

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Senad Omerovic

v.

Loso's Professional
Janitorial Services, Inc.

State File No. HH-60049

v.

Preci Manufacturing, Inc.

State File No. LL-00959

**ARBITRATOR'S RULING ON DEFENDANT PRECI MANUFACTURING, INC.'S
MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT LOSO'S
PROFESSIONAL JANITORIAL SERVICES, INC.**

APPEARANCES:

David Berman, Esq., for Defendant Preci Manufacturing, Inc./Travelers Ins. Co.
William Blake, Esq., for Defendant Loso's Professional Janitorial Services, Inc./Acadia Ins. Co.

ISSUE PRESENTED:

Has Defendant Loso's Professional Janitorial Services, Inc. (hereinafter "Loso's") waived its right to pursue an aggravation claim against Defendant Preci Manufacturing, Inc. (hereinafter "Preci"), such that Preci is entitled to judgment in its favor as a matter of law?

EXHIBITS:

Defendant Preci's Statement of Undisputed Facts, September 23, 2020

Defendant Preci's Exhibit 1:	Employer's Notice of Intention to Discontinue Payments (Form 27), 4/4/2019
Defendant Preci's Exhibit 2:	Acadia Payment Log
Defendant Preci's Exhibit 3:	Orthopedics Brief Operative Note (Dr. Krag), DOS 9/23/2016
Defendant Preci's Exhibit 4:	Return to Work Recommendations/Discharge Summary (Christopher Lewis, PT), DOS 12/2/2016
Defendant Preci's Exhibit 5:	Request to Insurance Company for Preauthorization of Medical Treatment (Form P1), response sent 10/25/2017
Defendant Preci's Exhibit 6:	Independent Medical Evaluation Report (Dr. Backus), 9/13/2017
Defendant Preci's Exhibit 7:	Operative Report (Dr. Jewell), DOS 1/15/2018

Defendant Preci's Exhibit 8: Physical Therapy Encounter Note (Rose Bernier, PT), DOS 5/31/2018
Defendant Preci's Exhibit 9: Progress Note (Dr. Jewell), DOS 6/1/2018
Defendant Preci's Exhibit 10: L Spine 4 or More Views, 6/1/2018
Defendant Preci's Exhibit 11: Letter from Dr. Jewell "To Whom It May Concern," 6/1/2018
Defendant Preci's Exhibit 12: Progress Note (Dr. Jewell), DOS 11/2/2018
Defendant Preci's Exhibit 13: Independent Medical Exam Report (Dr. Binter), 1/18/2019
Defendant Preci's Exhibit 14: Independent Medical Evaluation Supplemental Report (Dr. Backus, 2/2/2019

Defendant Loso's Response to Defendant Preci's Statement of Undisputed Facts, October 26, 2020

Defendant Loso's Exhibit A: Progress Note (Dr. Krag), DOS 10/26/2016; Physical Therapy Discharge Note (Lucia Ryan, PT), DOS 10/26/2016
Defendant Loso's Exhibit B: Physical Therapy Work Rehabilitation Encounter Note (Christopher Lewis, PT), DOS 12/1/2016; Occupational Therapy Encounter Note (Dawn Hameline, OT), DOS 12/1/2016
Defendant Loso's Exhibit C: Physical Therapy Work Hardening/Conditioning Discontinue Note (Christopher Lewis, PT), DOS 12/2/2016; Occupational Therapy Work Hardening Discontinue/Discharge Note (Dawn Hameline, OT), DOS 12/2/2016
Defendant Loso's Exhibit D: Supplemental Charting Note (Dr. Schwartzberg), DOS 1/3/2017
Defendant Loso's Exhibit E: Progress Note (Dr. Krag), DOS 1/11/2017
Defendant Loso's Exhibit F: MRI Lumbar Spine, 2/28/2017
Defendant Loso's Exhibit G: Progress Note (Dr. Krag), DOS 3/15/2017
Defendant Loso's Exhibit H: Progress Note (Dr. Jewell), DOS 6/2/2017; L Spine 4 or More Views, 6/2/2017
Defendant Loso's Exhibit I: Independent Medical Evaluation Report (Dr. Backus), 9/13/2017
Defendant Loso's Exhibit J: MRI Lumbar Spine, 9/18/2017
Defendant Loso's Exhibit K: Operative Report (Dr. Jewell), dictated 1/15/2018, 11:25 AM), DOS 1/15/2018 (dictated 1/15/2018, 11:25 AM; Operative Report (Dr. Jewell), DOS 1/15/2018 (dictated 1/18/2018, 3:17 PM); Brief Op Note (Dr. Akture), DOS 1/15/2018; Neurosurgery Post Procedure Note (Dr. Thakrar), DOS 1/15/2018
Defendant Loso's Exhibit L: Independent Medical Exam Report (Dr. Binter), 1/18/2019
Defendant Loso's Exhibit M: Independent Medical Evaluation Supplemental Report (Dr. Backus), 2/2/2019

