

State of Wisconsin



Labor and Industry Review Commission

Onyx Waste Services Midwest, Inc.
Reverse Applicant – Employer

Commerce & Industry Ins. Co.
Reverse Applicant – Insurance Carrier

Central Processing Corp.
Respondent

Zurich American Ins. Co.
Insurance Carrier

Claim Nos. 2007-006714
2017-017908

**Worker's Compensation
Decision¹**

Dated and Mailed:

May 14, 2024

onyxwaste_wsd.docx:190

Order

The commission **modifies** and **affirms** the decision of the administrative law judge. Accordingly, within thirty (30) days, the respondent shall reimburse the reverse applicant as follows:

1. For temporary disability and permanent partial disability benefits paid since October 23, 2014, the sum of sixty-four thousand, seven hundred seventeen dollars and twenty cents (\$64,717.20).
2. For medical treatment expenses paid after October 23, 2014, the sum of two hundred thirty-one thousand, four hundred eighteen dollars and seventy cents (\$231,418.70).

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

Georgia E. Maxwell, Commissioner

/s/

Marilyn Townsend, Commissioner

¹ **Appeal Rights:** See the yellow enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the following as defendants in the summons and the complaint: the Labor and Industry Review Commission, and all other parties in the caption of this decision or order (the boxed section above). Appeal rights and answers to frequently asked questions about appealing a worker's compensation decision to circuit court are also available on the commission's website, <http://lirc.wisconsin.gov>.

Procedural Posture

David Woods filed a hearing application dated December 8, 2015, alleging that he sustained a low back injury when he was working for Veolia Environmental Services and lifted an overhead door and felt a pop in his back on January 11, 2007. Veolia Environmental Services was subsequently known as Onyx Waste Services Midwest, Inc. (Onyx). Onyx subsequently impleaded County Materials Corporation, also known as Central Processing Corporation, and their insurer as additional parties. Onyx asserted that Woods' work exposure at Central Processing between May 1, 2007, and December 14, 2014, was the cause of his November 2014 lumbar discectomy and fusion. On January 20, 2022, an administrative law judge of the Department of Administration, Division of Hearings and Appeals (Division), Office of Worker's Compensation Hearings, approved a limited compromise agreement entered by Woods and both employers and insurance carriers. As part of the settlement agreement, Onyx reserved the right to seek reimbursement from Central Processing for benefits due and paid under mistake of fact. Following approval of the compromise agreement, the administrative law judge held a hearing on January 10, 2023, on the issue of liability for the benefits and medical treatment expenses, and issued a decision dated April 10, 2023, finding that Woods' work exposure with Central Processing was at least a material contributory causative factor in the progression of Woods' low back condition and need for surgery. As a result, Central Processing was ordered to reimburse Onyx for the benefits and medical treatment expenses. Central Processing filed a timely petition for commission review.

The issue is whether Woods' work with Central Processing was a material contributory causative factor in the onset and progression of his lower back condition. The commission has considered the petition and the positions of the parties and has independently reviewed the evidence submitted at the hearing. Based on its *de novo* review, the commission modifies and affirms the decision of the administrative law judge and makes the following:

Findings of Fact and Conclusions of Law

As supplemented by the commission's memorandum opinion,² the commission makes the same findings of fact and conclusions of law as stated in the decision of the administrative law judge and incorporates them by reference, subject to the following:

Modification

On the first page of the decision, replace "2019-022065" with "2007-006714."

Memorandum Opinion

David Woods (Woods), who was born in 1958, initially filed a hearing application following a traumatic injury he sustained to his low back on January 11, 2007. While working for Onyx, Woods had to lift a large, industrial-sized garage door, and as he did so, he felt a "pop" in his lower back, which was accompanied by pain and weakness in his bilateral lower extremities. He sought medical treatment and was provided relief with an epidural steroid injection. He returned to work without restrictions on March 15, 2007, but his employment ended with Onyx shortly thereafter. Woods then

² The commission's memorandum opinion may be the basis for more formal findings of fact. *Manitowoc Boiler Works v. Indus. Comm'n*, 165 Wis. 592, 594-95, 163 N.W. 172 (1917).

began working for Central Processing in May 2007 as a heavy mix driver. He worked for Central Processing until 2014. During this time, he continued to seek medical treatment for his back condition, including receiving numerous epidural steroid injections. In November 2014, Woods finally had surgery on his low back.

The 2007 Work Injury and Initial Medical Treatment

Woods worked for Veolia Waste Services (later known as Onyx) as a roll-off driver. On January 11, 2007, Woods was driving a roll-up truck. He had to lift up an industrial-sized garage door for the semi and box container to fit in the garage. The garage door did not have a chain lift or rope. He had to get underneath it and shove as hard as he could. When he did so, he felt a pop in his back and immediately went down to his knees because the pain was “astronomical” in his lower back. By the end of the weekend, he could not feel his legs. At the hearing, Woods stated that the injury was at Veolia/Onyx.³

Woods had an MRI of the **lumbar spine** on January 15, 2007, which showed **central canal stenosis at the L4-5 level with lateral recess compromise**. The MRI was read as **likely showing foraminal encroachment at L4-5 bilaterally, more so on the left**. There was also a small left synovial cyst overlying the facet complex, “which could be the etiology of the patient’s acute change in back symptoms. This certainly results in significant compromise within the lateral recess.”⁴

On **January 16, 2007**, PA-C Richard J. Nesbitt saw Woods for his low back pain and released him to return to work for sedentary/very light duty work, no lifting greater than 5-10 pounds, and work an 8-hour day. Dr. Kessel was to determine causation.⁵ On January 23, 2007, **Dr. Mark N. Weissman**, M.D., released Woods from all duties so he could concentrate on physical therapy. He thought that **surgery “would become the most viable option” and he did not “think that epidural steroid would serve any great purpose in this clinical setting.”** According to Woods, **Dr. Weissman wanted to do surgery right away.**⁶ On February 9, 2007, Dr. Weissman noted that Woods had made sufficient progress with physical therapy to return to regular duties as tolerated the next week.

While still working at Onyx, on **February 21, 2007**, Dr. Jeffrey F. Kessel, M.D., noted that Woods said he was “being hassled at work. Work restrictions are too restrictive, the employer doesn’t have light duty. He wants to go back to work for a trial of regular duty, work as tolerated.” Dr. Kessel noted, “The patient feels he can do most of the jobs. If he needs assistance with certain tasks, he will ask for it. **I would allow him to return to work with activity and lifting as tolerated.** If he has a setback he should let me know by phone.” Woods was also referred to pain management for injections.⁷

On March 5, 2007, Dr. Weissman noted that physical therapy had not helped. **Dr. Weissman noted that Woods had a significant segmental stenosis at L4-5. They**

³ Transcript of Proceedings dated January 10, 2023 (Tr.), pp. 47-49, 52, 57.

⁴ Central Proc. Exhibit (Ex.) 9.

⁵ Central Proc. Ex. 9.

⁶ Tr., p. 56.

