

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Senad Omerovic

v.

Loso's Professional
Janitorial Services, Inc./Acadia
Insurance Co.

State File No. HH-60049

v.

Preci Manufacturing, Inc./Travelers
Insurance Co.

State File No. LL-00959

ARBITRATOR'S OPINION AND ORDER

Hearing held via Zoom on February 10, 2021
Record closed on March 12, 2021

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.

ISSUES PRESENTED:

1. Whether Claimant suffered an aggravation, recurrence, or flareup of his February 22, 2016 compensable work injury when he returned to work at Preci Manufacturing, Inc. (hereinafter "Preci") on or about December 12, 2016 or thereafter;
2. Whether and to what extent any workers' compensation benefits paid to or on Claimant's behalf by Loso's Janitorial Services, Inc. (hereinafter "Loso's") should be allocated to Preci and reimbursed to Loso's; and
3. Whether Loso's has waived its right to pursue a claim for reimbursement against Preci on aggravation or flareup grounds.

EXHIBITS:

Joint Exhibit I:	Joint medical exhibit
Loso’s Exhibit A:	Preci site visit photo (1) and videos (2)
Loso’s Exhibit B:	Deposition of Lloyd Grunvald, July 23, 2020
Loso’s Exhibit C:	Deposition of Enes Bajrovic, July 23, 2020
Loso’s Exhibit D:	Claimant’s personnel file (Preci)
Loso’s Exhibit E:	Claimant’s payroll records (Preci), 12/10/16 – 8/25/17

FINDINGS OF FACT:

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.
2. At the time of his injury, Claimant worked two jobs. His full-time job was as a Computer Numerical Control (CNC) lathe machinist at Preci, where he worked weekdays from 7:30 AM to 4:00 PM. His part-time job was as a janitor at Loso’s, where he worked cleaning offices weeknights from 5:00 PM to 10:00 PM.
3. Although never formally evaluated from a functional perspective, the Loso’s job likely required at least a medium duty work capacity, described as one in which the employee must be able to lift 20 to 25 pounds occasionally and 10 to 25 pounds frequently. *Work Hardening Discharge Summary, Joint Medical Exhibit (JME) at 00386.*
4. The Preci job required multiple steps. First, the machine operator would have to set up the machine for the parts he or she was going to produce. This involved preparing a holding device for the part, loading the necessary tools onto the machine, and setting the controls. Once set up was completed, the operator could begin producing parts. This required loading a “blank” into the machine, pressing a button to start the machining process, unloading the part at the end of the machine’s “cycle time,” washing, inspecting, and measuring it to be sure it met specifications, and if acceptable, placing the finished part in a tray. Then the operator would begin the process again with a new “blank.” Setting up the machine required a certain amount of bending, and most of the tasks involved in the machining process were accomplished while standing.

Claimant’s Initial Treatment and September 2016 Surgery

5. Upon receiving notice of Claimant’s February 22, 2016 low back injury, Loso’s workers’ compensation insurance carrier, Acadia Insurance Co. (hereinafter “Acadia”) accepted his claim as compensable and commenced paying temporary disability and medical benefits accordingly.

6. Initially, Claimant treated conservatively for his injury. A March 2016 MRI revealed a left L5-S1 posterolateral disc herniation traversing the S1 nerve root and causing S1 radiculopathy. This was consistent with his symptoms, which the contemporaneous medical records described as 50 percent left-sided low back pain, and 50 percent left leg pain, tingling, and weakness radiating from his left groin down to his heel.
7. Claimant's symptoms failed to abate with either physical therapy, injections, or gabapentin. Ultimately, he consulted with Dr. Krag, an orthopedic surgeon. On September 23, 2016 Dr. Krag performed an L5-S1 discectomy, during which he removed a number of disc fragments.

Claimant's Post-Surgical Recovery and Work Hardening

8. Initially, Dr. Krag's surgery appeared to produce positive results. At his six-week post-operative follow-up, October 26, 2016, Claimant reported that his pre-operative symptoms – 50 percent low back pain and 50 percent left leg pain – were 80 percent relieved. Even so, he described some lingering pain in both the plantar area of his foot and his lateral pelvis associated with greater activity levels. Dr. Krag surmised that these symptoms were likely due to deconditioning and would abate with time.
9. Following an initial course of post-operative physical therapy, on November 2, 2016 Claimant entered a work hardening program. This consisted of physical and occupational therapy, four hours every weekday for four weeks.
10. At the start of his work hardening program, Claimant was demonstrating a sedentary work capacity, which was deemed inadequate for either his full- or part-time jobs. He required his wife's assistance to wash his lower body, and was able to don pants, shoes, and socks only by significantly modifying how these tasks were accomplished. He verbalized a very strong motivation to return to work, but also high levels of anxiety, fear, and concern related to both his current condition and the possibility of reinjuring himself. *Work Hardening/Conditioning Program Evaluation Notes, 11/2/2016, JME at 000262-000267.*
11. By the end of the program on December 2, 2016, Claimant was demonstrating functional gains in many areas. He had progressed from a sedentary to a medium work capacity. He was independent in all activities of daily living and was able to assist with housework. His sleep was improved. Although he continued to report "low level pain," in the therapist's view this did not "limit his performance of exercises or functional activities." Overall, he reported that his body felt "very good," and that he was "excited to get back to work." *Work Hardening/Conditioning Program Discontinue/Discharge Note, 12/2/2016, JME at 000375-383.*
12. Notwithstanding these positive reports, upon close inspection, the work hardening program records also documented troubling red flags. Claimant failed to comprehend that the goal of work hardening was not to reduce his pain, but rather to increase his

