

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

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| ROBERT GIBBONS, |) | |
| |) | |
| Employee, |) | |
| |) | |
| v. |) | Hearing No. 1012995 |
| |) | |
| HEARTLAND INDUSTRIES, |) | |
| |) | |
| Employer. |) | |

CLAIMANT’S PETITION TO APPEAL A UTILIZATION REVIEW DECISION

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 (“Board”) on November 2, 2020 pursuant to 19 *Del. C.* §2301(B) *via* WebEx Meeting platform pursuant to the Industrial Accident Board COVID-19 Emergency Order dated May 11, 2020.

PRESENT:

MARK MUROWANY

ROBERT MITCHELL

Julie Pezzner, Workers’ Compensation Hearing Officer, for the Board

APPEARANCES:

Stephen Morrow, Attorney for the Employee

Andrew Carmine, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Mr. Robert Gibbons ("Claimant") sustained a compensable work injury to his lumbar spine while pulling a heavy cart on September 13 1993 during his employment by Heartland Industries ("Employer"). As a result of the work accident, on July 11, 1994, Dr. Michael Sugarman performed a lumbar spine surgery that included an L5-S1 discectomy. Around 2008, Claimant underwent a procedure for placement of a spinal cord stimulator. On April 1, 2010, Claimant commenced treating with Dr. Ross Ufberg for pain management and continues treating with Dr. Ufberg presently.

Employer, through Travelers Insurance, disputed the compliance with the Delaware Health Care Practice Guidelines ("Practice Guidelines") Dr. Ufberg's medical treatment to include prescription medications including OxyContin and oxycodone from January 10, 2020 and ongoing by requesting a utilization review. A February 18, 2020 Utilization Review decision certified that office visits and prescriptions for Cymbalta and gabapentin were compliant with the Practice Guidelines but that the prescriptions for OxyContin and oxycodone were not compliant.

On March 4, 2020, Claimant filed a Petition to Appeal a Utilization Review Decision in which it contends that the OxyContin and oxycodone prescriptions have been and continue to be reasonable and necessary. Employer disputes the petition.

A hearing was held *via* WebEx meeting platform on Employer's petition on November 2, 2020. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. Ross Ufberg who is board certified in physical medicine and rehabilitation and is a certified provider under the Delaware Workers' Compensation Healthcare Payment System testified by deposition to a reasonable degree of medical probability on behalf of Claimant. He

commenced treating Claimant on April 1, 2010. He opined that his prescribed dosages of OxyContin and oxycodone prescriptions are reasonable and necessary. OxyContin is a long-acting opioid. Oxycodone is a short-acting opioid for breakthrough pain.

When Dr. Ufberg commenced treating Claimant, Claimant was taking two eighty milligram tablets of OxyContin three times daily. Claimant took them at 5:00 a.m., at 1:00 p.m. and at bedtime. He also was taking three thirty milligram tablets of oxycodone two times daily for breakthrough pain. Claimant reported that while treating with Dr. Kim he had tried a variety of muscle relaxants including Flexeril, Lyrica, and Neurontin to no avail.

Dr. Ufberg highlighted his medication adjustments. On December 9, 2011, he added Cymbalta for depression and neuropathic pain and tapered Claimant off from Zoloft. On November 2, 2012, Dr. Ufberg increased the Cymbalta dosage because Claimant reported that the Cymbalta was helping a lot to address his leg pain. On October 28, 2013, Dr. Ufberg switched Claimant from Elavil (an amitriptyline) to Pamelor (a nortriptyline). Pamelor has a side effect of drowsiness so that would help Claimant sleep. On May 18, 2015 Dr. Ufberg switched Claimant from Pamelor to Lunesta because Pamelor was causing dry mouth. Lunesta has a little more sedating effect than Ambien. On January 7, 2016, Dr. Ufberg added gabapentin for extremity pain.

In January, 2018, Claimant experienced great relief in his leg pain after completing a course of a prednisone. On January 26, 2018, Dr. Ufberg discussed titrating Claimant down from the current OxyContin dosage in light of experienced benefit and of recognizing Claimant's high dosage of OxyContin.

