman were painful and provided little to no relief. Claimant's symptoms were associated with standing intolerance, sitting intolerance and an inability to sleep secondary to her back pain. Physically Claimant had weakness in her left toe extensor in addition to palpable taut bands and tenderness over her lower back at L4-5 and L5-S1 interspinous ligament levels. Claimant also had degenerated discs in her back at L3-4 and L4-5.

Dr. Lieberman diagnosed Claimant with lumbosacral radiculopathy, chronic back pain and sought to rule out discogenic pain. Initially, the treatment plan involved epidural steroid injection therapy. Claimant had the first such injection on July 1, 2010, but had no improvement from the injection as of her July 15, 2010 follow-up appointment. At the July 15, 2010 appointment, Dr. Lieberman numbed up the joints of Claimant's back to further diagnostically evaluate the nature of her pain. After numbing the joints Claimant experienced no reduction in her pain signifying to Dr. Lieberman that Claimant's pain was not being caused by the lumbar facet joints. Subsequently on August 17, 2010, a discogram was performed on Claimant pressurizing the L2-3, L3-4, L4-5 and L5-S1 discs however Claimant's back pain could not be recreated. This diagnostic effort further clarified that Claimant's back pain was not being caused by the discs in her back. By Claimant's December 10, 2010 appointment, her back pain

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<sup>1</sup> See Joint Exhibit 1 (Stipulation of Facts).

persisted and she was prescribed a trial use of a TENS unit which also, by February 2011, was reported by Claimant as having provided little to no relief.

Dr. Lieberman testified that given these failed efforts, he referred Claimant for a psychological evaluation with Dr. Dettwyler (a standard first step) to determine whether or not Claimant would, from an emotional/psychological perspective, be an appropriate candidate for use of a peripheral nerve stimulator. Dr. Dettwyler met with Claimant, performed a standard evaluation and issued a report which Dr. Lieberman reviewed. According to Dr. Lieberman, Dr. Dettwyler found Claimant to be psychologically cleared to undergo the stimulator implantation.

Dr. Lieberman testified that it is his understanding that Employer subsequently referred this proposed peripheral nerve stimulator treatment to UR for review prior to its authorization. The UR panel, in a Determination reviewed by Dr. Lieberman, failed to certify the treatment as being within the Delaware Health Care Practice and Treatment Guidelines; a decision that Dr. Lieberman does not agree with. To the contrary, Dr. Lieberman testified that use of the peripheral nerve stimulator is within the Delaware Practice and Treatment Guidelines.

Dr. Lieberman testified that he is further aware that on September 7, 2011, Claimant was seen by defense medical examiner, Dr. Jerry Case, who issued a report indicating that the use of a spinal cord stimulator for Claimant would be inappropriate. Dr. Lieberman testified, however, that he never intended to use a spinal cord stimulator in Claimant's treatment. His proposed plan was for use of a peripheral nerve stimulator which is an entirely different device and procedure. Dr. Lieberman explained that a spinal cord stimulator is an epidurally placed stimulator that is used to block the pain signals sent through the top aspect of the spinal cord so as to block perception of the pain by the patient. A peripheral nerve stimulator is a stimulator that is placed in the subcutaneous fat of the patient which actually blocks perception of pain signals elicited

from various branches that were not blocked during the diagnostic undertakings previously attempted on Claimant (joint numbing and discogram). A peripheral nerve stimulator, according to Dr. Lieberman, is the least invasive procedure that he does. Furthermore, Claimant's pregnancy does not change Dr. Lieberman's opinion regarding use of this procedure in Claimant's case.<sup>2</sup>

Dr. Lieberman testified that in the 20 to 25 cases in which he has implanted peripheral nerve stimulators, he has found that if patients are appropriately selected and diagnostically worked-up in advance of the treatment, it is very effective in reducing pain levels and dependence on narcotic pain medications. In Claimant's case, Dr. Lieberman testified that Claimant is an appropriate candidate for the use of a peripheral nerve stimulator because she has failed aggressive conservative care consisting of narcotic use, analgesics and physical therapy. Furthermore, Claimant has had appropriate diagnostic work-up to rule out other sources of her pain but continues to suffer debilitating low back symptoms. Use in Claimant's case of a peripheral nerve stimulator, according to Dr. Lieberman, is not only within Delaware's Health Care Practice and Treatment Guidelines but is also reasonable, necessary and related to her January 2010 work accident with Employer.

