

DECISION RENDERED COVER LETTER

WCAIS CLAIM NUMBER: 8709809

INSURER CLAIM NUMBER:

DISPUTE NUMBER: DSP-8709809-1

WC2021138738

PETITIONS:

INJURY DATE: 08/07/2021

Petition To/For (LIBC-378) Suspend Compensation Benefits

JUDGE:

Petition To/For (LIBC-378) Review Medical Treatment and/or Billing

Robert Goduto

Petition To/For (LIBC-378) Review Compensation Benefits (Ask Judge to Review Agreement/Notice for mistakes)

The attached Decision of the Judge is final unless an appeal is taken to the Workers' Compensation Appeal Board as provided by law.

PARTIES:

If you do not agree with this Decision, an appeal must be filed with the Workers' Compensation Appeal Board within 20 days from, but not including, the date of this notice.

BONNIE COLE
47 SHULTZ RD
PINE GROVE, PA 17963

Keld R Wenge, ESQ
One Commerce Square
2005 Market Street, 18th Floor
Philadelphia, PA 19103-7042

An appeal may be filed online, at <https://www.wcais.pa.gov>, or paper forms for an appeal may be obtained from:

vs

Wegmans Food Markets Inc
PO BOX 30844
1500 BROOKS AVE
ROCHESTER, NY 14603-0844

Workers' Compensation Appeal Board
651 Boas Street, Room 832
Harrisburg, PA 17121-0750
717-783-7838

R. Burke McLemore, Jr., ESQ
225 GRANDVIEW AVE 5TH FLOOR
CAMP HILL, PA 17011-1712

Claimant/Employee Exhibits			
Number	Name	Admitted	Submitted For
C01	Fee Agreement	Yes	COLE, BONNIE
C02	CI Affidavit - signed	Yes	COLE, BONNIE
C03	UR Determination - Dr. Sauer	No	COLE, BONNIE
C04	Deposition Transcript, Dr. Rosenthal 12/13/22	Yes	COLE, BONNIE
C05	Litigation Costs	Yes	COLE, BONNIE
CS1	Claimant's Super Response	Yes	COLE, BONNIE

Defendant/Employer Exhibits			
Number	Name	Admitted	Submitted For
D01	Amended NCP	Yes	Wegmans Food Markets Inc
D02	Statement of Wages	Yes	Wegmans Food Markets Inc
D03	Letter to Judge/Video	Yes	Wegmans Food Markets Inc
D04	Claimant Acknowledgement of Authenticity of Video	Yes	Wegmans Food Markets Inc
D05	DR. LUCIAN BEDNARZ Deposition Transcript	Yes	Wegmans Food Markets Inc
D06	Lucian Bednarz, M.D. Deposition Transcript	Yes	Wegmans Food Markets Inc
DS1	Report of Lucian Bednarz, M.D.	Yes	Wegmans Food Markets Inc
DS2	Curriculum Vitae of Lucian Bednarz, M.D.	Yes	Wegmans Food Markets Inc
DS3	Surveillance Report	Yes	Wegmans Food Markets Inc

Witnesses		
Name	Witness For	Hearing Date
Bonnie Cole	Claimant/Employee	01/18/2023

Events			
Date	Time	Location	Status
01/18/2023	08:15:00	Pottsville Field Office	Conducted
01/05/2023	13:00:00	Pottsville Field Office	Canceled
08/03/2022	08:15:00	Harrisburg Field Office	Conducted
06/14/2022	10:00:00	Pottsville Field Office	Conducted

RECORD

On May 18, 2022, Wegmans Food Markets, Inc. and its insurer/third party administrator (hereinafter collectively referred to as (Employer”) filed a Petition to Review Medical Treatment and/or Billing (“Review Petition I”) and a Petition to Suspend Compensation Benefits (the “Suspension Petition”) against Bonnie Cole (“Claimant”), alleging, *inter alia*, that “Claimant refused reasonable medical treatment and advice, which if it had been followed would have reduced her disability and resulted in a reduction of medical treatment and lessened the chance that additional future treatment would be required.” The Bureau of Workers’ Compensation (the “Bureau”) assigned Review Petition I and the Suspension Petition to a Workers’ Compensation Judge on May 19, 2022. Claimant, by and through her attorney, filed an Answer to Review Petition I and the Suspension Petition on May 26, 2022, that denied all material allegations.

The first hearing in this dispute was held on June 14, 2022, at which time the parties had the opportunity to submit evidence for supersedeas purposes. On June 28, 2022, this Judge circulated an Interlocutory Order that Denied Employer’s request for supersedeas.

On July 19, 2022, Claimant filed a Petition to Review Compensation Benefits (“Review Petition II”) against Employer alleging, *inter alia*, that the description of the August 7, 2021, work injury should be amended to “include type 3A open commuted right tibia and fibia [sic] fractures.” The Bureau assigned Review Petition II to a Workers’ Compensation Judge on July 20, 2022. Employer filed an Answer to Review Petition II on July 19, 2022, that denied all material allegations.

