BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

JOSEPH DAVIS,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No.: 1506161
	)	
KENNY FAMILY SHOPRITE, OF BRANDYWINE,	)	
	)	
	)	
Employer.	)	

DECISION ON PETITIONS TO DETERMINE 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 Friday April 16, 2021, via video conference pursuant to the Industrial Accident Board COVID-19 Emergency Order dated May 11, 2020.

PRESENT:

ROBERT MITCHELL

IDEL WILSON

Eric D. Boyle, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Matthew R. Fogg, Attorney for the Employee

Andrew J. Carmine, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Joseph Davis ("Claimant") allegedly sustained an injury to his left foot on April 22, 2019 while in the course and scope of his employment with Delaware Supermarkets, *dba*, Shoprite ("Employer"). Claimant sustained a fracture on his left foot and ultimately had two surgeries. On December 21, 2020 Claimant filed a Petition to Determine Compensation Due seeking acknowledgement that his injuries were work related as well as payment of medical expenses and ongoing total disability benefits. Claimant had an average weekly wage of $543.60 which results in a compensation rate of $362.40. Employer disputes the causal relationship of the injury to Claimant's work duties. The causal relationship of the left foot fracture is the sole issue presented for the Board's determination. A video conference hearing was held on Claimant's petition on March 8, 2021. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. Jennifer Siefert, a board certified podiatrist, testified by deposition on behalf of Claimant. Dr. Siefert's specialty is foot and ankle surgery. Dr. Seifert was able to review Claimant's medical records in preparation for her deposition testimony. Dr. Seifert first testified about the incident on April 22, 2019. Claimant had also reported it on that day. The reports at that time indicated that Claimant had a strain to his lower extremity or foot. The description was that the worker injured his foot while breaking down the meat load. She agreed that Claimant initially went to a different podiatrist, Dr. Bray. Dr. Bray's initial report of April 22, 2019 was later amended. Dr. Seifert looked at both reports and noted that the original indicated that Claimant had reported a painful left foot for several months before seeing Dr. Bray. The amended report indicated there were no prior symptoms in the left foot. Claimant reported to Dr. Bray that he was carrying boxes of about 100 pounds when he felt a pop in his left foot and subsequently pain. Dr.

Seifert also reviewed a disability form completed by Dr. Bray where it indicated that Claimant had not had a similar condition in the past.

Dr. Seifert reviewed the initial x-rays that were taken on the day of the incident. She confirmed that they were normal. Dr. Seifert testified this did not surprise her because it was a non-weightbearing x-ray and the type of injury Claimant ultimately had, a Lisfranc fracture, is often missed on a normal x-ray. It can be diagnosed as a sprain. Claimant next treated with occupational health on April 23, 2019. In that initial report he provided the same mechanism of injury and denied having a prior history of injury or pain to that foot. A subsequent CT scan that was performed on June 24, 2019 revealed a sub articular fracture of the distal aspect of the middle cuneiform bone. This is what articulates the third metatarsal. Dr. Seifert diagnosed a Lisfranc fracture. She further explained that there is an entire complex in this area including ligaments, the second metatarsal and several cuneiform bones. She explained when you have a this injury you can have a high-energy trauma like a fall from a height or in a car accident. You can also have an indirect but more common injury such as when your foot is loaded, and your toes are flexed is if you're going to step forward. A force from a misstep that stresses this complex can cause a rupture in the ligament and fractures. This is a common injury in football as well. There was also an MRI performed on July 25, 2019 that showed mild edema, an intact the Lisfranc ligament, and some arthrosis. This is an arthritis that develops over time after a Lisfranc injury and is usually not diagnosed in less there is a displacement after the injury. Dr. Seifert agreed that this arthritis develops rapidly after a Lisfranc injury. She also agreed that you would see this type of finding for an injury that occurred in April on an imaging study done in July. There was a subsequent MRI performed in October 2019. The findings on that MRI showed fractures and edema that would be indicative of a Lisfranc fracture.

