C

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

FELAMI MOORE,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1393120
	)	
CORPORATE KIDS LEARNING CENTER,	)	
	)	
Employer.	)	

**DECISION ON PETITIONS
FOR REVIEW TO TERMINATE BENEFITS AND
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 February 19, 2015, in the Hearing Room of the Board, in Milford, Delaware. Deliberations were concluded on March 2, 2015.

PRESENT:

MARY DANTZLER

PATRICIA MAULL

Julie G. Bucklin, Workers' Compensation Hearing Officer

APPEARANCES:

Benjamin A. Schwartz, Attorney for the Employee

Wade A. Adams, III, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On January 28, 2013, Felami Moore ("Claimant") was injured in a compensable industrial accident while working for Corporate Kids Learning Center ("Corporate Kids"). Claimant has been receiving total disability benefits at a compensation rate of $215.00 per week (the minimum compensation rate at the time of the accident) based on her wages of $315.40 per week. On March 19, 2014, Corporate Kids filed a Petition for Review to terminate Claimant's total disability benefits, alleging that she is capable of working. Claimant argues that she remains totally disabled.

The parties stipulated to the admission of the labor market survey into evidence without the testimony. They agreed that the survey shows that there will be no wage loss with thirteen part-time and fifteen full-time sedentary duty jobs listed. The parties also stipulated to the admission of the surveillance DVD into evidence without the need for testimony.

On August 25, 2014, Claimant filed a Petition to Determine Additional Compensation Due, seeking acknowledgement that her April 22, 2014 lumbar spine surgery is compensable. Corporate Kids argues that Claimant's surgery was not reasonable, necessary, or compensable.

On February 19, 2015, the Board conducted a hearing on both petitions. Deliberations were concluded on March 2, 2015, after the Board had time to review the surveillance DVD and all of the evidence presented.

SUMMARY OF THE EVIDENCE

Claimant, thirty-eight years old, testified about her industrial accident, medical condition, and work experience. Claimant graduated from high school, took some college classes in psychology, and earned her certified nursing assistant ("CNA") degree. She is able to read, write, do basic math, and learn new things.

Claimant worked as a teacher's aide and kitchen manager for Corporate Kids. In the past, Claimant worked as an optical coordinator for Halpern Eyes, a physical therapy aide at Dynamic Physical Therapy ("Dynamic") and ran the front desk at Dynamic, and a server at Olive Garden for eight years. She also worked in several customer service jobs, wherein she had to answer the telephone, file paperwork, assist customers, do scheduling, send faxes, and use the computer. At Dynamic, Claimant had to file paperwork, assist patients, answer the telephone, send emails and faxes, communicate with the doctors, deal with insurance companies and paperwork, open the office, and keep the office neat. She is able to use Word and Microsoft Office, as well as other computer programs. She worked with people in every job that she ever held, so she has people skills, as well as computer skills.

Claimant's primary care physician is Dr. Sharad Patel at Dover Family Physicians. Claimant never had any back problems prior to the industrial accident. She treated with Dr. Patel for kidney problems that involved back flank pain. She underwent a kidney biopsy on January 18, 2013, which was about two weeks before the industrial accident. She had swelling in the legs, which caused trouble walking, so the biopsy was ordered. Claimant was worried and had anxiety because of the edema. The biopsy caused a hematoma on the kidney. Claimant cannot recall whether or not she was diagnosed with anxiety prior to the industrial accident. She agreed that the medical records from September 12, 2012 indicate that she had anxiety with a gradual onset for years and it has been consistent. Dr. Patel prescribed Xanax for an extended period of time and Claimant took it on an as-needed basis.

Claimant started seeing Dr. Gerald Milan, a nephrologist, beginning in October 2012 and he ordered the kidney biopsy. Claimant was diagnosed with focal segmental glomerulosclerosis ("FGS"). Her kidneys are not filtering properly, so they let out blood and protein in the urine.

Protein in the urine can cause edema in the legs and hands. Claimant was diagnosed with FGS shortly after the industrial accident, so it was a lot to deal with all at once. Sometimes the swelling in the legs was so bad that Claimant could not walk, so she takes medication for it now and walks fine.

On January 28, 2013, Claimant slipped and fell on the ice at work. She went to the emergency room with back complaints. The emergency room records indicate that Claimant's lumbar spine was non-tender and the thoracic spine was non-tender.

Claimant did not recall seeing Dr. Patel on February 4, 2013. Dr. Patel's records indicate that the appointment was for a recheck of the edema, which was worsening. Dr. Patel also noted that Claimant had back pain that occurred without an accident. He also noted that Claimant had a kidney biopsy the previous week and went to the emergency room for a hematoma.

Claimant started treating with Dr. Eric Schwartz and told him about her slip and fall and the back pain. Dr. Schwartz reviewed the MRI as normal. He said that he saw a sprain on the MRI. He did not recommend surgery or injections.

Then, Claimant started treating with Dr. Ganesh Balu and started receiving total disability benefits from Corporate Kids. Claimant started working part-time at Dynamic in January 2013, prior to the industrial accident, and continued to work at Dynamic until September 26, 2013, even while receiving total disability benefits from Corporate Kids. Claimant's attorney at that time, Zachary George, knew that Claimant was working part-time at Dynamic while receiving total disability benefits from Corporate Kids. She had applied to work at Dynamic on December 28, 2012 because she wanted to work full-time at Corporate Kids and part-time at Dynamic. After the accident, she stopped working at Corporate Kids because she could not perform her job duties there, but she kept working at Dynamic because she could perform those job duties.

On August 21, 2013, Claimant saw Dr. Bruce Katz. He noted that Claimant was working up to eight hours a day at that time. Claimant testified that she worked only part-time at that point. After the industrial accident, Dynamic had to clear Claimant to work at all because she had been off of work for a couple of months and then worked only part-time at Dynamic. She had restrictions when she returned to work, including no bending, standing, twisting, or turning. The pay stubs from Dynamic indicate that she was paid $9.00 per hour and worked seven hours between January 19 and February 1, 2013 and then returned to work again on March 2, 2013 and worked twenty-five hours over a two-week period. She continued to work until September 6, 2013 and was paid every two weeks.