⁷ Central Proc. Ex. 9; emphasis added.

discussed surgical options and epidural steroid injections, but Dr. Weissman did not think injections would likely lead to a long term relief of symptoms. Woods was going to get a second opinion, which Dr. Weissman thought was fine since his elective schedule would not allow him to do the surgery until early April.⁸

Woods had returned to work for Onyx for a couple of months, but he ended up settling a work dispute with the employer and left his employment in May 2007. Onyx conceded the work injury and continued to pay for medical treatment expenses for Woods' low back.

Woods' Work Duties at Central Processing

Woods began working for Central Processing, also known as County Materials, on or about May 21, 2007. Woods worked as a heavy equipment operator for Central Processing. His job involved running a ready-mix cement mixer, but sometimes he would also hop into a dump truck or semi-trailer if needed. Other than putting cement chutes on the truck, washing down the water tank, and doing pre-trip and post-trip inspections, he spent his time behind the wheel driving. The regular chutes would weigh about 40 to 50 pounds, and the aluminum ones were lighter than 40 pounds, around 30 to 35 pounds. Putting chutes on the truck could involve more lifting and bending. Woods estimated that he lifted 20 to 30 chutes per day. He would have done 5 to over 12 loads per day.⁹

Sometimes in the morning he would set up forms for the septic tanks to fill. Woods would also take the loads to construction sites. His work was seasonal, and he would be laid off after deer hunting season through the winter. According to Woods, his job involved driving, and sitting for at least an hour, and standing and waiting about 15-30 minutes per trip. His job required bending to reach hoses, chutes, and cement forms. It also required some twisting, but not a lot.¹⁰ Woods wore a back brace while he worked for Central Processing. The back brace was a way to mitigate against the jostling in the truck.¹¹ Central Processing allowed Woods to take time off to seek treatment for his back. According to Woods, his back treatment was basically steady throughout his employment with Central Processing.¹²

Heber De Leon, a claims supervisor for Central Processing, explained that Central Processing is a human resources and benefit company that staffs all facilities for County Materials Corporation, a manufacturing company that produces concrete products for the construction industry. According to Mr. De Leon, Woods reported a work injury to his left ankle in 2010 and an elbow injury in 2012. He never reported a low back injury. Woods' last day on the job was October 22, 2014, but he remained an employee until April 30, 2015. Scott Behnke, the vice president of ready-mix operations for Central Processing, worked for a time as Woods' supervisor. Mr. Behnke

⁸ Central Proc. Ex. 9.

⁹ Tr., pp. 17, 37, 40-41, 49.

¹⁰ Tr., pp. 19-23, 54, 69-70.

¹¹ Tr., pp. 30-32.

¹² Tr., p. 50.

knew that Woods had had a back injury and that he was treating for his back. Woods never reported a back injury at Central Processing to Mr. Behnke.¹³

Relevant Medical Treatment Notes

The various medical treatment notes from the time of the 2007 traumatic back injury and thereafter during his work for Central Processing show ongoing treatment for Woods' low back. The records at time noted the work activities and hours that Woods worked. After he had started working for Central Processing in May 2007, on July 14, 2007, Dr. Cary G. Tauchman, M.D., saw Woods for his back pain. Woods was now using a TENS unit, which was not helping. "He states that he is really not doing anything differently in terms of activities that otherwise might cause him to have more pain. **He states that he has not been doing much heavy lifting or straining.**" Woods did have young children, and that kept him active. **Dr. Tauchman diagnosed an acute exacerbation of a chronic low back problem.** Woods continued to treat with physical therapy. On February 5, 2008, Woods had vacuumed his whole house and later shoveled and had pain of 4/10. On January 15, 2008, the therapist noted that **Woods was working as a truck driver for County Concrete. "He states he has to lift about 50 to 60 pounds on that job. He is currently laid off."**¹⁴

On July 8, 2008, PA-C Nesbitt treated Woods for his chronic low back pain. PA-C Nesbitt noted that Woods had **low back pain due to discogenic disease with the need for repeat visits to the pain clinic for steroid injections.** He noted that Woods had good response to the injections. "Has lumbar discogenic disease with superimposed lumbar canal stenosis per Dr. Weissman's note in Neurosurgery on 3/05/2007. Dr. Weissman offered surgery, but the patient declined. He wanted to treat the back condition conservatively without surgery. He was last evaluated by Dr. Kessel for causation. **Dr. Kessel's last assessment for work related injury was on 4/17/2007; when he put the patient at end of healing with a 5% PPD rating and no restrictions.**"¹⁵

A July 15, 2008, physical therapy note indicated that "Patient is **currently working as a truck driver for County Concrete. He states he has to lift about 50 to 60 pounds on that job. He is currently laid off. He has been feeling really good since his injection in December.**"¹⁶ On August 4, 2008, NP Ann Robl-Jackson noted that Woods was in to schedule an injection. She noted, "He states he did well up until approximately the last month. **He has had increasing pain across the low back that he describes as aching and stabbing going down the back of both legs. He does have numbness to the right lower lateral leg. He states that numbness he has had has been ongoing. He continues to work full time. He drives a cement truck. He has been working extra hours because this is a busy time of year.**"¹⁷

On September 10, 2008, NP Robl-Jackson noted that Woods felt 75% better after the last injection. "**He is working longer hours and has been doing a lot of lifting.**" Pain was noted as present 100% of the time, but it could go as low as 1/10, and as high as

¹³ Tr., pp. 61-63, 67-68.

¹⁴ Central Prox. Ex. 9; emphasis added.

¹⁵ Central Proc. Ex. 9; emphasis added.

¹⁶ Onyx Ex. 11.

¹⁷ Onyx Ex. 9; emphasis added.

4/10. Activity level was 10/10. “Activities that aggravate his pain include sitting for long periods of time and usually his pain is worse by the end of the day.”¹⁸ According to Woods, this was every day, not just workdays.¹⁹ A phone note on October 22, 2008, indicated that Woods stated his back was back to normal, and he was requesting all restrictions be lifted so he could return to working regular duty.²⁰

On **November 4, 2008**, NP Robl-Jackson noted Woods was happy with the results of his injection. “Initially the next day he had left work early because he has developed increased pain. He was seen at the Occupational Health Clinic in Weston. The provider there had **given him a few restrictions that his work did not want to follow and so he did take several days off. He does feel this did benefit him and thinks that was probably the best thing taking those extra two days off. He is now back to work full time.**” Woods’ Vicodin usage was 0-1/day during the week and up to 3/day on weekends.²¹ At the hearing, Woods did not recall saying he felt better when he was not working at Central Processing.²²