Defendant Loso's Exhibit N: Letter from Acadia to VDOL specialist, 4/4/2019; Employer's Notice of Intention to Discontinue Payments (Form 27), 4/4/2019

Defendant Loso's Exhibit O: Letter from Attorney Gannon to VDOL specialist, 4/8/2019; Employee's Notice of Injury and Claim for Compensation (Form 5), 4/8/2019

Defendant Loso's Exhibit P: Letter from Attorney Berman to VDOL specialist, 5/7/2019; Denial of Workers' Compensation Benefits by Employer or Carrier, 5/7/2019

FINDINGS OF FACT:

Considering the evidence in the light most favorable to Defendant Loso's as the non-moving party, *State v. Delaney*, 157 Vt. 247, 252 (1991), I find the following facts:

1. Claimant injured his low back while working for Loso's on February 22, 2016. Specifically, while cleaning and emptying recycling at an attorney's office, he endeavored to pick up a box of trash, which was heavy with books to be recycled. As he lifted the box and twisted to put it in the elevator, he felt a sharp pain in his back. *Defendant Preci's Statement of Undisputed Facts*, ¶ 1; *Defendant Preci's Exhibit 1* (confirming date of injury); *Defendant Preci's Exhibit 6*, pp. 3-4 (confirming mechanism of injury as described in 2/23/2016 and 2/24/2016 medical records); *Defendant Preci's Exhibit 5* (confirming work-related injury as "lower back").
2. At the time of his injury, Claimant worked two jobs – as a janitor at Loso's and as a machine operator at Preci. *Defendant Loso's Exhibit C*, p. 6. The latter job required lifting metal pieces of unspecified weight and with unspecified frequency. *Id.*
3. Loso's workers' compensation insurance carrier, Acadia Insurance Co., accepted Claimant's claim and paid temporary disability and medical benefits. *Defendant Preci's Statement of Undisputed Facts*, ¶ 2; *Defendant Preci's Exhibit 2*.
4. As treatment for Claimant's low back injury, diagnosed as an L5-S1 left disc herniation, Dr. Krag, an orthopedic surgeon, performed an L5-S1 discectomy on September 23, 2016. *Defendant Preci's Statement of Undisputed Facts*, ¶ 3; *Defendant Preci's Exhibit 3*.
5. Acadia paid for the September 23, 2016 surgery. *Defendant Preci's Statement of Undisputed Facts*, ¶ 4; *Defendant Preci's Exhibit 2*.
6. At his first post-surgery follow-up on October 26, 2016, Claimant reported to Dr. Krag that his pre-operative low back and left leg symptoms were 80 percent improved. However, he was not symptom-free, reporting some plantar foot pain and lateral pelvic pain associated with greater levels of activity. Dr. Krag surmised that these were due to deconditioning and would likely abate with time. *Defendant Loso's Exhibit A*, p. 1.

