The social security number and dates of birth have been redacted from this opinion.

STATE OF MICHIGAN
DEPARTMENT OF LABOR AND ECONOMIC OPPORTUNITY
WORKERS' COMPENSATION BOARD OF MAGISTRATES

William Lejeune
SS# XXX-XX-XXXX

Plaintiff,

v

Nexteer Automotive Corporation,
Sedgwick Claims Management Services, Inc.

And

General Motors Company,
Self-Insured

Defendant.
_____/

APPEARANCES:

Timothy Burns (P45661), attorney for the Plaintiff
Denice LeVasseur (P32137), attorney for the Defendant Nexteer
Carrie Barrett (P42711), attorney for the Defendant General Motors (GM)

TRIAL DATE:

December 5, 2022 and December 9, 2022

OPINION

STATEMENT OF CLAIM:

The Plaintiff by way of Application for Mediation or Hearing, signed by the claimant on August 30, 2019, received by the Agency on September 3, 2019, alleged the following dates of injury: October, 2009; November 14, 2018; and February 7, 2019, claiming the following:

> "Two lifting injuries and heavy work caused or significantly aggravated disability due to low back. Given light duty work and partial benefits not paid. Plaintiff seeks a 30% attorney fee on reasonable and necessary medical."

The Plaintiff filed a subsequent Application for Mediation or Hearing, signed by the claimant on October 31, 2019, received by the Agency on November 4, 2019 to add a September 7, 2010 date of injury.

The Plaintiff filed a subsequent Application for Mediation or Hearing, signed by the claimant on July 25, 2022, received by the Agency on July 28, 2022 to add the following dates of injury: November, 2018 and December, 2018.

The Plaintiff filed a subsequent Application for Mediation or Hearing, signed by the claimant on October 27, 2022, received by the Agency on October 31, 2022 to add a September 5, 2019 (LDW) date of injury.

STIPULATIONS:

With regard to Defendant Nexteer: The parties stipulated that both were subject to the Act at the time of the alleged injury; the insured carrier was on the risk; and that the Plaintiff was employed by the Defendant at the time of the alleged personal injury. Plaintiff was left to his proofs that a personal injury arose out of and in the course of employment; that Plaintiff is disabled as a result of the personal injury; that notice and claim were timely made; and Plaintiff's average weekly wage. It was also stipulated that Plaintiff files his taxes married, joint with no dependents.

With regard to Defendant GM: The parties stipulated that both were subject to the Act at the time of the alleged injury; the self-insured was on the risk; and that the Plaintiff was employed by the Defendant at the time of the alleged personal injury. Plaintiff was left to his proofs that a personal injury arose out of and in the course of employment; that Plaintiff is disabled as a result of the personal injury; and that notice and claim were timely made. It was also stipulated that Plaintiff's average weekly wage was $2,655.23 for the April 14, 2008 date of injury; $2,067.31 for the October 4, 2009 date of injury and $2,650.43 for the September 10, 2010 date of injury; and that Plaintiff files his taxes married, joint with no dependents. Plaintiff was paid benefits from February 22, 2011 to September 5, 2011 at the rate of $746 per week.

WITNESSES TESTIFYING PERSONALLY:

Plaintiff:

William Lejeune, Plaintiff

Defendant – Nexteer:

Ricky John Heck
James Dominowski

Defendant – GM:

None

WITNESSES TESTIFYING BY DEPOSITION:

Plaintiff:

Paul A. Cullis, MD
Michele D. Robb, MA, CRC, LPC

Defendant – Nexteer:

Philip Mayer, MD
John N. Stokes, MA, CRC

Defendant – GM:

Gerald Schell, MD

EXHIBITS:

Plaintiff:

1. Deposition transcript – Dr. Cullis taken on November 3, 2020
2. Deposition transcript – Michele Robb taken on July 19, 2021
3. Medical records – plant medical
4. Employee incident report dated December 21, 2018
5. Medical records – Dr. Mark Adams
6. Medical records – Matrix Pain Management
7. Job search logs
8. Medical records – Munson Chiropractic
9. Wage calculations from September 9, 2018 – September 8, 2019

Defendant – Nexteer:

A. Deposition transcript – Dr. Mayer taken on June 29, 2021
B. Deposition transcript – John Stokes taken on August 20, 2021
C. Application for Hearing and VP dated April 10, 2013
D. Wage records, January 7, 2011 – October 11, 2019
E. Copy of a letter from Defendant to Plaintiff dated April 17, 2020
F. Applications for Hearing
G. Copy of Social Security Earnings records
H. Agency Form 105A
I. Plaintiff's driver's license
J. Medical records – Scheurer Hospital Emergency
K. Physical examination forms
L. Employee incident report dated August 22, 2014
M. Medical records – Scheurer Family Pharmacy
N. Photograph

O. Medical records – Dr. Scadden
P. Invoices of Heck Repair Company
Q. Surveillance video
R. Photographs
S. Photographs
T. Surveillance reports
U. Grievance filed by Plaintiff September 12, 2017
V. Medical records – lumbar MRI dated December 3, 2012

Defendant – GM:

A. Deposition transcript – Dr. Schell taken on September 2, 2021

DISCUSSION

WILLIAM LEJEUNE, PLAINTIFF

Plaintiff was born on @@. He has a high school diploma. He also trained as a tool and die maker beginning in 1985 and eventually became a journeyman in the early 1990s. He began working for Pigeon Manufacturing at that time as a production operator. This involved loading and unloading heavy parts and heavy sheets. His job as a journeyman tool and die maker was also heavy work. He could not return to the work he performed at Pigeon Manufacturing because of his back condition and the burning in his right leg.

In 1994 he worked for Active Industries as a tool and die maker. The job involved working on exposed panels using an 8 foot wrench. The job required considerable pushing and pulling with what Plaintiff estimates using 70 to 80 pounds of force. He worked for Active Industries until 2001. As with his job at Pigeon Manufacturing, Plaintiff could not return to that work at the present time because of his back and leg problems. Plaintiff did testify that he had no significant difficulties with either his back or leg while working for Active Industries.

Plaintiff began working for Minute Man Metal in 2002. This job also involved heavy lifting building conveyers and hoppers for the gravel industry. Plaintiff again could not return to that type of work.

Between 1998 and 2003 Plaintiff also engaged in self-employment as a truck driver hauling potatoes. This job involved placing pallets in the truck using a pallet jack and also strapping tarps. He likewise could not perform that job now.

In 2005, Plaintiff began working for Deckerville Metalworks again as a tool and die maker which involved heavy lifting. He estimated the weights he would lift would be somewhere between 25 and 30 pounds sometimes using a prybar to move equipment. He estimates the force used in pushing would be up to 100

pounds. He could not perform that job now. He left that position in 2006 going to Delphi.

Plaintiff took a pre-employment physical on August 16, 2006 and passed same without any restrictions being imposed. He was hired on September 25, 2006. He did admit that he had occasional back pain prior to working at Delphi. He had chiropractic treatment in 2006 as shown by a record dated August 23, 2006. The entry at that time indicated back pain with radiation in the buttock. He did not need any restrictions before September 25, 2006.

His job as a tool and die maker at Delphi involved repairing and building of equipment. The job required pulling and using a lift to help with heavier equipment. Pushing and pulling required 70 to 80 pounds of force in his experience. The job involved using wrenches and prybars sometimes in awkward positions. He described his job as a tool and die maker as heavy. Individual parts weighed 25 to 30 pounds.