function.¹ Thus, while he consistently demonstrated a willingness to do more, “even if I have pain,” *Work Hardening Health and Behavior Assessment, 11/2/2016, JME at 000260*, he just as consistently expected complete pain relief, and was “surprised to hear differently,” *Occupational Therapy Encounter Note, 11/28/2016, JME at 000359*.

13. Midway through work hardening, Claimant was still reporting continued tingling in his left leg, *Occupational Therapy Encounter Note, 11/18/2016, JME at 000328*, intermittent pain “that comes and goes without clear cause,” *Physical Therapy Work Hardening/Conditioning Progress Note, 11/21/2016, JME at 000335*, and occasional shooting pains from his back down to his left leg, *Occupational Therapy Encounter Note, 11/22/2016, JME at 000343*. Just before completing the program, he reported experiencing three to four “shocks” per day in his back. *Physical Therapy Work Rehabilitation Encounter Note, 11/28/2016, JME at 000360*. In his hearing testimony, Claimant credibly described these shocks as feeling like he was being “stabbed.”
14. Even on the day of his discharge from work hardening, Claimant self-reported the frequency of his low back pain as “constant.” *Physical Therapy Work Hardening/Conditioning Discontinue Note, 12/2/2016, JME at 000379*. On that same date, he rated his current pain on a ten-point analog scale as a three, a one at best and an eight at worst. *Id.* This compared with a current pain score of four upon entering the program on November 2, 2016, two at best, and six at worst. *Physical Therapy Work Hardening/Conditioning Evaluation Note, 11/2/2016, JME at 000262*.
15. I find from these reports that the substantial gains Claimant was making in the work hardening program in terms of strength, endurance, and function did not come without a price. His low back pain and radicular symptoms were ongoing throughout.
16. Claimant’s wife credibly corroborated this finding in her testimony. She observed that even at the conclusion of work hardening, Claimant was “not comfortable, not the same person.” Although he was still taking gabapentin for his nerve pain, he continued to complain “a lot” about tingling and numbness in his leg, which would “give out” on occasion, to the point where he would almost fall.
17. As noted above, Finding of Fact No. 11 *supra*, Claimant was discharged from work hardening on December 2, 2016 and released to return to work “at a medium work capacity or lighter.” *Occupational Therapy Work Hardening Discontinue/Discharge Note, 12/2/2016, JME at 000377*. His therapists recommended that he gradually increase his hours, from 30 hours per week for the first two weeks and then to 40 hours for the next two weeks “or until he is able to return to full 60-hour weeks without issue.” *Return to Work Recommendations/Discharge Summary, 12/2/2016, JME at 000386*.

¹ Notably, every daily physical and occupational therapy encounter note, from the start of work hardening to the program’s conclusion, includes a notation, under the heading, “Pain,” as follows: “Pain reduction not a goal of treatment.” See generally, *Occupational and Physical Therapy Encounter Notes, 11/7/2016-12/2/2016, JME at 000273-000375*.

18. Both Claimant and his wife credibly testified regarding the deleterious effect his being out of work had on his mental health. Mrs. Omerovic described her husband as a “work horse,” who became depressed because he was not able to provide for his family as “the man of the household.” And when Claimant was asked why he returned to work so soon after work hardening despite constant pain in his back and left leg, he stated simply, “Because I was trying to get back to work. I had pain, but I had to go to work,” and later, “Because I had to work, you have to try to get your life back.”
19. I find from this testimony, and from multiple corroborating references in the work hardening program records, that the fact that Claimant returned to work as quickly as he did was primarily a reflection of his overwhelming need to do so from a mental health standpoint. Unfortunately, it did not represent a significant improvement in his post-surgery pain and radicular symptoms, which remained bothersome and appeared not to be abating with time, as Dr. Krag had hoped.
20. Claimant did not return to his job at Loso’s, as that employer insisted on a full duty work release. Thereafter, Acadia’s claims representative inquired of Preci whether Claimant could return to work there. Preci agreed to allow him to do so. With consultation and assistance from Claimant’s Acadia-assigned vocational rehabilitation counselor, and with Claimant’s input as well, Preci’s management devised a modified duty job assignment.

