MICHAEL SHORT, Employee,
v.
REED TRUCKING, Employer.

INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

Hearing No. 1078771

Mailed Date: October 12, 2020
October 6, 2020

DECISION ON PETITION TO TERMINATE BENEFITS & UTILIZATION REVIEW APPEALS

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 September 11, 2020, via video conference pursuant to the Industrial Accident Board COVID-19 Emergency Order, dated May 11, 2020.

PRESENT:

WILLIAM HARE

PATRICIA MAULL

Heather Williams, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Walt Schmittinger, Esq., Attorney for the Claimant

John Ellis, Esq., Attorney for the Employer

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NATURE AND STAGE OF THE PROCEEDINGS

Michael Short ("Claimant") was injured in a compensable work accident on March 19, 1996, during which he injured his low back, while he was working for Reed Trucking ("Employer"). Claimant has been receiving partial disability benefits, since March 24, 2005, with a compensation rate of $357.19, based on an average weekly wage of $590.00.

On January 28, 2020, Employer filed a Petition for Review alleging that Claimant was physically capable of returning to work; and therefore, no longer entitled to total disability benefits. Claimant opposes Employer's Petition and alleges that he remains incapable of returning to work.

As a result of his injury, Claimant engaged in pain management treatment, which was submitted to Utilization Review ("UR") pursuant to 19 *Del. C.* § 2322F(h). A UR determination was issued, finding the platelet rich plasma ("PRP") injections and Oxycodone/Acetaminophen injections to be non-compliant with the Health Care Practice Guidelines. That same UR determination found Claimant's Ambien prescription, home exercise program, and four week follow up appointment to be compliant with the Health Care Practice Guidelines.[1] Employer filed a Utilization Review Appeal of that UR determination and contends that Claimant's Oxycodone, Ambien, and PRP injections are not reasonable, necessary or causally related to Claimant's work injury. Claimant contends that all the medical treatment is reasonable, necessary, and causally related to his work injury.

A hearing was held on Employer's Petition for Review and two UR appeals. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

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Dr. Jason Brokaw, board certified in physical medicine and rehabilitation, testified by deposition for Employer. As a pain management specialist, Dr. Brokaw treats chronic patients and performs facet injections similar to the one Claimant received on December 9, 2019. The doctor is familiar with platelet rich plasma ("PRP") injections. After reviewing Claimant's pertinent medical records, Dr. Brokaw examined

Claimant on March 6, 2020, when Claimant reported a 1996 work accident during which he injured his low back while loading a trailer. Claimant had undergone a total of nine surgeries, with the most recent in 2019, as well as pain management treatment since 2003.

At their visit, Claimant reported that his prior injections and spinal cord stimulator trial had not been successful. Claimant's reported symptoms were ongoing back pain, radiating into his right groin, right leg numbness and tingling, pain he rated at 6 or 7 out of 10, ranging from 5 to 10 out of 10. He reported increased pain with sitting more than twenty minutes, increased pain with bending, lifting, or walking. Claimant reported that the last time he had worked was in 2015, but had stopped for a prior surgery. He had attempted office work, but found it too difficult. Claimant reported to Dr. Brokaw that he was unsure of what type of work he could perform because of his pain and need to lie down frequently. Dr. Brokaw confirmed that Claimant has not attempted to find work since his most recent September 2019 release.

Upon physical examination, Dr. Brokaw found Claimant to have: mild pain behavior, no evidence of midline movement consistent with his fusion procedures, no pain complaints above his fusion, positive right sacroiliac maneuvers below the fusion, full range of right hip motion with buttock pain, normal left hip range of motion, poor one-legged right side stance maneuvers, decreased right ankle jerk reflexes, positive right side straight leg raise test, intact strength, and no atrophy. At the time of the examination, Claimant was prescribed Percocet and Ambien. Dr.

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Brokaw confirmed that Claimant had been released to work by Dr. Zaslavsky in March 2019. Dr. Brokaw diagnosed Claimant with: a 1996 lumbar spine work injury requiring L3 to S1 fusion, ongoing low back pain, right sacroiliac joint dysfunction with right leg sciatica, chronic opiate medication dependence, use of Ambien, history of failed medical cannabis use, and overlying medical comorbidities, including cardiac disease, prostate disease and obesity.

Dr. Brokaw concluded that Claimant will require ongoing medication management for pain, and that the safest strategy is to discontinue his opiate medications completely, and replace them with safer, more effective medications, including non-abusable medications, anti-inflammatories, muscle relaxers and neuropathic pain medications, which he noted Claimant had not tried sufficiently yet. The doctor pointed out that Claimant's narcotic medications interact significantly with his Ambien prescription and that Claimant has not had sufficient trials of non-abusable medication in the last five years. He described Dr. Balu's record keeping procedures as "poor" and noted that Claimant's records did not contain evidence of adequate assessment or adequate trials of other medications. Dr. Brokaw Deposition 16:23 (July 13, 2020). Dr. Brokaw explained that the Center for Disease Control ("CDC") has made recommendations recently for decreasing opiate medication intake and replacing those medications with safer treatment options. He reported that Claimant has not tried any safer options in the last five years, despite there being safer regimens than his chronic, opiate medication regimen. The doctor testified that Claimant had reported that he was unaware why safer treatment options had not been tried.

Dr. Brokaw reported that Claimant is currently prescribed oxycodone, which equates to 45 milligrams of morphine equivalents per day, which is just below the low to moderate dosage using the CDC criteria, and would not require a prolonged detoxification process. He recommended that Claimant's dose be reduced to lower amounts fewer times a day, so that he is

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safely removed from all opiate prescriptions within two to three months, without the risk of withdrawal. The doctor explained that Claimant could start trials with other forms of medications during the weaning period, and increase those medications after the weaning time.