Additional hearings were scheduled and/or held in this dispute as above listed. The parties had the opportunity to submit evidence and testimony. On January 18, 2023, this Judge issued a Briefing Schedule, directing counsel for the parties to submit Proposed Findings of Fact, Conclusions of Law, and/or Briefs, no later than March 22, 2023.

This dispute is now ripe for decision.

RULING ON PRESERVED OBJECTIONS

The parties did not preserve any objections that may have been made during the deposition(s) taken in this matter in accordance with the requirements of Section 131.66 of the Special Rules of Administrative Practice and Procedure before Workers’ Compensation Judges. Accordingly, to the extent any objections were made during the course of the foregoing deposition(s), such objections are deemed to have been waived.

FINDINGS OF FACT

1. Pending before this Judge are Review Petition I and the Suspension Petition filed by Employer that allege, *inter alia*, that “Claimant refused reasonable medical treatment and advice, which if it had been followed would have reduced her disability and resulted in a reduction of medical treatment and lessened the chance that additional future treatment would be required.” Also Pending before this Judge is Review Petition II filed by Claimant, alleging, *inter alia*, that the description of the August 7, 2021, work injury should be amended to “include type 3A open commuted right tibia and fibia [sic] fractures.”
2. On November 11, 2021, Employer issued an Amended Notice of Compensation Payable (“NCP”) for an August 7, 2021, work injury described as a fractured ankle that had occurred when Claimant was maneuvering a pallet into the staging area and her right leg got caught between the posts and the jack injured her ankle/foot. (Defendant Exhibit 01). The NCP noted that the claim was accepted for a right tibula [sic] and fibula fractures. (Id.).
3. As of August 7, 2021, Claimant had an average weekly wage of \$734.87, with a corresponding total disability rate of \$565.00, per week. (Defendant Exhibit 02).
4. During the hearing held on August 3, 2022, counsel for Employer and Claimant stipulated, on the record, to amend the description of injury to “a right open commuted ankle fracture slash dislocation involving the distal tibia as well as the proximal and distal fibular.” (Hrg., 8/3/22 at 7). Counsel for Claimant expressly agreed on the record to this description of injury. (Id. at 7-8).
5. In support of the petitions that it filed, and in opposition to the petition filed by Claimant, Employer submitted into evidence the September 19, 2022, deposition testimony of Lucian Bednarz, M.D., who is board certified in physical medicine and rehabilitation, as well as electrodiagnostic medicine. (Bednarz 9/9/22 Deposition at 6; Bednarz Deposition Exhibit 01). The testimony of Dr. Bednarz can be summarized, in part, as follows:
 - a. The doctor saw and examined Claimant on May 5, 2022, at which time he obtained a history from Claimant, and learned the following:
 - i. Claimant sustained an injury during August 2021, while working for Employer at a warehouse. Claimant told the doctor that she was running a pallet jack and her right foot got caught under the device, causing a laceration injury to the foot;
 - ii. Claimant was taken to Geisinger in Danville for evaluation and treatment. She was found to have a fracture, and she was placed in an external fixator;
 - iii. Initially, Claimant was made non-weightbearing and then graduated to a Cam walker, which the doctor noted was “basically a splint”;
 - iv. Claimant was followed by Dr. Cush and an orthotic was fabricated;

- v. At the time of the evaluation, Claimant was scheduled for a surgical follow-up with Dr. Cush.

(Bednarz 9/19/22 Deposition at 13-14). The doctor testified that the fracture Claimant had sustained was a “commuted fracture involving the right ankle.” (Id. at 14). He agreed that the treatment Claimant had received was reasonable, considering the nature of the injury. (Id.);

- b. In conjunction with his evaluation of Claimant, the doctor reviewed various medical records, including the records of Claimant’s family physician, the records from Geisinger medical Center, and the records of Dr. Rosenthal. (Id.). The doctor noted that there were multiple occasions, from August 17, 2021, until his evaluation, where it had been recommended, consistent with the standard of care, that Claimant was advised to cease smoking. (Id. at 14-15). However, Claimant did not follow those recommendations, and in fact, Claimant admitted to the doctor that she continued smoking even into May 2022. (Id. at 15);

- c. When the doctor saw, and evaluated, Claimant on May 5, 2022, he made the following observations and/or findings:

- i. Claimant presented with a Cam boot in place, which she was able to take off independently;
- ii. Claimant had some lower extremity swelling, an antalgic gait, and skin discoloration;
- iii. There was decreased ankle range of motion, some distal weakness, and some palpatory tenderness;
- iv. The remainder of Claimant’s examination was intact.

