BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

BOBBY SWEETMAN,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1436026
	)	
WILLIS CHEVROLET,	)	
	)	
	)	
Employer.	)	

DECISION ON PETITION TO TERMINATE BENEFITS

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause, by stipulation of the parties, came before a Workers' Compensation Hearing Officer on March 19, 2018, in a Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

PETER W. HARTRANFT

MARK A. MUROWANY

D. Massaro, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Edward Wilson, III, Attorney for Claimant
Joseph Andrews, Attorney for Employer

NATURE AND STAGE OF THE PROCEEDINGS

On December 14, 2015, Bobby Winston Sweetman, ("Claimant"), sustained a lumbar spine injury while working for Willis Chevrolet, ("Employer"). Employer has paid workers' compensation benefits including medical expenses for two low back surgeries with Dr. Rudin and total disability benefits. Claimant's wage at the time of the accident was $457.46 per week, resulting in a compensation rate of $304.99 per week.

On September 7, 2017 Employer filed a Petition to Terminate Benefits, alleging that Claimant is no longer totally disabled and can return to work in the same capacity that he was working in prior to the work accident. Claimant argues that prior to returning to work he should be weaned off his narcotic medication, Dilaudid, and a second FCE should be performed as the first is invalid. Since the date of filing, Claimant's benefits have been paid by the Workers' Compensation Fund pursuant to 19 *Del. C.* § 2347.

On March 19, 2018, the Board conducted a hearing to consider Employer's termination petition. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant was called upon to testify initially by Employer. He confirmed that while he was working for Employer it was at the Smyrna office. He agrees that he applied for the job in July of 2015.

Claimant was shown his job application dated July 31, 2015 (Employer's Exhibit No. 1). He agrees that he executed the document verifying its accuracy. He went to Pennsville High School and had auto body classes. He has vast knowledge of chemicals. He can also do restoration. He agrees that is a special type of knowledge. He learned detailing through experience. He does not believe that someone without this knowledge could perform this type of work. He agrees that his Resume indicates that he has worked for several employers as a Detail Manager, which involved keeping the work flowing.

Claimant agrees that while working for Employer he detailed cars and controlled workflow. He performed control quality and worked with customers. Claimant agrees that he had a work email address. He notes that as far as typing he hunts and pecks.

Prior to working for Employer he had a back injury in 2014. Claimant agrees that when he started working for Employer he was still having pain from his prior injury. Claimant agrees that on the same day he filled out his application for Employer he was reporting back pain to Dr. Boulos, as reflected in a radiology report for lumbar spine x-rays dated July 31, 2015 (Employer's Exhibit No. 2).

Claimant agrees that prior to the work accident he complained of low back pain which he rated at four out of ten. However, he does not agree that his pain has returned to baseline. He describes it as different now. Initially, before his first fusion, it was a burning, hot pain, but now it is more achy, dull and gripping with occasional burning with motion. Now he cannot lift

anything heavy, while previously he could lift whatever he wanted. Claimant agrees that Dr. Smith recorded that he could lift a gallon of milk. Claimant testified that he tried again later and it was more difficult. He can drive for about an hour or so before he gets achy.

Claimant has seen the Labor Market Survey and would be willing to attempt working those jobs. He would like to find a fulfilling job like he had with Employer. He has not been looking for work. He is not sure what he wants to do or what he can do. Claimant agreed that if a job opportunity were provided to him that would enable him to provide for his family he would take it.

Upon direct examination by his attorney, Claimant agrees that he has no computer skills. He has not taken any computer courses. In high school he took cooking and home economics. His wife uses the computer at home. He looks at internet sites and uses his phone more for that. He is not familiar with different program names, but is familiar with Windows. He can use the Internet.

Today his pain level is at three out of ten. He has not done much. Doing anything for more than an hour causes pain. He can sit for two hours before he gets achy.

He is on Dilaudid, 8 mg; 3 times a day as needed for pain. He does not know what his pain level would be without the medication. It takes the edge off. He agrees that he had pain in low back prior to the work accident and pain afterward. Before it was more of a burning; now it is more of a gripping, dull pain. He feels like he is being squeezed in the lumbar area and it goes down his right leg. He feels that he now has different limits and is limited in the amount of time that he can do things. He cannot lift anything heavy due to back pain.

Claimant described some of his limitations. He cannot lift more than three to four pounds. He cannot step on a curb hard as it causes pain. He cannot open doors. He cannot help with

groceries. He can bend, but not fully due to pain. He can squat and pick stuff up. It is achy to get on his knees.

Claimant has been seeing a pain management doctor, Dr. Seth L. Ivins, for about a year. They discuss his pain and activities. Dr. Ivins provides suggestions for Claimant, such as when to apply heat or ice and when to call it quits during activities.

Dilaudid is his only medication and he also uses a cream for his back when he goes to sleep. He gets up in the night to apply the cream.

He was referred to Dr. Ivins by Dr. Rudin because of his ongoing pain. Dr. Ivins discussed detoxification in the future when Claimant is ready. They are not ready now. The next step is an ablation for his SI joint. Claimant saw Dr. Smith for a DME and says that he did not spend much time with Claimant.

Claimant underwent a Functional Capacity Evaluation", ("FCE"), at Pivot Physical Therapy. Claimant could not lift and had to be iced down twice. It was overwhelming and depressing for him. His wife had to come and get him after an hour. Dr. Rudin explained to him afterward that it was because he was deconditioned, and his fusion was okay.

Claimant has not applied for a job because he does not know what he could do with his pain levels. Claimant agrees that if an FCE indicated that he could work a couple of hours a day he would do it.

Upon re-cross examination Claimant explained that he is planning on getting an ablation from Dr. Mark Eskander before any detoxification takes place. Dr. Ivins does not want to wean him off Dilaudid until he finds the source of Claimant's pain. Claimant initially disagreed that a First State Orthopaedics note in September of 2014 also indicated that a source of his pain could

not be explained. However, when the note was read to Claimant, he remembered that at that time he was told he had two ruptured discs.

Upon questioning by the Board Claimant explained that he feels pain when he lifts over four pounds. This affects his activities of daily living. He explained that he was on Percocet in 2014, before the work accident and he is no longer on it. He agrees that Dilaudid is the only narcotic that he takes and occasionally he will take a muscle relaxer. He applies the cream once or twice a night and uses approximately one or two tubes a month. He had taken one pill, 8 mg, on the day of the hearing.

Dr. Robert A. Smith, orthopedic surgeon, testified at the hearing by deposition on Employer's behalf (Employer's Exhibit No. 1). He examined Claimant on April 17, 2017 and October 16, 2017 and reviewed the pertinent medical records. In his opinion Claimant is capable of working in the same capacity that he was working prior to the work accident.

Dr. Smith agrees that in his deposition Dr. Rudin testified that he was not testifying in any capacity as to Claimant's physical capabilities.

Claimant described the mechanism of injury as occurring on December 14, 2015 when he was working as a car detailer and he tripped over an air hose and fell. Afterward he experienced pain in his back. At his most recent DME Claimant described severe pain in his right lower back. For a while he had some pain radiating to the right lower extremity, but he did not have any leg pain and he stated that his back pain became even worse when he tried to lift anything more than three pounds. He indicated that he did some home exercises, walked for exercise and can drive a car short distances. Other than that, there was not much detail about his home activities.