Dr. Balu testified that Claimant was prescribed a cane. Claimant explained that she had problems walking because of the back pain. She also had trouble bending, standing, and sitting. Dr. Bruce Rudin testified that Claimant had "unrelenting, significant, clinically limiting back pain" immediately before the April 22, 2013 lumbar spine surgery and that she could not do anything because of the pain. Claimant confirmed Dr. Rudin's testimony.

Claimant agreed that her kidney function worsened after the lumbar spine surgery. She completed a course of physical therapy and then therapy was extended, but she had problems, so she had to stop therapy. She was in and out of the hospital because of her kidney problems. She underwent chemotherapy and other treatment for the kidney condition. She gained seventy-five pounds because of the kidney medication (Prednisone) and because she was no longer active. She had kidney treatments once a month and saw the doctor for the kidney once a month after the lumbar spine surgery.

Since August 2013, Claimant has been in the hospital a lot, but she does not know the exact number of times. Her longest stay in the hospital was for a week from December 26, 2013

until January 2, 2014. She was in the hospital again in January 2015, which is why this hearing had to be rescheduled.

Claimant goes to dialysis three times a week now. Each dialysis session lasts for three hours and Claimant is tired afterwards. Claimant has stage III renal failure, but her kidney problem is under control and she will not need a kidney transplant.

Claimant had a defense medical examination ("DME") scheduled on August 26, 2014 at 10:15 a.m. with Dr. Ali Kalamchi, but she did not appear for the DME. Claimant believes that she missed the DME because she was not released from that hospital until that afternoon. She might have been released from the hospital on the previous day, but was home resting instead of going to the DME. She did not intend to miss the DME.

Claimant went to two DMEs with Dr. Kalamchi, one on September 10, 2013 and the other on December 1, 2014. She reviewed Dr. Kalamchi's reports. Dr. Kalamchi wrote about things that Claimant said or that he observed on September 10, 2013, but he was mistaken. Claimant said that she could drive short distances only, not that she cannot drive. Dr. Kalamchi said that he observed Claimant walking with a cane and with a very awkward guarded gait, but Claimant thinks that he was wrong. He also noted that Claimant was able to get up in a slow fashion and walked slowly without a cane; Claimant testified that she got up slowly, but did not have difficulty walking. Claimant testified that she did not point to her lumbar spine and say that she had horrible pain there. Dr. Kalamchi noted that Claimant could not reach her upper thighs when she bent forward, but Claimant testified that he was wrong and that she could reach further than that when she bent forward. Dr. Kalamchi noted that Claimant could bend laterally only five to ten degrees, but Claimant testified that she could bend to the sides more than that and that her hands were almost to her kneecaps at the DME. Dr. Kalamchi noted that Claimant could

rotate to the sides only five to ten degrees, but Claimant testified that she could rotate further than that. Dr. Kalamchi noted that Claimant was grimacing, squinting, and making facial expressions to indicate that she was in extreme pain. Claimant agreed that she had some squinting and tension in her face during the examination. Dr. Kalamchi noted that Claimant could only go thirty degrees on the right and fifty degrees on the left for the straight leg raising test, but could go ninety degrees when seated, but Claimant testified that she could get her knees to within several inches of her chest during that test. Claimant could do all of the movements that Dr. Kalamchi asked her to do, but she moved slowly and some movements caused pain. The second DME on December 1, 2014 was a similar type of examination as the first DME.

Claimant underwent lumbar spine surgery in order to relieve her pain and her lumbar spine has improved since surgery. Before surgery, her pain level was eight to nine out of ten on the pain scale on a daily basis. Now, her pain is not constant and is a three to four out of ten at its worst and she has no pain on other days when she takes medication.

Claimant believes that she cannot work now even though she has no pain some days because she has pain on other days. She could not perform her job duties at Corporate Kids because she cannot bend or lift children, load or stock the heavy cans of food, or sweep. She could not do a sedentary duty job now either. She needs more physical therapy because she cannot sit or stand for a long period of time. She wants to work and have a normal life again. She wants to play with her grandson, go to games, and go fishing; she cannot do those activities anymore. When she has no pain, she tries to enjoy her family because it is only for that moment or day and she will probably have pain the next day. She has two days a week that are not good. If she has two days in a row that are good, she tries to be more mobile and do more, but then she has a bad day the next day.

Todd L. Siegal, M.D., board-certified in diagnostic radiology and neuroradiology, testified by deposition on behalf of Corporate Kids. Dr. Siegal reviewed Claimant's March 4, 2013 lumbar spine MRI and her July 29, 2013 discogram and post discogram CT scan. The studies were performed at Delaware Open MRI and CT Imaging Center. Dr. Siegal believes that Claimant's diagnostic studies were clear and did not show any anatomic injuries to the lumbar spine. He did not review any of Claimant's other medical records and was not aware of the mechanics of the industrial accident.

The MRI study was valid, clear, and of adequate diagnostic quality. There was no patient motion and the imaging quality was good. It showed that all of the discs in Claimant's lower back were totally normal in appearance without any disc space narrowing. There was no disc desiccation, bulging disc, disc herniation, spinal stenosis, or nerve root compression at any level. It was a totally normal lumbar MRI scan.

The post discogram CT scan showed a normal intranuclear collection of contrast at each of the four levels (L2-3, L3-4, L4-5, and L5-S1). There was no disc degeneration, annular tear, bulge, or herniations. The discogram was entirely normal.

The only time a herniated disc might not show up on a scan is if it is a lousy quality MRI scan, the patient is moving around, or if it is done on suboptimal imaging parameters, so that the radiologist might not be able to see the disc herniation. Dr. Siegal believes that both of the studies that he reviewed were good quality studies. The MRI was not limited by motion artifact and it was done on a good quality open MRI machine. The post discogram CT scan was also a very good quality study that was not limited by any type of artifact from motion or degradations from the patient's body habitus or anything like that.

