



November 5, 2021

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RICHARD J. WINDISH
BONNIE J. BADGEWICK

Michael Harrington, Commissioner
Vermont Department of Labor
Commissioner's Office
P.O. Box 488
Montpelier, VT 05601-0488

Re: Scott Bessette v. Leader Evaporator Company, Inc.
State File No. CC-59616

Dear Commissioner Harrington:

Enclosed pursuant to Rule 19.1900 is the Arbitrator's Opinion and Order in connection with this matter. Copies of the Opinion and Order were sent to the parties via e-mail.

Please feel free to contact me with questions or concerns.

Yours truly,

/s/ Bonnie Badgewick

Bonnie J. Badgewick, Esq.

BJB/mac

Enc.

cc: William Skiff, Esq. (via e-mail)
William J. Blake, Esq. (via e-mail)
Erin Gilmore, Esq. (via e-mail)
James M. O'Sullivan, Esq. (via e-mail)
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STATE OF VERMONT
DEPARTMENT OF LABOR

Scott Bessette,)
Claimant)
)
v.) STATE FILE Nos. BB-02567 (Star)
) CC-59616 (Acadia)
) HH-50079 (AmTrust North America)
) LL-63876 (MEMIC Indemnity Company)
Leader Evaporator Company, Inc.)
Defendant)

ARBITRATOR'S OPINION AND ORDER

Hearing held via Zoom on Thursday, June 3 and July 27, 2021. Record closed on September 10, 2021.

APPEARANCES:

William B. Skiff, III, Esq., McVeigh Skiff, LLP, for Claimant Scott Bessette.

James O'Sullivan, Esq., Tentindo, Kendall, Canniff and Keefe, for Defendant Leader Evaporator Company, Inc./Star Insurance Company.

William Blake, Esq., Boxer Blake & Moore, PLLC, for Defendant Leader Evaporator Company, Inc. /Acadia Insurance.

David Berman, Esq., McCormick, Fitzpatrick, Kasper & Burchard, for Defendant Leader Evaporator Company, Inc. /AmTrust North America.

Erin J. Gilmore, Esq., Ryan, Smith & Carbine, Ltd., for Defendant Leader Evaporator Company, Inc. /MEMIC Indemnity Company.

ISSUE PRESENTED:

1. Which carrier is on the risk for the Claimant's 2018 low back related workers' compensation benefits including medical and indemnity benefits, and including, but not limited to, his 2019 low back surgery?

EXHIBITS:

Joint medical exhibit.

**HAYES,
WINDISH &
BADGEWICK**

00400992

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FINDINGS OF FACT:

1. The Claimant, Scott Bessette, resides in Swanton, Vermont.
2. The Claimant began working for the employer, Leader Evaporator Company, Inc. in 2009. Leader Evaporator Company, Inc., also in Swanton, Vermont, makes maple sugaring evaporators, tapping lines and sugaring supplies for maple syrup operations.
3. The Claimant began as a press brake machine operator, which included swinging stainless steel sheets into the press brake to bend it to create the evaporator. Sometimes there were smaller parts that needed to be bent. Claimant described the operator has to swing sheets of stainless steel "all day long," and this job took "pretty good physical strength".
4. On or about April 1, 2010, the Claimant injured his low back while lifting at work and had treatment. It is unclear if he lost any time from work. The carrier on the risk for purposes of workers' compensation coverage was Star Insurance Company. However, it is unclear if the workers' compensation carrier was ever billed for this treatment.
5. The medical note from April 5, 2010 reflects that the Claimant reported no history of back problems. JME 3. He reported he was "lifting and twisting" and felt a "pop", with tightening and progressive pain. JME 3.
6. The Claimant had three doctor's visits for the 2010 injury: one on April 5, 2010, April 7, 2010, and April 12, 2010. The April 7, 2010 note states that the Claimant had been resting for two days and taking his medication, felt better, and that he asked for a return to work note for the next day. JME 3-9. On April 12 it was noted that he "feels much better", and he would like to return to work, but there is "no light duty but this is their slowest time of the year and he won't have to do any heaving lifting." JME 8.
7. One day in early March 2011, there was a big snowstorm. The Employer asked the Claimant to snowblow the loading docks to prepare for some deliveries that day. The snowblower in question did not have a working reverse gear which meant he had to pull it back to operate it. The Claimant credibly reported he spent all day on March 21, 2011 yanking and pushing the snowblower through deep snow. He was also working operating the press brake that day with some heavy gauge stainless steel. He described it as physically demanding. He described he was sore all day, and more sore the next day. JME 25.
8. The Claimant reported, the day after the snowstorm he was operating the press

brake bending black iron to make a heavy arch front. Once it was bent, the weight was on the employees holding it. At that point, the person assisting the Claimant could not handle the metal piece and twisted away from it and let go, leaving all of the weight of the metal piece on the Claimant. He twisted away to lay the piece down gently on a table. Claimant believed he was sore from the snow blowing the day before, and it got worse from handling this weight.