He continued treatment with a chiropractor for back pain and general muscle tightness. Plaintiff testified that he noticed a significant change in his condition on April 14, 2008. He reported to the medical department on April 15, 2008. He was working on an anvil change job. During the course of putting in a new anvil, Plaintiff felt a crack in his back and tightness. He did continue working that day. The next day his pain was worse with radiation down his right leg. He testified that the pain he felt at that time was different than in the past which was just a muscle tightness. Following this date, Plaintiff felt a stabbing pain and a burning sensation down his right leg. Nevertheless, he kept working without restrictions. He did not seek any specific treatment and was able to do his job.

Plaintiff testified regarding a further injury on October 4, 2009 when he was performing a changeover in a press and slipped and fell on oil on a platform. At that time he wrenched his leg and back. He sought treatment by Dr. Adams but continued working without restrictions. He continued doing his same journeyman tool and die making job.

Plaintiff testified he felt a further significant change in his back on September 7, 2010. Plaintiff was using an Allen wrench and a prybar on a die that had separated. Plaintiff felt a snap in his back with radiation down his leg. Plaintiff testified he went to the medical department. At that time he was placed in the tool room and testified he really did nothing until the time of his surgery which occurred on February 27, 2011. The surgery according to Plaintiff went well. The burning pain went away. Plaintiff returned to work in 6 months. While he went to work in the same building, by that time, Nexteer had become the owner of the company. Plaintiff returned to work after his surgery with restrictions as to lifting, bending and pushing along with a weight restriction. Once again he was put in the tool room. Plaintiff indicated there was a lot of pushing, pulling, twisting and bending down to the floor and carrying parts. He

was able to do the work. The restrictions remained for approximately 1.5 years at which time he was moved from the tool room doing other things.

Plaintiff recalled going to the medical department on June 19, 2022 regarding his back problem with a complaint regarding his work activities making his back worse. He also recalled going to the medical department on August 22, 2014 when he slipped and fell doing a job drilling bolts causing his back to hurt. Nevertheless, Plaintiff testified he continued doing his regular job as a tool and die maker through September, 2019 performing the same duties as described above.

In November or December, 2018, Plaintiff was pulled from the tool room and worked on a job changing jaw end plates. Plaintiff testified that up until that time his job was irritating his back but the event in November or December, 2018 made his back go out "terrible." Plaintiff was out on the floor. A clip had broken and Plaintiff had to use a hammer. He bent over a railing and bending was at knee level and then at waist level. He did report the injury on January 9, 2019. Plaintiff identified Plaintiff's Exhibit 4 which was an incident report indicating back pain inside the right leg going down to the groin. Plaintiff testified that he had never experienced that type of pain before. Plaintiff continued working and the pain did not get any better and in fact got worse.

There was some confusing testimony from Plaintiff regarding restrictions around that time. Plaintiff initially testified that he had restrictions from Dr. Adams which he turned into the plant on February 7, 2019 but then indicated that perhaps it was the plant medical department that gave him restrictions. The restrictions were set forth in Plaintiff's Exhibit 3 on the date set forth above, i.e., February 7, 2019. Plaintiff testified that except for the time he was in the tool room prior to his 2011 surgery, all of his jobs required work beyond the restrictions of February 7, 2019.

Plaintiff kept working and his back got worse with radiation down the leg. He continued to treat with Dr. Adams. He last worked on September 5, 2019 which was the day before his surgery on September 6, 2019. Plaintiff testified that this second surgery did not work at all. He was experiencing the same type of pain in his back which would not go away. Plaintiff indicated that he talked to plant medical indicating that his back was bad when he was doing his job. He also testified that he was feeling pretty good until November or December, 2018 after which everything went to "heck."

Defense counsel for Defendant Nexteer voir dired the Plaintiff with regard to the job logs which were admitted as Plaintiff's Exhibit 7. Plaintiff testified that the logs were typed by his wife with information which he provided to her from Michigan Works and Michigan Talent Bank.

Plaintiff testified on further direct examination that he has had some interviews. Some were for jobs that were like his old jobs. When these prospective employers found out about his restrictions, he did not receive any offers.

Plaintiff continued his back treatment including the implantation of a spinal cord stimulator (SCS) on December 22, 2020 which he indicated did not help him at all. He testified that after his surgery in September, 2019, he could not go back to any of his jobs at either GM or Nexteer.

Plaintiff testified that Mr. Rick Heck was a family friend since high school. He testified that he does spend time socializing with Mr. Heck and did so in January and February, 2022 for the last time. They would discuss the weather and generally keeping each other company. He admitted that sometimes Mr. Heck would be working when he visited, but Plaintiff testified that he never worked. He testified that he visited perhaps 3 or 4 times a week and sometimes missed a week. When asked why he would visit Mr. Heck, he testified that he was bored just sitting at home.

He testified that he has driven a little bit for Mr. Heck. He still looks for work. He just cannot sit at home. When asked if he ever had any intention of going back work following his surgery, he said he would not give up a $100,000 a year job. He would go back to Nexteer if offered a restricted job.

He was shown a letter dated April 17, 2020 from Defendant Nexteer with regard to the loss of his job if he applied for Social Security Disability benefits. He was unaware that would be the case. He reiterated that he would take a job now if offered.

On final direct examination Plaintiff testified he had no dual employment when he worked for either GM or Nexteer.

Cross-examination by counsel for Defendant GM elicited the following information:

Plaintiff was asked about his resume showing a gap between November, 2001 and August, 2002. Plaintiff had no other job but was running his truck. Plaintiff testified that he did own the truck which included a semi-trailer. He sold the truck and trailer in 2005 or 2006. He testified that he was also a self-employed driver when he was working for Active Industries between 1998 and 2003. He did report his income. He was paid by the load indicating that for the trip to Wisconsin he was paid $1,000 total and for Detroit somewhere between $80 and $90. Neither trip involved payment for mileage.

Plaintiff acknowledged that he sought treatment with Dr. Munson before his employment with Delphi. The treatment was for pain in the low back and hip.

He acknowledged that the entry in Dr. Munson's record of August 23, 2006 was for back pain since high school. He denied any injury during high school.

He confirmed that when he hired in at Delphi it was as a tool and die maker journeyman which was not a production job. He acknowledged that he had a hoist for use with heavier weights. He also acknowledged that at times he had multiple people working with him.

He acknowledged that the entry of April 15, 2008 in the plant medical records which is Plaintiff's Exhibit 3 has no mention of a crack to his back or a rubber band pop. He admitted that between April 15, 2008 and October 4, 2009 he had no treatment. Likewise, he did not have any restrictions between those two dates. He did acknowledge that the incident of October 4, 2009 involved a slip on oil when Plaintiff wrenched his right hip and groin. He returned to work without restrictions.

Plaintiff acknowledged that on September 7, 2010 he "jerked his back" when a bolt snapped. The entry for that date indicated no mention of his back snapping. Plaintiff acknowledged that the restriction was only for 30 days by the plant medical director.

Plaintiff acknowledged that as of December 1, 2010 he was transferred to Nexteer and that he was working at that time without restrictions. He further acknowledged that he was working without restrictions until the time of his surgery on February 23, 2011. He confirmed that he did return to work at Nexteer on September 6, 2011 with restrictions. After the surgery he felt a lot better and continued working with Nexteer through 2019.