Dr. Siegal agreed that there is no reason to believe that Claimant had any anatomic injuries to her lumbar spine whatsoever. Anatomically, her entire lumbar spine, including her bones, soft tissues, and disc spaces, were entirely normal in appearance on both post-accident imaging studies. Any anatomic injury that Claimant could have possibly had, such as a fracture, bone marrow edema, disc herniation, is not shown on the imaging studies and is not present. Dr. Siegal testified that he was one hundred-percent certain that Claimant had no disc abnormalities, especially at the level on which she was operated, L4-5. It was a totally normal disc on both post-accident imaging studies. The surgeon could have removed fragments of disc material, but he probably removed fragments that were normal. Dr. Siegal believes that his interpretation of the MRI study was the same as the original radiologist's interpretation that it was an unremarkable study.

Ali Kalamchi, M.D., a board-certified orthopedic spine surgeon and a certified medical provider pursuant to the Delaware Workers' Compensation system, testified by deposition on behalf of Corporate Kids. Dr. Kalamchi examined Claimant on September 10, 2013 and December 1, 2014 and reviewed her medical records in conjunction with the examinations. He believes that Claimant's lumbar spine surgery was not indicated or causally related to the industrial accident and that Claimant has been physically capable of working since at least September 10, 2013 related to the industrial accident, but that she probably remains totally disabled due to her kidney condition.

Claimant slipped in an icy parking lot and fell backward, injuring her neck, low back, right knee, and wrist. She went to Kent General Hospital for an evaluation and was released. She told Dr. Kalamchi that she went back to the emergency room the next day and they found changes in her kidney, did a biopsy, and told her that she had internal bleeding from the fall. She

started seeing Dr. Patel afterward and started on a therapy program. She saw Dr. Schwartz on February 25, 2013 and he ordered an MRI of the cervical spine, lumbar spine and right knee. Dr. Schwartz reviewed all three MRIs and they showed no substantial abnormalities. He did not offer her any surgery or orthopedic treatment and referred her to pain management.

Claimant started treating with Dr. Balu and went through a fairly extensive program from therapy to chiropractic treatment and injections. Claimant told Dr. Kalamchi that she had three cervical injections on both sides and one lumbar injection and another epidural. By the time Dr. Kalamchi examined Claimant, she already had a discogram performed.

Claimant told Dr. Kalamchi about her pain. She described the pain to be severe, radiating to both buttocks, and at times to her right thigh. She did not experience any distal leg pain or numbness. She also told Dr. Kalamchi about her hypertension, asthma, and kidney issues, as well as about her carpal tunnel surgery in 2002. She reported that she had no neck or lumbar pain prior to the industrial accident and the symptoms started after the accident.

Claimant told Dr. Kalamchi about her work status. She worked in the kitchen for Corporate Kids for a year prior to the industrial accident. Prior to working at Corporate Kids, Claimant worked at a doctor's office. She also worked part-time at Dynamic at the front desk. She had not worked since the accident. Claimant said that she cannot drive and that a friend drove her to the DME. She also said that she does not do much other than going to doctor's appointment and for treatment. She said that her treatment at the time consisted of seeing Dr. Balu and taking her medication, Percocet and Flexeril.

The physical examination on September 10, 2013 showed that Claimant used a cane with a very awkward guarded gait. She reported that she started using the cane four days earlier to help with her balance. She was able to get up from a seated position in a very slow fashion and

she took a few slow awkward steps without the cane. There was moderate guarding by Claimant and she pointed to the lumbosacral region as the site of horrible pain. She leaned forward with a decrease in her lordosis. There was no clinical palpable spasm, meaning that there was no tightness of the paraspinal musculature. Forward flexion was limited to thirty degrees and she could barely reach the upper thighs. Attempts at lateral bending stopped between five and ten degrees. Lateral rotation stopped at ten degrees bilaterally. Extension was minus five, which means that she could not come up all the way straight up to neutral. The findings are significant in the way that they are very restricted.

The examination also showed that it took Claimant a while to lay flat on the examination table, she had a lot of pain expressions, and she complained of severe pain. She had obvious grimacing, squinting, facial changes, and verbalization expressing severe pain. Claimant was trying to exaggerate or impress the examiner that she was in pain. A patient can come in with pain, but it has to be directed to the pathology. There is no pathology in the lumbar spine that caused as much pain as Claimant expressed, especially when looking at the studies. Claimant's straight leg raising tests were thirty degrees on the right and fifty degrees on the left, while the seated straight leg raising tests were negative to ninety degrees, so she was obviously exaggerating and the findings were not accurate. Claimant also had a positive truncal rotation test, which is another indication of exaggeration. Claimant's presentation was not in line with the true anatomical findings.

Dr. Kalamchi reviewed the March 4, 2013 lumbar spine MRI and report. The report indicated that there was no obvious spinal pathology and for all practical purposes was normal. The study was performed at Delaware Open MRI and CT in Dover. Dr. Kalamchi believes that it is a reputable facility and he sees a lot of studies from that facility. If there is a normal study,

then there is no need for a fancier machine; therefore, in this case, with the normal study, there was no need for a fancier machine.

Dr. Kalamchi also reviewed that discogram that Dr. Balu performed. The discogram CT reported no frank evidence of an annular tear at the levels injected with contrast. A discogram should not be performed in patients whose symptoms do not coincide with the underlying pathology. Dr. Kalamchi would never order a discogram for a patient with the kind of presentation as Claimant. If a patient has psychosomatic and emotional issues, it is a contraindication to doing a discogram. Claimant did not need a discogram because of her presentation and because the MRI was normal. Even if the discogram is interpreted as being positive, a surgeon does not operate on a normal disc.