On April 11, 2018, Claimant underwent a nerve block that provided five days relief. On April 25, 2018, Claimant underwent a second nerve block that provided great relief in his back and his right lower extremity pain. On April 27, 2018, Claimant reduced his OxyContin intake by

taking one tablet at bedtime instead of two. He also was only taking one tablet daily of oxycodone. Claimant continued to take one six hundred milligram tablet of gabapentin daily and one ninety milligram tablet of Cymbalta daily. Claimant reported he had not needed to take Lunesta at bedtime. In August 2018, Claimant's muscle spasms worsened to the point he could not drive. In September 2018, Claimant reported that Flexeril was not helping.

On January 10, 2020, Claimant reported having increased sharp severe low back pain radiating down the right leg with associated numbness and tingling in the toes of his right foot over recent weeks. He continued to report difficulty with prolonged standing, with prolonged walking, with prolonged sitting and with prolonged driving. Such activities aggravated his low back and leg pain. Dr. Ufberg gave Claimant a lumbar support that reduced Claimant's pain and extended the duration of walking. Claimant's overall walking duration remained limited because his leg pain would become incapacitating.

Claimant rated his pain at a seven out of ten and rated his average daily pain at a seven out of ten. He said at its worst, his pain could rise to a ten out of ten. In terms of how much his pain limited his abilities on a scale of zero (no impact) to ten (prohibiting), Claimant rated his general mood and his abilities to work, to sleep, and to participate in social activities and in household chores at a seven. He rated how his injury impacts his relationship with his family and his sexual activities at a six. He reported he has to lie down ten times daily due to pain. His pain awakened him at night although he reported sleeping six hours nightly. He stated that he usually feels rested when he wakes up.

Upon physical examination, Claimant's range of motion of the thoracic spine and lumbosacral spine were markedly limited as they had always been. Forward flexion was limited to thirty degrees. Extension was limited to five degrees. Rotation was limited to thirty-five degrees

bilaterally. He reported pain on all ranges of motion. He had exquisite tenderness and severe spasm over the thoracic and lumbosacral paraspinal muscles. His muscle spasms were constant.

Dr. Ufberg most recently saw Claimant on June 5, 2020. Claimant continued to have severe muscle spasm across the back. He continued to have problems with prolonged sitting, prolonged standing, prolonged walking and prolonged driving. Claimant continued the same medication regimen and dosages since the 2018 titration. Claimant denied side effects from the medications. Claimant reported that without the medications he would have to lie in bed due to back pain, leg pain and spasm. He reported that the medications allowed him to rest at night and to better tolerate sitting, standing and walking. Dr. Ufberg did not discuss additional titration of dosages because Claimant's leg pain had gotten worse eliminating titration as a viable option.

Until recently, Claimant's medication regimen was as follows. Claimant took two eighty milligram tablets of OxyContin two times daily at 5:00 a.m. and at 1:00 p.m. He took one OxyContin tablet at bedtime. He took one thirty milligram tablet of oxycodone and was limited to two tablets daily for breakthrough pain. Claimant took ninety milligrams of Cymbalta daily. Claimant's gabapentin dosage increased to eight hundred milligrams twice daily for leg pain. Claimant was not having a problem with constipation. He was able to sleep and to tolerate more. Dr. Ufberg, noted however, that the higher gabapentin dosage was causing involuntary muscle twitching that Dr. Ufberg testified is common side effect for high gabapentin doses. Dr. Ufberg tried increasing the Cymbalta dosage to one hundred twenty milligrams.

Dr. Ufberg spoke to Claimant on the telephone on October 14, 2020. Dr. Ufberg testified that he would have preferred to have seen Claimant in person instead of being limited to a telephone call because Claimant is in a high-risk category. Claimant reported that his opioid prescriptions were not being filled due to the workers' compensation carrier's denial of coverage.

Claimant was utilizing leftover OxyContin and oxycodone from an earlier prescription but had to take lesser dosages. Dr. Ufberg was not concerned that Claimant had leftover medications. He testified that patients often squirrel away medications in case there is a problem or delay filling the prescriptions.

