BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

CLAUDIA DAVALOS,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1469864
	)	
ALLAN INDUSTRIES, INC.	)	
	)	
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 came before the Industrial Accident Board on July 31, 2019, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

ROBERT MITCHELL

ANGELIQUE RODRIGUEZ

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

APPEARANCES:

Cynthia H. Pruitt, Attorney for the Employee

Andrew M. Lukashunas, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On February 22, 2018 Claudia Davalos ("Claimant") injured her lumbar spine in a work accident which occurred while she was working for Allan Industries Inc., ("Employer"). Employer has acknowledged that Claimant sustained a strain and sprain injury in the work accident and has paid workers' compensation benefits, including medical expenses and total disability. Claimant's average weekly wage is $250.60 resulting in a compensation rate of $229.00 per week.

On February 6, 2019 Employer filed a Petition to Terminate Benefits, alleging that Claimant is no longer totally disabled as her work injury has resolved. Claimant maintains that her work injury issues are ongoing and that she continues to remain totally disabled. Since the date of filing, Claimant's benefits have been paid by the Workers' Compensation Fund pursuant to 19 *Del. C.* § 2347.

On July 31, 2019, the Board conducted a hearing to consider both petitions. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. Jonathan Kates, orthopedic surgeon, testified by deposition at the hearing on Employer's behalf (Employer's Exhibit No. 1). In relationship to this work accident he examined Claimant on June 7, 2018, and January 7, 2019 and reviewed the pertinent medical records. In his opinion Claimant is capable of returning to work full-time in a full duty capacity.

When Dr. Kates first saw Claimant, December 28, 2015, it was for an unrelated work accident that occurred in 2014. That work accident did not involve her lumbar spine.

On June 7, 2018 Claimant reported that she was working as a housekeeper when she was injured. She was lifting a bag of trash out of the can to throw it in the dumpster when she felt pain in her mid to low back. She felt a pressure sensation, but continued to work for several hours. The pain became severe when she was mopping the floor and at that time she reported it to her supervisor and went home. The next day she woke up in more pain and reported to the ER where she was evaluated, given an injection for pain and discharged. At that time a CT scan of the lumbar spine without contrast was performed which showed disc bulges at L3-4, L4-L5, and L5-S1. The one at L4-L5 was described as a moderate broad-based bulge. The other two were small. There was no fracture or traumatic alignment of the lumbar spine.

In June 2018 she had low back pain which she described as pressure. The pain was in the middle of her back. She would get cramping sensations in her low back. The pain occasionally radiated to her lower right lower extremity and she had occasional numbness of her right leg. The pain was worse if she sat or stood too long. It disturbed her sleep and was better if she lay prone, on her stomach, and applied ice. She was independent with activities of daily living and was cooking for her family, but it took longer. She was able to perform household chores.

On physical examination, an interpreter was present, and Claimant walked with a left sided limp, very slowly and deliberately. She was not using a cane or walker. She was able to stand on her toes and heels and had normal posture. Her shoulders and pelvis were level. She was able to stand on either leg and had normal alignment of her spine. There was tenderness in her lumbar spine and she had normal cervical range of motion. Her lumbar range of motion was markedly limited due to pain. She had normal strength in her lower extremities, except on the right. She had pain with resistance, and this affects her strength. Her reflexes were intact. She had decreased sensation in the right foot and lower leg in a stocking glove distribution, which is a non-dermatomal distribution. This is not an objective physiologic finding. Her straight leg raising in sitting and supine positions resulted in low back pain, but no leg pain.

Based upon this examination and Claimant's prior medical records Dr. Kates opines that Claimant sustained a lumbosacral strain and sprain in the work accident. Claimant had very significant symptom exaggeration and her complaints were out of portion to her physical examination finding. Her gait was very slow and deliberate, which means she seemed to be concentrating on each step. She had a limp on the left side, which is not consistent with a lumbar spine injury. She was able to stand on her toes and heels which indicates normal strength in her lower extremities from below the knee, although when Dr. Kates tested those areas she indicated pain and did not test out as normal strength. She had extremely limited range of motion of her lumbar spine, which Dr. Kates thought was out of proportion to her work injury. The decreased sensation in her right foot and leg, which was in a stocking glove distribution, was not a physiologic finding. Dr. Kates went on to explain that the nerve roots in the lumbar spine are not circumferential. They all affect a certain portion of the foot and leg. If a nerve root was injured,

Claimant would not come all the way around her foot and leg. If all of the nerve roots were injured, there would be numbness above her knee also.

With respect to medical treatment, Dr. Kates opines that up until her first DME she had not responded to any treatment, including an injection. He felt that she would benefit from physical therapy and then transition to a work conditioning program. Claimant was able to work with restrictions by June 2018. Dr. Kates recommended that the amount of time she could stand and walk, should be limited. He opined that she could lift 10 pounds frequently and 25 pounds occasionally. She could push or pull 20 pounds and 30 pounds occasionally. There was no restriction of simple grasping with her hands, pushing, pulling and fine manipulation. She could use foot controls. Dr. Kates recommended that she never bend, and squat or kneel only occasionally. She is not permitted to climb. These recommendations are based upon her clinical examination and subjective complaints. These restrictions are based on her injury and not having gone through the therapy and work conditioning program. They were appropriate restrictions at the time.

Dr. Kates next examined Claimant, with the assistance of an interpreter, on January 7, 2019. Claimant was continuing to see Dr. Eskander and another physician whose name she did not remember. She had undergone two additional injections, in September and October, that did not relieve her symptoms. In December 2018 she had an injection that helped her for two or three days. She did not go to physical therapy because she could not find a therapist that spoke Spanish. She had not returned to work. Claimant complained of low back pain in the middle of her low back. The pain radiated to her right posterior hip and her right lower extremity. She had occasional radiation to her left lower extremity she said she had occasional numbness in her right leg and a feeling that her right leg may give out, though she had not actually fallen. Her pain was worse and

by sitting, standing, walking and driving. She had pain at night if she lays on her side or back. Her pain was better lying prone. She was independent with her activities of daily living. She was able to perform household chores, cooking and cleaning, but it took her longer. She complained of difficulty bending and stated that she was able to drive and that she drove her daughter to school and back. She said she spent most of her day at home.