The interpretation of Claimant's discogram CT showed asymmetrical extension of the contrast at L2-3, which means that one side is a little bit more than the other, but there was no frank tear. There was a normal finding at L3-4 with central disc material in satisfactory overall contour. Likewise, there was no evidence of annular tear at L4-5 with a marginal extension slightly asymmetrical to the right. The L5-S1 contrast material extends slightly asymmetrical at the 6:00 to the annular margin, but no frank tear. All of the findings on Claimant's discogram and CT were normal; there was no leak. The discogram pictures were interpreted as normal.

On September 10, 2013, Dr. Kalamchi determined that Claimant had chronic nonspecific lumbar pain. The diagnosis was based mostly on her subjective presentation and moderate psychosomatic and emotional overlay. When Dr. Kalamchi examines patients, he observes their behavior and has to judge their personalities. It is critical to understand psychological overlay and the personality of the patient because surgeons do not want to operate on a patient that will not be helped by whatever he does due to the other emotional issues. Dr. Kalamchi is not going

to treat the patients for their emotional issues, but if they have emotional issues, he has to state it in his records, whether he is treating the patient or seeing the patient for a second opinion.

As of September 10, 2013, Dr. Kalamchi believed that Claimant had been over-treated for her pathology. The more a patient is over-treated, and regardless of the motive for the patient's presentation, the more the issue is reinforced and the patient takes on the sick-role type. If the physician cannot help the patient and there is no abnormality, the physician should just cut the treatment and start the patient on home exercises, weight reduction, and encourage the patient to return to normal life and return to the workforce. Unfortunately, this was not done in Claimant's case.

Claimant was physically capable of working on September 10, 2013. She had normal MRIs and there was no reason for her not to work. By the time Dr. Kalamchi saw Claimant, her initial injury was eight to nine months earlier. Dr. Katz had recommended a possible surgery by that point, but Dr. Kalamchi would not operate on her for the reasons he mentioned. There was nothing that he could fix with a normal MRI; the discogram confirmed that it was normal. Even if Claimant had pain at any one or two levels, it was not an indication for surgery as far as Dr. Kalamchi is concerned. The surgery was not medically indicated and Dr. Kalamchi did not think that Claimant needed surgery or even extensive conservative treatment.

Dr. Kalamchi viewed the surveillance video of Claimant from April 19, 2014, which was taken three days before her April 22, 2014 lumbar spine surgery. When Dr. Kalamchi initially examined Claimant on September 10, 2013, she was using a cane, but she did not use a cane in the surveillance video. Claimant was driving and walking in the video. Dr. Kalamchi thought that Claimant's gait was much better in the video than when he saw her during the examination. Claimant was able to carry items in the surveillance video. Claimant's presentation in the

surveillance video was definitely different than how she presented to Dr. Kalamchi. Claimant was moving normally in the video and it did not look like she was restricted.

Dr. Kalamchi examined Claimant again on December 1, 2014. She reported that she continued to follow up with Drs. Balu and Rudin. Dr. Kalamchi understood from the medical records that Claimant underwent lumbar fusion surgery with Dr. Rudin on April 22, 2014. The procedure was one that Dr. Kalamchi has performed thousands of times in the past. Claimant reported that she continued to have moderate low back pain with leg radiation postoperatively. At times, she noticed slight improvement, though not enough to affect her functional activity. She described the pain to be constant in the lumbosacral region and worse toward the left buttock. Sometimes the pain was severe and sharp across the lumbar spine. She also experienced pain going down both legs to the feet.

Claimant told Dr. Kalamchi about other medical issues that affected her functioning, including her severe renal disease. Claimant had moderate lower limb swelling that affected her ambulation and her renal function was deteriorating. Claimant's edema was contributing to her functional limitations. Her weight had increased by about fifty pounds since the September 2013 examination. The weight gain along with the edema was hindering her progress.

Claimant was not working. Her husband, daughter, mother, and other family members helped out at home. Claimant was able to drive very short distances. She was doing physical and aqua therapy, as well as massage therapy twice a week. She sees Dr. Rudin for the surgical follow-up but she mostly sees Dr. Balu for pain management and medication refills. She was taking ten milligrams of oxycodone three times a day in addition to a muscle relaxant and Lasix.

During the physical examination on December 1, 2014, Dr. Kalamchi noted that Claimant had gained weight, looked very puffy, and still used a cane. She was very slow in

getting up from a seated position, but was able to take a few steps without the cane. Holding on, she was slowly able to go on her heels and toes. All range of motion was done actively. She pointed to the mid lumbosacral region as the site of discomfort. There was no clinical spasm and lordosis was maintained. Forward flexion was slow and she was able to flex to about forty degrees and barely reach the distal thighs. Lateral bending stopped at ten degrees and rotation between fifteen and twenty degrees bilaterally. Extension was uncomfortable beyond neutral. Claimant's straight leg raising tests were limited to about eighty degrees due to back pain. When Dr. Kalamchi lifted Claimant's leg the last time, she stopped at thirty or forty degrees while supine, but at that examination, he was able to lift her leg to eighty degrees before she claimed that it hurt. The pain was mostly in the back, not sciatic pain.

Claimant's presentation was basically the same in December 2014 as it was in September 2013. She allowed Dr. Kalamchi to lift her leg further and she laid down more flat on the examination table in December 2014. Her knee and ankle reflexes continued to be physiologic and there was no sensory or motor deficit distally.

Dr. Kalamchi reviewed Claimant's updated medical records, including the surgical records. The diagnosis remained the same since she still had chronic low back pain with leg radiation post anterior and posterior spine fusion. Dr. Kalamchi believes that his opinion that Claimant was not a surgical candidate due to her psychosomatic and emotional behavior and the MRI findings was confirmed by her lack of improvement postoperatively. The MRI findings were mild at best and did not require extensive front and back reconstructive procedures. Dr. Kalamchi doubts that Claimant will show dramatic functional improvement in the foreseeable future. He also believes that the surgery was not related to the January 2013 industrial accident.