On October 15, 2020, Claimant got a prescription for Hysingla ER, eighty milligrams to take one tablet every twenty hours – the maximum dosage Claimant’s plan would allow. Hysingla ER is essentially equivalent to OxyContin. In essence, Claimant went from five tablets daily of eighty milligrams to two eighty milligram tablets daily.

Dr. Ufberg stated that he suspects Claimant would be suffering from at least partial side effects from withdrawal. He explained that there will be withdrawal symptoms when dosages are reduced more than twenty percent. Dr. Ufberg commented that withdrawal side effects could potentially be life threatening in someone who has cardiac arrhythmia, like Claimant does. Dr. Ufberg has not had any contact with Claimant since this teleconference. When asked if he has “specific knowledge in the last nine days that he [Claimant] has presented to an ER or a medical facility in withdrawal?”¹ Dr. Ufberg responded, “No. I don’t know if he’s alive, even.”²

Dr. Ufberg represented that the Utilization Review decision denied the opioid prescriptions because according to the decision, Dr. Ufberg failed to document reduced pain levels and/or improved function. It was also noted that Dr. Ufberg did not have a patient care contract with Claimant. Dr. Ufberg disagreed with such assertions. Dr. Ufberg testified that he monitors Claimant’s pain levels by having Claimant complete a visual analog scale with faces at every visit. On average, Claimant’s pain has been a seven out of ten.

¹ *Ufberg Depo.* 10/22/2020, 60:1-3.

² *Id.* at 60:4-5.

Dr. Ufberg acknowledged that he might not document the positive impact the opioids are having on specific activities but he discusses with Claimant at every visit how the pain medications help with activities including standing, walking and sitting. Dr. Ufberg also asks about possible side effects of dry mouth, constipation and sleep. Dr. Ufberg is particularly interested in his patients' sleeping habits. He explained that sleep helps function. Lack of sleep increases pain. Furthermore, the more time spent sleeping, the less waking hours to take medication.

In particular, the opioids as prescribed is helping Claimant with function and with sleep. They enable to Claimant to help his wife with her day care business operated at their home. Claimant consistently has reported that the opioids help him better tolerate standing, walking, and sitting. Claimant also consistently has reported that without the opioids, he would be in bed and unable to function. In other words, Claimant would be incapacitated without the opioids.

Dr. Ufberg emphasized that Claimant has significant radiculopathy and severe muscle spasm. Dr. Ufberg remarked that Claimant's muscle spasm is so severe, it is the worst he has seen in his practice. Sometimes Claimant cannot expand his rib cage to take a breath. Claimant's radicular complaints are consistent with his S1 radiculopathy diagnosis. Dr. Ufberg recognized the dosages are high but he explained that someone with chronic moderate to severe pain over time will likely require higher doses due to tolerance. Dr. Ufberg added that he had tried five or six muscle relaxants to no avail.

Dr. Ufberg recognized that Delaware law requires patient care contracts and informed consents when prescribing opioids. He testified that he had Claimant sign a patient care contract in 2010 when he commenced treating Claimant. The most recent informed consent form was executed on April 13, 2017. Dr. Ufberg implied that he remains compliant with law because he discusses with Claimant the risks of addiction, overdoses and death. Dr. Ufberg stated that at some

point Claimant had Narcan at home but could not recall when and recognized that Narcan has an expiration date.

Dr. Ufberg testified that part of the patient care contract entails conducting random pill counts. January 2019 was the most recent pill count. Dr. Ufberg remarked that Claimant is due for another. Dr. Ufberg testified that he tries to do a random pill count annually, particularly when there have not been major issues.

Dr. Ufberg documented in late 2019 and in 2020 that Claimant was using marijuana. Dr. Ufberg represented that Claimant has had a medical marijuana card for years that Dr. Ufberg represented he prescribed. Dr. Ufberg testified that the medical marijuana enabled Claimant to reduce his OxyContin intake to one pill at bedtime. The marijuana at bedtime helps reduce his pain to allow him to sleep. Dr. Ufberg testified that in his experience, marijuana only provides mild pain relief but provides tremendous help with sleep.