Claimant’s Symptomatology and Medical Course After Returning to Work

21. Claimant returned to work at Preci on December 12, 2016. He worked four hours per day, five days per week, on one of two machines. By all accounts, and as documented by the video evidence, *Loso’s Exhibit A*, his job was extremely light duty. Co-employees set the machines up for him, as that task involved both bending and prolonged standing. The parts he machined weighed no more than one or two pounds, and the cycle times were relatively short. To avoid any unnecessary twisting, he loaded the completed parts into a cart placed next to the machine, rather than putting them in a tray on the table behind him. He was provided with a tall chair, which he used as a prop to lean against, a position he found more comfortable than sitting. He was encouraged to take breaks, or even to leave work early, whenever he needed to. Both his supervisor, Enes Bajrovic, and Preci’s vice president, Lloyd Grunvald, checked in with him often to see how he was doing.
22. Upon Claimant’s return to work at Preci, Acadia ceased temporary total disability payments and began paying temporary partial disability benefits instead.
23. Claimant and his wife both testified regarding his initial return-to-work experience. Claimant credibly testified that he was “not doing very good,” with more pain in his low back and more tingling down his left leg. He was on his feet for most of the hours he worked and felt “painful” at the end of the day. He was adamant, however, that his symptoms did not “return” after he went back to work; rather, they continued as they had during the work hardening program. Mrs. Omerovic credibly testified to the same effect. She recalled that Claimant continued to take gabapentin, even though he was driving and

working around machinery. The medication made him “loopy” and sleepy, and he returned home exhausted after work each day.

24. Three weeks after starting back to work at Preci, on January 2, 2017 Claimant increased his hours from four to six daily. I find from his credible testimony that he did so despite his ongoing pain and symptoms, because he found that being at work was beneficial from a mental health perspective.

25. The very next day, January 3, 2017, Claimant presented to Dr. Schwartzberg, his primary care provider, requesting an increase in his gabapentin dosage. Dr. Schwartzberg, who had not seen Claimant since before Dr. Krag’s surgery, described his status as follows, *Dr. Schwartzberg Supplemental Charting Notes, 1/3/2017, JME at 000388*:

He is back to work 6 hours a day. He reports 80% improvement following surgery with regard to back pain and sciatica and at this time motivated to continue working with [sic] his pain seems to be increased.

26. Although awkwardly worded, I find that Dr. Schwartzberg’s report is consistent with both Claimant’s and his wife’s credible testimony, *viz.*, Claimant was driven to continue working notwithstanding his worsening pain complaints.

27. Dr. Schwartzberg noted that Claimant had a scheduled follow up with Dr. Krag on January 11, 2017. In the meantime, he increased Claimant’s gabapentin dosage from 1800 to 2400 milligrams per day. I find that Dr. Schwartzberg’s decision to do so was likely not related to the increase in Claimant’s work hours from four to six daily, as that schedule had only just taken effect the day before.

28. Claimant presented to Dr. Krag on January 11, 2017. Dr. Krag ordered another MRI scan, which was completed on February 28, 2017, and then re-evaluated Claimant on March 15, 2017. Based on both his contemporaneous office notes and his credible hearing testimony, I find the following:

- Claimant’s initial work-related injury caused a “fairly typical, garden variety” L5-S1 disc herniation.
- The February 2017 MRI scan did not show any recurrent disc herniation or nerve root compression at L5-S1. That being the case, it is unlikely that Dr. Krag left an extruded disc fragment behind at the time of his September 2016 surgery.
- The sources of Claimant’s low back and leg pain were closely related, but likely not exactly the same.
- Claimant’s worsening low back pain was likely due to ongoing disc degeneration at L5-S1. The goal of Dr. Krag’s September 2016 surgery was to remove herniated disc fragments, but this would have had no effect on the degenerative

process. Once ruptured as a consequence of the initial injury, the disc would have continued to degenerate regardless.

- Claimant’s leg symptoms of pain, tingling, and numbness were likely caused by scar tissue in and around the S1 nerve root, which travels within the spinal canal, across the back left side of the L5-S1 disc. It was inevitable that scar tissue would have formed in the area as a result of the original disc herniation and surgery. Scar tissue would have caused the nerve to stick, so it could not move as freely as it otherwise would have. This would have caused more tension on the S1 nerve root (even without nerve root compression *per se*), and therefore more leg symptoms with even routine activities such as sitting down or standing up.
- Based on Claimant’s description of his job duties at Preci, his work activities there likely caused the back and leg symptoms he was already having to become more prevalent but did not cause the symptoms themselves. In Dr. Krag’s words, “[I]t was the same pain he’d had right along; . . . He already had those symptoms before he ramped up from four to six hours.”

