BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

GARY ANDERSON,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1249425
	)	
HARBOR SEAFOOD HOUSE,	)	
	)	
Employer.	)	

DECISION ON PETITION TO DETERMINE ADDITIONAL COMPENSATION DUE

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on July 25, 2019, in the Hearing Room of the Board, in Wilmington, Delaware.

PRESENT:

IDEL M. WILSON

MARK MUROWANY

Susan D. Mack, Workers' Compensation Board, for the Board

APPEARANCES:

Jeffrey S. Friedman, Esquire, Attorney for the Employee

Joseph Andrews, Esquire, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On April 23, 2018, Gary Anderson ("Claimant") filed a Petition to Determine Additional Compensation Due seeking approval for proposed lumbar spine surgery and an associated recurrence of total disability that he alleges to be related to a compensable work accident that occurred on April 8, 2004. Harbor Seafood House ("Employer") agreed prior to the hearing that the proposed surgery was compensable; however, the Employer argued that Claimant had voluntarily withdrawn from the workforce prior to surgery and was therefore not entitled to receive total disability benefits. The only documented period of *total* disability benefits went from April 14, 2004 to June 9, 2004. The most recent period of temporary *partial* disability began on October 15, 2012 and ended on June 19, 2018 due to the exhaustion of the 300 weeks of partial disability benefits available under the Workers' Compensation Statue. Claimant has not been receiving disability benefits since that time.

A hearing was held on Claimant's petition on July 25, 2019. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Joint Stipulation of Facts: Claimant Gary Anderson was injured by an industrial accident on April 8, 2004. His average weekly wage was $565.00, which yielded a compensation rate of $376.68 per week. Pursuant to Agreements and Receipts, Claimant received the following disability compensation in this case: (1) total disability for 8.1 weeks from April 14, 2004 to June 9, 2004; (2) temporary partial disability for 2 weeks from June 10, 2004 to June 23, 2004; (3) temporary partial disability for 1.7 weeks from July 1, 2004 to July 12, 2004 (4) permanent partial disability for 33 weeks in 2009; (5) permanent partial disability for 42 weeks in 2017; and (6) temporary partial disability for 296.3 weeks from October 15, 2012 to June 19, 2018.

Claimant filed a DACD petition on April 23, 2018 seeking to retroactively convert all periods of temporary partial disability into total disability, and if this was not possible, asking if he is required to execute a Receipt as all 300 weeks of benefits have been paid. The Petition also sought a finding that proposed lumbar surgery would be reasonable, necessary, and related and asked the Board to determine whether he would be entitled to a recurrence of total disability following surgery.

As of the hearing, Claimant has withdrawn his claim for retroactive total disability benefits. The parties have agreed that the proposed surgery is reasonable, necessary, and related to the work accident. The only remaining issue for the hearing is whether the employee is entitled to a recurrence of total disability following surgery.

Bruce J. Rudin, M.D., an orthopedic spine surgeon, testified by deposition on behalf of Claimant Gary Anderson. (Claimant's Exhibit 1) Dr. Rudin confirmed that he performed a hardware removal surgery on June 7, 2012. Claimant had previously undergone a two-level lumbar spine fusion at L4-5 and L5-S1. The fusion surgery and hardware removal were both compensable procedures related to the 2004 work injury. Claimant underwent a functional capacity evaluation (FCE) on January 13, 2013[1] that determined he could return to work in a medium duty capacity. Dr. Rudin testified that Claimant was doing pretty well when he saw him in November and December 2012 and the FCE allowed Claimant to return to medium duty work. Dr. Rudin did not see Claimant again until February 2018. Dr. Balu had been providing pain management treatment in the interim. Despite occasional injections and quite a bit of medication, Claimant described worsening back and right leg pain that was severe as of February 2018. Diagnostic testing showed