Dr. Smith explained that in someone with severe back pain some objective signs to look for would be muscle spasm, any deformity of the spine and signs of instability of the spine.

Sometimes when the patient moves the spine you can feel crepitation, or clicking, and popping. The best indicators of what is going on are imaging studies.

Claimant underwent surgery with Dr. Rudin both before and after the work accident. From looking at the imaging study reports, and Dr. Rudin's deposition transcript, the fusion of the lumbar area has completely resolved and there is no stenosis or instability. Claimant also underwent an EMG, which Dr. Smith believes was normal, so there is no nerve impingement. There is no evidence of nerve or spinal encroachment on the post-operative imaging studies.

On physical examination Claimant was able to walk and stand normally, meaning, he did not have a limp or bent over gait. He was not using a cane or crutch and he did not require back bracing. Dr. Smith did not find any adverse soft tissue problems, like spasm, atrophy or trigger points. There was no deformity of the spine. When asked to move his spine actively, Claimant had pretty good range of motion considering that he had a fusion of his lumbar spine. He was able to flex forward fifty degrees. The lumbar spine can typically flex sixty degrees, so it was just a little bit short. Side bending was thirty degrees bilaterally, which is normal. When Claimant moved his spine Dr. Smith could not detect any soft tissue spasm or rigidity in the adjacent soft tissues. Neurologically his motor strength and sensation and reflexes were all normal. Dr. Smith explained that any time a fusion is performed some normal motion of the spine is taken away. A one or two level fusion is not going to reduce motion all that much. In Claimant's case he had only minor deficit in his range of motion due to the fusion. Essentially, Claimant's subjective complaints of pain did not correlate with his objective presentation. Dr. Smith believes that this indicates an exaggeration of symptoms. Dr. Smith agrees that this coincides with Dr. Rudin's testimony that he has no idea why Claimant is out of work as he believes that Claimant is as healed as he is going to be from the surgeries.

Dr. Smith agrees that he would be confused by Claimant's ongoing symptoms of pain after surgery as well. This appears to be a very successful fusion surgery with no residual stenosis or instability. Claimant has associated normal soft tissues in the spine and no neurological deficits.

Based on his physical examination of Claimant and review of the medical records Dr. Smith opines that from an objective standpoint Claimant has made a complete recovery from his work injury and surgery. He could return to work in the same capacity that he was working in at the time of the work accident, as a car detailer. Based upon the examination and review of the available medical data is no reason why Claimant could not return to work in this capacity.

Dr. Smith agrees that the FCE report indicates that Claimant can work eight hours per day in a light-duty capacity and that Claimant can sit two to three hours total, or thirty minutes continuously; and walk or drive for the same amount of time. The report also indicates that bending, turning, twisting, kneeling, squatting and crawling can all be done occasionally. He cannot climb. Claimant can do frequent repeated arm motions, and repetitively using the wrist and hand to reach above the shoulder. He can also operate occasional foot controls.

Dr. Smith questions these results noting that there is also a subjective component to an FCE. It depends on how willing the person is to do what the examiner is asking him to do. Claimant may be able to bend once or twice and then another time reports a pain and that he cannot do it. Thus, the examiner indicates that Claimant failed in that area, but it was based on his subjective complaint rather than something organic that is preventing him from doing so. Based on his own physical examination of Claimant, Dr. Smith does not place any restriction on Claimant's ability to stand. Claimant's fusion is solid, he has no neurological deficit or muscle wasting and normal strength. There is also no restriction on his ability to sit, walk (he walks for

exercise), drive, bend (his range of motion was 90 percent of normal and he did not have any adverse soft tissue problems, so he is able to do functional bending), do repeated arm motions, use his wrists or hands, reach above his shoulders or use the foot controls. Dr. Smith notes that there are no issues with Claimant's upper extremities related to this claim and he does not have any restrictions with the use of his upper extremities.

Dr. Smith notes, again, that an FCE is taken into account in forming an opinion in this matter, but in any test, particularly these kinds of functional tests, it depends on the willingness of the person to put in a full effort. In Dr. Smith's opinion there is a discrepancy between Claimant's relatively benign clinical findings and what he claims that he cannot do, so there are some problems with the FCE result.

Dr. Smith then reviewed Claimant's history prior to the work accident. In August of 2014 he was treating with First State Orthopaedics for an annular tear at L4-L5. Claimant rated his pain at that time at four out of ten. Dr. Smith agrees that in September of 2014 Claimant's Delaware Neurosurgical Group records indicate that he had been having ongoing pain for the prior year after he hurt himself doing yardwork. That same month Claimant informed his doctor at First State Orthopaedics that he had excruciating pain. Again, he was being evaluated for an annular tear. Dr. Smith agrees that as far as he knows Claimant was still working at that time.

Dr. Smith reviewed Claimant's First State Orthopaedics records after the December of 2015 work accident. On January 6, 2016 he was complaining of low back pain which he rated at seven out of ten and then later that same month he rated it at eight out of ten. By March of 2016 he rated his pain at four out of ten. Dr. Smith notes that he has the typical pattern of fluctuating complaints for someone with back issues. Dr. Smith agrees though that after this time including March, April, and July of 2016 Claimant reported pain at three, four or five out of ten. Typically,

Claimant reported an average of pain at four out of ten. Dr. Smith agrees that by January of 2017 Claimant was at complaining of four out of ten pain, which would be his baseline pre-accident status as this was what he was reporting back in August of 2014. Dr. Smith agrees that it appears that Claimant returned close to his actual baseline pain wise at that point. Then later in April of 2017 he reported that his pain was anywhere from two to four out of ten. As late as July of 2017 he was only complaining of occasional back pain and he was negative for straight leg raising. Dr. Smith notes that this is indicative of a lack of nerve involvement.

On January 18, 2017, Claimant's doctors at First State Orthopaedics were noting that he had to be weaned off narcotics and this is referenced throughout the records. However, Dr. Smith notes that Claimant was still on Hydromorphone at his October of 2017 DME. Hydromorphone is a type of morphine which is a high grade narcotic. Claimant was not trying to wean himself off it nor is he capable of weaning himself off this narcotic on his own. However, Dr. Smith notes that narcotics do not preclude Claimant from returning to work as he can probably tolerate them. Dr. Smith explained that the system acclimates to them and patients who have been on narcotics for a long time can drive etc. because the body adjusts. It is not good for Claimant to be on the narcotics and it is not appropriate, but it would not preclude him from returning to work.

By September of 2017 Claimant complains of occasional low back pain and as recently as October 11, 2017 he complained of pain at four out of ten. Again, he was back to his pre-accident baseline status at four out of ten pain. His pain level of four out of ten does not, in and of itself, preclude Claimant from returning to work.