Dr. Seifert first saw Claimant for a second opinion on February 6, 2020. He had been referred for a surgical consult after the last round of imaging performed by Dr. Bray. Her assessment at that time was Lisfranc dislocation and sequela. Dr. Seifert ultimately performed surgery, a second and third tarsometatarsal arthrodesis. This means that she fused the joints after removing the damaged cartilage and used hardware to hold the bones together. The second surgery was a removal of that hardware. This is a common occurrence because the hardware can irritate the foot at due to its placement. Claimant was then started on physical therapy, but he continues to have pain and swelling in his foot. Dr. Seifert noted with Claimant's smoking history he will have symptoms farther out from the surgical intervention. Smoking slows the healing process. In Dr. Seifert's opinion Claimant was injured at work on April 22, 2019 and sustained a work-related Lisfranc fracture to his left foot. All of the treatment has been reasonable, necessary and causally related to the April 22, 2019 work injury.

Dr. Seifert agreed that Dr. Schwartz also found the treatment reasonable, necessary, and agreed with that diagnosis. Their disagreement comes from the mechanism of the work accident and Dr. Schwatz did not feel it had sufficient energy to cause the Lisfranc fracture. Dr. Seifert reviewed a document from the American Academy of Orthopedic Surgeons on Lisfranc injuries. The document notes that these injuries can happen with a simple twist and fall or low energy injury. It is common in football and soccer players and when someone stumbles over the top of a flexed foot. She agreed that in this case it was an indirect trauma that caused the fracture. Dr. Seifert treats patients with Lisfranc injuries. She agreed that she commonly sees these patients with the low impact type injury. Dr. Seifert has placed and continues to place Claimant on total disability from work.

On cross examination Dr. Seifert acknowledged that the records indicated that Claimant suffered an injury in May 2019 which was the history provided to her medical assistant. The extent of the mechanism of injury that she was aware of at that time was that Claimant was carrying a box at work and felt a pop in his left foot. She did not initially have the MRI scan for review. Because of the physical examination findings of tenderness Dr. Seifert ordered a new MRI with the suspicion of a Lisfranc injury. She conceded she did not have any of the medical records in her possession at that time. Many of them were sent to her for the deposition. She agreed that she did not have the records available prior to her surgeries. She agreed that the imaging showed multiple fractures including dislocation of the Lisfranc joint. She agreed that these injuries require surgery if they are displaced, such as this one. Dr. Seifert agreed that her note of August 21, 2020 two months after the first surgery indicated that Claimant was not currently working unrelated to the foot. She did not recall why that was documented. The last note from her office is dated February 11, 2021 which was four months post the hardware removal. She agreed that Claimant was still in a postoperative shoe and experiencing difficulty with weight-bearing. Dr. Seifert testified that she was aware of the documentation from the American Association of Orthopedic Surgeons on Lisfranc injuries.

Joseph Davis testified on his own behalf. He is 42 years old and lives with his parents in Newark Delaware. He has lived in the same house for his whole life. His highest level of education is a GED. When the accident occurred, he was working at the ShopRite on Concord Pike as a meat cutter's apprentice. He has been with Employer since 2012. Claimant testified that when the accident occurred, they had been breaking down a meat load from the pallets. Claimant was carrying a heavy box of pork which he testified was a wide box and awkward to carry. He was leaning a bit forward as he was walking and when he came down on his left foot, he felt a pop and

immediate pain. He had to put the box of meat down to keep from dropping it. Claimant testified that he never had a previous injury to the left foot. He was not having any pain in the left foot prior to this incident. Claimant did previously treat with Dr. Bray for a right foot injury that occurred when he was playing hockey.

Claimant immediately reported the incident to his supervisor. Claimant testified concerning the initial note from Dr. Bray that first indicated that his pain in the left foot had been going on for a few months. He does not know why that statement was in the note as that is not what he told Dr. Bray. When Claimant first learned of this, he brought it up to Dr. Bray and they changed the note. Claimant confirmed when he had x-rays at Dr. Bray's office he was sitting on a table. Claimant testified about the forms that he completed for his union benefits. The forms do indicate that he only had prior injuries on the opposite foot and nothing to the left foot. Following the visit to Dr. Bray, Claimant treated with Pivot Occupational Health but did not think they did anything meaningful for him. They diagnosed him with plantar fasciitis and sent him back to Dr. Bray. Ultimately Dr. Bray wanted to get a second opinion and referred him to Dr. Seifert.