Dr. Ufberg acknowledged that Delaware physicians should not prescribe opioids and marijuana simultaneously. There is a study indicating that patients using marijuana and opioids had some slight increased risk for overdose death. He remarked that while it is not recommended for a patient to use both opioids and marijuana, it seems to contradict how doctors treat terminal cancer patients.

Dr. Ufberg acknowledged receiving a reprimand in the form of a citation by the medical board and paid \$6,000 in legal fees for his defense because one of his workers' compensation patients tested positive for marijuana and opioids. Initially he did not take action upon receiving the urine drug screen result. Consequently, he was cited: for not discharging the patient for violating the patient care contract; for not counseling the patient to stop the opioids; and for not

documenting that the patient came off opioids. Dr. Ufberg represented that he eventually corrected the situation.

Dr. Ufberg acknowledged that Claimant tested positive for THC on July 2, 2020. Dr. Ufberg was not surprised by Claimant's positive result because Dr. Ufberg was aware of Claimant's marijuana use. Dr. Ufberg added that the lab must have made an error testing for THC because when he orders urine drug screen tests, he does not test for marijuana. He also does not inquire his patients about its use. He stated, "it's kind of like don't ask, don't tell."³ When asked, "you earlier testified it's a problem if a UDS [urine drug screen] is positive for both marijuana, of which THC is a component, and opioids",⁴ Dr. Ufberg responded, "It's not a problem for me"⁵ but then stated it "potentially" is a problem for the medical board.⁶

Dr. Ufberg recognized that Claimant has comorbidities of chronic obstructive pulmonary disease ("COPD"), atrial fibrillation ("AFib") and hypertension. Dr. Ufberg testified that his comorbidities support not titrating down the dosages of opioids because cardiac arrhythmia, for example, would increase the dangers of withdrawal symptoms. Dr. Ufberg added that Claimant's private prescription plan's approval of Hysingla ER is also indicative of the reasonableness and necessity of the opioid prescriptions.

Dr. Ufberg has not consulted with a cardiologist or with Claimant's pulmonary physician about the opioid prescriptions. Dr. Ufberg was aware that Claimant was hospitalized in early 2020 for shortness of breath. He did not review the medical records or discharge notes from the hospital admission.

³ *Id.* at 52:9-10.

⁴ *Id.* at 53:13-16.

⁵ *Id.* at 53: 17.

⁶ *Id.* at 53:20.

Claimant testified on his own behalf. He is sixty-four years old. He has constant stabling deep pain in his back that extends down his right leg and into his foot. It is unbearable at times and brings him to tears. He has been taking opioids since the work accident in 1993. Claimant has not returned to work since the work accident. His pain has increased in the last two years and it continues to worsen. There are times he must lie down ten times per day.

Claimant verified that his OxyContin and oxycodone dosages have remained the same since 2018 when he reduced his OxyContin intake from six tablets daily to five tablets daily. He takes two OxyContin tablets at 5:00 a.m., two tablets at 1:00 p.m. and one tablet at bedtime. He takes oxycodone twice daily for breakthrough pain.

Without the OxyContin and oxycodone prescriptions his pain would be unbearable and he would be confined to lying in bed. He would not be able to shower, to dress, to get up and to move around.

The medications help him function. He can empty the dishwasher. He can clean. Claimant's wife operates a daycare for children from ages two through six years old. She only has five children under her care this year due to COVID-19. He helps his wife with her daycare by reading stories to the children, playing puzzles and other similar type games. He was able to help his wife a few weeks prior to the hearing after she underwent knee surgery.

Claimant represented that his sitting tolerance is twenty to thirty minutes. His walking is limited to twenty minutes. Driving is limited to ten minutes. Dr. Ufberg's office is located six miles from his house. By the time he reaches Dr. Ufberg's office, his right foot becomes numb. Claimant estimated that in the last year he started sleeping six hours through the night without waking up from pain. He was shown forms he completed that indicated he was sleeping six hours at night that predated one year prior.

Dr. Ufberg assisted with him getting a medical marijuana card. Approximately two years ago he stopped using the medical marijuana card because he cannot afford its purchase. He has a friend who gives him recreational marijuana on occasion. Claimant acknowledged that his urine drug screen test in July 2020 was positive for marijuana. He remarked that if had to give up any medication, it would be the marijuana because it does not help that much anyway.