Dr. Smith then reviewed Claimant's Pivot Physical Therapy records. Dr. Smith agrees that Dr. Rudin testified that if this was not a worker's compensation case he would not necessarily need to rely on an FCE. Normally, Dr. Rudin would rely on physical therapy notes to

determine a return to work status. Thus, Dr. Smith reviewed Claimant's physical therapy records and he agrees that on September 18, 2017, Claimant stated that he could carry a gallon of milk. Dr. Smith notes that a gallon of milk weighs about seven pounds. Dr. Smith agrees that as late as September 27 and 29, 2017 Claimant reported that he felt pretty good overall. One month later on October 24, 2017 Claimant was discharged from therapy. Dr. Smith notes that one day of feeling well would not be an automatic return to work indicator, however, it is significant when considering his lack of any abnormal physical findings. Dr. Smith notes that at his DMEs Claimant was complaining of severe back pain without any abnormal physical findings which does not make sense. Thus, Dr. Smith is not sure if Claimant is capable of giving a straight answer about his pain level. Perhaps he just cannot as he does not understand the process, but it does not seem like his pain levels are consistent or that they go along with his clinical findings. Again, Claimant rated his pain at four out of ten as late as September of 2017 which would be an indication that he has returned to his baseline level of pain.

Dr. Smith agrees that even if Claimant were considered to have a fourteen percent permanency this does not mean that he could not work. One can have a permanency and work full-time without restriction, it depends on the job requirements. There is not a strict correlation between permanency level and work restrictions. The impairment rating is based on objective factors and does not preclude Claimant from returning to work. From an objective standpoint Claimant should be able to return to the job that he had before the work accident. His subjective complaints are not consistent with his objective examination. There is a disconnect between the two. From an objective standpoint there really is nothing going on in Claimant's spine that would prevent him from going back to work regular duty. Dr. Smith agrees that a return to work would be therapeutic for Claimant and that the goal in workers' compensation cases is to return the

Claimant to work. Dr. Smith reviewed the LMS and approves the twenty-seven jobs provided. He considered the positions very carefully and opines that the jobs are benign in that they do not require a lot of physical input from the individual. Dr. Smith opines that Claimant could do all of them safely, without any impact on his spine. Most of them are in the sedentary range of lifting, not requiring lifting more than five pounds, and only one job might require up to ten pounds.

On cross-examination Dr. Smith agrees that previously he opined that Claimant's March 8, 2016 surgical procedure performed by Dr. Rudin was not causally related and therefore, that Claimant had no permanency. He agrees that later he opined that Claimant had a twelve percent permanency rating of his lumbar spine. He notes this change of opinion was after the surgery was either deemed as or agreed to be compensable at the Board level.

Dr. Smith agrees that he came to his conclusion that Claimant could return to work without restrictions, for the car detailing job, prior to the FCE report. He agrees that the FCE had a different conclusion. He agrees that there is no mention in the FCE report that Claimant was not demonstrating full effort. He notes however, that some of the things they asked Claimant to do were limited because he had back pain.

When asked about whether Claimant could wean himself off narcotics, Dr. Smith notes that many patients just wean themselves off. They stop taking it or they taper down their doses. He agrees that Dr. Rudin testified in his deposition that the reason he referred Claimant to a pain management doctor, Dr. Ivins, was to wean Claimant off the narcotic. Dr. Smith notes that it has been a long time and usually it does not take that long to wean somebody off. Claimant is still on high grade narcotics.

Dr. Smith agrees that Dr. Rudin did not think much of the FCE either. So Dr. Smith agrees with him that it is not a valid study. There is no comprehensive clinical examination that

was done by the physical therapist. He simply asked Claimant to do certain things and Claimant could not because he said he had back pain. Dr. Smith does not necessarily agree that a new FCE exam performed by another individual would be appropriate. It is not the therapist as much as it is the Claimant. Claimant has complaints of pain that are not in proportion to his objective examination and the organic examination of his spine. He really has nothing wrong with his spine. He has a solid fusion. He has no neurological compromise or instability. So there is a disconnect with the FCE result.

As far as Dr. Rudin's testimony regarding hyperalgesia, Dr. Smith notes that this is just an assumption on Dr. Rudin's part and more importantly, the way to get rid of it anyway is to get Claimant off his narcotic. He notes that it has been many months since Claimant has been seeing Dr. Ivins. It does not take that long to wean somebody off narcotics. At the most, it takes a couple of weeks. Claimant has been on the narcotics for a long time and just keeps getting prescriptions. It is really consistent with the opioid crisis and definitely not a good scenario for Claimant.

On re-direct examination Dr. Smith agrees that Dr. Rudin indicates in his report that he would have thought that Claimant would have been off his medication six to nine months ago. Dr. Smith also does not know why Dr. Ivins has been treating Claimant for so long and not taken him off the narcotic. Dr. Ivins continues to prescribe the narcotics, switching from one to another, but they are all high grade narcotics. He did not see any indication that Dr. Ivins was placing Claimant into a detox protocol. So despite Dr. Rudin's testimony that he sent Claimant to Dr. Ivins for detox, based on Dr. Smith's review of the records there is no indication that happened at any time. Again, Dr. Smith still believes that Claimant can return to work. Claimant has become used to the narcotics and is still able to function.

Dr. Smith agrees that Dr. Rudin testified that the FCE in this case is basically a "crappy" test. Dr. Smith agrees that it is not a valid test, at least in this particular case. He agrees that the test was influenced by Claimant's poor performance because he was complaining of pain. Essentially, he was self-limiting. So he had no willingness to do the test because either he was afraid of having pain or he was stating that he had pain, but it was all subjective. There was nothing objective about the test result. The physical therapist did not document that Claimant had a muscle spasm or that his leg gave out or anything like that. Dr. Smith agrees that as of most recently Claimant is still complaining of four out of ten pain which was exactly what he was complaining about prior to the work accident.

Dr. Smith agrees that previously when he rated Claimant with a zero percent permanency he was of the opinion that Claimant's surgery was unrelated which has since changed given the fact that the parties have agreed that the surgery was related. Again he reiterates that Claimant can still work even with a permanent impairment. He notes that Claimant worked before the work accident with the same level of back pain. He also agrees that Claimant was taking Percocet in September of 2014, prior to the work accident due to a previous low back injury.

Barbara R. Riley, Senior Vocational Case Manager, testified at the hearing on Employer's behalf. She reviewed the pertinent employee and medical records, as well as certain medical testimony in preparing a Labor Market Survey, ("LMS"), for Employer (Employer's Exhibit No. 4).

Ms. Riley notes that Claimant was an auto detailer for seventeen years at various places. He has a high school diploma and has taken auto shop classes. His experience is classified as semi-skilled. After hearing him testify Ms. Riley believes that Claimant is more skilled than some people in that occupation because his work required a lot of transferable skills; attention to

detail; customer service skills; working directly public; flexibility and quality control analysis (inspecting products equipment). He would have to be a creative thinker due to his dealing with things and people. He also has manual dexterity given his handling of a lot of moving parts and objects.

Claimant was very skilled for his work with Employer. Ms. Riley relied upon the two DME reports which indicate that Claimant could return to work as an auto detailer. She also reviewed the FCE which placed light-duty restrictions and her job summary took that into consideration. Ms. Riley tries to find jobs that she knows that the person can perform. In the LMS she located twenty-three sedentary to light-duty positions and the remaining are light to medium duty.

