

**JOSEPH SPROWL, Employee,**  
**v.**  
**PLAYTEX PRODUCTS, Employer.**

**INDUSTRIAL ACCIDENT BOARD OF THE  
STATE OF DELAWARE**

**Hearing No. 1468560**

**Mailed Date: October 21, 2020  
October 20, 2020**

**DECISION ON PETITION FOR REVIEW TO  
TERMINATE BENEFITS**

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 October 9, 2020, via videoconference, pursuant to the Industrial Accident Board COVID-19 Emergency Order dated May 11, 2020.

**PRESENT:**

MARY DANTZLER

WILLIAM HARE

Julie G. Bucklin, Workers' Compensation Hearing Officer

**APPEARANCES:**

Walt F. Schmittinger, Attorney for the Claimant

Paul V. Tatlow, Attorney for the Employer

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**NATURE AND STAGE OF THE  
PROCEEDINGS**

On January 9, 2018, Joseph Sprowl ("Claimant") sustained a compensable industrial injury to the right shoulder and cervical spine while working for Playtex Products ("Playtex"). Claimant earned \$1,192.88 per week at the time of the industrial accident and has been receiving

total disability benefits at his compensation rate of \$686.99 per week.

On February 12, 2020, Playtex filed a Petition for Review to terminate Claimant's total disability benefits, alleging that Claimant is capable of working in a full-time sedentary to light duty capacity. Claimant agreed that his doctor has released him to work with sedentary restrictions, but argues he remains totally disabled, because he is a displaced worker.

In a letter dated May 19, 2020, Claimant amended the pre-trial memorandum to allege that Claimant seeks acknowledgment for a headache condition. Playtex disputes that the headache condition is work-related.

On October 9, 2020, the Board entertained a hearing via videoconference on Playtex's petition and this is the Board's decision.

**SUMMARY OF THE EVIDENCE**

John Townsend, M.D., board-certified in neurology and clinical neurophysiology, testified by deposition on behalf of Playtex. Dr. Townsend examined Claimant on February 5, 2019, June 11, 2019, November 14, 2019, and July 16, 2020, and reviewed Claimant's medical records in conjunction with the examinations. He believes that Claimant is physically capable of working full-time in a sedentary to light duty capacity, consistent with the release to work from Dr. Irene Mavrakakis, Claimant's treating physician.

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Claimant was injured on January 9, 2018, while leaving his job as a factory mechanic. He slipped on an icy sidewalk and injured his cervical spine and right shoulder. Claimant is now alleging he also has a headache condition related to the industrial accident.

During the November 14, 2019 examination, Claimant reported that he continued to have discomfort in his neck and right shoulder and he was coming along slowly. He had some injections,

but the relief did not last long. He complained of tingling in his neck that went to his right hand to the first three digits. He also noted two tender areas in the neck. Claimant went to massage therapy and still went to treatment for his shoulder. He reported that he had headaches on both sides of his head. Claimant rated his neck pain as a seven out of ten on the pain scale, noting that driving anywhere kills him, but local driving was not too bad. Claimant continued to have shoulder complaints with pain going into the shoulder. He noted that he did a lot of shoulder stretches and the pain would catch him by surprise with certain movements.

Claimant reported that he could do basic housekeeping chores and drive. He was looking for a job, but was not working at the time of the examination. His medications included gabapentin and tizanidine.

Based on the medical records, the cervical spine MRI showed a disc bulge at C4-5 and central disc protrusion at C5-6 and the right shoulder MRI showed mild infraspinatus tendinosis. Claimant continued to follow up with Dr. Mavrakakis at First State Orthopedics for neck and right shoulder pain. He eventually came under the care of Dr. Kennedy Yalamanchili, who noted complaints of neck pain going into the right arm with some numbness and tingling. Dr. Yalamanchili suggested a CT scan and bone scan. Dr. Mavrakakis administered facet joint injections and prescribed gabapentin. Claimant underwent a C2-3 anterior cervical discectomy and decompression with Dr. Yalamanchili in October 2018 and a right shoulder arthroscopic

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subacromial decompression surgery with Dr. Steven Manifold in March 2019. He continued to have intermittent facet injections with Dr. Mavrakakis through the end of 2019.

The physical examination on November 14, 2019 showed diminished range of motion in the neck and tenderness over the paraspinal muscles, but no muscle spasms. Claimant had diminished

range of motion in the right shoulder and tenderness over the acromioclavicular ("AC") joint. From a neurologic standpoint, Claimant had normal strength, reflexes, and gait, but he had some diminished sensation in the right hand involving the right arm and going into the first three digits.

Dr. Townsend's impression on November 14, 2019 was that Claimant had chronic neck pain and right shoulder pain status post-surgery in both regions. Dr. Townsend did not find persistent evidence for nerve root compression. Claimant was experiencing ongoing neck and shoulder pain at that time. Dr. Townsend felt that it would be reasonable for Claimant to attempt sedentary duty work and noted that Claimant's treating doctors released him to work in a sedentary duty capacity. Dr. Townsend felt that Claimant should not lift more than ten-pounds occasionally and he should avoid overhead work. The restrictions were based on Claimant's prior history and ongoing subjective complaints.

At the most recent examination on July 16, 2020, Claimant explained to Dr. Townsend that he still had discomfort in his neck and right shoulder. He was working as a valet at Bayhealth Hospital, but felt the job was increasing his symptoms. Claimant spent six to seven hours a day standing or sitting behind a counter and then getting in and out of cars while he worked. Dr. Townsend agreed that the valet job may not have been ideal for Claimant based on the amount of activity involved and Claimant's report that it aggravated his symptoms. Dr.