On physical examination Claimant had expressions of pain in any position she was in; meaning standing, sitting, walking, or lying down. She had an antalgic gait on the left side, or a limp on the left side. When she was sitting in the chair, she kept shifting from one side to the other. She was able to get on the examination table without assistance and could go from sitting to supine independently, but needed some assistance going from supine to sitting. She had tenderness in her lumbar spine, and when her upper lumbar spine was pressed, she said it made her lower lumbar spine hurt. That is an unusual finding. She had very little active range of motion of her lumbar spine. Her strength was only limited by pain in her back on certain muscle groups on the right side. That would be turning her ankle in, straightening her knee or bending her knee. Those resisted movements caused back pain. Her reflexes were normal, and her sensation was normal. Straight leg raising in the sitting and supine positions caused low back pain. Dr. Kates was unable to perform an Ober's test, or Gaenslen's (important) or Faber testing because of back pain. Dr. Kates also reviewed the interim medical records

Based upon his physical examination and Claimant's records Dr. Kates again concluded that she had a lumbosacral sprain and aggravation of her degenerative disc condition. There was no objective evidence of ongoing injury. Dr. Kates continued to opine that Claimant's subjective complaints, or her symptoms, were out of proportion to her physical findings. He noted, again, that Claimant's limp was present during the DME, but not with any of her treating physicians. During

her prior DME, in June 2018, Dr. Kates had opined that she did not need any further injections. Claimant reported that the injections she had undergone since then did not provide any pain relief. Dr. Kates opines that these injections were not reasonable or necessary. Her treating physicians were attempting to relieve her pain in any way possible, without hurting her and that is why they were recommended. However, Dr. Kates opines that the injections were not reasonable or necessary. Claimant did not undergo physical therapy as recommended at her first DME.

Dr. Kates opines that Claimant had reached maximum medical improvement by January 7, 2019 and there was no further treatment necessary. Claimant at this time could return to her usual work without restrictions. Dr. Kates reviewed Employer's LMS and opines that the 10 jobs referenced are either light or sedentary duty. He has reservations with respect to the hotel house position at the Clarion Hotel. The characteristics of the job, such as how many pounds to lift and carry and positioning were acceptable, but emptying trash receptacles and some cleaning on stairways and landings could exceed weights and positioning that they described under the physical requirements. In other words, the job might be a light-duty job. The job description also indicates that rare bending is possible. Dr. Kates agrees that if accommodations were made, such that she would not need to perform these duties, then he would not have any concerns with that job. Dr. Kates accepts all of the jobs as within Claimant's capabilities, in consideration of both her subjective complaints and objective findings.

In summary, Dr. Kates did not find Claimant's subjective complaints to be credible based upon his physical examinations. By January 7, 2019 her work-related injuries had resolved, and she had reached maximum medical improvement.

Subsequent to her last DME Claimant continues to treat with Dr. Eskander. A May 17, 2019 discogram and CT scan with contrast, ordered by Dr. Xing, were reviewed by Dr. Kates. The

discogram showed annular fissures at L3-4 and L4-5 that were grade 4 and a grade 4 annular fissure on the left at L5-S1. The tear at L3-4 was also on the left and at L4- 5 it was a central fissure. This CT with contrast showed a left grade 4 annular fissure at L3-4 and a central grade 4 annular fissure at L4-5 with some of the contrast extending out of the disc margin. At L5-S1 a grade 4 annular fissure was present on the left side. There was no central canal stenosis, lateral recess or foraminal stenosis. Dr. Kates explained that a fissure is the separation of fibers from the annulus, or the ligament that encloses the softer portion of the disc. Previously, it was called a tear, but now is called a fissure because the same findings can develop from degenerative changes that are not from trauma and the word tear indicates trauma.

Dr. Kates explained that the first CT on February 23, 2018 was taken without contrast and the second on May 17, 2019 was performed with contrast. Without the contrast the details of the annulus, such as the fissure, could not be seen. The contrast, which is injected into the disc, would leak into the fissure and show up on the CT scan. Thus, Dr. Kates agrees that these annular fissures may have existed on February 23, 2018, but were just not visible because of the nature of the study. In fact, with degenerative disc disease there are always fissures in the annulus. The findings on CT scan May 17, 2019 are consistent with a patient who has degenerative disc disease. Setting causation aside, even if the CT findings on May 17, 2019 are causing Claimant's pain, she would still be able to perform sedentary to light-duty work.

Dr. Kates agrees with Dr. Eskander's description of the May 17, 2019 CT findings, however, not with his recommendation for a spinal cord stimulator. Dr. Kates explained that Claimant has not had a trial of physical therapy as he suggested long ago. He believes that with Claimant's symptom exaggeration she is not a good candidate for a spinal cord stimulator. No treatment that Claimant has tried so far has helped her, and Dr. Kates believes that it is unlikely a

spinal cord stimulator would help. There are also potential complications and side effects from any invasive treatment. As well, Dr. Kates believes that Claimant is relatively young for a spinal cord stimulator and once the permanent stimulator is in place, she is unable to have an MRI unless it is removed, which means another surgical procedure. In Dr. Kates' opinion Claimant is not a good candidate for spinal cord stimulator.

Again, Dr. Kates has opined that Claimant reached maximum medical improvement in January 2019. No further treatment is reasonable and necessary. Her physicians trying to help her with additional procedures, the injections, which resulted in the outcome that Dr. Kates predicted, ~~were not reasonable and necessary. The studies that were taken on May 17, 2019 were related~~ because her treating physician ordered them, but they were not reasonable or necessary. The recommended spinal cord stimulator is related to Claimant's degenerative disc disease and not the work accident. It is not good treatment for Claimant as her subjective complaints of pain do not correlate with any objective findings on physical examination or diagnostic studies. Claimant is capable of sedentary to light-duty work in Dr. Kates' opinion.