On cross examination, Dr. Lieberman indicated that while Claimant did not have good results from the use of the TENS unit, a peripheral nerve stimulator is markedly different from the TENS inasmuch as the TENS has been found to be a much more superficial treatment. Had Claimant had significant pain relief from the TENS unit, that would have obviated the need to go to the next step and use of the peripheral nerve stimulator.

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<sup>2</sup> Claimant was pregnant at the time of Dr. Lieberman's testimony as well as that of defense medical examiner, Dr. Case. Claimant has since given birth to a son on February 4, 2012. See Joint Exhibit 1 (Stipulation of Facts).

Dr. Lieberman admitted that he had not reviewed the records of Dr. Puri, Claimant's primary care physician, and was unaware that Claimant had treated for her back condition with that physician at all. Dr. Lieberman was unaware of any EMG being performed in Claimant's case.

Dr. Lieberman agreed that a psychological evaluation is required before either a peripheral nerve stimulator or spinal cord stimulator is implanted in a patient. The purpose of this evaluation is to determine if there is a history of drug abuse or psychological instability in a patient before the treatment is undertaken. Specifically, psychological conditions that are unmanaged such as uncontrolled anxiety, depression or any uncontrolled disorder could potentially disqualify a candidate for use of either device. While Dr. Lieberman confirmed that he does not undertake to perform psychological evaluations of his patients himself, he does ask questions of them to screen the impact of a patient's pain on daily function in an effort to determine how the pain is affecting the patient's mood and emotional status. In Claimant's case, Dr. Lieberman is not aware of any family history of depression or psychiatric problems though he acknowledged that Claimant both reported to him that she had previously had some problems with depression and scored relatively high on the Dallas Pain Questionnaire for anxiety, depression and social interest.

Dr. Lieberman testified that due to Claimant's pregnancy, he has not treated her since February 2011. Given the amount of time that Claimant has not been engaged with care, it would, according to Dr. Lieberman, be reasonable to reevaluate her to assess whether or not the use of a peripheral nerve stimulator continues to be an appropriate and reasonable course of treatment. To the extent that Claimant's complaints remain confined to the same region as

before the pregnancy and continue to be at the level of severity that they were at or higher than before, use of the stimulator would continue to be appropriate.<sup>3</sup>

Dr. John Dettwyler, Ph.D., a psychologist certified under Delaware's Workers' Compensation statute, testified by deposition on behalf of Claimant. Having conducted a psychological assessment of Claimant at the request of Dr. Lieberman to determine Claimant's psychological appropriateness to undergo implantation of a peripheral nerve stimulator, Dr. Dettwyler indicated that he conducted a standard psychological examination of Claimant that revealed Claimant to be psychologically fit to undergo the procedure.

Dr. Dettwyler testified that he examined Claimant on March 2, 2011, at the request of Dr. Lieberman. The purpose of this examination was to determine whether or not Claimant was psychologically ready to complete an implant for a peripheral nerve stimulator. Having undertaken this assessment, Dr. Dettwyler opined that there was no psychological impediment to Claimant completing this procedure as she demonstrated nothing that could interfere with the capacity to identify or appreciate any gains made from the implant. According to Dr. Dettwyler, Claimant demonstrated appropriate expectations for the outcome of the procedure which is the biggest predictor of one's happiness in going through a procedure such as this.