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Townsend would characterize the job as sedentary to light duty because it had more walking than a sedentary duty job, but less lifting than a light duty job.

Claimant tried working at another job on an extruder machine where he had to get up on a catwalk. He was concerned about being on the catwalk and complained that the job was very physically demanding. Dr. Townsend agreed that

the extruder job was not the best choice for Claimant, given the physical demands of the job.

Claimant complained that he was getting a lot of headaches and he had seen Dr. Stephen Penny, who prescribed rizatriptan, which is a medication for migraine headaches. Claimant described having several headaches per week, which were more frequent with the new job. The headaches were located just below the skull and radiated to the sides of the head. He experienced some vertigo sensations when he had the headaches.

When Claimant took rizatriptan, it did not improve the nausea or sensation of being off balance. He continued to complain of daily neck pain, although he felt that it was improved with gabapentin, but it was very sensitive at the base of the neck. He felt that the headaches were coming from the upper part of the neck and if he turned his head the wrong way, he experienced shooting pain into the shoulder blades. Long drives made his neck pain worse and he still had some limited range of motion in the right shoulder. As for Claimant's daily activities, he was able to mow the grass, go to the store, drive, and do basic household chores. His medications continued to be gabapentin, tizanidine, and rizatriptan.

The updated medical records showed that Claimant continued to receive periodic facet joint injections and physical therapy. He continued to complain of pain in the neck and right shoulder. He complained of intermittent dizziness in March 2020 and saw Dr. Penny in April

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2020, complaining of headaches and some lightheadedness when he had the headaches. Claimant had a history of infrequent migraines before his fall.

The physical examination on July 16, 2020 showed that Claimant had decreased range of motion with tenderness in the cervical spine, diminished range of motion in the right shoulder, and tenderness over the AC joint. He had normal strength, reflexes, and gait and he continued to

have some loss of sensation in the first three digits of the right hand.

Dr. Townsend's impression was that Claimant continued to have complaints of neck and right shoulder pain and was status post surgeries to both areas. Claimant's physicians released him to work in a light-duty capacity and he was working at a reasonable job at the time of the examination. It was less likely that he would be able to do his previous job as a production mechanic, given the lifting involved in that job. Dr. Townsend felt it was reasonable to allow Claimant to work in a light-duty capacity, since his treating physicians released him to work in a light-duty capacity. Any job in the sedentary or light duty range would be reasonable for Claimant as of the examination in July 2020. From a subjective standpoint, Claimant had similar complaints in July 2020 as in November 2019, so his symptoms were not worsening and he was probably getting more benefit from the higher dose of gabapentin, but he still had neck pain and shoulder complaints.

Dr. Townsend reviewed the labor market survey that Barbara Riley compiled with twelve jobs included. He was aware that Ms. Riley's deposition testimony had been taken in the prior week and she indicated that seven of those twelve jobs are currently available. Dr. Townsend believes the jobs that were solely sedentary duty capacity would be reasonable for Claimant.

The jobs at the autoplexes indicate that they are light duty, but it depends on how much lifting Claimant is required to do and how frequently he would have to lift, because the job

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would be reasonable for Claimant if he only had to lift up to twenty pounds occasionally. The majority of the jobs as described suggest that Claimant would be greeting and obtaining vehicle information, scheduling service appointments, and writing up problems, so those activities are predominately sedentary duty.

The job at TCC Cellular Connection is predominately sedentary duty, so it would be a reasonable job for Claimant. The Applebee's job would not be great for Claimant because it entails going in and out and carrying items as to sole activity of the job, so it is not reasonable based on Claimant's persistent complaints.

With regard to Claimant's headache condition, Dr. Townsend believes that if Claimant sustained a specific injury that might cause headaches, he would expect Claimant would have complained about headaches persistently. Based on Dr. Townsend's review of the medical records, the headaches and dizziness were more recent complaints since 2019, as opposed to something that has been a complaint since the industrial accident. Also, Claimant has a preexisting history of episodic migraine headaches. The nature of migraine is that it can fluctuate and be less frequent sometimes and more frequent other times. Dr. Penny treated the migraines initially with an abortive medication called rizatriptan. Based on the more recent records, Dr. Penny prescribed a CGRP blocking agent called Emgality, which is a prophylactic medication to prevent headaches. Dr. Penny is treating a migraine headache disorder, which Claimant had episodically in the past and it appears to have worsened over the past year, as opposed to specifically getting worse at the time of the industrial accident.

The treatment with Dr. Penny is reasonable and necessary, but unrelated to the industrial accident. There has not been a persistent complaint of headache since the onset of the industrial accident. Claimant first began to complain to Dr. Townsend about headaches in November 2019

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and Claimant has a history of episodic migraine headaches predating the industrial accident. There is nothing in the medical records to suggest there was something that occurred at the time of the industrial accident that produced a persistent headache complaint.

Dr. Townsend does not know specifically when Claimant had the migraine headaches prior to the industrial accident or if he was having them at the time of the accident. He did not have any of the medical records predating the industrial accident. He did not take a full headache history of issues predating the accident, so he did not know about the frequency, duration, or quality of the headaches or the treatment predating the industrial accident. The only history Claimant offered was that he had migraine headaches in the past.

Dr. Townsend agreed it is possible for a person to have headaches related to neck pain, although he would not expect development of migraine headaches as a result of some neck discomfort. Migraines can be triggered by a number of things, including chronic neck pain. Claimant's chronic neck pain can be an aggravating factor in his more frequent or more substantial migraine headaches, but there are many things in the environment that can aggravate migraines.