On cross-examination Dr. Kates reiterated that Claimant's condition did not improve between his DME in June 2018 and January 2019. He agrees that when he saw Claimant previously with respect to a work accident taking place in 2014, there was no treatment rendered to her lumbar spine.

As to the fairly significant restrictions that he placed on Claimant in June 2018, Dr. Kates explained that he felt she did not make an effort to have the physical therapy that he recommended. He does not believe that not being able to find a therapist that could speak Spanish was a reasonable excuse because many of the therapy centers have Spanish speaking therapist and certainly if they do not, then an interpreter can be provided. Her symptoms were out of proportion to her objective

findings and Dr. Kates did not feel that Claimant was real in her physical examination. He believes by the time of her second DME that she was recovered and should return to her regular duty work. He felt it was unfortunate that she had not been released to sedentary duty in that year because she was certainly capable, given that she was taking care of her family. Claimant indicated that she was separated from her husband and cared for her two children and drove her daughter to and from school. Thus, she certainly would have been capable of sedentary work during that timeframe. By the time of her second DME, Dr. Kates felt that she had recovered from the injury and there was no reason that she could not return to work. He cannot give an exact date of when she completely recovered from the work accident. If she had gone to physical therapy for four weeks as Dr. Kates suggested and then went for work conditioning, she would have been fully recovered by approximately September 2018.

Dr. Kates was not aware that Claimant had been evaluated for physical therapy at ATI Physical Therapy on March 5, 2019. He agrees that Claimant has a history of depression. He agrees that someone with depression sometimes reacts differently to pain than someone without a history of depression. He is aware that Claimant has been on Cymbalta for several weeks. He explained that Cymbalta is an antidepressant, but it is also used in some cases for chronic pain. He cannot describe the exact mechanism of operation for chronic pain, but it is helpful for some patients.

He agrees that his opinion is that Claimant sustained a lumbosacral strain and sprain in the work accident. He agrees that physicians do not usually recommend spinal injections for lumbar strains and sprains. Dr. Kates agrees that the diagnosis of the physician who ordered the epidurals was because there is a component coming from the spine itself.

Dr. Kates agrees that the diagnostic testing shows significant conditions at L3-4, L4-5 and L5-S1. He agrees that if the degenerative disc disease of Claimant's spine became symptomatic as

a result of the work accident, then it was caused by the work accident. He agrees that Claimant has significant findings related to her low back degenerative disc disease.

Dr. Kates agrees that it would have been helpful to see Claimant after the discogram and Dr. Eskander's most recent note since she has started taking Cymbalta. He does not agree that an FCE to evaluate her ability to return to work safely is necessary here. Given her symptom exaggeration he does not believe that she could put out the effort to have an FCE, or that it would be meaningful. He agrees it is possible that if the Cymbalta had improved her condition and her perception of the pain that an FCE would be reasonable.

On redirect examination Dr. Kates clarified that even without an FCE he is still comfortable relying on his work release from January 2019. He notes that even if it is true that Claimant's perception of her pain improved because she was placed on an antidepressant, then her ability to return to work would also be improved. He agrees that in instances where a patient has been diagnosed with depression, a reasonable form of treatment is to return back into a routine, such as returning to stable work.

Dr. Kates agrees that Dr. Eskander made a referral to physical therapy in March 2019 but notes that he had recommended it back in June 2018. It was nearly a year later when Dr. Eskander finally looked into physical therapy for Claimant.

Employer next presented surveillance of Claimant from July 25, 2018, January 9, 2019 and January 10, 2019, performed by Titan Investigative Alliance, LLC. Employer's Exhibit No. 2. This surveillance was admitted without objection. It shows Claimant walking, driving, taking out trash and picking up her child from school, involving sitting in the vehicle for over twenty minutes at a time.

Truman Doyle Perry, III, Senior Vocational Case Manager, testified at the hearing regarding a Labor Market Survey, ("LMS"), which he prepared on behalf of Employer. Based on Claimant's employment as a cleaner he assumed that Claimant had less than a high school degree. The Statement of Facts indicates that Claimant's former employer was Building Services, but there was no mention of her position. He assumed it was similar, as a general cleaner. He notes that she has many transferable skills including making comparisons; taking instructions; handling items; customer and personal service skills as well as listening and communicating with peers and instructors. He also familiarized himself with Claimant's medical history and restrictions and utilized sedentary to light duty classification of jobs.

Mr. Perry found entry-level jobs that provide on-the-job training for Claimant. He notes that the jobs are amenable to people who do not speak English and many of the positions find it beneficial if the applicant speaks Spanish. Based on Claimant's background his vocational opinion is that she could earn the wages reflected on the LMS.

Mr. Perry identified ten positions available from February 7, 2019 through April 9, 2019. The average salary range for the positions is from $403.50, with a high average weekly wage of $412.00 and a low of $395.00. According to Mr. Perry, Claimant would qualify for the average weekly wage, or $403.50. Mr. Perry personally observed the jobs and confirmed their availability by contacting the potential employers. He notes that as of the day before the hearing eight of the positions were still available and all of these jobs are frequently available on the labor market.

On cross-examination Mr. Perry testified that all of the positions are full-time. They are all either light or sedentary duty and he agrees that at one point Dr. Kates opined that Claimant could work full-time without restrictions.

Dr. Mark Eskander, orthopedic surgeon, testified at the hearing by deposition on Claimant's behalf (Claimant's Exhibit No. 1). He began treating Claimant on April 3, 2018 and reviewed the pertinent medical records. In his opinion Claimant sustained a soft tissue injury, strain and sprain in the work accident and there is a disc injury at L3-4 and L4-5 and arthritic changes in her back. He opines that Claimant remains totally disabled.

At her first visit Claimant described back pain radiating to the right leg, middle of the back, slightly more to the right side, stemming from a work accident on February 26, 2018. Claimant was lifting a trash bag about 20 pounds and felt like she pulled something and immediately felt a hot feeling in her lower back. She never had any prior back pain or treatments and had been seen by Dr. Ginsberg who recommended physical therapy and was considering injections. She was also seen at Concentra after getting worked up at Christiana Hospital.