As far as the geographic area all of the jobs are less than thirty miles from Claimant's home. She understands that he can drive. Many jobs are still available with public transportation and/or Uber. She contacts employers and goes to the job site. The twenty-seven jobs on her LMS were available from September 5, 2017 until January 1, 2018. The wage range for these full-time positions is from $508.15 to $540.24, with an average of $524.19. After the survey, wages have gone up for two of the employers. Nine jobs involve automotive environments.

After hearing Claimant testify Ms. Riley notes that he is very articulate and friendly. That is something she would take into consideration for jobs involving customer relations. Some of the jobs could become managerial positions. Dispatching requires a lot of responsibility. In four of his past jobs Claimant was a Detail Manager which requires attention to detail. This helps him with job hunting as it shows integrity and that he can get people to resolve issues, etc.

The LMS is a representative sample of the jobs available. She utilized jobs which she felt that Claimant was best suited for. They were available from September 2017 to the present. All of the jobs on the survey are within his educational, background and physical restrictions.

As far as his lack of computer training she notes that there are many free classes available and there would also be on the job training. He could get up to speed in about two or two and a half hours for computer basics. These positions do not require advanced computer skills.

Ms. Riley contacted each employer to determine job availability. She confirmed that each employer would accept Claimant despite his pain medication prescription. Employers indicated that as long as he has a prescription, then he would be considered for the positions. Some jobs require drug testing, but as long as he has a prescription that would not prevent him from getting the jobs.

Ms. Riley also observed all of the jobs being performed. Lastly, she reviewed Dr. Rudin's deposition and based upon her review nothing precludes Claimant from performing any of the jobs on her LMS.

On cross-examination Ms. Riley clarified that she found 27 jobs available from September 2017 to January 2018. The jobs were open for a couple of weeks at least. The LMS represents the most recent date of job availability as of last Thursday, nine of the twenty-seven employers are hiring.

Ms. Riley explained that she contacts employers and goes to where the job is being performed also. She typically observes what the employee must do and often talks to someone who is actually doing the job, which makes a big difference. To determine the physical requirements she relies upon the medical information that she has and Claimant's physical limitations. She uses the DMEs, Claimant medical records and FCE to determine which jobs are

appropriate. When asked if an FCE was determined to be an invalid examination would it affect her LMS Ms. Riley would not comment on the issue as it requires medical expertise..

The Dilaudid prescription is not a bar to his employment, as long as Claimant has a prescription, employers do not have an issue with it.

Dr. Bruce J. Rudin, orthopedic surgeon, testified at the hearing by deposition on Claimant's behalf (Claimant's Exhibit No. 1). He began treating Claimant prior to the December of 2015 work accident and reviewed the pertinent medical records. He opines that prior to returning to work Claimant should be weaned off his narcotic, Dilaudid, and undergo a second FCE. He does not dispute that Claimant will be capable of returning to work, but he opines that these steps should take place first.

Dr. Rudin agrees that in relationship to this worker's compensation case he performed a spinal fusion at L4-L5 and L5-S1 in March of 2016. Claimant had a prior surgery before the work accident that Dr. Rudin opines had not healed properly when Claimant was then involved in the incident at work. Following the spinal fusion Dr. Rudin performed a hardware removal surgery on March 16, 2017. He notes that the fusion was healed. Typically, on someone who is thin the pedicle screws bother the muscles. Removal of the hardware usually gets rid of about 50 percent of the patient's residual back pain. After both surgeries Claimant was out of work and he also attended physical therapy. After the hardware removal surgery in March of 2017 Dr. Rudin referred Claimant to Dr. Seth L. Ivins to help him with pain medication and to work towards detoxing him of his opioid medication. Dr. Ivins started seeing Claimant in February of 2017 and prescribing opioids.

In reviewing the records prior to deposition Dr. Rudin skipped over the LMS because he does not believe it is his job to decide if Claimant can physically do a specific job. He provides a

note that indicates what his patients' physical capabilities are and that is what he does. At the point where he releases a patient to work he would have a conversation with that patient as to what he is physically capable of doing.

Claimant has consistently been described Dilaudid 8 mg, three to four times a day by Dr. Ivins. Dr. Rudin notes that this is quite a lot and additionally Claimant has other medications that help him periodically and some compound pain creams. The opioid is the issue. Pursuant to Dr. Ivins medical records Claimant continues to consistently rate his pain at five or six out of ten.

Dr. Rudin has no idea why Claimant has not been weaned off the Dilaudid. He cannot figure it out, especially after his review of the records. In the beginning Dr. Ivins was going to detox Claimant and then the hardware removal was scheduled. He thinks Dr. Ivins reasonably decided to hold off on getting off the detox because Claimant would have increased pain from surgery. However, typically by three months after hardware removal the patient is back to baseline. For whatever reason, and Dr. Rudin does not understand, Dr. Ivins writes in literally every single note that the patient has plateaued and is not ready for detox. To Dr. Rudin that is backwards because normally someone is not detoxed who hasn't plateaued. Once a patient has plateaued there is really no expectation of change and that is when detox indication is attempted. So Dr. Rudin does not understand why he has ten notes from Dr. Ivins that state that the patient has plateaued and is not ready for detox. It's a surprise to Dr. Rudin because Dr. Ivins has been pretty helpful in getting patients off medication.

With respect to the October 25, 2017 FCE Dr. Rudin believes it is terrible. He had a long discussion with Claimant and his wife who did not understand how in a very short period of time an FCE can determine what he is physically capable of doing. Dr. Rudin explained that it usually lasts longer and there is a lot that goes into it beforehand. Dr. Rudin notes that the entire

experience was under an hour. When Dr. Rudin first saw the report he did not read it, but now that he has read it he notes that of the hour they spent doing physical stuff, half of that was upper extremity, walking on a treadmill, stuff that has absolutely nothing to do with his ability to work. So here is an occupational therapist who spent maybe thirty minutes with Claimant when it's normally two and half hours of trying to re-create what the patient is physically capable of doing. The sheets that this therapist gave are not typical. Dr. Rudin does not understand how to extrapolate the therapist's findings into an eight hour day. He believes this is a very poor FCE. The FCE indicates that Claimant can work in a light-duty capacity eight hours a day, which Dr. Rudin felt was a bit aggressive. Claimant was "terrible" for three days after the FCE, he was taking more medication and was limping. All of these things happened as a result of the one-hour FCE, which Dr. Rudin assumes was a three-hour physical ability test. So Dr. Rudin indicated to Claimant that if he is not going to get detoxed then this is his work capability. There has been a big delay in Claimant's getting detoxed and so the thought was that Claimant could be released to work consistent with the FCE. However, when Dr. Rudin looked at the quality of the FCE he was suspect regarding its accuracy. He does not think it is reasonable to force Claimant back to work at something that is potentially harmful without a better test. Dr. Rudin's recommendation is to repeat the FCE, with someone like Neil Taylor, who Dr. Rudin says is the best guy in Delaware at performing FCE's.