(Id. at 18);

- d. Subsequent to his evaluation of Claimant, the doctor reviewed additional records, including an updated MRI of the ankle done on August 15, 2022, which showed non-healing fractures and inflammatory changes. (Id. at 19). The doctor explained that the inflammatory changes can be seen with poor healing and infection. (Id.). This essentially means that the fracture is not healing. (Id.). The doctor testified that “in totality, the appropriate orthopedic intervention was provided initially with external fixator immobilization followed by therapy. These nonunions are what we typically see in individuals that have other comorbidities, the number one being tobacco use.” (Id. at 19-20;

- e. The doctor testified that tobacco use is a primary risk factor for poor healing and vascular disease. (Id. at 9-10). He noted that, with chronic tobacco use, there are multiple physiological changes that occur that effect the nervous system, the vascular system and it suppresses the immune system. (Id. at 10). The doctor

testified that with a traumatic injury, it is essential that the whole patient is treated with exercise, as well as smoking and alcohol cessation, because without that, surgical procedures will fail. (Id.);

- f. With respect to fractures, the doctor testified that toxic agents, such as smoking or alcohol, will suppress a fracture from coming together or lead to non-healing and the non-healing can result in other complications such as skin breakdown and infection. (Id. at 11). He went on to testify that it is “imperative in individuals with a traumatic injury to follow medical recommendations to stop smoking and drinking and take care of themselves otherwise we know the outcome will be poor.” (Id.). Individuals with orthopedic injuries who follow the recommendation to stop smoking and drinking have a much better outcome. (Id. at 12);
- g. Based upon his experience, the doctor agreed that had Claimant followed the medical advice of her doctors and stopped smoking, this would have improved her condition, or prevented further deterioration of her condition from the work injury. (Id. at 16). The doctor testified that “[b]oth alcohol and tobacco cessation we know improves surgical outcomes and the nature of the fracture was such that we see on a regular basis and typically heals without significant consequences. So taking in comorbid factors with the tobacco abuse being number one without that smoking cessation as part of [Claimant’s] treatment program she put herself at risk for poor healing, infection, and other complications that we would otherwise not see in individuals that don’t have those risk factors.” (Id. at 16-17);
- h. The doctor agreed that the recommended smoking cessation would have had a high probability of success, i.e., preventing further problems and aiding in healing. (Id. at 17). He testified that it is an essential part of the pre-surgical management and post-surgical rehabilitation and had been an ongoing recommendation by Claimant’s treating providers. (Id.). He went on to testify that removing toxic agents, such a tobacco, do not pose a risk, but rather improve the likelihood of more rapid healing. (Id. at 17-18). The doctor agreed that the recommendation that Claimant cease smoking was medically reasonable. (Id. at 18).
- i. Based upon his examination of Claimant, his interview of Claimant, his review of medical records, and his experience as the head of the amputation clinic, the doctor opined that Claimant’s noncompliance with the advice of her doctors to quit smoking resulted in delayed healing and nonunion of the fractures, which is a typical scenario that he sees on a regular basis. (Id. at 21). The doctor agreed that Claimant’s refusal to cease smoking prolonged the healing process. (Id.). He further agreed that Claimant would have been more functional had she ceased smoking. (Id. at 22).
- j. The doctor testified that the type of work-related fracture that Claimant suffered was a commuted intra articular fracture involving the distal tibia with a tibiotalar joint dislocation and a distal fibular fracture, which is the lateral malleolus. (Id. at 26);

- k. Although the doctor had not seen a job description, he believed that as of his May 2022 evaluation, Claimant was capable of full-time gainful employment, with temporary sedentary restrictions. (Id. at 27)¹.
6. Claimant stipulated that the individual depicted in the surveillance video submitted into the record by Employer was, in fact, her. (Claimant Exhibit 02). This Judge has reviewed and considered the video surveillance.
 7. In opposition to the Suspension Petition and Review Petition filed by Employer, and in support of the Review Petition that she filed Claimant testified telephonically² at the hearing held on January 18, 2023. The testimony of Claimant can be summarized, in part, as follows:
 - a. Claimant worked for Employer for a little over two years as a “picker”. (Hrg., 1/18/23 at 17). On August 7, 2021, Claimant was trying to stage a “stand on pallet jack”, and as she tried to back up in a tight area, the pallet jack went underneath a pole and pushed Claimant’s right leg causing it to break. (Id. at 18);
 - b. Claimant testified that she has undergone three surgeries for her injury. (Id. at 19). She asserted that at no time had Employer offered her a smoking cessation program to help her quit smoking or any type of program to help her quit drinking. (Id.). She maintained that she has tried to quit smoking since her injury, and that she was able to quit for three months from May 2022. (Id. at 20, 229). Her family doctor had prescribed medication to assist Claimant in her efforts to quit smoking, but this medication did not work. (Id. at 20). However, as of the time she testified, Claimant had returned to and continues to smoke, but she testified that she now smokes less than before her injury. (Id.). She noted that she has smoked since age 12 and is currently age 54. (Id. at 21);
 - c. During October 2022, Claimant underwent an amputation, without complications, of her right leg below the knee. (Id.);
 - d. Claimant initially denied that her own doctors have offered her smoking cessation treatments since the work injury. (Id. at 22). However, when directly asked about an August 27, 2021, visit with her family doctor, Claimant acknowledged that this practitioner had, in fact, offered Claimant tobacco cessation treatment. (Id.). She also acknowledged that even before the work injury, she had been told that she needed to quit smoking, but she did not follow the advice of the doctor. (Id. at 23). Claimant then agreed that as of March 31, 2022, she was smoking every day. (Id. at 24);

¹ During the deposition of Dr. Bednarz, counsel for Employer stipulated that neither a job description nor a specific job offer was at issue in the pending dispute. (Bednarz at 27-28)

² At the January 18, 2023, hearing, Claimant initially joined the Microsoft Teams meeting using video. (Hrg., 1/18/23 at 15). However, due to technical difficulties she experienced, she ultimately appeared telephonically for her testimony, without objection by either counsel. (Id.).