Dr. Brokaw explained that Claimant is prescribed Ambien, which is a sedative-hypnotic with benzodiazepine properties, which significantly increases the risks of overdose and death when combined with opiates. He described Ambien as "...one of the most dangerous for this because it is a rapid-onset, fast-acting sedative-hypnotic and therefore increases the risk of overdose more than others." Dr. Brokaw Deposition 19:10-13(July 13, 2020). He testified that the CDC and Food and Drug Administration ("FDA") have determined that opiates should not be combined with other abusable medications, and that "[i]t is a well-known accepted fact that these medications should not be combined." *Id*. at 20:6-8. Dr. Brokaw disagreed strongly with Dr. Balu's conclusion that Claimant's oxycodone/Ambien combination is appropriate because Claimant has been prescribed that combination for a long time without incident, and noted that Claimant's comorbidities, including his cardiac disease, increase his risk of over-sedation, sleep apnea and overdose. The doctor concluded that "...the longer [Claimant]'s on this combination, the more dangerous it becomes for him." *Id*. at 20:21-23. Dr. Brokaw disagreed with Dr. Balu's conclusion that the FDA recommendations are not relevant to Claimant's treatment, and noted that patients like Claimant are the exact group to whom those recommendations are made. The doctor explained that there are other, safer, equally effective, sleep aids Claimant can take that will not put Claimant at risk of overdoes when combined with opiates. He concluded that Claimant's ongoing use of Ambien is not reasonable and necessary treatment.

Dr. Brokaw determined that Claimant's receipt of a PRP injection was not reasonable and necessary because it did not make sense to use an injection in an area that is already fused, or in

an area that is not the source of pain, as in Claimant's case. He noted that PRP injections are experimental with poor results, and are not supported by medical literature for use in the spine. The doctor testified that Claimant had reported that the PRP injection had been ineffective and he had a history of unsuccessful epidural injections. Dr. Brokaw explained that pain diaries are important when providing injections for diagnostic purposes. He concluded that Claimant's PRP injection was not supported by the Delaware Practice Guidelines, had not provided any objective functional improvement, as confirmed by Dr. Balu, and was not reasonable and necessary treatment for Claimant. Dr. Brokaw concluded further that there is no injection that will benefit Claimant because Claimant has received both epidural and sacroiliac injections in the past, which have been ineffective. He confirmed that Claimant showed no subjective improvement from the PRP injection.

Dr. Brokaw testified that there no reason for Dr. Balu to have increased the frequency of Claimant's telehealth visits to more often than once a month, and noted that the Healthcare Guidelines allow for twelve visits per year for patient's prescribed narcotics. He concluded that monthly visits for monitoring Claimant's opiate prescriptions are reasonable and necessary treatment. The doctor recommended that Claimant be allowed three months for the detoxification process, with three monthly visits, but noted that Claimant will not require monthly visits after he is weaned off the opiate medications.

The doctor concluded that Claimant could return to work in a sedentary or light capacity, but will have permanent restrictions related to standing, bending and lifting, and may need to change positions. Dr. Brokaw reported that Claimant "...is certainly not totally disabled." Dr. Brokaw Deposition 36:4-5 (July 13, 2020). He concurred with Dr. Zaslavsky's finding that Claimant can return to work in a full-time sedentary capacity. The doctor confirmed that

Claimant's treating surgeon had discharged Claimant to as needed visits effective January 29, 2020.

Dr. Brokaw agreed with the UR finding that both the PRP injections and oxycodone use are non-compliant with the Delaware guidelines. He disagreed with the UR finding that Ambien is compliant because of the dangers associated with it.

The doctor confirmed that Claimant's records indicate Dr. Balu has not performed a physical examination of Claimant since 2018 and there is no evidence of subjective pain scores since 2019. He reiterated that Claimant's treatment records with Dr. Balu contain many inaccuracies. Dr. Brokaw reported that Claimant's treatment records contain insufficient documentation as to any pain exacerbations in mid-2019 and the documentation that is provided is templated, copied and pasted.

On cross examination, Dr. Brokaw confirmed that he had examined Claimant on one occasion in March 2020 and that the medical records he reviewed did not include all records going back to the date of the 1996 work accident. The doctor noted that not all of Claimant's older treatment records impact his clinical conclusions. He agreed that he did not have information of all the medications Claimant had been prescribed over his course of treatment. Dr. Brokaw confirmed that Claimant's opiate dose had been lowered in 2019, qualifying it as a low dose, according to the CDC standards. He agreed that Claimant's treatment records show no evidence of non-compliance or abuse.

The doctor agreed that Claimant had reported worsening symptoms with prolonged lifting, walking or sitting and that he needed to lie down when his symptoms increased. He explained that Claimant's physical examination results showed Claimant had decreased balance

with one-legged stance maneuvers on the right compared to left, which could be pain inhibited or neurologic in nature, but was likely caused by pain.

Dr. Brokaw confirmed his recommendation that Claimant have appropriately lowered reasonable dosages of opiates with some form of ongoing medication maintenance, but he recommended Claimant be completely detoxified, and prescribed safer medications. He modified his opinion that Claimant would require three months to allow Claimant six months off of opiates before he completes the detoxification process. He confirmed his opinion that Claimant should be prescribed non-opiate medications given the lack of trials for those medications in his recent medical history. He agreed that Gabapentin should not be tried again as it had not worked in the past. The doctor confirmed that he is not recommending detoxification because of Claimant's non-compliance or abuse, but because there are better treatment options that Claimant has not been provided in the past several years. He confirmed his concerns about Dr. Balu's documentation insufficiencies, as well as the lack of efficacy for Claimant. Dr. Brokaw testified "...[t]here are certainly still far safer treatment options for [Claimant], especially considering he's 63 years old now and will have more medical comorbidities as he gets older, which makes these dangerous treatments even more dangerous." Dr. Brokaw Deposition 61:18-24 (July 13, 2020). He confirmed that his opinion has been slightly modified, but he confirmed that Claimant would be safer if opiates are discontinued.