When Claimant saw Dr. Seifert he completed an intake form. On that form he denies having subsequent injuries and it notes that he was injured by carrying the box. Claimant was never cleared to return to work and was never told that he was terminated. Claimant agreed he did agree that his benefits eventually stopped. He did get some six months of wage benefits through the union. The record was incorrect when it stated that the injury was in May because it was in April. Claimant did not make a worker's compensation claim until November 2020 because he thought that he got all the benefits that he was entitled to through the union. His friends told him he should make a worker's compensation claim since the injury happened at work. They also recommended that he see a lawyer. Claimant testified that he is not currently cleared for work. He obtained a

boot for his foot and is currently wearing it. Although Dr. Seifert. encouraged him to wear a sneaker which he tries to do for 2 to 3 hours a day. He still has pain and swelling in his foot. The pain is constant and worse when walking. His last surgery was in October. He is willing to do a desk job, but he has not been cleared to return to work. Claimant testified that he does not do very much during the day. In the morning he'll get his coffee and breakfast and then pretty much sit around all day.

On cross examination Claimant confirmed that he did not fall or lose his balance. He was able to put the box down and nothing struck his foot. The incident occurred at 6 to 7 in the morning he went directly to the store manager to report what happened. He thought that it happened during the week as he was off on Wednesday and normally, he works during the weekends. Claimant's hobbies include going to baseball games and playing ice hockey and street hockey. Clamant told Dr. Bray that he hurt his foot at work. The last time he saw Dr. Bray was in 2017 although other family members have seen him more recently. Claimant was mad that the note said that he had prior problems with the left foot. Claimant found out about it from the doctor in Dover [Dr. Schwartz]. After that Claimant talked to Dr. Bray directly about how the note was incorrect and they changed it. Between 2012 and 2019 Claimant was a meat wrapper and he was learning how to be a meat cutter. Their work area was a hard tile floor although it was level. The injury happened approximately halfway to the meat box. He was wearing nonslip steel toed boots which were required but uncomfortable.

JoAnn Davis testified on behalf of Claimant. She is Claimant's mother. She was aware that Claimant had hurt his right foot in the past playing sports. He got medical treatment right away. She was not aware of any problems with Claimant's left foot before this incident. Mrs. Davis saw him every day. She was aware of the foot problem in 2019 because Claimant called her as he was

leaving work and told her she he was having a sharp pain in his foot. She noticed that Claimant's foot was swollen and he was limping. They called Dr. Bray and took him over there. As far as she was aware there was no discussion about the right foot or prior problems with the left foot. She felt that Claimant was getting better after the second surgery although he was still having some swelling. She felt that Claimant would get more swelling if he was on his feet too much. Claimant does not do much but does help do certain things around the house. Claimant tries to keep his foot elevated during the day.

On cross examination Ms. Davis confirmed that she spoke personally to the doctor although Claimant did the talking because he is an adult. She just listened in and did not interrupt the conversation. She did not help with the paperwork. The lady from ShopRite helped Claimant with the paperwork. Claimant had been working a lot of hours prior to the incident. Claimant testified that he weighs approximately 210 pounds.

Dr. Eric Schwartz, a board certified orthopedic surgeon, testified by deposition on behalf of Employer. He examined Claimant on March 9, 2021. In conjunction with his examination Dr. Schwartz reviewed Claimant's medical records. At the time of the examination Claimant provided a history of carrying a load of meat when he felt pain in his left foot. Dr. Schwartz summarized some of the initial medical records that he reviewed. These included records from Dr. Bray, a podiatrist, from April 2019 until November 2019. Dr. Bray initially saw Claimant on April 22 and that record documented left foot pain for several months getting worse over time. Dr. Schwartz testified that this note had been recently corrected to indicate there was no left foot pain prior to the April incident. There were also records from First State Orthopedics and Pivot Occupational Health. Claimant also provided some details regarding his employment. He had been working for 12 years at ShopRite as a meat wrapper and meat cutting apprentice. Claimant denied any prior

treatment or injury to his left foot. On further questioning Claimant did recall treatment to his right foot by Dr. Bray. Claimant's left foot gave out when he was carrying a heavy weight and he is now barely able to walk on it.