Cross-examination by counsel for Defendant Nexteer indicated that while Plaintiff was working for Defendant GM, one period of time involved November 18, 2009 with a return to work on March 30, 2010. At that time, Plaintiff returned with a 30 pound restriction for just 2 months.

Plaintiff admitted that he sought chiropractic treatment when his back tightens and always when he works a lot. Sometimes he went when his back just tightened up.

Plaintiff was shown Plaintiff's Exhibit 8 which is an office note of August 23, 2006 indicating treatment with Dr. Crowley. Plaintiff testified that Dr. Crowley was also a chiropractor and he did not treat with him very long. Plaintiff further testified that he had no direct injuries to his back before working for Nexteer and/or Delphi.

Plaintiff testified to a slip and fall at home in approximately 2003. It appeared Plaintiff was pointing to his right leg first and then his left leg. He did

so while testifying that his leg “cracked.” He stated that he did not lose any time from work but was given crutches and continued working.

He reiterated that his job at Minute Man Metal involved working with hoppers and conveyers and that during that time he engaged in side jobs with his trucking business. He estimated that his income with his trucking business was approximately $11,000 per year. He did not have much work trucking outside fall and spring. He testified that the trucking jobs would be in the Detroit area in July through January and Wisconsin in the spring.

Plaintiff was shown Defendant’s Exhibit G which was information from the Social Security Administration regarding Plaintiff’s earnings. Plaintiff’s highest earnings were in 2007 at $113,000 with the highest hourly rate in January, 2011 at $35.94 per hour. He admitted that he received a “buy down bonus” of $50,000. Effective January 31, 2011, his hourly rate went down to $29.00 per hour.

Plaintiff testified that his job as a journeyman tool and die maker was a skilled position which required him to “use his brain.” The job involved making sure that presses have to be perfectly calibrated. Usually the equipment would be repaired in the tool room which does have a desk. He admitted that he stands in front of the machines most of the time doing drilling sometimes by hand using a grinder. He admitted that sometimes he can sit. He also admitted that the tool room has a lift to assist in lifting heavier weights. Plaintiff also admitted that he can read blueprints and can drive a manual transmission vehicle.

Plaintiff testified that some jobs do not require heavy lifting and agreed that the Form 105A completed in November, 2011 indicated that his job at Active Industries did not involve a lot of heavy lifting.

Plaintiff was shown an employment application, resume, and Agency Form 105A which he identified and were admitted as Defendant Nexteer’s Exhibit H.

Plaintiff further testified that he had a commercial drivers’ license until February 5, 2016. He also had a motorcycle endorsement which ended in 2018. He also had an NT endorsement which allows him to drive tankers hauling liquids which he did for about a year. His job would be to transfer liquids to farmers who would then place it in some sort of a tank. He switched from a commercial drivers’ license to a chauffers’ license in 2016. He still kept a farm endorsement dated January, 2019 which he used to transport tractors. Plaintiff was shown an enhanced chauffeurs’ license with a motorcycle endorsement and a farm endorsement which was introduced as Defendant Nexteer’s Exhibit I.

Defense counsel for Nexteer read a portion of Dr. Cullis’ deposition regarding Plaintiff’s injury in 2009. Plaintiff admitted that he was already

receiving treatment from a chiropractor at that time. Plaintiff further stated that he did not tell Dr. Cullis about back pain since high school. Plaintiff was also presented with an entry of October 19, 2009 from Scheurer Hospital. Plaintiff could not remember what he was doing with regard to the entry as to back pain in 2009. With regard to the injury date of November 14, 2018, Plaintiff did not dispute that there was no visit to the plant medical department on that date. He admitted that was a date that was on the application that he signed. He further admitted he had no visits to the plant medical department throughout 2018. He confirmed that his last day of work was September 5, 2019 and that nothing happened before that last day of work. He is unsure as to whether any doctor told him to stop working.

As to the injury date of December 21, 2018 set forth in Plaintiff's Exhibit 4, Plaintiff did not dispute that the information on that exhibit with regard to that date did not match what he told Dr. Cullis. He told Dr. Cullis that he was reaching up and the Plaintiff's Exhibit 4 indicates that he was bending over.

Plaintiff testified to various physical examinations that he had while working for Nexteer. On January 24, 2012 and August 10, 2012, the records indicated that Plaintiff needed restrictions. On August 22, 2013 the form indicated no disability and that Plaintiff could do anything and did not need restrictions. The same information was contained in a physical examination form of December 11, 2017. On January 23, 2019 there was a form that indicated Plaintiff cannot do any assignment and could not do bending or lifting.

Plaintiff confirmed that he did have back pain since high school which continued throughout his employment. Plaintiff has been taking Norco since his first surgery. Plaintiff indicated that he missed no time from work after August 22, 2014 and worked without restrictions. Plaintiff was shown a further injury report of June 29, 2015 but again admitted that he lost no time from work and had no restrictions and continued to do his job. The same was true with regard to an injury report of July 11, 2016. The last report was December 21, 2018.

Plaintiff does not recall the information contained in the medical department record of January 30, 2019 regarding back pain he has had since his previous lumbar surgery which he controls with medication.

Plaintiff does not do any yard work. He has an antique tractor that he took to parades. He does not have a three wheeler.

Plaintiff was presented with an entry of Covenant Occupational Health dated June 13, 2012 indicating weed whacking and increased back pain. Plaintiff testified that he does not do that a lot and frankly does not remember the entry.

Plaintiff acknowledged his last day of work was September 5, 2019 and he applied for Social Security Disability within a month. When asked if it was his

intention to return to work and why he applied for Social Security Disability within a month of his last day of work, Plaintiff responded that Dr. Adams had advised him that it may take a year for him to recover from that surgery.

Plaintiff was questioned regarding some of the positions he applied for set forth in Plaintiff's Exhibit 7 which are the job logs. Two of the positions were school counselor and psychologist. Plaintiff acknowledged that he was not qualified for those positions but felt that maybe there was something else might be available.

Plaintiff testified he has a single axle 14x7 foot utility trailer. He has used it in the past to help people move things but did not receive any pay.

Plaintiff was shown some photographs. He identified his house and a boat on a trailer which he has not used in the current year. He stores the boat in his friend Rick Heck's shed. It is 18 feet. He fishes off a dock. Plaintiff was shown pictures of a lawn de-thatcher and snowblower as well as a mobile home which he said belonged to Mr. Heck.

Plaintiff acknowledged having surgery for tongue cancer about a year previously in July, 2021. Plaintiff admitted he saw Dr. Scadden on June 29, 2022 for a slip and fall on his hand. No complaint of back pain was discussed at that time.

On final cross-examination by defense counsel for Defendant Nexteer, Plaintiff indicated that with regard to the note in Dr. Scadden's records of June 8, 2022, his back issues come and go.

On re-direct examination, Plaintiff indicated that he was truthful in preparing the Agency Form 105A. He confirmed that his job as a tool and die marker did involve a lot of heavy type work.

As to his Application for Hearing in August 29, 2019 indicating certain injury dates, Plaintiff testified that he did not have all of the plant medical records or any records at the time he first prepared that application. He has a poor memory and does not fully recall all of the incidents of injury that took place.

He confirmed that he was working in the tool room after his September, 2010 injury where he claims he was doing "nothing" until the time of his surgery by Dr. Adams in February, 2011.

On final re-direct examination, Plaintiff reiterated that his back symptoms never resolved even after his surgery.