Dr. Penny's April 15, 2020 report indicates a history of infrequent migraines before the industrial accident and sometimes the more severe current headaches are similar to the migraines he experienced in the past. The history indicates that Claimant had migraines before the industrial accident that were severe at times.

Given the information Dr. Townsend reviewed after the July 16, 2020 examination, he agreed the new information caused him to reconsider the light duty work release in his July 16, 2020 report. There are some light duty jobs that Claimant could do, but ideally, Claimant should do less lifting and carrying than a light duty job can entail and he should do more desk-type

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work. Dr. Townsend does not have any problem from a physical standpoint for Claimant lifting and there are certain jobs that are more appropriate or less aggravating than other jobs

noted on the labor market survey. Sedentary duty jobs are a better fit and less aggravating for Claimant.

Claimant's treating physicians released him to a more strenuous level of work by the July 2020 examination than in the November 2019 examination and his pain level was lower in July 2020 than in November 2019. However, Dr. Townsend is aware that the more strenuous work release level did not work out for Claimant when he tried working in a light duty capacity. Work restrictions were not the main focus of Dr. Townsend's report in July 2020; the examination focused on permanent impairment of the neck and right shoulder. The examination in November 2019 focused on Claimant's work capability. Dr. Townsend and Dr. Stephen Rodgers agreed that Claimant sustained thirty-three percent permanent impairment to the cervical spine and nineteen percent to the right upper extremity as a result of the industrial accident.

Barbara Riley, a vocational rehabilitation specialist, testified by deposition on behalf of Playtex. Ms. Riley prepared a labor market survey with Claimant in mind. She visited all of the jobsites and saw the jobs being performed, except for the remote positions where the person was working from home. She is familiar with the physical requirements for all of the jobs listed on the survey.

Ms. Riley is aware of Claimant's industrial accident and injuries to the cervical spine and right shoulder, as well as his surgeries. She reviewed records from Drs. Mavrakakis, Yalamanchili, Townsend, and Penny. Dr. Mavrakakis released Claimant to work full-time in a sedentary duty capacity and had also released him to work in a light duty capacity for a period of time. Dr. Townsend believed Claimant could work in a sedentary to light duty capacity.

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Claimant has an extensive and interesting employment background. He has done a lot of different things. He worked as a mechanic at

Playtex for four years, doing maintenance and preventive maintenance work when he was injured. Previously, Claimant worked as a quality inspector for three years at ILC in Dover, inspecting containment systems and installing and maintaining testing equipment. For at least six years, Claimant worked as a die cut operator at two different employers. He worked as a shift supervisor at Lamtec and as a process operator and building maintenance person for another three years when he lived in Texas. Claimant worked as the volunteer service coordinator for three years for the State of Delaware and had some management leadership responsibilities in that position.

More recently, after being released to work after the industrial accident, Claimant worked as a healthcare valet. His job duties included curbside greeting of patients and guests, giving directions, parking cars, and providing customer service. Prior to the valet position, Claimant worked as an extruder operator for a brief period of time at New Process Fibre in Greenwood.

Claimant graduated from high school and attended six semesters at Idaho State University, where he took courses in science and ecology. During high school or sometime thereafter, Claimant did vocational technical schoolwork in electrical and mechanical work.

Based on Claimant's education and vocational experience, he has transferable skills and abilities that can be used in other employment. Claimant has interpersonal skills, excellent computer skills, communication skills, and mechanical skills. He has skills in critical thinking, troubleshooting, judgment and decision-making, complex problem solving, time management, analytical thinking, and deductive and inductive reasoning. In the volunteer services position, Claimant had to recruit and select hundreds of volunteers and he had to be tactful, negotiate,

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participate in marketing events, and coordinate many things. He also had to have excellent communication skills, as well as planning and project management skills.

Ms. Riley prepared a labor market survey, which lists twelve positions that are appropriate for Claimant from a physical standpoint and taking into account his transferrable skills, educational background, and employment background. The jobs were in customer service, asset protection, entry-level sales, service advisor, surveillance, and restaurant. The average weekly wage for the twelve positions is \$647.13.

Since the hearing was continued from June 12, 2020 to October 9, 2020, due to issues related to the Covid-19 pandemic, Ms. Riley updated that labor market survey before the hearing. Of the twelve jobs originally contained in the labor market survey, seven of the employers are still hiring at the time of the hearing. The remaining positions are at Dover Downs as a surveillance officer; TransCore as a customer service representative; Home Depot as an asset protection specialist; Preston Autoplex has several openings, including as an entry-level automotive sales consultant; Hertrich Automobile Dealership has several openings at four locations for automotive service advisor and related tech jobs; TCC Cellular Connection is hiring in two locations; and Applebee's is hiring numerous people as full-time Carside To-Go specialists. The average weekly wage for the seven jobs remaining on the survey is \$614.29.

Despite the Covid-19 pandemic, many businesses continued to hire employees and many other businesses started opening back up since the summer and have been hiring. There are also many employers hiring for work-from-home positions. Despite the pandemic and the increased unemployment rate, there are numerous types of industries and employers who are desperately seeking employees. Many employers have jobs available and are not getting enough applicants. All of the jobs listed on the labor market survey are appropriate for Claimant and are located less

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than thirty-five miles from his home. Claimant would be a viable candidate for all of the jobs listed on the survey based on his education, experience, and physical abilities.