Two years ago Claimant suffered simultaneously from AFib and congestive heart failure. He testified he goes into AFib when he gets stressed. He is fearful impact of decreasing the medications, especially so abruptly and of the impact it will have on his heart. He does not know how his heart is doing from day to day. He is not that strong. He is also scared of COVID-19. The decrease in medications is making him full of pain and a nervous wreck.

Claimant testified that his pain rating at its worst has been a seven to an eight out of ten. It typically ranges from a six to an eight. He disputed the veracity of Dr. Ufberg's notation that Claimant's worst pain rating is a ten out of ten. Claimant was shown the visual analogs he completed from various visits with Dr. Ufberg from May 3, 2016 through March 11, 2020 on which Claimant circled ten was his worst pain. Claimant responded that he never remembered indicating a pain rating higher than an eight.

Claimant testified that there have been a few times he went without his OxyContin prescription. He explained that he typically picks up his prescriptions on a Thursday but there were times the pharmacy was not able to fill it until the following Monday. The longest duration he has gone without the medications was from a Thursday to a Monday. He does not do well when he is not taking the OxyContin and he did not do well when the dosage reduced.

Claimant testified that the reason he has medication remaining to enable him to take at least a reduced amount since the denial of coverage is because he could not take his medication while

he was hospitalized for seven days. He estimated that the hospital stay enabled him to have thirty-five pills remaining.

On the day of the hearing, he took two tablets of OxyContin at 5:00 a.m. and two more tablets around 12:30 p.m. He initially rated his current pain level at the hearing at a three on a ten-point pain scale but then increased the rating to a five or six. He remarked that his pain level during the hearing is the best it has been and his legs do not yet hurt. Claimant denied ever having his pain level reduced to a two despite Dr. Ufberg's documentation in April 2018.

Dr. John Townsend who is board certified in neurology testified by deposition to a reasonable degree of medical probability on behalf of Employer. He reviewed pertinent medical records and examined Claimant on June 25, 2020. Dr. Townsend opined that the medications at issue as prescribed are not reasonable or necessary.

Claimant is taking dangerous levels of opioids that should be carefully titrated down with close monitoring especially in light of Claimant's comorbidities. In April, Claimant had recently been in the hospital and diagnosed with congestive heart failure. He required a cardiac pacer placed. He has chronic obstructive pulmonary disease and lung disease related to smoking. Tapering should be done slowly and closely monitored to avoid triggering arrhythmia of the heart. Dr. Townsend agreed with Dr. Meyers' suggestion from February 22, 2019 of a six to twelve-month tapering period. Dr. Townsend recognized that Claimant will continue to require medication management and that long-acting and short-acting opioids are necessary but not at such unsafe dosages.

In the 2016/2017 timeframe, a drug evaluation called Taper RX suggested an opiate-tapering schedule. Based on the medical records, it appeared Dr. Ufberg agreed with the titration and reduced Claimant's OxyContin by one pill daily and the short-acting oxycodone was reduced

to thirty milligrams once daily. Claimant was also taking gabapentin. He underwent three transforaminal epidural injections by Dr. Witherell in 2018. It did not appear Claimant experienced relief from the nerve blocks. Claimant's dosages appeared to remain the same since 2018 although at the time of the defense medical examination, Claimant was taking two oxycodone daily.

The CDC recommends that opioids should not exceed fifty to ninety morphine milligram equivalence ("MME"). The Practice Guidelines do not address a ceiling for opioid dosages. Claimant's opioid dosage as prescribed by Dr. Ufberg would equate to six hundred ninety MME. Dr. Townsend opined that ideally, Claimant's OxyContin dosage should be tapered down to eighty milligrams twice daily in light of the fact Claimant has been on as high as one hundred sixty milligrams three times daily. The thirty milligrams of oxycodone may be appropriate or perhaps reduced to fifteen milligrams but allow Claimant to take it more frequently for breakthrough pain. Dr. Townsend suggested introducing Nucynta to reduce pain. That has a long and short-acting formulation. However, medications containing Narcan would not be good in light of the duration Claimant has been taking opioids because it would increase the risk of withdrawal.