Upon physical examination she had a normal neurologic exam and normal strength, sensation and reflexes. However, there were some areas of tenderness and he was able to elicit pain in other ways. Notably she was tender at the SI joint. She had positive straight leg raising and positive Weber testing bilaterally. Those were the notable examination findings. She described radiation typically to the right leg. Claimant presented with a lumbar spine CAT scan that was done at Christiana Hospital and it showed some disc protrusions at L3-4, L4-5 and L5-S1.

At this point Dr. Eskander diagnosed Claimant with a lumbar radiculopathy, discontinued Norco and prescribed Gabapentin and Zanaflex. There were concerns about the SI joint, greater trochanter and right piriformis. Dr. Eskander wanted Dr. Bley or Dr. Voltz to perform ultrasound evaluations and injections in those areas and lumbar injections would be considered as well.

After this Dr. Eskander's office performed a lot of injections in the lumbar spine and some of the joints around the pelvis and hip. There were no significant breakthroughs as far as long term

pain reduction. Some of the injections helped for a week, and some of the lumbar injections, particularly the bilateral L5s, helped for about a week but there was no long-term change in her symptoms. By March 21, 2019 Claimant had a series of injections, at the L5 S1 level, and each provided only temporary relief. Dr. Eskander felt at this point that Claimant should be evaluated for discogenic pain and ordered a discogram which is a provocative test to elicit pain that comes from the discs. Before that he wanted Claimant to be on a medication called Cymbalta because at her last visit she was getting upset and tearful in the office. Dr. Eskander explained that Cymbalta has two effects, it can help the nerves and decrease depression, as well as help to reduce back pain. He felt that placing her on Cymbalta would allow him to keep some of her other symptoms at bay, but also allow the discogram to be a clearer test.

When Claimant returned to see Dr. Eskander after receiving the discogram he was taken aback by how good she looked. The Cymbalta had a significant positive effect on how she was feeling. She was upright, more conversant, happier, smiling and laughing. The discogram still showed that there were two bad discs. So even though she was feeling better there was structural damage at L3-4 which showed concordant pain and at L4-5 with concordant pain. There was structural damage in the form of annular tears at L5-S1 which did not have concordant pain but showed the same pathology.

Dr. Eskander notes that the way to treat the structural issues long term would be to perform a three-level lumbar fusion that could potentially have some dramatic side effects as far stiffness and continued pain. Another option to consider before doing a fusion is a spinal cord stimulator, which Dr. Eskander recommends. It can be a nice option because there is some pain relief and functionality without having to undergo a multilevel fusion. Claimant has been sent to Dr. Xing to

undergo a spinal cord stimulator trial. If she does well, then she will see a neurosurgeon for the procedure. The results of the trial are still uncertain.

As well, Dr. Eskander notes that Claimant has only just started Cymbalta. This usually takes a few weeks to take effect. She had some positive results and he would like to reevaluate her after a few weeks of Cymbalta and see what the spinal cord stimulator results look like. He agrees that Claimant has a prior history of depression. He agrees that the type of injury that Claimant has, an ongoing chronic pain, can have a different effect on someone who has depression issues. He agrees that it plays a role and needs to be acknowledged as part of the overall care of Claimant. He was quite happy with the Cymbalta result and believes that it was helping her mood and her body's understanding of pain. Dr. Eskander plans on continuing in that vein of making her body feel like there is less pain and using a spinal cord stimulator rather than a major surgery.

As far as surgery, Claimant is young and healthy and would be a good surgical candidate, but Dr. Eskander does not want to subject a patient to a multilevel fusion unless all other options have been exhausted. If she can be treated at this time without doing the fusion, long-term she would be much better off. There are a lot of consequences with a fusion that will creep up in five to fifteen years. If we could solve her problem without a major surgery, Dr. Eskander believes everyone would be happier.

As far as a diagnosis, Dr. Eskander testified that Claimant had an injury to the lumbar spine that caused back pain and radiating leg pain by throwing trash. The injury is a soft tissue injury, a strain or sprain, but there is another component to it, a disc injury at L3-4 and L4-5, at least. There are some arthritic changes in her back. The L5-S1 facet fracture probably became more painful after this event. Claimant has issues with the SI joint and greater trochanter, so those were irritated as well. Again, a lot of different structures around the lower back and pelvis had been inflamed

and irritated through this event. This has been going on for a little over a year. So on top of the injury there has been deconditioning and a lack of function. There has been sort of a multilayered effect on top of the original injury.

In summary, Dr. Eskander opines that Claimant has soft tissue and structural injuries. His goal is to reduce the pain level in her body so that he can build her back up with therapy and create some functionality so that this stuff can start to resolve and move in the right direction. He notes that he did not see anything significant regarding any previous back problems before the work accident. He believes the most likely scenario is that she had a degenerative condition of her lumbar spine that was made symptomatic by the work accident. There were degenerative changes that were quiet and there was nothing that was triggering them to be symptomatic until the work injury. Then all of those degenerative changes became acute and inflamed and triggered pain and loss of function.

Dr. Eskander agrees that he has placed Claimant on total disability from her first visit through the present time. He testified that the reason for this is because at every visit that he has had with her she was laying on the stretcher in the exam room. She was in significant pain. He did not know what the diagnosis was and did not feel comfortable sending her to work in such bad shape. It took a long time to get the diagnosis right and figure out how to relieve some of her pain. He believes we are on the right path now and finally starting to head down the right road, but she would not have been able to do much. She would have been highly likely to be injured again. She had been a risk to herself, a risk to the employer and to those around her if she really was not fit to go back to work. Again, she is now on the right path and looked better than he had ever seen her at her last visit. He is hopeful that he can continue this positive trend and get a nice result with the spinal cord stimulator. After that if things are in a new, happy place, then he will return Claimant

to work and perform an FCE to determine what her work status looks like to get her back into the workforce. He agrees that consistently throughout her records Claimant describes standing, walking and sitting causing pain and lying down makes it better. When he walks into the examination room, he usually finds her laying down on the stretcher. Aside from the last visit, Claimant was like that for the majority of her visits. He believes it has taken so long for Claimant because it has taken a long time to get the right diagnosis. The injections initially only helped temporarily. He believes that the way her brain understands pain is different, it is heightened. She has this intensity to her pain, and we need to help her brain understand that it is not as bad or at least to minimize the effect of it.