The doctor explained that Ambien is not a benzodiazepine, but has benzodiazepine properties that cause it to show positive for benzodiazepine on drug screenings. He reported that there are other medications available, including nerve pain, psychiatric and antihistamines, that are safer than any sedative-hypnotic (like Ambien) or benzodiazepines. Dr. Brokaw confirmed his recommendation that Claimant participate in physical therapy.

Dr. Brokaw agreed that Claimant's work releases in September 2019 and January 2020 were provided by Dr. Zaslavsky's physician's assistant, but noted that physicians are responsible for their assistants' decisions. He acknowledged that he had not seen a work note written by Dr. Zaslavsky specifically. The doctor agreed that he had suggested Claimant undergo a functional capacity evaluation, but one had not been ordered, and that he had recommended Claimant participate in some kind of vocational rehabilitation program. He concluded that Claimant would benefit both psychologically and physically from returning to work. Dr. Brokaw explained that he is attempting to provide Claimant with safe and appropriate treatment options so that he can return to work safely.

Dr. Brokaw confirmed that the Delaware Practice Guidelines do not address telehealth appointments or PRP injections. He acknowledged that he has not performed any PRP injections in many years (during his training) and reiterated that PRP injection therapy remains fairly experimental and is not appropriate for patients with fusions.

On redirect examination, Dr. Brokaw confirmed that he had physically examined Claimant one time.

When called by Employer, Claimant testified that he has been released to return to work since he left Employer. On October 22, 2014, Claimant was released to return to work and in April of 2018, he began receiving total disability payments. Claimant confirmed that he did not perform any job searches from 2014 to 2018.

On September 18, 2019, Claimant was released to sedentary duty. He has not looked for work or returned to work since he was released to return to work in September 2019. Claimant alleged that his pain level has prevented him from returning to work. He agreed that Dr.

Zaslavsky released him to work in 2019, but claimed he can work for two hours before he has to lie down.

Claimant testified that injections have worked sometimes and not others. He agreed that the most recent PRP injection, in December 2019, was not helpful. He has continued the same treatment regimen since 2019. Claimant reported that he does keep a pain diary after every injection and believes he kept the pain diary in December 2019 and turned it in to Dr. Balu's office.

Claimant could not recall if Dr. Balu had warned him of the risks associated with combining Oxycodone and Ambien. He testified that "I've been taking them so long and nothing has ever happened." Claimant reported that the current Oxycodone/Ambien combination relieves his pain and he denied that any other medications have helped in the past.

When called by his own counsel, Claimant testified that he is 64 years old and was an over the road driver for Employer. He reported that he has driven trucks for most of his life. In March of 1996, Claimant was loading pallets onto his truck when he "felt something pop." He has had numerous surgeries since the 1996 work accident, the most recent of which was March 2019.

Claimant testified that he continues to have pain in his right leg and groin area, which occurs "pretty much all the time." Claimant has treated with Dr. Balu for over ten years. In December of 2019, Claimant had a PRP injection, after he had discussed the injection with another patient. He reported that the PRP injection provided no relief at all and that he does not plan to have another injection. He has discussed the spinal stimulator option, after he had an unsuccessful trial stimulator in 2015.

Claimant reported that his Oxycodone prescription "takes the edge off and that his Ambien prescription helps him sleep. He has tried

taking other medications over the years and was taking a higher dose of narcotics prior to his 2019 surgery. He described the reduction of his narcotic doses as "a struggle." Claimant testified that he would be concerned if his medication dosages were reduced further. He takes Ambien every night and reported that he cannot sleep without it.

Claimant testified that he has not tried to find work and confirmed that he can "do something," but has to move around after two hours of activity. He testified that he "love[s] driving a truck" and would still be working if he had not had the work accident. He last worked in 2014, when he drove a dump truck. He walks and stretches for exercise.

When cross examined by Employer, Claimant confirmed that his prior testimony was accurate.

Dr. Ganesh Balu, board certified in physical medicine and rehabilitation, and pain medicine, testified by deposition for Claimant. After reviewing Claimant's pertinent medical records, Dr. Balu testified that he began treating Claimant's chronic pain in October 2005, related to a work injury Claimant sustained in 1996. Dr. Balu explained that Claimant's treatment is focused on maintenance/conservative treatment since Claimant has undergone numerous surgeries. He reported that Claimant's treatment has included: injections, therapy, anti-inflammatory medication, neuropathic pain medication, and opiate pain medication. The doctor described Claimant's current treatment as involving "...low dose opiates and occasional injections on an as-needed basis," which has allowed Claimant to manage his symptoms. Dr. Balu Deposition 10:6-7 (July 7, 2020).

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Dr. Balu had reviewed the January 3, 2020 UR Decision and confirmed that the utilization reviewer found the PRP injection and the oxycodone prescriptions do not comply with the Health Care Practice Guidelines and that the Ambien prescription, home exercise program and follow up appointments are compliant. He confirmed that Claimant underwent an L3-4 lumbar anterolateral redo fusion on March 21, 2019. On April 23, 2019, Claimant saw Dr. Balu and his opiate prescription dose was decreased. On May 21, 2019, Dr. Balu decreased Claimant's opiate prescription dose again. At the time of the April and May 2019 visits, Dr. Balu found Claimant to be complaint with his medications. On June 18, 2019, Claimant saw Dr. Balu and reported low back pain and Dr. Balu maintained Claimant's current pain medication dose. On July 17, 2019, Dr. Balu reduced Claimant's opiate prescription dose to 100 pills (from 110 pills) for 30 days. Dr. Balu explained that Claimant has been managing the reductions in opiate doses, but has had pain exacerbations, but "...overall, we had agreed that we're going to decrease his opiate dependence." Dr. Balu Deposition 17:22-24 (July 7, 2020).