Dr. Dettwyler testified that Claimant did not raise any mental health concerns for him and had no Axis II diagnoses. Dr. Dettwyler explained that under the Diagnostic and Statistical Manual that is used for psychological diagnosis there are five axis. The first axis contains diagnoses of depression, bi-polar disorder, schizophrenia, anxiety disorders, adjustment disorders and things like that. Axis II is where one would place the personality disorders such as dependent personality, narcissistic personality, borderline personalities and others. The

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<sup>3</sup> To that end, Dr. Case has documented that at least as of September 7, 2011 (the time of his second evaluation of Claimant); Claimant's complaints continue to be largely the same as they were when she met with Dr. Case in April before her pregnancy).

literature, according to Dr. Dettwyler, is very clear that the ability to appreciate any gains from a medical procedure is contraindicated by the existence of an Axis II disorder because those are the disorders that really allow one to function smoothly from a personality basis. There is nothing in the literature to suggest, however, that Axis I disorders are implicated in the success or failure related to treatment of chronic pain. In Claimant's case, while she was stressed (which is a normal component of pain), she appeared to be coping well with the stress demonstrating nothing alarming in terms of her ability to complete the procedure at issue. As such, Dr. Dettwyler indicated that he finds Claimant to be a good candidate for use of a peripheral nerve stimulator.

Dr. Dettwyler testified that he is aware of the UR Determination in this case non-certifying the proposed implantation of the peripheral nerve stimulator. He indicated that he has reviewed the report and disagrees with the UR panelist's finding that he only performed a cursory psychological evaluation of Claimant. While Dr. Dettwyler admitted that he did not perform standardized testing such as the MMPI or MMPI2 on Claimant, he indicated that such testing is not considered to be reliable and are not validated instruments for the prediction of success or failure in surgery. Dr. Dettwyler characterized use of such tests as an unnecessary expense without scientific basis.

Dr. Dettwyler testified that he did not address secondary gain in Claimant's assessment because it did not exist nor did he address a prior diagnosis of bi-polar disorder for Claimant, despite being aware of it, because Claimant did not exhibit any symptoms, was not on any medication for it and, as previously noted, it would have been superfluous to the point of this examination. Dr. Dettwyler testified that including that diagnosis would have been distracting and suggestive of a problem that does not exist and would not be particularly relevant to

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Claimant's odds of experiencing success with the proposed surgery (because it is an asymptomatic Axis I condition). Furthermore, while Claimant may have some history of treatment for depression, she was not depressed at the time of her evaluation and depression again is not a significant indicator of one's ability to experience surgical success.

Dr. Dettwyler testified that he has done well over 1000 similar evaluations for patients proposed to undergo surgery. The methodology has changed over the years as physicians refine and better appreciate the elements that are of true import in conducting such evaluations, however, the structured interview examination that he performed on Claimant is consistent with today's practices.

Dr. Dettwyler testified that he is aware of the Delaware Health Care Practice and Treatment Guidelines. As such, his examination of Claimant was within those Guidelines.

On Cross examination, Dr. Dettwyler testified that Claimant was not working at the time that he evaluated her though he was unaware of how long she had been out of work or if she was being kept out of work by her treating physicians. While Claimant admitted having taken narcotic pain medications in the past, she reported to Dr. Dettwyler that she was not using them at the time of her assessment because of related adverse side effects.

Dr. Dettwyler testified that Claimant was not taking any medications for mood or depression at the time that he saw her. He explained that Lexapro is a selective serotonin reuptake inhibitor (anti-depressant) and that Wellbutrin is an anti-depressant of a different category that provides release of adrenaline.

Dr. Dettwyler testified that he met with Claimant for approximately 45 minutes to an hour to conduct his assessment of her. During this time, he asked her cursory questions regarding things happening in her life, what her support system is like and what her general

mental status is to gain a current picture of her mental standpoint. Claimant offered no information regarding family history of depression or psychological disorders of any kind nor did Dr. Lieberman ever advise Dr. Dettwyler that Claimant had a history of bi-polar diagnosis. Dr. Dettwyler testified that he did not receive or review any records prior to conducting Claimant's evaluation but admitted that he was aware of the prior bi-polar diagnosis. He maintained, however, that in order to establish predictability for Claimant's capacity to respond to the proposed surgery, prior diagnoses are not necessarily relevant. In fact, Dr. Dettwyler testified that a prior diagnosis of bi-polar disorder does not have any impact on Claimant's current functioning. He indicated that had Claimant been currently treating and exhibiting symptoms of bi-polar disorder, than it would have been important in the final analysis.