Claimant was seen by Dr. Rudin on December 4, 2017 and he was noted to be at maximum medical improvement in terms of his fusion. His fusion was well healed and the remainder of his spine was noted to be pretty good by Dr. Rudin. Claimant had no significant compression lesion that Dr. Rudin could see. Dr. Rudin was not quite sure that there would be any value in further decompression. He explained the FCE to Claimant and they had a long

discussion regarding potential narcotic induced hyperalgesia as being the source of his significant residual discomfort. Dr. Rudin agreed to do nothing different and to keep Claimant out of work until he was detoxed.

At this December of 2017 appointment Dr. Rudin explained that it is not the narcotics that give the pain. Claimant has pain so he perceives severe pain and a severe limitation of function. Dr. Rudin notes that his x-rays look basically perfect. The fusions are healed, even the one that Claimant came to the see Dr. Rudin for that had not healed properly, and the one adjacent to it is healed. Dr. Rudin has removed the hardware and there is no pressure on the nerve. Thus, from an anatomic or mechanical perspective there is nothing left to do. Dr. Rudin believes that Claimant's problem is a long term use of narcotics or opioids in the amount of opioids that he takes.

Dr. Rudin explained that there is a condition called narcotic induced hyperalgesia. That is a reaction in the brain where the body perceives a painful stimulus as worse pain in a person who is taking higher doses of narcotics. Despite thinking that more medication would be beneficial, it actually results in patients getting worse. Dr. Rudin testified that the reason is because there is a section of the brain that senses pain. It is typically very small, like the size of a pea. It is right by the pituitary gland and in a patient on chronic narcotics for a long period of time that area of the brain could become the size of a lemon or a lime. So it is dramatically bigger and much less painful stimulus is required to make the patient feel terrible. Dr. Rudin explained to Claimant that the best thing he could do for himself was to wean off his medication.

Dr. Rudin agrees that Claimant has been seeing Dr. Ivins since February of 2017, for over one year, and he has yet to go through a detox program. Dr. Rudin has not spoken with Dr. Ivins about starting a detox program. He does not understand why Dr. Ivins has not done so. Dr. Rudin

was not aware of it until he was preparing for his deposition. The notes do not make any sense to Dr. Rudin and he testified that he owes Dr. Ivins a phone call to try and understand it. Dr. Rudin would have thought that Claimant would have been off his medication six to nine months ago.

Dr. Rudin clarified his opinion that when Claimant is off all of his medications the FCE should be repeated to see what he is capable of doing at the time. He suggests getting an FCE right now to see what his physical capabilities are because the one that was done is suspect. If Claimant is able to get off his medications he should be reevaluated to see what he can do. Dr. Rudin has provided notes for Claimant to be off work until that occurs.

On cross-examination Dr. Rudin agrees that his office has been treating Claimant as far back as 2014. He agrees that back then Claimant was complaining of low back pain which he rated at four out of ten. He also described that it felt like he had a bullet in his lumbar spine. Dr. Rudin eventually agreed that in September of 2014, at the time of an epidural injection, Claimant was complaining of excruciating pain. He agrees that the prior note from August 20, 2014 discusses Claimant being on Percocet at the time.

Dr. Rudin points out that during this time Claimant was complaining of thoracic spine pain and a thoracic spine MRI was ordered. He agrees however, that the chief complaint on August 20, 2014 was lumbar and thoracic spine pain. He also agrees that they did x-rays of Claimant's lumbar spine. He does not remember if his office ever found anything in the thoracic spine and he admits that he never treated Claimant for a thoracic spine problem. Again, the September 2, 2014 note indicates that Claimant had an annular tear at L4-L5. He also was describing pain at four out of ten. Dr. Rudin believes that he was working at the time.

Dr. Rudin agrees that September 17, 2014 Christiana Care records indicate that and MRI of Claimant's lumbar spine was performed and he described having bilateral buttocks pain for a

year. They also performed a body scan for lumbar radiculopathy. A lumbar CAT scan was performed on October 2, 2014 and on July 31, 2015 lumbar imaging was performed due to back pain. Dr. Rudin does not know if Claimant was taking any narcotics at that time. Dr. Rudin assumes that he was working up until the work accident. He agrees that the First State Orthopaedics notes from February 15, 2017 indicate that Claimant relays four out of ten back pain. He agrees that was after Claimant had a hardware block. So Claimant had an injection in his back to see if his hardware was causing pain. He agrees that on April 26, 2017 Claimant described his pain as two to four out of ten. Also, on July 19, 2017 Claimant described his low back pain as occasional. Dr. Rudin notes that Claimant definitely improved after the hardware removal surgery on March 16, 2017. After physical therapy he got dramatically worse. He was getting better going to therapy, doing rehab and then he hurt himself at some point.

By December 4, 2017, Claimant described his pain to Dr. Rudin as five out of ten in the notes before he had plateaued with physical therapy. This is when Dr. Rudin felt Claimant was at maximum medical improvement and Dr. Rudin thought that being detoxed was the best thing for Claimant.

Dr. Rudin agrees that he has patients who are working and that describe five out of ten pain. He explained that it is a personal sort of thing. People report pain on an individual basis. He agrees that people can work even with pain. Dr. Rudin then went into a discussion about how he had operated that day for four hours and his back was hurting, but he was still working. He agrees that he does have some patients who are able to work even if they are going through a pain management program. He also testified that he has patients who are not on any pain management who cannot work at all.

Dr. Rudin agrees that Claimant had an EMG on January 17, 2018 and it was normal. He agrees that Claimant does not have any indication of nerve damage. Dr. Rudin notes that Claimant has not been complaining of sciatica for the last three years, rather his problem is back pain, not leg pain. Every now and then he has a complaint of some L5 radiculopathy which is down the side of his leg. After the FCE it was bad and he had not had it before. It is not why Claimant had the surgery though and it is not his dominant complaint. Dr. Rudin agrees that the lumbar spine levels that he fused are totally stable and the nerves are protected and not compressed.

Dr. Rudin does not know why Claimant cannot work with four out of ten low back pain. He believes that Claimant is as healed as he is going to be from the surgeries. Claimant comes in and says that he is functionally disabled and unable to do things. Dr. Rudin thinks that his medication is a problem for him. Dr. Rudin described in detail how crippled Claimant was when he first came to see Dr. Rudin and how he's much better now that Dr. Rudin has operated on him. He admits that Claimant's ability to process pain is not good. He came in worse than most. He notes that Claimant has a problem that some people would tolerate and would be okay with, but for him it is a big problem. The way he processes these limitations and his painful stimulus is a big problem.

Dr. Rudin once again reiterated that he does not find the FCE valid. He clarified that he is not taking the position that Claimant is incapable of doing anything. He just believes that the FCE is a bad test because he thinks the assessment is wrong. Dr. Rudin believes that Claimant is going to be able to do something, whether it is four or six hours of sedentary work, he cannot say. But he believes that the FCE was not properly done. He believes that a redone FCE is going

to allow Claimant to do something. Dr. Rudin does not believe that the current FCE is substantive. The summary is wrong based on the findings during the test according to Dr. Rudin.

