

JULIUS BAYNARD, Employee,
v.
AE QUESENBERRY, Employer.

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

Hearing No. 1483348

Mailed Date: March 18, 2020
March 17, 2020

**DECISION ON PETITION TO DETERMINE
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 December 19, 2019, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

ANGELIQUE RODRIGUEZ

VINCENT D'ANNA

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

APPEARANCES:

Natalie Wolf, Esquire, Attorney for the Employee

Christopher T. Logullo, Esquire, Attorney for the Employer

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**NATURE AND STAGE OF THE
PROCEEDINGS**

Julius Baynard ("Claimant") filed a Petition to Determine Compensation Due ("DACD") on May 21, 2019 seeking a finding that he suffered a disc injury to his lumbar spine in a work-related accident on February 13, 2019. Claimant seeks compensation for medical treatment for the lumbar disc injury, including a stem cell

replacement procedure with Dr. Rudin. Claimant also seeks total disability benefits from May 6, 2019 and ongoing. The Employer, AE Quesenberry Carpentry, has acknowledged a sprain/strain injury to the low back in a work-related accident on February 13, 2019, but it argues that the diagnosis and treatment with Dr. Rudin for a lumbar disc injury was not reasonable, necessary, or causally related to the work accident.

A hearing was held on Claimant's petition on December 19, 2019. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

The parties stipulated to the following facts: Claimant Julius Baynard was involved in a work accident on February 13, 2019 while ripping up floor boards during the course of his employment. The Employer through its carrier Liberty Mutual acknowledged a low back strain and sprain and paid without prejudice for medical treatment for a brief period following the injury. The Employer also paid for total disability benefits from February 19, 2019 through May 5, 2019. The total disability payments were made without prejudice based on an average weekly wage of \$462.84 and a compensation rate of \$308.56 per week. Claimant filed a DCD petition seeking an agreement for the February 13, 2019 work injury; recognition of compensable injuries consisting of an annular tear at L5-S1, disc displacement, and radiculopathy; continued medical treatment, including stem cell injection and platelet lysate epidural injection therapy performed November 11, 2019; and total disability benefits from May 6, 2019 and ongoing. The issues presented for

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decision at the hearing are: (1) the nature and extent of Claimant's injury; (2) whether the continued medical treatment delineated in the Medical Bill Exhibit (Claimant's Exhibit 1), including stem cell treatment, is reasonable, necessary, and causally related to the work

accident; and (3) whether Claimant is entitled to total disability benefits from May 6, 2019 forward.

Bruce J. Rudin, M.D., a board-certified orthopedic spine surgeon, testified on behalf of Claimant Julius Baynard. Dr. Rudin began treating Claimant on April 10, 2019 upon referral from WorkPro. Claimant provided a history of being 30 years old and injuring his low back during demolition work on February 13, 2019. Claimant had undergone multiple imaging tests, including an MRI, and received six weeks of physical therapy and medications. Claimant described being in constant back pain with a pain level of nine out of ten. He denied any prior low back pain during the previous year. He had injured himself in a 2008 motor vehicle accident, but that injury had resolved. Claimant also acknowledged a 2017 work incident in which a box fell on him. He did not receive any treatment related to the 2017 event. Dr. Rudin observed that Claimant was in terrible condition at the first visit. He was crying. He was unable to pick up his daughter or put on his shoes. He could not work. Dr. Rudin provided Claimant with a total disability note. Dr. Rudin suspected a stress fracture in the spine at L3-4 and focused on this at first. He noted that this would be a typical source of pain for a young person. An MRI was unimpressive but showed a hint of fracture, leading Dr. Rudin to order a CT scan. The stress fracture was confirmed by CT scan. However, a nerve block to L3-4 performed to confirmed the area as a source of pain was only thirty percent helpful. This led Dr. Rudin to question the stress fracture as the source of Claimant's severe pain. A high dose prednisone and deep tissue massage also failed to help. Dr. Rudin testified that the stress fracture seen on diagnostic testing was old, so he began to suspect the L3-4 disc as the problem instead. He felt that Claimant was eligible for a discogram according to the Delaware

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practice guidelines. He described Claimant as a "poster child" for ordering the test. Another injection was tried at L3-4 to see if that would help, but after it proved ineffective, Dr. Ginsberg

proceeded to perform a provocative discogram. The discogram produced no pain or positive findings at L3-4 and some indication of degeneration but no pain at L4-5. However, Claimant screamed with ten out of ten concordant pain when the L5-S1 disc was put under low pressure. A post-discogram CT scan showed degenerative disc changes at L5-S1. At a follow up visit on August 6, 2019, Dr. Rudin diagnosed Claimant with a suspected circumferential annular tear at L5-S1 based on the positive discogram. Dr. Rudin explained that the most common type of annular tear is radial, going from the center out, but a circumferential tear goes around the outside of the annulus. According to Dr. Rudin, Claimant was eligible for surgery under the practice guidelines, based on his severe symptoms six months after the injury and his lack of response to conservative care.