An MRI of the lumbar spine on January 20, 2009, showed moderate diffuse annular bulge along with an interval increase in the central disc protrusion that led to severe canal narrowing along with bilateral lateral recess narrowing and moderate bilateral neural foraminal narrowing at L4-5.²³ On March 10, 2009, NP Robl-Jackson noted that Woods was doing better after his injection. “**He is thinking about possibly seeing a surgeon next fall for his low back. He states that injections are helpful, but they are not long-lasting. He does feel as if things are progressively getting worse, and his most MRI did reveal some changes as well.** ...He continues to be laid off but is hoping to be called back to work next month.”²⁴ On **June 23, 2009**, NP Robl-Jackson noted that Woods was doing better with the injection, but he felt the benefits had already worn off. “**He is back to work. He drives cement truck. He states they have been working long hours, 12-13 hours a day. He does feel the jostling while in the truck aggravates his low back.**” At the hearing, Woods agreed, “Even with an air seat, they’re not the smoothest animals.” This was on all roads, but there was more jostling on rougher terrain.²⁵

On **July 31, 2009**, NP Robl-Jackson noted Woods was feeling 90% better after an injection. “**He continues to drive a cement truck. He is averaging 16-hour days. He is happy with the results at this time.... Once the injections are no longer effective, he may like a surgical consultation.**”²⁶ By September 25, 2009, Woods had returned and was seeking another injection. “He has been getting these every three or four months. **He was told in the past that he was a surgical candidate. However, he does not want to have surgery if at all possible. He does not want to take the time off from work, and he feels that if he has any work restrictions, his current employer will not retain him.**”

¹⁸ Onyx Ex. 9; emphasis added.

¹⁹ Tr., pp. 29-30.

²⁰ Central Proc. Ex. 9.

²¹ Onyx Ex. 9.

²² Tr., p. 30.

²³ Central Proc. Ex. 9.

²⁴ Onyx Ex. 9; emphasis added.

²⁵ Tr., pp. 31-32.

²⁶ Onyx Ex. 9; emphasis added.

Pain was 100% of the time, and was as low as 4/10 and as high as 8/10. “The patient does work. He drives a cement mixer which he is able to do quite well.”²⁷

On April 14, 2010, Dr. McCool saw Woods in the walk-in clinic again with complaints of low back pain. “He works for companies called Veoila. **He normally drives a cement truck for them but they have been laid off for the winter. They called him back Monday to work in the plant. He works on an assembly line moving light bricks from one assembly line to another, just standing in one position and rotating his waist right to left, right to left. He says that he did that for 12 hours a day on Monday and then he did it Tuesday. By the morning, he says his back just gave out and he just can’t do it anymore. He has pain in the lower back.** Dr. McCool placed Woods on light duty until Dr. Kessel could examine him.”²⁸

On April 15, 2010, Dr. Kessel found Woods reporting pain of 5/10. Woods had had long-term problems with his back “since the injury.” He required an injection every 3 to 4 months, and they worked great. His last flare-up of pain was October 21, 2008, and his last injection was January 27, 2010. He was off work since Thanksgiving for the normal winter lay-off period. “**He was called back to work on Monday, 04/12/2010. They put him in the block plant. His job that day was taking bricks off the line and passing them to a co-worker. He estimates that every 2 seconds he would have to take 4 bricks weighing 5 to 6 pounds total by his estimate, twisting to the left, walking a few steps and putting them down. No bending is involved, but it is fast work.**” Woods had worked an 11-hour shift, and he started having pain around noon. Dr. Kessel diagnosed low back pain, muscle spasm, **overuse syndrome (low back)**, and lumbar facet syndrome, work-related. Dr. Kessel stated, “Based upon medical information available at this time (history given by the patient and examination findings), it is my medical opinion that the medical presentation is work related. **He has aggravated a preexisting condition with the repetitive quick motions involving twisting that went on for at least 4 hours before the onset of pain.**” Dr. Kessel stated that the problem was one of overuse: “It certainly was not overly strenuous work. It was highly repetitive with fast movements.”²⁹

On April 21, 2010, NP Robl-Jackson noted, “He states that he had been called back to work over a week ago. He did go to work for 2½ days. He was put on brick production. He states that the repetitive movement from turning side to side aggravated his low back. He has been off work since last Tuesday. He states he does need to get back to work. **I did tell him that he should not perform twisting or turning positions. He states he cannot have any work restrictions or he will not be able to return to work. I did give him my recommendations but he assures me he wants to go back to work. He understands the risks.**” On July 16, 2010, NP Robl-Jackson noted that Woods had increased back and leg pain for the past 1½ weeks. He felt the injection was wearing off. “**He has been working long hours, 40-50 hours a week. He has been doing a lot more lifting and bending.**” Pain was 100% of the time, as low as 3/10 and as high as 7/10. Activity level was 8/10. “Since last visit his activity level has increased.”³⁰

²⁷ Onyx Ex. 9; emphasis added.

²⁸ Central Proc. Ex. 10; emphasis added.

²⁹ Central Proc. Ex. 10; emphasis added.

³⁰ Onyx Ex. 9; emphasis added.

According to Woods, the brick production work was a very rare occurrence and happened only once or twice. It was a fast-paced job that required a lot of twisting and turning. Woods felt like this aggravated his back when he did it. He told Central Processing that he did not like doing that job, and he did not have to do it again.³¹

An MRI of the lumbar spine on September 13, 2011, found that the L4-5 degenerative facet arthropathy had increased since 2009. There was also an L4-5 central disc protrusion causing moderate to severe spinal canal stenosis, lateral recess and exiting neural foraminal narrowing, similar to 2009. Minimal anterior listhesis was likely degenerative. The MRI also found degenerative spondylosis, including the T11-12 level.³²

On September 29, 2011, Woods presented to Dr. Thomas J. McCool, M.D., at the walk-in clinic for his low back pain **“that started yesterday when he was riding a cement mixer truck that had no air ride seats. Normally the truck he drives has an air ride seat and it is very comfortable, but this truck did not have any air ride seats and he likened it to riding a buckboard wagon. In riding this truck yesterday, it created some pain in his middle lower back and slightly to the right side.”** Woods had been trying other modalities, “but he is realizing that he is getting more flare-ups and not a lot of improvement for any length of time. He has been getting steroid injections in the back but **has come to the conclusion that he probably is going to need to have some back surgery.”**³³ During the exam, it was noted that **turning and twisting with the upper torso at the waist aggravated the lower back.** “He wants to return to work at full duty, did not see a problem with that he says because he can get back into his truck with his air ride seat and should not be a problem returning to work tomorrow, he anticipates.”³⁴

On October 24, 2011, NP Robl-Jackson noted that Woods had had a surgical consultation with Dr. Rao on October 19, 2011. Dr. Rao had informed Woods that he would need to quit smoking to have the surgery. Woods wanted to see if he could wait at least another year. “He states he is concerned that he will not be able to work after the surgery. He does, however, complain of increased pain today. He states that **2 of his coworkers recently quit to go out to North Dakota, so he has been doing a lot more bending, lifting, and carrying, which has aggravated his pain.**” Pain was 100% of the time, as low as 4/10 and as high as 8/10. Activity level pain was 9/10. On March 27, 2012, NP Robl-Jackson noted Woods wanted to discuss physical therapy for his back and leg pain. “He has been doing some yard work that aggravated his pain. He has been having more muscle spasms He will be going back to work after the weight limits have been lifted. **He does cement work and is concerned that this may aggravate the pain.**” Woods was interested in radiofrequency ablation to see if he would have longer

³¹ Tr., pp. 35-36.