9. His manager told him to rest over the weekend. When he returned Monday, he reported he was in pain, his right leg felt like "rubber" and was numb, and he could not urinate at that time. He reported he had his wife bring him to the emergency room.
10. He presented to Northwestern Medical Center on March 21, 2011. JME 17-20. In the comment section it describes pain began a week ago after shoveling but got worse a few days ago after lifting. It goes on to describe that something let go that morning while putting on his socks. The Claimant was describing severe pain that radiated down his leg. JME 17. An MRI of the lumbar spine without contrast was performed. It revealed moderate right L3-4 foraminal stenoses due to small intraparenchymal disc herniation along with scattered mutli-level disc and mild lower lumbar facet degenerative changes, along with foraminal stenosis moderate at bilateral L4-5 and mild at bilateral L5-S1. JME 18, 21. The final impression was lumbar radiculopathy. JME 19.
11. He treated conservatively with Northwestern Occupational Health and Dr. Roberts, along with physical therapy and injection therapy. He also continued to work with restrictions. JME 23-26, 30- 68.
12. The Claimant first saw Verne Backus, MD, MPH on April 22, 2011 for a revisit/follow-up workers' comp for his back injury. The history of the events giving rise to his complaints was again completed. JME 33.
13. During April there were several reports of the Claimant's legs giving out in the physical therapy records. He was reporting right leg pain and extreme numbness that he could not bear weight. JME 38, 41, 36. As of May 3, 2011 the Claimant had three injections and physical therapy for several weeks with only mild improvement. He was referred to Dr. Barnum for a surgical consult. JME 62. He opted to see Dr. Jewell instead of Dr. Barnum because he could get in sooner. JME 89.
14. A new MRI was done on May 27, 2011. JME 107. Dr. Jewell saw him on June 1, 2011. After reviewing the MRI Dr. Jewell indicated he had a far lateral L3-L4 disc herniation concordant with this symptoms. However, the Claimant was also reporting severe tail bone pain and posterior bilateral leg pain in a S1

distribution. Dr. Jewell suggested a follow-up MRI to determine whether or not there was any additional pathology. JME 109.

15. He was seen again on June 22, 2011 by Dr. Jewell. Following the repeat MRI Dr. Jewell stated he could not explain many of his aches and complaints in his back and lower extremity, but it was clear to him that he had right quadriceps atrophy, a far lateral L3-L4 disc herniation and right-sided thigh pain. He proposed a far lateral L3-L4 discectomy. JME 115. The follow-up MRI on June 17, 2011 also showed a right sided disc herniation. JME at 114-115.
16. Claimant underwent a right L3-4 lateral discectomy with Dr. Jewell on July 29, 2011. The pre- and post-operative diagnoses were right L3-4 far lateral disc herniation. He reported he was out of work for around eight weeks after the surgery. JME 122-123.
17. The records indicate the Claimant had gait and functional impairments and urinary retention post-discectomy, and bladder dysfunction, which required intensive in-patient rehabilitation. JME 353 -399, 408-409. He then continued rehabilitation from surgery at home, and through skilled physical therapy, and medication therapy. During this time, he also complained of low back pain radiating into both legs to his physical therapist. JME 427.
18. On or about November 7, 2011 the Claimant started a work rehabilitation program four days a week for four hours a day at Northwestern Occupational Health. JME 499, 505, 517. He completed the program on December 16, 2011.
19. Post-operatively, Claimant treated conservatively with improvement but not a complete resolution of symptoms. For example, on December 2, 2011 it was noted: "Scott is doing well this week. States is lifting 30# at work and is now at 45# and benching 62-67# in rehab. He feels really good. Not having as much coccyx pain and less tenderness in thigh. He is trying to not pay attention to the groin pain." JME 561.
20. In a December 6, 2011 Behavioral Medicine Pain Management visit with Laurance Thompson MS, Claimant reported a very positive progress to full duty work. He stated he was tolerating the transition well and he is less frightened by the pain he was experiencing and learning to ignore the sensations. He was trying to cut back on the pain medication. JME 543.
21. In a December 9, 2011 note from Northwestern Occupational Health confirms Claimant reported a 2/10 pain. He continued to progress in rehab. He worked three hours this week and was enthusiastic about being back at work. He was

lifting 55 pounds in the gym. JME 561. Similarly, a December 16, 2011 note states: "Scott completed the work rehab program today and is pleased with his progress. He will have his FCE on Monday, 12/19/11. He is lifting 60 lbs." Claimant was discharged from his work rehab program the same date. JME 564.

22. A Functional Capacity Evaluation was performed on December 19, 2011 which noted Claimant had already returned to work, transitional duty, as of November 21 2011. Claimant tested as having a heavy duty work capacity and was therefore cleared to return to work as a press brake operator. JME 577. Dr. Jewell agreed with the return to work on December 21, 2011. JME 582.
23. The Claimant went back to work on the press brake when he returned to Leader Evaporator. He testified: "I'm not a doctor but I should have never gone back on that press brake because of the because of the [sic] injury "
24. The Claimant credibly reported dealing with chronic pain since his 2011 surgery, "every single day." His pain was up and down. He had days when it was intolerable and days when it was tolerable. The Claimant testified that he never had a day where he was pain free between 2011 and 2019. He also testified that his pain absolutely got worse over time between 2011 and 2019.
25. On January 10, 2012 Claimant was seen by Dr. Backus for an Independent Medical Evaluation and was placed at medical end result with a 12% impairment rating. JME 594. The parties entered into a Form 22 Agreement which was approved by the Department on February 10, 2012. Dr. Backus advised future care would include ongoing pain medications, which may be weaned. JME 594.
26. On April 25, 2012, Claimant presented at Northern Tier Centers for Health to discuss continuing medications including Cymbalta, Lyrica and Tramadol. JME 620. These follow-up visits continued. JME 622, 629, 632, 636, 638, 670, 684, 688, 690, 694, 702, 754, 792.
27. On March 7, 2013, the Claimant complained of back pain and stiffness and reported that he was still taking 50 mg of Tramadol for his pain, one to two tablets, three times a day. JME 673-674.
28. In late 2013 Claimant reported a recent increase in right leg pain. JME 690. Therefore, a repeat MRI was performed on September 20, 2013. The study showed progression of foraminal narrowing and a "small annular bulge." JME 692.