[1] Dr. Rudin referred to an FCE date of January 13, 2013, but subsequent references in the medical testimony were to the FCE being done in November 2012. The November 2012 date seems to correspond to the agreement regarding temporary partial disability signed in December 17, 2012. The discrepancy in the FCE date is not relevant to the outcome of the petition.

that Claimant had severe adjacent-segment degeneration at L3-4 related to the previous fusion surgery. The biggest resulting problem was that Claimant's leg was giving out. Dr. Rudin recommended surgery, including a laminectomy to take pressure off the nerves and an extension of the spinal fusion up one level. Dr. Rudin provided Claimant with a note dated February 21, 2018 that indicated Claimant could work medium duty with restrictions on lifting and repetitive bending. Dr. Rudin also did not want Claimant loading and unloading trucks. Dr. Rudin commented that, although he has maintained the same medium duty work note in 2018 and into 2019, allowing 50-pounds of lifting with a weak leg was incorrect. He believed the note overstated Claimant's capabilities. Nonetheless, he would still allow Claimant to do something and did not believe Claimant was totally disabled. He confirmed his belief that Claimant was capable of working in some capacity from February 2018 through the most recent visit in June 2019. Dr. Rudin continued to recommend the lumbar spine surgery at the visit on June 12, 2019. If Claimant undergoes the surgery, he would begin physical therapy six weeks after surgery. Dr. Rudin anticipated releasing Claimant to some form of work between three and four months after surgery but it could take as long as six months. He did not believe Claimant would ever be released to more than a sedentary or light light-duty position.

Claimant Gary Anderson testified that he is 49 years old. He was injured in 2004 while he was loading a truck with totes of seafood for Harbor Seafood House. His low back popped as he grabbed a sliding tote while turned sideways. Dr. Rudin performed surgery for the low back injury in June 2011 and then removed the screws in a June 2012 surgery. Claimant also treated with Dr. Balu for his injuries. An FCE indicated he could do medium duty work. Claimant continued to see Dr. Balu monthly between the FCE and his return to see Dr. Rudin in 2018. In 2015, Dr. Balu placed Claimant on total disability from work. Treatment for his low back injury included injections, therapy, and deep tissue massage. The injections did not help. Claimant had a lot of

constant pain. The original low back injury was to L4-5 and L5-S1, but Claimant began getting shooting pains down his legs to his feet. He was miserable. Claimant insisted that since the low back surgery he has always been in pain. The pain has gotten progressively worse over time. In 2018, Dr. Balu sent him back to see Dr. Rudin. Claimant testified that Dr. Balu had been keeping him on total disability. Dr. Rudin told Claimant he needed additional surgery at the L3-4 level. Claimant intends to get the surgery done.

Claimant testified that his pain level at the hearing was a "strong" level seven out of ten. He felt miserable. He only gets two to three hours of sleep due to pain. He uses ice packs, a heating pad, and a TENS unit, but these only help him temporarily. Claimant gets shooting pain straight down his legs and numbness in his feet, with the pain worse on the right side. He had to stop several times on the two hour drive from Laurel to the hearing in order to get out of the car and stretch. His pain ranges from a pain level of six to seven on most days and sometimes gets as high as an eight. Claimant described his pain as similar to 2015 when Dr. Balu took him out of work. Claimant is unable to cut the grass even with a riding mower. He needs to cook food in stages and sit down while preparing the food. He tries to do as much as he can in the house. He spends his days at home and limits his activities to avoid a bad flareup in symptoms. He is able to walk his dog and walk down to the mailbox. Claimant visits his daughter and granddaughter but cannot pick up the grandchild. He has not taken any vacations for the past two years.

Claimant has not applied for SSDI. He has not applied for a job since the FCE was done. Claimant testified that he is a truck driver. He worked for Entenmann's as a delivery driver for several years after the 2004 work accident. He wants to return to the delivery driver job after undergoing the next low back surgery. Claimant does not have a CDL. It was not required for the driving jobs he has held in the past. Claimant attended school through ninth grade and does not have a GED. He went to truck driving school in 1990. Dr. Rudin told him he could do light duty

work, but Claimant stated that he is still unable to do the activities of a delivery truck driver. Stepping up into a truck and opening the doors of a truck would be difficult. Claimant intends to drive a delivery truck again if the surgery is successful.