To avoid surgery, Dr. Rudin recommended Claimant undergo a regenerative medicine "stem cell" protocol. Claimant underwent the procedure two months before the hearing. Dr. Rudin asserted that Claimant is feeling much better now in comparison to before the regenerative therapy. The protocol used involves removing stem cells, concentrating them, and re-injecting them into the spine. Dr. Rudin described this process as the first truly new, promising type of care for the spine since he was in medical school. Dr. Rudin partners with another physician to perform the procedure. The consulting physician is an expert in regenerative medicine and has been performing the procedure for twelve years. Dr. Rudin asserted that 65 to 70 percent of patients who are otherwise candidates for spine surgery show improvement with regenerative medicine and avoid surgery. Dr. Rudin differentiated the process he does from the "stem cell" procedures performed by several chiropractors and primary care physicians in Delaware who are not spine experts. He

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described himself as "offended" by them calling themselves experts in this procedure after a week of training. Dr. Rudin also insisted that Dr.

Brokaw was incorrect in stating that no studies have been done on the use of regenerative medicine in the spine. He testified that a paper in the journal of the American Society of Interventional Pain Physicians summarizes all the studies about regenerative medicine in the spine conducted so far and concludes there is level III research evidence in support of using stem cell therapy for the spine. Dr. Rudin insisted that there is almost no downside to trying regenerative medicine other than some pain from inflammation due to the needles. He again asserted that a large percentage of patients improve after undergoing the procedure. In addition, the regenerative medicine process is much less expensive than surgery at about \$10,000 and the patient walks away from the procedure with only two band-aids. The procedure is safe, cheap, and easy to do, and the patient can still undergo surgery later if necessary. Dr. Rudin compared regenerative medicine to spine surgery, which costs \$125,000 and puts the patient out of work for four months. In addition, surgery patients have less than a fifty percent chance of returning to their previous job even if the surgery improves their symptoms. Dr. Rudin testified that the outcomes for stem cell treatment have been durable, lasting for years. The patient gets the full benefit of the procedure within about three months. Dr. Rudin further testified that the current Delaware practice guidelines are ten years old, and he believes a new version of the guidelines will include regenerative medicine. Dr. Rudin disagreed with Dr. Brokaw's testimony that the use of regenerative therapy was experimental. He acknowledged that the procedure used on Claimant is not FDA approved, but this is because the procedure involves harvesting the patient's own stem cells and reinjecting them. As a result, the procedure is outside of the FDA's jurisdiction. The FDA only regulates stem cell therapy where purchased stem cells are used. Dr. Rudin testified that he has sent patients to out-of-state clinics for years to have regenerative therapy

done, but the procedure is now being performed in Delaware. Dr. Rudin emphasized that medicine changes over time. The reputation of stem cell treatments has been harmed by the abuse in the use of regenerative therapy. He insisted that the new practice guidelines will try to avoid these abusive practices from occurring in Delaware workers' compensation cases.

Dr. Rudin reviewed the medical bill exhibit (Claimant's Exhibit 1). He confirmed that all the treatment represented was reasonable, necessary, and related to the work injury. The treatment, including bills from First State Orthopaedics, physical therapy, a discogram, and the regenerative medicine therapy, all occurred after the work injury. Dr. Rudin explained that the diagnostic discogram performed by Dr. Ginsberg tested three levels, whereas the discogram done to inject the stem cells was performed at one level. The stem cell procedure cost about \$15,000 including the discogram. Dr. Rudin confirmed that Spine Care Delaware covers the facility charges for treatment with Dr. Ginsberg and the stem cell procedure. Professional fees are listed in the FSO bill. Dr. Rudin opined that, but for the accident on February 13, 2019, Claimant would not have needed the treatment covered by the medical bills. He opined that the treatment was all related to the work accident.

Dr. Rudin acknowledged that Claimant may have had degeneration in his spine before the work accident, but the degeneration was asymptomatic. The work accident made the condition symptomatic. He noted that Claimant was performing heavy duty work prior to the work accident. Dr. Rudin denied that Claimant had just a sprain/strain injury from the work accident. He noted that Claimant was in terrible clinical condition when he first saw Dr. Rudin two months after the accident. Dr. Rudin insisted that something other than a sprain/strain was causing the continuing pain. The injections provided at L3-4 were not helpful for Claimant, because L3-4 was not the pain generator. Dr. Rudin again pointed to the ten out of ten pain response at L5-S1 during the

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discogram. The radiologist reading the CT scan did not find an annular tear at L5-S1, but he stated that the disc was abnormal. Dr. Rudin suspects Claimant has a circumferential annular based on the positive response to the discogram at that level. Dr. Rudin also testified that part of the treatment protocol was to "seal" a circumferential tear.

