VIRGIL PUGH, Employee,
v.
NEW CASTLE COUNTY, Employer.

INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

Hearing No. 1354747

Mailed Date: November 17, 2015
November 16, 2015

DECISION ON PETITION TO DETERMINE ADDITIONAL COMPENSATION DUE

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause, by stipulation of the parties, came before a Workers' Compensation Hearing Officer on October 8, 2015, in a Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

SUSAN D. MACK
Workers' Compensation Hearing Officer

APPEARANCES:

Frederick S. Freibott, Esquire, Attorney for the Employee

Monica Horton, Esquire, Attorney for the Employer

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NATURE AND STAGE OF THE PROCEEDINGS

Virgil Pugh ("Claimant") filed a Petition to Determine Additional Compensation Due ("DACD") on February 25, 2015 seeking a finding of compensability for dental work that he attributes to an acknowledged work accident that occurred on May 12, 2010. The Employer, New Castle County ("NCC"), denies a causal relationship between Claimant's tooth decay and the work accident and injury.

The parties stipulated that the case could be heard and decided by a Workers' Compensation Hearing Officer, in accordance with title 19, section 2301B(a)(4) of the *Delaware Code*. When hearing a case by stipulation, the Hearing Officer stands in the position of the Industrial Accident Board. *See* DEL. CODE ANN. tit. 19, § 2301B. A hearing was held on the pending petition on October 8, 2015.

SUMMARY OF THE EVIDENCE

The parties stipulated to the following facts: Claimant Virgil Pugh is 44 years old and is employed as a pipe layer with New Castle County. On May 12, 2010, Claimant was involved in a compensable work accident in which he injured his low back. Claimant underwent two work-related lumbar fusion surgeries at the L4-5 level on January 3, 2012 and July 7, 2014. The issue presented in this petition is whether Claimant's medication, narcotic and non-narcotic, caused him to suffer xerostomia, or dry mouth, and related dental decay. Claimant treated with Dr. Chamish, a dentist, from April 14, 2009 to May 13, 2009. He treated with another dentist, Dr. Duffy, from June 8, 2011 to August 16, 2013. When Claimant stopped treating with Dr. Duffy in August 2013, all of Claimant's cavities had been treated, a certain number of teeth had been extracted, and Claimant was in a state of good dental health. After a 13-month lapse in dental treatment, Claimant appeared at Dr. Duffy's office again on September 23, 2014. Dr. Duffy described Claimant's state of dental health

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on that date as having rampant caries all over his mouth. Eighteen of Claimant's teeth had cavities. Claimant submits that the reason for his dental decay was xerostomia from the medication needed for the May 12, 2010 work accident. The Employer submits that the dental decay did not stem from the work accident.

Claimant Virgil L. Pugh, Jr. testified that he is a pipelayer supervisor for New Castle County. Claimant acknowledged a history of injuring his

tailbone, acromion, and right knee in motor vehicle accidents in 2004 and 2005, after which he treated with Dr. King and Dr. Cary. He was taking both narcotic and non-narcotic medications for these injuries through 2010. Claimant never had a problem with "dry mouth" before his work-related injury in 2010. He practiced regular home dental care from 2005 and 2010, brushing twice a day, flossing once a day, and using a water pick once a day. Claimant's parents and grandparents all had their teeth. He saw a dentist, Dr. Chamish, in April and May 2009 to have one tooth extracted and two teeth filled.

On May 12, 2010, Claimant was carrying a large bag of stone, and as he put it down and stood up, he heard a pop. He developed more pain in his back throughout the day and then the next day was sent to Christiana Care. He underwent conservative care for his low back, but eventually he had a lumbar fusion at L4-5 performed by Dr. Yalamanchili. The January 3, 2012 surgery involved installation of a cage, four screws and rods, and a bone graft. He was in terrible pain after surgery. His pain level was a "20." Claimant described the pain as constant, unbearable, and traveling down to the legs. He therefore increased the amount of pain medications he was taking. Claimant felt like the implant was moving around in his spine. Dr. King increased his dosage of OxyContin in April 2012.

Claimant saw a different dentist, Dr. Duffy, between June 2011 and August 2013. He did not see a dentist between 2009 and 2011 because he had no dental insurance during that time period. Dr.

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Duffy told Claimant that dental issues could hinder his spinal fusion, so Claimant had Dr. Duffy address existing dental problems between 2011 and August 2013. By August 2013, all of his existing dental problems had been addressed and Claimant planned to undergo only routine cleanings with Dr. Duffy in the future.