In October 2020, Dr. Ufberg switched Claimant from OxyContin to Hysingla ER – a long-acting form of Vicodin and the MME dosage reduced by half. Dr. Townsend could not tell from the medical records if Claimant's pain reduced. The MME dosage of oxycodone remained the same. Dr. Townsend cautioned that especially with this level of reduction, Claimant's respiratory and cardiac status should be closely monitored. It would also be important to know what the pain levels were and whether they were dramatically changing to guide the degree and rate of additional tapering of medications.

At the defense medical examination, Claimant reported that since he was hospitalized for COPD, his low back and right leg were even more painful. Claimant rated his pain at a seven out of ten. Claimant reported to Dr. Townsend that he had been on the same medication for twenty years. Dr. Townsend commented that since 2017 (to include the period of the attempted titration), Claimant's pain level has remained consistent with the highest rating of ten out of ten and current rating being consistently at a seven or an eight out of ten. There has been no reduction in pain levels. Claimant reported that the medications were helping him function.

Dr. Townsend had additional concerns regarding Dr. Ufberg's treatment of Claimant. Claimant had a urine drug screen in July 2020 that was positive for THC – components of marijuana. Dr. Townsend was not aware if Claimant had a medical marijuana card. Dr. Ufberg testified that Claimant did but Dr. Townsend did not see any indication in the medical records. Marijuana and opiates can produce depression of the cognitive status, the mental status. Someone using a lot of opiates and a lot of marijuana has a potential for increased risk for breathing problems. Claimant already has COPD.

Furthermore, Claimant had a spinal cord stimulator. Claimant reported to Dr. Townsend that the spinal cord stimulator had not worked for four years. It did not appear anything was done about that. Dr. Townsend recognized Dr. Ufberg on multiple occasions mentioned the spinal cord stimulator in his records but did not follow through. On July 26, 2018, Dr. Ufberg documented that Claimant was considering replacement of his spinal cord stimulator. On April 9, 2019, Dr. Ufberg indicated that Claimant reported he will discuss with a cardiologist the safety of surgery related to the spinal cord stimulator. Dr. Townsend acknowledged that Dr. Ufberg cannot force Claimant to address the spinal cord stimulator and especially when there is an issue with a cardiologist.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

UR APPEAL

When a party appeals a Utilization Review determination, the appeal is heard by the Board *de novo*. 19 Del. C. §2322F(j). However, when the Board is confronted with the issue of medical treatment, a different standard applies than the applicable standard under Utilization Review. Workers' Compensation Regulation 5.4 provides, in relevant part that, "the designated utilization review company will review treatment to determine if it is in compliance with the practice guidelines [Treatment Guidelines] developed by the Health Care Advisory Panel and adopted and implemented by the Department of Labor." The focus of a Utilization Review determination is on whether or not a specific treatment falls within the applicable Practice Guidelines. If the treatment by a certified health care provider falls within the applicable Treatment Guidelines, the treatment is "presumed, in the absence of contrary evidence, to be reasonable and necessary." 19 Del. C. § 2322C(6). *See also, Meier v. Tunnell Companies*, Del. IAB, Hearing No. 1326876, at 4 (Nov. 25, 2009) (ORDER).

The adoption of the Practice Guidelines does not change the issues the Board must determine regarding the compensability of medical treatment. *Meier v. Tunnell Companies*, Del. IAB, Hearing No. 1326876, at 4. When the issue of the compensability of medical treatment is brought before the Board, the Board must determine whether or not such medical treatment is reasonable, necessary and causally related to the work accident. *See Turnbull v. Perdue Farms*, Del. Super., C.A. No. 98A-02-001, Lee, J., 1998 WL 281201 at * 2 (May 18, 1998) (employer is obligated to pay for necessary and reasonable medical expenses related to work injury), *aff'd*, Del. Supr., 723 A.2d 398 (1998). The Board does not review the evidence to determine if such medical treatment falls within the Practice Guidelines. The Board will consider the evidence *de novo* to

determine the reasonableness and the necessity of the medical treatment and if such treatment is causally related to the work accident. As a result, when the Board makes a determination regarding medical treatment, there is the possibility that medical treatment falling outside the scope of the Practice Guidelines may be reasonable and necessary and/or that medical treatment falling within the scope of the Practice Guidelines may not be reasonable or necessary. *Id.* at 5.