The physical exam on the initial examination by Dr. Bray noted third metatarsal joint pain on palpation and a Taylor's bunion on the left foot, which was also painful on palpation. Dr. Schwartz testified that the Taylor's bunion unlike the usual bunion on the great toe, is located on the small toe. There was also hypertrophic skin underneath the fifth metatarsal where the bunion is located. That is called a callous lesion and it takes a long time to develop. Dr. Bray's office performed x-rays and they came back normal with no fractures. The diagnosis was arthritic in nature. The arthritic diagnosis is something that would take years to develop. At the time Dr. Bray felt that the pain was coming from that arthritis. For treatment Dr. Bray injected the foot in the arthritic areas and then also debrided the bunion and lesion. Dr. Schwartz confirmed that the amended note only removed the reference to the foot being painful for several months prior to the incident at work. Claimant next went to Pivot Occupational Health on April 23. That note began "the patient is a 40-year-old meat wrapper employee of ShopRite presenting for evaluation of left foot pain beginning on April 22". The mechanism of injury was that he was walking while carrying a box when he felt weakness and pain in the left foot. The note indicated there was no other specific or clear mechanism of injury. Claimant's podiatrist ordered an x-ray, injected the foot and shaved some bunions. Pivot provided a diagnosis of plantar fasciitis of the left foot and left foot sprain. There was no specific mechanism of injury noted. That record also referred Claimant back to his podiatrist for care of a nonwork related problem.

On February 27, 2020 Claimant then began treating with First State Orthopedics. Dr. Schwartz reviewed a patient intake form that Claimant completed. The entries for whether the visit

was related to an accident are not completed. Workers comp is also not checked. There was an note indicating that Claimant sustained an injury at work in May 2019 but it was not workers compensation. The note indicated that Claimant was carrying a box at work and felt a pop in the left foot. The note further indicated that symptoms became acute about nine months ago which Dr. Schwartz felt was consistent. Dr. Schwartz agreed that he reviewed an MRI dated July 26, 2019 which did show a significant injury to the left foot.

The impression on the MRI was multifocal marrow contusions within the bones of the foot. There was incomplete fracture visible at multiple bones. Dr. Schwartz noted this would be the inferior talus, proximal cuboid, fourth metatarsal base and a cuneiform fracture. This was accompanied by a sprain of the Lisfranc ligament. In other words the MRI revealed multiple bone fractures and a ligament injury. Dr. Schwartz noted that this these findings were not consistent with the mechanism of injury described by Claimant. Dr. Schwartz indicated that the Lisfranc injury is a keystone in the foot and if it isn't fixed you will get a rapid onset of severe arthritis. This is where the second metatarsal gets displaced from the tarsal bones. Dr. Schwartz testified that it requires excessive kinetic energy to occur, in other words a crush injury, a car accident or a fall from a height. Dr. Schwartz testified that Claimant underwent two surgeries to fix this injury, the first on June 25, 2020 which was a fusion of several metatarsal and tarsal bones. The diagnosis was Lisfranc fracture or dislocation with malunion and posttraumatic degenerative joint disease. The second surgery was a removal of the hardware placed in the first surgery. Dr. Schwartz testified that Dr. Seifert also noted that there was already significant arthritis nine months out from the injury. He noted that the key to this was that it was dislocated.

When Dr. Schwartz performed a physical examination Claimant noted that he continued to have significant left foot pain and swelling despite two surgeries. On physical examination Dr.

Schwartz noted a 5 cm scar across the dorsum of the foot. There was diffuse left foot pain and Dr. Schwartz appreciated swelling when compared to the other foot. Claimant had normal ankle range of motion but otherwise limited motion of the left foot as well as sensory deficits. Dr. Schwartz agreed that these are significant findings. He noted that Claimant was significantly painful and swollen. He also had sensory deficits status post the two surgeries. Dr. Schwartz agreed that when Claimant came in for the examination, he was wearing a CAM boot. Dr. Schwartz diagnosed a persistent left foot pain status post Lisfranc fracture or dislocation and resultant surgeries. Dr. Schwartz agreed that the treatment was reasonable and necessary as well is causally related to the complaints.

Where Dr. Schwartz disagreed was whether it was causally related to the incident that occurred at work on April 22, 2019. The basis for his conclusion is that the mechanism of injury described to him and the other doctors would not be sufficient to produce this type of condition. Dr. Schwartz at this point noted that there was an initial comment that Claimant had left foot pain for several months that was getting worse over time and even though that was amended it would not matter because there is no mechanism of injury that would produce this fracture which requires significant trauma. Dr. Schwartz reiterated that this injury is only caused by excessive kinetic energy like enormous foot force across the foot in the tarsal metatarsal area and in his opinion there is a 0% possibility that it is produced by the mechanism of injury described to him by Claimant. To Dr. Schwartz the weight of the box would not make a difference unless the box fell on Claimant's foot which it did not in this case.