In September 2013, Dr. King increased Claimant's dosage of OxyContin from a total of 320 mg per day to 400 mg per day. He also prescribed Percocet four times a day and added Soma. Claimant's back pain was "terrible." From September 2013 through 2014, Claimant noticed that he was drinking water all day and he would wake up two to three times a night to drink more water and then have to urinate. This was the first time he noticed this dry mouth and increased need to drink. Claimant's back hurt badly and a second surgery was planned with Dr. Rushton. Pre-surgical testing showed that Claimant was allergic to nickel and cobalt. Claimant had the second lumbar surgery in July 2014, at which time Dr. Rushton removed the original cage and installed a larger one. The surgery was somewhat helpful, in that now the bone is growing on the graft. However, Claimant still has constant low back pain from scar tissue that formed after the first surgery. Claimant still has dry mouth and drinks a lot of water. He denied drinking soda or eating a lot of sweets. He eats a well balanced diet and tries to limit his sugar intake. Claimant insisted that he brushes his teeth twice a day; however, he does not floss or use a water pick any more because of the sensitivity around his teeth. His teeth are in constant pain, and his gums burn and are very sensitive. Recently a tooth broke when he was eating a ham and cheese sandwich, and he had three more teeth pulled. He had tried to put off removing the teeth as long as possible in order to avoid bone loss. In September 2014, his tooth was hurting so badly one weekend that he pulled his own tooth out. Claimant noticed all the brown on his teeth, so he went to see Dr. Duffy, who told him he had rampant tooth decay. Claimant insisted that the only thing that changed between the previous visit to Dr. Duffy in August

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2013 and the return visit in September 2014 was the increased intake of medications. Claimant now needs to get dental implants.

On cross-examination, Claimant testified that he began working for NCC on September 7, 1999. Claimant recalled seeing Dr. Mastrota for dental

care in the 1990s and Dr. Saltz in the early 2000s. Dr. Saltz pulled a wisdom tooth. Claimant also went to Wilmington Medical Center to have an abscess drained after the wisdom tooth removal. He does not recall any specific dental problems or visits between the treatment with Dr. Saltz and the treatment with Dr. Chamish in 2009. He had dental insurance between 2009 and 2011 but did not see any dentists between the April/May treatment with Dr. Chamish and his first visits to Dr. Duffy in June and July 2011. After seeing Dr. Duffy in June and July 2011, Claimant did not go to the dentist again until November 2012. Claimant saw Dr. Duffy several times between November 2012 and August 2013. When he first noticed the "dry mouth," he did not seek treatment right away because he was having so many other problems such as scarring on his legs and pain. His main concern was his back and getting that treated, and as noted earlier, he underwent back surgery in July 2014. In late May or June 2014, Claimant started noticing tooth problems again. His teeth were turning brown at the gum line. He saw Dr. Duffy between September 2014 and December 2, 2014. Claimant then saw Dr. Duffy again the week before the hearing.

Claimant's teeth have been too sensitive for the past six to eight months to use dental floss or the water pick. He had used a water pick nightly since the early 2000s. He also flossed around four nights a week for years. Claimant acknowledged telling Occupational Health on June 3, 2010 after his work accident that he was taking narcotics for pain from a 2005 motor vehicle accident.

On re-direct, Claimant confirmed that he told Dr. Batt at Occupational Health in June 2010 that he had suffered a new injury, with severe pain that was going down his legs. Claimant insisted

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this was not the same as his previous back injury. Dr. Batt recommended a discogram, but Claimant retained an attorney after the Employer refused to pay for it. Claimant's main priority between September 2013 and July 2014 was getting treatment for his back and then he planned to take care of his teeth.