7. Following his surgery, Claimant participated in a work hardening/conditioning program. Having begun the program at a sedentary work capacity, by the time of his discharge on December 2, 2016 he was demonstrating a medium work capacity. *Defendant Loso's Exhibit C*, p. 8.
8. Claimant's work hardening/conditioning program providers released him to return to work gradually, starting part time with restrictions, as of December 2, 2016. *Defendant Preci's Statement of Undisputed Facts*, ¶ 5; *Defendant Preci's Exhibit 4*; *Defendant Loso's Exhibit C*. On or about December 10, 2016 he returned to work at Preci for four hours per day, and on or about January 3, 2017 he increased to six hours per day. *Defendant Preci's Exhibit 13*, p. 3. From the record before me now, it is unclear whether and to what extent Claimant was restricted from lifting the metal pieces he had described as a function of his machine operator job prior to his February 2016 work injury, *see Finding of Fact No. 2, supra*. The record is similarly unclear as to whether and to what extent other aspects of Claimant's Preci job were modified to accommodate the recommended restrictions. For example, the recommendations advised that Claimant was capable of only occasional bending, *Defendant Preci's Exhibit 4*, p. 3, an aspect of his machinist job that Dr. Jewell later found to be "particularly difficult" for him. *Defendant Preci's Exhibit 9*; *see Finding of Fact No. 27, infra*.
9. After returning to work at Preci, Acadia switched payments from temporary total to temporary partial disability. *Defendant Preci's Statement of Undisputed Facts*, ¶ 6; *Defendant Preci's Exhibit 2*.
10. Claimant never returned to work for Loso's. *Defendant Loso's Exhibit N*, p. 2.
11. Claimant's return to work at Preci did not progress as hoped. On January 3, 2017, he reported to Dr. Schwartzberg that after initially improving post-surgery, his back pain had increased when he returned to work. *Defendant Loso's Exhibit D*. Shortly thereafter, at his four-month follow-up with Dr. Krag on January 11, 2017, he reported experiencing increased low back pain and left leg symptoms after progressing from four to six hours of work per day. Dr. Krag questioned whether the increased symptoms might be due to another disc herniation but surmised that they were more likely just the result of increased "movement and activity" while the previously compressed nerve root continued to heal. His plan was for Claimant to continue with the six-hour daily work schedule for at least the next six weeks. *Defendant Loso's Exhibit E*, p. 1.
12. On February 28, 2017, Claimant underwent a lumbar spine MRI, which Dr. Krag interpreted as failing to show any recurrent disc herniation or nerve root compression at the L5-S1 level. *Defendant Loso's Exhibit F*, p. 2; *Defendant Loso's Exhibit G*, p. 1.
13. Dr. Krag next examined Claimant on March 15, 2017. Given the absence of any new pathology on the recent MRI scan, Dr. Krag could not clearly identify a structural basis for Claimant's increased symptoms. However, he now suspected that the degeneration of the L5-S1 disc that led to Claimant's initial herniation had "continued to progress" and was the "principal source" of the symptoms. His treatment plan was for Claimant to decrease his work status down from six hours to four hours daily. He also suggested that Claimant

consider the possibility of surgical fusion at the L5-S1 level. *Defendant Loso's Exhibit G*, pp. 1-2.