Dr. Dettwyler indicated that Claimant had reported some success to him with use of the TENS device however he clarified during brief re-direct examination that the degree of palliative relief she enjoyed was insufficient to avoid consideration of other treatments. Dr. Dettwyler indicated that the reason he cited the minimal success that Claimant did enjoy with the TENS unit is because it provides virtually the same signal that the stimulator will provide. Dr. Dettwyler explained that a lot of people do not tolerate that well and so the fact that Claimant enjoyed any benefit from the TENS is some indication of her ability to tolerate the stimulator itself.

Claimant testified that she is 34 years old. Prior to the industrial injury now at issue, she worked an over night shift for Employer at its skilled nursing facility providing direct patient care. On January 20, 2010, while assisting a patient in the showers, Claimant attempted to stop the patient from falling and experienced immediate pain in her back. Claimant testified that after

being seen at the hospital she saw her primary care physician, Dr. Puri, until he referred her out for specialized care for her back.

Claimant acknowledged that she was previously (at age 14) diagnosed with bi-polar disorder but indicated that she has never received any treatment for the condition. Claimant also acknowledged that she has previously taken both Lexapro and Wellbutrin for depression though she discontinued the use of both approximately two years ago.

In terms of her treatment for the back injury, Claimant testified that the TENS unit that Dr. Lieberman prescribed her as a trial, provided some minimal relief but left her feeling that had it reached a little bit deeper, it would have been far more valuable in relieving her symptoms.

Claimant testified that in May 2011, she discovered that she was pregnant with a son who was born on February 4, 2012. In comparing her pre-pregnancy low back pain with that which she has experienced since giving birth, Claimant indicated that the pain is in the same area but more intense now than it was before. Claimant indicated that she is not taking any pain medications to address these symptoms because she is nursing her infant but also because with three kids to care for the drugs make her groggy and less able to manage her life. While Claimant indicated that she recognizes that the peripheral nerve stimulator is not a cure for her chronic pain, she indicated that she believes it will address a significant amount of her pain and allow her a higher quality of life with her family.

On cross examination, Claimant admitted that as recently as February 2010, her family physician, Dr. Puri, was documenting a family history (maternally) of depression for her and prescribing Claimant Lexapro and Topamax for depression. In fact, Dr. Puri's records indicate a history and active diagnosis for Claimant of bi-polar disorder, migraines and depression. In September 2010, Claimant asked Dr. Puri for a prescription for Wellbutrin to help her quit

smoking. Claimant also confirmed that while Dr. Puri's records as of October 25, 2011 continue to document manic depression (bi-polar disorder) and depressive disorder as active diagnoses for her, Claimant maintained that those were conditions that she reported as historically significant to her when she began care with Dr. Puri that got carried over throughout his records.

Claimant indicated that she got some relief from the TENS unit but indicated her belief that the nerve stimulator would provide more such relief. Claimant further testified that she is unsure about her willingness to return to narcotic pain medication for management of her back symptoms because of the impact that it has on her ability to interact with and care for her family.

Dr. Jerry Case, M.D., a board certified orthopedic surgeon, testified by deposition on behalf of Employer.<sup>4</sup> Having evaluated Claimant on two separate occasions in addition to reviewing her relevant medical records, Dr. Case opined that use of a nerve stimulator in Claimant's case is unreasonable and unnecessary.