Dr. Kalamchi recommended that Claimant continue in rehabilitation and also see a psychologist and/or psychiatrist for her depression. She told him that she has depression. Also, Claimant's renal function affects her functional level dramatically and needs to be addressed, although obviously it is not related to the industrial accident. Dr. Kalamchi doubts that Claimant will return to work at this time and cannot anticipate when she will be able to return to work, but that is based on her renal function and psychosomatic issues. From the lumbar spine point of view, Claimant was capable of working in at least a light duty capacity.

Dr. Kalamchi also viewed the surveillance video from August 13 and August 26, 2014. In those videos, Claimant was driving around, making stops, and getting in and out of her car. She was not using a cane and she was able to walk up steps. She was about four or five months post-surgery and he would expect her to be able to do those activities at that point post-operatively. She was functioning, at least in the video, ten times better than when Dr. Kalamchi saw her in the examination. The video confirms that from a lumbar spine perspective, Claimant could return to work in at least a light duty capacity. Claimant's presentation in the video was completely different from her presentation to Dr. Kalamchi, which is why he holds the opinion that she has other issues that impact her presentation on examination. Dr. Kalamchi is not surprised that Claimant does not have abnormality in the lumbar spine and that she can function at a much better level. The video confirms exactly what Dr. Kalamchi has been saying.

Ganesh Balu, M.D., board-certified in pain management and rehabilitation and a certified medical provider pursuant to the Delaware Workers' Compensation system, testified by deposition on behalf of Claimant. Dr. Balu began treating Claimant on March 20, 2013. He believes that the medical treatment has been reasonable, necessary and causally related to the industrial accident and that Claimant remains totally disabled.

Dr. Balu was aware of Claimant's industrial accident and the treatment she received prior to coming to his office. She had tried physical therapy, but was not getting better, so she was referred to Dr. Balu for pain management. She complained that her entire back was painful following the industrial accident and the low back was the worst. Claimant had paraspinal spasm and facet tenderness in the initial physical examination. The facet-loading test was positive. Dr. Balu did not see any lower extremity weakness, but Claimant had a mild antalgic gait. The initial diagnosis was possible strain or to rule out facet syndrome affecting the lumbar spine.

Claimant continued to treat with Dr. Balu once every four weeks for pain management. She was given pain medication, but she continued to complain of severe low back pain. She was treated with lumbar facet injections, which did not help. She underwent lumbar epidural injections with partial relief. When the lumbar spine pain returned, she got frustrated with her inability to function. She was aware that the tests had been negative, including the lumbar spine MRI, so she requested additional tests or treatment from Dr. Balu. They discussed the possibility of a discogram to further evaluate the possibility of discogenic low back pain and those tests were performed in July 2013.

Dr. Balu noted that Claimant had pain in the lower two lumbar discs, L4-5 and L5-S1, during the discogram. Those discs were reported as concordant pain, which means that in Claimant's own experience with pain, the pain being reproduced during the discogram was similar to the pain that she experienced on a daily basis for which she wanted additional treatment. The L4-5 level was negative during the discogram. A discogram is a very objective test and the objectivity lies with the physician and with the patient. Dr. Balu believes that Corporate Kids paid for the discogram.

After the discogram, Dr. Balu discussed the discogram and the CT scan results with Claimant. The radiologist read the CT scan and indicated that there was no frank tear, which Dr. Balu believes means that the radiologist could not really appreciate a large tear. The radiologist's opinion does not make the decision regarding surgery; the decision is based on a combination of the patient's physical examination, clinical findings, the length of problems they are facing, the discogram, and whether there were any variabilities or problems doing the discogram. The CT scan is taken as a confirmatory test following the discogram and the decision to proceed with surgery with not based solely on the CT scan report. When there is a CT scan that shows no frank tear at the level where there was a positive response and concordant pain during the discogram, it just adds a level of complexity to the decision-making process, but it does not confirm or rule out a diagnosis. When the discogram is positive and the CT scan is negative, Dr. Balu has to go back and understand a little bit about how the discogram is done and how the radiologist looked at it. Most times, there is a positive CT scan when there is concordant pain; however the study is not invalid just because the CT scan was not confirmatory.

Following the discogram and CT scan, Claimant was offered other treatment within Dr. Balu's office. Dr. Balu offered to continue conservative treatment or perform a disc injection to control the pain, given that Claimant had concordant pain in the lower most discs. Claimant asked for additional treatment, so Dr. Balu referred her to Dr. Katz for a surgical opinion given Claimant's complaints. Dr. Balu is aware that Dr. Rudin performed Claimant's lumbar spine surgery in April 2014. After surgery, Claimant continued to seek pain management treatment with Dr. Balu, which entailed medication refills and additional therapy until November 2014.

Dr. Balu agreed that he did not review the hospital records from the date of Claimant's accident, so he did not know about her complaints on that date. He agreed that the lumbar spine

MRI was negative. Dr. Balu was aware that Claimant treated with Dr. Schwartz after the accident and Dr. Schwartz referred her to Dr. Balu for pain management. Dr. Schwartz refers patients to Dr. Balu for pain management when he does not have any surgical treatments to offer.

Claimant was taking Xanax for anxiety when she came to Dr. Balu on March 20, 2013. A lot of people have anxiety on a day-to-day basis depending on the situation. Not every patient with anxiety is going to exaggerate her pain score.

Dr. Balu agreed that his office provided Claimant with a cane on September 23, 2013 based on her presentation. She was having difficulty functioning and it seemed like she was hurting so badly that she had difficulty walking. She was also complaining of so much pain that she told Dr. Balu that she could not work. Dr. Balu expected Claimant to use the cane on an as-needed basis.

If Dr. Balu became aware that Claimant was more active in her everyday life than she presented to him, it would change how he treated her. On March 17, 2014, Claimant reported that her pain level was ten out of ten on the pain scale. The low back pain was still affecting her daily living and she had trouble walking and bending. On April 15, 2014, Claimant had the same issues. She had been marking the same functional problems with sitting, standing, walking, driving, and bending, so nothing significant had changed other than her telling Dr. Balu that she was getting ready to undergo surgery with Dr. Rudin.