The medication Cymbalta helps to do that. Part of the diagnosis is scaling back that pain intensity and the other part would be to disconnect the brain in the spine from feeling that pain. The spinal cord stimulator can actually do that quite nicely. So he is chasing structural diagnoses this whole time and Claimant does have structural diagnoses. There is a pain threshold and understanding of pain that has to be addressed.

Dr. Eskander does not agree that Claimant could perform the jobs on Employer's LMS. She is better, but he believes that he has two more steps to get through. She needs more time on the Cymbalta and the spinal cord stimulator trial. After that she would be in a better place to return to jobs like this. He believes it would take another 4 to 6 weeks to get the rest of the treatment squared away, such that she could return to work.

Dr. Eskander reviewed the diagnostic test results, which include a CT of the lumbar spine taken February 23, 2018; an MRI taken March 13, 2018, a bone scan taken April 8, 2019 and a discogram done May 17, 2019, which have been discussed by Dr. Kates who agrees with Dr.

Eskander's discussion of the results. Dr. Eskander agrees that all treatment directed at Claimant's lumbar spine since the work accident has been reasonable, necessary and related.

On cross-examination Dr. Eskander testified that at Claimant's first visit he did not go into any more details as far as Claimant's activities of daily living, other than just positional items. Obviously, with her only decreasing pain when lying down, she really did not do much in that position. He agrees that he did not perform any range of motion measurements for the lumbar spine in his physical examinations. He agrees that he saw her approximately eight times and the examinations were the same; no neurological deficit and limitations as far as pain with provocative testing in the lumbar spine and pelvic area. He agrees that there was no clonus or Hoffman's signs during her testing. He explained that the femoral nerve stretch was negative as well.

Dr. Eskander agrees that he has been treating Claimant for approximately fourteen months and the treatment that she has received is an initial bout of physical therapy, some injections and medication. A total of five injections and she only obtained about 50% relief from the last one.

When he examined Claimant, her son was present at every visit and interpreted for her. If the son had been unavailable, then Dr. Eskander would use a translation service.

Dr. Eskander does not believe that Claimant is functional enough to return to work. Putting her back to work now would be jeopardizing a lot for her, the employer and the people around her and would not go well. He did not discuss with Claimant that she can drive her car but testified that sounds reasonable. Lifting grocery bags also sounds reasonable. She gets herself dressed and is able to get to appointments. He notes that her disability score is 62%, which is not full disability. She is able to perform some tasks, albeit with pain. So taking out the trash sounds reasonable. She probably is getting through some of her daily activities. He agrees that if someone is capable of driving, going to the grocery store and taking out trash they are capable of doing some type of

work. However, the question is whether he can send her back to work for one hour. He does not believe that putting her back to work for half an hour or an hour and setting her up to fail miserably would be productive. The goal is to return her to work and keep her functional. Only in her last visit has there been significant improvement. Dr. Eskander believes that they are headed in the right direction and ultimately that she will return to work. He believes that in a few weeks after being on Cymbalta she will be able to return to work. The plan right now is to get more Cymbalta in her system. She also has to try the trial spinal cord stimulator. It should be a few weeks and then an FCE will be done and a return to the work force. He notes that perhaps if Claimant does extremely well with Cymbalta, and even if the spinal cord trial proves to be ineffective, then he would say move forward with the FCE. He agrees that is reasonable.

Dr. Eskander testified that people with strains and sprains have symptoms for about six to eight months. Symptoms go away and there is a return to normal function. Many people are able to function reasonably well with some of the symptoms. He does not believe in this case that is the main issue. There is a strain or sprain component, there always is, but he believes the reason it is taking so long for Claimant to get better is because there is a structural component here that has not been addressed. As well, there is a pain perception issue by her body and brain that has not been addressed.

Dr. Eskander is unaware of any lumbar spine MRI done before the work accident. Dr. Eskander agrees that he does not typically treat mental health issues, but Claimant carries the diagnosis of depression. Dr. Eskander clarified that he believes that Claimant cannot return to work partly because it is a time issue. She might be able to withstand certain activities for an hour at a time, but most employers will not accept that. He does not believe that is a reasonable expectation. He desires to address her overall condition and get her to return to work in a reasonable capacity.

He believes her pain was such that she really was not functional. She can go in short spurts and perform certain duties but going to work requires something for a period of time. One would have to be able to function well enough, otherwise the job will be lost. His fears are that she would go in and be fired immediately. He notes again that Claimant does not have a 100% disability score, rather a 60% disability score, so she is doing some of her normal routine, just not well enough. Based on her responses to the questions there some functionality, but it is not high level. When she is in the office with Dr. Eskander she is laying down and that is when he sees her in that position.

On redirect examination Dr. Eskander agrees that Claimant has been taking nonnarcotic medicines for this injury.

Claimant testified at the hearing on her own behalf.[1] Claimant is 48 years old and lives with her four children who range in ages from 11 to 23 years old.

Claimant agrees that in the surveillance footage she is seen picking up her child at school who she picks up daily at approximately 3 PM. As far as activities of daily living Claimant agrees that she is able to wash and dress herself. She cleans her house sometimes and gets help from the older children. She does light cooking once in a while and the children cook as well.

Claimant agrees that surveillance showed her running errands, dropping someone off and attending medical appointments. She testified that after running the errands she has to lie down to rest for a while. She rests because of tiredness after doing her duties. Her back hurts after doing chores around the house. She can do them for a little while and then rest. She would not like to return to work because her doctor has not cleared her to do so. If her doctor released her to return to work, then she would do so.