Dr. Case testified that he examined Claimant on April 21, 2010. At that time, Claimant confirmed that she was injured on the job for Employer while attempting to prevent a patient in Employer's skilled nursing facility from falling.<sup>6</sup> Claimant had received initial evaluation at the local hospital and then followed-up with her primary care physician. Claimant's primary care physician referred her to Dr. Cagampan who, in turn, referred Claimant to Dr. Smith for injections and chiropractic treatment. A January 26, 2010 MRI performed on Claimant's low back showed a small central disc protrusion or bulge and L5-S1 while an EMG performed by Dr. Cagampan showed no evidence of radiculopathy. In April 2010, Claimant was seen by Dr. Katz who had a second MRI performed on April 13, 2010. This second film showed some degenerative changes in Claimant's lumbar spine, some disc desiccation at L3-4 and L4-5, a

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<sup>4</sup> Dr. Case testified on two different occasions in this case; November 29, 2010 and December 12, 2011. The original November 2010 Deposition was added as an addendum to the December 2011 Deposition. To the extent

slight annular bulge at multiple levels but no indenting of the thecal sac and no central or foraminal stenosis. There was also a disc bulge at L4 and a mild disc bulge at L5-S1, neither showing nerve root compression.

Claimant's subjective complaints in April 2010 were of low back pain at seven out of ten on a standard pain scale with some intermittent pain radiating into her left buttocks, right calf and right thigh. Claimant indicated she had tingling in both legs. Claimant had been prescribed Vicodin to help with this pain but indicated that she took it only infrequently. Physically, Claimant's examination findings were minimal leaving Dr. Case with some difficulty in explaining Claimant's subjective complaints of pain and tingling in her extremities.

Dr. Case diagnosed Claimant as having a lumbar strain and degenerative lumbar changes. He indicated that a course of therapy transitioning into a work hardening program as well as some more vigorous exercise at home would be appropriate for Claimant moving forward. Dr. Case also thought that Claimant was capable of full-time, light-duty work with the limitations based solely on Claimant's subjective complaints. Dr. Case explained that a lumbar strain should respond to treatment within six to twelve weeks from the time of the accident causing the injury. Given that Claimant's diagnostic imaging studies showed no evidence of structural damage and the discogram performed by Dr. Lieberman showed no discogenic pain generators, one would expect Claimant to recover within the standard timeframe. Dr. Case observed that Dr. Katz seemed to agree based upon the fact that Dr. Katz dismissed Claimant as a potential surgical candidate and cleared her to return to full-time up to light-duty work in April 2010.

Dr. Case testified that he then saw Claimant for a second time on September 7, 2011. Dr. Case garnered from Claimant and her records that in the interim between his evaluations of her,

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that testimony provided in one or both depositions is relevant to the matter at hand, Dr. Case's testimony has been summarized concurrently.

Claimant was prescribed a TENS unit on a trial basis by Dr. Lieberman. Claimant reported no response to the use of this device. Dr. Lieberman then proposed use of a peripheral nerve stimulator in Claimant's back. Dr. Case explained that this is a minor surgical procedure as defined by the Delaware Health Care Practice and Chronic Pain Treatment Guidelines, section 7.0.

Dr. Case testified that Claimant reported to him at the September 2011 evaluation that her back pain had remained static until she became pregnant. Claimant was five months pregnant at the time of this assessment. Consistent with the pregnancy, Claimant reported that her back pain had been worse, rising to eight out of ten on the pain scale as opposed to the seven out of ten that it had been before the pregnancy. Claimant reported burning in her legs at night. She had been treating with Dr. Lieberman until the pregnancy but was now being treated by her obstetrician.

Physically, Claimant had a normal gait despite being five months pregnant. While Claimant was tender at L5, she had no sensory loss in her legs, her hip motion was normal and straight leg raising testing provoked back pain but no radiculopathy. Claimant's reflexes were normal and there was no atrophy to measurement. Again, as was the case in the 2010 examination, Dr. Case found Claimant's examination findings to be minimal. Dr. Case indicated that his diagnoses were unchanged from his original assessment excepting the addition of Claimant's pregnancy.