On cross-examination, Claimant was asked to review a series of agreements and receipts he had signed over the years. (Employer's Exhibit 1) He signed a receipt on June 14, 2004 that terminated a period of total disability that began on April 14, 2004. On May 5, 2005, Claimant signed an agreement and receipt for a period of partial disability from June 10, 2004 to July 13, 2004. Agreements in 2009 and 2017 documented benefits received for permanent impairment to the lumbar spine as a result of the work accident. The most recent agreement for temporary partial disability benefits was signed on December 17, 2012 and documented partial disability benefits at the rate of $122.39 per week beginning October 15, 2012. Claimant confirmed that he signed a receipt today for the termination of the partial disability benefits as of June 19, 2018 because he had reached the maximum available 300 weeks of benefits. (Employer's Exhibit 2) Claimant conceded that he never applied for a job during the time he had been receiving partial disability benefits. He also told Dr. Balu that he had not looked for a job since the surgery in 2011. Claimant agreed that Dr. Rudin told him in 2018 that he could do medium duty work. Claimant did not know he should look for a job outside of his field of truck driving. Dr. Rudin recently gave Claimant a work release dated June 29, 2019 allowing him to perform medium duty work. Claimant has not looked for any job since then. He intends to return to work after the L3-4 surgery. If he can never do truck driving again, he will look for a different job. He has never looked for another type of job because he wanted to return to truck driving. Claimant can drive himself to work if he gets a job. Claimant confirmed that he has other health issues. He is currently being treated for leukemia. He does not believe the chemotherapy would keep him from working. He takes the chemotherapy at

night and it rarely interferes with his sleep or makes him feel sick. He has taken the chemotherapy for four years.

Under questioning by the Board, Claimant testified that he looked for truck driving jobs but did not apply for any, because the ones he found required a CDL or required more weight lifting than he believed he could do. He does not think he could lift 50 pounds. It hurts him to carry a bag of groceries. His wife drove him from Laurel to the hearing. Claimant confirmed that he went to a truck driving school, but he did not get a CDL because he got a job with a distributor that did not require it. After the 2004 work accident, Claimant worked as a route delivery driver for Entenmann's and then Snyder's. The Entenmann's job paid about $180 per week plus ten percent of sales. His last job before the surgery in 2011 was as a security guard. He was a security guard from 2009 to 2011. That was the last time he worked.

Ganesh Balu, M.D., testified by deposition on behalf of Claimant Gary Anderson. (Claimant's Exhibit 2) Dr. Balu began treating Claimant on May 19, 2004 for chronic pain related to his work injury. Claimant's initial diagnosis was discogenic low back pain diagnosed by lumbar discogram. Claimant underwent a lumbar discectomy, and when that failed, he underwent a two-level fusion at L4-5 and L5-S1. Claimant's current diagnosis is post-laminectomy syndrome and adjacent-level disease with discogenic pain affecting the levels above the fusion. Dr. Balu confirmed that he has been the primary doctor treating Claimant for chronic pain and providing him with work release notes. He gave Claimant a note taking him out of work on March 18, 2015. Dr. Balu continues to opine that Claimant is totally disabled from work due to his condition. Dr. Balu noted that Claimant has been through surgeries that did not relieve his chronic low back pain and now his condition has progressed to develop adjacent disc disease. Claimant also had continuous lumbar radiculopathy with constant pain over the years. Dr. Balu further testified that Claimant had been treated aggressively with various pain medications and injections that provided

only partial relief. Given the failed surgeries, documented functional limitations, and the need for continued medical care and possible surgery, Dr. Balu had kept Claimant out of work since 2015. Dr. Balu confirmed that multiple times he had discussed with Claimant his ability to work and whether he thought he could return to any form of work. Dr. Balu further testified that even sedentary work can not work for some patients, because the patient must sit for a certain length of time. He explained that sitting is a very bad position for persons with significant discogenic low back pain due to increased intradiscal pressure and pain. Even short-distance walking can cause pain in some patients who have failed surgery. He felt Claimant was one of the patients who could not return to any work. Dr. Balu was shown the recent physician's report from Dr. Rudin that indicated Claimant could perform medium duty work with lifting and bending restrictions. Dr. Balu continued to opine that Claimant is currently incapable of working.