On cross-examination by defense counsel for GM, Plaintiff indicated that he could not remember exactly when he saw Dr. Crowley before Dr. Munson but believes he only treated with Dr. Crowley for about one month.

Plaintiff confirmed he broke his arm when he was in the 6th grade playing basketball. He does not engage in any current activities including no weight lifting. He corrected a word in Dr. Shell's deposition from "dumbbells" to "anvils."

Plaintiff agreed that on July 26, 2010 he advised Dr. Adams he had been treating with a chiropractor for preventative maintenance including traction. He also agreed that when he saw Dr. Adams in January, 2010, he made no mention of the September, 2009 injury.

RICKY JOHN HECK

Defendant Nexteer called Mr. Ricky John Heck as a witness. Mr. Heck was appearing pursuant to a subpoena. Mr. Heck testified that he has known Plaintiff for 42 or 43 years. He confirms that Plaintiff does appear at Mr. Heck's place of business anywhere from 0 to 7 days a week depending on how Plaintiff feels. In the last 6 months Plaintiff appeared at Mr. Heck's business two or three times per week. Mr. Heck runs a business which involves maintenance of semi tractors and farm trucks and field equipment. An F endorsement is required.

Equipment that would be used in Mr. Heck's business would include wrenches, torches, a cart, a compressed air impact wrench, grinding wheel and socket wrenches. All of the equipment is on his property. He has a house and also a pole barn where he keeps his tools. The pole barn is 40x60 feet.

Mr. Heck produced some invoices regarding his business. One invoice was for September 15, 2022 regarding a red semi with a dump trailer. The invoice showed a total charge of $2,282.53. He testified that delivery was made by both himself and the Plaintiff to the owner's grandmother's farm. The vehicles used were a dump truck and a pick up truck. The second invoice was dated September 13, 2022 for repairs. The total of that invoice was $1,415.98.

Mr. Heck testified that it is possible that Plaintiff helped him with a car on August 11, 2022. He further testified that Plaintiff has done no work for him since the summer.

Mr. Heck has a motorcycle endorsement but testified that the last time he did any motorcycle riding was 20 years previously. Mr. Heck testified that he has a utility trailer but does not use it. Mr. Heck testified that he has not used Plaintiff's utility trailer and has not used Plaintiff's boat but simply stores it. He testified further that Plaintiff takes the boat in May and returns it in November. He does not fish with the Plaintiff and does not borrow his snow blower.

The witness testified that he does see Plaintiff socially. He has seen a load of tires on a trailer at Plaintiff's home.

On final examination by defense counsel for Nexteer, Mr. Heck testified that Plaintiff's wife does the lawn cutting and that he has never seen Plaintiff do it.

On examination by Plaintiff's counsel, Mr. Heck confirmed that he and Plaintiff are buddies and that they like to talk. He has never given work to the Plaintiff and has never paid the Plaintiff for any work. As to the jobs on the invoices, Mr. Heck testified that they are one person jobs and that he did all the work. Mr. Heck did testify that Plaintiff did help deliver the equipment with regard to the September 15, 2022 invoice.

JAMES DOMINOWSKI

Defendant called Mr. James Dominowski. He is the director of investigations for SSTT, Inc. He has been employed at that company for 38 years. Mr. Dominowski testified that he conducted the investigation on Plaintiff. He performed the surveillance on September 30, 2021. The witness identified a packet of reports that he prepared. Mr. Dominowski identified the pole barn which was observed on many occasions. Plaintiff was seen often leaving usually in the morning, arriving at Mr. Heck's and working on trucks and equipment.

Mr. Dominowski identified various photographs depicting Plaintiff's trailer with tires as well as a three wheeler. Mr. Dominowski also identified further pictures marked as Defendant Nexteer's Exhibit S and also the reports he prepared marked as Defendant Nexteer's Exhibit T.

On cross-examination by Plaintiff's counsel, Mr. Dominowski indicated that he does not own the investigation company. Mr. Dominowski was the supervising investigator. Mr. Dominowski was then questioned at some length with regard to several if not all of the reports in connection with the investigation. These reports commenced on July 28, 2021 with a final report being September 29, 2022. Mr. Dominowski was questioned on 54 reports. On 27 of the reports, the witness testified that the surveillance began at Plaintiff's home and no activity of any sort was reported. He further testified that on almost all occasions the surveillance began at Plaintiff's home. With regard to 31 of the reports upon which the witness testified, no activity was reported. On some occasions, Plaintiff was seen at Mr. Heck's place of business but was not seen performing any activities. On September 13, 2021, Plaintiff was seen picking up some pieces of wood and carrying them to a barn. On September 21, 2021, Plaintiff was seen reaching under the hood of a truck. No bending or twisting activities were noted. On September 30, 2021, Plaintiff was seen walking slowly carrying a cup. No bending or lifting was noted. On November 29, 2021, Plaintiff was seen going into Mr. Heck's home and no further activities were seen. Likewise

for December 28, 2021; January 25, 2022; and January 27, 2022. On March 22, 2022 Plaintiff was at Mr. Heck's place however, no work was seen or noted in the report. On April 23, 2022, Plaintiff was standing in the driveway of Mr. Heck's place and no work was seen. On April 26, 2022 the doors on Mr. Heck's barn were open and no work was observed. Plaintiff was observed in the barn. On August 26, 2022 the investigators arrived at Plaintiff's home in the morning and then went to Mr. Heck's place where they observed two people working. One was Mr. Heck but the other one was not Plaintiff. On September 2, 2022, Plaintiff was at Mr. Heck's place. Mr. Heck was observed working on the truck. Plaintiff is seen bringing tools to Mr. Heck who was working. The witness testified that he does recall this as he drove by several times. While he did observe the Plaintiff, he did not observe heavy lifting but did observe Plaintiff handling tires and some bending.

On re-direct examination by counsel for Defendant Nexteer, Mr. Dominowski testified that on April 26, 2022, a boat was observed on Plaintiff's premises and a motor on a pallet was observed behind the truck. On May 20, 2022 a boat was observed in Plaintiff's driveway along with an older tractor.

PLAINTIFF – REBUTTAL

Plaintiff's counsel called the Plaintiff as a rebuttal witness. With regard to the video depicting Plaintiff on September 15, 2022, the Plaintiff testified that the activities shown on that day are not things that he does on a regular basis and not as physically demanding as his previous employment. The video depicting Plaintiff sitting on a tire and doing some reaching involved rewiring under the truck which was not forceful work. Plaintiff reiterated that he was not paid for any of those work activities.

On re-cross examination by counsel for Defendant Nexteer, Plaintiff agreed that the video on September 15, 2022 did show him bending over on the truck wheel for an extended period of time. He agreed he never rubbed his leg or his back. He agreed that the video showed Plaintiff hammering behind the truck and also using a grinder which was similar to the type of equipment he used in the tool room when he worked for Defendant.

PAUL CULLIS, MD

Plaintiff offered the deposition testimony of Dr. Paul Cullis taken on November 3, 2020. Dr. Cullis' curriculum vitae was marked as Plaintiff's Exhibit 1 and attached to the transcript of his deposition without objection from either defense counsel. Dr. Cullis is board certified in neurology since June, 1985. Dr. Cullis testified that he spends most of his time treating patients and does independent medical evaluations for Plaintiffs and Defendants. Dr. Cullis is an Associate Professor of Neurology at Wayne State University. He is also a

Professor of Neurology at St. George's in the Caribbean and is a Clinical Associate Professor of Neurology at Central Michigan.