On cross-examination, Dr. Rudin testified that this is the first time he has testified in person at a hearing in 28 years of practice. He is planning to retire from performing surgery but still sees injured workers. Claimant told Dr. Rudin about a 2008 motor vehicle accident that resulted in a low back injury and leg pain. Dr. Rudin confirmed a reference in Dr. Lifrak's 2010 records to a rollover accident. Dr. Rudin had not seen Dr. Xing's records for treatment after the 2010 accident. He did not believe Dr. Lifrak's 2010 report rating permanent impairment to the low back was relevant to the current low back injury and symptoms. Dr. Rudin asserted that a person with a permanent impairment rating can still be fully functional, performing heavy duty work, and not receiving any treatment or medications. Dr. Rudin focuses on the treatment record from the year preceding the work accident to assess whether Claimant had back problems and was missing work, taking medications, or receiving treatment for a back injury. Claimant's current pain is in the back, with no radiation to the legs. Diagnostic studies showed a fracture at L3-4 but, according to Dr. Rudin, L3-4 turned out not to be the source of Claimant's pain. Dr. Ginsberg saw Claimant on June 12, 2019 and did not see a lot of pathology on the MRI. He did not believe it showed a clear annular tear. When Dr. Rudin sent Claimant to Dr. Ginsberg for a discogram, he believed Claimant had discogenic pain at L3-4. The discogram and CT scan in July 2019 were negative for pain at L3-4. Both L4-5 and L5-S1 showed degenerative changes but no annular tears were visible. Dr. Rudin insisted that the absence of an annular tear finding on the CT scan was actually consistent with a circumferential

tear. Dr. Rudin thought the pain at L5-S1 found during the discogram could

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be coming from the degenerative disc or from an annular tear, but he noted that degenerative discs are not typically painful on a discogram. The discogram/CT study must show an abnormal disc and a positive pain response for that level of the spine to be treatable. Dr. Rudin offered Claimant two choices, surgery or regenerative medicine. Claimant did not want to undergo surgery. Dr. Rudin has seen Claimant twice since the regenerative therapy, which took place on November 11, 2019. On November 18, 2019, Claimant reported seven out of ten pain and a post-injection flareup in symptoms. On December 5, 2019, Claimant's pain level was a six out of ten. Dr. Rudin observed that Claimant was much improved clinically at that exam. Claimant was able to put his clothes on and sit longer than before. Dr. Rudin still has not released Claimant to return to work and will not consider releasing him until three months after the procedure.

Dr. Rudin was asked to comment on a study published in the journal of the American Society of Interventional Pain Medicine in 2019. The article reviewed spinal research literature in regard to regenerative medicine. The discussion section of the article indicated that the studies reviewed provided fair evidence about the efficacy of regenerative medicine. Dr. Rudin noted that regenerative medicine was found to be at least as good as facet injections and epidurals for treatment of the spine. Dr. Rudin agreed that no high quality randomized control studies were reviewed. The reviewers gave more weight to better quality studies in reaching their conclusions. Dr. Rudin insisted that this article shows that Dr. Brokaw is wrong in stating that no studies exist about regenerative medicine in the treatment of the spine. Dr. Rudin testified that his own experience is that 70 percent of his patients that have used regenerative medicine have been able to avoid surgery. The procedure used at FSO is the best protocol for regenerative medicine in the spine.

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On re-direct, Dr. Rudin testified that he will evaluate Claimant three months post-procedure to determine if Claimant is capable of working or undergoing an FCE. He insisted that he must see Claimant to determine his work capability. He criticized Dr. Brokaw for stating that Claimant could return to work without examining him a second time. Dr. Rudin expressed his excitement about regenerative medicine as something new to offer spine patients. His hope is that this will help a lot of patients avoid surgery and the associated costs and impairment.

Under questioning by the Board, Dr. Rudin acknowledged that no long-term studies are available yet to determine the durability of the regenerative medicine treatment. Dr. Rudin pointed out that spine surgery usually requires years of followup care and surgery. The most recent documentation of back pain in Claimant's medical records that pre-dated the work accident was in 2017 after a box fell on Claimant. Dr. Rudin saw no evidence of treatment for back pain after that incident. Dr. Rudin insisted that Claimant's treatment has complied with the Delaware practice guidelines "by the book." During the discogram, the patient is asked whether the procedure reproduces the pain he has felt since he was injured. A positive response is considered concordant pain. If the Claimant experiences a new type of pain during the discogram, this is considered discordant pain. Dr. Rudin determined whether the work accident caused Claimant's symptoms by looking at how normal Claimant was prior to the accident. Dr. Rudin believes it is probable Claimant has a circumferential annular tear but this has not been proven by diagnostic studies. Dr. Rudin confirmed that Medicare and BCBS do not pay for regenerative medicine/stem cell treatment at this time, but he believes eventually insurance companies will pay when a history of longterm recovery has been shown. He noted that some insurance companies are paying for specific uses of stem cell therapy such as for tennis elbow. Double blind studies are unlikely to be performed

because patients do not want to agree to no treatment.

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On additional cross-examination, Dr. Rudin testified that no insurance companies pay for regenerative medicine to the spine, so far as he knows. They do pay for the treatment in other joints. Some companies who directly pay for medical treatment, such as Amazon, do pay for regenerative medicine to the spine.