On cross-examination, Dr. Balu confirmed that the first lumbar spine surgery took place in 2011 with Dr. Rudin. Dr. Balu's note from March 18, 2015 indicated that Claimant had returned to modified duty work for several years after his injury but had not worked since his last surgery. Dr. Balu kept Claimant out of work as of March 18, 2015. Dr. Balu issued another note on January 31, 2019 in which he opined that Claimant continued to be disabled given that he had not worked since his last surgery in 2011. The note also stated that Claimant had not been released to work by his treating physician, Dr. Rudin. Dr. Balu agreed that Claimant had never returned to work between 2011 and 2019. Dr. Balu was not aware that Claimant had entered into an agreement for temporary partial disability in October 2012. In his January 2019 note, Dr. Balu suggested another functional capacity evaluation to establish return-to-work capabilities. To Dr. Balu's knowledge, Claimant has not undergone another FCE.

Lawrence Piccioni, M.D., testified by deposition on behalf of the Employer, Harbor Seafood House. (Employer's Exhibit 3) Dr. Piccioni has examined Claimant multiple times since

2004 at the Employer's request. The most recent defense medical examination took place on July 27, 2018. Dr. Piccioni confirmed that he believes the proposed surgery to the lumbar spine would be reasonable, necessary, and related to the industrial accident. He is aware that Claimant injured his low back in 2004 while lifting a heavy object at work and feeling a pop in his back. Claimant's chief complaint on July 27, 2018 was increasing pain in his back that was severe enough to return to Dr. Rudin for further surgical evaluation. Dr. Piccioni had examined Claimant throughout the years and Claimant always had some back pain and "light symptoms." (*Id.* at 11) Dr. Piccioni believed that around February 2018 Claimant experienced a marked increased in his low back symptoms. He thus characterized the increase in symptoms as occurring a relatively short time before the July 2018 DME.

Dr. Piccioni agreed with Dr. Balu's statement that Claimant had not returned to work since his 2011 surgery. In addition, Claimant had signed an agreement placing him on temporary partial disability as of October 2012. Dr. Piccioni also confirmed that the June 26, 2019 physician's report of injury completed by Dr. Rudin indicated Claimant could still work eight hours at medium duty work with a lifting limit of 50 pounds. Dr. Piccioni was not familiar with any records taking Claimant out of work throughout the 2011 to June 2019 time period. Dr. Piccioni reviewed the FCE for Claimant and confirmed that it was a valid study and showed Claimant to be capable of medium duty work with various restrictions. Dr. Rudin had released Claimant to medium duty work accordingly. Dr. Piccioni also reviewed the physician's report from Dr. Rudin dated February 21, 2018. He confirmed that Dr. Rudin indicated Claimant could work eight hours medium duty and referenced the FCE. Dr. Piccioni opined that it would be inappropriate to convert retroactively the partial disability Claimant had received since 2012 into total disability. He concurred that Claimant's marked increase in symptoms, which necessitated reevaluation and further surgery, had only occurred recently in 2018.