14. On June 2, 2017, Claimant underwent a neurosurgical consult with Dr. Jewell. Consistent with Dr. Krag's observations, Dr. Jewell reported that while Claimant had not experienced complete relief of symptoms following his September 2016 surgery, he was "significantly better," but that his symptoms worsened a few months later with "increasing intensity at work." *Defendant Loso's Exhibit H*, p. 1.
15. On August 23, 2017, Dr. Jewell reported that Claimant continued to be in "fairly severe pain." *Defendant Preci's Exhibit 6*, p. 18.
16. A repeat lumbar MRI scan on September 18, 2017 revealed a "probable recurrent disc herniation in the left subarticular region in close proximity to the descending left S1 nerve root." *Defendant Loso's Exhibit J*, p. 1. Upon reviewing this finding, at his October 18, 2017 office visit Dr. Jewell offered Claimant a surgical treatment option, namely, a "redo discectomy on the left at L5-S1," which Claimant accepted. *Defendant Preci's Exhibit 6*, p. 19.
17. On October 20, 2017, Dr. Jewell submitted a preauthorization request to Acadia. The proposed medical treatment for which preauthorization was sought was identified as "redo Left L5-S1 discectomy." *Defendant Preci's Statement of Undisputed Facts*, ¶ 7; *Defendant Preci's Exhibit 5*.
18. Acadia's adjuster, Ryan Heaslip, neither authorized nor denied the preauthorization request. Instead, he indicated on October 25, 2017 that he had ordered a medical records review. *Defendant Preci's Statement of Undisputed Facts*, ¶ 8; *Defendant Preci's Exhibit 5*.
19. At Acadia's referral, Claimant underwent an independent medical evaluation with Dr. Backus on September 13, 2017. Dr. Backus' report is undated, though it includes discussion of medical records generated both prior to and following his examination, including Claimant's September 18, 2017 lumbar spine MRI, *Finding of Fact No. 16, supra*, an October 2, 2017 electrodiagnostic medicine consult, and Dr. Jewell's October 18, 2017 encounter note and October 20, 2017 preauthorization request. *Defendant Preci's Statement of Undisputed Facts*, ¶ 9; *Defendant Preci's Exhibit 6*, pp. 18-19. I infer from these facts that Dr. Backus issued his report at some point after October 20, 2017 but before January 15, 2018, the date of Dr. Jewell's surgery, *see Finding of Fact No. 23, infra*.
20. As of his September 13, 2017 independent medical evaluation, Dr. Backus was aware that Claimant was working as a machine operator twenty hours per week. *Defendant Preci's Statement of Undisputed Facts*, ¶ 10; *Defendant Preci's Exhibit 6*, p. 21. However, his report revealed only scant details of that job, including the following "pertinent excerpts," *Id.*, p. 3:
 - Dr. Johansson's August 18, 2016 note, which states Claimant's occupational history as follows: "he works two jobs. One is a part-time job, . . . the other is as a machine

operator. This is his full-time job, and that does not require a lot of heavy lifting.” *Id.*, p. 10;

- An October 2, 2016 occupational therapy note, which states, “According to today’s testing and report of positional tolerances, he does not meet the physical requirements of either of his jobs at Loso’s Janitorial or Presi [sic] Manufacturing. It is estimated that both [of] these jobs require him to function at MEDIUM or heavier work capacity per [patient] report. Job description[s] are currently not available.” *Id.*, p. 14;
- Dr. Krag’s March 15, 2017 note, which states, “However, on about 01/03/2017, when he moved up from 4 hours to 6 hours per day of light duty work, he began to have increasing symptoms.” *Id.*, p. 16.

21. Among the specific questions Dr. Backus was asked to address in the report of his September 13, 2017 independent medical evaluation was the following: “Is the recommended surgery [as proposed in Dr. Jewell’s preauthorization request, *Finding of Fact No. 17, supra*] causally related and medically necessary?” *Defendant Preci’s Exhibit 6*, p. 27.
22. In answer to the above question, Dr. Backus stated as follows: “The surgery offered by Dr. Jewell is reasonable and medically necessary though it is elective, meaning choosing to have surgery or not is a personal choice given the benefit cannot be predicted with any accuracy. If he has the surgery it is causally related to the work injury claim.”¹ *Id.*
23. On January 15, 2018, Dr. Jewell performed the surgery for which he had sought preauthorization. His operative report identifies both the pre- and post-operative diagnoses as “recurrent left L5-S1 disk [sic] herniation,” for which the surgical procedure was “redo left L5-S1 microdiscectomy [sic].” *Defendant Preci’s Exhibit 7; Defendant Loso’s Exhibit K*. Acadia paid for the surgery. *Defendant Preci’s Exhibit 2*.
24. Post-operatively, Claimant engaged in 13 physical therapy sessions through May 31, 2018. *Defendant Preci’s Exhibit 8*. Loso has acknowledged that “on information and belief” Acadia paid for this treatment. *Defendant Preci’s Exhibit 2; Defendant Loso’s Response to Defendant Preci’s Statement of Undisputed Facts*, ¶ 14. The payment log is difficult to decipher, such that I cannot make a specific finding to that effect.
25. On June 1, 2018, Dr. Jewell requested flexion-extension films of Claimant’s lumbar spine. *Defendant Preci’s Statement of Undisputed Facts*, ¶ 15; *Defendant Preci’s Exhibit 9*.
26. The flexion-extension films were completed on June 1, 2018. *Defendant Preci’s Exhibit 10*. Loso has acknowledged that “on information and belief” Acadia paid for this treatment. *Defendant Preci’s Exhibit 2; Defendant Loso’s Response to Defendant Preci’s Statement of Undisputed Facts*, ¶ 16. The payment log is difficult to decipher, such that I cannot make a specific finding to that effect.