On August 21, 2019, Dr. Balu saw Claimant, who reported pain of a 6 out of 10 and slow pain improvement, but Claimant denied he would manage without pain medications. At this visit, Dr. Balu reduced Claimant's opiate dose to 90 pills for thirty days. Dr. Balu confirmed that Claimant's urine drug screenings showed Claimant had been compliant. At Claimant's September 18, 2019 visit, Claimant denied the ability to manage without pain medications, which he denied could be decreased successfully. Dr. Balu explained that he considers the length of time he has treated a patient, along with the patient's interactions and pain exacerbations when deciding whether the patient can maintain function at the current prescription level. On November 13, 2019, Claimant wanted to try a PRP injection for its regenerative effect and he

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completed a positive patient response form, which Dr. Balu determined justified Claimant's ongoing prescription opiates.

Dr. Balu testified that Claimant expressed interest in trying the PRP injection, which is documented as providing significant pain relief in

patients with chronic pain, but the injection does not guarantee results. He explained that PRP injections are commonly used to treat musculoskeletal issues following surgery and that although PRP injections were formerly reserved for sports injuries, they are no used to treat chronic pain. The doctor noted that if the patient's response is good, the injection will be repeated. Dr. Balu reported that a thirty to forty percent pain improvement qualifies as a successful outcome, and pointed out that insurance providers normally expect at least fifty percent improvement to justify the treatment.

On December 9, 2019, Claimant had a PRP injection, which Dr. Balu determined is appropriate for tendon sheath injections, joint inflammation, and ligament attachments. He described the PRP injection as "...biological glue and also a significant or excellent anti-inflammatory... properties that we can use it in anywhere." Dr. Balu Deposition 26:22-24; 27:1 (July 7, 2020). The doctor explained that he used the PRP injection to decrease Claimant's pain, which was axial pain from his various surgeries. When Claimant returned to Dr. Balu on January 10, 2020, he reported partial pain relief from the injection, but Claimant's record does not reflect any percentage of relief.

Dr. Balu explained that the American Society of Interventional Pain Physicians' clinical guidelines categorize various treatments or injection procedures and PRP injection statistics are limited due to the number of studies produced. Dr. Balu concluded that a trial PRP injection was reasonable for Claimant specifically because he has gone through multiple surgeries and required further treatment options. The doctor testified that he has provided other patients with PRP

injections and those have provided positive relief. He explained that injections are a treatment option that are used to reduce the amount of narcotic pain medication, which has been shown to lead to dependence and/or addiction in some patients. Dr. Balu testified that "...as newer treatments are easily available, we have been embracing so that patients have the opportunity to try this treatment and not resort to only opiates or traditional treatments like steroid-based injections, which have their own side effects... ." Dr. Balu Deposition 31:13-19 (July 7, 2020). The doctor noted that steroid injections are not appropriate for Claimant specifically because he has had joint issues (steroids can lead to osteoporosis) and hypertension, which could be worsened with the use of steroids. He denied that Claimant was at greater risk of opiate dependence/addiction and noted that Claimant has been compliant with his medications and his current dosage level falls within the mild to moderate level, making his dosage "...fairly acceptable given his multiple back diagnoses and multiple surgeries and chronic pain from these effects." *Id*. at 33:15-18.

Dr. Balu testified that Claimant had completed a questionnaire to assess his risk of drug addiction, and Claimant's responses did not concern Dr. Balu. When Claimant saw Dr. Balu on February 5, 2020, he had no new complaints. On April 6, 2020, Claimant had a telehealth visit with Dr. Balu and reported low back pain and right leg radicular pain, for which he was considering a spinal cord stimulator. Dr. Balu increased the frequency of Claimant's follow up visits because the visits were virtual. On April 20, 2020, Claimant had another virtual visit with Dr. Balu and reported having good and bad days. At this visit, Claimant was no longer considering a spinal cord stimulator because a prior trial stimulator had been ineffective. Dr. Balu noted that there had been some improvement in the stimulator technology since Claimant's prior trial. On May 4, 2020, Claimant had another virtual visit with Dr. Balu and no changes

were made to his medication regimen. At a May 18, 2020 visit, Claimant reported no new symptoms, but they discussed further injection treatment. Dr. Balu explained that patients normally choose the injections they receive after

the provider informs them of the available options. At Claimant's June 3, 2020 visit, Claimant had no new complaints and his medications remained the same. At Claimant's June 17, 2020 visit, Claimant reported that his current medications were helping him manage his pain and Dr. Balu refilled Claimant's Ambien and Oxycodone (90 tablets for 30 days) prescriptions.

Dr. Balu testified that he was not currently planning to reduce Claimant's medication any further, but he would consider it in the future if "...there is room to decrease his medication as we have tried in the past... ." *Id*. at 43:2-3. The doctor reported that Claimant had tried anti-inflammatories and muscle relaxers in the past and agreed that continued anti-inflammatory use could help Claimant.

Dr. Balu disagreed with Dr. Brokaw's conclusion that Claimant's Ambien prescription should be discontinued in conjunction with his narcotic prescriptions, but agreed that there can be side effects from combining the two types of medications. He explained that the risks associated with the medications has to be weighed against the benefits Claimant is receiving from the combination, which he noted has caused no side effects in Claimant. The doctor reported that Claimant needs Ambien to sleep and the oxycodone for his pain, and concluded that the treatment is reasonable.

Dr. Balu agreed with Dr. Brokaw's conclusion that Claimant could benefit from additional physical therapy. He confirmed that he had deferred Claimant's work releases to Dr. Zaslavsky and agreed that Claimant can return to work in a full-time sedentary capacity. He confirmed that there are several dates of service (May 23, 2019, December 9, 2019, April 20,

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2020, May 4, 2020, June 3, 2020, and June 17, 2020), which remain unpaid despite their submission to the carrier. Dr. Balu concluded that all of Claimant's treatment, including PRP injection, oxycodone and Ambien prescriptions, and office visits, have been reasonable and necessary treatment related to Claimant's work injury. The doctor reported that Claimant will continue to need treatment, and that treatment should/could include: Ambien, oxycodone, physical therapy, massage therapy, acupuncture therapy, traction therapy, laser therapy, and injections, if needed.