29. Dr. Jewell was consulted on October 17, 2013 and wrote: "Bessette is a 42-year-old gentleman status post far lateral L3-4 microdiscectomy. He did have some relief of his right thigh pain from that procedure. Prior to this procedure, he had multiple other neurologic complaints. These have not improved either postoperatively and at this point, after reviewing his new MRI, I have discussed with him that these symptoms are not generated from his lumbar spine. They remain a significant concern to him and his wife. I will schedule him for a neurology consult. He will follow up with me on a p.r.n. basis." JME 696.
30. A repeat MRI of the lumbar spine was performed on November 22, 2013 and upon review showed a small recurrent disc herniation at the L3-L4 level on the right side with enhancing scar tissue creating foraminal stenosis. JME 750-753.
31. EMG studies were performed on January 24, 2014 at Fletcher Allen by Dr. Hehir, he notes: "patient continues to suffer with radiating pain into the right lower extremity and buttock". He indicated there was "no associated weakness on exam. EMG/NCS today was unremarkable without evidence of ongoing lumbosacral radiculopathy or peripheral neuropathy." A referral to the FAHC pain clinic was made. JME 764. Claimant underwent two injections with Dr. Borello and reported on May 29, 2014 to Dr. Barnum he was doing well and back to his regular job. Dr. Barnum placed Claimant at medical end on May 29, 2014 and specifically stated in his progress note that he was not offering an increase in permanent impairment. JME 808-809.
32. Sometime in 2014 or 2015 the Claimant stopped working on the press brake for the Defendant employer and worked in the RO department (reverse osmosis). An "RO" machine separates the water from the sap so that the sap will boil quickly. There are different sizes of RO machines, from backyard machines that are five feet high and sixteen inches wide (150 gallons per hour) to ones that can process 4,000 gallons per hour (seven feet high, twelve feet long, 10,000 pounds).
33. The Claimant credibility testified that testing the RO machines was also a physically demanding job. He also credibly reported that while working on the RO machines he was constantly having flare-ups, requiring medicine and getting worse. This is consistent with the medical records, and continued prescription medication. FOF 26, *supra*.
34. Claimant underwent another FCE on June 9, 2014 with Charles Alexander who opined that he tested at the "full medium level with abilities into the heavy level ... " He recommended a job analysis to make sure this was consistent with

Claimant's work duties as a press brake operator. JME 817.

35. The October 30, 2014 notes Claimant as reporting: "Lower back unchanged, no worse, no better despite the continued use [sic] of pain meds also on a regular basis." He went on to report: "if he did not have the pain meds, he would not be able to function." He was continuing to work but "is not working so intensely lately". JME 873. Similarly, the January 29, 2015 indicates Claimant reporting: "So far has been able to continue at his job despite the considerable pain." JME 883.
36. On April 30, 2015 the Claimant returned to Dr. Zelato at Northern Tier Center for Health for "chronic low back pain". That note states "has been on low grade narcotic pain medication (Tramadol) on a regular basis for several years now". He "continued to have significant pain despite the medication but he continued to require that medication for some pain relief and increased function". JME 906.
37. In the medical note from June 11, 2015, wherein Claimant had experienced pain while stepping off of a ladder, he told his provider that "[i]n his mind this is the exact same problem that he had originally and he feels that it is directly related to the initial workman's comp injury in 2011" JME 908. Claimant testified at the hearing: "I should be able to step off a ladder".
38. He was seen again on July 30, 2015 reporting back pain and burning in the back. It was noted he could only sit for half an hour at a time and only sleeping two to three hours. JME 912.
39. There is a gap in treatment records from July 30, 2015 to approximately August 9, 2017.
40. There is an August 9, 2017 note from Swanton Health Center to establish care in which to obtain a refill for Tramadol for his low back pain, JME 923-924. He reported "Tramadol and Ibuprofen TID lets him get through the work day".
41. Likewise, there is a Swanton Health Center note dated December 26, 2017. JME 929. He reported he was feeling "more and more" pain in the lower back. He reported he felt he will need surgery "before I can't walk at all", and was going to follow up with ortho.
42. In the April 24, 2018 visit it was noted again the medications were getting him through the work day, and sometimes he was taking Cyclobenzaprine to permit sleep, "if the back spasms are severe after overdoing it at work." JME 942.

43. On April 24, 2018 he was reporting back spasms that are "severe after overdoing it at work" JME 942, and on August 6, 2018 he complained of "burning pain intermittently down his right leg associated with his back pain." JME 946. Similarly, he was seen on November 12, 2018 complaining of back pain which had "significantly worsened" and that he might be amenable to surgery. JME 958. Claimant further reported "[h]e was told he had spinal stenosis by Dr. Barnum several years ago, however due to improvement in his symptoms, he did not follow up." He also now reported a "new pain" on the right side of his mid back that will radiate around to his left flank, and sometimes will get a similar pain on the right, exacerbated when sitting or standing for a long period of time. On December 18, 2018 Claimant reported that over the last six months pain was worse with "increased activity." JME 961.
44. In a November 12, 2018 note the Claimant was reporting his pain "significantly worsened" and he might be amenable to surgical intervention. JME 957-958.
45. When asked about the November 12, 2018 medical record, describing low back pain radiating to the right side and a "new pain" on the left side, the Claimant responded that the pain on the left side was not a new pain and that he had complained of pain on his left side before.
46. Though the specific time line was less than clear, at some point in 2016-2017, the Claimant applied for a quality control job at the Defendant employer. Approximately one year later, the Claimant began working in quality control, and the Claimant continued testing the RO machines.
47. On December 18, 2018 he presented at Northwestern Orthopaedics and Rehab Center for worsening mechanical low back pain. JME 961-962.
48. Dr. Barnum ordered a repeat MRI, which was performed on December 31, 2018. This showed multi-level lumbar spine degeneration disc and facet disease, and a residual/recurrent eccentric disc bulge again noted with moderate/severe right neural foraminal narrowing and disc material abutting the existing right L3 nerve root within the moderate/severely narrowed right neural foramen there is mild/moderate left neural foraminal narrowing and mild/moderate spinal canal narrowing. JME 964.
49. At a January 15, 2019 office visit Claimant reported he was having flare-ups with "any increased activity." He stated that the pain had gotten to the point where he might now undergo another surgery. JME 968- 970. A March 5, 2019 treatment record states Claimant reported: "He has been doing hard physical

work over the last few weeks and has increased pain in the right lower extremity as well as intermittent pain posteriorly in the left lower extremity." The March 5, 2019 visit states Claimant reported his pain was "bad enough to undergo surgical intervention" but it would have to wait until May when he is "less busy at work." Pain on the right side was "constant in nature." JME 969.