Claimant Julius Baynard testified that he worked for AE Quesenberry as a carpenter's assistant and laborer in February 2019. He had worked for the company for a little over a month. On February 13, 2019, Claimant was doing demolition work on a shed. As he applied extra force to remove a floorboard, he felt a pull in his back. He did not seek treatment immediately, because he thought it was just normal pain due to the heavy work he performs. After the injury, he did lighter work for a few days. Claimant felt bad pain in his back on February 18, 2019 when he bent down to spackle. A supervisor sent him to WorkPro for evaluation. Dr. Covington at WorkPro provided medications and physical therapy. None of the treatment helped. Dr. Covington also tried to place Claimant on light duty, but the Employer did not have any light duty work available. Claimant has not worked since February 18, 2019. Dr. Covington eventually sent Claimant to see Dr. Rudin. Dr. Rudin referred Claimant for conservative care. Some medications were helpful but Claimant experienced constant pain and limits in his activities. Claimant testified that he can take a lot of pain, but this pain was constant no matter what he did. He was in pain both sitting and standing. Claimant did not want to undergo surgery at the age of 31, so he chose to undergo the stem cell treatment offered by Dr. Rudin. No hospitalization was required after the procedure. Since the stem cell treatment, Claimant feels much better. His pain level is now three to four out of ten, and he can pick up his daughter and do activities he was unable to do before the treatment. Claimant still has some stiffness in his

back. Claimant hopes to return to work but does not want

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to do a labor job anymore due to the risk of further injury. Claimant had no physical restrictions before the work accident.

Claimant confirmed that he was involved in a bad motor vehicle accident in 2010 in which he suffered multiple injuries. He had to learn to walk again after the accident. He denied any additional treatment after June 2010. Claimant was involved in a motorcycle accident in 2013. He injured his head. Claimant was released after a visit to the emergency room. In 2017, a box fell on his head at work. His boss made him go for treatment after the incident. Claimant denied any treatment for two years prior to the work accident in February 2019. Claimant did not recall any accident in 2008.

On cross-examination, Claimant confirmed that he has been involved in three motor vehicle accidents since he became an adult. He was a passenger in the January 1, 2010 MVA when the vehicle rolled over and hit a tree. Claimant treated with Dr. Lifrak. He had head pain and pain throughout his spine after the accident. Claimant did not treat after June 2010 although Dr. Lifrak noted that he still had subjective pain and muscle spasms at that time. Dr. Lifrak rated permanency for the spine injury. Claimant also had seen Dr. Xing and undergone physical therapy after the 2010 accident. The motorcycle accident occurred on March 3, 2012. Claimant was thrown from his bike and suffered a head injury. He denied a back injury. Claimant recalled an accident in high school when he was "T-boned" by a taxi. Claimant began working for QE Quesenberry in January 2019.

Dr. Rudin documented a pain level of eight to nine out of ten leading up to the stem cell procedure. Claimant reported a pain level of seven shortly after the procedure and a pain level of six on a visit to Dr. Rudin in December 2019. Claimant's pain level is now a three. Claimant has

not returned to work yet and will not do so until the doctor and the attorney tell him he can.

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Claimant does not want to undergo back surgery. Dr. Rudin told Claimant the stem cell procedure was experimental and insurance companies do not agree to pay for the procedure.

On re-direct, Claimant testified that he had no difficulty working for two years prior to his employment with QE Quesenberry in January 2019.

Under questioning by the Board, Claimant testified that he wants to return to a less physical job. He did not want to get surgery due to the long recovery period. He has young children at home who want him to be active with them. He has four children and admits to being behind in his child support.

Jason Brokaw, M.D., a specialist in physical medicine and pain management, testified by deposition for the Employer, AE Quesenberry Carpentry. (Employer's Exhibit 1) Dr. Brokaw examined Claimant on April 23, 2019 and reviewed medical records related to the case. Claimant provided a history of injuring his low back on February 13, 2019 while pulling up floorboards as he was demolishing a shed. Prior to the April DME, Claimant had treated at an urgent care center and occupational medicine clinic and seen a spine surgeon, Dr. Rudin. Dr. Brokaw has also reviewed MRIs, CT scans, and discography reports performed over the course of 2019. None of the diagnostic studies showed any posttraumatic findings such as fractures, dislocations, herniations, or tears. They showed minimal degenerative arthritis findings. Claimant has a congenital pars defect at L3-4, but this has not caused any slippage or spondylolisthesis. Dr. Brokaw described this as a coincidental finding that did not correlate to Claimant's type of pain. Claimant had received two diagnostic injections from Dr. Ginsberg. The first injection at L3-4 had a negative diagnostic and therapeutic response. Dr. Ginsberg then performed left-sided lumbar

facet injections at multiple levels in the lower lumbar spine. The second injection also had a negative diagnostic and therapeutic response. The response to the injections indicated these areas

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were not causing Claimant's pain. At the DME in April 2019, Claimant described ongoing pain in the left lower lumbar region of his spine. One episode of left leg nerve pain was brief and went away quickly. Since then, his pain had been in one area of the left lower lumbar region.