Dr. Cullis performed an independent medical evaluation upon Plaintiff on July 28, 2020. That examination included taking a history, reviewing records, and developing impressions and conclusions regarding Plaintiff's condition. Dr. Cullis made only one change in the second paragraph of the first page of his report of July 28, 2020 indicating that the word "collapse" should be "prolapse."

Dr. Cullis confirmed that Plaintiff underwent a discectomy and fusion at the L5-S1 level in February, 2011. He confirmed that an MRI performed in 2009 showed findings at the L5-S1 level and another MRI that did show a disc herniation at L5-S1. He further testified that disc herniations are commonly caused or significantly aggravated by activities or events that place force upon the spine. He also testified that history is important in terms of causation. Dr. Cullis testified that the development of radicular symptoms would be important. He further testified that an EMG done in December, 2009 showed evidence of an L5 radiculopathy which would be consistent with the level where the disc was herniated.

As to the L3-L4 level, Dr. Cullis confirmed that the MRIs done in 2009 and in 2010 did not show pathology at the L3-L4 level. Moreover, x-rays performed in April, 2008 and October, 2009 likewise did not show any pathology at the L3-L4 level.

Dr. Cullis was presented with a very lengthy hypothetical question beginning on the bottom of page 9 and continuing through page 12 of the deposition transcript. This hypothetical included reference to Plaintiff's alleged injuries in 2008, 2009 and 2010. The hypothetical question also included information regarding Plaintiff's medical treatment up to 2011. Both defense counsel objected to the question to the extent that it did not conform with the proofs presented at the time of trial. I will accept the doctor's answer over defense counsel's objection and in the later portions of this opinion will determine if the hypothetical question is substantially in conformity with the proofs at trial.

Dr. Cullis was asked whether the injuries described in the hypothetical and the nature of Plaintiff's employment as a tool and die maker involving bending, lifting and twisting thereafter were the cause of Plaintiff's disc herniation and surgeries or significantly aggravated by Plaintiff's employment activities as a tool and die maker and the injuries described. In response, Dr. Cullis testified that within a reasonable degree of medical certainty the injuries described in the hypothetical over the period of time caused the disc herniation which required surgery by Dr. Adams in 2011.

Plaintiff's counsel prefaced his subsequent questioning of Dr. Cullis indicating that MRIs subsequent to 2011 indicated significant L3-L4 pathology

and specifically in 2019 including objective evidence of a pinched nerve at L4 level. The question Plaintiff's counsel asked was whether someone is more susceptible to developing degenerative changes after an injury. Dr. Cullis testified as follows:

> A. After the original injury which required surgery Mr. Lejeune would have been more susceptible to developing degenerative changes in the spine. And also since he had surgery at the L5-S1 level he would be more inclined to develop disk herniation or prolapse at the, at the levels above that.
>
> (Cullis dep. Pg. 13)

The changes which Dr. Cullis found at the other levels would be considered post traumatic because they occurred after the traumas in 2010 and 2011.

Dr. Cullis was asked to review an MRI report of Plaintiff's lumbar spine dated September 6, 2014. He testified that the report indicated moderate bilateral L3-4 facet hypertrophic changes seen without herniated nucleus pulposus or spinal stenosis. Dr. Cullis confirmed that the findings showed a rapid progression over several years which appeared to be related to the incidents described in the hypothetical question including incidents in plant medical records of June 19, 2012 when Plaintiff was performing a change over job and in August, 2014 when Plaintiff slipped and caught his elbow on a machine flexing his back with the development of significant increased symptoms.

Plaintiff's counsel once again prefaced a question with a reference to the plant medical records showing that in July, 2016 Plaintiff was pulling a super spacer and sliding it out twisting and pulling and developed significant increase in low back pain. Dr. Cullis was then asked to review an MRI of the lumbar spine and specifically at the L3-4 level. Dr. Cullis responded that the report showed that at the L3-4 level there was a mild disc bulge with mild effacement of the thecal sac. The report showed mild to moderate hypertrophy of the facets and mild to moderate foraminal narrowing bilaterally. He further testified that the changes had progressed and now there was a narrowing of the foramen through which the nerve roots run.

Dr. Cullis confirmed that he received a history from Plaintiff indicating an event occurring in December, 2018 when he was bending into a machine in an awkward manner and developed an increase in back pain. Dr. Cullis was asked to review an MRI report of March 13, 2019 which indicated that at the L3-4 level there was a broad based disc bulge, endplate osteophytic spurs causing effacement of the ventral thecal sac. The report also indicated an asymmetric right posterolateral disc bulge and hypertrophy of the facet joints causing mild compression of the right L3 nerve root. A CT myelogram was also performed. The CT myelogram is a procedure involving placing contrast into the spine which in some ways shows the presence of disc prolapse or herniation more

dramatically than the MRI. Dr. Cullis reviewed the CT myelogram report which indicated moderate to broad based right paracentral disc herniation at L3-4 level along with endplate osteophytic spur effacing the ventral thecal sac and in close proximity to the right L4 nerve root. He further testified that the "gold standard" would be the actual operative report. Dr. Adams performed surgery on or about September 6, 2019 indicating visualization of an impressive calcified disc herniation at L3-4. Dr. Cullis testified that the finding is consistent with the MRI and especially the CT myelogram which is a distinct new problem which had not been present previously before these injuries in 2018. Dr. Cullis testified that based upon his review of the studies, the surgeries done in 2011 and 2019 were reasonable and necessary as a result of injuries sustained at work.

Plaintiff's counsel again presented a hypothetical question regarding Plaintiff's employment activities subsequent to his surgery in 2011. The hypothetical question begins at line 18 on page 18 and continues through line 15 on page 19. Plaintiff's counsel then asked whether the doctor had an opinion within a reasonable degree of medical certainty as to whether Plaintiff's continued work at Nexteer significantly aggravated his underlying pathology. Once again both defense counsel objected to the hypothetical question essentially based upon whether the facts set forth in the hypothetical would conform to the evidence at trial. Once again, I would accept the doctor's answer and consider the objection in the subsequent portions of this opinion. In response to Plaintiff's counsel's question, Dr. Cullis answered as follows:

> A. It's my opinion within a reasonable degree of medical certainty that the injuries you described at work in or around 2018 significantly aggravated the underlying pathology as described earlier on. And specifically that it caused entrapment of the right L4 nerve root requiring further surgery by Dr. Adams in September, 2019.
>
> (Cullis dep., pg. 20)

Dr. Cullis saw Plaintiff post-operatively in July, 2020. Plaintiff indicated that he did not get a lot of relief from his back pain and pain radiating into his right leg. Dr. Cullis indicated that restrictions would be appropriate for Plaintiff including not involving himself in any repetitive lifting, bending or stooping. He further needed to change positions and was not able to lift more than 10 pounds. He further testified that with these restrictions, Plaintiff would be unable to perform the duties of his previous employment. Dr. Cullis further testified that Plaintiff would never be able to return to his previous employment or work outside of the restrictions that he outlined.

On cross-examination by defense counsel for Nexteer, Dr. Cullis indicated that he had no records of Dr. Adams other than the operative report which was shown to him on the date of the deposition. He further confirmed that he did not see any plant medical records prior to the day of the deposition.