50. A May 20, 2019 treatment note documented that over the last one to two months Claimant's pain was to the point that he is "having difficulty performing his job." The same treatment note on page four summarizes the MRI findings revealing a recurrent disc herniation at L3-4 at a far lateral position on the right side impinging on the L3 nerve root. The same treatment note on page five also states that Claimant's symptoms were interfering with activities of daily living as well as his job. JME 984-987. Dr. Barnum notes in the Assessment and Plan Section: "Given the amount of scar tissue that is present the patient may as well require an L3-L4 posterior lateral fusion." JME 987 and 992.
51. Other than reporting an "increase" in work activities, these medical notes do not state specific changes to work duties or obligations.
52. Claimant underwent the laminectomy and fusion surgery on May 22, 2019 with Dr. Barnum. Both the pre and post-operative diagnoses on the operative report were: "Recurrent L3-4 herniated nucleus pulposus with right lower extremity radiculopathy and spondylolisthesis." JME 991-992.
53. On June 6, 2019, Dr. Barnum wrote "There has been some question as to whether this is a work-related injury or not. As you recall the patient did have a work injury in 2011. He subsequently underwent an L3-L4 laminotomy and discectomy. I saw the patient in 2014 and my notes are attached. And from that time the patients has had persistent radicular symptoms in his right lower extremity and his L3 nerve root distribution. They finally got to the point where he could not tolerate it and wanted to undergo revision surgery and the plan was for him to undergo revision L3-L4 laminectomy and discectomy and foraminotomy however to adequately decompress the nerve root which was completely scarred down required a foramen ectomy [sic] and destabilization of the L3-L4 level. And once again as I have previously stated it is more probably not to his current symptomatology and his most recent surgery I directly related to his work injury of 2011." JME 1006.
54. Claimant left Leader Evaporator in September 2020. He credibly testified, and the records reflect, this was an emotionally charged decision for him given his tenure at Leader.

55. On his own initiative, Claimant obtained his commercial driver's license because he felt that work would be easier on his back than the work for the Defendant employer. The Claimant is currently working, full-time as a CDL driver.
56. The Claimant clearly testified that his symptoms, including back pain, thigh pain and groin pain, never went away. He testified he constantly had flared-up symptoms throughout the years.

Expert Medical Opinions

Dr. Verne Backus

57. Dr. Backus is a board certified occupational medicine specialist. He treated the Claimant as part of his work-related care at Northwestern Occupational Health. He testified that he recalled the Claimant well from seeing him in 2011 and 2012. He offered a permanent partial impairment rating on January 10, 2012. JME 594.
58. He also saw the Claimant at the Claimant's attorney's request after the surgery performed on May 22, 2019 for a permanent partial impairment rating on March 5, 2020. JME 1071. He thereafter offered an opinion on the aggravation/recurrence issue in a report dated July 14, 2020. JME 1104-1116.
59. Dr. Backus summarized his understanding of this case that a prior injury in 2010 to the back had improved. A subsequent injury in 2011 resulted in the L3-4 discectomy with improved symptoms. The Claimant went through a work hardening program and was working hard to get back to work. Dr. Backus stated that the Claimant loved his job and wanted to get back to it. He also testified that surgery did not resolve everything but he was able to get back to work. By the end of work hardening he had enough capacity to return to his old job. Dr. Backus testified that he treated through his return to work with Northwestern Occupational Health. His symptoms did not fully resolve and he continued to struggle. After the Functional Capacity Evaluation he was operating at a different capacity and could not do the press brake position. Dr. Backus testified that he thought this was a better job but the Claimant thought it was still very physical. He also noted that Claimant was always worse during the busy season.
60. Dr. Backus testified in his opinion the Claimant's condition was stable as he had been managing his flare-ups for years. They got worse when he had to do more work. It is his opinion that the actual physical work changed the underlying condition. He opined that there was no point in time where the

Claimant's back did not bother him doing physical work. There was nothing to point to other than the work as the causative factor, which was heavy work.

61. Dr. Backus testified to a reasonable degree of medical certainty the work activities in 2018-2019 constituted an "aggravation" not a recurrence. JME 1116. There is no question that Dr. Backus had all relevant records, and had Claimant's deposition transcript for review.
62. Dr. Backus agreed with the chronology outlined by Dr. White that the records and reported history of the Claimant indicated waxing and waning of his symptoms since the 2011 injury. However, Dr. Backus disagreed with the conclusion. In his opinion things remained symptomatic but manageable for many years. In Dr. Backus' opinion his change in underlying stability in 2018 has everything to do with the heavy work at his job.
63. While Dr. Backus stated repeatedly Claimant's work at Leader Evaporator was physically demanding and heavy in nature, his opinions as they relate to the specific activities in 2018-2019 are vague, at best. The records clearly reflect Claimant had continued difficulties, which required ongoing pain medications since the original 2011 injury and surgery. FOF 26, 27, 29, 35,40, 67, *supra*. He was "always worse" when he performed physical work after the 2011 event and surgery.
64. Dr. Backus did not offer a specific opinion relative to the 2015 "ladder" incident, nor the 2010 Star Insurance event.

Dr. George White

65. Dr. White is board certified in occupational medicine. His current position is one of performing Independent Medical Examinations through Occupational Health Logic, Williston, Vermont.
66. Dr. White was called to testify by AmTrust. He performed an Independent Medical Examination on August 2, 2019. JME 1041. In the report, Dr. White conducted a thorough review of the medical records, physical exam and, perhaps most importantly, a detailed interview/discussion with Claimant. JME 1042. Dr. White explained his discussion of the ladder incident on June 11, 2015 with Claimant. He testified that Claimant felt it was a "normal flare-up" or a "typical exacerbation" like those he was reporting continuously having since the 2011 injury, and that treatment had continued with the same pain medications ever since the 2011 injury. Claimant reported to Dr. White, as he did at the hearing, that he did not understand why stepping off of a ladder was being considered a "new injury" as it was "no different from his typical pattern which had been covered under his workers' compensation claim" since 2011.