³² Central Proc. Ex. 10.

³³ Onyx Ex. 10; Central Proc. Ex. 10; emphasis added.

³⁴ Onyx Ex. 10.

relief.³⁵ He also continued physical therapy.³⁶ According to Woods, his pain was always increased with work.³⁷

On **September 7, 2012**, NP Robl-Jackson noted Woods felt 80% relief after the last injection, but it was now down to 50%. **“He does drive a cement truck, works full-time, but does pick up extra hours during the summer months. He states that he was lifting heavy cement chutes yesterday and he does believe this aggravated the low back....He is thinking when their hours are down, which is in the winter, he may have the surgery.”** He was experiencing pain 100% of the time, as low as 1/10 and as high as 4/10. Pain activity level was 9/10. On March 14, 2013, NP Robl-Jackson noted the pain was getting worse the last 3 weeks and Woods wanted to discuss an injection. “He states his pain is exacerbated by extension and rotation of the lumbar spine. The pain does radiate down the back of the legs and along the right lateral lower leg....He is concerned that he will have his DOT license revoked if he continues on the medication. He states he really needs his job.”³⁸ On July 2, 2013, NP Robl-Jackson noted that Woods **“states that several weeks ago he had fallen backwards at work. He was carrying a 40 pound cement chute and landed on his back with the chute landing on his chest. Since then he has had significant increased pain.”** Woods was working 60-hour weeks.³⁹

An MRI of the lumbar spine on September 9, 2014, showed multilevel degenerative changes, including moderate to severe spinal canal stenosis at L4-5. A grade 1 degenerative spondylolisthesis at L4-5 was present, slightly worse than on the 2011 study. On September 12, 2014, Woods first saw Dr. Jason J. Potocki, M.D., who noted, “He has a long history of low back problems which started in the year 2007. At that time he was at work. He was trying to open a large garage door for a truck. He felt a pop in his back with severe pain, and it really has been a problem ever since. However he has been treated conservatively.” Dr. Potocki noted that Woods had been getting epidural steroid injections for 7 years, **“and it is getting diminished returned with the injections.”** His pain was worse with activity and better with rest. “He does work a full-time job now. He drives a cement mixer.” Dr. Potocki felt the spinal stenosis with spondylolisthesis at L4-5 was a significant contributor to Woods’ pain. He felt that surgery was very reasonable, and Woods decided to proceed with this.⁴⁰

On **September 26, 2014**, Dr. Feng Lu, M.D., noted that Woods was having more trouble working due to back and leg pain. Surgery was planned in November. Pain was 50% in the low back and 50% in the lower extremities. “The pain increases with everything he does but walking and standing causes more pain.”⁴¹

On **October 23, 2014**, Dr. Potocki indicated that Woods **“has really been having quite a bit of trouble at work. It is very difficult for him to walk or even stand up straight.**

³⁵ Onyx Ex. 9; emphasis added.

³⁶ Central Proc. Ex. 10.

³⁷ Tr., p. 39.

³⁸ Onyx Exs. 9, 10; emphasis added.

³⁹ Onyx Ex. 9; emphasis added.

⁴⁰ Central Proc. Ex. 10; emphasis added.

⁴¹ Onyx Ex. 10; Central Proc. Ex. 10.

He is having a lot of low back and bilateral lower extremity discomfort. He is wondering if his restrictions can be revised.” Dr. Potocki stated, “Frankly, I am surprised that he has been able to work in the past as severe as his findings are. We have revised his work restrictions to place him on sedentary duty.”⁴² This is the date that Woods first missed work due to what Onyx alleges is the date the occupational disease injury ripened. Woods never returned to work for Central Processing after this.

A chart of the injections and radiofrequency ablation from March 2007 until the surgery (and beyond) shows that Woods had **at least 26 epidural steroid injections at L4-5 before the surgery, as well as a right medial branch block at L4-5 and bilateral radiofrequency ablation at L4-5**. The injections generally provided 75-100% relief; the radiofrequency ablation provided no relief. In January 2014, the injection provided 100% relief for the first three weeks, and then 50% improvement. The injection in April 2014 provided 100% relief, and the October 28, 2014, injection provided 75% relief.⁴³ According to Woods, when he first started getting injections, they provided relief. He had multiple injections because the symptoms would return after a period of relief. The relief would only last about 3 months. **“I was told eventually that they would not help at all, which was true.”** In 2007, the injections provided 100% relief and he was able to work without restrictions. When asked if he had any low back injuries when he worked for Central Processing, Woods responded, “No injuries that I can recall. No actual physical injuries requiring treatment.” According to Woods, in all his time working at Central Processing, he never reached a sensation of pain that reached the level of pain he felt on January 11, 2007.⁴⁴ But according to Woods, from 2007 to 2014, his back condition got worse.⁴⁵

Woods applied for short-term disability in October 2014 with Central Processing,⁴⁶ and Dr. Potocki performed a posterior L4-5 laminectomy with posterolateral fusion at the L4-5 level with iliac crest bone graft in November.

Post-surgery, Woods noted that his pain was nearly gone. He felt 75% better by December 23, 2014. He continued healing in 2015 and doing physical therapy. On March 10, 2015, a therapy note indicated that Woods fell on ice on the sidewalk the previous day and landed on his buttocks. By May 21, 2015, six months out from the surgery, Woods was making slow progress. On June 3, 2015, Dr. Thomas Simpson, M.D., noted that Woods’ leg pain had resolved and his activity was 80% of normal. Aggravating factors for pain were activity and relieving factors were rest. Woods elected to proceed with an epidural steroid injection. By June 29, 2015, Woods was doing better and planning a trip to the Dominican Republic in July. Woods continued to receive epidural steroid injections after the surgery in 2016 through 2018.⁴⁷

⁴² Onyx Ex. 10; Central Proc. Ex. 10.

⁴³ Onyx Ex. 9; Central Proc. Exs. 12, 13.

⁴⁴ Tr., p. 57.

⁴⁵ Tr., pp. 19, 23-25, 57.

⁴⁶ Tr., p. 52.

⁴⁷ Central Proc. Exs. 7, 12.

On April 28, 2017, NP Ann Robl-Jackson noted that Woods' pain was 5/10. Things had been stable. Woods continued to work at Eastbay in a night shift. In August 2017, Dr. Anshu Varma, M.D., noted that Woods was not able to work a full regular job.⁴⁸

On December 14, 2018, Dr. C. Timothy Ablett, M.D., discussed legal issues with Woods. He noted, **"Yes. I explained to Mr. Woods that I do feel that the episode described above was the causation of his low back problems, both in a sense of direct causation and in a sense of acceleration of a normally degenerative process."**⁴⁹ The episode described was the lifting injury in January 2007. "Mr. Woods had no prior history of low back issues before that episode, but since that time has experienced significant difficulty for which he underwent surgery under the care of Dr. Potocki."