Dr. Piccioni testified that Claimant had chronic myelogenous leukemia ("CML") for which he had been on chronic chemotherapy since 2015. Dr. Piccioni did not have access to any medical records about Claimant's cancer treatment or any limitations the oncologist might have placed on Claimant's work and daily activities. He noted that treatments for leukemia often necessitate downtime or missed time from work. He "absolutely" agreed that the cancer and chemotherapy could be a factor keeping Claimant out of work. (*Id.* at 22)

If Claimant underwent the proposed surgery, Dr. Piccioni testified that the surgery would be followed by about six weeks of total disability from work, six weeks of sedentary duty, and then restricted duty through about the six-month mark. A final determination about Claimant's work capabilities could be made about six months after surgery.

On cross-examination, Dr. Piccioni confirmed that he does not dispute the proposed surgery at L3-4 and any postsurgical treatment required. Dr. Piccioni reviewed the November 2012 FCE that concluded Claimant could work with restrictions. He is aware that Dr. Balu continued to treat Claimant from 2012 through to the present. He had not seen any forms filled out by Dr. Balu placing Claimant on no-work status during the time period. Dr. Piccioni agreed that Claimant went to see Dr. Rudin again in 2018 because he was doing worse. Dr. Rudin had provided work notes from 2018 through to the present placing Claimant on medium duty work. Dr. Piccioni confirmed that his June 27, 2018 report stated that Claimant would be considered on no work status until surgery had been performed. He explained that, at the time he prepared the report, his understanding was that surgery was imminent and he felt that a short period of total disability to prepare for surgery would be appropriate. He does not believe it would have been reasonable to keep Claimant out of work for a full year awaiting surgery.

On re-direct, Dr. Piccioni confirmed that the only FCE report he had seen was from November 2012. Dr. Piccioni saw the workers' compensation forms completed by Dr. Rudin after

2012 but not the forms completed by Dr. Balu. Dr. Rudin's forms continually relied on the FCE results and indicated Claimant could perform medium duty work. Dr. Piccioni commented that the fact Claimant had not sought treatment from Dr. Rudin for six years showed he was considered stable during that time. If a change had occurred, Dr. Piccioni would have expected Claimant to return to Dr. Rudin. Dr. Piccioni had recommended the FCE when he examined Claimant on August 8, 2012; that prompted the FCE in November 2012 and the partial disability agreement.

Dr. Piccioni acknowledged that he found Claimant to be credible and not a symptom magnifier.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Recurrence of Total Disability

Claimant Gary Anderson alleges that he should be entitled to a recurrence of total disability benefits after undergoing low back surgery related to a compensable April 8, 2004 work accident. The parties have stipulated that the proposed surgery with Dr. Rudin would be reasonable, necessary, and related to the work injury. The remaining issue for decision is whether Claimant is entitled to a recurrence of total disability benefits following the surgery. The Employer, Harbor Seafood House, does not dispute that Claimant would be unable to work for a period of time after he undergoes the lumbar spine surgery proposed by Dr. Rudin. Rather, the Employer disputes an award of total disability because it contends that Claimant has voluntarily withdrawn from the labor market, making him ineligible to receive compensation for a recurrence of total disability. Claimant insists that he is not retired and he has not voluntarily removed himself from the workforce. Claimant argues that his decision not to apply for work was related to his work-related low back injury and nothing else. He therefore believes he is entitled to total disability benefits following surgery. The only documented period of *total* disability benefits received by Claimant was in 2004, prior to the surgeries with Dr. Rudin. The parties entered into an agreement for

temporary *partial* disability benefits beginning on October 15, 2012; those benefits ended effective June 19, 2018 when Claimant reached the 300-week statutory maximum for partial disability.[2]

"The burden is upon the claimant to show recurrence after total disability benefits have terminated." *Publisher's Circulation Fulfillment v. Humber*, C.A. No. 02A-05-002, 2003 WL 1903777 at *2 (Del. Super. Ct. Apr. 17, 2003) (citing *McGlinchey v. Phoenix Steel Corp.*, 293 A.2d 585, 587 (Del. Super. Ct. 1972)). The Claimant must present evidence of a change in condition or circumstances after the prior disability was terminated to establish a recurrence. *See, e.g., Publisher's Circulation Fulfillment* at *3; *West v. Ponderosa Steak House*, C.A. No. 97A-02-005, 1998 WL 281195 at *4 (Del. Super. Ct. May 13, 1998); *Bradley v. Waco Scaffolding & Equip.*, C.A. No. 97A-02-19, 1997 WL 819131 at *2 (Del. Super. Ct. Dec. 8, 1997).