Michael Duffy, D.M.D., testified by deposition on behalf of Claimant Virgil Pugh. (Claimant's Exhibit 1) Dr. Duffy first saw Claimant on June 8, 2011. On his dental history form, Claimant indicated his gums did not bleed, he brushed his teeth twice a day, and he did not floss. Dr. Duffy performed a comprehensive examination and found early periodontal disease, multiple cavities, and some missing teeth. He described the findings as common. He planned to fill the cavities, extract some teeth, and get the gums cleaned up. At the first visit, he provided Claimant with an antibiotic and removed a tooth. Claimant maintained regular visits to Dr. Duffy through August 16, 2013, initially to fix up his teeth and then to maintain them, though Claimant never got his deep cleaning. As of August 16, 2013, all of Claimant's caries were treated and Claimant was in good dental health. Claimant next saw Dr. Duffy on September 23, 2014. Claimant's front tooth had broken off at the gumline and he had rampant caries all over his mouth, 18 cavities in total. Dr. Duffy subsequently extracted a tooth and filled a tooth to try to control the pain, but he has recommended Claimant's undergo full mouth extractions and get dentures and/or implants. It was not possible to repair the caries at this point, so Dr. Duffy recommended removing the teeth. Dr. Duffy was surprised at how fast Claimant's mouth had deteriorated.

Dr. Duffy reviewed Claimant's past medical records. Dr. Chamish provided dental care for Claimant in 2009. On April 14, 2009 Claimant presented with a toothache at tooth number 7. Dr. Chamish provided a filling for that tooth and scheduled Claimant for a deep cleaning. Claimant returned on April 29, 2009 and required a tooth extraction of tooth number 29. Dr. Chamish also

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filled tooth number 30. Claimant came back for teeth cleaning on May 13, 2009. Claimant was supposed to return on June 3, 2009 but was a no-

show. Dr. Duffy also reviewed records from Dr. King and Dr. Cary that documented treatment after car accidents on July 2, 2004 and May 9, 2005. The doctors prescribed a series of pain medications from 2004 up through 2009. Dr. Duffy agreed that Claimant had been prescribed a lot of pain medicine for chronic pain management, including Percocet, Feldene, Ultracet, Relafen, Motrin, a Medrol Dosepak, Soma, Xanax, and Lortab. The records indicated Claimant was involved in a work accident on May 12, 2010. Dr. Cary saw Claimant on July 8, 2010 and discontinued the prescription for Soma. Claimant was prescribed OxyContin, 80 mg/12 hours, and Percocet for breakthrough pain. On April 23, 2013, Claimant was prescribed both 80 mg OxyContin and 40 mg OxyContin so he had more flexibility on dosing during the day. Dr. King increased the prescription of OxyContin, 80 mg tablets, to two tablets and three tablets by mouth. Dr. Duffy confirmed this was an increase in the OxyContin dosage. Dr. King also kept Claimant on Percocet and placed him back on Soma to control muscle spasms.

Dr. Duffy confirmed that the causes for dental decay are genetics, home care, diet, environment, and medicine-induced xerostomia, or dry mouth. Claimant had stated he brushed his teeth twice a day. Dr. Duffy did not know about Claimant's diet, but he did not think diet alone would cause the problems Claimant had, unless Claimant ate pure sugar and never brushed his teeth. Environmental issues such as paint fumes or caustic fumes, or biting fingernails or pencil, might be a factor in tooth decay, but could be ruled out if this was not something Claimant was exposed to. Medicine can induce dry mouth, especially when taken in combination. Dr. Duffy explained that most medicines had a side effect of dry mouth, but when medicines are combined, an increase in dry mouth is a common side effect. Narcotics also have a propensity to cause dry mouth. Dr. Duffy agreed that Claimant was taking a good amount of narcotic and non-narcotic medications after the

two motor vehicle accidents, but as of August 16, 2013 Claimant was in a good state of dental health. Over the next thirteen months, Claimant continued to take narcotic medications, some in increased dosages, and he was also placed back on Soma. Dr. Duffy opined that the rampant deterioration he saw in September 2014 was the result of Claimant's dry mouth, which he agreed was most likely explained by Claimant's use of pain medicines. Other than narcotic medication, dry mouth could be caused by antihistamines or mouth breathing; however, Claimant did not indicate he had seasonal allergies on his intake form and Dr. Duffy would not expect to see such rampant deterioration after 13 months as a result of seasonal allergies.