On cross examination, Dr. Balu confirmed that he attempts to make his patients' records as accurate as possible, but he also uses computer generated templates. He confirmed that the UR decision indicates the PRP injection is non-compliant with the Delaware Treatment Guidelines. He agreed that Claimant's August 21, 2019, September 18, 2019, and October 16, 2019 records indicate Claimant reported a 6 out of 10 pain rating, but that those ratings are "copied" and are "...not clinically relevant." Dr. Balu Deposition 55:2, 5-6 (July 7, 2020). Dr. Balu was unaware if Claimant had engaged in aqua therapy. He confirmed that Claimant has been instructed to do home exercises and stretching.

The doctor acknowledged that Claimant's November 13, 2019 documented physical examination section was carried forward in all visits since October 10, 2018, which was prior to Claimant's most recent surgery. Dr. Balu could not recall whether he recommended PRP injections or whether Claimant requested a PRP injection. He agreed that Claimant's November 13, 2019 record notes that Claimant has failed multiple spinal injections. The doctor testified that Claimant received one PRP injection in 2019, one transforaminal injection in 2018, and one SI joint injection and one hardware block in 2015.

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Dr. Balu agreed that the positive response form Claimant completed in November of 2019 is a subjective form. He agreed that Claimant has been on pain medication for many years. The doctor confirmed that Claimant received a three-level bilateral facet injection from L3 to S1, as well as a PRP injection on December 9, 2019, the purpose of which was to address Claimant's axial

back pain. He confirmed that the total charge for the PRP injection was approximately $9,000.00. The doctor acknowledged that Claimant had not returned the pain diary he was given at the time of the PRP injection. Dr. Balu confirmed that Claimant had reported "partial relief from the PRP injection at his January 10, 2020 visit. *Id*. at 71:20. He agreed that there was no indication in Claimant's records of an pain score change or any physical examination changes before or after Claimant received the PRP injection. The doctor confirmed that Claimant has not returned to work in any capacity since the PRP injection.

Dr. Balu denied that the Food & Drug Administration ("FDA") has issued warnings about PRP injections, but acknowledged that the FDA had issued warnings about some stem cell injections, which are categorized as regenerative medicine treatment options. He agreed that supporting evidence for PRP injections is limited.

Dr. Balu acknowledged that someone else in his offices handles patient billing and he has no professional certifications in that area. He confirmed that his billing staff uses a software to determine the amounts according to the fee schedule.

On redirect examination, Dr. Balu confirmed that his focus is on a patient's specific pain complaints more than a pain rating and that Claimant had been reporting waxing and waning pain in his low back radiating to his legs. He confirmed that he has used the same billing software for some time and that some of Claimant's invoices had been paid.

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On re-cross examination, Dr. Balu confirmed that there are risks associated with the combination of Ambien and opiate prescriptions. He agreed that Claimant's pain ratings had remained consistent. He reported that, within the guidelines, diagnostic injections are reasonable, but repeat injections may not be reasonable if there is no significant pain relief. The doctor acknowledged that Claimant did not receive significant relief from the PRP injection.

Dr. James Zaslavsky, board certified in orthopedic surgery, testified by deposition for Claimant. Dr. Zaslavsky confirmed that Claimant had been treating with him since 2014 and had developed adjacent-level disease and new symptoms, which, after a gap in treatment from 2016 to 2018, led Claimant to have a direct lateral surgical fusion at L3-4 on September 10, 2018. When Claimant experienced ongoing back pain and developed a non-union at L3-4, he had a posterior lumbar fusion and laminectomy at L3-4 on March 21, 2019. After his March 2019 procedure, Claimant improved, and by May 2019, Claimant had full strength in his right leg and considerable improvement in his right hip range of motion.

In July of 2019, Claimant continued to improve, but experienced some right leg symptoms. In September of 2019, Claimant complained of right side groin numbness, with improved back and leg pain and good low back range of motion. At Claimant's September 2019 visit, Dr. Zaslavsky approved Claimant for full-time, sedentary work. At a January 29, 2020 visit, Claimant reported right groin pain complaints and right anterior thigh pain. At this visit, Dr. Zaslavsky continued Claimant's full-time, sedentary work restriction. At an August 26, 2020 visit, Claimant reported worsening right leg, groin and thigh pain, and Dr. Zaslavsky was concerned that Claimant was having trouble climbing stairs. Claimant's physical examination results showed: positive straight leg raise, right truncal shift when standing, inability to bear weight on his right leg, low back spasms and antalgic gait, for which Dr. Zaslavsky

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recommended an MRI. Claimant's x-rays were normal and he was kept on the same sedentary work restriction.

Dr. Zaslavsky testified that he was concerned about Claimant's L2-3 spinal level worsening,

which could cause pain in the groin area. The doctor noted that Claimant has reported pain complaints since 1996 and has never received effective pain relief treatment for the pain, which has waxed and waned. Dr. Zaslavsky reported that Claimant's most recent MRI results were "fine" and that "...[t]hose next levels look okay, look very stable. There is no impingement on the nerve. There is no worsening of the alignment at that level. And, overall, things look very stable." Dr. Zaslavsky Deposition 14:4-8 (September 2, 2020).

Dr. Zaslavsky determined that Claimant should see an orthopedic doctor to rule out any intrinsic hip problem like arthritis. He confirmed that Claimant's groin pain "...doesn't appear to be coming from his back." *Id*. at 14:18-19. The doctor explained that Claimant's pain could stem from chronic nerve pain and/or flare-ups that exist for some time and then improve. He testified that Claimant's activity level can affect his symptoms and noted that even subtle changes in activities can cause significant flare ups in Claimant's symptoms.