Claimant cites the legal principles outlined in *Archangelo v. State of Delaware*, Del. IAB, Hrg. No. 1389452 (May 27, 2016), *aff'd,* Del. Super., C.A. No. N16A-9-004, 2017 WL 3912786, Parkins, J. (Aug. 9, 2017), to support his argument that he did not voluntarily withdrawal from the labor market. The IAB decision in *Archangelo* provides a nice summary of relevant case law on the issue of voluntary withdrawal. The Board stated in *Archangelo*, "It is beyond dispute that, when a claimant has voluntarily withdrawn from the competitive labor market for reasons unrelated to the work accident, that claimant is not entitled to wage replacement benefits (either partial or total disability)." *Id.* at 4. While this principle has been applied to deny disability benefits where a claimant has formally retired from an employer, the courts also have made clear that the rule only applies when the retirement or withdrawal was voluntary and not motivated by the work injury. *Id.* The courts have permitted the award of disability benefits where other evidence shows that the employee intended to remain in the labor force after retirement. The Superior Court stated

[2] It seems likely Claimant received some sort of disability payments after the surgery in 2011 but no information was presented to the Board other than the agreement placing Claimant onto partial disability as of October 15, 2012.

in *General Motors Corp. v. Willis* that "simply because an individual takes a voluntary retirement does not automatically preclude receipt of partial disability benefits if an employee wishes to continue working and actively seeks, and obtains, employment after retirement." *General Motors Corp. v. Willis*, C.A. No. 99A-12-008, 2000 WL 1611067, at *3 (Del. Super. Ct. Sept. 5, 2000). As a corollary, the Superior Court has also found that an individual may withdraw from the competitive labor market without necessarily having formally retired. *See, e.g., Shaffers Markets v. Alphin*, C.A. No. 98A-04-002, Gebelein, J., 1999 WL 1568396 at *4 (Del. Super. Ct. May 18, 1999). The question such a case is "whether, under the totality of the circumstances, it can reasonably be stated that Claimant has voluntarily chosen to remove himself from the competitive labor market for reasons unrelated to his work injury." *Archangelo v. State of Delaware*, Del. IAB at 5 (citing *Redman v. State*, C.A. No. 14A-05-006, Parkins, J., slip op. at 4 (Del. Super. Ct. Feb. 4, 2015)).

The Board weighs multiple factors when determining whether a voluntary removal from the job market has occurred. Factors may include the claimant's efforts at finding other employment or failure to seek work; whether claimant is close to a normal retirement age; whether a claimant has an independent source of income; and whether the claimant is engaging in activities that might be seen as inconsistent with working such as attending school fulltime. *Id.* at 7-8. A claimant's non-work-related medical issues may also be a factor considered by the Board. *Shawn Butler v. Chrysler Group*, LLC, Del. IAB, Hrg. No. 1266852 (July 14, 2010). The review of case law in *Archangelo* shows the *length of time* a claimant has gone without seeking work has been influential in finding a voluntary withdrawal from the labor market. *Archangelo v. State of Delaware*, Del. IAB at 10-11. Previous decisions have found that a claimant demonstrated a voluntary withdrawal from the labor market where he or she did not return to work for nine years, seven years, two years and four months, one year and ten months, and one year and nine months.