On cross-examination, Dr. Duffy stated that he did not note any bleeding when he probed Claimant's teeth on June 8, 2011. He prescribed Claimant antibiotics because the tooth he extracted was infected. Dr. Duffy extracted two more teeth on June 21, 2011, and he filled another tooth on July 5, 2011. Dr. Duffy next saw Claimant a year and a half later on November 30, 2012, when Dr. Duffy noted that three teeth required fillings. On December 17, 2012, Dr. Duffy performed the fillings. Dr. Duffy filled two teeth on January 7, 2013 and two more teeth on January 23, 2013. When Claimant returned on February 27, 2013, Dr. Duffy determined that one of the teeth he had filled in December 2012 now required a root canal. The root canal was performed on March 12, 2013. The back of the root canal was closed up on May 7, 2013. Claimant returned on July 29, 2013 after he fractured a cusp off of a tooth. Dr. Duffy smoothed off the rough edge. The next visit was August 16, 2013. At that time, Dr. Duffy placed a very large filling in the fractured tooth. Dr. Duffy also provided a prescription for an antibiotic for Claimant to take before any additional dental work, including cleanings. Claimant needed to pre-medicate for his dental work because of the pins and plates in his back. Dr. Duffy was not sure if Claimant was scheduled at that point to come in for a cleaning. Dr. Duffy confirmed that he saw Claimant nine times between November 30, 2012 and

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August 16, 2013. This number of visits was sometimes needed to take care of a patient's caries, because not everything can be done in a week. Claimant next returned to see Dr. Duffy on September 23, 2014, which was thirteen months later. Dr. Duffy was unaware of any scheduled visits between August 16, 2013 and September 23, 2014 or if Claimant sought any other dental treatment during that time period. At the September 23, 2014 visit, Dr. Duffy noted that Claimant had rampant caries. He discussed the causes of tooth decay with Claimant on October 7, 2014; he discussed sugar, acid, saliva, and the connection between them. This is the date Dr. Duffy first diagnosed Claimant with dry mouth, or xerostomia, based on the amount of decay in his mouth.

Dr. Duffy opined in his report to Claimant's counsel that a combination of factors were responsible for Claimant's tooth decay, most likely accelerated by Claimant's dry mouth. Dr. Duffy confirmed that medication is a frequently reported cause of xerostomia. He commented that all medicines have the potential to cause dry mouth, including antihypertensive medication. Dr. Duffy was not aware if Claimant had a history of hypertension or being treated for the condition. He did not know if Claimant had a history of depression, but agreed antidepressants can cause dry mouth. Skeletal muscle relaxants and opioids can also cause dry mouth, and Claimant had been taking both of those medications since 2004 or 2005. Dr. Duffy was aware Claimant smoked but could not say how much. He was not aware of Claimant's history of smoking marijuana. Dr. Duffy knew while treating Claimant that he had back problems, because he had trouble laying back in the dental chair. Given the pain medications Claimant was taking, Dr. Duffy assumed Claimant was getting treatment somewhere. Claimant identified Roxicodone, hydrocodone, and Soma on his patient history to Dr. Duffy, so the dentist did not prescribe him any pain medicines.

Dr. Duffy confirmed that hydrocodone, Roxicodone, Lortab, Norco, Vicodin, and Percocet (Oxycodone/acetaminophen) were all narcotic pain medications, and he accepted that Claimant was

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prescribed these medications between 2004 and 2010. The medical records from 2004 to 2010 also indicated Claimant was prescribed the muscle relaxants Soma and Flexeril, the NSAID Feldene, and Ultracet, a drug that acts like an opioid, during that time frame. When Claimant saw Dr. Chamish in 2009, he indicated that he was taking Oxycodone, Carisoprodol, and hydrocodone. Dr. Chamish's records documented that he gave Claimant a deep cleaning of the teeth and gums. Dr. Duffy acknowledged that Claimant's 11-year history of using pain medication may have had an impact on his dental health. Dr. Duffy also agreed that several factors go into the formation and progression of dental decay and a combination of these factors were responsible for Claimant's tooth degradation. He opined in December 2014 that Claimant's dry mouth was caused by the medication for his 2010 work injury without having reviewed any of Claimant's other records. In response to questioning, Dr. Duffy opined that he believed the medicines Claimant had been on were a contributor to the exacerbation of his dental decay. He then stated that he believed it was the OxyContin that was causing Claimant's dry mouth. He confirmed his opinion that the drugs Claimant was taking as a result of the 2010 work injury were the cause of the dry mouth. He then agreed that the opioids Claimant was taking before the 2010 work injury could have been the cause of Claimant's dry mouth.

On re-direct, Dr. Duffy confirmed that Claimant was in good dental health as of August 13, 2013, regardless of all the prior opioids and other medications, smoking, and any other issues from 2004 or 2005 up to 2010. Dr. Duffy though it would be unlikely for Claimant's teeth to have deteriorated to the extent they did in the thirteen months after August 13, 2013 but for the

continued dosages of opioids, Soma, and other medications given to Claimant because of the work accident. He thought that reasonably it was the medicines that dried out Claimant's mouth and accelerated his dental problem. Dr. Duffy agreed that the dosages of medications increased after the work accident.