- e. When presented with a note from Dr. Widmaier from October 2021, Claimant maintained that she told this provider that she had cut back on smoking, but she denied that this provider had warned her that continued smoking could result in the loss of her leg. (Id. at 24-25). She further denied that every doctor that she visited with had told her that she needed to quit smoking or that she would have serious consequences. (Id. at 26). She continued to assert that she has cut back on smoking, but she agreed that she was supposed to stop smoking entirely because smoking would negatively affect the healing of her fracture. (Id. at 27).
8. In opposition to the Suspension Petition and Review Petition filed by Employer, and in support of the Review Petition that she filed, Claimant submitted into evidence the December 13, 2022, deposition testimony of Scott Rosenthal, D.O., who is Board Certified in anesthesia and pain management. (Rosenthal at 7; Rosenthal Deposition Exhibit01). The testimony of Dr. Rosenthal can be summarized, in part, as follows:
- a. The doctor first saw Claimant on October 11, 2021, at which time he obtained a history and learned the following:
 - i. Claimant reported that she had sustained an injury on August 7, two months before the doctor saw her;
 - ii. While working at a distribution center for Employer, Claimant was backing up a pallet jack when her leg got caught between the pallet jack and a post;
 - iii. Claimant had a type 3A commuted right tibial and fibular fracture. On August 7, 2022, Claimant was taken to the operating room immediately for an open fracture debridement and placement of an external fixator;
 - iv. On August 9, 2022, Claimant was returned to the operating room for irrigation and debridement, as well as adjustment of the external fixator;
 - v. At the time of his first encounter with Claimant, she was non-weightbearing in a cast, and in a wheelchair at the time of the visit. The cast was from the knee to the foot;
 - vi. Claimant reported that she had been seeing Dr. Widmaier, an orthopedist at Geisinger, every couple of weeks;
 - vii. Claimant complained of constant pain in the leg that she rated at a five out of ten. She showed the doctor pictures of the injury, as well as the workplace at the time and after. The doctor noted that there were lacerations of the lateral and posterior leg and commuted bone fragments. In additions, Claimant's tissues were of poor quality. The doctor commented that the latter condition was due to Claimant's social habits, which was a concern to the surgeon;

- viii. Claimant reported that she had cut down on her smoking from one and a half packs/two packs a day to one half pack a day. She also reported that she drinks about six beers a day;
- ix. Claimant had a history of Hepatitis C, but She had been treated for this condition and at the time of the evaluation, Claimant was clear of this virus;
- x. Claimant was taking Tramadol for pain, Wellbutrin twice a day to quit smoking, ropinirole, Tylenol, Aleve, calcium, and vitamins;
- xi. Claimant had not worked since the date of injury.

(Rosenthal at 8-10). The doctor provided an initial impression that Claimant had suffered a severe fracture that was treated, and that her pain was fairly well controlled. (Id. at 10-11). The doctor testified that he did not see any evidence of compartment syndrome or complex regional pain syndrome. (Id.). However, the doctor testified that given the severe nature of the injury, Claimant should use a bone growth stimulator to promote healing of the bones. (Id.). In addition, the doctor added Lyrica and duloxetine to Claimant's medication regimen and wanted her to follow up regularly. (Id.);

- b. When the doctor saw Claimant again on November 15, 2021, Claimant was wearing a CAM boot, but still non weightbearing and in a wheelchair. (Id.). The doctor noted bluish discoloration of the leg and scabbing near the outside of the ankle. (Id.). Claimant reported that she had reduced smoking to one-quarter of a pack a day. (Id.). The doctor gave Claimant a device that helps the bone to heal, he continued her on medications, and asked her to follow up in two months. (Id. at 11-12);
- c. Claimant was again seen by the doctor on January 10, 2022, at which time she reported that she was down to two cigarettes a day. (Id. at 12). She rated her pain at a one out of ten, but she was still wearing a CAM boot, still non weightbearing, and her medications were unchanged. (Id.). Claimant was wearing a bone growth stimulator, the doctor noted that there was tissue healing, and Claimant was told to follow up in two months. (Id.);
- d. Claimant was next seen by the doctor on March 14, 2022, at which time she was full weightbearing. (Id.). The doctor noted that Claimant was using a cane at home and a walker outside. (Id.). Claimant was fitted with a custom brace that would fit in her shoe, but this would not be available for Claimant until May. (Id.) Claimant was still using a bone growth stimulator. (Id.). She rated her pain at a three to seven out of ten. At that time, the doctor had Claimant completely off work. (Id. at 13);
- e. On June 16, 2022, Claimant was seen again, and it was noted that she was still using the bone growth stimulator, she was still taking medication to which the doctor added Tramadol, and the doctor still had Claimant on a no work status. (Id.). The

doctor and Claimant discussed the transfer of her orthopedic care from Dr. Widmaier to Dr. Cush, and the latter surgeon had “put the thought in [Claimant’s] head that she may need an amputation....” (Id. at 14);