JME 1054.

67. Dr. White testified that there were ups and downs and waxing and waning of symptoms throughout the reports of Claimant, and the records. He opined this was typical back pain post surgery and there was never an incident to break the chain of causation to the original 2011 incident. JME 1056.
68. Dr. White confirmed the opinions set out in his IME report, specifically that he did not consider any incident in June of 2015 an aggravation, and that ongoing symptoms, including 2018-2019 treatment and surgery, relate to the initial incident in 2011. JME 1055.
69. Dr. White's opinions are consistent with the medical records regarding the pattern of the original 2011 injury and complaints of the Claimant over the years and into the present. His opinion that the waning stopped and the symptoms were getting worse without an inciting or acute objective event is credible, supported by the medical records and persuasive.

Dr. Nancy Binter

70. Dr. Binter is a board certified neurosurgeon. She had a twenty-four year career in which she performed thousands of spine surgeries. She retired from surgical practice in 2011 and now performs Independent Medical Examinations.
71. Dr. Binter performed an independent medical records review on May 10, 2021. JME 1191-1220. She was asked specifically to review the matter with respect to causality of increasing symptomology reported in 2018, culminating in an L3-4 re-exploration, laminectomy and fusion on May 22, 2019 as it relates to an accepted work injury on March 21, 2011.
72. Dr. Binter testified that the Claimant had a lot of pain complaints since 2011 but the consistent and relevant one was the right leg pain in a right L3-4 distribution. She stated that this was supported by his MRIs which were done in 2011, as they showed a right far lateral L3-4 disc herniation which was consistent with his weakness, deficit and wasting. This is his original work injury and accepted complaint that is relevant to his current pain complaint. From her perspective this is objective evidence of an anatomical injury that did not change from 2011 to 2019.
73. Following the first surgery in 2011 the Claimant continued to make the same complaints, and based upon the records he was consistently reporting the same distribution of pain and symptoms.
74. While Dr. Binter acknowledged there is a gap in the medical records, from her

perspective he consistently had the same symptoms and was continuing to take medications.

75. With regard to the 2015 “step off” incident, she stated from her perspective that was “not at all significant” and was not evidence of a new injury or provoking any new symptoms from the records review. She did not offer a specific opinion as to the 2010 Star Insurance event.
76. She also offered that the 2019 surgery revealed scar tissue, which meant from her perspective there was no “fresh” or “acute” injury. It was instead the original issue but now with more scar tissue. She testified from a reasonable degree of medical certainty the fusion in 2019 and related treatment was more probably than not related to the 2011 event. It is her opinion the need for the fusion is due to the anatomical location of the original injury.
77. Dr. Binter acknowledged that there was a constellation of other things that are not relevant in her opinion to the discussion of the surgical fusion, including the work-up in 2014 by Dr. Nepveu, as the Claimant was never not taking drugs for the 2011 event nor did he ever see an anatomical resolution. Instead, from her perspective, there is a common thread throughout this process which is always an L3-4 distribution pain, which is consistent throughout the records even where other reports do not add up.
78. Dr. Binter did not meet with the Claimant, nor did she perform a physical examination. Given her review in 2021, post fusion, this factor does not detract from the overall weight of her opinions as a surgeon. She also testified could not opine as to whether or not work activities in 2018 to 2019 caused or contributed to the increase in symptoms as she did not have records between 2015-2017. She reported that he had the same complaints in 2013. She offered that there was no objective evidence or any kind of contribution or new injury that is different, nor one that changed the underlying disability resulting from the 2011 event.
79. In Dr. Binter’s opinion, without objective medical evidence there is no support for the notion that work activities in 2018 to 2019 caused or contributed to the increase symptoms nor a change in the underlying disability.
80. All experts agree, and the Claimant’s testimony supports, the pain never went away, it waxed and waned since the original 2011 event and surgery, and Claimant continued to do, for the most part, heavy work. All experts likewise agree there was no specific incident that occurred to “destablize” the condition. For purposes of the legal analysis, Dr. Backus opines the continued heavy work in 2018-2019 worsened the underlying disability, whereas Dr. Binter and Dr. White opine there is nothing that broke the causal connection to the

original injury, nor contributed independently to the final disability and resulting surgery.

81. No expert offered any credible medical opinion as it relates to the 2010 event involving Star Insurance.

CONCLUSIONS OF LAW:

82. This case involves an "aggravation recurrence" dispute involving a low back injury which is being adjudicated pursuant to Arbitration Rule 19. The carriers on the risk for Leader Evaporator are: (a) 2010: Star Insurance (f/k/a MIG Insurance); (b) 2011: Acadia Insurance Company; (c) 2015: AmTrust Insurance Group (Technology Insurance Company); and (d) 2018 -present: MEMIC Indemnity Company.
83. From the statutory perspective, in the aggravation /recurrence analysis 21 V.S.A. §662(c) provides: Whenever payment of a compensable claim is refused, on the basis that another employer or insurer is liable, the Commissioner, after notice to interested parties and a review of the claim, but in no event later than 30 days, shall order that payments be made by one employer or insurer until a hearing is held and a decision is rendered. For the purposes of this review, the employer or insurer at the time of the most recent personal injury for which the employee claims benefits shall be presumed to be the liable employer or insurer and shall have the burden of proving another employer's or insurer's liability. Payments pursuant to this subsection shall not be deemed an admission or conclusive finding of an employer's or insurer's liability nor shall payments preclude subsequent agreement under subsection (a) of this section or prejudice the rights of either party to a hearing or appeal under this chapter.
84. The most recent employer and its carrier is presumed to be the liable party and has the burden of proving another employer's or insurer's liability. See *Rodger Parker v. Albert Decel*, Op. No. 58-94WC (March 1, 1995) (citations omitted). In this case, MEMIC, as the carrier on the risk from 2018 and ongoing, bears the burden of proving the other carriers' liability. To the extent the evidence clearly supports a recurrence and there is no credible evidence of any aggravating event or activity, the burden is overcome.
85. Defendant Star Insurance Company was the carrier on the risk for the April 2010 event. FOF 4-6 *supra*. The most recent carrier in this claim is MEMIC Indemnity Company who came on the risk in 2018. It is MEMIC's burden to prove another carrier's liability. As it relates to Star Insurance, there is no competent medical evidence, nor any factual evidence supporting a claim that Defendant Star Insurance Company is the carrier liable for benefits in this case.