Claimant told Dr. Brokaw he had undergone treatment for low back pain after a motor vehicle accident around 2010. At that time, he was informed that he had disc herniations and a bulge. He attended therapy and chiropractic treatment, learning how to walk again. His pain resolved after about a year and he had no ongoing pain until the new injury occurred in February 2019. Dr. Brokaw relied on the history provided by Claimant, because he had not seen medical records that predated the work accident. Upon examination, Dr. Brokaw observed that Claimant weighs 339 pounds and qualifies as morbidly obese. Claimant exhibited mild leaning behavior, leaning off to the right side due to pain complaints in his left low back region. He was also leaning slightly forward. Dr. Brokaw noted tenderness to palpation at the left lumbosacral junction. Claimant had increased pain with flexion and left rotational maneuvers. Left-sided lumbar facet maneuvers were equivocal. Claimant had decreased range of motion in his lumbar spine. A neurologic exam was normal other than hypoactive ankle jerk reflexes. The examination revealed that Claimant was hurting in the left lower lumbar regions, worse with flexion, left rotation, and side bending and extension. Overall, these exam findings were most consistent with a muscular etiology, although Dr. Brokaw acknowledged that the lumbar facet maneuvers were equivocal in nature. The only objective finding was the hypoactive ankle jerk reflex, but this was not related to the lumbar spine. Dr. Brokaw assessed Claimant with a lumbar sprain in relation to the work injury on February 13,

2019. Dr. Brokaw also assessed Claimant with pre-existing disease of the lumbar spine, which included disc bulges and herniation that required treatment over 10 years ago due to a motor vehicle accident. A pars intra-articular fracture in the L3 region was a coincidental finding

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that did not correlate to Claimant/s symptoms. Dr. Brokaw diagnosed Claimant with a lumbar strain and sprain based on the mechanism of injury in the February 2019 work accident, the treatment claimant had received to date, diagnostic studies, and clinical examination results. Dr. Brokaw asserted that Claimant did not have any posttraumatic findings in his lumbar spine. Claimant did not even have significant arthritis. Dr. Brokaw felt that the mechanism of injury and the way claimant hurt when he moved was consistent with a muscular strain only.

Dr. Brokaw opined that the lumbar fusion surgery and the regenerative medicine procedure recommended by Dr. Rudin in August 2019 were not reasonable and necessary procedures for Claimant's work accident and injury. Dr. Rudin was recommending that Claimant undergo one of these procedures. Dr. Brokaw disagreed with the recommendation for surgery because the diagnostic tests did not show an annular tear or any other significant structural abnormality that would be amenable to surgery. Dr. Brokaw asserted that the discography was a subjective study and was not corroborated by the follow-up CT scan on the same day of the procedure or the diagnostic studies completed before the discogram. He did not believe this subjective test result was a good predictor of surgical success. Dr. Brokaw confirmed that the discogram was interpreted to be negative at L3-4 and negative at L4-5 but positive and concordant at L5-S1. The patient was sent for a CT scan immediately after the discogram to look for something that correlated with the pain at the L5-S1 level. Dye was placed in the middle of the disc to look for leaking out of a tear on the CT scan. No leaking was found. Dr. Rudin suspected a circumferential annular tear but no annular tear was ever seen on

the diagnostic studies of Claimant. Dr. Brokaw considered this a very equivocal clinical suspicion. He insisted that the diagnostic tests did not reveal any pathology amenable to a major surgery such as a lumbar fusion. Dr. Brokaw also testified that a main indication for surgery is the failure of conservative care. He noted that Claimant was only six

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months out from a soft tissue injury, and he felt that Claimant did not have good concordance between his objective findings and his subjective findings. Dr. Brokaw also believed that Claimant was a poor surgical candidate because of his obesity, his tobacco use, and marijuana use.

Dr. Brokaw also opined that the stem cell treatment was not reasonable for Claimant's condition. Dr. Brokaw described stem cell treatment as experimental in nature. Such treatments have been shown to be effective in certain conditions, especially around the knee and the shoulder regions. However, Dr. Brokaw testified that there are no good studies showing long-term benefit of stem cells in the lumbar spine region. He insisted that no control studies show a benefit of stem cell treatment in the lumbar spine for conditions such as Claimant has. Dr. Brokaw did not believe stem cell treatment should be performed in a workers' compensation setting. It would only be reasonable in an academic experimental setting with oversight from an investigational review board. Dr. Brokaw did not believe the stem cell treatment should be performed, because it was experimental and unlikely to benefit Claimant. In his opinion, Claimant would not be a candidate for the stem cell treatment in an academic experimental setting, due to Claimant's co-morbidities. Claimant's obesity and his workers' compensation status would preclude him from the initial investigational experiments for stem cell treatment. If such treatments proved effective and were published, Claimant might be a secondary candidate. That would not occur until years from now due to the lack of current good literature to support stem cell treatment in the lumbar spine.

Dr. Brokaw recommended weight loss, mobilization through aggressive activation-based physical therapy, and medications such as anti-inflammatories and muscle relaxers to treat Claimant's lumbar strain and sprain. Dr. Brokaw would not recommend chronic opioid medication, and he would not recommend any further aggressive procedures such as pain management injections or any other forms of surgical procedures. As of April 2019, Dr. Brokaw

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recommended two to three more months of light to medium duty work restrictions. After Claimant received appropriate treatment, he would eventually be capable of returning to full-time, full duty work without restrictions. Dr. Brokaw acknowledged that Claimant may have been disabled from work for the first couple of weeks after an acute strain such as he suffered. After that, he probably could have done sedentary to light duty work as he started to heal. Dr. Brokaw would not have totally disabled Claimant from work beyond two weeks after the work accident.