Based upon Claimant's physical findings, MRI and CT scan reports, Dr. Case opined that Claimant is not a candidate for a spinal cord stimulator. Dr. Case explained that spinal cord stimulators are for use in patients who have experienced failed back surgery or some other very serious condition causing excruciating pain that is not relieved by high doses of narcotics. Claimant, according to Dr. Case, does not fit any of those parameters. Claimant has a relatively

mild low back condition with chronic low back pain but is nowhere near the level that would require something as drastic as a spinal cord stimulator. Even the use of a peripheral nerve stimulator would require an invasive procedure that is unnecessary in Claimant's case. Use of a peripheral nerve stimulator is a rare procedure that Dr. Case frankly admitted he had never actually seen. Dr. Case maintained, however, that given Claimant's objective findings and even her subjective complaints, use of such radical treatment would be unwarranted. Furthermore, given the length of time that Claimant has been away from treatment with Dr. Lieberman due to her pregnancy, it would be entirely necessary for Dr. Lieberman to see and reassess Claimant before making any final determinations as to use of a nerve stimulator of any kind. Given that Claimant has been able to get through her pregnancy without pain medications and has only experienced a slight increase in her pain levels, Dr. Case testified that it is entirely possible that after delivery of the baby and recovery of her muscles, further treatment may not be needed or certainly not at the level that Dr. Lieberman thought the last time he saw Claimant. Dr. Case testified that either way, he disagrees with Dr. Lieberman's opinion that an implanted nerve stimulator is appropriate because Claimant has failed aggressive conservative care. He indicated that he, himself, is a low back pain sufferer so he knows that people with such limited pain can get by doing exercises and taking medication, when needed.

On cross examination, Dr. Case indicated that he does not believe that Dr. Katz performs peripheral nerve stimulator or spinal cord stimulator procedures as part of his practice. Dr. Case also admitted that it was his understanding until just before testifying that Dr. Lieberman was recommending use of a spinal cord stimulator for Claimant rather than the peripheral nerve stimulator that he has actually proposed. In this regard, Dr. Case admitted that the spinal cord stimulator involves a more invasive surgical procedure because the device has to be placed in the

patient's spinal column as opposed to the peripheral nerve stimulator which is placed outside of the spinal column in subcutaneous tissue.

### 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.<sup>5</sup> Claimant has filed the current petition as an appeal from a UR Determination non-certifying the proposed use of a peripheral nerve stimulator in Claimant's back. Claimant thus has the burden of proof to demonstrate that this treatment is reasonable and necessary.<sup>6</sup> In assessing the merits of the instant case, the Board is persuaded that Claimant has met her burden.

Employer has attacked Claimant's request for relief on two fronts, the first of which is the psychological basis upon which Claimant was cleared for this procedure. In this regard, Employer has argued that the UR panel that non-certified Claimant's proposed peripheral nerve stimulator procedure with Dr. Lieberman did so because Dr. Dettwyler's psychological examination of Claimant was too cursory to sufficiently serve as a basis for approval of going forward with the procedure. Dr. Dettwyler's uncontroverted testimony, however, was that he performed his examination to current medical standards and consistent with the methods of the 1000 plus other evaluations he has performed over the years. As justification for his noted failure to perform any psychological testing on Claimant such as the MMPI or MMPI2, Dr. Dettwyler explained that knowledge gained through the years in his profession has molded the way that he conducts these evaluations. He testified that the results yielded by such testing (as was specifically raised as a concern by the UR reviewer) have been shown to be a poor predictor of a patient's actual ability to formulate reasonable expectations and be successful after surgery.

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<sup>5</sup> DEL. CODE ANN. tit. 19, § 2322.

<sup>6</sup> DEL. CODE ANN. tit. 29, § 10125(c); *see also Meier v. Tunnel Companies*, Del. IAB Hearing No. 1326876 (December 1, 2009).



As such, he did not perform this testing and instead relied on a structured interview consistent with conventional wisdom.