Following his examination Dr. Schwartz was of the opinion that Claimant could return to work in a full time sedentary duty position utilizing the boot. He agreed that he would not want Claimant to be in a weight-bearing position for any prolonged period of time. He could not return

to work in his former position but could do office type work like answering telephones. Dr. Schwartz agreed that Claimant would require additional care for his significant symptoms and should see an orthopedic foot and ankle specialist. Dr. Schwartz also reviewed several prior Industrial Accident Board decisions that involved the same injury. In the first case a large piece of iron weighing over 800 pounds hit the claimant's foot. In the second case the claimant fell 20 feet from a scaffolding. Dr. Schwartz agreed that these were more commonly the mechanisms of injury that you would see with a Lisfranc fracture.

On cross examination Dr. Schwartz conceded that he is not a foot and ankle specialist. He also agreed that he only saw Claimant on the one occasion. He agreed that all the treatment has been reasonable and necessary. He agreed that there were two rationales behind his opinion on causal relationship. The first being a questionable issue of a pre-existing problem in the foot and the other one was the mechanism of injury. Dr. Schwartz testified that he was unable to review any of the disability paperwork completed by Claimant and Dr. Bray. He also agreed that the note with the prior history was amended to remove that prior history. He agreed that the amount of weight Claimant was carrying would not matter unless he dropped it on his foot. Dr. Schwartz testified that he is a member of the American Academy of Orthopedic Surgeons. There was a document authored by that group specifically regarding Lisfranc injuries. This statement indicated that Lisfranc injuries are often mistaken for a simple sprain. Dr. Schwartz agreed with that statement. The document further indicated that these injuries can happen with a simple twist and fall and that it was a low energy injury. Dr. Schwartz disagreed with that statement noting that it is certainly not a low energy injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Causation

The Delaware Workers' Compensation Act states that employees are entitled to compensation "for personal injury or death by accident arising out of and in the course of employment." DEL. CODE ANN. tit. 19, § 2304. Because Claimant has filed the current petition, he has the burden of proof. DEL. CODE ANN. tit. 29, § 10125(c). "The claimant has the burden of proving causation not to a certainty but only by a preponderance of the evidence." *Goicuria v. Kauffman's Furniture*, Del. Super., C.A. No. 97A-03-005, Terry, J., 1997 WL 817889 at *2 (October 30, 1997), *aff'd*, 706 A.2d 26 (Del. 1998). 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." *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992). "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." *Reese*, 619 A.2d at 910. *See also State v. Steen*, Del. Supr., 719 A.2d 930, 932 (1998)("[W]hen there is an identifiable industrial accident, the compensability of any resultant injury must be determined *exclusively* by an application of the 'but for' standard of proximate cause.")(Emphasis in original); *Page v. Hercules, Inc.*, Del. Supr., 637 A.2d 29, 33 (1994). There is no dispute that Claimant reported pain in his foot that occurred while he was carrying a box of meat at work. The issue in this case is whether Claimant sustained a Lisfranc fracture as the result of the incident at work on April 22, 2019. There is no dispute concerning the reasonableness and necessity of the treatment Claimant received for this injury.

Following a review of all the evidence presented the Board finds that Claimant has met his burden to prove that he was injured at work and as a result sustained a Lisfranc fracture requiring several surgeries. In reaching this conclusion the Board will rely on the medical opinion of Dr. Seifert. When the medical testimony is in conflict, the Board or hearing officer, in the role as the finder of fact, must resolve the conflict. *General Motors Corp. v. McNemar*, 202 A.2d 803 (Del. 1964). As long as substantial evidence is found, the Board may accept the testimony of one expert over another. *Standard Distributing Company v. Nally*, 630 A.2d 640, 646 (Del. 1993). The Board finds Claimant's testimony to be credible and supported by the medical records. Dr. Schwarz on his examination found ongoing objective evidence of the Lisfranc fracture such as swelling and diminished sensation. Dr. Schwartz testified that all the treatment including the surgeries was reasonable, and necessary. However, there is one issue regarding Claimant's credibility which was questioned by Employer. This has to do with the initial treatment records with Dr. Bray, which prior to being amended, noted that Claimant had had left foot pain for several months prior to the incident at work. However, the Board notes there is other documentary evidence supporting Claimant's denial of prior problems with his left foot. A disability form completed by Dr. Bray indicated that the prior problem was to the opposite foot in 2017. Another form for lost time benefits also indicated no prior problems. Other medical records like the Pivot intake form also indicated that the pain occurred on the 22nd. The Board is satisfied that the note by Dr. Bray was an error, which was also evidenced by his correction when it was brought to his attention. Claimant's testimony was consistent with all the other medical records. He reported the incident immediately, which does lend credibility to the claim.