[1] Claimant testified with the assistance of a certified Spanish language interpreter, Adriana Martinez, with a and

Claimant agrees that she was prescribed Cymbalta by Dr. Eskander and it helped her a little bit. After her injury she did physical therapy, but she was getting worse and it hurt. She tried again this year to do physical therapy.[2]

Upon questioning by the Board Claimant indicated that she started on Cymbalta at a 30 mg dosage and is now on 60 mg. She also takes ibuprofen for pain. She prepares breakfast and gets her 11-year-old daughter ready for school. She also transports her child to and from school daily. Claimant takes her older son to work and picks him up. She takes her children to doctor's appointments, pediatrician appointments, etc. When asked what her plan is for the future Claimant testified that she wants to return to work, just as before. To prepare for this she is trying to take care of herself the way the doctor tells her to.

[2] The parties agree that the record in this case has been frozen at May 30, 2019, the date of the continued hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Motion for Directed Verdict

At the close of Employer's case, Claimant moved for a Directed Verdict arguing that Dr. Kates' testimony shows that there has been no change in Claimant's condition and despite this he testified that Claimant could return to work full-time, full duty. Previously, Dr. Kates had placed restrictions on Claimant's ability to work and the parties had entered into an Agreement as to Compensation dated August 17, 2018 that Claimant was entitled to total disability at that time. Claimant argues that Employer's expert testimony does not meet the standards of Title 19, Section 2347 of the Delaware Code which provides that

> [o]n the application of any party in interest on the ground that the incapacity of the injured employee has subsequently terminated, increased, diminished or recurred or that the status of the dependent has changed, the Board may at any time, but not oftener than once in 6 months, review any agreement or award.

DEL. CODE ANN. tit. 19, § 2347.

Claimant also relies on *Sudler v. University of Delaware*, 1993 WL 189474, at *3, which states, "[t]o modify a voluntary compensation agreement based on total disability, the Employer is required to offer proof of a diminution of the disability" citing *Downes v. State,* Del.Super., C.A. No. 92A–03–006, Graves, J., (Dec. 18, 1992) Let.Op. at 3. Claimant also argues that part of the reason for its motion is that Claimant does not know what defense it is refuting: whether Claimant can work full time, full duty or with restrictions.

Employer, on the other hand, argues that there has been a change in circumstance, including the passage of time, seventeen months since the work accident. Employer asserts that other circumstances to consider in this case are Claimant's credibility, symptom magnification and duty to mitigate. Claimant's argument is that she remains totally disabled, a position which does not

change even with Employer arguing alternatively and presenting a LMS accommodating Dr. Kates' initial restrictions. Essentially, Employer maintains that it is not required to show a change in condition here and that showing a change in circumstance is sufficient.

At the hearing the Board denied Claimant's motion. Employer correctly asserts that in a petition to terminate disability benefits, an employer need not necessarily show a change in the medical condition of the claimant. It is sufficient to show that the claimant's "incapacity had terminated, not that [her] physical condition improved." *Holden v. State*, 1996 WL 280877 at *4 (Del. Super. Ct.). *See also Brokenbrough v. Chrysler Corporation*, 460 A.2d 551, 553 (Del. Super. Ct. 1983)("change of condition" standard not the appropriate burden in a termination case); *Blackstock v. J.S. Alberici Construction Co., Inc.*, 2000 WL 145820 at *3 (Del. Super. Ct.)(finding that even though doctor's opinion had not changed from the prior hearing when it had been rejected, the Board could properly rely on it in a later hearing when there was additional evidence in the form of new examinations that occurred after the prior decision had been rendered). *See also, State v. Sturgeon*, 2011 WL 2416305 (Del. Super. Ct.)(finding that where the Board's determination to deny employer's petition to terminate was based solely upon employer's failure to show a change in condition reversal is appropriate and that a petitioner seeking termination of total disability benefits must show that the claimant's condition *or circumstances* have changed since the prior determination such that the disability has diminished and claimant is now able to return to work in some capacity.).

As well, the Supreme Court has reiterated this standard for Termination petitions in *Puckett v. Matrix Services*, 2013 WL 69234 (Del.) when it held that the doctrine of *res judicata* and collateral estoppel did not prohibit the Board from terminating benefits, where the Board previously determined that the claimant was totally disabled physically and employer presented

no new evidence that claimant's physical condition had changed. The Court reinforced the premise that Section 2347 does not require that the symptoms of the injury or condition be significantly diminished; rather evidence must be presented to show that claimant is medically able to return to work and that employment is available within the claimant's work-related restrictions. Lastly, *Arrants v. Home Depot*, 65 A.3d 601 (Del. 2013) held that agreement of claimant and employer's experts that claimant had not reported a decrease in the level of his pain did not bar the Board from concluding that claimant's condition and circumstances had changed sufficiently to allow him to return to full-time sedentary work.

~~Therefore, in the instant case, Claimant's Motion for Directed Verdict is denied given this~~ principle, well established by the Court, that Employer's burden in a Petition to Terminate is not necessarily to show a change in the medical condition of a claimant. As well, the instant case requires deliberation of the factual issue as to whether Claimant's subjective complaints are to be believed. Additionally, Employer is permitted to argue in the alternative. The Board finds no basis to grant Claimant's request for a Directed Verdict.

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 no longer totally disabled as her lumbar spine work injury has resolved, and she is able to return to her usual work.

Both medical experts agree that Claimant has sustained a lumbar spine strain and sprain as well as an aggravation of her pre-existing degenerative disc disease. Where they differ has to do with the believability of her subjective complaints, treatment and most importantly, her ability to return to work. Dr. Eskander believes that Claimant continues to remain incapacitated from any form of work, while Dr. Kates opines that Claimant's condition as it relates to the work accident resolved, at the latest, by the time of his second DME on January 7, 2019 and she has been able to work since that time at her usual work, without restrictions. The Board places more weight on his opinion in this matter and finds that Dr. Kates 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.). Therefore, Employer's petition is granted.

At the crux of the matter are Claimant's subjective complaints which Dr. Kates believes are exaggerated while Dr. Eskander accepts her representations of pain as related to her objective findings. Employer argues that Dr. Eskander's evaluations were somewhat limited by Claimant's exaggerated pain complaints and laying on a stretcher during his examinations. No range of

motion measurements were done, and by all accounts her neurologic and reflex examinations have been normal.