Dr. Cullis confirmed that Plaintiff told him only of two injuries, one in 2009 and the other on November 14, 2018. Dr. Cullis testified that he did not see a medical record with regard to a November 14, 2018 injury. Dr. Cullis further testified that while Plaintiff did not mention a December, 2018 injury, Dr. Cullis was unsure whether the November date was accurate or whether it was December. Dr. Cullis confirmed that in his report, Plaintiff stated that he was reaching upwards to do something when he wrenched his back.

Dr. Cullis was asked whether in his review of records it was safe to say that the back pain Plaintiff had after 2011 was pretty consistent throughout the entire time until 2018 and today. In response, Dr. Cullis testified as follows:

> A. He continued to experience back pain on and off over that period of time. Initially he told me he was on restrictions for about four years after the original injury and then he wound up working without restrictions from probably about 2015 on.
>
> (Cullis dep., pg. 24)

Dr. Cullis was asked to define what he meant by prolonged walking, standing and sitting. He responded by indicating that prolonged walking is probably more than a couple of blocks and prolonged sitting or standing is more than half an hour.

Dr. Cullis confirmed that Plaintiff's residence in Owendale is approximately a 2 hour drive to the doctor's office is Roseville. Plaintiff's wife drove him for the evaluation.

Dr. Cullis confirmed his opinion that because of Plaintiff's fusion surgery at L5-S1, Plaintiff was going to have degenerative changes above and below the orthopedic device. When asked whether all of the changes in Plaintiff's lower back were going to be post traumatic as opposed to age related, Dr. Cullis testified as follows:

> A. There was a significant aggravation of the pathology over the period of time from the first surgery until the second surgery. And given the fact that he had had previous back trauma and had previous fusion it's my opinion that the changes seen at L3-4 are related to that previous surgery and trauma.
>
> (Cullis dep., pg. 26)

Dr. Cullis agreed that surgical findings indicating significant calcification at L3-4 would indicate some type of longstanding change. The calcification would not be an initial traumatic event.

Dr. Cullis was unaware of Plaintiff had a more recent EMG within the last 3 years.

Dr. Cullis agreed that a failed back syndrome referred to in Dr. Scadden's pre-operative evaluation is defined as an individual continuing to experience pain without relief after having surgery. When asked whether a failed back syndrome is a new issue and not a traumatic event but just the prior back surgery not relieving the issues, Dr. Cullis testified as follows:

> A. Well, I don't think I would characterize it that way. I think that the prior back surgery did relieve the issues and Mr. Lejeune got better. He didn't get 100 percent better, but he got well enough after the previous back surgery that he could return to work with restrictions and subsequently without restrictions.
>
> So I wouldn't describe it as failed, a failed back surgery. I would agree; however, that he didn't get complete resolution of his symptoms after the prior surgery.
>
> (Cullis dep., pg. 27)

He agreed that Plaintiff was still experiencing pain in his right lower extremity despite having the surgery. He agreed that Plaintiff's most recent surgery in 2019 did not substantially relieve his symptoms.

Dr. Cullis testified that he believed Plaintiff was using Norco on and off since 2008. He agreed that long term use of narcotic medications can lead to addiction or habituation.

Dr. Cullis agreed that Plaintiff could return to work within the restrictions he outlined. He testified that he did perform straight leg raising tests on Plaintiff but the results were not contained in his report. He further testified that Plaintiff has an L4 nerve root entrapment that would not produce an abnormal straight leg raising test. He testified that weakness, loss of sensation decreased reflexes and an abnormal EMG would be diagnostic test of an L4 problem. When asked whether outside of an abnormal EMG all of the items the doctor indicated such as weakness and loss of sensation and decreased reflexes are within Plaintiff's control, Dr. Cullis answered as follows:

> A. Well, hold on for a second let me, let me look. When I saw him he was shifting in the chair during the examination as if in pain, he got up and walked around intermittently. I could feel muscle spasm in his lower back on both sides which I believe is an objective finding.
>
> He had scars from previous surgery. There was flattening of the usual lumbar curvature which is an objective finding. There was weakness of extension of the right knee which is subjective, sensation was reduced on the right L4 dermatome which is subjective. The right knee jerk was absent which is objective and he appeared to be in pain when he walked.
>
> (Cullis dep., pg. 29-30)

On final cross-examination by defense counsel for Nexteer, Dr. Cullis agreed that paraspinal muscle spasm is an indication of chronic back pain.

On cross-examination by defense counsel for GM, Dr. Cullis testified that he never had a chance to look at plant medical records from Defendant GM. He further agreed that he has never had any conversation with the plant medical director, Dr. Herrick. He agreed that he relied on the accuracy of the history provided to him by Plaintiff.

Dr. Cullis asked whether it was accurate that Plaintiff told him that after his original injury in 2009 and after he underwent surgery, Plaintiff was able to return to his regular job after about 4 years. Dr. Cullis responded that Plaintiff indicated that he worked with restrictions for about 4 years and then was able to perform unrestricted duty.

He agreed that Plaintiff's original injury was addressed by Dr. Adams in 2011 at the L5-S1 level. He further testified that there was substantial improvement but not complete resolution of his symptoms after that injury. He agreed that historically Plaintiff indicated that he had been back to work after the surgery and then described a new event in 2018.

Dr. Cullis confirmed that there was a medically distinguishable change in pathology at the L3-L4 level shown on the CAT scan and the myelogram after the second injury. Dr. Cullis further testified that Plaintiff's return to work after his first surgery performing the activities described in the hypothetical as well as the specific events set forth in the plant medical chart would have contributed in a significant manner to the changes in the pathology creating a medically distinguishable condition.

As to the EMG in December, 2009, the report indicated radiculopathy at the L5 level which was completely different from the new problem at the L3-4 level. The doctor indicated further that they were completely separate and distinct pathologies.

On re-direct examination, Dr. Cullis was asked to assume that Plaintiff returned to work involving restricted and unrestricted activities. Dr. Cullis answered that with that history combined with the serial x-rays and MRIs, Dr. Cullis' opinion would be that Plaintiff's continued employment significantly aggravated his pathology.

Deposition Exhibit 1 is the extensive curriculum vitae of Dr. Cullis. Deposition Exhibit 2 is an EMG report of June 20, 2019 covered in the questioning of Dr. Cullis. Deposition Exhibit 3 is an MRI of the lumbar spine report dated March 14, 2019 also covered in the testimony of Dr. Cullis. Deposition Exhibit 4 is an MRI of the lumbar spine of July 30, 3016 again covered in the doctor's testimony. Deposition Exhibit 5 is an MRI report of

September 6, 2014 also covered in the doctor's testimony. Deposition Exhibit 6 is an MRI of the lumbar spine of November 10, 2010 also covered in the doctor's testimony. Deposition Exhibit 7 is an MRI of the lumbar spine report dated November 11, 2009 again covered in the body of the deposition. Deposition Exhibit 8 is an x-ray of the lumbar spine dated April 17, 2008, further x-ray of the lumbar spine dated October 8, 2009, and a further x-ray of the lumbar spine dated September 6, 2014 and a further x-ray of the lumbar spine dated January 25, 2019 all of which were covered in the testimony of Dr. Cullis. Deposition Exhibit 9 is an EMG report of the right lower extremity. Deposition Exhibit 10 is the narrative report of Dr. Cullis dated July 28, 2020. The report is not inconsistent with Dr. Cullis' testimony.