Ms. Riley reviewed Claimant's updated medical records. Based on the most recent restrictions issued by his treating physician, he is able to work in a sedentary duty capacity. The same physician, Dr. Mavrakakis, previously released Claimant to work in a light duty capacity. The change to sedentary duty restrictions was made because Claimant had increased pain after working in a light duty position as a healthcare valet. Ms. Riley has seen the healthcare valet job being performed and would classify it as a sedentary to light duty position, but closer to light duty because of the amount of moving around it requires. Dr. Mavrakakis specifically determined that Claimant cannot do the valet job. Claimant's job before the valet position was as an extruder operator at New Process Fibre, which was a medium-duty position, possibly even a heavy-duty position, and he left the job because it was way too strenuous for him.

Ms. Riley reviewed the packet of documents from Claimant's job search efforts, which also included his résumé. Claimant made contact with a number of the prospective employers listed on the labor market survey. As a result of his job search efforts, Claimant obtained two jobs in this calendar year. Claimant's job search effort was performed in good faith. Ms. Riley believes Claimant wants to work.

Ms. Riley agreed that only two with a possible third position from the updated labor market survey are sedentary duty. The two sedentary-duty jobs are as a surveillance officer at Dover Downs and a customer service representative at TransCore. Although the TCC Cellular Connection job is retail and listed on the survey as sedentary to light duty, Ms. Riley has viewed it at all three locations and it is essentially a sedentary duty position. Customers come in, sign themselves in,

and an employee sitting at a desktop greets them; however, now the employee is

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not even standing up to shake hands because of Covid-19 protocols. The only reason the position was listed as light duty was because Ms. Riley erred on the side of caution; the lifting requirement is less than ten pounds, which is sedentary, and the standing and walking are occasional, which is also sedentary.

Stephen F. Penny, M.D., a board-certified neurologist and a certified physician pursuant to the Delaware workers' compensation system, testified by deposition on behalf of Claimant. Dr. Penny began treating Claimant on April 15, 2020 upon a referral from Dr. Mavrakakis. Dr. Penny believes the treatment provided has been reasonable, necessary, and causally related to the industrial accident.

Claimant slipped and fell at work in January 2018. He landed on his right arm, injuring his neck and right shoulder. He did not lose consciousness, but felt dazed. He underwent treatment, including surgery, for both areas. Claimant continued having symptoms from the neck and shoulder, including headaches, which ultimately resulted in the referral to Dr. Penny.

Claimant reported to Dr. Penny that he had very infrequent migraine headaches in the past prior to the fall. Dr. Penny did not obtain any information about Claimant's age when the migraines began or how often they occurred. After the fall, Claimant experienced a few more headaches, but the headaches seemed to be worse after his cervical spine surgery in October 2018. Claimant also reported having intermittent episodes of vertigo since the initial fall at work that lasted as long as twenty minutes.

Dr. Penny's sense is that Claimant had fairly significant headaches. The headaches were severe and many of the characteristics suggested migraine headaches, including Claimant's observation that the current headaches were fairly

similar to the migraines he suffered years before the injury. Claimant also related a close temporal relationship between when the neck

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pain was worse and when he developed headaches; as the neck pain worsened, the more likely he was to get a headache. Dr. Penny noted in his April 15, 2020 report that "Neck pain is a clear trigger" based on Claimant's observation about the close temporal relationship. There is a known association with headaches and neck injuries. Any injury to the local area, be it the neck, jaw, face, or even a sinus or dental problem, would be a common cause for headaches. Even if Claimant had an underlying predisposition toward infrequent headaches prior to the industrial accident, the accident and resulting neck pain could trigger the more frequent and substantial symptoms he has been experiencing since the accident.

The initial treatment included medication (rizatriptan) to take when Claimant's head hurt and to take a higher dose of the muscle relaxant he was already taking when he was experiencing more neck pain and tightness. They also discussed treatment he could do for the vertigo.

The next visit was on June 9, 2020. Claimant reported that the headache medication helped. The medication was used as an acute treatment, so it might limit the duration of a particular headache, but it would not reduce the number of headaches he had. Claimant also reported that he was continuing to experience neck pain, especially with physical activity. They also spoke about treatments for vertigo again, but unfortunately, they require full mobility of the neck, which he does not have, so he was not a good candidate for that particular treatment. Dr. Penny was concerned about the ongoing neck pain on a daily basis that was worse with activity. Claimant was going to continue using rizatriptan, as Dr. Penny previously prescribed.

The most recent visit was on September 16, 2020 and Claimant's headaches remained fairly

frequent. He had pretty severe headaches two or three times per month and less severe headaches frequently, but he did not indicate exactly how often. Rizatriptan was still helping, but it was not working quite as well. Often, Claimant had to take a second dose after several

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hours because it did not give him complete relief. Dr. Penny discussed alternative treatments for someone who was having frequent severe headaches without complete relief from one of the acute therapies; he prescribed an additional migraine medication (Emgality) with the goal of preventing the headaches. Hopefully with the two medications, Claimant will get less frequent headaches and the headaches will be less severe when they do occur.

Dr. Penny believes Claimant's headaches are related to his ongoing neck pain that occurs as a consequence of the industrial accident. The treatment he has provided, including the office visits and medications, is causally related to the industrial injury. Management of the headaches is the goal of Dr. Penny's treatment, but reduction in neck pain often brings significant improvement in the headaches as well. Dr. Penny hopes the medications can correct Claimant's headache problem, which is most often the case.