- f. The doctor saw Claimant again on August 25, 2022, at which time it was noted Claimant’s pain was worse, i.e., she rated it at a seven out of ten and noted that it was constant. (Id. at 13). Claimant was using a cane and wearing the molded/plastic brace in her shoe. (Id.). At the time of this visit, the doctor noted that Claimant was completely off cigarettes and alcohol. (Id.). There was no change in medications. (Id.). The doctor noted that the orthopedic care for Claimant had been transferred to Dr. Sauer, who had in turn referred Claimant to Dr. Nathan Miller, a provider who Claimant had yet to see. (Id. at 14). There was a question concerning chronic infection, so the purpose of a visit with Dr. Miller was to discuss an amputation below the knee. (Id. at 15);
- g. The doctor noted that Claimant underwent an MRI on August 15, 2022, which showed a united fracture of the distal tibia, a partial bridging fracture of the distal fibula, but there was a question of chronic infection. (Id.);
- h. Claimant was again seen by the doctor on November 14, 2022, at which time Claimant had developed “full-blown osteomyelitis and had to undergo a right below-the-knee amputation performed by Dr. Miller...” on October 27, 2022. (Id. at 16-17). The doctor explained that “osteomyelitis” is an infection into the bone. (Id. at 17). Claimant was wearing a brace but had not yet been fitted with a prosthesis. (Id.). The doctor testified that his plan of treatment included a sympathetic nerve block to try and slow down the phantom limb pain process, which had started. (Id. at 16). He also spoke with Claimant about the possible need to implant a spinal cord stimulator in the future to control the pain and the phantom limb pain. (Id.);
- i. It was the opinion of the doctor that during the course of his treatment of Claimant during the past year, she was not able to work. (Id. at 19). He opined that the diagnosis of Claimant’s condition is “chronic right lower extremity somatic and phantom limb pain as a result of [August 7, 2021] severe injury requiring amputation.” (Id.);
- j. The doctor testified that throughout the time he had treated Claimant, she has never refused treatment., i.e., “she was very compliant once she realized that her social habits were interfering with her ability to get well – she immediately curtailed them faster than I’ve ever seen any patient curtail them.” (Id. at 19-20). Although the doctor agreed that an extensive smoking history can impact the body’s ability to heal, he went on to testify that it was the severity of Claimant’s injury that caused the chronic infections that led to the amputation and not the social habits of smoking and drinking. (Id. at 20-21);

- k. During cross examination, the doctor agreed to the following: Claimant was counseled multiple times and on repeated occasions that she needed to quit smoking in order to allow her fracture to heal; the doctor had, in fact, given Claimant this same advice; that there is a known association between the inability of fractures to heal and smoking; that there is a known association between the development of osteomyelitis after a fracture in conjunction with smoking; that it is reasonable medical advice to have told Claimant to quit smoking; that he had not reviewed any surveillance records; and that his records indicated that Claimant had a complete cessation of her smoking activities. (Id. at 23-25). The doctor also acknowledged that he is not an expert in the field of osteomyelitis, and he does not consider himself an expert on the effects smoking has with regard to lower extremity healing and complications caused by osteomyelitis. (Id. at 22).
9. On January 16, 2023, Employer took the rebuttal deposition testimony of Lucian Bednarz, M.D. (Bednarz 1/16/23 Deposition). The testimony of Dr. Bednarz from this deposition can be summarized, in part, as follows:
- a. The doctor testified that when he saw Claimant during May 2022, she admitted to ongoing alcohol and tobacco use, including smoking. (Id. at 7);
 - b. Claimant ultimately developed osteomyelitis, which is a bone infection. (Id.). The doctor testified that a bone infection is serious in the sense that the vascular supply to the bone is such that it is very difficult to treat non surgically, and once it develops, it usually is treated by the surgical removal of the infected bone. (Id. at 7-8);
 - c. The doctor agreed that he is aware of the medical literature concerning the risk of smoking as impacting on nonunion fractures and the development of osteomyelitis. (Id. at 8). He further agreed that it has been his experience running the orthopedic trauma and amputation unit at Allied Rehab Hospital in Scranton, as well as teaching amputee care to residents for the past 25 years, that the literature indicates that smokers have a double the risk of nonunion after a fracture as nonsmokers. (Id. at 9). He further agreed that the literature indicates, and his experience supports the proposition that smokers are twice as likely to develop infection and that they are 3.7 times as likely to develop osteomyelitis as nonsmokers. (Id.). In addition, the doctor also agreed that it has been his experience that smokers had a far slower healing track than nonsmokers. (Id.). Moreover, the doctor agreed that the literature indicates that seventy percent of smokers go on to develop deep tissue infections. (Id. at 10);
 - d. The doctor agreed that Claimant's refusal to follow reasonable medical advice, including cessation entirely of smoking, caused, or substantially contributed to, the development of nonunion and osteomyelitis in her injured extremity. (Id.). He testified that "as the primary treatment recommendation, it would be the contributing factor to the need for ongoing surgical care as was predicted since the main treatment is tobacco and alcohol cessation prior to any surgical intervention,