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David E. Mastrota, D.M.D., a dentist, testified by deposition for the Employer, New Castle County. (Employer's Exhibit 1) Dr. Mastrota examined Claimant at the Employer's request on June 25, 2015. He also reviewed various medical and dental records related to the case. Medical records indicated Claimant was involved in motor vehicle accidents in 2004 and 2005. Claimant treated with Dr. Atkins and Dr. Cary of Delaware Diagnostic and Rehabilitation Center in 2004 and 2005 and was prescribed Vicodin, Percocet, Ultracet, Relafen, a Medrol Dosepak, Motrin, Soma, Xanax, and Flexeril at various visits. Records from 2006 reflect the prescription of Percocet, Lortab, Norco, Endocet, Soma, Xanax, and a Medrol Dosepak. Between October 2009 and May 2010, Dr. Cary and Dr. Damon saw Claimant on six occasions and provided refills of Claimant's pain medications.

Dr. Mastrota reviewed the dental records from Dr. Duffy. Claimant saw Dr. Duffy three times in June and July 2011. Dr. Duffy identified areas of dental decay and planned a tooth extraction and a couple of fillings. He also planned to do a cleaning. The periodontal exam showed some pocketing, which Dr. Mastrota assumed would also mark bleeding points in the gums. Dr. Duffy next saw Claimant on November 30, 2012. There were no intervening dental records.

Dr. Mastrota also reviewed the dental records of Dr. Chamish from 2009. Claimant saw Dr. Chamish first on April 14, 2009. Claimant provided a history of taking oxycodone, hydrocodone, and Carisoprodol and signifying that he was receiving pain management care. The April 14, 2009 exam showed a broken tooth with decay around it. Dr. Chamish restored the tooth with a filling. Claimant was supposed to then receive a deep cleaning, which involves the use of anesthesia and aggressive cleaning beneath the gum for what is usually significant gum disease. Claimant returned to Dr. Chamish on April 29, 2009 with a toothache. One tooth had a large area of decay that involved the nerve and the other tooth had lost a filling. Dr. Chamish removed the decayed tooth and placed a temporary filling in the tooth next to it. He also provided Claimant with a prescription for

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Vicodin. Claimant returned again on May 13, 2009, and Dr. Chamish started the deep cleaning. Dr. Mastrota did not have any dental records prior to 2009 and had no information about Claimant's dental health prior to his visit to Dr. Chamish. Dr. Mastrota also had no records or information about Claimant's dental health between the April/May 2009 visits to Dr. Chamish and Claimant's subsequent care with Dr. Duffy beginning in June 2011.

Dr. Mastrota examined Claimant on June 25, 2015 and confirmed the findings of Dr. Duffy on his last visit with Claimant. Dr. Mastrota found that Claimant's remaining upper teeth were beyond restore, because the decay was very rampant and extensive in almost every tooth. He felt that removing all the teeth was the best option, and then the issue to be resolved would be whether to provide a denture or implant-retained denture. An implant would cost a lot more money. Claimant told Dr. Mastrota he was taking OxyContin and oxycodone for pain, as well as several other medications. There are various factors that affect a person's dental health, including routine dental care, home care, intake of sugars, genetics, medications, health, and smoking. Dr. Mastrota agreed with Dr. Duffy that Claimant's current dental health was due to dry mouth as it relates to ingestion of pain medication. He testified that the medications seemed to be the only thing that would make the teeth get that bad that quickly. Dr. Duffy agreed that Claimant had a significant history of taking

pain medicine since 2004, and he testified that longterm use of pain medicine definitely increases dry mouth. The history of pain medicine usage by Claimant preceded the work injury by a long time.