On April 4, 2019, Dr. Potocki noted that he had done the lumbar decompression in 2014. Woods had had slowly increasing pain in the back and pelvic area, which was exacerbated by long periods of standing. He had been going to pain management and had multiple injections, as well as physical therapy. "He was barely able to walk or get around." Woods was not interested in pursuing more injections or physical therapy. He now had adjacent-segment syndrome, and he was leaning toward additional surgery. He ultimately had a fusion extension and revision with extension at L3-4 in May 2019, and on July 30, 2019, Dr. Potocki noted that Woods was doing well post-surgery. He had been working at East Bay in a sedentary capacity, but he was kept off work another 6 weeks.

Onyx's (Reverse Applicant's) Medical Opinions

The reverse applicant, Onyx, submitted eight WKC-16-Bs from Dr. William R. Klemme, M.D. In his first IME and WKC-16-B dated April 3, 2008, Dr. Klemme noted that Woods reported that Dr. Weissman had recommended surgery, but Woods instead had physical therapy and injections, noting that injections typically lasted three to four months.⁵⁰ Dr. Klemme diagnosed preexisting advanced multilevel lumbar degenerative disc disease and spondylosis, not related to the 2007 work injury; preexisting bilateral facet arthropathy and left-sided synovial cyst at L4-5, not work-related; broad-based central disc protrusion at L4-5 related to the 2007 work injury; acquired stenosis at L4-5 secondary to the prior diagnoses; and chronic low back pain with lower extremity sensory hypesthesia responsive to intermittent epidural steroid injections, causally related to the 2007 work injury. Dr. Klemme noted that Woods was working and that he experienced a recurrence of his symptoms when he returned to work. This was a recurrent pattern with Woods being fully functional in the intervals between epidural steroid injections. He opined that Woods' symptoms were causally related to the 2007 injury by precipitation, aggravation, and acceleration of a preexisting degenerative lumbar condition. Dr. Klemme did not recommend work restrictions and noted that Woods appeared capable of full, unrestricted work during intervals between injections. He assigned an end of healing as of March 17, 2008, and assessed 3% permanent partial disability. According to Dr. Klemme, Woods had two treatment choices going forward. He could have intermittent epidural steroid

⁴⁸ Central Proc. Ex. 13.

⁴⁹ Central Proc. Ex. 6; emphasis added.

⁵⁰ Onyx Ex. 1.

injections every three to four months “as needed for symptoms,” or have decompression surgery.

On December 1, 2009, Dr. Klemme did another IME and WKC-16-B.⁵¹ He noted that Woods reported that he was able to manage his symptoms with the periodic injections. Woods noted that prolonged sitting and standing was difficult due to his low back pain, and that his symptoms were generally worse with activities, especially lifting. Woods wore a back belt at work. Dr. Klemme again opined that Woods had the same diagnoses. Woods appeared to be managing his symptoms quite well. He was working full duty with no restrictions. Dr. Klemme opined that Woods needed the injections to manage his symptoms up to three times per year. He noted no significant interval changes to modify the healing plateau.

Dr. Klemme performed another IME, reviewed additional medical records, and prepared another WKC-16-B dated February 14, 2011. At this time, Woods indicated that he continued to experience “waxing and waning low back pain.”⁵² His symptoms gradually recurred, and then he had more injections. In the reference to the medical note of April 14, 2010, Dr. Klemme noted that Woods had been assessed with mechanical low back strain secondary to repetitive work on the assembly line. On April 21, 2010, he had been advised not to perform twisting or turning positions. Dr. Klemme found no reason to change or amend his previous medical opinions. His opinions regarding maximum medical improvement or disability had not changed; and he again opined that Woods did not require any permanent work restrictions.

On September 12, 2013, Dr. Klemme reviewed additional medical records, and prepared another IME and WKC-16-B.⁵³ He again opined that Woods’ lumbar condition was a permanent precipitation, aggravation, and acceleration of his preexisting lumbar degenerative condition beyond normal progression. He also again opined Woods had reached an end of healing as of March 3, 2008; and that Woods was capable of unrestricted work activities. The symptoms did not represent a mere manifestation of the preexisting condition. Woods had since undergone radiofrequency ablation without symptomatic benefit. Woods’ pain was noted as variable, up to 8/10 with activities when the injections had waned. Dr. Klemme opined that Woods’ condition was essentially unchanged, and Dr. Klemme did not change his opinions. The ongoing injections remained a treatment option as in the past. He agreed that surgery remained an option as well. He again opined that Woods was capable of full and unrestricted work activities as a heavy equipment operator, and that he had reached an end of healing in 2008, and any permanent disability was attributable to the 2007 work injury.

Dr. Klemme prepared a medical record review and WKC-16-B dated September 3, 2015, after Woods’ surgery.⁵⁴ Dr. Klemme noted that Woods had a newly acquired grade 1 degenerative spondylolisthesis at L4-5, which he thought was related to his preexisting multilevel degenerative changes and disc protrusion. Dr. Klemme opined

⁵¹ Onyx Ex. 2.

⁵² Onyx Ex. 3.

⁵³ Onyx Ex. 4.

⁵⁴ Onyx Ex. 5.

that the surgery was causally related to the 2007 work injury. In reference to instances of Woods falling on ice, being pulled by a dog on a leash, changing his wife's tire, and falling over a dog at night, Dr. Klemme opined that these were not material or structural injuries and Woods' back condition had no causal relationship to those incidents. Dr. Klemme felt Woods should proceed with work hardening.

On March 22, 2016, Dr. Klemme again prepared an IME and WKC-16-B.⁵⁵ Woods had described increasing lumbar and bilateral lower extremity pain beginning in October 2014, such that he was unable to continue working. Woods was currently off work, and a recent functional capacity evaluation had limited him to light or very light duty work. Dr. Klemme did not change his opinions regarding causation. He continued to attribute Woods' back condition to the 2007 injury. At this time, he assessed 12% permanent partial disability and did assign permanent work restrictions, which he attributed to the 2007 injury.

Dr. Klemme provided another medical records review and WKC-16-B dated August 15, 2016.⁵⁶ At this time, Dr. Klemme referred to the vocational rehabilitation consultation by Mr. Guckenberg. Dr. Klemme noted that Mr. Guckenberg found that Woods worked just over 8 years as an equipment operator and driver for Central Processing. This involved driving a cement mixer, a dump truck, a wheel loader, a skid steer, and also flatbed semi-truck runs. Mr. Guckenberg also noted that Woods indicated that every year his back symptoms became worse, until he could no longer work and needed surgery. Dr. Klemme stated, "This statement, in my professional medical opinion, clearly indicates a progressive lumbar pain syndrome that was clearly aggravated and precipitated on an occupational exposure basis during Mr. Woods employment with County Materials Corporation between May 1, 2007, and the date of the lumbar surgery... on December 12, 2014,..." As a result, Dr. Klemme opined that it was probable that Woods' work activity was a material contributive causative factor in the progression of his lumbar condition.