On cross-examination, Dr. Brokaw confirmed that Claimant was working full duty as a carpenter before his injury. Claimant had no restrictions on his physical capabilities to Dr. Brokaw's knowledge. He also understood that Claimant had not required any medical treatment for his low back for several years prior to the work accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Compensability

Claimant Julius Baynard seeks a finding that he suffered a lumbar disc injury in a work accident that occurred on February 13, 2019 and that the treatment for this injury, including regenerative medicine with Dr. Rudin, was reasonable, necessary, and causally related to the work accident. Claimant also seeks total disability from May 6, 2019 onward. The Employer, AE Quesenberry Carpentry, acknowledged a

sprain/strain injury to the low back in a work accident on February 13, 2019; however, the Employer contends that the diagnosis and treatment for a lumbar disc injury was not reasonable, necessary, or causally related to the work accident. Because this is Claimant's petition, he must prove his claims by a preponderance of the evidence. *See Lomascolo v. RAF Industries*, No. 93A-11-013, 1994 WL 380989, at *2 (Del. Super. Ct. June 29, 1994).

Under Delaware law, an employer is obligated to pay for reasonable and necessary medical expenses related to a work injury. *See DEL. CODE ANN. tit. 19, § 2322; Turnbull v. Perdue Farms*,

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C.A. No. 98A-02-001, 1998 WL 281201, at *2 (Del. Super. Ct. May 18, 1998), *aff'd*, 723 A.2d 398 (Del. 1998). In determining causation in an identifiable industrial accident, the "but for" standard of causation is applied. *See State v. Steen*, 719 A.2d 930, 932 (Del. 1998); *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992). "The accident need not be the sole cause or even a substantial cause of the injury. If the accident provided the 'setting' or 'trigger,' causation is satisfied for purposes of compensability." *Reese*, 619 A.2d at 910.

The Board first considers the nature of Claimant's injury in the February 13, 2019 work accident. The accident itself appears to be uncontested. After weighing the evidence, the Board finds that Claimant has proved by a preponderance of the evidence that he injured his lumbar disc in the February 13, 2019 work accident. The Board finds Dr. Rudin's opinion that Claimant suffered a lumbar disc injury at the L5-S1 level in the accident to be more credible and persuasive than that of Dr. Brokaw. *See, e.g., Peden v. Dentsply International*, C.A. No. 03A-11-003, 2004 WL 2735461, at *5 (Del. Super. Ct. Nov. 1, 2004) (finding the Board is free to choose between differing medical opinions that are supported by substantial evidence). Dr. Rudin is an orthopedic spine surgeon with specialized

training and extensive experience in the evaluation and treatment of spine injuries, whereas Dr. Brokaw does not perform spine surgery or specialize in the treatment of the spine. The Board accordingly gives Dr. Rudin's opinion additional weight in relation to Claimant's low back diagnosis. In addition, the failure of conservative care such as physical therapy and medications to alleviate Claimant's severe low back symptoms suggests a more significant injury than the back strain/sprain injury diagnosed by Dr. Brokaw. The potential for a more serious injury was recognized by the doctor who treated Claimant initially, because the doctor referred Claimant to see Dr. Rudin for evaluation within two months of the accident. Dr. Rudin then observed at his initial evaluation on April 10, 2019 that Claimant was in terrible

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condition, with constant back pain and a pain level of nine out of ten. Dr. Rudin initially suspected a stress fracture at L3-4 as a source of pain, but when an injection to this area did not provide adequate relief, he began to consider a disc injury. A provocative discogram was performed to investigate further for discogenic pain. The discogram produced no concordant pain at L3-4 or L4-5, but produced ten out of ten concordant pain at L5-S1 under low pressure. A post-discogram CT scan showed degenerative disc changes at L5-S1. Dr. Rudin explained that concordant pain is found when pressure to a disc during the discogram produces the same symptoms that the patient had been complaining about in seeking treatment. Dr. Rudin cited the discogram findings in concluding that the source of Claimant's pain was the L5-S1 disc. The Board finds Dr. Rudin's assessment of the test results and diagnosis of Claimant with a disc-related injury, not just a sprain/strain injury, to be persuasive.