¹ The identifying information on page 1 of Dr. Backus’ report included the following: “Date of Injury: 2/22/2016.” Neither party challenges his subsequent reference to “the work injury claim” as the injury that occurred on that date.

27. On June 1, 2018, Dr. Jewell issued a statement “To Whom It May Concern” that in his opinion, Claimant could not return to work on account of his continued back and leg pain. *Defendant Preci’s Exhibit 11*. This was consistent with Dr. Jewell’s treatment note of the same date, in which he stated, “[Claimant] is unable to work as a machinist, which requires bending and twisting, which is particularly difficult for him.” *Defendant Preci’s Exhibit 9*.
28. Acadia paid Claimant temporary total disability benefits in accordance with Dr. Jewell’s total disability note. *Defendant Preci’s Statement of Undisputed Facts*, ¶ 17; *Defendant Loso’s Response to Defendant Preci’s Statement of Undisputed Facts*, ¶ 17.²
29. On November 2, 2018, Dr. Pino administered diagnostic bilateral L4, L5, and S1 medial branch blocks under fluoroscopy. *Defendant Preci’s Statement of Undisputed Facts*, ¶ 18; *Defendant Preci’s Exhibit 12*. Loso has acknowledged that “on information and belief” Acadia paid for this treatment. *Defendant Loso’s Response to Defendant Preci’s Statement of Undisputed Facts*, ¶ 18. The payment log is difficult to decipher, such that I cannot make a specific finding to that effect.
30. At Acadia’s referral, Claimant underwent an independent medical evaluation with Dr. Binter on January 18, 2019. This occurred after a new adjuster, Mary Jane Post, had been assigned to the file. *Defendant Preci’s Statement of Undisputed Facts*, ¶ 19; *Defendant Preci’s Exhibit 13*, p. 1.
31. Dr. Binter’s report reflects citations to various medical records, ranging in date from February 22, 2016 through July 25, 2018. *Defendant Preci’s Exhibit 13*, pp. 3-16. Dr. Backus’ report of his September 13, 2017 independent medical examination reflects citations to most, if not all, of the same records, at least through October 20, 2017. *Defendant Preci’s Exhibit 6*, pp. 3-19. However, each doctor noted certain records that the other did not mention. On the record before me now, it is impossible to decipher whether this was because one or the other doctors had not been given a particular record to review, whether it was because he or she did not believe it pertinent to the opinions rendered, or whether he or she simply overlooked it.
32. Dr. Binter concluded that Claimant had suffered an aggravation while working for Preci at some time during 2017. *Defendant Preci’s Statement of Undisputed Facts*, ¶ 20. According to her analysis:

After the negative for recurrence MRI on 02/28/17 [Claimant] continued to work as a machinist with increasing pain. A second MRI 5 months later showed a

² Both parties seem to imply that Claimant had been working for some period of time prior to Dr. Jewell’s June 1, 2018 disability note, such that Acadia recommenced paying temporary total disability benefits shortly thereafter. In fact, Acadia’s payment log reflects that it issued temporary total disability checks continuously from January 15, 2018 through June 25, 2018, *Defendant Preci’s Exhibit 2*, p. 17-18, and beyond, *id.*, p. 9-14. This is consistent with Dr. Binter’s January 18, 2019 report, which states that Claimant “has been out of work since January 13, 2018.” *Defendant Preci’s Exhibit 13*, p. 3. However, the payment log is difficult to decipher, and as this fact is not central to my analysis of the pending motion, for now I find only that Acadia paid temporary total disability benefits in accordance with Dr. Jewell’s note, without specifying to what extent payments had been ongoing beforehand.

recurrent disc herniation. This would be an aggravation of a pre-existing condition caused by his machinist job not caused by his part-time janitorial job. *Defendant Preci's Exhibit 13*, p. 17.