Defendant Star Insurance is therefore released from liability as a carrier in this action.

86. An "aggravation" means an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events. Rule 2.1200. A "recurrence" is defined as the return of symptoms following a temporary remission. Rule 2.3900. If an "aggravation" is found, the new employer/carrier is wholly liable. If there is a finding of a "recurrence," liability remains with the original employer/carrier. A third possibility is a "flare-up." A "flare-up" is a temporary worsening of a pre-existing condition for which a new employer/carrier is responsible until the condition returns to baseline. Once baseline is reached, liability reverts back to the original carrier. Rule 2.2300.
87. As it relates to Defendant AmTrust, Dr. White offered competent and credible medical testimony that the 2015 incident was not an aggravation of the 2011 incident, and that instead the symptoms reported in the medical records, and by Claimant in testimony and during his evaluation, clearly weighed in favor of a recurrence of the 2011 event.
88. It is acknowledged there was testimony that the Department of Labor had previously held the 2015 incident and treatment to be a "flare-up" under the definitions set forth above. However, in fully evaluating the testimony and medical records in the context of this claim, it is the Arbitrator's decision that the "flare up" category does not merit consideration as it relates to the claim for 2018-2019 benefits.
89. Again, as it relates to Defendant AmTrust, MEMIC, as the last carrier on the risk, bears the burden of proving another's liability, namely AmTrust, as the 2015 carrier. The medical and factual evidence does not support liability for workers' compensation liability for a flare-up, nor a continuing aggravation arising from the 2015 "ladder" incident. AmTrust is therefore released from liability as a carrier in this action.
90. Now concluding Star Insurance and AmTrust are not liable for workers' compensation benefits arising from the 2018-2019 symptoms, treatment and surgery, we turn to the evaluation as it relates to liability as between Acadia and MEMIC. As per the caselaw cited above, MEMIC, as the last carrier on the risk, bears the burden of proof that Acadia is the responsible carrier.
91. Acadia paid for the medical treatment since 2018-2019, long with associated temporary disability, and increased permanent impairment under Dr. Backus' rating, all without prejudice and is seeking reimbursement through arbitration.
92. In evaluating the remaining carriers' roles we look to the analysis set forth in

the caselaw. Specifically, our Supreme Court has held:

[i]n workers' compensation cases involving successive injuries during different employments, the first employer remains liable for the full extent of benefits if the second injury is solely a 'recurrence' of the first injury-- i.e., if the second incident did not causally contribute to the Claimant's disability. If, however, the second incident aggravated, accelerated, or combined with a pre-existing impairment or injury to produce a disability greater than would have resulted from the second injury alone, the second incident is an 'aggravation,' and the second employer becomes solely responsible for the entire disability at that point. *Pacher v. Fairdale Farms & Eveready Battery Co.*, 166 Vt. 626 (1997). The Vermont Supreme Court has further stated that "[m]ere continuation or even exacerbation of symptoms, without a worsening of the underlying disability, does not meet the causation requirement." *Stannard v. Stannard Co.*, 2003 VT 52, §11.

93. The factors that the Department typically considers when finding an aggravation of a pre-existing condition are: 1) whether there is a subsequent incident or work condition that destabilized a previously stable condition; 2) whether the claimant had stopped treating medically; 3) whether the claimant had successfully returned to work; 4) whether the claimant had reached an end medical result; and 5) whether the subsequent work contributed independently to the final disability. *Trask v. Richburg Builders*, Op. No. 5 1-98WC (1998).
94. Considering these factors in turn, it is first acknowledged. by and through the medical records and Claimant's testimony, Claimant never stopped taking Tramadol during the time from before his 2011 surgery until the fusion in 2019. Claimant credibility testified, and the records consistently reflect continued difficulties with completing his work day after his return to work following the 2011 surgery.
95. The first *Trask* factor is whether there was a subsequent incident or work condition that destabilized a previously stable condition. *Trask v. Richburg Builders*, Op. No. 51-98WC (1998). On balance, the facts of this case indicate a recurrence of the 2011 injury.
96. The Claimant's back condition from 2011 did not fully resolve. The Claimant traded the brake press job for the RO position in 2014 or 2015, however this was still a physical job. It is undisputed the work performed by Claimant was physical. It is likewise undisputed there was no "incident" in 2018 or 2019. It is likewise undisputed that the Claimant continued to report pain symptoms and utilize medications from 2011 to 2019.
97. Claimant credibly testified he continued to experience pain on a "waxing and

waning basis” since 2011. The evidence revealed this waxing and waning would often correlate to an increase or change in duties while with the employer, although this was always a physically demanding employment. Likewise, his continued use of narcotic pain medications is a strong indication that his injury had not stabilized or resolved. *Mason v. Baker Distributing*, Op. No. 79-95WC (October 30, 1995). This factor weights in favor of a recurrence.