Dr. Rudin suspects that Claimant's pain is coming from a circumferential tear to the annulus, given the discogram result and the absence of a radial tear appearing on the CT scan. He noted that a circumferential tear would not

show up on a CT scan. Dr. Rudin also acknowledged that the pain could be coming from degenerative changes in the disc, although he noted that degenerative discs typically were not painful on a discogram. Dr. Rudin insisted that any degenerative condition in Claimant's lumbar spine was asymptomatic before the work accident and the work accident made it symptomatic. Dr. Rudin's opinion relating Claimant's current lumbar spine pain to the work accident is supported by the medical records. The records do not document any low back pain or dysfunction for several years preceding the work accident. The most significant previous injury to the low back occurred in a 2010 motor vehicle accident, nine years ago. The Board further notes that, at the time of the February 2019 injury, Claimant was working in a very physical job with QE Quesenberry. Also, Claimant provided un rebutted

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testimony that he did not have any physical restrictions prior to the accident. After the accident, Claimant was unable to do his job and described significant symptoms and functional problems such as difficulty sitting and standing and an inability to pick up his daughter. These severe symptoms continued through conservative treatment with WorkPro and then with Dr. Rudin's office. Based on the evidence presented, the Board is satisfied that Claimant suffered a lumbar disc injury at L5-S1 on February 13, 2019 that caused severe pain and dysfunction and led to his treatment with Dr. Rudin.

The Board next considers whether the treatment with Dr. Rudin, in particular the regenerative medicine procedure, was reasonable and necessary treatment for Claimant's work-related lumbar spine injury. The Board chooses to rely on Dr. Rudin's opinion that the treatment provided to Claimant was reasonable and necessary for his work-related low back injury. Claimant was continuing to have severe symptoms when he first saw Dr. Rudin on April 10, 2019, two months post-injury. Therefore, Dr. Rudin was justified in ordering additional conservative treatment such as deep tissue

massage and sending Claimant for injections with Dr. Ginsberg in an attempt to further diagnose and treat Claimant's symptoms. When these treatments did not succeed, Dr. Rudin also was reasonable to request a provocative discogram to assess whether a lumbar disc injury was the source of Claimant's pain and dysfunction. The strong positive "concordant" response at L5-S1 shifted Dr. Rudin's attention from a suspected disc problem at L3-4 to a confirmed disc problem at L5-S1. Dr. Rudin asserted that Delaware's treatment guidelines would allow for surgical intervention in this case, six months post-injury. However, the Board concurs with Dr. Rudin and Claimant that spine surgery for a 31-year-old individual should be avoided if at all possible. Dr. Rudin thus offered a regenerative medicine treatment for

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Claimant's disc injury instead of surgery, and Claimant decided to go forward with the treatment in November 2019.

The Employer strongly opposes the compensability of the regenerative medicine or "stem cell" procedure because it considers the procedure experimental in nature. Dr. Rudin admitted that typically insurance companies do not pay for regenerative medicine procedures to the spine and consider them experimental. Nonetheless, he insisted there was support in the medical literature for his decision to treat Claimant with regenerative medicine. Dr. Rudin also opined that insurance companies eventually will pay for the procedures as a less expensive and invasive alternative to spine surgery. He noted that insurance companies do pay for some regenerative medicine protocols such as for tennis elbow. Dr. Rudin rebutted Dr. Brokaw's claim that no studies support the use of regenerative medicine for the spine. He reviewed in detail a 2019 journal article that summarized all the studies performed so far on regenerative medicine in the spine and evaluated their findings. He insisted that the article provides support for his decision to use a stem cell protocol for Claimant's lumbar spine injury. Dr. Rudin differentiated the

procedure he uses, which harvests the patient's own stem cells and injects them into the injured area, from the "stem cell" therapies used and abused by some other medical providers. Dr. Rudin further asserted that the procedure he uses is not governed by the FDA, because it does not introduce purchased cells from another person. Dr. Rudin also favors the use of the regenerative medicine protocol instead of surgery for Claimant because of the much lower cost of the procedure and the ease and safety of the procedure from the patient's perspective. He works with a physician who is expert in the field of regenerative medicine to perform the procedure for his patients. This consulting physician has found that 65 to 70 percent of patients who are otherwise candidates for spine surgery show improvement with regenerative medicine and avoid surgery.

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The Board gives extra scrutiny to treatment that is new and not yet widely adopted by the medical community, as appears to be the case for the regenerative medicine protocol used by Dr. Rudin. Furthermore, regenerative medicine to treat spine injuries is not included in Delaware's current practice guidelines for treating low back injuries. Dr. Rudin also benefits financially from performing regenerative medicine on spine patients, which could bias his opinion on the efficacy of the treatment. Nonetheless, the Employer has not offered credible evidence to rebut Dr. Rudin's testimony about the safety and efficacy of the procedure for a spine patient such as Claimant. Dr. Brokaw does not appear to have any training or experience in the use of regenerative medicine to treat the spine or in regenerative medicine or treatment of the spine generally, so his testimony does not carry the same weight as that of Dr. Rudin in this instance. In addition, Claimant underwent the regenerative medicine treatment about a month before the hearing and reported a significant reduction in his pain level both to his treating doctor and at the hearing. It is too early to tell if the treatment will provide longterm benefit, but the improvement in symptoms described by Claimant provides evidence that, at least in the shortterm, the

regenerative medicine protocol has benefited Claimant. The Board also concludes that the severity of Claimant's pain and lack of response to multiple attempts at conservative care prior to the use of the regenerative medicine therapy favored the use of the stem cell procedure in this case. The stem cell procedure was a reasonable attempt at alleviating Claimant's symptoms without undergoing the much greater expense and invasiveness of spine surgery. This is particularly true where Claimant is so young and has been out of work for so long. Thus, in consideration of the facts and evidence presented to the Board at this time, the Board finds that Claimant has met his burden to prove that the treatment with Dr. Rudin, including the regenerative medicine protocol, has been reasonable and necessary treatment for his work-related lumbar spine injury.