Dr. Balu confirmed that Claimant's kidney condition, FSG, causes edema in her legs, which might contribute to functional limitations, including walking. Dr. Balu also confirmed that patients who undergo lumbar spine surgery take anywhere from three to six months to recover, although sometimes it takes nine to twelve months to recover, depending on the type of fusion performed, the premorbid conditions, and whether there was any uneventful post-op time.

Dr. Balu believes that it takes around six months for a patient to recover from the fusion surgery and return to work. He believes that Claimant's surgeon has opined that Claimant is unable to return to work at this time.

Bruce J. Rudin, M.D., a board-certified orthopedic spine surgeon, testified by deposition on behalf of Claimant. Dr. Rudin began treating Claimant on January 22, 2014. He believes that the medical treatment, including surgery, has been reasonable, necessary, and causally related to the industrial accident and that Claimant remains totally disabled.

Dr. Rudin was aware of Claimant's industrial accident and medical treatment. Claimant had an extensive conservative care program for many months with Dr. Balu prior to coming to Dr. Rudin's office for surgery. Since Claimant failed to improve with conservative care, she was referred to Dr. Katz in Dr. Rudin's office.

Claimant began treating with Dr. Katz on August 21, 2013. Her dominant complaint was of back pain. She described the industrial accident and no significant preexisting history. It seemed that her symptoms were related to the industrial accident. She described her pain level as being nine out of ten on the pain scale and she reported that she had difficulty sitting, lifting, walking, and standing tall because those activities made her symptoms worse. She also described having eight months of physical therapy, injections, medications, and the like from Dr. Balu, as well as a provocative discogram with Dr. Balu. Dr. Katz summarized in the result section of the report that the discogram demonstrated concordant pain at L4-5 and L5-S1. He recommended a surgical fusion, but there was a delay because the insurance carrier did not authorize payment for the proposed surgery. During that time, Dr. Katz went out on medical leave and still has not returned to work.

Dr. Rudin took over Claimant's care on January 22, 2014. Dr. Rudin looked at Claimant and listened to her history and complaints. Claimant had severe back pain with a pain level of nine out of ten a year after the industrial accident and the discogram was positive at L4-5 and L5-S1, so Dr. Rudin also recommended surgery. Dr. Rudin also reviewed the x-rays, MRI, and post-discogram CT scan. The MRI was relatively unremarkable, but Dr. Rudin will almost never use an open MRI for diagnostic decision-making, especially if he is considering surgery unless the patient is really tiny, skinny, and claustrophobic. The quality of an open MRI image in a patient who is bigger and heavier is really poor. As a general rule, he would not have used the MRI when deciding whether to operate. Claimant had the discogram and the post-discogram CT, which was a good and valid study, so that was the piece of information that Dr. Rudin needed to agree with Dr. Katz. The discogram and CT scan also led Dr. Rudin to the opinion that Claimant's care had been reasonable, necessary, and causally related to the industrial accident, that the surgical recommendation was in compliance with the Delaware practice guidelines, and that the surgery was the most reasonable course of action for a patient who at that point had more than a year of disabling back pain.

One thing that is treated with surgery is functional limitation, which includes pain, bending, walking, sitting, working, and perhaps not being able to tolerate medications that make the patient comfortable. When Dr. Rudin saw Claimant on January 22, 2014, she was still in a significant amount of pain from the low back and had weakness in both hips and legs. She had as the guidelines say "unrelenting, significant, clinically limiting back pain." Dr. Rudin did not remember whether or not Claimant had problems walking at that point. He agreed that the records indicate that Claimant still had issues with changing positions, bending, lifting, driving, walking, standing, and all other activities.

At the second visit, which was conducted on March 12, 2014, Claimant had a similar presentation. Her pain level was between eight and ten out of ten prior to the surgery.

Dr. Rudin performed the L4-5 and L5-S1 discectomy and fusion on April 22, 2014. He took an anterior and posterior approach to the procedure, which he does in ninety-five percent of his spinal fusion surgeries for twenty years. The technique is appropriate pursuant to the practice guidelines for a spinal fusion. Dr. Rudin believes that the surgery was reasonable and necessary as a result of Claimant's industrial accident. He believes that the care provided was in compliance with the practice guidelines and, therefore, presumed to be reasonable. Dr. Rudin believes that Dr. Kalamchi is wrong when he states that the discogram was not reasonable, since the guidelines at section 4.2.3.3.1 state that a provocative discogram is appropriate for "a patient with functionally limiting unremitting back pain of greater than four months duration in whom conservative treatment has been unsuccessful and in whom the specific diagnosis of the pain generator has not been made apparent on the basis of other noninvasive imaging studies." Dr. Rudin also believes that it was appropriate for Dr. Balu to perform the discogram even though he is also the treating pain management physician who ordered the test. Claimant had concordant pain at L4-5 and L5-S1; she had a properly indicated diagnostic study that was administered properly. The surgery was also compliant with the practice guidelines and, even if it was not compliant, it was reasonable, necessary, and related to Claimant's industrial accident.

Dr. Rudin did not observe any indication of any psychological or emotional issues in Claimant that made him feel that the surgery was not appropriate or indicated. Claimant has been reasonable in Dr. Rudin's office and did not show signs of symptom magnification. Claimant's complaints seemed legitimate or else Dr. Rudin would not have performed the

surgery or he would have required psychological counseling beforehand. Dr. Rudin agreed that he did not have any evidence of Claimant's activities outside of his office.