and failure to do so results in the need for more aggressive surgical procedures including limb loss.” (Id. at 11);

- e. The doctor did not agree with the testimony of Dr. Rosenthal, where Dr. Rosenthal denied smoking had anything to do with Claimant’s failure to heal the osteomyelitis or the amputation. (Id.). The doctor agreed that there was a direct connection between Claimant’s failure to cease smoking and drinking and the subsequent amputation of her lower extremity. (Id. at 14);
 - f. The doctor clarified the recommendations that he made at the time of the May 2022 evaluation concerning Claimant’s ability to work. (Id. at 12-13);
 - g. The doctor testified that, in the past quarter of a century and given the thousands of amputees he has treated, he has never recommended the use of a spinal cord stimulator as a treatment to alleviate symptomology arising from a lower limb amputation. (Id. at 14-15);
 - h. During cross examination, the doctor agreed that, at the time of the injury, the initial procedure was directed at limb salvage. (Id. at 16-17). However, he went on to further agree that there was always a risk of limb loss. (Id. at 17). He further agreed that his review of Dr. Rosenthal’s records indicated that there had been a decrease in smoking reported. (Id. at 17).
10. This Workers' Compensation Judge has carefully reviewed all the testimony and evidence presented by the parties in this case. Based upon a careful and thorough review of the testimony and evidence, this Workers' Compensation Judge makes the following credibility determinations:
- a. This Judge, having had the opportunity to listen to, and subsequently review, the testimony of Claimant when she testified at the January 18, 2023, hearing, finds the testimony of Claimant credible, but only in part. Specifically, this Judge accepts the testimony of Claimant concerning the events of August 7, 2021, that resulted in the work injury. In addition, this Judge accepts in general terms, that she had undergone surgeries for her injured limb, and ultimately underwent an amputation procedure during October 2022. Employer presented no fact witnesses to dispute the testimony of Claimant concerning the work event that resulted in the injury on August 7, 2021, and the general recitation of Claimant concerning the medical treatment for the injury did not significantly differ from the medical treatment timeline outlined by the medical experts presented in this dispute. However, this Judge does not find Claimant to be particularly credible on the issue surrounding whether she was advised by medical providers to stop smoking, whether she was provided with medical assistance to stop smoking, or whether she stopped, or reduced, her smoking activity. To the extent that any of the testimony of Claimant could be interpreted or construed to support a finding that Claimant was not told by medical providers to quit smoking, or that the medical providers who treated her after the work injury did not inform her of the negative impact that smoking had on

the healing of the work injury, such testimony is rejected by this Judge as not credible. Based upon the totality of the evidence presented, this Judge finds that Claimant was advised, by numerous providers, to quit smoking. Although Claimant initially denied that her own doctors had offered her smoking cessation treatments, she subsequently acknowledged that her own primary care doctor had not only offered her smoking cessation treatment at an August 27, 2021, visit, but that provider had prescribed medication to assist in smoking cessation. Even Claimant's own medical witness in this dispute, who had begun seeing Claimant on October 11, 2021, agreed that smoking cessation would allow her fracture to heal and that there is a known association between the inability of fractures to heal and smoking. Although not the only factor weighed and not dispositive in this dispute, when assessing the overall credibility of Claimant on the issue of smoking and whether she complied with the smoking cessation recommendations of her providers, this Judge weighed the observations made by the surveillance video conducted on during March 21, 2022, where it appeared to the view of this Judge that Claimant was observed smoking on at least six separate occasions between 7:23 am and 2:07 pm. Given the rate of consumption during the foregoing interval, which also included Claimant attending physical therapy for a period of time, this Judge is not particularly persuaded by Claimant's assertion as to her level of effort or success in smoking cessation. The observations this Judge made from the video surveillance supported the history Claimant gave to Dr. Bednarz on May 5, 2022, where she acknowledged that she continued to smoke through that date.