On cross-examination, Dr. Mastrota agreed that as of June 25, 2015, Claimant's teeth were extremely deteriorated, with rampant dental caries in almost every tooth. The tooth decay was along the gumline and wrapped around the tooth in most cases. Dr. Mastrota confirmed that the records from Dr. Atkins and Dr. Cary after the motor vehicle accidents were dated between September 30, 2004 and August 29, 2006. The pain medications prescribed were identified in the records. The

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next record from Dr. Cary was dated October 15, 2009. Dr. Cary provided a refill of pain medication, but did not specific which medication. Dr. Mastrota could not say whether it was narcotic or non-narcotic. Dr. Cary's records from October 2009 to May 6, 2010 were similar in referring to refilling pain medication in general terms. Claimant told Dr. Chamish in April 2009 that he was taking pain medication due to a prior car accident. On April 29, 2009, Dr. Chamish prescribed Vicodin for, Claimant's toothache and tooth extraction. Dr. Mastrota agreed that Dr. Duffy began treating Claimant on June 8, 2011 and Claimant maintained regular visits with Dr. Duffy up to August 16, 2013. Dr. Mastrota had no reason to doubt Dr. Duffy's December 3, 2014 report stating that as of August 16, 2013 Claimant's dental caries were all treated and Claimant was in good dental health. Dr. Mastrota and Dr. Duffy are colleagues. After the August 16, 2013 visit, there was a lapse in dental care for thirteen months, after which Dr. Duffy noted that Claimant's mouth was filled with generalized rampant decay and in need of full mouth extractions and dentures. Dr. Duffy was reasonable to be surprised how fast Claimant's mouth had deteriorated. Dr. Mastrota agreed this rate of deterioration was not normal. Claimant told Dr. Mastrota that he brushed his teeth and flossed, and according to Dr. Duffy's records, his teeth were being cleaned and maintained. Dr. Mastrota would have asked Claimant about his diet and noted anything significant. Dr. Mastrota described Claimant's past dental care as fair because it was inconsistent and he did not know about what care Claimant had received prior to 2009. He assumed Claimant's dental health was stabilized with no decay and stable gums prior to the thirteen-month hiatus. Nothing stood out as far as dental care, home care, or diet as an issue contributing to Claimant's tooth deterioration. Dr. Mastrota did not know if Claimant had a family history of bad teeth. Claimant did indicate he smoked, which is a factor in poor dental health. Claimant's generalized health was not a factor so far as Dr. Mastrota could tell. Dr. Mastrota agreed that prescription and narcotic medications increase dry mouth, and

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longterm use can cause rampant decay. Dr. Mastrota again agreed that Dr. Duffy found Claimant to be in good dental health as of August 16, 2013. Dr. Mastrota was aware that Claimant had suffered a back injury and undergone a spinal fusion, and was taking narcotic medications as of August 16, 2013. When asked "Isn't it more likely than not that, from August 16, 2013, the use of narcotic medications from that point forward is the reason for his rapid decay in his mouth?" Dr. Mastrota answered "It seems to be the only logical explanation, going by the facts and what was presented." (*Id.* at 56)

On re-direct, Dr. Mastrota agreed that the deep cleaning done by Dr. Chamish was generally done for beginning gum disease or extensive gingivitis. He did not know how often Claimant brushed and flossed. Dr. Mastrota agreed that there was a hiatus in dental care between Dr. Chamish and Dr. Duffy, and when Claimant first saw Dr. Duffy, some dental treatment was required.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Compensability of Dental Condition

Claimant Virgil Pugh seeks a finding that his extensive dental decay is causally related to an acknowledged industrial accident that occurred on May 12, 2010 while he was working for New Castle County. Claimant contends that the pain medications he takes for the work-related low back injury caused xerostomia, or dry mouth, and the resultant severe dental decay. The Employer previously agreed that Claimant injured his low back in a work-related accident on May 12, 2010 and paid for medical and disability benefits related to the injury. This included two spinal fusion surgeries at L4-5 in January 2012 and July 2014. In response to the current petition, the Employer denies any causal relationship between Claimant's present xerostomia and dental decay and the acknowledged work-related injury to the low back. Because this is Claimant's petition, he must

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prove his claims by a preponderance of the evidence. *See Lomascolo v. RAF Industries,* No. 93A-11-013, 1994 WL 380989, at *2 (Del. Super. Ct. June 29, 1994).