Dr. Rudin is aware of Claimant's unrelated kidney disorder. She is very ill from that condition and the treatment slows down her recovery from the fusion surgery. With a two-level anterior and posterior surgery, most often at six months, the patient would have a functional capacity evaluation ("FCE") to see what she is capable of doing if she has a physically demanding job. A patient could be back to work at a desk job in six to eight weeks and could be doing a light duty job within about three months of the surgery. Claimant will probably never be released to work at more than a medium duty job based on her two-level fusion and that would be after an FCE. Without the kidney problems, Claimant could probably have gone to an FCE in October or November 2014. The chemotherapy that Claimant takes for the kidney condition is toxic for the bone healing process and it is more likely than not that she will need additional surgery to try to get her fusion to heal. Dr. Rudin has been reluctant to order the scans because he does not want to give her the radiation, which might hurt her kidneys.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Termination of Benefits

When an employer files a petition to terminate total disability benefits, the employer bears the initial burden of proof regarding the Claimant's ability to work. *Torres v. Allen Family Foods*, 672 A.2d 26, 30 (Del. 1995) (*citing Governor Bacon Health Center v. Noll*, 315 A.2d 601, 603 (Del. Super. Ct. 1974)). For the following reasons, the Board finds that Claimant is no longer totally disabled.

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 substantial evidence to support the decision, the Board may accept the testimony of one physician over another. *Standard Distributing Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993). In the case at hand, the Board finds that the opinions of Drs. Kalamchi and Siegal are more persuasive than the opinions of Drs. Balu and Rudin. The Board accepts Dr. Kalamchi's opinion that Claimant has been physically capable of working in a light duty capacity since at least September 10, 2013 related to her industrial accident.

The Board finds that Dr. Kalamchi's opinion is supported by Dr. Siegal's opinion and by Claimant's presentation in the surveillance video. The Board also finds that Claimant's presentation to the physicians is not credible based on the surveillance video and, therefore, the opinions of Drs. Balu and Rudin are not persuasive, as they relied on Claimant's history and subjective complaints when they issued their opinions and provided medical treatment.

The Board viewed the surveillance video. Surveillance was conducted on April 19, 2014, August 13, 2014, and August 26, 2014. In general, all of the videos show Claimant moving around freely without any sign of low back pain. There are major credibility issues raised due to the surveillance videos. In the videos, Claimant walks normally without a cane, although slowly sometimes. She walks up and down stairs without any indication of pain. She never looked down to see where she was walking as someone in pain might do, which indicates to the Board that she was not afraid of falling. She drives, bends at the waist, and carries a large purse and packages.

More specifically, the Board finds that the video on April 19, 2014 shows Claimant leaning into her car to clean out trash and walking normally into and out of Wawa. Most telling, Claimant was standing and walking around at Midway Speedway in Rehoboth for an hour and a half and only sat down on the bench for seven minutes after about forty-five minutes. She was

walking without a limp and without a cane. She had no sign of being in pain with no grimacing or holding her back. She held a large purse in her hand the entire time. She swayed around a bit while she was talking on the telephone. After Midway Speedway, Claimant walked around the outlet shopping center in Rehoboth and then walked around Rehoboth Avenue with her family. The Board finds Claimant's activities and behavior surprising on April 19, 2014, since she had told Dr. Balu on April 15, 2014 that her back pain affected her daily living. She reported that she had functional problems with sitting, standing, walking, driving, and bending. Dr. Rudin described Claimant's pain on January 22, 2014 and March 12, 2014 as "unrelenting, significant, clinically limiting pain" and that she could not do anything because of the pain. Claimant underwent lumbar spine fusion surgery on April 22, 2014, which was only three days after the surveillance video was taken. The Board cannot understand why Claimant would undergo lumbar fusion surgery on April 22, 2014, since she was able to be so active and functional three days earlier without any sign of pain or discomfort.

Furthermore, Claimant claims to have been in severe pain even after the surgery and that she is in so much pain that she is still unable to work. However, the surveillance video on August 13, 2014 shows Claimant driving around to run errands from approximately 8:45 a.m. until 2:15 p.m. She gets in and out of the car freely and frequently. She walks normally without a cane. She carries a large shopping bag and leans and bends to reach into the car. Claimant even bent at the waist to pick up her telephone that she dropped on the ground. She was standing up straight while waiting and talking on the telephone. She walked up and down steps without apparent difficulty. There were no signs of pain.

Then, on August 26, 2014, the surveillance video shows Claimant driving and running errands from approximately 7:15 a.m. until after 3:00 p.m. with the longest break in the

surveillance between 12:35 p.m. and 2:47 p.m. Claimant was walking without a limp and without a cane. The surveillance on August 26, 2014 was especially important to the Board, because Claimant missed her DME with Dr. Kalamchi that was scheduled for 10:15 that morning. Claimant testified that she missed the DME because she was still in the hospital that morning for her kidney condition and did not get discharged until the afternoon. She later testified that she might have gotten discharged on the previous day, but was home resting on August 26, 2014, so she missed the DME. The video shows that Claimant's testimony, whether she was in the hospital or resting at home, was untrue. The Board finds that Claimant was perfectly capable of running errands for most of the day starting early in the morning and into the afternoon and she was perfectly capable of driving herself around to run those errands.

Drs. Balu and Rudin based their treatment and opinions on Claimant's report of her pain level and functional loss. Given Claimant's presentation in the surveillance video three days before surgery and again four months after surgery, the Board finds that Claimant's presentation to the doctors was extremely misleading. She was much more functional than she led them to believe. Furthermore, given that Claimant's testimony is not credible and that the video shows Claimant being functional for long periods of time, the Board accepts Dr. Kalamchi's opinion that Claimant showed signs of symptom magnification during the examinations and that she has been physically capable of working since at least September 10, 2013. The Board accepts Dr. Kalamchi's testimony that the surveillance videos confirm that Claimant could return to work in at least a light duty capacity from a lumbar spine perspective. Dr. Kalamchi was not surprised that Claimant could function at a much higher level than she let on during the examinations because he found signs of symptom magnification and psychosomatic overlay during the examination and the video confirms his opinions.

Claimant stipulated to the admission of the labor market survey, which showed sedentary duty jobs that are available in the open labor market without any wage loss. Furthermore, Claimant did not argue that she is a displaced worker, so the Board will not discuss the displaced worker issue.

Based on the foregoing, the Board finds that Claimant is not totally disabled and has been capable of working in a light duty capacity since at least September 10, 2013. Claimant is not entitled to an award of partial disability benefits, because the labor market survey shows that she would not suffer a wage loss. Corporate Kids' Petition for Review to terminate Claimant's total disability benefits is granted as of the date of filing on March 19, 2014.