MICHELE D. ROBB

Plaintiff also offered the deposition testimony of Michele Robb taken on July 19, 2021. Ms. Robb is a licensed professional counselor and certified rehabilitation counselor. She performed a Stokes evaluation on the Plaintiff on or about September 11, 2020. Ms. Robb's curriculum vitae was marked as Deposition Exhibit 1 and attached to the transcript of her deposition without objection. Ms. Robb took a history from Plaintiff, reviewed medical records including restrictions of Dr. Mayer and Dr. Cullis and reviewed Plaintiff's employment and educational history, certifications and training. She performed a universe of jobs and transferable skills analysis and a maximum wage earning capacity analysis and thereafter performed a labor market survey after which she prepared a report dated November 25, 2020. The report was attached to the transcript of her deposition as Exhibit 2 subject to both defense counsel objections as to hearsay contained in the report. Ms. Robb's report was also typed into the record.

Part of the history obtained from Plaintiff indicated that he sustained specific lifting activities and repetitive heavy work resulting in L5-S1 and L3-L4 disc herniations. He reported conservative chiropractic treatment as well as physical therapy. He also reported surgeries in 2011 and 2019. Ms. Robb reviewed restrictions of Dr. Philip Mayer and Dr. Paul Cullis. Plaintiff also reported his education and certifications as a tool and die maker. He also indicated that he worked as a tool and die maker on and off since 1986. He also indicated that he was a truck driver for approximately 5 years from 1998 through 2003 as an owner/operator performing local transports with a tractor-trailer. Ms. Robb identified the universe of jobs for which Plaintiff would be qualified based on his education, training and work history: tool and die marker, truck driver, delivery driver, shop laborer, machine operator, general laborer as well as a full range of unskilled occupations. She also performed a transferable skills analysis. Plaintiff reported being actively seeking other employment and maintaining logs of his job search activity. Plaintiff further indicated that he had had no interviews or offers of employment. Ms. Robb did not review the logs as it was not a part of the evaluation process.

Ms. Robb conducted job searches on November 16, 2020 and November 25, 2020 utilizing Indeed.com and Michigan Talent Connect. She reviewed a total of 422 current vacancies located within a 50 mile radius of Plaintiff's residence in Owendale, Michigan. She was unable to locate any appropriate vacancies within Plaintiff's education, training, work experience and restrictions of Dr. Cullis. She stated in her report that work in the sedentary/light unskilled category is limited due to advances in technology and competition for work in the category is high. Further, an individual with any type of physical limitation that must be accommodated by a potential employer will not be given serious consideration for work in the current labor market.

In her summary, Ms. Robb indicated that when considering Dr. Mayer's medical opinion, current restrictions were unclear and therefore she was unable to comment about a potential wage earning capacity. When considering Dr. Cullis' restrictions, Plaintiff may have a median range earning capacity of $9.65 to $11.40 per hour. She further commented that the most significant factor impacting wage earning ability would be the restrictions secondary to the physical issues.

Ms. Robb testified that Plaintiff indicated that he was working at Nexteer at the time of his injuries. She would classify Plaintiff's job as a tool and die maker/technician in the medium skilled work category reporting earnings at $30 per hour. $30 was the maximum wage that Plaintiff earned in his work history. She could not say whether an average weekly wage of $2,113.30 per week would be the totality of his hourly wage including benefits. She agreed that Plaintiff's work history included work as a tool and die maker/technician, shop laborer, and truck driver. Plaintiff did not have a current CDL endorsement on his license. Plaintiff reported difficulty driving due to pain. She reiterated the universe of jobs for which Plaintiff was qualified.

Ms. Robb confirmed that she reviewed the IME report of Dr. Mayer and the deposition of Dr. Cullis.

As to Dr. Mayer's report, Ms. Robb indicated confusion as to whether Dr. Mayer would impose restrictions or not. When asked for purposes of her evaluation how she treated Dr. Mayer's restrictions or lack of restrictions, Ms. Robb testified as follows:

> A. I couldn't, I couldn't give an opinion one way or the other because there was no evidence at that point that the surgery provided the needed relief, that there was a solid fusion or that he'd undergone the appropriate post-operative rehabilitation program.
>
> (Robb dep., pg. 24)

She further agreed that assuming Plaintiff reaches the appropriate post operative rehabilitation program and the arthrodesis is solid, Dr. Mayer would place no restrictions on the Plaintiff.

Using Dr. Cullis' restrictions of no repetitive lifting, bending or stopping; change positions as needed; and lifting no more than 10 pounds, Plaintiff would have no transferable skills from his education, certifications, training and previous employment.

As to maximum wage earning capacity, Ms. Robb was unable to make a conclusion based upon her confusion with regard to Dr. Mayer's restrictions or lack thereof. With regard to Dr. Cullis' restrictions, Ms. Robb found three possible types of jobs: parking lot cashier, motel desk clerk, counter attendant, all with wages ranging between $10.86 and $11.40 per hour. None of those jobs were open and available. If Plaintiff were able to get one of those jobs, his maximum wage would be the aforementioned $10.86 through $11.40 per hour.

Ms. Robb indicated her labor market surveys occurred on November 16 and November 25, 2020. She reiterated she viewed a total of 422 vacancies.

Plaintiff reported to Ms. Robb that he was taking Norco, Neuration, Flexeril and Pamelor. He reported side effects of drowsiness. Plaintiff was still experiencing radiating pain and numbness into the right leg. She reiterated the information in her report that physical restrictions are an additional barrier to securing employment. She testified further that the most significant barrier to employment are the restrictions identified by Dr. Cullis.

Ultimately, Ms. Robb testified that Plaintiff's maximum wage earning capacity based on his prior education, employment history and certifications and assuming the restrictions of Dr. Cullis as well as her own transferable skills analysis, would be $9.65 per hour up to $11.40 per hour. She further testified that it was very unlikely that Plaintiff would be capable of securing any employment and therefore had no wage earning ability. She also testified that accepting Dr. Mayer's opinion that assumed Plaintiff reached the correct post-operative recovery and a solid arthrodesis, Plaintiff would have no loss of wage earning capacity.

On cross-examination by defense counsel for Nexteer, Ms. Robb confirmed that she waited to prepare her report regarding her evaluation of Plaintiff until after she was provided a copy of the deposition of Dr. Cullis which contained restrictions. The report of Dr. Cullis did not contain any restrictions.

Ms. Robb does not factor causation into her evaluations. She confirmed that her report indicated that Plaintiff possessed a valid driver's license with no endorsement and reliable transportation. She also confirmed that Mr. Stokes in his report indicated Plaintiff had a farm and motorcycle endorsement as well as a

commercial driver's license with no restrictions. She further testified that her report regarding Plaintiff's driver's license was based upon the interview she had with the Plaintiff. She further confirmed that Plaintiff's report of $30 an hour was based on history and that she was not provided with wage records.

Ms. Robb confirmed that Plaintiff's maximum wage earning capacity under the restrictions of Dr. Cullis would involve specific positions as a parking lot cashier, motel desk clerk and counter attendant. She testified that the three positions would come pretty close to the jobs that actually exist in the economy under the restrictions of Dr. Cullis.

She did not review Plaintiff's job logs. She is unaware as to whether Plaintiff is applying for jobs within his education or within his skills as restricted by Dr. Cullis.

She confirmed that when she performed her initial evaluation in the fall of 2020, the State of Michigan was reentering a period of restrictions on public movement for the COVID-19 pandemic. She agreed that currently, the State is under no restrictions for COVID. She would agree there was a desperate need for unskilled and low wage laborers in the light, medium and heavy category of work but not in the sedentary category of work.