Id. For example, the claimant in *State v. Disharoon*, Del. Super., C.A. No. S13A-01-003, 2013 WL 3339395, at *3 (June 17, 2013), was seeking a recurrence of total disability benefits following surgery and the employer opposed the benefits because the claimant had not worked for a year and nine months leading up to surgery, despite being advised by several treating doctors that she could perform sedentary work. The court found that the claimant did not make a good faith job search and the IAB erred in granting a recurrence of total disability benefits. *Id.* Similarly, the court in *Popken v. State*, Del. Super., C.A. No. N11A-09-009, Street, J., 2013 WL 1871754 (April 23, 2013), agreed that the claimant had not made a reasonable job search between March 12, 2009, the date she agreed to terminate total disability benefits with no ongoing wage loss, and a compensable surgery in January 2011, despite being physically capable of performing some work. The court thus affirmed the Board's conclusion that claimant had voluntarily removed herself from the workforce prior to surgery and was not eligible for a recurrence of total disability benefits after surgery. *Id.* In contrast, the Board in *Archangelo* determined that the claimant had not withdrawn from the labor market, despite his decision not to look for work for one year and four months while on partial disability benefits. *Archangelo v. State of Delaware*, Del. IAB at 13. The Board decided that other factors such as claimant's comparatively young age, lack of other income sources, and desire to concentrate on rehabilitation so he could return to his career as a professional educator weighed in favor of claimant not having withdrawn from the labor market. *Id.* While the outcomes in voluntary withdrawal cases can appear contradictory at times, the Superior Court emphasized in *State v. Disharoon*, 2013 WL 3339395, at *3, that the burden of proof in a particular case can affect the result. The court in *Disharoon* stated that, where the claimant has filed a petition seeking a recurrence of total disability benefits, she has the burden to show that she remained in the work force during the relevant time periods for which she sought benefits. *Id.*

In the case at hand, the Board weighs whether, under the totality of circumstances in this case, Claimant has met his burden to prove that he has remained a part of the work force or if he has voluntarily chosen to remove himself from the competitive labor market for reasons unrelated to his work injury. After considering the evidence presented, the Board finds that Claimant Gary Anderson voluntarily removed himself from the workforce at some point after he recovered from the 2011 and 2012 surgeries, despite the physical capacity to work, and is therefore ineligible for total disability benefits at this time. The Board reaches this conclusion for several reasons. First and foremost, Claimant provided no credible evidence that he made a good faith job search at any point after he underwent the FCE in November 2012 and his surgeon, Dr. Rudin, released him to medium duty work in accordance with the FCE results. In addition, Claimant voluntarily signed an agreement that he was partially disabled as of October 15, 2012, thus agreeing he had the physical capacity to work at some level. This agreement remained in effect through June 19, 2018, when his benefits ended due to their exhaustion under the Workers' Compensation Act, not because of a change in his medical condition. Claimant never filed a petition alleging a recurrence of total disability until April 2018, even after Dr. Balu gave him a no-work note in 2015. Claimant continued to receive partial disability payments and never sought a change in his status. Claimant stated at the hearing that he wanted to return to the work he had done in the past as a truck driver and did not feel able to do so; however, he did not seek training for or apply for any jobs within the physical capabilities identified by the FCE, Dr. Rudin, and Dr. Piccioni. Claimant also acknowledged that he had worked as a security guard for two years just prior to the 2011 surgery. This shows Claimant had substantial work experience in a job other than driving that he could have pursued after his release to work in 2012. Despite this history, Claimant admitted that he never returned to any form of work after 2011 and has not applied for any jobs. At the hearing, Claimant acknowledged that he did not intend to look for a job until after surgery. The extended

period of time when Claimant did not seek work while he remained on partial disability, along with Claimant's statement that he does not intend to work until after surgery, strongly suggest Claimant has voluntarily withdrawn from the work force for reasons other than the work injury. This case is unlike *Archangelo* where the claimant stayed out of work to concentrate on an active rehabilitation program so he could return to his high-skilled career as a professional educator. Claimant here spends his time at home hoping he will someday be able to return to driving job, a job he has not done for over ten years and is not within his current physical restrictions. Even if the time period Dr. Balu provided Claimant with total disability notes between 2015 and 2018 factored into Claimant's decision to remain out of work during that time, it does not explain why Claimant chose not to pursue employment within his capabilities between 2012 and 2015 or after Dr. Rudin provided him with medium duty release notes beginning in February 2018. Dr. Rudin testified in July 2019 that he now believes Claimant is limited to sedentary to very light duty work, but he did not opine that Claimant should stay out of all types of work.