33. Upon reviewing Dr. Binter's report, on February 2, 2019, Dr. Backus issued a Supplemental Report. *Defendant Preci's Exhibit 14*. In his introductory paragraph, he noted that his initial report "did not provide a causal analysis other than to answer the question that his treatment had been related to the original 2/22/2016 injury" at Loso's. Acadia had requested the supplemental report, he explained, "for a specific causal analysis regarding if the work [Claimant] returned to as a machine operator aggravated [his] condition and was responsible for [Dr. Jewell's January 2018] surgery." *Id.*, pp. 1-2.
34. With particular reference to Dr. Binter's January 2019 independent medical examination report "and additional medical history," Dr. Backus now "specifically considered" the aggravation question. *Id.*, p. 20. To a reasonable degree of medical certainty, and consistent with Dr. Binter's opinion, he concluded, "[Claimant's] work [as] a machine operator after his first surgery contributed at least some to destabilizing his recovery from the first surgery and thus qualifies as an aggravation of his condition from the 2/22/2016 claim." *Id.*
35. In reaching this conclusion, Dr. Backus stated that Dr. Binter had "judged the physical activities of lifting and twisting [as] a machine operator constituted an aggravation . . .". *Id.* True, Dr. Binter's report specifically quoted Dr. Jewell's June 1, 2018 treatment note to the effect that Claimant was unable to return to his machinist job "because it requires bending and twisting, which is particularly difficult for him." *Defendant Preci's Exhibit 13*, p.15; *see Defendant Preci's Exhibit 9, Finding of Fact No. 27, supra*. She did not reference it further in her discussion, however, *Defendant Preci's Exhibit 13*, pp. 17-18; *see Finding of Fact No. 32, supra*. Dr. Backus' statement thus infers that she placed greater emphasis on it than she did. Nevertheless, as Dr. Jewell's comment post-dated Dr. Backus' first independent medical evaluation report by many months, I find that it was likely a component of the "additional medical history" to which he referred in his supplemental report.
36. Citing (1) Dr. Backus' report of his September 13, 2017 independent medical evaluation, (2) his February 2, 2019 supplemental report, and (3) Dr. Binter's January 18, 2019 independent medical examination report, on April 4, 2019, Ms. Post filed an Employer's Notice of Intention to Discontinue Payments (Form 27) on Acadia's behalf. *Defendant Preci's Statement of Undisputed Facts*, ¶ 23; *Defendant Loso's Exhibit N*. As grounds for the discontinuance, she asserted that Claimant's "recurrent disc herniation and need for surgery and total disability since 6/1/2018 is related to the job duties he performed at Preci Manufacturing subsequent to his return back to work full duty." *Id.*
37. On April 8, 2019, Claimant's attorney filed a Notice of Injury and Claim for Compensation (Form 5) against Preci. The notice stated the date of injury as "on or about 12/10/2017 [sic]."³ *Defendant Loso's Exhibit O*.

³ This appears to have been a typographical error. December 10, 2016 marked the day Claimant returned to work at Preci following his recovery from Dr. Krag's September 2016 surgery, and was the date of injury noted on Preci's denial of Claimant's claim against it, *Loso's Exhibit P*.

38. On May 7, 2019, Attorney Berman filed a Denial of Workers' Compensation Benefits by Employer or Carrier (Form 2) on Preci's behalf. As grounds for the denial, Preci's adjuster alleged both waiver and recurrence. *Defendant Loso's Exhibit P*.

CONCLUSIONS OF LAW:

1. To prevail on a summary judgment motion, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to judgment in its favor as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). The party opposing the motion is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44, 48 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425, 428 (1979).
2. This claim comes before me in the context of a dispute between two employers as to which is responsible for paying the workers' compensation benefits owed Claimant on account of his compensable work-related injury. Vermont's workers' compensation statute, 21 V.S.A. § 662(e), requires that such "aggravation-recurrence" disputes be resolved through arbitration.
3. In this case, Loso's accepted responsibility for Claimant's February 22, 2016 low back injury, which occurred in the course and scope of his work for that employer. Similarly, it accepted responsibility for Dr. Krag's September 23, 2016 surgery as treatment causally related thereto. It now seeks to avoid responsibility for benefits paid after Claimant returned to work at Preci, on the grounds that his work duties there caused or contributed to an aggravation of his preexisting condition, thus breaking the causal link back to the original injury.
4. Without addressing the merits of the aggravation-versus-recurrence dispute, in the pending motion Preci asserts that by its conduct Loso's has waived its right to pursue an aggravation claim against it. It argues that Loso's had ample factual information and time to investigate such a claim, and by continuing to pay benefits for more than two years after Claimant returned to work there, as a matter of law it has now forfeited its right to do so.
5. The Vermont Supreme Court has defined waiver as "an intentional relinquishment of a known right involving 'both knowledge and intent on the part of the waiving party.'" *Smiley v. State of Vermont*, 2015 VT 42, ¶ 10, quoting *LaFrance Architect v. Point Five Dev. S. Burlington, LLC*, 2013 VT 115, ¶ 38. A waiver may be express or implied. *Id.* However, if implied, "'caution must be exercised both in proof and application,' such that '[t]he facts and circumstances relied upon must be unequivocal in character.'" *Id.*, quoting *Holden & Martin Lumber Co. v. Stuart*, 118 Vt. 286, 289 (1954).
6. Preci argues that Loso's waiver should be implied by the fact that it continued to pay benefits even after it had access to information that should have prompted it to assert an aggravation claim. For example, it knew that Claimant had returned to work for Preci, that he experienced worsening symptoms thereafter, and that by September 2017 an MRI scan had

revealed a recurrent disc herniation. This should have been sufficient, Preci asserts, either for Loso's independent medical examiner, Dr. Backus, to have questioned whether an aggravation might have occurred or, when he failed to address the issue in his report, for its adjuster to seek clarification.

7. I note at the outset that whether Dr. Backus should or should not have addressed the aggravation question in his September 2017 report is irrelevant to the waiver issue Preci has raised. The "intentional relinquishment of a known right" that would constitute a waiver under the circumstances of this case rested with Loso's adjuster, not with its independent medical examiner.
8. Preci cites to the Commissioner's opinion in *J.C. v. Richburg Builders*, Opinion No. 37-06 (August 15, 2006), in support of its argument that Loso's conduct here should be viewed as a waiver. The defendant in that case accepted and paid for five surgeries to the claimant's neck and low back, as well as extensive temporary total and permanent partial disability benefits, over a period of nine years. When the claimant sought coverage for a sixth surgery, the defendant denied the claim, primarily on the grounds that it was not medically appropriate. Having obtained an expert psychiatric opinion to the effect that the claimant's ongoing symptoms were psychological in origin, apparently the defendant also argued that the sixth surgery was not causally related to the claimant's work injury. With little discussion, the Commissioner ruled that the defendant had waived the causation defense by not raising it at the outset of the claim, some nine years earlier.
9. The problem with Preci's argument, and the reason why its citation to *J.C. v. Richburg Builders* is inapposite, is because it conflates Loso's right to *investigate the possibility* that Claimant's work for Preci caused or contributed to his recurrent disc herniation with its right to *assert a claim* against Preci on those grounds.⁴ The defendant in *J.C.* was held accountable for failing to investigate causation in a timely manner. Loso's did so here. Its adjuster responded promptly to Dr. Jewell's preauthorization request, by requesting that Dr. Backus perform an independent medical examination, exactly as the workers' compensation statute envisions, 21 V.S.A. §640b.
10. Should Loso's adjuster have specifically asked Dr. Backus to address the aggravation question as part of his investigation? Perhaps a more diligent adjuster might have done so. Alternatively, perhaps even a diligent adjuster might have assumed that if evidence pointing to an aggravation existed in the medical records Dr. Backus reviewed, he would have noted and discussed them accordingly, in the context of his causation analysis. Either scenario is plausible, but ultimately irrelevant. The defining characteristic of waiver is intent, not negligence. What matters is what the adjuster actually knew, not what he might have found