The doctor concluded that Claimant's symptoms are caused by chronic radiculopathy due to the nerve tensions signs, as well as neurologic changes. He confirmed that Claimant's sedentary work restriction is still warranted, and if Claimant is unable to perform at that level, then a functional capacity evaluation could be warranted to define Claimant's limitations and restrictions. Dr. Zaslavsky confirmed that he has concerns about Claimant's ability to tolerate sedentary work on a full-time basis and noted that Claimant would need to go through an adjustment period if he is to return to work, and should expect some flare ups in his symptoms.

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Dr. Zaslavsky confirmed his opinion that Claimant's pain management treatment, including opiate pain medication, is reasonable, necessary, and related to Claimant's work injury. He agreed that Claimant is currently prescribed a relatively modest amount of narcotics and noted that Claimant's prescriptions have been reduced successfully. He confirmed that Claimant will require continuing follow up treatment.

On cross examination, Dr. Zaslavsky confirmed the records he had reviewed. He agreed that Claimant's April 3, 2019 treatment record indicates Claimant reported that he was doing fairly well and feeling better than he had been prior to his most recent surgery, and his x-ray results were fine. Claimant's May 5, 2019 records indicate his back pain had improved and his July 3, 2019 records indicate his back and leg pain were slightly improved. At the July 2019 visit, Claimant reported some increasing back pain down his legs and had minor weakness and a positive right straight leg raise, for which he was referred for aquatic therapy. Claimant's September 18, 2019 records indicate Claimant was doing better overall, but had not engaged into aquatic therapy. Claimant was released to full-time, sedentary work. Claimant's January 29, 2020 records indicate he was continued on a full-time, sedentary work restriction. Dr. Zaslavsky confirmed his conclusion that Claimant is capable of working full-time in a sedentary capacity, most recently as of August 26, 2020.

The doctor was unaware if Claimant had seen a hip specialist as he recommended. He agreed that returning to work can be a major component of a chronic pain patient's treatment plan and it can be helpful for such patients. He noted that if Claimant intended to return to work a functional capacity evaluation could be helpful in determining Claimant's capabilities.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

MOTION FOR DIRECTED VERDICT

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At the close of Employer's case in chief, Claimant moved for a directed verdict, alleging that Employer is required, but failed, to show Claimant is medically employable and that there is work available for Claimant. Claimant acknowledged that the medical experts agree that

Claimant can work, but alleges that Employer must provide an economic analysis and/or a labor market survey, in addition to showing Claimant is able to work.

Employer submits that Claimant has no good faith basis for continuing to receive total disability benefits, as the medical experts have concluded Claimant is capable of working. Employer submits that it is undisputed that Claimant is medically employable, which shifts the burden to Claimant to show he is actually displaced or a *prima facie* displaced worker. Employer notes that Claimant has not sought work since 2014, which relieves Employer's burden of showing there are jobs available for Claimant. Employer argues that Claimant failed to note on the Pre-trial Memorandum that he is claiming to be a displaced worker.

Delaware courts have determined that Employer bears the initial burden of proving that Claimant is medically capable of working. *Adams v. NKS Distributors*, Del. Super., C.A. No. 96A-07-002, Cooch, J., 1997 WL 27101 at *2 ((Jan. 6, 1997). Once Employee has proven Claimant's work ability, the burden shifts to Claimant to prove his/her actual or *prima facie* displaced worker status. *Id*. It is only when a Claimant has demonstrated successfully that he/she is displaced and cannot locate employment, despite a reasonable job search, that the burden shifts back to Employer to show job availability. *Id*. at *3. In this case, Claimant has acknowledged that he last worked as a dump truck driver in 2014 and has not looked for work since he was last employed. The evidence is insufficient to find Claimant either *prima facie* displaced or actually displaced. Thus, the burden does not shift back to Employer to prove job availability. Therefore, Claimant's Motion for a Directed Verdict is denied.

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TERMINATION

As already outlined above, normally, in a total disability termination case, the employer is initially required to show that the claimant is not completely incapacitated (i.e., demonstrate "medical employability"). *Howell v. Supermarkets General Corp*., 340 A.2d 833, 835 (Del. 1975); *Chrysler Corporation v. Duff*, 314 A.2d 915, 918n.l (Del. 1973). Claimant is then required to rebut that showing, show that he or she is a *prima facie* displaced worker, or submit evidence of reasonable, yet unsuccessful, efforts to secure employment which have been unsuccessful because of the injury (i.e., actual displacement). As a rebuttal, the employer may present evidence showing regular employment opportunities within claimant's capabilities. *Howell*, 340 A.2d at 835; Duff, 314 A.2d at 918n.1. In this case, the Board finds that Claimant is medically capable of returning to work in a full-time sedentary capacity.

The first issue is whether Claimant is medically capable of working and the Board finds that he is. Both Claimant's own treating physician, Dr. Zaslavsky, and Employer's expert, Dr. Brokaw, have concluded that Claimant is medically capable of working with restrictions. Both Dr. Zaslavsky and Dr. Brokaw determined that Claimant could work in a full-time, sedentary capacity and the Board agrees.

The next issue is whether Claimant qualifies as a displaced worker. An injured worker can be considered displaced either on a *prima facie* basis or through showing "actual" displacement. The employer can then rebut this showing by presenting evidence of the availability of regular employment within the claimant's capabilities. See *Howell*, 340 A.2d at 835; Duff, 314 A.2d at 918n.1. In this case, Claimant testified that he has not looked for work since 2014 when he was last employed as a dump truck driver. Therefore, this evidence is insufficient to deem Claimant actually displaced.