Finally, Dr. Klemme prepared another medical records review and WKC-16-B dated August 8, 2017.⁵⁷ Among the records reviewed at this time included a November 3, 2014, physical job demands report for Woods' medium duty work, and a physical demands analysis dated May 29, 2016, for Woods' work. Dr. Klemme continued to opine that Woods' work at Central Processing represented a material contributive causative factor in the progression of his lumbar condition, which led to, at least in part, the L4-5 decompression and instrumented arthrodesis surgery in November 2014.

Central Processing's (Respondent's) Medical Opinions

Central Processing submitted several reports and WKC-16-Bs from Dr. William T. Monacci, M.D., a neurosurgery consultant. In his first IME and WKC-16-B dated February 22, 2018, Dr. Monacci reviewed Woods' medical records and examined and interviewed him. In his interview, Woods explained that he had worked as a heavy equipment operator for Central Processing without a significant amount of manual

⁵⁵ Onyx Ex. 6.

⁵⁶ Onyx Ex. 7.

⁵⁷ Onyx Ex. 8.

lifting. He was required to sit for prolonged periods of time and go over rough terrain in vehicles. Dr. Monacci found with regard to causation that Woods clearly had a preexisting condition, but the work injury on January 11, 2007, caused a permanent aggravation, likely causing the disc protrusion and increased stenosis at L4-5. He opined that surgical treatment was inevitable, given the continuum of symptoms unabated since the injury. Dr. Monacci referred to Woods' work for Central Processing and noted, "A detailed job description is not provided. However, the medical records do contain episodes of work-related aggravation in his symptoms."⁵⁸ Dr. Monacci opined that 50% of the causation in the case was due to the work injury in 2007, 30% was due to the normal activities of daily living and the aging process, as well as his comorbidities. And 20% was due to his work activities, "which based on the medical records involve some physical work which may be stressful to the low back." Nevertheless, Dr. Monacci stated that "I do not believe an occupational disease is applicable in this case."

On March 20, 2018, Dr. Monacci provided a Supplemental Report and WKC-16-B. At this time, Dr. Monacci stated, "After further review of information regarding this case and with regard to causation," Woods clearly had a preexisting but asymptomatic condition prior to the 2007 work injury. Dr. Monacci opined that the work injury in 2007 caused a permanent aggravation of the low back condition. He noted that while the medical records do contain episodes of work-related aggravation in his symptoms, "these episodes were minor in nature and did not cause a permanent change in an already unrelenting pain syndrome for which he had been receiving continuous care for a number of years."⁵⁹ At this time, Dr. Monacci apportioned 50% of causation due to the 2007 work injury and 50% due to the normal activities of daily living and the aging process, as well as Woods' comorbidities. He stated, "Although there were episodes of work-related activity with County Materials that precipitated treatment, no permanent change in an already unrelated ongoing pain syndrome occurred. Consequently, I do not believe an occupational disease with respect to County Materials is applicable in this case."

On July 16, 2020, Dr. Monacci reviewed additional records and provided another Supplemental Report and WKC-16-B.⁶⁰ Dr. Monacci's opinions as to causation did not change. He stated that it remained his opinion that Woods' work for Central Processing was not a material contributory factor in his need for surgical intervention. The work was not of sufficient, magnitude, duration, or frequency to be a material contributory factor.

Central Processing also submitted a WKC-16-B from Dr. Kessel dated March 25, 2016, in which Dr. Kessel identified the 2007 work injury as the traumatic event.⁶¹ He diagnosed chronic low back pain, radiating pain, and a history of back surgery in 2014. Dr. Kessel noted that he was not asked to assess causation and referred to

⁵⁸ Central Proc. Ex. 1.

⁵⁹ Central Proc. Ex. 2.

⁶⁰ Central Proc. Ex. 3.

⁶¹ Central Proc. Ex. 4; *see also* Central Proc. Ex. 12.

Dr. Potocki's comments on that. Dr. Kessel assessed disability.⁶² Central Processing also submitted a WKC-16-B from Dr. Ablett dated August 14, 2020.⁶³ Dr. Ablett identified the 2007 work injury as the traumatic event and diagnosed the low back injury requiring spinal surgery. He opined that the work incident directly caused the disability and stated, "I explained to Mr. Woods that I do feel that the episode described above was the causation of his low back problems, both in a sense of direct causation and in a sense of acceleration of a normally degenerative process."

The Vocational Report

Onyx submitted a Vocational Rehabilitation Consultation dated June 2, 2016, from Michael J. Guckenberg, MS, CDMS, LPC. Mr. Guckenberg performed his analysis to determine if Woods had sustained any loss of earning capacity, which he determined was 60% to 65%. In conducting his analysis, Mr. Guckenberg reviewed Woods' work with Central Processing and stated, "Mr. Woods said in his job with County Materials Corporation he drove a cement mixer, dump truck, wheel loader, skid steer, and also made flatbed semi-truck runs. This was a seasonal position and Mr. Woods said that every year his back symptoms became worse, until he just could not go any longer and underwent back surgery. He said when he used up his FMLA leave, he still was not medically released, and as a result, he was terminated."⁶⁴

Analysis

The issue is whether Woods' work with Central Processing was a material contributory causative factor in the onset and progression of his lower back condition. If so, Onyx seeks reimbursement from Central Processing for paid medical expenses and benefits paid. The reverse applicant (Onyx) has the burden of proving beyond a legitimate doubt all the facts necessary to establish a claim for compensation.⁶⁵ The commission must deny compensation if it has a legitimate doubt regarding the facts necessary to establish a claim, but not every doubt is automatically legitimate or sufficient to deny compensation.⁶⁶ Legitimate doubt must arise from contradictions and inconsistencies in the evidence, not simply from intuition.⁶⁷

The Parties' Arguments

Central Processing argues that Onyx failed to meet its burden to prove that Woods' work at Central Processing was a material contributory causative factor in the onset or progression of his lumbar spine condition. First, Central Processing argues that Woods' testimony showed that he attributed his back condition solely to his 2007 injury at Onyx. He repeatedly referred to the injury in 2007, and though he began working for Central Processing in 2007, he was in active treatment for his low back injury and was up front with Central Processing about that injury. Woods never once reported any additional back injury or aggravation while working at Central Processing during his employment. Woods suffered an acute injury in 2007, and he

⁶² Dr. Kessel also assessed disability in a Medical Report on Industrial Injury dated March 27, 2016. Central Proc. Ex. 12.

⁶³ Central Proc. Ex. 5.

⁶⁴ Onyx Ex. 12.

⁶⁵ *Leist v. LIRC*, 183 Wis. 2d 450, 457, 515 N.W.2d 268 (1994); *Erickson v. DILHR*, 49 Wis. 2d 114, 118, 181 N.W.2d 495 (1970).

⁶⁶ *Erickson*, *supra*, at 119; *Leist*, *supra*, at 457.