In terms of Claimant's personal history or family history of mental health issues, Dr. Dettwyler further explained that historical significance does not necessarily lend itself to the limited issue that he was addressing in Claimant's case regarding Claimant's ability to form appropriate surgical expectations. He explained that diagnoses like depression and bi-polar disorder are Axis I diagnoses which the professional psychological literature has disavowed as contraindicated to determining, predictably, how one will respond to surgery. Dr. Dettwyler testified that it is the Axis II personality disorders that are of the greatest concern in this kind of evaluation. While Dr. Dettwyler acknowledged that had Claimant been actively treating for bi-polar disorder, it might have played a more significant role in his assessment that was not the case. Given that Claimant exhibited no symptoms of bi-polar and had not ever been treated for it with medication or otherwise, according to Dr. Dettwyler, inclusion of a lengthy discussion of the issue would have only been superfluous and distracting, suggestive of a problem that does not exist in relation to Claimant's ability to appreciate surgical gains. In the same vein, Claimant was not depressed and showed no signs of depression during her assessment. A history, therefore, of medication management for depression in the past would not preclude Claimant from being a good candidate for the proposed procedure. As such, Dr. Dettwyler maintained that his evaluation of Claimant was both consistent with current practices and the Delaware Health Care Practice and Treatment Guidelines. Furthermore, Dr. Lieberman's testimony that his concern as a surgeon moving forward with such a procedure is related to unmanaged mental health issues of patients supports Dr. Dettwyler's assessment that because Claimant was not

suffering any symptoms or requiring any medication to maintain stability, her past history of a bi-polar diagnosis or even treatment of depression is not controlling in this context.

Employer provided no medical testimony to contradict Dr. Dettwyler and instead exclusively relied on the denial of certification of the procedure by the UR panel. The Board was not provided the UR panelists Determination nor did the Board hear any evidence in opposition to the explanations provided by Dr. Dettwyler. As such, the Board accepts as credible the testimony of Dr. Dettwyler, that emotionally and psychologically, Claimant was fit to undergo the procedure when he evaluated her.<sup>7</sup>

Employer's second prong of attack is based on Dr. Case's testimony that Claimant does not need nor is it reasonable to implant a stimulator in her back. Dr. Case testified that Claimant has only minimal objective findings and equally limited subjective complaints. While Claimant self reported pain at seven out of ten on the pain scale before her pregnancy and reported during the pregnancy that it went up to eight out of ten, Dr. Case noted that Claimant was surviving the pain with only minimal use of narcotics before the pregnancy and none during the pregnancy. Dr. Case points to Claimant's ability to avoid narcotic dependence as evidence that she does not need such a radical treatment. Dr. Case even draws comparisons between his own chronic low back pain and that suffered by Claimant indicating that if she only did more exercise and used medications as needed, she could manager her symptoms without the need for this treatment.

Dr. Lieberman, on the other hand, testified that Claimant failed very aggressive, conservative care. She was provided physical therapy, chiropractic care, narcotics, analgesics, epidural steroid injections, discography and nothing relieved her symptoms or identified an operable pain generator. Dr. Lieberman testified that this procedure, when used for patients who

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<sup>7</sup> The Board does have some question as to how transferable this finding is now over a year after it was offered. It cannot be that a mental health assessment is good forever or that it can speak to an individual's mental stability at

have been properly worked-up as Claimant has, can be very successful in reducing symptoms and allowing an individual to enjoy a higher quality of life.

Having weighed the testimony of these two physicians on the issue of reasonableness and necessity, the Board finds Dr. Lieberman to be the more credible of the two.<sup>8</sup> Dr. Case admitted that up until the time of his testimony it was his belief that Dr. Lieberman had proposed the more invasive spinal cord stimulator for Claimant rather than the peripheral nerve stimulator. Dr. Case also admitted that he has never been involved in or seen a case where either device was used whereas Dr. Lieberman indicated that he has been involved in 20 to 25 implants of such devices. Dr. Lieberman further explained that the peripheral nerve stimulator proposed for Claimant addressed pain signals coming from different nerve branches than those unaffected by his earlier diagnostic efforts with Claimant; a topic Dr. Case failed to even address. On these grounds alone, it seems to the Board that Dr. Lieberman has more experience and expertise than Dr. Case not just in the filed but with Claimant as well.