98. The second *Trask* factor is whether the Claimant ever stopped treating medically. *Trask, supra*. It is acknowledged a gap exists in the medical records from July 30, 2015 to August 9, 2017. JME 923.
99. Dr. Backus’ finding of medical end in 2012 was not without the indication of future care and ongoing medications. JME 594. The records continuously document medication refills for the back pain from the 2011 event. FOF 26 - 31, 35, 40-47, *supra*. All of these records contain some assertion that he continued with low grade narcotics to get him through the work day. FOF 35 and 40, *supra*.
100. As of his return to care on August 9, 2017 Claimant was actively reporting daily medication use for his chronic pain. Claimant testified he stopped treatment because his medication was being denied. He testified to continued use of medications, some of which he paid for out of pocket due to difficulties with coverage between the 2011 and 2019 surgeries. While there is no active care between 2015 and 2017, continued medication use is consistent with treatment. This factor supports a recurrence.
101. The third *Trask* factor is whether the Claimant successfully returned to work following the work injury. *Trask v. Richburg Builders*, Op. No. 51-98WC (1998). The Claimant returned to work after his 2011 work injury and worked until he left the Defendant employer in 2020. On balance, the medical records and Claimant’s own testimony do not indicate this was “successful”.
102. The Department has held that "just because the claimant returned to work after every incident is not necessarily indicative of a 'successful return.'" *Tatro v. Town of Stamford Wallis*, Op. No. 25-00WC (2000); *Nelson v. Federal Express Freight*, Op. No. 19-16WC (2016) (holding that the evidence supported a recurrence rather than an aggravation because the claimant continued to treat for his complaints during the entire period of time, and he returned to work but worked through the pain).
103. It is undisputed Claimant continued to take medications. The medical records reflect complaints that the work particularly during busy season impacting his symptoms. FOF 26, 27, 35-37, *supra*. Claimant went back to the press brake

job after surgery. At some time in 2014-2015 he switched to reverse osmosis (RO). He credibly testified the quality control for this RO machine was physically demanding as well. His medical records support his reports that he required medication to make it through a work day. FOF 35, 40-45, *supra*. Of importance, the Claimant's work ethic as a dedicated employee was evident in the records and his testimony. While he may have strived for a successful return to work it is clear that his struggle with symptoms followed him from 2011 to 2019. This factor, on these facts, favor a recurrence.

104. The fourth *Trask* factor is whether the Claimant had reached an end medical result. *Trask v. Richburg Builders*, Op. No. 51-98WC (1998).
105. The Claimant was first placed at end medical result for his 2011 work injury on January 10, 2012 by Dr. Backus. Dr. Barnum placed the Claimant at end medical result for his 2011 work injury on May 29, 2014. There is no dispute here that the Claimant reached a medical end result for the 2011 surgery. This factor favors an aggravation.
106. The fifth *Trask* factor is whether the subsequent work contributed independently to the final disability. *Trask v. Richburg Builders*, Op. No. 51-98WC (1998). The fifth factor carries great weight, but it must be balanced against the cumulative effect of the other factors. *Tatro v. Town of Stamford Wallis*, Op. No. 25-00WC (2000). The question is whether the continued work at Leader Evaporator between 2018-2019, during MEMIC's risk period, is what led to the de-stabilization of his condition. On balance, the medical evidence, Claimant's report and expert opinions support a finding of a recurrence on this factor.
107. Dr. Backus noted Claimant was relatively stable in the sense that he had been managing his flare-ups for years. He testified working with the RO machines is what contributed to the final disability in 2018/2019. He also confirms there was no specific event but it is "common and expected" that over time things can weaken because of the "natural process" not because of any specific event, although it is "easier" to identify when there is an event. Here, there is "nothing to point to other than the work, which was heavy work."
108. On the issue of whether the work contributed to the final disability, Dr. Backus points to the objective impairment from the surgery, stating he now has a higher degree of impairment due to the second surgery and fusion. He concludes the work in 2018/2019 constitutes an aggravation such that benefits are assignable to MEMIC.
109. In this case the critical issue is whether the Claimant's duties with Leader Evaporator in 2018 to 2019 contributed independently to the final disability.

Of particular relevance to this case, the Court in *Pacher v. Fairdale Farms & Eveready Battery Co.*, 166 Vt. 626 (1997)(confirmed “mere continuation or even exacerbation of symptoms, without a worsening of the underlying disability does not meet the causation requirement”).

110. To support his conclusion of an aggravation, Dr. Backus states the Claimant’s condition “then destabilized in 2018 with several references in the records to work related factors.” This reliance is inconsistent with the medical reports and testimony of the Claimant which indicates he was continuing to struggle no matter what he did since his return to work. See FOF 26, 32, 35, 26, 20 and 41, *supra*; JME 1104-1107.
111. Dr. Backus’ opinion certainly speaks to a worsening of symptoms as a result of the heavy work Claimant was doing. That Claimant did heavy work in all jobs except quality control does not seem to be a factor that is in dispute. What is absent from Dr. Backus’ analysis and opinion is a finding, supported by credible objective evidence, that there was something more than a continuation of Claimant’s already bad symptoms, something beyond an exacerbation of symptoms which indicates an actual worsening of the underlying progressive condition. Stating Claimant had an increase in impairment due to the surgery does not objectively support there was a worsening of the underlying disability on these facts. That piece is simply missing from Dr. Backus’ analysis and thus, as it relates to the *Trask* fifth factor, on the credible medical evidence, Dr. Backus’ statement of destabilization is not found to be persuasive.
112. It is true that an injury need not be instantaneous to be accidental within the meaning of 21 V.S.A. §618. *Pelkey v. Rock of Ages*, Op. No. 74-96WC (January 3, 1997); *Campbell v. Heinrich Savelberg, Inc.*, 139 Vt. 31 (1980). “A recurrence is the continuation of a problem which had not previously resolved or become stable, whereas an aggravation is the destabilization of a condition which had become stable, although not necessarily symptom free.” *Jaquish v. Bechtel Const. Co.*, Opinion No. 30-92WC (December 29, 1992).” On these facts there is no credible evidence or testimony which outlines a destabilization as a result of the specific job duties or work attributable to the time period of 2018-2019, irrespective of whether an “incident” occurred.
113. Dr. Binter and Dr. White provide opinions stating that the Claimant's 2018 low back treatment and subsequent surgery were all causally related to his 2011 work injury and thus a recurrence. Dr. Backus opined the work in 2018 and 2019 amounts to an aggravation due to his heavy work.
114. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-

provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Op. No. 37-03WC (Sept. 17, 2003).