Based on the totality of the evidence incorporated herein, the Board denies Claimant's appeal of the Utilization Review decision and finds that Dr. Ufberg's prescriptions of OxyContin and oxycodone have not been reasonable or necessary. The Board accepts the medical opinions of Dr. Townsend over the medical opinions of Dr. Ufberg.

The CDC recommends that opioids should not exceed fifty to ninety MME. At issue, Claimant was taking five eighty milligram tablets of OxyContin daily and two thirty milligram tablets of oxycodone twice daily. Dr. Townsend testified that Claimant's opioid dosage as prescribed by Dr. Ufberg would equate to six hundred ninety MME. Such over prescriptions would be life-threatening in and of itself following CDC standards. Dr. Townsend opined that ideally, Claimant's OxyContin dosage should be titrated down to eighty milligrams twice daily in light of the fact Claimant has been on as high as one hundred sixty milligrams up to three times daily. The thirty milligrams of oxycodone taken once (as opposed to twice) for breakthrough pain may be appropriate or perhaps reduced to fifteen milligrams to allow Claimant to take it twice.

The Board accepts Dr. Townsend's representation that titration, especially with respect to Claimant in light of Claimant's AFib and COPD, should be down very carefully with close monitoring of Claimant's cardiac and respiratory status to avoid triggering arrhythmia of the heart. Claimant has been having issues with AFib and COPD and was hospitalized in April 2020 for congestive heart failure. He required a cardiac pacer placed. Dr. Ufberg acknowledged that

withdrawal side effects could potentially be life threatening in someone who has cardiac arrhythmia, like Claimant does. The Board accepts Dr. Townsend's opinions of the reasonableness and necessity of a six-to-twelve-month titration period.

The Board is highly concerned by Dr. Ufberg's lackadaisical approach to managing Claimant's medical care. It is of great concern that Claimant's OxyContin MME dosage has essentially been reduced by at least half since the insurance denial of coverage without close monitoring by Dr. Ufberg. The Board is deeply concerned by Dr. Ufberg's remark, "I don't know if he's alive, even"⁷ in response to being asked if aware of any medical facility visits for withdrawal.

To make matters worse, Dr. Ufberg has been aware Claimant uses marijuana while taking such high dose opioids but has not taken any action. Dr. Townsend testified that someone using a lot of opiates and a lot of marijuana has a potential for increased risk for breathing problems – more reasons for concern in a patient like Claimant who has AFib and COPD. Dr. Ufberg testified that he follows a "don't ask, don't tell" policy regarding the combination of opioids and marijuana. He admittedly purposely does not test for marijuana when ordering urine drug screens despite already having received a citation for that very practice - not action when a workers' compensation patient tested positive for THC while taking the prescribed opioids.

Dr. Ufberg acknowledged that Delaware law requires yearly patient care contracts and informed consents but has failed to comply. According to the evidence, Dr. Ufberg only had Claimant sign a patient care contract when he commenced treating Claimant in 2010. The most recent informed consent was from April 13, 2017. It does not appear that Dr. Ufberg has tried to lower Claimant's MME dosages other than in 2018.

⁷ *Id.* at 60:4-5.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Claimant's Petition to Appeal a Utilization Review Decision is DENIED in its entirety. The Board orders that a copy of this decision be sent to the Board of Medical Licensure & Discipline (861 Silver Lake Boulevard, Suite 203, Dover, DE 19904) for it to consider appropriate disciplinary sanctions against Dr. Ufberg. The Board requests that, to the extent permissible by law, the Board of Medical Licensure & Discipline notify the Industrial Accident Board's chairperson, Mark Murowany, of the actions taken.

IT IS SO ORDERED THIS 4th DAY OF JANUARY, 2021.

INDUSTRIAL ACCIDENT BOARD

Mark Murowany/Chair
MARK MUROWANY

Robert Mitchell/Sec
ROBERT MITCHELL

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

Julie Pezzner

Mail Date:

CR 1/5/21
OWC Staff