⁴ Both parties have addressed the waiver issue in the context of Loso's ability to assert an aggravation claim against Preci, though technically that right rested with Claimant. Loso's right is more accurately stated as the ability to deny Claimant's claim on the grounds that the causal link back to the original injury was severed by his work duties at Preci, such that it no longer bore responsibility for ongoing benefits, which is in fact what it did, *Defendant Loso's Exhibit N*; see 21 V.S.A. § 662(c). Thereafter, when Claimant filed his Notice of Injury and Claim for Compensation against Preci, *Defendant Loso's Exhibit O*, and Preci responded with its own denial, *Defendant Loso's Exhibit P*, the battle between the two employers was joined. The aggravation-versus-recurrence issue then proceeded to arbitration, as the statute requires, 21 V.S.A. § 662(e).

out. *See, e.g., W.C. v. Orleans Central Supervisory Union*, Opinion No. 55-98 (September 15, 1998) (no waiver where evidence failed to demonstrate that adjuster had actual knowledge that it had mistakenly accepted injury claim occurring outside its carrier's policy period).

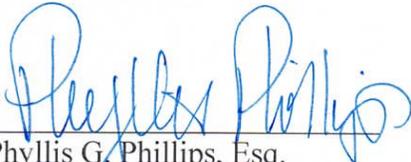
11. Considering the evidence in the light most favorable to Loso's, I conclude that Preci's has failed to establish, as a matter of law, that Loso's intentionally relinquished its right to investigate the possibility of an aggravation claim against Preci. To the contrary, it exercised it in a timely and appropriate manner.
12. The question whether Loso's waived its right to assert a claim against Preci on aggravation grounds leads to the same result, though by a slightly different analysis. The answer lies in the legal requirement that medical causation issues be resolved by way of expert medical testimony. This is because they concern "physical processes [that are] obscure and abstruse," and about which "a layman can have no well-founded knowledge and can do no more than indulge in mere speculation . . .". *Jackson v. True Temper Corp.*, 151 Vt. 592, 596 (1989), quoting *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17, 19 (1941); see also *Marsigli's Estate v. Granite City Auto Sales, Inc.*, 124 Vt. 95, 103 (1964) (on the issue of medical causation, "competent expert medical testimony is required to remove a determination from the realm of speculation" and establish a sufficient causal link between a claimed injury and employment).
13. With this in mind, Vermont's workers' compensation statute, 21 V.S.A. §655, grants employers and their carriers the right to obtain independent medical examinations. Independent medical examinations are the primary means by which an employer can obtain the expert opinions necessary either to challenge – or to affirm – a claim of work-related medical causation.
14. In this case, Loso's adjuster appropriately exercised the employer's right to obtain an independent medical examination in September 2017, by hiring Dr. Backus. Thereafter, when Dr. Backus issued his opinion – that Dr. Jewell's proposed "redo discectomy" was medically appropriate and causally related to Claimant's February 2016 injury – Loso's was both entitled and required to rely on it, by paying benefits accordingly.
15. That circumstance did not change until early 2019, when first Dr. Binter and then Dr. Backus provided expert opinions establishing the possibility of an aggravation claim against Preci. With those in hand, Loso's acted reasonably and promptly, by filing a discontinuance on the grounds that the causal link back to Claimant's February 2016 injury had thus been severed, *Defendant Loso's Exhibit N*.
16. From the evidence before me now, I cannot conclude that Loso's intentionally relinquished its right to assert an aggravation claim against Preci at any time prior to early 2019. To the contrary, Loso's acted entirely in concert with the only expert medical opinion it had in hand. It paid workers' compensation benefits to and/or on Claimant's behalf, not because it had waived its right to contest liability, but because it had no grounds to do otherwise.

17. To summarize, considering the evidence in the light most favorable to Loso's, I conclude that Preci has failed to establish, as a matter of law, that Loso's intentionally relinquished its right either to investigate the possibility of an aggravation claim against Preci, or to assert one once the necessary expert opinion evidence became available.

ARBITRATION ORDER:

Defendant Preci Manufacturing, Inc.'s Motion for Summary Judgment against Defendant Loso's Professional Janitorial Services, Inc. is hereby **DENIED**.

DATED at Williston, Vermont this 23rd day of November, 2020.



Phyllis G. Phillips, Esq.
Arbitrator