Under Delaware law, an employer is obligated to pay for reasonable and necessary medical expenses related to a work injury. *See* DEL. CODE ANN. tit. 19, § 2322; *Turnbull v. Perdue Farms,* C.A. No. 98A-02-001, 1998 WL 281201, at *2 (Del. Super. Ct. May 18, 1998), *aff'd,* 723 A.2d 398 (Del. 1998). The primary issue before the Hearing Officer is the causal relationship between the dry mouth and dental decay and the acknowledged work injury. In determining causation in an identifiable industrial accident, the "but for" standard of causation is applied. *See State v. Steen,* 719 A.2d 930, 932 (Del. 1998); *Reese v. Home Budget Center,* 619 A.2d 907, 910 (Del. 1992). "The accident need not be the sole cause or even a substantial cause of the injury. If the accident provided the 'setting' or 'trigger,' causation is satisfied for purposes of compensability." *Reese,* 619 A.2d at 910. Furthermore, "[a] preexisting disease or infirmity, whether overt or latent, does not disqualify a claim for workers' compensation if the employment aggravated, accelerated, or in combination with the infirmity produced the disability." *Id.*

After weighing the evidence, I find that Claimant has proved by a preponderance of the evidence that the use of pain medication in relation to his May 2010 work injury caused xerostomia, or dry mouth, and a significant acceleration in his tooth decay after August 16, 2013 such that Claimant now requires extensive dental treatment. This finding is supported by the testimony of both dental experts and Claimant's testimony about the onset of his dry mouth symptoms and the course of his dental treatment.

Dr. Duffy and Dr. Mastrota agreed that, while Claimant has been taking narcotic and non-narcotic pain medications since 2004, Claimant was in a state of good dental health as of August 16, 2013, with his dental condition stable at that point. In contrast, when Claimant next saw Dr. Duffy

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in September 2014, he had rampant tooth decay throughout his mouth to the extent that both Dr. Duffy and Dr. Mastrota agreed that the teeth were no longer repairable and had to be removed in favor of dentures or implants. The dentists concurred that pain medications and especially a combination of medications, including the ones taken by Claimant, can cause dry mouth, and medication-induced dry mouth is a common factor in tooth decay. The experts recognized that Claimant had been taking a combination of pain medications for eleven years and this history of pain medication may have had an impact on Claimant's dental health prior to 2013. Nonetheless, both Dr. Duffy and Dr. Mastrota found the speed with which Claimant's teeth deteriorated between August 2013 and September 2014 to be surprising. They attributed Claimant's current dental health to dry mouth as it related to the ingestion of pain medication, with Dr. Mastrota commenting that the medications seemed to be the only thing that would make Claimant's teeth get that bad that quickly. No

factor stood out to Dr. Mastrota as a contributing factor to this deterioration other than the medications. Dr. Duffy confirmed that the dosages of some medications Claimant had been prescribed, particularly the OxyContin, had increased after his work injury and he thought it reasonable to conclude these medicines dried out Claimant's mouth and accelerated his dental decay. He thought it unlikely that Claimant's teeth would have deteriorated to the extent they did after August 13, 2013 but for the continued dosages of opioids, Soma, and other medications prescribed to Claimant because of the work accident. Dr. Duffy reviewed the records from Dr. Cary and confirmed that the dosage of OxyContin had been increased in April 2013. It is also notable that the first time Dr. Duffy diagnosed Claimant with dry mouth was in September 2014, even though he had been treating Claimant since 2011. Dr. Mastrota testified that the deep cleaning performed by Dr. Chamish in 2009 suggested the presence of significant gum disease prior to the work accident. Nonetheless, Dr. Mastrota's testimony on cross-examination acknowledged a causal link between the

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narcotic medication use after August 16, 2013 and the rapid tooth decay between August 2013 and September 2014. He testified that the use of narcotic medication was "the only logical explanation" for the rapid decay. (Employer's Exhibit 1 at 56)

Claimant's testimony also supports that the rapid change in his dental condition after August 2013 coincided with a worsening in his work-related injury and an increase in his dosages of pain medication. Claimant underwent the first fusion surgery in January 2012, and he testified that he was in terrible pain afterwards. He described the pain as constant and unbearable. He recalled that his treating pain doctor increased his pain medications in April 2012 and then again in September 2013. Claimant did not undergo a second fusion surgery to address the failure of the first surgery until July 2014, so it would not be unexpected for Claimant to require an increased amount of pain medication until that surgery took place. Claimant also provided unrebutted testimony that he first noticed dry mouth and an increased need to drink after September 2013, when Dr. King increased his medication dosage. He began to notice tooth problems again in late May or June 2014 when he saw that his teeth were turning brown at the gum line. He explained that he did not seek treatment right away for the dry mouth or the brown teeth because his primary concern was getting his back treated. As noted earlier, Claimant underwent a second back surgery in July 2014. Claimant was prompted to see Dr. Duffy again in September 2014 after one tooth hurt so badly he pulled it out himself. He insisted that the only change that occurred between August 2013 and September 2014 was the increased intake of medications as prescribed by Dr. King.