With respect to FCEs generally Dr. Rudin does not require one for all of his patients. He sends his workers' compensation patients for an FCE because it is paid for by the carriers. Dr. Rudin did not agree that for his non-workers compensation patients he can determine on his own whether or not they can return to work even if they don't have an FCE. Instead he says that he relies on physical therapy progress reports. He reviews the physical therapy records and determines a patient's capabilities. However, in workers' compensation cases, wherein he testifies under oath, Dr. Rudin believes the patients deserve the best information that he has and that is an FCE done properly. Dr. Rudin says that he will not assess work capabilities after three years of being off work without an FCE. He will not testify in any capacity as to what Claimant's capabilities are.

Dr. Rudin wrote the law and the point of the form that he uses is to describe what the patient is physically capable of doing. His professional medical opinion is that Claimant is totally disabled. Dr. Rudin says it is impossible for him to look at a patient who he has been seeing and has been out of work for three years and has had three spine surgeries and for him to assess whether the patient is physically capable of working. Dr. Rudin believes it would require some sort of x-ray vision that he does not have. He prefers to use an FCE. He notes that this recommendation is in the Health Care Practice Guidelines. Dr. Rudin testified that he kept Claimant out of work because he thought his physical capabilities would improve if he was detoxed, and then there would be a more realistic indication of what he is physically capable of doing. Dr. Rudin does not believe that Claimant has any more healing to do. He has permanent symptomatology. He has pain as a result of his injury and his surgeries to treat that injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Termination

In the usual 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.1 (Del. 1973). In other words, the initial burden is on the employer to show "that the employee is no longer totally incapacitated for the purpose of working." *Torres v. Allen Family Foods*, 672 A.2d 26, 30 (Del. 1995). In response, the claimant may either rebut that showing, show that he or she is a *prima facie* displaced worker or submit evidence of reasonable efforts to secure employment which have been unsuccessful because of the injury (*i.e.*, actually displaced). In rebuttal, the employer may then present evidence showing the availability of regular employment within the claimant's capabilities. *Howell*, 340 A.2d at 835; *Duff*, 314 A.2d at 918n.1. In the instant case, the Board finds that Employer has satisfied its initial burden of proof that Claimant is physically capable of working in the same capacity in which he was working at the time of the work accident.

Here Employer's expert, Dr. Smith, opines that Claimant is capable of returning to work in the same capacity in which he was working at the time of the work accident based upon his review of the records and the similarity in Claimant's symptoms and his pain levels now compared with when he was working prior to the work accident. Dr. Smith does not give much credence to an October of 2017 FCE report as he deems it invalid due to a lack of effort on Claimant's part. Dr. Rudin, Claimant's treating surgeon, opines that while he believes that Claimant can work, prior to that he wants Claimant to be weaned off his narcotic, Dilaudid, and to undergo a second FCE because Dr. Rudin also believes that the current FCE is invalid, albeit

for different reasons. The Board places more weight on Dr. Smith's opinion in this matter and finds that he provided the most persuasive opinion regarding Claimant's ability to work. *See Disabatino Brothers, Inc. v. Wortman*, 453 A.2d 102, 106 (Del. 1982); *see also Standard Distributing Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993)(holding when there is a conflict between the opinions of two experts, the Board is free to choose either one and will meet the "substantial evidence" standard on review.). Dr. Rudin's testimony does not successfully refute this opinion. Therefore, Employer's petition is granted.

To begin with the Board finds Dr. Smith's discussion compelling regarding Claimant's rating of his low back pain complaints prior to the work accident, when he was also working, and their similarity with his current complaints. Claimant alleges that they are somehow different now, but this testimony is not believable to the Board.

Claimant testified that his pain is different than it was before the work accident, despite the similarity in his pain ratings. He describes it currently as an achy, dull and gripping pain and occasional burning with motion. Previously he says it was only a burning hot pain. He also states that he cannot lift anything heavy now. The Board finds this testimony is not credible when compared with his prior medical records. The demeanor and credibility of the witnesses and the weight to be accorded their testimony is for the Board to determine. *General Motors Corp. v. Cresto*, 265 A.2d 42, 43 (Del Super. Ct. 1970). It does not account for the similarity of reporting in Claimant's medical records, nor for the times when he described more intense low back pain prior to the work event. For example, Claimant described his pain as a bullet in his lumbar spine. He also used the term excruciating in the pre-work accident records to describe his pain. His rating of pain at this time is discussed in further detail below.

Dr. Smith credibly points out that Claimant's current physical examinations are close to normal, with the exception of a slight loss of motion due to his spinal fusion. At Claimant's DMEs he was able to flex forward fifty degrees, normal being about sixty degrees. So his flexion was just a little bit short. Otherwise, his examination was normal. Claimant had no spasm, atrophy or trigger points. Neurologically his motor strength, sensation and reflexes were all normal. Claimant has normal soft tissues in the spine and no neurological deficits. There is no evidence of any nerve or spinal encroachment on any post-operative studies. His EMG is normal. Dr. Smith believes that the disconnect between Claimant's subjective complaints of pain and his objective presentation points to an exaggeration of symptoms and the Board accepts this testimony. As Dr. Smith points out this actually coincides with Dr. Rudin's testimony, in that Dr. Rudin testified that he has no idea why Claimant is out of work because he is healed from his surgeries. The surgeries appear to have been successful with no residual stenosis or instability.

Dr. Smith notes that prior to the work accident Claimant was working and treating for his low back and typically he rated his ongoing low back pain at four out of ten. Claimant's medical records reveal that currently he is consistently rating his lumbar pain at four, or less. At hearing Claimant testified that his pain was at three out of ten. Dr. Smith notes the fluctuating nature of pain complaints for patients with back issues, but here he notes a consistency in Claimant's reporting of pain. As late as July of 2017 Claimant was only complaining of occasional back pain and was negative for straight leg raise testing when he was seen by First State Orthopaedics. Overall, after an extensive record review, Dr. Smith opines that by January of 2017 Claimant was at his baseline pre-accident status as far as his reporting of pain. The Board accepts this testimony. It is noteworthy to the Board that, as Dr. Smith points out, Claimant's pain ratings

before the work accident, when he was working in his current position, are the same as he has now. The Board finds that overall, objectively and subjectively, there is no reason why Claimant cannot return to work in the same capacity in which he was working previously, consistent with Dr. Smith's opinion.

Claimant's subjective complaints of pain do not preclude him from working. A return to work does not require the absence of pain. It requires a showing by Employer that Claimant is capable of working and the Board finds that Employer has done so. Nothing in the law requires that an employee be completely pain free before that employee returns to work.[1] In fact, total disability does not even mean the "inability to continue in the same employment or the same line of work." *Federal Bake Shops, Inc. v. Maczynski*, 180 A.2d 615, 616 (Del. Super. 1962). Rather, it is the inability to perform *any* services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. *M.A. Hartnett, Inc. v. Coleman*, 226 A.2d 910, 913 (Del. 1967). Dr. Rudin's testimony provides insufficient medical support for the proposition that Claimant is so injured as to be totally disabled from all forms of employment, particularly when the credibility of Claimant's subjective complaints is doubtful.