The Board further notes, however, that even the UR panelist who apparently non-certified Claimant's proposed treatment did so on the grounds of concerns that he had with the psychological assessment performed by Dr. Dettwyler and not related to performance of the actual procedure as being outside of the Delaware Health Care Practice and Treatment Guidelines. On this issue, while the Board appreciates Dr. Case's argument that the Practice Guidelines seem to suggest that use of an implanted nerve stimulator might most often occur in cases where an individual is attempting to wean from significant narcotic medication, there was

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some time in the future. As such, while it may be necessary for Claimant to have some follow-up evaluation before moving forward with the procedure, the Board is satisfied with the methodology used by Dr. Dettwyler.

<sup>8</sup> When there is a conflict between the opinions of two experts, as is the case in this matter, the Board is free to choose either one and will meet the "substantial evidence" standard on review. *See Standard Distributing Co. v. Nally*, Del. Supr., 630 A.2d 640, 646 (1993) ("Although Dr. Case's opinion was to the contrary, the Board was entitled to accept the testimony of one medical expert over the views of another.")

no evidence presented that avoiding such narcotic dependence isn't as equally a valuable concern. Specifically, Claimant testified that she suffers through her pain using narcotic pain medications as infrequently as possible due in large part to her three children and the mental fogginess that she experiences with the medications.

Thus, given the thoroughness with which Dr. Lieberman has assessed Claimant before recommending this procedure and the conviction with which Claimant has elected to forego significant narcotic pain medication use in the hopes of getting the relief she needs from this procedure, the Board finds the procedure both reasonable and necessary under the circumstances.<sup>9</sup>

#### **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."<sup>10</sup> 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 minimal fee in an appropriate case, so long as some fee is awarded.<sup>11</sup> A "reasonable" fee does not generally mean a generous fee.<sup>12</sup> Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation.

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<sup>9</sup> Much as was the Board's concern with the amount of time elapsed since Claimant's psychological assessment with Dr. Dettwyler, the Board presumes that Dr. Lieberman, once reengaged in Claimant's care, will fully reassess the ongoing need for the implant before undertaking the actual surgical procedure.

<sup>10</sup> DEL. CODE ANN. tit. 19, § 2320.

<sup>11</sup> 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).

<sup>12</sup> See *Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966).

Claimant has achieved a finding of compensability for medical expenses related to implantation of a peripheral nerve stimulator. Claimant's counsel submitted an affidavit stating that he spent a total of approximately 25 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 2009 and has some experience in workers' compensation litigation. Counsel or his firm's first contact with Claimant was on June 1, 2010. Thus, Claimant has been represented by counsel or his firm for approximately a year and a half. 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 than 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 a total attorney's fee in the amount of \$5,400.<sup>13</sup>

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.

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<sup>13</sup> The Board's decision potentially confers upon Claimant not only the costs associated with the actual procedure at issue but the non-monetary benefits of ongoing, related treatment as well. *See Pugh v. Wal-Mart Stores, Inc.*, 945 A.2d 588, 591-92 (Del. 2008).

**STATEMENT OF THE DETERMINATION**

For the reasons set forth above, the Board finds that the proposed peripheral nerve stimulator procedure is compensable. Claimant's Petition is GRANTED.

Claimant is further awarded a reasonable attorney's fee in the amount of \$5,400.00 and the payment of her medical witness fees.


IT IS SO ORDERED THIS 13 DAY OF MARCH, 2012.

**INDUSTRIAL ACCIDENT BOARD**


  
MARY MCKENZIE DANTZLER

  
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: 3-15-12

  
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OWC Staff