The Board must consider additional factors besides Claimant's lack of a job search when determining whether his withdrawal from the work force was voluntary and unrelated to the work injury. Claimant is currently the relatively young age of 49 years old, which makes it less likely that he voluntarily removed himself from the workforce. Another factor that can be considered by the Board in assessing voluntary withdrawal from the workforce is information about Claimant's other sources of income, if any. The Board previously commented in *Archangelo* that the more independent income a claimant has, the more reasonable it is to conclude that the claimant has chosen to withdraw from the labor market. *Archangelo v. State*, Del. IAB at 8. The only income information presented at the hearing was that Claimant had been receiving partial disability payments of $122.39 per week through June 19, 2018 and that he did not apply for Social Security Disability benefits. Claimant also received a lump sum payment of $15,820.56 in permanency

benefits on November 14, 2017. No other evidence or testimony about income or means of support was elicited at the hearing. Due to the limited evidence, the Board cannot determine whether this factor weighs for or against a voluntary removal from the work force.

Another factor to be considered by the Board is whether Claimant is engaging in non-work activities compatible with a voluntary withdrawal from the work force, for example, attending school fulltime. Claimant testified that he spends his days at home and limits his activities to avoid a bad flareup in his low back symptoms. He described limits on his household activities. He has not taken any vacations for the past two years. He claimed to have continued significant levels of pain for which he can only obtain temporary relief. This testimony could favor a withdrawal from the work force for reasons related to his work injury rather than non-work-related activities; however, the Board did not find the degree and extent of complaints made by Claimant to be credible given the medical testimony that he was physically capable of working.

Unrelated medical issues may also be a factor in a claimant's decision to withdraw from the labor market. Dr. Piccioni thought Claimant's diagnosis and treatment for chronic leukemia since 2015 could be a factor in Claimant staying out of work, but Claimant denied the chemotherapy prevented him from working. The Board does not have enough medical evidence about the impact of the leukemia on Claimant's work capabilities to determine whether this is a substantial factor in Claimant remaining out of the work force. The Board notes that Claimant had been released to medium duty work in 2012, several years before the chemotherapy diagnosis, and did not return to work or apply for any jobs during that time period either. This reduces the likelihood that the leukemia diagnosis played a major role in Claimant's decision to remain out of work for so many years.

After weighing the totality of the facts and circumstances and considering that the burden of proof is on Claimant, the Board finds that Claimant has voluntarily withdrawn from the work

force for reasons unrelated to the work injury. The Board finds the extended period of time out of work, without making a good faith search for a job within his physical restrictions, to be the determining factor in this case. The Board accordingly finds that, at the time of the hearing, Claimant was not eligible for total disability benefits. It should be noted that voluntary withdrawals from the labor market are only temporary in nature. Even if a withdrawal is found, a claimant can subsequently return to the competitive labor market and once again be eligible for wage replacement benefits. *See, e.g., Butler v. Chrysler Group, LLC*, Del. IAB, Hrg. No. 1266852, n. 7 (July 14, 2010) (citing *Hudson v. Christiana Care Health System*, Del. IAB, Hrg. No. 1262540, at 10 (Nov. 17, 2006)).

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board DENIES Claimant's petition for recurrence of total disability.

IT IS SO ORDERED THIS 31st DAY OF OCTOBER, 2019.

INDUSTRIAL ACCIDENT BOARD

Idel Wilson
IDEL M. WILSON

Mark A. Murowany (Chair)
MARK MUROWANY

I, Susan D. Mack, Board, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

Susan D. Mack

Mailed Date: 11/6/19

TP
OWC Staff