The focus of Dr. Penny's treatment has been on the headaches, rather than on the vertigo. The vertigo appears to be a separate problem that is probably stemming from an inner ear problem, which may or may not be related to the initial injury. It did not sound like there was a temporal relationship between the headaches and vertigo. Vertigo is not a typical feature of a cervical spine injury. The recommended treatment for vertigo involves certain exercises at home requiring very good cervical spine mobility, but Claimant could not move his neck enough to do the treatments.

Irene Mavrakakis, M.D., board-certified in anesthesiology and interventional pain management and a certified physician pursuant to the Delaware workers' compensation system,

testified by deposition on behalf of Claimant. Dr. Mavrakakis began treating Claimant on June 4, 2018 and treats Claimant for his continuing complaints following his cervical spine surgery and right shoulder surgery. She released Claimant to work in a full-time sedentary duty capacity

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on July 1, 2019. She expanded the release to light duty capacity on February 11, 2020, and then reduced the release to sedentary duty again on September 3, 2020.

Dr. Mavrakakis released Claimant to work full-time in a sedentary duty capacity on July 1, 2019. Dr. Manifold imposed additional restrictions of no lifting, pushing or pulling over five pounds related to the right shoulder injury. Dr. Mavrakakis maintained the sedentary duty restrictions in October, November, and December 2019.

On February 11, 2020, Claimant continued to have cervical spine pain. He completed a course of physical therapy and was working full-time as an extruder operator. His return to work had been a relatively recent development. Claimant was motivated to get back to work in some capacity. At the prior visit, Dr. Mavrakakis released him to a sedentary duty capacity and the treatment was being managed by the prescription medications of gabapentin and tizanidine. There were concerns about the physical demands required by the extruder position, but Claimant wanted to try it, so Dr. Mavrakakis released him to work in a light duty capacity.

On March 6, 2020, Claimant had continuing symptoms and benefitted from an increase in the gabapentin at the prior visit, although he was unable to continue working in the extruder operator job because it was too physically demanding for him. Claimant described pain in the neck with a radiating quality into the right trapezius and shoulder and he had an aggravations of his symptoms with lifting, driving, pushing, and pulling. Claimant also reported having intermittent dizziness. The examination



showed tenderness in the spine, as well as cervical spasms and limited range of motion that was painful. There were objective and subjective indications of Claimant's continuing injury on the physical examination. Dr. Mavrakakis agreed the extruder operator job required more than light duty restrictions and it was appropriate for Claimant to stop working at that job. She kept Claimant on light duty restrictions at that time.

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Dr. Mavrakakis referred Claimant to Dr. Penny for persistent headaches and dizziness, which she believed were related to the industrial injury. Claimant does not have a prior history of persistent headaches or dizziness and the neurological consultation was warranted to further evaluate the symptoms. There is a known association with cervical spine pain and muscle spasms in that area causing headaches. The threshold for her to make the referral was the headaches in combination with dizziness.

By the June 3, 2020 visit, Claimant had seen Dr. Penny. He reported that the prescribed medications were helping and Dr. Penny thought the dizziness could have been positional. The physical examination on June 3<sup>rd</sup> showed that Claimant had persistent tenderness at C4-5 and C5-6 facets. Dr. Mavrakakis recommended facet injections at C4-5 and C5-6 and that Claimant return to physical therapy.

The facet injections were administered on June 16, 2020 and Claimant returned to see Dr. Mavrakakis on July 1<sup>st</sup>. Claimant had decreased pain in the area of the injection by approximately seventy-percent. He was in therapy and trying to get a job as a valet. The examination showed that he still had facet tenderness in the neck, but it was a little below the injection site, and he had a trigger point in the right trapezius and restricted range of motion. Dr. Mavrakakis recommended a TENS unit, continued physical therapy, and facet injections at C6-7 and C7-T1, as well as trigger point injections for the right trapezius.

The injections were administered on July 21, 2020 and Claimant returned to see Dr. Mavrakakis on August 10<sup>th</sup>. Claimant had an eighty-percent decrease in his symptoms from the injections initially and a fifty-percent reduction afterwards. He still had tenderness and restricted range of motion in the cervical spine, but appeared to be doing better with an acceptable pain level following the injections. Claimant continued to work in a light duty capacity as a valet.

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The plan was for Claimant to continue taking his current medications, do a home exercise program, and return to Dr. Mavrakakis in three months. She approved of him continuing to work in a light duty capacity.

Claimant returned to Dr. Mavrakakis on September 3, 2020. He presented early with increased symptoms related to his employment as a valet at Bayhealth Hospital in Milford. He reported having difficulty transitioning in and out of vehicles while working. He is a large, tall man and the awkward body mechanics from getting into and out of vehicles repeatedly during his shift affected his neck and shoulder. It turns out that the job was not the best fit for Claimant in relation to his current physical restrictions, even though it was a light duty position.

Claimant was having issues with anxiety and depression at the September 3<sup>rd</sup> visit, which had been ongoing issues. Dr. Mavrakakis told Claimant that the valet job was a bad idea at that point and he needed to stop working in that job because it was exacerbating his symptoms. He was on the verge of tears, because he wants to work. She referred him to Dr. John Detwiler, a psychiatrist, to help with the depression and anxiety related to the industrial accident.

Dr. Mavrakakis also issued a work note, instructing greater limitations of sedentary duty with an ability to change positions as needed. Even though she acknowledged that it was not particularly lifting causing the exacerbation, but

rather the motion and mechanics of the situation, but she did not want any further exacerbation related to potential work. She hopes the sedentary duty restrictions will be temporary, but she needs to look at the details of what sedentary and light duty means in the context of Claimant, not just related to what is specifically in the guidelines. It might be in Claimant's best interest to keep his restrictions at a sedentary duty level in order to avoid exacerbation.