The Employer argues that Claimant had been taking narcotic and non-narcotic pain medications long before the May 2010 work accident because of two prior motor vehicle accident, and Claimant already suffered from significant dental disease by the time he saw Dr. Chamish in 2009. The Employer thus contends that Claimant's current dental decay cannot be attributed to the

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work-related accident and injury. However, the Board has recognized repeatedly that "[a] preexisting disease or infirmity, whether overt or latent, does not disqualify a claim for workers' compensation if the employment aggravated, accelerated, or in combination with the infirmity produced the disability." *Reese,* 619 A.2d at 910. While Claimant may have had some dental disease prior to the work accident, and this disease may have been related to the pain medications he was taking after the motor vehicle accidents, the evidence outlined previously shows that Claimant's dental disease accelerated significantly over a relatively short period of time in 2013 and 2014. This acceleration occurred after a significant, new injury to Claimant's low back occurred in May 2010 that necessitated lumbar

fusion surgery in January 2012. This was followed by an increase in pain and an increase in the dosage of narcotic pain medications in 2012 and 2013. Thus, the work accident and injury, and the pain medications required to treat the pain from this new injury, represent a significant change that likely accelerated Claimant's dental disease and led to the generalized, rampant decay now present in Claimant's mouth. His current need for extensive dental treatment is analogous to the need for surgery after a work-related accident, where the claimant also has a pre-existing condition. In these situations, the Board determines compensability by considering "whether the surgery would have been required *at that time* but for the accident." *See Blake v. State of Delaware,* No. 477,2001, Veasey, C.J. (Del. Mar. 12, 2002) (ORDER). The Board is satisfied that Claimant would not have the rampant dental decay and the need for extensive dental treatment at this time but for the work accident that occurred in May 2010.

Based the above discussion, I find that Claimant's current dental condition and need for dental treatment is causally related to the compensable work accident that occurred on May 12, 2010. Claimant's petition is therefore granted.

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Attorney's Fee and Medical Witness Fee

A claimant who receives an award is entitled to a reasonable attorney's fee in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is less. 19 *Del. C.* § 2320. At the current time, the maximum based on the average weekly wage calculates to $10,194.40.

In setting an attorney's fee, the Board considers the factors set forth in *General Motors Corp. v. Cox,* 304 A.2d 55, 57 (Del. 1973). Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation. Claimant has successfully proved that his current need for dental treatment is causally related to the compensable back injury that occurred in May 2010. He is therefore entitled to payment of dental expenses in accordance with the applicable fee schedule. Claimant's counsel submitted an affidavit stating that he spent over thirty hours preparing for the hearing. Claimant's counsel has been a member of the Delaware bar since 1989 and has extensive experience in the practice of workers' compensation law. Counsel's initial contact with Claimant occurred on July 7, 2010. Counsel does not represent Claimant in anything other than a workers' compensation context. The subject matter of this case was somewhat unusual in comparison to the typical workers' compensation case, but the causation itself was not unique or unusual. Claimant's counsel represents that he has a contingent fee arrangement with Claimant. A copy of the fee agreement was provided to the Board. Counsel's stated hourly rate non-contingent work is $300.00. There is no evidence that Employer is unable to pay an attorney's fee.

Based on the factors set forth above and the attorneys' fees customarily charged in this locality for similar proceedings, I find that an attorney's fee of $7500 or thirty percent of the dental expenses, whichever is less, is reasonable in this case.

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

STATEMENT OF THE DETERMINATION

For the reasons set forth above, I find that Claimant's current need for dental treatment if causally related to the work accident on May 12, 2010 and I therefore GRANT Claimant's Petition for Additional Compensation Due. Claimant is awarded compensation for reasonable and necessary dental treatment at an amount that comports with the applicable fee schedule. I further award an attorney's fee in the amount of

$7500 or thirty percent of the dental expenses, whichever is less, and a medical witness fee.

IT IS SO ORDERED THIS 16th DAY OF NOVEMBER, 2015.

INDUSTRIAL ACCIDENT BOARD

/s/_____
SUSAN D. MACK
Workers' Compensation Hearing Officer

Mailed Date: 11-17-15

/s/_____
OWC Staff