The primary issue though is one of medical opinion, which boils down to whether the mechanism of injury was sufficient to cause the Lisfranc fracture. In Dr. Schwartz' opinion this

type of fracture requires a great amount of force or trauma to the foot. Sufficient force was not present in the mechanism of injury as stated by Claimant. In Dr. Seifert's opinion this type of fracture can occur either with a low impact injury or a high force injury. In this regard the Board is going to give deference to Dr. Seifert as foot and ankle surgery is her specific area of expertise. She testified that she has experience treating Lisfranc fractures as well. Further the paper from the American Academy of Orthopedic Surgeons on Lisfranc fractures supports Dr. Seifert's opinion rather than Dr. Schwartz. Dr. Schwartz was 100% sure that Claimant could not have picked up this injury just by walking while carrying a heavy object. Yet that was not what the guidelines from the AAOS state, an organization of which he is a member. Dr. Seifert explained how someone could injure the Lisfranc structure with a low impact injury. She used the example of a football player stepping down with his foot in a certain way as one common mechanism of injury. This type of misstep can rupture the ligaments and cause a fracture. The low impact mechanism is more common among the patients Dr. Seifert treats with Lisfranc fractures. In this case Claimant was carrying a large, heavy, and awkward item and heard a pop and felt pain after stepping down. Claimant testified that he was leaning forward as he was carrying the box. This mechanism of injury clearly fits within the examples provided by Dr. Seifert.

Consequently, the Board finds that Claimant suffered a Lisfranc fracture and it is causally related to the stepping incident at work on April 22, 2019. Outstanding medical expenses are to be paid in accordance with the fee schedule set forth in section 2322(B) of Title 19 of the Delaware Code. Employer must also pay Claimant's total disability from the last day worked ongoing, with consideration for the Union disability benefits already received. Claimant's Petition to Determine Compensation Due is hereby **GRANTED.**

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. 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*, Del. Super., C.A. No. 96A-01-005, Cooch, J., 1996 WL 527213 at *6 (August 9, 1996). A "reasonable" fee does not generally mean a generous fee. *See Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966). Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation.

Claimant's counsel submitted an affidavit stating that approximately nineteen (19.75) hours were spent preparing for this hearing, which lasted approximately two (2) hours. Claimant's counsel has been admitted to the Delaware Bar since 2002 and is experienced in the area of workers' compensation litigation, a specialized area of the law. Claimant's first contact with Counsel's firm was on November 10, 2020. The case was of average complexity, involving no unusual question of fact or law. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances. There is no evidence that accepting Claimant's case precluded counsel from other employment although Counsel noted that preparation for this hearing prevented work on other cases. Counsel's fee arrangement with Claimant is on a contingency basis. Counsel does not expect a fee from any other source.

The Board awarded compensability of Claimant's accident that resulted in a serious fracture to his left foot, two surgeries and ongoing total disability. Taking into consideration the fees customarily charged in this locality for such services as were rendered by Claimant's counsel and the factors set forth above, the Board finds that one attorney's fee in the amount of $7,500.00 is appropriate in this case. 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

Accordingly, for the reasons stated above, the Board **GRANTS** Claimant's Petition to Determine Compensation Due. Claimant sustained a Lisfranc fracture of his left foot as a result of the work related incident. Employer must pay the outstanding medical expenses in accordance with the fee schedule set forth in section 2322B(3) of the Delaware Code. Employer must also pay Claimant total disability for his lost wages, with consideration given to the previously received Union disability benefits. The Board awards Claimant the payment of a reasonable attorney's fee in the amount of $7,500.00 and the payment of Claimant's medical witness fees in accordance with 19 *Del. C.* § 2322(e).

IT IS SO ORDERED THIS 7th DAY OF MAY 2021.

INDUSTRIAL ACCIDENT BOARD

/S/
ROBERT MITCHELL

/S/
IDEL WILSON

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

Mailed Date: 5/10/21

OWC Staff