29. As Claimant was reporting that increasing his gabapentin dosage had resulted in increased sleepiness but no decrease in leg symptoms, at his January 11, 2017 office visit Dr. Krag recommended decreasing the dosage back down to 1800 milligrams per day. He also endorsed maintaining Claimant’s work schedule at six hours per day, because “[he] really does not want to ‘go backwards.’” *Dr. Krag Progress/Follow up Note, 1/11/2017, JME at 000399.*
30. At his March 15, 2017 office visit, Dr. Krag discussed Claimant’s treatment options – do nothing, continue attempts to progress with activity intensity, or consider surgical fusion at the L5-S1 level. In the meantime, he recommended that Claimant decrease his work schedule from six hours daily back down to four. *Dr. Krag Progress/Follow up Note, 3/15/2017, JME at 000414.* Claimant maintained that work schedule until January 2018, when he underwent a repeat discectomy with Dr. Jewell, *see infra* at Finding of Fact No. 32. His work assignments and job duties remained the same throughout.
31. I find from Dr. Krag’s credible hearing testimony that surgical fusion at L5-S1 was a reasonable treatment option notwithstanding that the February 2017 MRI showed no evidence of either recurrent disc herniation or nerve root compression. By immobilizing the area, fusion would help ameliorate Claimant’s low back pain, and if, as Dr. Krag suspected, scar tissue was impeding mobility of the S1 nerve root, it could conceivably alleviate his leg symptoms as well.

Claimant’s Second Surgery and Current Medical Status

32. Fearful of undergoing fusion surgery, in June 2017 Claimant sought a second opinion from Dr. Jewell, a neurosurgeon. *Dr. Jewell Progress Note, 6/2/2017, JME at 000417.* In contrast to the February 2017 MRI, which had failed to show any significant pathology to account for Claimant’s persistent symptoms, a repeat MRI in September 2017 revealed

a recurrent disc herniation² in close proximity to the left S1 nerve root. *JME at 000469*. As treatment, Dr. Jewell performed a left L5-S1 redo microdiscectomy on January 15, 2018. In the course of this surgery, he removed an extruded disc fragment from under a layer of scar tissue, as well as several small fragments from the disc space itself. *Operative Report, 1/15/2018, JME at 000506-07*.³ At the end of the procedure, the S1 nerve root was stated to be freely mobile and well decompressed.

33. Although Dr. Jewell described the January 2018 surgery as “technically successful,” *Dr. Jewell Progress Note, 3/19/2018, JME at 000523*, unfortunately it failed to relieve Claimant’s low back and left leg symptoms. A March 2018 MRI showed that the disc fragment Dr. Jewell had targeted in his surgery was gone, with no other nerve root compression evident. *JME at 000521*. Ultimately, and despite his best diagnostic efforts, Dr. Jewell was unable to determine where the pain generator was. *Dr. Jewell Progress Note, 6/1/2018, JME at 000576*. This left Claimant with pain management as his only viable treatment option.
34. Claimant has pursued various pain management alternatives in the years since Dr. Jewell’s surgery, including physical therapy, medial branch blocks, radiofrequency ablation, and epidural steroid injections. He has also treated for depression. In December 2019 he was determined to be an appropriate candidate for a spinal cord stimulator trial. This proved successful, and he underwent permanent placement in August 2020. In his hearing testimony, Claimant reported that the device has helped “a lot,” to the point where he is no longer taking any pain medications for his symptoms.
35. Claimant has not worked since Dr. Jewell’s January 15, 2018 surgery. The evidence does not suggest that he suffered any work-related accident or other traumatic injury during his time at Preci after returning to work there in December 2016.

Expert Medical Opinions

36. In addition to Dr. Krag, who testified in his role as Claimant’s treating orthopedic surgeon, the parties offered three independent medical examiner opinions regarding the extent, if any, to which Claimant’s work at Preci in December 2016 and thereafter aggravated his initial February 22, 2016 work-related injury at Loso’s.

(1) *Dr. Binter*

37. At Loso’s request, Dr. Binter conducted an independent medical examination in January 2019. Dr. Binter is a board-certified neurosurgeon. Over the course of her 24-year career, she performed approximately 4,000 spine surgeries, including the types of

² The term “recurrent” in this context connotes its medical usage – the re-herniation of a previously herniated disc – not its legal definition in the workers’ compensation context. *See Conclusion of Law No. 3 infra*.

³ The medical record includes two operative reports, which led to some confusion regarding the extent of Dr. Jewell’s surgical investigation of the L5-S1 disc space. I find from the credible testimony adduced at hearing that the operative report referred to above, at which Dr. Akture was listed as the surgical assistant, is likely the correct version.

surgeries at issue in Claimant's case. She retired from her surgical practice in 2011 and now performs independent medical examinations.