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Dr. Mavrakakis treated Claimant's exacerbation with injections, administered on September 15<sup>th</sup>. She had not seen him in follow-up by the time of her deposition. He remains on sedentary duty restrictions, as of the September 3<sup>rd</sup> visit. In the next work note, Dr. Mavrakakis will add that Claimant needs to avoid repetitive twisting, turning, and side bending of his cervical spine; those restrictions should have been in the September 3<sup>rd</sup> work release note.

Claimant, fifty-seven years old, testified about his industrial accident, medical treatment, current condition, work experience, and education. Claimant worked at Playtex as a production mechanic, which involves significant physical demands. He was working at Playtex when he was injured on January 9, 2018.

Claimant slipped and fell on ice in the parking lot. He turned to avoid hitting his head. He fell on his right side with his shoulder going into the neck. He had to slide to an area where he could stand up. Then, he went to the guard shack to report the industrial accident and he was treated. Ultimately, he underwent surgery to the cervical spine in October 2018 and right shoulder in March 2019.

Claimant is still symptomatic with the right shoulder and neck symptoms. He has vertigo, which comes on suddenly and unexpectedly. He also has headaches on a daily basis that vary in intensity and, some days, the headaches are migraines. He takes rizatriptan to intercept the intensity of the headaches and try to prevent the

headache from turning into a migraine. He has severe migraine headaches two to three times per month and less severe headaches almost daily. He generally runs out of rizatriptan before his next monthly refill. In September, Dr. Penny started prescribing Emgality to prevent migraines and Claimant takes rizatriptan when he still gets a migraine. Claimant is hopeful that Emgality will help.

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Claimant has a history of migraines from his childhood and teenage years. At that time, he saw an ENT physician and had allergy tests performed to see what caused the migraines, but he did not get any answers. The doctor hoped Claimant would outgrow the migraines and before he reached twenty-five years old, the migraines were infrequent. He did not have any migraines from age twenty-five until after the industrial accident, so he had no treatment for the migraines during that timeframe.

Now, Claimant's neck pain contributes to the intensity of the headaches. The worse his neck feels, the worse his headache becomes. Since the industrial accident, the headaches were the reason Claimant started seeing Dr. Mavrakakis. After surgery, the headaches became much more frequent and the intensity varies on a daily basis.

Claimant never had vertigo before the industrial accident. The first time he had a severe episode, he thought he was having a heart attack, but then the vertigo subsided. Claimant discussed the episode with his primary care physician, but they have not discussed it much since that time. The vertigo started later after the industrial accident.

Claimant still has problems with his right shoulder. He cannot sleep through the night because he wakes up frequently with shoulder and neck pain; he tosses and turns trying to get comfortable. Claimant has diminished range of motion in the shoulder and still has numbness and tingling to the fingers. He probably has normal strength in the right arm, because he is

left hand dominant, so he does not use the right arm as much as the left.

Claimant saw Dr. Townsend most recently in November 2019 and July 2020 and complained of headaches at all of his appointments. Dr. Townsend's focus was on the neck situation and the shoulder range of motion.

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Claimant reviewed the labor market survey and applied to the jobs listed on the survey. The jobs were not available as represented. Claimant called many of the jobs and got some people to answer, but they were confused by what he was saying and others never answered the phone. None of the applications resulted in a job offer.

Claimant also conducted his own job search using GlassDoor.com and Indeed.com and looking in local business directories. He also called around to different businesses. He obtained the extruder operator and valet positions through Indeed.com.

Claimant has had work restrictions since recovering from the acute injury with the shoulder. Dr. Mavrakakis handles the work restrictions. In July 2019, Claimant was released to work in a light duty capacity and found a job as an extruder with New Process Fibre in Greenwood in February 2020. The position was supposed to be primarily as a shift supervisor, but it turned out to be primarily as an extruder machine operator. Claimant had to walk on a catwalk and operate the equipment. If he knew it would be an extruder operator job, he would not have accepted the job. He lasted for two weeks in the position, but then Dr. Mavrakakis insisted that he stop working there because the job provoked his symptoms. It took a while to calm down the symptoms after he stopped working at New Process Fibre.

Then, Claimant obtained a job as a valet at Bayhealth Hospital in Milford during the Covid-19 pandemic. Claimant interviewed with the supervisor and made it clear that he had

limitations in the neck and shoulder, but he was told that accommodating the limitations would be no problem. He noticed right away that many people had very small cars and it was very difficult to turn his head. He developed pain right away, but he continued working anyway. Then, Claimant was told to assist patients getting in and out of their cars and to their appointments, if possible. The job duties were more than Claimant was led to believe during the

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interview. Claimant worked there for nine weeks, but by the tenth week, Bayhealth started allowing visitors to the hospital again and the workload increased too much to handle. On September 3, 2020, Dr. Mavrakakis instructed Claimant to stop working in the valet job and Claimant agreed. She also imposed sedentary duty restrictions.

Claimant resumed his job search in the same fashion, by looking online and in local business directories. He has not found a job. Now, he has sedentary duty restrictions instead of light duty restrictions.

The facet injections in mid-September 2020 helped. Claimant felt really good and had good range of motion for the first few weeks, but as the effect wore off, the symptoms started returning. Claimant is still concerned about vertigo and he was concerned about it while working as a valet. He has spoken to Dr. Detwiler twice on the phone so far and he has additional appointments scheduled.

Claimant is comfortable driving locally, but not too far. He tried to drive to Easton, Maryland from his home in Houston, Delaware, but it was too taxing.