⁶⁷ *Erickson*, *supra*; *Richardson v. Indus. Comm'n*, 1 Wis. 2d 393, 396-97, 84 N.W.2d 98 (1957).

knew that the epidural injections were only a temporary conservative measure that would continue to lose effectiveness until they would eventually not help at all. Though Woods' pain got progressively worse between 2007 and 2014, nothing in his work at Central Processing ever reached the level of pain he experienced on the date of the traumatic injury in 2007. He knew he would eventually need surgery as early as 2007, but he chose to treat conservatively with epidural injections over 7 years, until the effectiveness of the injections wore off entirely, as he was told would happen.

Central Processing also argues that there were multiple additional credible professional medical opinions that show the 2007 injury was the cause of Woods' condition. Dr. Kessel prepared a WKC-16-B and related Woods' condition to the 2007 injury. Dr. Kessel treated Woods and mentioned the use of epidural steroid injections to manage his pain and assessed that his condition would not get any better. Dr. Weissman also diagnosed Woods with acute lumbar discogenic disease with L4-5 bulging directly related to the 2007 work injury. Dr. Weissman noted that surgery was likely the most viable option and recommended surgery in March 2007. He opined that the steroid injections would not serve any great treatment purpose. Dr. Ablett saw Woods on multiple occasions between 2009 and 2018 and prepared a WKC-16-B. He diagnosed Woods with acute low back pain from the 2007 work injury. He opined that Woods' treatment, need for surgery, and post-operative pain were all directly related to the original work injury. According to Central Processing, it is entirely absurd that these professional expert medical opinions were not considered by the administrative law judge. Considering these opinions, the greater weight of the credible evidence demonstrates that the original work injury was the cause of all of Woods' low back pain and need for surgery. Central Processing also argues that the testimony Mr. De Leon and Mr. Behnke also demonstrated that Woods never complained of work-related low back pain and did not report a back injury during his work at Central Processing. Indeed, Woods' termination from Central Processing was a planned event as a result of Woods' decision to proceed with surgery to address his lumbar spine.

Regarding the medical causation opinions of Dr. Klemme and Dr. Monacci, Central Processing argues that both doctors changed and modified their opinions on causation with subsequent reports. Dr. Monacci based his findings on examination of Woods, the supplemental medical records during the course of Woods' employment with Central Processing, and a job description, and he determined that the episodes of lumbar pain were minor and were not a contributory causative factor in the progression of the lumbar condition. By comparison, Dr. Klemme had been given multiple opportunities to examine and review the records over 8 years. At every turn, he confirmed the work injury in 2007 caused Woods' ongoing back pain and need for surgery. It was not until he was presented with the vocational report of Mr. Guckenberg, that Dr. Klemme completely reversed course based on a single reference to a comment made by Woods in the report. It defies logic, according to Central Processing, to find that Dr. Klemme's about-face was more credible than the modified opinions of Dr. Monacci. Dr. Klemme provided eight WKC-16-Bs, and in the first six, he reached the same conclusions concerning the original conceded work injury in 2007. This included reports done while Woods was working at Central Processing. The report dated September 3, 2015, specifically concluded that the back surgery was directly related to the work injury at Onyx and not any episode at Central Processing. It was not until his report dated

August 15, 2016, that Dr. Klemme changed his opinion based on the sentence in the vocational report. Central Processing argues that this change of position was not credible by Dr. Klemme. Dr. Klemme did not based his changed opinion on the medical evidence, but on the single statement in the vocational report.

According to Central Processing, Dr. Monacci provided the more credible medical opinion. Though he initially assigned 20% for Woods' work at Central Processing, after a further extensive review of the medical treatment history, including materials not previously provided to him addressing the "episodes" during Woods' employment with Central Processing, Dr. Monacci modified his prior conclusions in two subsequent reports. Dr. Monacci opined that following the original injury, surgery was inevitable. It was only prolonged by the masking effect of the 20-30 epidural injections administered over the course of 7+ years following the work injury. Dr. Monacci explained that any "episodes" of low back pain stemming from Woods' employment at Central Processing were minor in nature, with no permanent impact on the overall, underlying condition of Woods' lumbar condition. His modification was not ideal, but at least it was based on further review of the medical evidence and was consistent with the opinions of Woods' treating doctors. This evidence along with the medical evidence pointing to the original injury as the cause of Woods' back condition creates legitimate doubt as to the claim commenced by Onyx. This is a simple, common-sense case, according to Central Processing, where the record shows the original injury was ultimately going to require surgery; Woods wished to put off that inevitability for as long as he could, while treating conservatively with epidural injections; and when those injections no longer worked to curb his pain or provide benefits, Woods proceeded with the surgery. Woods never fully recovered from the injury at Onyx because it required surgery to correct and he chose to put off that surgery. The need for surgery had nothing to do with Woods' work at Central Processing and everything to do with the fact that he stopped obtaining relief from pain management injections he was using to treat the permanent impact on his lumbar spine from the initial injury. The need for surgery came as no surprise as everyone knew the effects of the epidural injections were not going to provide lasting relief.

Onyx responds and argues that it proved beyond a legitimate doubt that Woods' work activities at Central Processing were a material contributory causative factor in the progression of his lumbar spine condition. Onyx argues this is a medical question, and only doctors who addressed this question may be considered. According to Onyx, only Dr. Klemme and Dr. Monacci addressed this medical question, and Dr. Klemme's opinions are more credible because they are supported by the facts, they remained consistent throughout the course of the case, and Dr. Monacci discredited his own opinions. The other doctors' opinions are not relevant because they did not provide opinions whether the work at Central Processing was a material factor in the onset or progression of Woods' low back condition. Dr. Weissman may have discussed surgery, but he also discussed steroid injections as another potential option. It is not clear that surgery was a necessity. Onyx argues that the facts show that Woods testified that every year his back symptoms got worse until he could just not go on any longer and underwent the back surgery. The medical evidence supported that Woods condition became worse over time. When Woods began working for Central Processing, he had no work restrictions. Within months, his medical providers were documenting the

impact of his work activities on his lumbar condition. At times, Woods was given restrictions limiting his work hours and taking time off work, which was beneficial. The medical records showed the long work hours that Woods worked. Different work activities also caused specific problems, such as the brick production work, lifting and bending, rough riding in the cement truck, and working with the chutes. According to Onyx, the medical evidence supports Woods' work at Central Processing only harmed his lumbar condition. Accordingly, Dr. Klemme's opinion as to causation is the most credible, and it does not matter what Woods believed caused his back condition.

Dr. Klemme's opinions also remained consistent, according to Onyx. Onyx argues that Central Processing erroneously asserts that Dr. Klemme changed his opinion. Dr. Klemme did give opinions as to the original injury causing Woods' back condition, but a traumatic work injury does not preclude a subsequent occupational exposure injury for the same worker, and the latter does not negate the former. Dr. Klemme answered new questions in his seventh report about an occupational injury. By opining that Woods' work at Central Processing was at least a material contributory causative factor in the progression of his lumbar condition, Dr. Klemme did not disavow the 2007 accidental injury. Rather, he opined that Woods' back condition had two work-related causes. It was Dr. Monacci who changed his opinion, according to Onyx, because he originally agreed with Dr. Klemme that Woods' lumbar condition had two work causes, when he opined that those work activities were 20% of the cause of his condition. This only goes to bolster Dr. Klemme's credibility, according to Onyx.