38. It is difficult to comprehend the factual basis for Dr. Binter's opinion regarding the causal relationship, if any, between Claimant's return to work at Preci in December 2016 and his ongoing symptoms and need for treatment thereafter. Her independent medical examination report was based on three critical, yet clearly inaccurate assumptions – first, that Claimant had returned to work full-time and full duty after completing work hardening; second, that his symptoms worsened only after doing so; and third, that his treatment had concluded.
39. In fact, as I have already found, the job Claimant returned to at Preci was, by all accounts, very light duty, and he never approached his full-time pre-injury hours. Finding of Fact No. 21 *supra*. His back pain and left leg symptoms were present to some degree throughout his participation in work hardening, Finding of Fact Nos. 13-16 *supra*. And with only a four-week gap from the time he completed work hardening to the time he returned to Dr. Schwartzberg (and barely three months post-surgery), Finding of Fact No. 25 *supra*, his treatment was quite clearly ongoing.
40. Nevertheless, in her report, Dr. Binter concluded that the recurrent disc herniation visible on Claimant's September 2017 MRI represented an aggravation caused by his work at Preci rather than a recurrence of his original injury at Loso's. Dr. Binter's hearing testimony in support of that opinion was confusing and contradictory. To wit:
 - Dr. Binter described her opinion as “an issue of absence, not presence.” Lacking evidence of any other intervening event or outside activities, she proclaimed, Claimant's work at Preci must necessarily have been the “inciting event” for his worsening symptoms. Yet she was unable to point to any specific aspect of Claimant's job duties that would have qualified as “inciting” besides the fact of his increased activity generally. “He was worse when he was at work,” she stated, “and the longer he was there, the worse he got.” This is classic *post hoc, ergo propter hoc* reasoning. It establishes a temporal relationship, not a causal one.
 - Dr. Binter repeatedly pointed to the fact that Claimant's February 2017 MRI showed neither a recurrent disc herniation nor nerve root compression, while the September 2017 MRI did, as evidence that his work in the interim must have caused these to occur. Yet elsewhere in her testimony, she acknowledged that doctors have no way of knowing why or when a disc herniates or why some patients experience post-operative symptoms and others do not. “We always speculate why, . . . [but] the reality is that we don't have any objective magic . . .,” she admitted. Such speculation has no place in a medical expert's causation opinion. *Jackson v. True Temper Corp.*, 151 Vt. 592, 595 (1989).
 - Dr. Binter described the S1 nerve root compression visible on Claimant's September 2017 MRI as more significant than the disc fragment, because “that

was what was causing his symptoms.” Why then, did Dr. Jewell’s January 2018 redo discectomy, which he and Dr. Binter alternately described as “technically successful” and yielding an “excellent post-operative result,” fail to alleviate Claimant’s symptoms? Dr. Jewell addressed this question by searching, albeit unsuccessfully, for other possible anatomical pain generators. Dr. Binter maintained her adherence to a causation theory that I find simply does not fit the facts.

(2) *Dr. Backus*

41. At Acadia’s request, Claimant underwent an independent medical examination with Dr. Backus, a board-certified occupational medicine specialist, in September 2017. Dr. Backus issued an initial report in December 2017, and a supplemental report in February 2019.
42. In his initial report, Dr. Backus addressed only the medical question whether Dr. Jewell’s proposed redo discectomy was reasonably necessary and causally related to Claimant’s original injury. He determined that it was. *Dr. Backus Independent Medical Evaluation Report, 12/13/2017, JME at 000452*. Because he was not specifically asked to do so, he did not address the question whether Claimant’s ongoing treatment and disability might instead have constituted an aggravation or flareup causally related to his work at Preci.⁴
43. Dr. Backus squarely addressed the latter issue in his February 2019 supplemental report. To a reasonable degree of medical certainty, he concluded that Claimant’s work at Preci had “contributed at least some to destabilizing his recovery” from Dr. Krag’s September 2016 discectomy and thus “qualifies as an aggravation of his condition.” *Dr. Backus Independent Medical Evaluation Supplemental Report, 2/2/2019, JME at 000623*. “It is more likely than not,” he continued, “that had he not returned to the work [as] a machine operator at the time he did after his first surgery, that he would not have needed the 2nd surgery on 1/15/2018.” *Id.*
44. As was the case with Dr. Binter, I find that the conclusions Dr. Backus stated in his supplemental report were based on critical, but entirely inaccurate, assumptions. He assumed that Claimant’s return to work at Preci was both full time and full duty, that it was “initially a successful return to work,” and that his left leg symptoms returned only after he did so. *Dr. Backus Independent Medical Evaluation Supplemental Report, 2/2/2019, JME at 000623*. As Dr. Backus himself acknowledged in his hearing testimony, I find that the credible evidence was to the opposite effect on each of these points.

⁴ Preci used Dr. Backus’ failure to address the aggravation/recurrence question in his December 2017 report as grounds for its argument that Acadia has waived its right to contest the issue now. Its Motion for Summary Judgment to that effect was denied on November 23, 2020.