The Board accepts Dr. Kates' well-reasoned expert opinion that as early as Claimant's first DME she had significant symptom exaggeration, as her complaints were out of portion to her physical examination. He provides specific concrete examples which are credible to the Board. Such as, that her gait was very slow and deliberate, which Dr. Kates notes is an indicator that she seemed to be concentrating on each and every step. She also had a limp on the left side, which is not consistent with her lumbar spine injury. Interestingly, this limp was only seen at her DMEs. Dr. Kates went on to point out that Claimant was able to stand on her toes and heels, which indicates normal strength in her lower extremities from below the knee, but when Dr. Kates tested those areas, she indicated pain and did not test out as normal. Claimant also had extremely limited range of motion of her lumbar spine, which Dr. Kates felt was out of proportion to her work injury.

Importantly, Dr. Kates notes that Claimant's pain distribution is not consistent with a spinal nerve problem. Dr. Kates explained that the decreased sensation in her right foot and leg was in a *stocking glove* distribution, which is not a physiologic finding. He explained that the nerve roots in the lumbar spine are not circumferential and if a nerve root is injured then it would not come all the way around the foot and leg as it did in Claimant. As well, even if all of the nerve roots were injured, then there would be numbness above the knee also, which was not present. Dr. Kates provided certain restrictions after Claimant's first DME, but he noted at that time that they were based upon her clinical presentation and subjective complaints. He further pointed out that Claimant had not gone through physical therapy and so he felt that the restrictions were appropriate.

By the time of Claimant's second DME Dr. Kates found no objective evidence of ongoing injury. Once again, her subjective symptoms were out of proportion with her physical findings. She had expressions of pain in *any* position she was in; meaning standing, sitting, walking, or lying down. She again had an antalgic gait on the left side, or a limp on the left side, which seemed to be present at her DMEs, but not when she saw her treating physicians. Interestingly, this time when her upper lumbar spine was pressed, she said it made her lower lumbar spine hurt, which Dr. Kates notes is an unusual finding. She had very little active range of motion of her lumbar spine. Her strength was only limited by pain in her back on certain muscle groups on the right side. Her reflexes were normal, and her sensation was normal. Straight leg raising in the sitting and supine positions caused low back pain. Ultimately, Dr. Kates opines that Claimant reached maximum medical improvement by the time of her second DME, January 7, 2019, and there was no further treatment necessary. He opines that by January of 2019 Claimant's work-related injuries had resolved, she had reached maximum medical improvement and was able to return to her usual work without restrictions. The Board accepts Dr. Kates' opinion as credible.

The Board finds that Dr. Eskander's testimony does not successfully refute Dr. Kates' credible opinion. Even Dr. Eskander describes Claimant as laying on the stretcher in significant pain at every examination, despite her normal neurologic and reflex examinations. Dr. Eskander has kept Claimant on total disability since her first visit with him because she has been in such significant pain at all of her visits, only laying on a stretcher in the exam room.

Interestingly though, Employer presents surveillance of Claimant as early as July of 2018 showing Claimant walking, driving, taking out trash and picking up her child from school. While the Board agrees that surveillance does not show anything earth shattering, it still reveals that Claimant is capable of much more than Dr. Eskander believes or describes during the same

timeframe when she was seen in his office. Claimant testified that she takes her daughter to and from school, her son to and from work, and is independent in her activities of daily living. She takes her children to doctors' appointments. She has been able to perform household chores, cooking and cleaning, although it takes her longer. This does not support Claimant's allegation that she is unable to work in any capacity. Again, while Board agrees that the surveillance is not momentous, it is still pivotal in revealing that Claimant is able to move, drive, sit and walk more fluidly and frequently than is believed by her treating physician, Dr. Eskander.

Claimant also exhibits an apparent lack of motivation with treatment. She terms her initial physical therapy as unsuccessful, but her medical expert does not speak to that specific issue. Then Claimant informed Dr. Kates that she did not participate in therapy because she could not find a Spanish speaking therapist. The Board finds Dr. Kates credible on this matter when he testified that this is a poor excuse given the fact that interpreters are available and there are Spanish-speaking physical therapists. Interestingly, Dr. Eskander testified that Claimant's son interpreted for all of her appointments with him. It seems to the Board that Claimant is not serious about obtaining treatment.

Even Dr. Eskander seems halfhearted in his approach to Claimant's treatment. For example, therapy was recommended by Dr. Kates as early as June 2018, however, it was not until March 2019, just after filing of this petition, that Dr. Eskander finally orders physical therapy. Dr. Eskander has been treating Claimant for approximately fourteen months and the treatment that she has received has been rather limited and to the Board does not appear directed at getting Claimant back to functioning and work. There was an initial short bout of physical therapy, suggested by Dr. Ginsberg, five injections and medication. Claimant's records indicate that from the five

injections she has only realized about 50% relief, for a very short time, from the last injection. She informed Dr. Kates at her DME that she had no relief of symptoms with these injections.

Again, to the Board neither Claimant or her doctor seem committed to the goal of getting her better and ultimately returning her to work. Dr. Eskander testified that he saw significant improvement after Claimant started taking Cymbalta, but still has made no effort to return her to work. The Board notes that 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. Eskander's testimony may indicate that is his goal, but his actual approach to Claimant's medical treatment in the last fourteen months provides little evidence of an attempt at actually working toward this goal. Dr. Eskander believes that Claimant has been unable to work because of extreme pain and that she would be highly likely to injure herself again and possibly others. The Board finds this latter assertion by Dr. Eskander pure speculation.

Lending further credibility to Dr. Kates' opinion is that at Claimant's first DME Dr. Kates opined that she did not need any further injections. This opinion was confirmed by the fact that despite several more injections, by the time of her second DME Claimant reported that these injections did not provide *any* pain relief. Dr. Kates' comes across as believable to the Board on several levels. He recommended physical therapy in June of 2018 and now Claimant's treating doctor has finally made that referral, in March 2019, after Employer filed the current petition. The Board notes that both recommendations of Dr. Kates in June of 2018 have ultimately been accepted by Dr. Eskander. Importantly though, because of the Board's finding, based on Dr. Kates' credible testimony that Claimant's symptoms are exaggerated and there has been a resolution to her work injury, any treatment recommendations after January of 2019 are unrelated to the work injury.