115. Also weighing in this mix are the opinions of Dr. Barnum, while not outlined at the hearing in live testimony, were expressed in his reports over the years and specifically in June 2019. JME 1006. He states from the post-recovery period of the 2011 surgery in 2014 the Claimant has had “persistent radicular symptoms in his right lower extremity and his L3 nerve root distribution”. Consistent with the testimony of Claimant and the medical records noted above FOF 35 and 43, *supra*. Claimant “finally got to the point where he could not tolerate it” and wanted to pursue surgery. He directly related this to his work injury of 2011.
116. The facts of this case are contrasted to those outlined in the Department decision on the aggravation/recurrence claim in *Longe v. Boise Cascade Corp., et al*, Op.No. 42-98WC (July 20, 1998)(appealed and remanded on other grounds). In that case, after sustaining an injury to his back in 1983, the claimant had no treatment other than one noted flare in 1988, which was treated with physical therapy, not medications. Likewise the claimant’s return to work was incredibly robust. The aggravation was supported by the clear detail of the work hours and work activities, which likely re-herniated the disc repaired in 1983, specifically his “work activities involved constant and extensive bending, lifting, reaching, stacking and stooping while working at an exceptionally fast pace”. These activities resulted in a “rapid” development in pain similar to the previous pain.
117. By comparison, Claimant here was never pain free, and continued to medicate to “get through his day”, and had no intervening trauma and no real change in his symptom complex over the years since 2011. As early as 2014, Claimant is reporting he would not be able to function without the pain meds. Yet, he continued to push through at work, despite the consistent pain complaints. While Dr. Backus indicates hard physical work was the cause in 2018-2019, the records do not support specific activities or duties as they did in *Longe*. Moreover, the opinion that the time frame of difficulty in performing work was only 2018-2019 ignores the realities set forth in the medical records.
118. Dr. Binter opined there was no evidence of a new work injury in 2018. She noted that the Claimant’s pain complaints were in the same anatomical distribution from 2011 forward, and the finding of scar tissue and foraminal stenosis at L3-4, at the time of the 2019 surgery, was evidence of the absence of destabilization. Her testimony of the absence of objective evidence of

destablization is persuasive based upon the record as a whole.

119. The September 20, 2013 MRI showed progression of the right neural foramen narrowing at L3-L4. JME 692-693. The November 22, 2013 MRI revealed a residual/recurrent small disc protrusion and surrounding enhancing fibrosis at L3-L4. Dr. Binter testified that this MRI done with and without contrast, showed a recurrent disc herniation, and severe stenosis on the right and scarring at L3-L4. It is acknowledged Dr. Binter did not actually review the MRI films.
120. In contrast, Dr. Backus does not comment on the MRI comparisons. He does, however cite to Dr. Hehir's December 9, 2013 report. JME 1104-1107. That report indicated as of 2013 the Claimant was reporting "persistent radiating pain into his right lower extremity, primarily in the distribution of L4 and L3 nerve roots." That report, quoted in Dr. Backus' July 2020 review, goes on to indicate the potential for "re-evaluation" of surgical intervention or other interventional procedure. *Id.*
121. Dr. Binter did not evaluate whether Claimant's specific job duties from 2018 and 2019, or any time frame for that matter, caused or contributed to the increase in symptoms. It was instead her position that he had the same complaints as he did in 2013 going forward, these complaints were consistent in the medical records, and consistently treated with medications. This opinion is consistent with Dr. White's opinion of waxing and waning of symptoms over the years, and even Dr. Backus' opinion that the heavy work contributed to the increase in symptoms. What is absent from all expert analysis is the specific work duties, consistent with the medical records, which offer evidence of something more than an increase in symptoms and signify an objective change in the underlying condition arising from the 2011 event and surgery.
122. I find the 2018 low back related symptoms, treatment, and resulting surgery in 2019 were recurrences of the Claimant's 2011 injury on Acadia's risk. There is no specific objective evidence that anything occurring during MEMIC's risk period, which started in 2018, causally contributed to the final disability and fusion surgery. There was nothing more than various increases in symptoms which were consistent with the waxing and waning of Claimant's original condition stemming from the 2011 event. MEMIC has satisfied it's burden in this regard.
123. It is appropriate, on these facts, to apportion responsibility for the Arbitrator's fee among the parties from 2011 to the present, namely: Acadia, AmTrust and MEMIC. As there was no evidence presented with which to evaluate the impact of the 2010 claim, in the interest of fairness it would be unreasonable for Star Insurance to be responsible for payment of the fees to arbitrate. Thus,

as between Acadia, AmTrust and MEMIC the Arbitrator's bill shall be split equally.

ORDER:

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED:

1. Acadia's request for reimbursement of workers' compensation benefits paid on this claim pursuant to 21 V.S.A. sect. 662 is hereby DENIED. Acadia shall bear any ongoing responsibility for any and all workers' compensation benefits to which Claimant proves or has proven entitlement on account of the original 2011 injury consistent with this decision.
2. Star Insurance, AmTrust and MEMIC are absolved of any liability for reimbursing Acadia for any workers' compensation benefits paid or payable from 2018 forward consistent with this decision.
3. Acadia, AmTrust and MEMIC shall equally share the Arbitrator's fees, which shall follow under separate cover.

DATED at Woodstock, Vermont this 5th day of November, 2021.

/s/ Bonnie Badgewick

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