45. In his hearing testimony, Dr. Backus attributed the cause of Claimant's aggravated symptoms to the amount of standing that his modified duty job at Preci required.⁵ As Dr. Binter had, he acknowledged that it was "impossible to know exactly what happened physically." Nevertheless, he concluded that because Claimant's "deterioration happened while he was there working and being on his feet for four to six hours," his work duties must have caused it.
46. Were Dr. Backus' causation opinion correct, I would expect some corroborating evidence to that effect. The contemporaneous medical records do not support the hypothesis that prolonged standing caused or contributed to Claimant's symptoms, either prior to or following Dr. Krag's surgery. For example:
- Immediately prior to Dr. Krag's surgery, Claimant's physical therapist reported bending and sitting as postures that aggravated his symptoms and standing and lying on the floor as postures that alleviated them. *Physical Therapy Initial Evaluation Note, 9/15/2016, JME at 000203*. Earlier medical records were to the same effect. See, e.g., *Dr. Schwartzberg, D.O., 5/13/2016, JME at 000091* ("He continues to be very uncomfortable sitting posture unloading his lumbar spine"); *Dr. Krag, 5/24/2016, JME at 000100* ("The low back pain is worsened with sitting or lifting, somewhat improved, but never relieved, by lying down"); *Dr. Johansson, D.O., 8/23/2016, JME at 000144* ("He finds that standing is better than when he is sitting. Sitting really aggravates his symptoms further").
 - Immediately following Dr. Krag's surgery, the same physical therapist reported again that sitting and bending aggravated Claimant's pain, while standing alleviated it. *Physical Therapy Progress Note, 10/5/2016, JME at 000243*.
47. As with Dr. Binter's analysis, I find that Dr. Backus' opinion is grounded in a temporal relationship between Claimant's worsening symptoms and his work at Preci, not a causal one.
48. I further find that Dr. Backus' opinion, stated in his supplemental report and reiterated in his hearing testimony, that but for his work at Preci, Claimant would not have come to Dr. Jewell's January 2018 redo discectomy, is at odds with the facts and purely speculative. As noted above, Finding of Fact Nos. 13-16 *supra*, Claimant's low back and left leg pain and radicular symptoms were ongoing even before his work hardening program concluded. He sought additional treatment barely four weeks later. From there, a straight-line medical course led directly to Dr. Krag's suggestion in March 2017 that he consider fusion surgery as a treatment option. I find from these facts that three weeks of

⁵ Notably, Dr. Backus did not mention prolonged standing as a causative factor in his February 2019 report. Indeed, he did not specifically identify any functional activities associated with Claimant's Preci job that in his opinion caused an aggravation other than to note that "Dr. Binter judged the physical activities of lifting and twisting [as] a machine operator constituted an aggravation . . ." *Dr. Backus Independent Medical Evaluation Supplemental Report, 2/2/2019, JME at 000623*. In his hearing testimony, Dr. Backus acknowledged that Dr. Binter likely had misunderstood the nature of Claimant's modified duty job in that regard.

working four hours per day likely did not hasten Claimant's need for further treatment. That die had already been cast.

(3) *Dr. Rudolf*

49. At Preci's request, Dr. Rudolf, a board-certified orthopedic surgeon, conducted an independent medical examination in May 2019. Based on Dr. Rudolf's written report and hearing testimony, I find the following:

- Dr. Rudolf correctly assessed that Claimant's low back and (to a greater extent) left leg symptoms were ongoing throughout his work hardening experience.
- Unlike the other medical experts, including Dr. Krag, Dr. Rudolf interpreted Claimant's February 2017 MRI as showing a disc fragment at L5-S1 with compression on the S1 nerve root. In his report, Dr. Rudolf theorized that Dr. Krag may have mistakenly left the fragment behind during his September 2016 discectomy. In his hearing testimony, Dr. Rudolf largely abandoned the latter theory, though he continued to maintain his interpretation of the MRI as showing a new disc fragment as early as February 2017. I find that the credible expert evidence, particularly from Dr. Krag, weighs against this interpretation and therefore reject it.
- Claimant's modified-duty job at Preci was "about as light as you can get," and his work activity did not involve "the kind of stress that would be associated with trauma sufficient to cause a re-herniation."
- Consistent with the concept that an activity "can be hurtful, but not harmful,"⁶ the fact that Claimant may have found standing at work for four or even six hours daily uncomfortable does not necessarily mean that standing caused his disc to re-herniate.
- The most likely causes of Claimant's ongoing symptoms were either further degeneration at the site of his original disc herniation, as occurs in five to fifteen percent of all cases, and/or scar tissue limiting the mobility of his S1 nerve root.

CONCLUSIONS OF LAW:

1. This claim comes before me in the context of a dispute between two employers, and their respective workers' compensation insurance carriers, 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.