The Board is charged with the task of determining, based upon the evidence before it, whether Claimant is able to return to work. Employer has convinced the Board via the credible testimony of its expert witness that Claimant is able to do so and has been since her last DME. The Board agrees with Dr. Kates that Claimant's symptoms are exaggerated, not consistent with her objective findings, and that her work injury, a lumbar spine strain and sprain and aggravation of her previously existing degenerative disc disease, has resolved. As well, the Board agrees that Claimant has been capable of working in the same capacity that she was working on the day of the work accident at least since January 7, 2019. Dr. Eskander's testimony does little to persuade the Board otherwise.

With respect to Dr. Eskander's assertion that Claimant should undergo an FCE before a return to work is possible, the Board accepts Dr. Kates' opinion that this is not necessary given her symptom exaggeration. Dr. Kates does not believe that Claimant could put out the effort necessary in order to have a meaningful FCE and the Board agrees. So even without an FCE Dr. Kates is still comfortable relying on his work release starting in January 2019 and the Board accepts this opinion.

To the extent that Dr. Eskander opines that there is a pain perception problem, or any mental health issue, related to the work accident the Board finds this testimony lacking in credibility. By his own admission, Dr. Eskander does not treat mental health issues. The Board notes that by all accounts Claimant carried a diagnosis of depression before the work accident. Specific to the issues at hand, the scope of Claimant's injury and her ability to work, the Board accepts Dr. Kates' assertion that in instances where a patient has previously been diagnosed with depression, a reasonable form of treatment is to return back into a routine, such as returning to stable work. Her work related injury is limited to a lumbar strain and sprain with a temporary

aggravation of her pre-existing degenerative disc disease that resolved, at the latest, by January 7, 2019.

Claimant maintains that she has tremendous objective findings in her lower back. Dr. Eskander testified that Claimant had an injury to the lumbar spine that caused back pain and radiating leg pain by throwing trash. Only Dr. Eskander has diagnosed Claimant with a related radiculopathy here. Dr. Kates points out believably that Claimant's symptoms are not consistent with a spinal nerve problem. Dr. Eskander claims that Claimant also has issues with the SI joint and greater trochanter, which were irritated in the work accident. Then he testifies that "a lot" of different structures around the lower back and pelvis had been inflamed and irritated through this event and it has been going on for over a year. There is little specificity to his testimony regarding injuries of the pelvis and SI joint and the Board agrees with Dr. Kates that Claimant's work injury has long since resolved. The Board disagrees with Dr. Eskanders' assertion of a multilayered effect on top of the original injury and it appears to be overreaching testimony, because other than a few injections Dr. Eskander certainly has not been focused on treating Claimant. As noted above, the Board accepts Dr. Kates' credible testimony that even with her objective findings, Claimant's subjective complaints appear exaggerated here. Moreover, the Board notes that even if Claimant's subjective complaints were believable, they still do not prevent her from working.

Claimant also argues that because Dr. Kates initially provided work restrictions after her first DME and admits on cross-examination that her condition has not changed that this weakens his opinion. However, the Board notes that at the time of Claimant's first DME Dr. Kates pointed out the significant discrepancy between her subjective complaints versus her objective findings. As noted above, he provided specific, believable, examples of her symptom magnification and the Board accepts his opinion. Thus, the Board does not find Dr. Kates any less believable because

he initially provided work restrictions on June 7, 2018, despite Claimant's exaggeration of symptoms that was present at both of her DMEs.

Lastly, Employer agrees that Claimant's medical bills up until her second DME, or January 7, 2019, are compensable, and the Board accepts this as appropriate.

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 she has made an attempt at a reasonable job search to establish actual displacement. Therefore, the question is solely whether she 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 or she 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 any of the above criteria. The Board is satisfied that Claimant is not a *prima facie* displaced worker.

Accordingly, the Board finds that Claimant's work injury has resolved, there is no mental health component as loosely asserted by Dr. Eskander, she is physically capable of working in the same capacity that she was at the time of the work accident and she is not a displaced worker. Because the Board has found that Claimant's work injury has resolved and she is capable of

working in her usual capacity consistent with Dr. Kates' credible opinion, she can return to work in the same capacity in which she was working at the time of the work accident and 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").

In an abundance of caution, in the event that the Board accepted Dr. Kates' initial 2018 sedentary to light-duty work restrictions, Employer has presented a valid LMS which also shows no wage loss. Dr. Kates reviewed Employer's LMS and accepts that all of the jobs are within Claimant's capabilities in consideration of both her subjective complaints and objective findings, with the exception of some reservations concerning a the hotel house position at the Clarion Hotel. Even with the elimination of this position, Employer has more than shown that there is no wage loss here.

In conclusion, Employer's Termination Petition is granted and the Board finds, consistent with Dr. Kates' credible testimony that by the time of her second DME Claimant's work injury had resolved and she requires no further treatment related to the work accident. Employer does not dispute the compensability of Claimant's medical treatment up until January 7, 2019. The medical bills at issue are to be paid in accordance with the fee schedule pursuant to title 19, section 2322(b) of the Delaware Code.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board finds, consistent with Dr. Kates' credible testimony, that Claimant's lumbar spine work injury resolved by January 7, 2019 and she has reached maximum medical improvement. As agreed upon by Employer, her medical expenses through that date are compensable. Claimant has been able to work in her usual capacity, without restrictions, since that time and her total disability benefits are terminated as of the date of filing. Therefore, Employer's termination petition is **GRANTED**.

IT IS SO ORDERED THIS 17th DAY OF SEPTEMBER, 2019.

INDUSTRIAL ACCIDENT BOARD

Robert Mitchell
ROBERT MITCHELL

Mark L. M. / For A. R.
ANGELIQUE RODRIGUEZ

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

D Massaro

Mailed Date: 9/26/19

SW
OWC Staff