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An additional determination is whether Claimant should be considered displaced on a *prima facie* basis. With respect to the issue of *prima facie* displacement, the critical elements to

be considered are claimant's degree of obvious physical impairment coupled with the claimant's mental capacity, education, training, and age. *Duff*, 314 A.2d at 916-17. Under normal circumstances, to qualify as a *prima facie* displaced worker, one must have only worked as an unskilled laborer in the general labor field. *See Vasquez v. Abex Corp*., Del. Supr., No. 49, 1992, at ¶ 9 (November 5, 1992); *Guy v. State*, Del. Super., C.A. No. 95A-08-012, Barron, J., 1996 WL 111116 at *6 (March 6, 1996); *Bailey v. Milford Memorial Hospital*, Del. Super., C.A. No. 94A-03-001, Graves, J., 1995 WL 790986 at * 7 (November 30, 1995). In Claimant's case, the Board finds that Claimant can work in at least a sedentary capacity. In addition, while Claimant is 64 years old, he has transferrable skills, including years of commercial driving experience and communication skills, which would be valuable skills for any employer. The Board notes that Claimant was able to testify clearly that he can "do something" and communicate that he "love[s] driving a truck." Therefore, the Board finds that Claimant is not a *prima facie* displaced worker.

Having found that Claimant is medically employable and not a displaced worker, the Board finds Claimant's total disability status should terminate.

MEDICAL TREATMENT

When an employee has suffered a compensable injury, the employer is required to pay for reasonable and necessary medical "services, medicine and supplies" causally connected with that injury. 19 *Del. C.* § 2322. However, to assist in assessing what is reasonable or necessary medical treatment for a workers' compensation injury, Delaware adopted Health Care Practice

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Guidelines.[2] These "guidelines shall apply to all treatments provided after the effective date of the regulation . . . regardless of the date of injury." 19 *Del. C.* § 2322C(1). To determine compliance with the guidelines, an employer may refer treatment for consideration by UR, which then issues a determination.

In this case, the UR determination found Claimant's PRP injection and Oxycodone/Acetaminophen to be non-compliant with the Health Care Practice Guidelines. It is from this determination that Claimant took the current appeal, which is an appeal *de novo*. 19 *Del. C.* § 2322F(j). In that same UR determination, Claimant's Ambien, home exercise program and four week follow up visit were found to be compliant with the Health Care Practice Guidelines. It is from this determination that Employer took the current appeal, which is an appeal *de novo*. 19 *Del. C.* § 2322F(j). The focus of a UR determination is whether the identified treatment is within the Health Care Practice Guidelines. Unlike the UR determinations, the primary issue before the Board is not whether treatment is within the applicable guidelines, but whether the treatment is reasonable and necessary. *Meier v. Tunnell Companies LP*, Del. IAB, Hearing No. 1326876, at 3-4 (November 24, 2009)(ORDER).[3]

In the current case, the issue is whether the PRP injection, Oxycodone/Acetaminophen prescription, and Ambien prescription constitute reasonable and necessary medical treatment to treat Claimant's work injury. "Whether medical services are necessary and reasonable or

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whether the expenses are incurred to treat a condition causally related to an industrial accident are purely factual issues within the purview of the Board." *Bullock v. K-Mart Corporation*, Del. Super., C.A. No. 94A-02-002, 1995 WL 339025 at *3 (May 5, 1995) "The law is clear that disputes about the reasonableness of medical expenses are factual questions for the Board to decide." *Kovach v. Churchman's Village/Health Care*, Del. Super., C.A. No. 98A-02-018, Barron, J., 1998 WL 960777 at *2 (October 5, 1998).

In determining whether or not the proposed treatment is reasonable and necessary, Delaware's Supreme Court has stated that the Board must decide "whether the treatment is reasonable for that specific claimant and not whether the treatment is reasonable generally for anyone with the claimant's condition." *Brittingham v. St. Michael's Rectory*, 788 A.2d 520, 523 (Del. 2002). When determining "reasonableness" the Board should consider various factors, including: claimant's age, prior surgical experience, general physical condition, likelihood of success, risk of worsening the condition, or risk of death from the offered treatment. *Brittingham* at 524-25. When the evidence is in conflict, the Board is free to accept the opinion of one expert's over the opinion of another's. *DiSabitino Brothers, Inc. v. Wortman*, 453 A.2d 102 (Del. 1982).

In this case, the Board finds Claimant's continued Oxycodone and Ambien prescriptions are not reasonable or necessary treatment for Claimant's work injury, and Claimant should be weaned from those prescriptions. Dr. Brokaw concluded that there are effective yet safer treatment options for Claimant's pain, including non-abusable medications, anti-inflammatories, muscle relaxers, and neuropathic pain medications. He noted that Claimant's Oxycodone prescription interacts significantly with Claimant's Ambien prescription, increasing Claimant's risk for overdose and death. Dr. Brokaw pointed out that Claimant's treatment records do not

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contain evidence of adequate trials of other, non-abusable medications. He concluded that Claimant could be weaned from all opiate prescriptions in two to three months, without a risk of withdrawal. Dr. Brokaw disagreed with Dr. Balu's conclusion that Claimant's Oxycodone/Ambien combination is appropriate, and cautioned that "...the longer [Claimant]'s on this combination, the more dangerous it becomes for him." Dr. Brokaw Deposition 2-:21-23 (July 13, 2020). Even Dr. Balu agreed that he and Claimant had agreed to reduce Claimant's opiate dependence, and he had, in fact, reduced Claimant's opiate dosage several times in 2019. Dr. Balu admitted that there can be side effects from the Oxycodone/Ambien combination and agreed that he would consider reducing Claimant's opiate medications further in the future. The Board finds Claimant's continued opiate/Ambien combination prescription creates a risk too great to warrant its continuation beyond a weaning process. Dr. Brokaw confirmed that monthly follow up visits during the weaning process are reasonable and necessary and the Board agrees.