⁶ Claimant's work hardening program therapists repeatedly endorsed this "hurt-versus-harm" concept, though they questioned whether cultural and/or language barriers made it a difficult one for Claimant to comprehend. *See, e.g., Physical Therapy Work Rehabilitation Encounter Note, 11/18/2016, JME at 000334; Physical Therapy Progress Note, 3/29/2018, JME at 000542; Physical Therapy Progress Note, 4/5/2018, JME at 000546; Physical Therapy Progress Note, 4/16/2018, JME at 000553.*

§662(e), requires that such “aggravation/recurrence” disputes be resolved through arbitration.

2. As to the burden of proof in such cases, the statute directs that “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.” 21 V.S.A. §662(c); *Farris v. Bryant Grinder Corp.*, 2005 VT 5, ¶11. Therefore, to avoid liability in this case, Preci must establish that Claimant’s entitlement to workers’ compensation benefits following his return to work there in December 2016 was caused by a recurrence of his initial February 2016 work injury at Loso’s, for which Acadia remains responsible.

3. Codifying existing caselaw, *see, e.g., Cehic v. Mack Molding, Inc.*, 2006 VT 12, ¶8, citing *Pacher v. Fairdale Farms*, 166 Vt. 626, 628 (1997), Vermont’s workers’ compensation rules define the terms “aggravation,” “recurrence,” and “flare-up” as follows:

Rule 2.1200 “Aggravation” means an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events.

Rule 2.3900 “Recurrence” means the return of symptoms following a temporary remission.

Rule 2.2300 “Flare-up” means a temporary worsening of a pre-existing condition caused by a new injury for which a new employer or insurance carrier is responsible, but only until the condition returns to baseline and not thereafter.

4. Evaluating these terms in the context of this claim, I conclude that the “flareup” category does not merit consideration. No evidence was submitted, and neither party argued, that Claimant suffered a “distinct new injury” while at Preci that only “temporarily worsened” his condition. *Cehic, supra* at ¶10.

5. The workers’ compensation rules further define the terms “aggravation” and “recurrence” with reference to the following factors, Workers’ Compensation Rules 2.1210 and 2.3910:

Rule 2.1211 Whether a subsequent incident or work condition has destabilized a previously stable condition (*see also* Rule 2.3911);

Rule 2.1212 Whether the injured worker had stopped treating medically (*see also* Rule 2.3912);

Rule 2.1213 Whether the injured worker had successfully returned to work (*see also* Rule 2.3913);

Rule 2.1214 Whether the injured worker had reached an end medical result (*see also* Rule 2.3914); and

Rule 2.1215 Whether the subsequent work contributed independently to the final disability (*see also* Rule 2.3915).

6. Considering these factors in turn, I conclude first that Claimant's work at Preci did not destabilize his condition, because it had never stabilized to begin with. The contemporaneous medical records document ongoing complaints of low back and (to a greater extent) left leg pain and radicular symptoms from at least midway through his work hardening program to its conclusion. *See* Finding of Fact Nos. 13-16 *supra*. Claimant credibly testified that these symptoms never abated, as Dr. Krag had hoped, *see* Finding of Fact Nos. 8 and 19 *supra*. That he consistently demonstrated his willingness to push through them during work hardening, even as they continued to worsen, does not negate their existence.
7. That Claimant had never stopped treating medically is obvious. After being discharged from the work hardening program on December 2, 2016, he returned to Dr. Schwartzberg, his treating physician, barely one month later, on January 3, 2017. His treatment has been ongoing since.
8. I acknowledge that Claimant returned to work at Preci on December 12, 2016 and continued working there for the next year, until January 15, 2018. I cannot conclude that this constituted a "successful" return to work, however. Claimant was limited in both his work duties and his hours. As to the latter, he never came close to his pre-injury status, which encompassed working two jobs for a total of 60 to 70 hours weekly. As Claimant's wife credibly testified, even the hours he was able to manage came at the price of pain and exhaustion at the end of each day.
9. That Claimant had not reached an end medical result by the time he returned to work at Preci is also obvious. He returned to work barely three months after Dr. Krag's September 2016 surgery, and just ten days after being discharged from work hardening. He resumed treatment three weeks later. These undisputed facts negate a finding of end medical result.
10. I conclude that the first four factors used to differentiate between an aggravation and a recurrence point squarely toward a recurrence of Claimant's February 2016 work injury at Loso's and away from an aggravation related to his work at Preci.
11. The fifth factor – whether Claimant's work at Preci "contributed independently to the final disability" – deserves close scrutiny. The Vermont Supreme Court has endorsed similar language, holding that to support a finding of aggravation rather than recurrence, the medical evidence must establish that the second incident or work condition "causally contributed to the claimant's disability." *Cehic, supra* at ¶10, quoting *Pacher, supra* at 627. Of particular significance in this case, the Court in *Pacher* acknowledged, "Mere

continuation or even exacerbation of symptoms, without a worsening of the underlying disability, does not meet the causation requirement.” *Id.*