- b. This Judge, having carefully reviewed and considered the September 19, 2022, and January 16, 2023, deposition testimony of Lucian Bednarz, M.D., finds the testimony and opinions of Dr. Bednarz to be competent and credible in this dispute. One of the factors that this Judge weighed when finding the testimony and opinions of Dr. Bednarz to be credible and persuasive concerning the issues presented in this dispute is the fact that he is the Director of the Orthopedic and Amputee Rehabilitation Unit at the Allied Services Rehabilitation Hospital. An additional factor that lent more credibility to the testimony and opinions of Dr. Bednarz in this dispute is the fact that he also teaches amputee care to resident physicians, which he has been doing for the past 25 years. As such, this Judge accepts, as medical fact, and as agreed to by the doctor, that the literature indicates smokers have double the risk of nonunion after fractures as nonsmokers. In addition, this Judge also accepts as a medical fact that the literature also indicates that smokers are twice as likely to develop infection, with smokers having 3.7 times more likelihood of developing osteomyelitis than nonsmokers and that 70% of smokers go on to develop deep tissue infections. The doctor noted that he has treated multiple fractures of the nature Claimant suffered, and he credibly testified that it is unusual for it to go on to limb loss absent other medical comorbidities, such as tobacco abuse. Given the background and experience of Dr. Bednarz, this Judge finds his overall testimony to be credible on the following facts: that the recommended smoking cessation would have had a high probability of success, i.e., preventing further problems and aided in healing; that smoking cessation is an essential part of the pre-surgical management and post -surgical rehabilitation and that this had been

an ongoing recommendation by Claimant's treating providers; that removing toxic agents, such as tobacco, do not pose a risk, but rather improve the likelihood of more rapid healing; that the recommendation of smoking cessation was medically reasonable; that Claimant's continued smoking, in spite of the recommendations of treating providers to cease, substantially contributed to the development of the nonunion and osteomyelitis in the injured extremity; that there was a direct connection between Claimant's failure to cease smoking and drinking and the subsequent amputation of her lower limb; and that Claimant would be more functional now had she ceased smoking per the recommendations of her doctors. This Judge also accepts, as credible, the following testimony of Dr. Bednarz: "[b]oth alcohol and tobacco cessation we know improves surgical outcomes and the nature of the fracture was such that we see on a regular basis and typically heals without significant consequences...."

- c. This Judge, having carefully reviewed and considered the December 13, 2022, deposition testimony of Scott Rosenthal, D.O. finds the testimony of Dr. Rosenthal to be competent, but less than credible and persuasive in this dispute. Although the doctor testified that he did not feel that Claimant's activities of smoking and drinking is what required her to have an amputation, he did agree that smoking can impact the ability of the body to heal. When weighing the overall opinions proffered by the doctor, this Judge did not find his assertion that the impact of smoking was inapplicable in this case to be particularly credible. This credibility determination is made based upon the fact that the doctor acknowledged that he does not consider himself to be an expert in orthopedics or an expert on the effects of smoking with regard to lower extremity healing and complications caused by osteomyelitis. (See Rosenthal at 22). When considering the competing medical evidence and opinions, this Judge simply found the opinions of Dr. Rosenthal not to be credible when compared to those of Dr. Bednarz, especially given the more focused experience possessed by Dr. Bednarz as the Director of the Orthopedic and Amputee Rehabilitation Unit at the Allied Services Rehabilitation Hospital. As such, the testimony of Dr. Rosenthal is rejected where it conflicts with, or is materially different from, the testimony and opinions of Dr. Bednarz.
11. Claimant and her attorneys have entered into a contingent fee agreement that provides for the payment of twenty (20%) percent of whatever sum is secured by the attorney for past or future compensation benefits, including interest or penalties, including any award/agreement for past and/or future medical bills, treatment, or testing. (Claimant Exhibit 01). However, counsel for Claimant did not question Claimant or elicit any testimony from Claimant concerning her understanding of the terms of the fee agreement, especially any fee that may be charged against medical bills.
12. Counsel for Claimant submitted a Statement of Litigation Expenses, which total \$4,537.53.³ (Claimant Exhibit 05). To the extent that the litigation expense exhibit was to be supplemented, counsel for Claimant was specifically instructed by this Judge to submit

³ In her post hearing Proposed Findings of Fact, Claimant updated litigations costs to total \$4,872.28.

an additional exhibit as a supplement and that Proposed Findings of Fact are not exhibits. (Hrg., 1/18/23 at 9-10).