Claimant called the employers listed on the labor market survey on May 5<sup>th</sup>, during the height of the Covid-19 pandemic. He contacted Dover Downs, TransCore, LinCare, Home Depot, Preston Automotive, Hertrich Automotive, and Discover Financial Services. He did not contact TCC Cellular Connections. The hearing was

originally scheduled for June 12<sup>th</sup>, but it was continued due to Covid-19. He has not tried to contact the employers listed on the survey again, because he has been focused on his own job search.

Claimant agrees that he can work in a sedentary duty capacity with the additional restrictions Dr. Mavrakakis imposed in September 2020. Claimant graduated from high school

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and took some college courses. He was seeking a double major in biology and ecology and a minor in geology in college. He stopped going to college in his third year to start his family.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Termination of Benefits

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

When there is a conflict in the medical testimony, the Board must decide which physician is more credible. *General Motors Corp. v. McNemar*, 202 A.2d 803 (Del. 1964). As long as there is substantial evidence to support the decision, the Board may accept the testimony of one physician over another. *Standard Distributing Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993). In the case at hand, the physicians agree that Claimant is capable of working full-time in a sedentary duty capacity. Claimant wants to work and agreed that Dr. Mavrakakis released him to work in a sedentary duty capacity on July 1, 2019, then expanded the release to light duty capacity on February 11, 2020, and then reduced the

release to sedentary duty again on September 3, 2020. Dr. Townsend opined that sedentary duty jobs are a better fit for Claimant and less aggravating than light duty. Claimant also agreed that he is able to work in a sedentary duty capacity with the additional restrictions Dr. Mavrakakis imposed on September 3, 2020. Therefore, the Board finds that Claimant has been physically capable of working full-time in a sedentary duty capacity since at least September 3, 2020. He tried to work in two jobs in a light

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duty capacity, but they were too physically strenuous for him, although the extruder operator position was a medium duty job, so it exceeded the light duty restrictions.

Since Claimant is not physically totally incapacitated, the burden shifts to Claimant to prove that he is a displaced worker. *Wyatt v. State of Delaware*, Del. Super. Ct., C.A. No. 97A-05-004 HDR, Ridgely, J., at 3 (March 27, 1998)(Order). Given Claimant's age, physical limitations, education, mental capacity and training, the Board finds that he is not *prima facie* a displaced worker. *Torres*, 672 A.2d at 30 (citing *Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (Del. 1973)). Claimant is only fifty-seven years old, is a high school graduate and went to college for six semesters, and has transferable skills based on his education and work experience. Claimant has interpersonal skills, excellent computer skills, communication skills, and mechanical skills. He has skills in critical thinking, troubleshooting, judgment and decision-making, complex problem solving, time management, analytical thinking, and deductive and inductive reasoning. In the volunteer services position, Claimant had to recruit and select hundreds of volunteers and he had to be tactful, negotiate, participate in marketing events, and coordinate many things. He also had to have excellent communication skills, as well as planning and project management skills. He is able to read, write, drive a car, and function as an adult in today's society and he has sedentary-duty work restrictions. Claimant did not even argue

that he is *prima facie* a displaced worker; Claimant argues that he is a displaced worker because he could not find suitable employment due to his restrictions even after a reasonable job search.

Since Claimant is not *prima facie* a displaced worker, he may still prove that he is a displaced worker by showing he has made a reasonable effort to locate employment, but was unable to do so due to his disability. *M.A. Hartnett, Inc. v. Coleman*, 226 A.2d 910, 913 (Del. 1967) (claimant must show inability "to obtain employment because of his physical condition");

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*Zdziech v. Delaware Authority for Specialized Transportation*, Del. Super. Ct., C.A. No. 87A-AU-10, Gebelein, J. (October 13, 1988) (four applications in over a year period is not a reasonable effort when there is no evidence that failure to obtain employment was because of disability); *see also Torres*, 672 A.2d at 30 (citing *Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (Del. 1973)).

Claimant conducted a job search by searching on GlassDoor.com and Indeed.com, as well as looking in local business directories and calling local businesses. He also called the jobs listed on the labor market survey, but many of the employers did not answer the telephone and the ones who answered were confused about what he was saying. Claimant obtained two jobs based on his own job search. Claimant has been looking for a sedentary duty position since September 3<sup>rd</sup>, when Dr. Mavrakakis told him to stop working as a valet and imposed sedentary duty restrictions; however, he has not found a job within his restrictions. Even Ms. Riley agreed that Claimant conducted a reasonable job search. The Board finds that Claimant met his burden of proof, because conducted a reasonable job search for a sedentary duty position, but has been unable to obtain employment due to the stricter restrictions imposed on September 3<sup>rd</sup>.

The Board finds that the current labor market survey is insufficient to overcome the burden of proof in this case. There are only two sedentary duty jobs remaining on the survey with a possible third position at TCC Cellular Connection, if it is truly a sedentary duty position; however, even three jobs remaining on the survey is insufficient to prove there are jobs available for Claimant in the open labor market. Since Playtex is unable to meet its burden of proof with the labor market survey, the Board finds Claimant to be a displaced worker at this time. *Watson v. Wal-Mart*, Del. Supr., No. 442, 2010 (Oct. 21, 2011).

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Based on the foregoing, the Board finds that Claimant is a displaced worker and, therefore, remains totally disabled. Playtex's Petition for Review is denied and Playtex must make the appropriate reimbursement to the Workers' Compensation Fund.