According to Onyx, Dr. Monacci discredited his own opinions when he changed his opinions and said that Woods' work for Central Processing was not a cause of his back condition. Despite his years of working with the Wisconsin Worker's Compensation Act, Dr. Monacci inaccurately maintained that apportionment of liability was appropriate in this case. This further calls into question the credibility of his opinions, and Dr. Monacci did not explain the reason for his changed opinion. Though he stated that the episodes were "minor," he did not reveal why. And though he stated that the episodes did not cause a permanent change, he again did not explain why. He only vaguely referred to "additional information" that he reviewed. Dr. Monacci's opinion that Woods' activities at Central Processing were not a material contributory causative factor in his back condition, but his very limited activities of daily living were causative, is highly illogical, according to Onyx. It is illogical that getting dressed, opening the door for dogs, relaxing and going to bed would cause his back condition when working long hours, bending, lifting, twisting, and jostling would not.

Was Woods' work with Central Processing a material contributory causative factor in the onset or progression of his low back condition?

The commission finds that the medical evidence shows that Woods' work was *at least a material contributory causative factor* in the progression of his low back condition. Under the occupational disease theory of causation, employment exposure need not be the sole cause or the main factor in the applicant's condition.⁶⁸ It is sufficient to show

⁶⁸ *City of Superior v. DILHR*, 84 Wis. 2d 663, 668 n.2, 267 N.W.2d 637 (1978); *Universal Foundry Co. v. DILHR*, 82 Wis. 2d 479, 487-88 n.5, 263 N.W.2d 172 (1978).

that work exposure was a material factor in the development or progress of the disabling disease.⁶⁹

In this case, Woods' work at Central Processing involved driving a cement truck and setting up the 30 to 50-pound chutes on the truck, which required lifting and bending. The driving also involved jostling that affected his back. Though the work was seasonal, when he worked, he worked very long days doing this work. He also wore a back brace to help with the fact that he would be jostled in the truck.

The medical evidence shows that Woods' back condition changed over the time he was working for Central Processing. The MRI in 2009 showed changes from the MRI 2007, and the MRI in 2011 showed that the facet arthropathy had increased from 2009 and there was now central disc protrusion at L4-5 causing moderate to severe spinal stenosis. By the MRI in 2014, his spine showed multilevel degenerative changes, and his degenerative spondylolisthesis at L4-5 was slightly worse than in 2011. There were also other references throughout the medical records of the hard work that Woods was doing in his job and episodes of that work causing additional back problems. In particular, on August 4, 2008, when Woods was having numbness in his right leg and pain in his legs, it was noted that he drove a cement truck and had been working "extra hours" at the busy time of year. In September 2008, he was noted as working longer hours and doing a lot of lifting. In November 2008, Woods took a few days off and felt that that benefited him and he was then able to return to work. In June 2009, the medical record notes that Woods was working 12-13 hours per day and that he felt that the "jostling" while in the truck aggravated his low back. By July 2009, Woods was working 16-hour days.

In addition, a few medical records note specific instances of Woods' work causing low back aggravations. In April 2010, Woods had been called back to work after layoff and was moving bricks from one assembly line to another, standing in one position and rotating at his waist for 12 hours. His back "gave out" and he could no longer do the work. Dr. Kessel specifically diagnosed an overuse syndrome for his low back after this incident, stating that he had aggravated a preexisting condition with repetitive quick motions. Woods was then advised not to perform twisting or turning positions. At this time, it was also noted that Woods was working 40-50 hours a week and doing a lot of lifting and bending.

In September 2011, Woods also had an incident where he was riding in a truck without an air seat, which caused him back pain. In October 2011, the medical notes indicate that some coworkers had quit, and Woods had to do more bending, lifting, and carrying that had aggravated his back pain. Woods was concerned that the cement work aggravated his back pain. In September 2012, Woods had been lifting heavy cement chutes and thought it aggravated his low back. There was also an incident in July 2013, when Woods fell backwards at work while carrying a 40-pound chute and landed on his back, causing significantly increased pain. Woods was working 60-hour weeks at this time. By October 2014, Woods was having difficulty walking or standing up straight and was no longer able to do his job.

⁶⁹ *Id.*; *Milwaukee Malleable & Grey Iron Works v. Indus. Comm'n*, 239 Wis. 610, 615-16, 2 N.W.2d 197 (1942).

Based on the work that Woods did for Central Processing, and the specific instances noted in the medical records of the aggravations caused to his back by his work, as well as the credible opinion of Dr. Klemme, the commission finds that the Onyx has proved that the seven years of work at Central Processing were at least a material contributory causative factor in the progression of Woods' low back condition. It is true that the initial medical opinions were focused on causation for the initial injury, but when specifically asked about an occupational injury and provided information about the work, Dr. Klemme opined that the work at Central Processing was at least a material contributory causative factor. The two are not mutually exclusive. The traumatic injury could have caused a low back injury directly and through aggravation of a preexisting condition, *and* Woods' work at Central Processing could have been a material contributory causative factor in the progression of the condition. That is essentially what Dr. Klemme opined. This was consistent with Woods' symptoms worsening and becoming aggravated when he operated vehicles and was jostled, and also having to lift the chutes during his long workdays. The commission finds Dr. Monacci's opinion less credible because he initially stated that Woods' work for Central Processing was 20% contributory to his ongoing lower back symptoms and condition, but then later changed his opinion and determined that the aggravating episodes at work were only minor in nature and did not cause permanent change. Though he opined that the work incidents were minor, this was not true because Woods' condition worsened, and he was even diagnosed with an overuse syndrome on one occasion.

This result may seem unfair to Central Processing because the original traumatic injury occurred while Woods worked for Onyx, Woods initially had an option to have surgery but chose to proceed conservatively with injections, and Woods continued to receive care for his back for years while he worked for Central Processing. However, the medical evidence is persuasive that Woods also sustained an occupational injury while working for Central Processing that was at least a material contributory causative factor in the progression of his condition. This is the effect of liability with all occupational disease injuries. The entire liability for the occupational claim falls on the insurer whose policy was in place at the time the disability and loss of wage occurred. Courts have stated that while this may seem unfair, "it all evens out: 'The company that had insured the compensation liability at the time disability occurred is the one that must pay the compensation awarded. This rule will work no injustice to any individual carrier or employer because the law of averages will equalize burdens imposed by this act among the employers and the compensation insurers of this state.'"⁷⁰ Accordingly, the administrative law judge's decision is affirmed as modified.

cc: Atty. John R. Jokela
Atty. Michael P. McFarlane
Atty. Scott E. Wade

⁷⁰ *Virginia Surety Co., Inc. v. LIRC*, 2002 WI App 277, ¶20, 258 Wis. 2d 665, 654 N.W.2d 306, citing *Employers Mut. Liab. Co. v. McCormick*, 195 Wis. 410, 415-416, 217 N.W. 738, 740 (1928).