12. The parties offered conflicting medical expert testimony on this issue. In such cases, I am directed to use a five-part test to determine which expert’s opinion is the most persuasive, *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (September 17, 2003):
 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.
13. All of the medical experts here examined the pertinent records, conducted comprehensive evaluations, and were well-qualified to offer opinions on the aggravation/recurrence issue. But as the treating surgeon who examined Claimant both before and after his return to work at Preci, Dr. Krag was best positioned to evaluate the progression of his symptoms. I accord his opinion somewhat greater weight as a result.
14. Dr. Krag’s causation opinion was the most consistent, both internally and externally. Internally, his hearing testimony was clear and concise and did not deviate from the opinions reflected in his treatment notes.
15. Externally, Dr. Krag’s opinion logically encompassed all of the relevant facts. By focusing their attention on when and why Claimant’s disc re-herniated, Drs. Binter, Backus, and, to a lesser extent, Rudolf, missed what seems to me to be the most salient point – that Claimant’s pain and radicular symptoms failed to abate even after Dr. Jewell’s “technically successful” redo discectomy. Dr. Krag’s opinion – that scar tissue likely restricted mobility of the S1 nerve root, causing tension without compression *per se* – explains why.
16. I conclude that Dr. Krag’s causation opinion is the most persuasive. I thus further conclude that Claimant’s work at Preci did not “contribute independently” to cause his final disability. This was not an issue of “absence rather than presence,” as Dr. Binter declared, nor a consequence of prolonged standing, as Dr. Backus speculated. The combination of a weakened disc that continued to degenerate after its initial injury-related herniation and scar tissue that formed thereafter logically accounts for Claimant’s ongoing symptoms and worsening condition. In Dr. Krag’s words, “Everything that happened downstream [from Claimant’s initial injury and disc herniation] is all connected to that.”

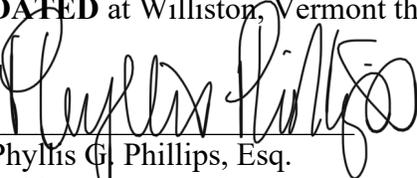
17. The Commissioner previously has observed that there is “a distinct difference between a worsening due to the natural progression of a condition and a worsening resulting from the nature of a job.” *Tatro v. Town of Stamford*, Opinion No. 25-00WC (August 9, 2000), Conclusion of Law No. 13. Where, as here, an injured worker is suffering from a condition that has not yet stabilized, such that he is continuing to treat, has not yet reached an end medical result, returns to limited duty work while enduring ongoing pain, and continues to worsen for reasons unrelated to his job, the causal link back to the initial injury remains unbroken.
18. Differentiating between a recurrence attributable to the natural progression of a prior injury and an aggravation caused by the nature of the injured worker’s subsequent work is critical, both from a specific case perspective and from a broader, public policy angle. Very often, the linchpin of an injured worker’s successful transition from disability to function is modified duty return-to-work. However, for this strategy to work, employers must be free to do what Preci did here, and not be dissuaded by the threat of liability for the natural consequences of an earlier injury.
19. I conclude that Preci has sustained its burden of proving that Claimant’s ongoing disability and need for medical treatment from December 12, 2016 forward amounted to a recurrence of his initial February 2016 injury at Loso’s, for which Acadia remains fully responsible.
20. Having concluded that Acadia bears sole responsibility for the workers’ compensation benefits paid and/or payable to Claimant, I need not address Preci’s renewed argument that Acadia had waived its right to contest liability by accepting Dr. Jewell’s January 2018 surgery as compensable. Having heard no new evidence compelling a different conclusion, I consider my prior ruling on Preci’s Motion for Summary Judgment dispositive of that issue.
21. Vermont’s workers’ compensation statute allows for liability to be apportioned among the parties in arbitrated aggravation/recurrence cases, 21 V.S.A. §662(e)(2)(A). I conclude that there is no basis for apportioning liability for paying workers’ compensation benefits to and/or on Claimant’s behalf; rather, I conclude that these are solely Acadia’s responsibility.
22. I conclude that it is appropriate to apportion responsibility for the arbitrator’s fee equally between the parties. Having been ordered at the informal level to pay benefits, Acadia properly exercised its right to obtain a formal ruling on the aggravation/recurrence issue. Neither party propounded frivolous arguments or engaged in unseemly posturing. Fairness dictates that each party bear its share of the cost of this proceeding.

ORDER:

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

1. Defendant Loso's Professional Janitorial Service, Inc. shall bear ongoing responsibility for all workers' compensation benefits to which Claimant proves or has proven his entitlement on account of his February 22, 2016 compensable work-related injury;
2. Defendant Preci Manufacturing, Inc. is absolved of liability for reimbursing Loso's for any workers' compensation benefits paid or payable from December 12, 2016 and thereafter;
3. The parties shall bear equal responsibility for the arbitrator's fees.

DATED at Williston, Vermont this 8th day of April, 2021.



Phyllis G. Phillips, Esq.
Arbitrator