### **Compensability of Headache Condition**

Claimant bears the burden of proving the headache condition is causally related to the industrial accident. Playtex argues that Claimant's headaches are unrelated to the industrial accident. There is no dispute that the treatment has been reasonable and necessary. After considering all of the evidence presented, the Board accepts the opinion of Dr. Penny over Dr. Townsend regarding the causal relationship between Claimant's headaches and the industrial accident. The Board finds that Claimant has met his burden of proof regarding his headache condition.

Claimant has not had a migraine since he was twenty-five years old. He developed headaches after the industrial accident. After the cervical spine surgery, the headaches became much more frequent and the intensity varies on a daily basis. He has headaches on a daily basis, as well as migraines a few times per month. Claimant's neck pain contributes to the intensity of the headaches; the worse his neck feels, the worse his headache becomes.



Dr. Townsend did not take a complete history from Claimant regarding his prior headaches. He did not know that Claimant did not have any migraines from the age of twenty-five until after the cervical spine surgery, which is more than thirty years since his last migraine until the onset of headaches following the industrial accident.

The Board accepts Dr. Penny's opinion that Claimant's migraines are causally related to the industrial accident and the cervical spine condition. Dr. Penny explained that there is a known association between headaches and neck injuries. Even Dr. Townsend agreed that a

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person could have headaches related to neck pain. Dr. Penny noted in his April 15, 2020 report that Claimant's "neck pain is a clear trigger" for the headaches, based on Claimant's observation about the close temporal relationship between the neck pain and headaches. Dr. Penny explained that even if Claimant had an underlying predisposition toward infrequent headaches prior to the industrial accident, the accident and resulting neck pain could trigger the more frequent and substantial symptoms Claimant has been experiencing since the accident and cervical spine surgery.

Based on the foregoing, the Board finds that Claimant's headaches and migraines are causally related to the industrial accident. There is no dispute that the treatment provided has been reasonable and necessary. The Board finds that the treatment for the headaches and migraines is compensable and the medical expenses must be paid in accordance with the Delaware Workers' Compensation Fee Schedule.

#### **Attorney's Fee and Medical Witness Fees**

Having received an award, Claimant is entitled to a reasonable attorney's fee assessed as costs against Playtex in an amount not to exceed thirty percent of the award or ten times the average weekly wage, whichever is smaller. *Del. Code Ann.* tit. 19, § 2320. However, when the

employer submits a settlement offer to Claimant or Claimant's counsel at least thirty days before the hearing that is equal to or greater than the Board's award, the Claimant is no longer entitled to receive an award of attorneys' fees. *Id.* At the conclusion of the hearing, Playtex submitted a settlement offer that was sent to Claimant's counsel before the hearing. The settlement offer was less than the award; therefore, Claimant is entitled to an attorney's fee award in this case.

Claimant's counsel submitted an affidavit attesting to 32.6 hours of preparation for this two and a half-hour long hearing. This case was not novel or difficult, nor did it require

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exceptional legal skills to try properly. It was argued that acceptance of this case precluded other employment by Claimant's counsel. The Board considered the fees customarily charged in this locality for similar legal services, the amounts involved and the results obtained. The Board also considered the argument that this case posed time limitations upon Claimant's counsel, the date of initial contact on June 26, 2018, and the relative experience, reputation, and ability of Claimant's counsel. It was argued that the fee was contingent, that Claimant's counsel does not expect to receive compensation from any other source, and that the employer is able to pay an award. *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973).

The Board must consider the ten factors enumerated in *Cox* when considering an attorney's fee award or else it would be an abuse of discretion. *Thomason v. Temp Control*, Del. Super. Ct., C.A. No. 01A-07-009, Witham, J., slip.op. at 5-7 (May 30, 2002). Claimant bears the burden of establishing entitlement to an attorney's fee award and must address the *Cox* factors in the application for an attorney's fee. Failure to address the *Cox* factors deprives the Board of the facts needed to properly assess the claim. The *Cox* factors were addressed in the Affidavit Regarding Attorney's Fees.

In the case at hand, based on the results obtained, information presented, and the fact there is no dispute that an award of an attorney's fee is due, the Board finds that one attorney's fee in the amount of \$11,214.90 or thirty-percent of the award, whichever is less, is reasonable. *Del. Code Ann.* tit. 19, § 2320. This award is reasonable given Claimant's counsel's level of experience and the nature of the legal task. In accordance with § 2320(10)a, the attorney's fee awarded shall act as an offset against fees that would otherwise be charged by counsel to Claimant under their fee agreement.

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As there is an award, medical witness fees are taxed as costs against Playtex. *Del. Code Ann.* tit. 19, § 2322(e).

#### **STATEMENT OF THE DETERMINATION**

Based on the foregoing, Playtex's Petition for Review to terminate Claimant's total disability benefits is DENIED. Claimant is entitled to payment of ongoing total disability benefits at this time. The Board also finds that the headache condition is causally related to the industrial accident and, therefore, Claimant is entitled to payment of medical expenses for treatment of the headaches in accordance with the Delaware Workers' Compensation Fee Schedule. Claimant is also awarded medical witness fees and an attorney's fee in the amount of \$11,214.90 or thirty-percent of the award, whichever is less. Playtex must make the appropriate reimbursement to the Workers' Compensation Fund.

IT IS SO ORDERED THIS 20<sup>th</sup> DAY OF OCTOBER 2020.

#### **INDUSTRIAL ACCIDENT BOARD**

/s/ Mary Dantzler

/s/ William Hare

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

/s/ \_\_\_\_\_

Julie G. Bucklin  
Workers' Compensation Hearing Officer

Mailed Date: 10-21-20

/s/ \_\_\_\_\_

OWC Staff