Dr. Rudin does not testify that Claimant is unable to work, but rather that certain parameters must be met first. Essentially, Dr. Rudin agrees that Claimant will be capable of working, but Dr. Rudin will not release Claimant until he is weaned off his narcotic, Dilaudid, and at least a second FCE is performed. The Board notes that Dr. Smith agrees that Claimant should be weaned off his Dilaudid and Dr. Smith did not rely upon the FCE result either. Dr. Smith opines that neither of these issues precludes Claimant from returning to work and the

[1] Indeed, in accordance with this, Delaware's practice guidelines state that "[e]ven if there is residual chronic pain, return-to-work is not necessarily contraindicated." *Chronic Pain Treatment Guidelines*, at § 2.7.

Board agrees. Dr. Rudin's incidental opinion has not successfully refuted the expert testimony of Dr. Smith.

The Board will first consider Dr. Rudin's opinion that Claimant should be weaned off Dilaudid prior to a return to work. Interestingly, he sent Claimant to Dr. Ivins over a year ago, according to Dr. Rudin for this express purpose. Yet, Dr. Rudin has no idea why it has not been done and has not even spoken with Dr. Ivins regarding the issue. The Board finds Dr. Rudin's lack of preparedness to discuss this issue, which actually forms the basis of his opinion, significantly detracts from his opinion. It seems to have come upon him suddenly, which is inexplicable because Claimant has been seen by Dr. Ivins for over a year. Throughout Dr. Rudin's deposition he testifies that he is not sure why Dr. Ivins has not weaned Claimant off the narcotic. Yet, Dr. Rudin believes that Employer should wait for a termination of benefits until Claimant is weaned off his medication and a second FCE occurs. All parties agree that the only narcotic that Claimant is taking is Dilaudid and that it would be best for him to be weaned off it; however, the Board finds that this does not preclude Claimant from working consistent with Dr. Smith's opinion.

With respect to this weaning process, Claimant testified that Dr. Ivins does not want to wean him off Dilaudid until he finds the source of Claimant's pain. Importantly, Claimant's statement is not medical expert testimony. It is not even known if Dr. Ivins is planning on weaning Claimant off this narcotic or why he has not done so already.

Dr. Rudin makes it clear in his testimony that he is confused as to why the weaning has not been done and that at the very least it should have been done six to nine months ago. Dr. Smith explains, however, that this medication usage does not preclude Claimant from working as his body has adjusted to the dosage. Dr. Rudin does not credibly describe why he believes that

Claimant cannot work while on Dilaudid. The Board finds Dr. Smith's opinion persuasive on this matter.

Dr. Rudin next testified that he believes Claimant can work in some capacity and will be able to do so, but not until a second, better FCE is performed subsequent to the weaning process. He even suggested getting an FCE right now to see what Claimant's physical capabilities are at this time. So it appears that Dr. Rudin is suggesting two more FCEs. Dr. Rudin believes it is necessary for a certain therapist, Neil Taylor, to perform an FCE for it to be valid. This testimony is not persuasive to the Board. First, an FCE is not required in this instance, let alone an FCE by a specific therapist. Dr. Rudin testified that it is impossible for him to determine Claimant's capabilities without one, yet the Board notes that an FCE is not required in every case. While the Guidelines suggest one, these are only guidelines and not mandatory. In this instance there are other records to review and the Board finds that Dr. Smith more carefully considers the totality of the medical evidence in forming his opinion.

As noted, both experts agree that the FCE is insufficient, albeit for different reasons, and neither expert relied upon it much in forming their opinions. The Board here finds that Dr. Smith provided the more believable testimony that the FCE is invalid because of Claimant's lack of effort and the fact that he alleged that he was unable to do certain things when he reported back pain for which there is no apparent objective reason. Dr. Rudin testified that the FCE is invalid because of the brevity of the testing and lack of focus. Ultimately, this is a distinction without a difference given that Employer does not rely on the FCE either. Neither expert has relied upon the FCE in forming their opinions.

Dr. Smith goes beyond the FCE and considers Claimant's physical therapy records in forming his opinion (as well as Claimant's objective presentation). Dr. Rudin admits that he

considers physical therapy records with his non-Workers' Compensation patients, but he does not do so in this instance. Dr. Smith's review of the therapy records shows that by September of 2017 Claimant was noted to be able to carry a gallon of milk. In those records as late as September 29, 2017 Claimant reported that he felt pretty good overall. Then in October of 2017 he was discharged from therapy. Dr. Smith notes that these records are not necessarily an indicator of an automatic return to work, however, they are significant when considering the lack of any abnormal physical findings in Claimant's case. Claimant complains of severe back pain without any abnormal objective findings or upon examination, which does not make sense to Dr. Smith, or to Dr. Rudin for that matter. Importantly Claimant rated his pain at four out of ten as late as September 2017 which the Board finds is consistent with his baseline level of pain pursuant to Dr. Smith's credible testimony.

Thus, the Board does not find the reasons that Dr. Rudin provides here for requiring a second FCE before a return to work sufficient. Rather, the Board finds Dr. Smith the more credible of the experts due to his reliance on Claimant's objective presentation and Dr. Smith's record review which reveals that Claimant has returned to at least his baseline condition, one in which he was working prior to the work accident. Dr. Smith testified that Claimant can work in at least the capacity in which he was released after the FCE, or light duty, full-time work. Dr. Smith further opines that Claimant is capable of performing the same work that he was doing at the time of the work accident and the Board accepts this opinion. The Board finds that Claimant is capable of returning to work in the same capacity that he was working in prior to the work accident.

During his deposition Dr. Rudin testified that he is not taking the position that Claimant is incapable of doing anything. He also states that he is not testifying in any capacity as to

Claimant's physical capabilities. This testimony is not helpful in a termination petition where specifically Claimant's physical capabilities are at issue and whether he can return to work. Dr. Rudin also would not review the LMS testifying that he does not believe it is his job. He would not speak to Claimant's physical capabilities in relation to the specific jobs because he provides a note that indicates the physical capabilities so he believes that he does not have to consider the LMS. This also detracts from his opinion. The goal here is for Claimant to eventually return to work. One of the primary goals of the Delaware Workers' Compensation statutory scheme is "to return individuals to the work force." *Brittingham v. St. Michael's Rectory*, 788 A.2d 519, 526 (Del.). Dr. Rudin's testimony does not appear to be working toward this goal, rather it seems to be setting up insignificant barriers to Claimant's success in this realm.

To counter Dr. Smith's testimony Claimant argues that Dr. Smith's former opinion in this case, that the spinal fusion surgery was unrelated, discredits his current opinion. This argument fails as Dr. Smith's prior opinion was proffered before the parties reached an agreement about the compensability of surgery, and so it is insignificant at this hearing regarding Claimant's ability to return to work. It is a red herring. As well, Claimant's focus on Dr. Smith's permanency opinion as evidence of ongoing total disability is misguided. As Dr. Smith notes, Claimant is capable of returning to work despite a permanency rating. It is another red herring.