Medical Expenses for Lumbar Spine Surgery

Claimant bears the burden of proving that the medical expenses for the lumbar spine surgery have been reasonable, necessary, and causally related to the industrial accident. Corporate Kids accepted compensability of Claimant's industrial accident, but argues that Claimant's lumbar spine surgery was not reasonable, necessary, or causally related to the industrial accident. The Board finds that Claimant is not credible and that the lumbar spine surgery was not reasonable or necessary.

As discussed in detail above, Claimant's presentation on the surveillance video on April 19, 2014, which was three days before the surgery, shows a different image of Claimant than she presented to the physicians. Claimant was very functional and had no signs of low back pain on April 19, 2014. Given Claimant's functional abilities and presentation three days before surgery and her lack of credibility, the Board finds that the April 22, 2014 lumbar spine fusion surgery was not reasonable or necessary and, therefore, the surgery is not compensable.

Furthermore, the Board accepts Dr. Kalamchi's testimony that the surgery was not reasonable since the MRI was negative and there was no reason to operate. Dr. Kalamchi explained that there is no pathology in the lumbar spine that caused as much pain as Claimant expressed, especially when looking at the imaging studies. Claimant presented with signs of symptom magnification during the examinations. The MRI of the lumbar spine was normal and the report indicates that it was a normal lumbar spine with no obvious spinal pathology. The Board accepts Dr. Kalamchi's opinion that even though the MRI was conducted on an open MRI machine, the study was clear and there is no need for a "fancier machine" since it was a normal study. The Board also finds that Dr. Siegal's testimony supports Dr. Kalamchi's opinion that the MRI was a clear, valid study that was negative. Dr. Siegal explained that the MRI showed that all of the discs in Claimant's low back were totally normal in appearance without any disc space narrowing, disc desiccation, bulging discs, herniated discs, spinal stenosis, or nerve root compression at any level. Dr. Siegal believes that his interpretation of the MRI study was the same as the original radiologist's interpretation that it was an unremarkable study. Early on, Dr. Schwartz indicated that the lumbar spine MRI was normal and he did not recommend surgery. Even Dr. Balu agreed that the MRI was negative.

Dr. Rudin testified that he did not rely on the MRI because it was performed on an open machine, so it is not reliable unless the patient is "really tiny and skinny" and that the quality of an open MRI image in a heavier patient is really poor. The Board finds that Dr. Rudin's statement is irrelevant on this issue because the MRI was taken early in 2013 shortly after the accident, before Claimant gained significant amount of weight due to the medication for her kidney condition. The testimony reveals that she gained weight after her kidney diagnosis and taking the medication.

The Board also accepts Dr. Kalamchi's opinion that the post discogram CT scan reported no frank evidence of an annular tear at the levels injected and the discogram pictures were interpreted as being normal. It is a contraindication to do a discogram on a patient with psychosomatic and emotional issues, such as Claimant. Also, a discogram was not needed because Claimant had a normal MRI study. Dr. Kalamchi explained that even if the discogram was interpreted as being positive, a surgeon does not operate on a normal disc. Dr. Siegal confirmed Dr. Kalamchi's opinion that the post discogram CT scan was of very good quality, was entirely normal, and showed a normal intranuclear collection of contrast at each of the four levels tested. There was no disc degeneration, annular tear, bulge, or herniation. Dr. Siegal explained that Claimant had no anatomic injuries to her lumbar spine whatsoever. Anatomically, Claimant's entire lumbar spine, including the bones, soft tissues, and disc spaces, were entirely normal in appearance on both post-accident imaging studies. Dr. Siegal was one hundred percent certain that Claimant had no disc abnormalities, especially at the level of her surgery, L4-5, since it was a totally normal disc on both post-accident imaging studies. He explained that the surgeon could have removed fragments of disc material, but he probably removed fragments that were normal.

Dr. Rudin relies on the practice guidelines at section 4.2.3.3.1 as support for his opinion that the discogram was appropriate for Claimant since she had "functionally limiting unremitting back pain." However, the Board finds that the surveillance video shows that Claimant's low back pain was nowhere near as severe as she described to the physicians and her pain did not functionally limit her. The Board finds that Dr. Rudin's reliance only on the discogram and Claimant's subjective complaints to support his opinion that the lumbar fusion surgery was appropriate is unpersuasive considering the normal MRI, which was a clear and valid study, and

considering the normal post discogram CT scan, as well as considering Claimant's presentation on the surveillance video three days before the surgery.

Since the Board accepts Dr. Kalamchi's opinions and finds that Claimant is not credible, the Board finds that the lumbar spine surgery was not reasonable, necessary, or compensable. Therefore, Claimant's Petition to Determine Additional Compensation Due is denied.

STATEMENT OF THE DETERMINATION

Based on the foregoing, Corporate Kids' Petition for Review to terminate Claimant's total disability benefits is GRANTED as of the date of filing on March 19, 2014. The Board also finds that Claimant's Petition for Additional Compensation Due is DENIED.

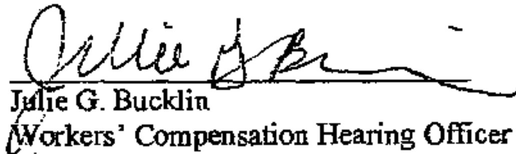
IT IS SO ORDERED THIS 9th DAY OF MARCH 2015.

INDUSTRIAL ACCIDENT BOARD

/s/ Mary Dantzler

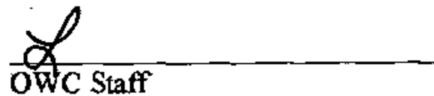
/s/ Patricia Maull

I hereby certify that the above is a true and correct decision of the Industrial Accident Board.



Julie G. Bucklin
Workers' Compensation Hearing Officer

Mailed Date: 3.13.15



OWC Staff