The Board finds that Claimant's need for a PRP injection is reasonable and necessary treatment for Claimant's work injury. While Dr. Brokaw testified that Claimant's receipt of a PRP injection was not reasonable given the fact that it was given in a location that was already fused, Dr. Balu testified that he attempted the injection on one occasion because PRP injections have been shown to provide significant pain relief for patients with chronic pain. Dr. Balu noted that the PRP injection was appropriate for Claimant specifically because Claimant has undergone so many surgeries, which necessitated consideration of different treatment options. The doctor pointed out that the PRP injection is an additional, non-narcotic treatment option for Claimant. Claimant confirmed that some of the injections he has received have helped, but some have not. While he acknowledged that the 2019 PRP injection had been unsuccessful, he had hoped that it would be. He confirmed that he does not plan to receive an additional PRP injection. The Board

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finds Claimant's receipt of one PRP injection in an attempt to find an addition non-narcotic treatment option was reasonable and necessary treatment for Claimant's work injury.

Based on the above, the Board finds Claimant's Oxycodone and Ambien prescriptions are not reasonable and necessary treatment for Claimant's work injury beyond a two to three month weaning process. In addition, the Board

finds that Claimant's receipt of a PRP injection was reasonable and necessary treatment for his work injury. Therefore, Employer's and Claimant's UR appeals are granted in part and denied in part, and the UR decision is reversed in part and affirmed in part.

ATTORNEY'S FEE & MEDICAL WITNESS FEES

A claimant who is awarded compensation is entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller." 19 *Del. C.* § 2320. At the current time, the maximum based on Delaware's average weekly wage calculates to $11,214.90. The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55 (Del. 1973). The Board is permitted to award less than the maximum fee and consideration of the *Cox* factors does not prevent the Board from granting a nominal or minimal fee in an appropriate case, so long as some fee is awarded. *See Heil v. Nationwide Mutual Insurance Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96A-01-005, Cooch, J., 1996 WL 527213 at *6 (August 9, 1996). A "reasonable" fee does not generally mean a generous fee. *See Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966). Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation. By operation of law, the amount of attorney's fees

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awarded applies as an offset to fees that would otherwise be charged to Claimant under the fee agreement between Claimant and Claimant's attorney. 19 *Del. C.* § 2320(10)a.

Claimant has achieved an award of a PRP injection and continued Oxycodone/Ambien prescriptions through a weaning period. Claimant's counsel submitted an affidavit stating that approximately 33.4 hours were spent preparing for the hearing, which itself lasted approximately three hours. Claimant's counsel has significant experience in workers' compensation litigation, a specialized area of law. His initial contact with Claimant with respect to this matter was in February of 2000, so the period of representation was approximately over twenty years at the time of hearing. This case involved no unusual or difficult question of law or fact. It required only average skill to present the case properly. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances. There is no evidence that counsel was actually precluded from accepting other employment because of his representation of Claimant, although naturally he could not work on other matters at the exact same time that he was working on this one. Counsel's fee arrangement with Claimant is on a thirty-three percent contingency basis. Counsel does not expect to receive compensation from any other source with respect to this particular litigation. There is no evidence that the employer lacks the financial ability to pay an attorney's fee.

Taking into consideration the fees customarily charged in this locality for such services as were rendered by Claimant's counsel and the factors set forth above, the Board finds that an attorney's fee in the amount of $3,000.00 is reasonable in this case. The Board is satisfied that this amount adequately reflects the value of any non-monetary benefit that may potentially arise from this decision. *See Pugh v. Wal-Mart Stores, Inc.*, 945 A.2d 588, 591-92 (Del. 2008).

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Medical witness fees for testimony on behalf of Claimant are awarded to Claimant, in accordance with title 19, section 2322(e) of the Delaware Code.

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STATEMENT OF THE DETERMINATION

For the reasons set forth above, Claimant's total disability status is terminated as of January 28, 2020, the date Employer's Petition was filed. Employer's UR appeal is granted and denied in part. The UR decision is affirmed as to the Oxycodone/Acetaminophen finding and reversed as to the Ambien finding.

Claimant's UR appeal is granted in part and denied in part. The UR decision is reversed as to the PRP injection finding. Claimant is entitled an attorney's fee and medical witness fees.

IT IS SO ORDERED THIS 6th DAY OF OCTOBER, 2020.

INDUSTRIAL ACCIDENT BOARD

/s/William Hare
WILLIAM HARE

/s/Patricia Maull
PATRICIA MAULL

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

/s/_____
HEATHER WILLIAMS

Mailed Date: 10-12-2020

/s/_____
OWC Staff

Notes:

[1.] While the UR determination included Claimant's home exercise program and four week follow up appointment, the parties' Stipulation of Facts included only ongoing Oxycodone/Acetaminophen, Ambien and PRP injections.

[2.] The Health Care Practice Guidelines currently consist of six separate "treatment guidelines" addressing carpal tunnel syndrome, chronic pain, cumulative trauma disorder, low back, shoulder and cervical. The adopted practice guidelines can be found at http://dowe.ingenix.com/DWC.asp.

[3.] This comment needs a little clarification. By statute, treatment by a certified health care provider that conforms to the guidelines is "presumed, in the absence of contrary evidence, to be reasonable and necessary." 19 *Del. C.* § 2322C(6). Thus, when treatment is outside of the guidelines, a UR determination might refer to it as not being "reasonable and necessary," but that conclusion is based on whether the treatment is within the guidelines. On appeal, however, treatment that a UR determination finds to be outside the guidelines may still be found by the Board, during *de novo* review, to be reasonable and necessary if convincing evidence is submitted. Likewise, treatment that a UR determination might declare as within the guidelines (and, thus, presumptively reasonable and necessary) might still be found by the Board, during *de novo* review, not to be reasonable or necessary treatment if convincing evidence is submitted. *See Meier*, at 5. The burden of proof rests with the party challenging the UR determination.