Lastly, Claimant argues that Dr. Smith's examinations were only cursory and so not valid, but this argument fails as well. First, only Claimant alleges that Dr. Smith's examinations were superficial. The Board notes that Dr. Smith was able to thoroughly describe Claimant's physical condition, which is not unlike Dr. Rudin's description of Claimant's objective findings. Moreover, even if there was any deficiency in his examinations, this is more than overcome by

Dr. Smith's thorough record review. The Board finds that Dr. Smith's examinations of Claimant are sufficient.

In summary, Claimant injured his lumbar spine at work two and a half years ago. He underwent a spinal fusion in March of 2016 and hardware removal one year later. Thus, it has been over one year since Claimant has undergone any related surgery. Since then his physical examinations have been normal with a slight decrease in his range of motion. He is forty-four years old. There is no neurological deficit and he has a normal EMG. He is on one narcotic, Dilaudid. He underwent an FCE in October of 2017 which found that he could work in a light-duty capacity on a full-time basis. The Board accepts Dr. Smith's testimony that he can work in at least this capacity, but to a reasonable degree of medical probability he can work in the capacity in which he was working at the time of the work accident. His recorded pain levels are similar to those before the work accident and even Claimant's own treating doctor cannot explain Claimant's inability to work. Dr. Rudin also has not placed any driving restrictions on Claimant. Overall, Dr. Rudin's testimony that a return to work requires that Claimant be weaned off Dilaudid and then a second FCE does not successfully refute the credible testimony of Dr. Smith on the issue of a return to work. As such, Employer's Termination Petition is granted.

Under Delaware case law, when a treating physician has instructed a claimant to stay out of work, that claimant is entitled to rely on the doctor's instructions and thus is considered temporarily totally disabled regardless of actual physical condition. *Gilliard-Belfast v. Wendy's, Inc.*, 754 A.2d 251, 254 (Del. 2000). In the instant case, Dr. Rudin testified that he kept Claimant out of work because he thought his physical capabilities would improve if he was detoxed first. As such the rule set forth in *Gilliard-Belfast*, and its successor cases, applies. Thus, Claimant's total disability status must end effective the date of this decision.

The next question to be addressed in the termination analysis is whether Claimant is a displaced worker. The burden of establishing the availability of employment does not fall to the employer until the claimant has, through a reasonable job search, shown an inability to secure employment. *Hager v. Acme Markets*, Del. Super., C.A. No. 99A-02-001, Alford, J., Order at 4 (May 16, 2000)(quoting *Adams v. NKS Distributors*, 1997 WL 27101 at *3 (Del. Super. Ct. 1997)). Claimant did not present any testimony that he has made an attempt at a reasonable job search to establish actual displacement. Therefore, the question is solely whether he is displaced on a *prima facie* basis. Roughly speaking, and as a practical matter, to qualify as a *prima facie* displaced worker, one must only have worked as an unskilled laborer in the general labor field. *See Vasquez v. Abex Corp.*, 618 A.2d 91 (Del. 1992) (to be a *prima facie* displaced worker, claimant must establish that he is an unskilled worker, unable to perform any task apart from general labor; and that his or her inability to perform the duties of a general laborer is causally related to the accident in issue.); *Guy v. State*, 1996 WL 111116 at *6 (Del. Super. Ct.); *Bailey v. Milford Memorial Hospital*, 1995 WL 790986 at * 7 (Del. Super. Ct.).

Claimant does not meet these criteria. He was working as a Detail Manager with Employer. He has a high school education with a focus in auto body work. He is in his mid-forties which is relatively young. He was well-spoken when he provided testimony to the Board. There is no suggestion that his mental capacity is anything but normal. The Board is satisfied that Claimant is not a *prima facie* displaced worker.

Accordingly, the Board finds that Claimant is physically capable of working and he is not a displaced worker. Because he can return to work in the same capacity in which he was working at the time of the work accident, there is no need for Employer to disprove the existence of partial disability. *See Waddell v. Chrysler Corporation*, Del. Super., C.A. No. 82A-MY-4,

Bifferato, J., slip op. at 5 (June 7, 1983)(burden to prove claimant is also not partially disabled is only on employer when "there is evidence that in spite of improvement, there is a continued disability, and such disability could reasonably affect the employee's earning capacity"). However, Employer has provided evidence of no wage loss here, due to the possibility of the Board finding Dr. Smith's testimony credible that at the very least Claimant could perform full-time, light-duty work. Employer's LMS more than satisfies its burden of proof in this instance. The FCE released Claimant to full-time, light-duty work and Employer's LMS consists of twenty-seven *sedentary* positions which do not reveal any wage loss. Thus, even if Claimant were released to sedentary work he would not suffer a wage loss. Here though the Board finds that Claimant is capable of working in the same capacity in which he was working before the work accident.

Employer presented a LMS showing a sample of sedentary jobs available. Claimant did not meaningfully challenge the survey as Dr. Rudin admits that he did not review it. Dr. Smith carefully considered all of the jobs on the survey and testified credibly that Claimant could do all of them safely, without any impact on his spine and the Board agrees. As Dr. Smith points out, most of the jobs are in the sedentary range of lifting, not requiring lifting more than five pounds, and only one job might require up to ten pounds.

The purpose of the survey is not to find a job for Claimant, but merely to establish that suitable employment opportunities are available and have been available since Claimant was able to return to work. Employer's survey has done this and importantly, it shows that even if Claimant were returned to work in a lesser capacity, that of sedentary work, he would not sustain any wage loss.

Claimant's wage at the time of his injury was $457.46 per week. The average weekly wage from the LMS is calculated at $524.19, therefore, Claimant would not realize a diminished earning capacity if the Board were to find that Claimant was capable of working in a sedentary, or even a light-duty capacity. Here, of course, the Board has found that Claimant is capable of returning to work in the same capacity that he was working in at the time of the work accident, consistent with Dr. Smith's credible testimony. Accordingly, Claimant's total disability benefits are terminated effective the date of this decision.

In conclusion, Employer has satisfied its burden of proof that Claimant is capable of returning to work. The Board finds consistent with Dr. Smith's opinion that Claimant is capable of returning to work in the same capacity in which he was working at the time of the work accident as his objective examinations reveal that he is well healed from surgery and a thorough review of the records reveals that his low back pain has returned to baseline. Dr. Rudin's testimony that weaning Claimant off Dilaudid and performing another FCE are necessary before Claimant returns to work does not successfully refute Dr. Smith's credible opinion. The Board finds that he is not a displaced worker. Claimant is not entitled to partial disability. Therefore, Employer's petition is granted as of the date of this decision.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board finds that the evidence presented supports a finding that Claimant is capable of returning to work in the same capacity in which he was working at the time of the work accident consistent with Dr. Smith's opinion. Claimant's expert does not successfully rebut this finding. Thus, Employer's petition is **GRANTED** as of the date of this decision and Claimant is not entitled to partial disability benefits.

The Board orders Employer to make appropriate reimbursement to the Workers' Compensation Fund in accordance with title 19, section 2347 of the Delaware Code.

IT IS SO ORDERED THIS 13th DAY OF APRIL, 2018.

INDUSTRIAL ACCIDENT BOARD

PETER W. HARTRANFT

for MARK A. MUROWANY

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

Mailed Date: 4-17-18

OWC Staff