CONCLUSIONS OF LAW

1. The parties hereto are bound by the terms and provisions of the Pennsylvania Workers' Compensation Act, as amended.
2. An employer who, pursuant to Section 306(f.1)(8) of the Act, seeks a forfeiture of benefits being paid bears the burden of establishing that the claimant is no longer entitled to benefits. See, Bereznick v. WCAB (Eat 'N Park Hospitality group), 989 A.2d 46 (Pa. Cmwlth. 1009); Folmer Ice Cream Co. v. WCAB, 330 A.2d 584 (Pa. Cmwlth. 1975). Any Claimant who refuses medical treatment which would have alleviated all or a portion of his disabling condition has effectively increased his disability by the percentage corresponding to the degree of relief the medical evidence establishes that he would have received. Byrd v. WCAB (Temco Services Industries), 473 A.2d 723 (Pa. Cmwlth. 1984). Both the Suspension Petition and Review Petition I asserted the same allegations: that reasonable treatment had been refused by Claimant and that had she undertaken such treatment, it would have resulted in a reduction of medical treatment and lessened the chance that additional future treatment would be required.
3. This Judge concludes, as a matter of law, and based upon the credibility determinations this Judge has made, that Employer has met its burden of proof to be entitled to relief under Section 306(f.1)(8) of the Act. As such, Employer is entitled to the relief outlined in that section of the Act.
4. It is the burden of the party seeking modification of the Notice of Compensation Payable, or Supplemental Agreement to prove that a material mistake of fact or law was made at the time the Notice of Compensation Payable was issued. Birmingham Fire Company v. WCAB (Kennedy), 657 A.2d 96 (Pa. Cmwlth. 1995). In this dispute, this Judge notes that during the hearing held on August 3, 2022, counsel for Employer and Claimant stipulated, on the record, to amend the description of injury to "a right open commuted ankle fracture slash dislocation involving the distal tibia as well as the proximal and distal fibular." This agreement between the parties occurred prior to any medical depositions being taken, and as such, Claimant was not required to incur the expense of a medical deposition, nor to incur the expense of a medical report to expand the description of injury. However, given the stipulation that results in Claimant expanding the description of injury, this Judge concludes that Claimant would be entitled to reimbursement of litigation expenses up until the date of the stipulation.
5. Section 440 (a) of the Act provides that where a claimant succeeds in the litigated case reasonable counsel fees are to be awarded against the employer, as a cost, unless the employer meets its burden of establishing facts sufficient to prove a reasonable basis for contest. United States Steel Corp. v. W.C.A.B. (Luczki), 887 A.2d 817, 820 (Pa. Cmwlth. 2005), *appeal denied*, 587 Pa. 726, 899 A.2d 1125 (2006). "A reasonable contest is

established when medical evidence is conflicting or susceptible to contrary inferences, and there is an absence of evidence that an employer's contest is frivolous or filed to harass the claimant." (Id.). The employer bears the burden of proving a reasonable basis for contesting liability. Department of Corrections v. W.C.A.B. (Clark), 824 A.2d 1241 (Pa. Cmwlth. 2003).

6. This Judge concludes, as a matter of law, and based upon the credibility determinations made hereinabove, that Employer presented a reasonable contest. Here, at the time it filed its petitions, Employer had in hand an opinion of Dr. Bednarz that Claimant's continued alcohol and tobacco abuse is a significant factor contributing to delayed healing and the need for additional treatments, which would otherwise not be anticipated. (Bednarz 9/19/22 Deposition, Exhibit 02). In the view of this Judge, there was conflicting medical evidence in this dispute that was susceptible to contrary inferences. In the instant matter, this Judge has credited the testimony and opinions of Dr. Bednarz in its entirety. Under such circumstances, this Judge does not find it appropriate to award an attorney fee against Employer.
7. The Judge finds that the Fee Agreement with Counsel is fair and reasonable as it relates to wage loss benefits only. Although the Commonwealth Court has held that a twenty (20%) fee of any benefits awarded applies to both medical and disability compensation benefits (See Neves v. WCAB (American Airlines), 232 A.3d 996 (Pa. Cmwlth. 2020), Counsel for Claimant did not question their client as to any understanding Claimant may have as to the implications or burden Claimant could be subjected to if such a fee were to be deducted from what Employer would be obligated to pay a healthcare provider. This Judge concludes that, at a minimum, the facts set forth in Neves requires that a record be created as to such an understanding by a claimant. In addition, this Judge notes that the Workers' Compensation Appeal Board has found that a fee against future medical bills of an unknown nature is speculative in nature. Kurtz v. Fedex Supply Chain, Inc, 2022 WL 398223 (January 13, 2022). Given the foregoing, this Judge declines to award a 20% counsel fee on medical benefits, as there is no evidence that Claimant understands the amount of the medical bills outstanding, if any, or the potential nature of the possible medical bills that could be incurred in the future. This Judge finds that Claimant cannot agree to something that is undefined and uncertain, unlike wage loss benefits, which are a defined and a consistent amount.

ORDER

WHEREFORE, upon consideration of the foregoing, it is hereby ORDERED and DIRECTED that:

1. The Suspension Petition and Review Petition I are GRANTED, consistent with the foregoing Findings of Fact, the credibility determinations made by this Judge and the foregoing Conclusions of Law. Wage loss benefits are suspended, effective May 5, 2022.

2. Review Petition II is GRANTED, based upon the stipulation of the parties set forth on the record at the August 3, 2022, hearing. Claimant is entitled to reimbursement of litigation expenses only up to the date Employer stipulated to expand the description of injury, i.e., August 3, 2022.

3. Employer shall reimburse counsel for Claimant's litigation expenses, in the amount of \$272.20.

4. The record is closed.



Robert Goduto
Workers' Compensation Judge
Harrisburg Field Office