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After weighing the evidence, the Board finds that Claimant has proved by a preponderance of the evidence that he injured his lumbar disc at L5-S1 in the February 13, 2019 work accident. The Board also finds that the medical treatment rendered has been reasonable, necessary, and causally related to the work accident. The Employer shall pay medical expenses in accordance with the applicable fee schedule.

Total Disability

In addition to the claim for medical treatment, Claimant seeks payment for total disability benefits from May 6, 2019 and ongoing. The Employer previously paid total disability benefits without prejudice from February 19, 2019 through May 5, 2019 at the rate of \$309.56 per week. Dr. Rudin testified that he placed Claimant on total disability when he first saw Claimant on April 10, 2019 and he continued to maintain Claimant on total disability as of the date of the hearing. He planned to keep Claimant on total disability for at least three months after the regenerative medicine procedure performed on November 11, 2019. On the other hand, Dr. Brokaw testified that he did not believe total

disability from work was required more than two weeks after the date of injury. He recommended two to three more months of restricted duty work after his examination of Claimant on April 23, 2109, but after that he anticipated Claimant would be able to return to full duty, fulltime work.

The Board finds Dr. Rudin more credible on the issue of disability for several reasons. Dr. Rudin and Claimant have described significant symptoms and limitations over the course of Claimant's treatment and a lack of improvement until the recent stem cell treatment in November 2019. Dr. Rudin has continued to see Claimant in person since April 2019 whereas Dr. Brokaw has not seen Claimant since the DME on April 23, 2019. This puts Dr. Rudin in a better position to judge work capability through to the present time. Additionally, Claimant recently underwent

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the regenerative medicine treatment with Dr. Rudin and the Board finds it reasonable to allow Claimant time to respond to the treatment before returning to work. Dr. Rudin has recommended at least three months of total disability after the procedure, and no one has rebutted his testimony about the necessary recovery time.

Based on the preceding discussion, the Board accepts Dr. Rudin's opinion that Claimant has been total disabled from April 10, 2019 to the present. Claimant is awarded total disability from May 6, 2019 and ongoing at the rate of \$308.56 per week. The Board expects that Claimant will be released to some form of work as early as possible, since Claimant has been out of work for a year at this point. The Board has often recognized that a return to work is helpful in the recovery of injured workers. Claimant has expressed interest in returning to a less physical job than he was performing at the time of injury.

Attorney's Fee and Medical Witness Fee

A claimant who is awarded compensation is entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the

award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller." 19 *Del. C.* § 2320. At the current time, the maximum based on Delaware's average weekly wage calculates to \$10,888.40.

In setting an attorney's fee, the Board considers the factors set forth in *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973). Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation. Claimant has been awarded workers' compensation benefits with respect to his lumbar spine injury. An attorney's fee award is thus warranted in this case.

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Claimant's counsel submitted an affidavit stating that she spent 34 hours preparing for the hearing on the pending petition. Claimant's counsel has been a member of the Delaware bar since 1993 and has extensive experience in the practice of workers' compensation law. Counsel has represented Claimant since May 6, 2019. Counsel does not represent Claimant in anything other than a workers' compensation context. This case was no more complex than the usual case. Claimant's counsel represents that she has a contingent fee arrangement with Claimant. A copy of the fee agreement was provided to the Board. Counsel's hourly rate for a non-contingent case is \$475 per hour but she recognizes that counsel of similar experience and skill typically have hourly rates of approximately \$300 to \$350 per hour. Counsel represents that no fees have been or will be received from any other source. There is no evidence that Employer is unable to pay an attorney's fee.

Taking into consideration the factors set forth above and the fees customarily charged in this locality for similar services, the Board finds that an attorney's fee of the maximum statutory fee or thirty percent of the award, whichever is less, is reasonable and within statutory limits in this case.

A medical witness fee for medical testimony on behalf of Claimant is awarded to Claimant, in accordance with title 19, section 2322(e) of the *Delaware Code*.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board GRANTS the Claimant's Petition to Determine Additional Compensation Due. The Board finds that Claimant has injured his L5-S1 lumbar disc in the February 13, 2019 work accident. The Board also finds that the medical treatment rendered under the direction of Dr. Rudin has been reasonable, necessary, and causally related to the work accident. The Employer shall pay medical expenses in accordance with the applicable fee schedule.

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The Board further awards total disability from May 6, 2019 and ongoing at the rate of \$308.56 per week. An attorney's fee of the maximum statutory fee or thirty percent of the award, whichever is less, and a medical witness fee are also awarded.

IT IS SO ORDERED THIS 17th DAY OF MARCH, 2020.

INDUSTRIAL ACCIDENT BOARD

/s/ _____
ANGELIQUE RODRIGUEZ

/s/ _____
VINCENT D'ANNA

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

/s/ _____

Mailed Date: 3-18-20

/s/ _____
OWC Staff