On cross-examination by defense counsel for GM, Ms. Robb testified that the restrictions imposed by Dr. Cullis would be in the sedentary category of jobs. She agreed that the job search that she conducted is simply a snapshot in time and that she has not updated her search anytime after November 25, 2020.

Ms. Robb reiterated that she did not review Plaintiff's job log and further stated that she has not reviewed the logs after the date of her report nor did she review a copy of Plaintiff's resume. She confirmed that the parking lot cashier job, motel desk clerk job, and counter attendant job were jobs she actually searched for in 2020. She admitted that she did not perform a transferable skills analysis outside of Plaintiff's restrictions to determine the initial universe of jobs based on Plaintiff's education and experience. She agreed that the records she reviewed were two reports of Dr. Mayer and Dr. Cullis' deposition. She did not review Dr. Adams' records or any other treating physicians' records.

As to Plaintiff's medications identified as Norco, Flexeril, Neuration, and Pamelor, Ms. Robb did not know the amount or frequency taken. She is also unaware of any medical restrictions which prevents Plaintiff from driving.

On re-direct examination, Ms. Robb again reiterated that the State of Michigan was "fully open" as it relates to restrictions due to COVID. She agreed that the state was "fully open" at the time of Mr. Stokes' report of June 20 and June 21, 2021. She further agreed that Mr. Stokes' identification of 10 jobs in his

labor market survey did not comport with the medical opinion of Dr. Cullis and was inconsistent with her findings performed 7 months earlier.

As to drivers' license endorsements, Ms. Robb testified she looks for vocationally relevant endorsements such as CDL and Chauffers' license. She admitted that she had never heard of a "F endorsement."

Ms. Robb testified that her review of the Agency Form 105A indicated that Plaintiff's last job at Nexteer provided earnings of $30 per hour. The information provided to Ms. Robb by the Plaintiff was consistent with the information on the Agency Form 105A.

She testified that a sit/stand option is consistent with the ability to change positions as needed. She further testified that a 10 pound weight limit is also consistent with a sedentary restriction. Taken all together, i.e., a 10 pound weight limit, sit/stand option or the ability to change positions is consistent with a sedentary classification. She further testified that she would not place anyone with the restrictions imposed on Plaintiff in a light duty capacity. She indicated that light duty work would require lifting up to 20 pounds and would require someone to be on their feet substantially more than Plaintiff is physically capable of doing. She went on to identify light work as lifting up to 20 pounds, standing and walking a maximum of 6 hours out of an 8 hour day.

On re-cross examination by defense counsel for Nexteer, Ms. Robb agreed that not every single light duty work job is going to require the exertion of 20 pounds of force occasionally or 10 pounds of force frequently, or negligible amount of force constantly. She agreed that a farm endorsement is required for any vehicle controlled and operated by a farm or used to export agricultural products, machinery or supplies.

Deposition Exhibit 1 is Ms. Robb's curriculum vitae. Deposition Exhibit 2 is Ms. Robb's report of November 25, 2020 which has been discussed in the body of the deposition.

PHILIP MAYER, MD

Defendant Nexteer offered the deposition testimony of Dr. Philip Mayer taken on June 29, 2021. Dr. Mayer is a board certified orthopedic surgeon whose curriculum vitae was typed into the record of the deposition without objection from either Plaintiff's counsel or counsel for Defendant GM. He prepared three reports in connection with his examination of Plaintiff and review of medical records. The reports are dated December 10, 2019, January 23, 2020, and June 2, 2021 marked as Exhibits 1, 2 and 3 and attached to the transcript of the deposition subject to objections by Plaintiff's counsel and counsel for Defendant GM as to any hearsay contained not cured at the time of

trial. Both counsel indicated that agreeing to the procedure should not be construed as an adoption of any of the doctor's conclusions.

On direct-examination, Dr. Mayer testified that Plaintiff referenced an injury on December 10, 2010 while doing heavy work standing on an oily floor when he slipped. Plaintiff further referenced an injury on November 14, 2018. Plaintiff did not discuss any medical treatment received between those two dates. Plaintiff was wearing a lumbosacral orthosis which is a Velcro closing wrap. Dr. Mayer testified that relatively soft wraps have not been shown to provide biomechanical stability to the spine. As to the November 20, 2018 date of injury, Plaintiff described the incident as reaching upward as he was standing. Dr. Mayer recommended that Plaintiff speak to his primary physician for an assessment of possible peripheral vascular insufficiency because he found neither foot had pulses. Failure to have pulses in either foot can be associated with standing and difficulty walking. Absence of pulses raises the possibility of a vascular arterial insufficiency and thus a vascular claudication which can mimic symptoms of lumbar spinal stenosis.

Dr. Mayer testified that failed back syndrome has no specific definition but is affixed to people who have had spinal surgery but continue to have symptoms. Dr. Mayer also explained the difference between a fusion procedure and a decompression. The doctor's explanation begins on page 34 of his deposition and continues through page 37.

He also testified that reviewing the imaging studies available, calcification and bone spurs are not post traumatic pathologies for an acute injury. He went on to testify that there was a boney component seen on the CT scan and on plain radiographs. The MRI showed soft tissue and the findings, in Dr. Mayer's opinion, when compared to previous imaging showed that Plaintiff had calcified degenerative disc dominant to the right at the L3-L4 level. He did not see acute post traumatic pathology. He further testified a fusion at one level of the spine, and in Plaintiff's case the first fusion at the L5-S1 level, can cause development of degenerative changes at the adjacent segment which would be the L4-L5 level. He further stated that it would be improbable to assume that it would skip up a level to L3-4.

Dr. Mayer was concerned about Plaintiff's use of opioid Hydrocodone and the use of Gabapentin. Both drugs are not benign and have significant adverse consequences particularly when used chronically. Gabapentin is actually an antiseizure medication. Dr. Mayer testified that it has been shown that it has no value in the treatment of back pain or radicular pain. Hydrocodone is recognized as a narcotic and chronic opioids are known to induce pain in such a manner that the person taking the medication has more pain than they did before. Physicians should be very cautions in opioid management.

Dr. Mayer was questioned with regard to Dr. Cullis' testimony indicating that the November, 2018 incident was the problem without indicating an anatomic change. Dr. Mayer responded as follows:

> Self-reported history does not imply a change of underlying pathology. It doesn't imply an injury either. It's just a self-reported history. So in doing a causation analysis, it's incumbent upon the person doing the examination to ferret out the facts to determine if indeed not only is there a self-reported change in symptoms, but is there an identifiable change in underlying pathology that's part of a causation analysis, and that's very, very important.
>
> There's a big difference between simply saying, oh, I hurt when I did it versus being able to say, yeah, you blew out a disc or you tore this or that. So self-reported history does not establish causation and you need to see a change of underlying pathology matching the symptoms with the pathology being acute related to the event.
>
> (Mayer dep., pg. 44)

Dr. Mayer was also questioned with regard to Dr. Cullis' opinion regarding the herniation of the disc. He was asked to explain the difference between a hard disc and a soft disc herniation. He testified that a typical acute disc herniation would be a soft tissue event. He described operative findings of the disc as "really kind of looks like gristle on the end of a chicken drumstick, but it is a soft material." With an aged disc or degenerative disc, calcium deposits or boney deposits are built up resulting in the formation of new bone. In Dr. Mayer's review of the records in Plaintiff's case, there was formation of boney prominence at the posterior right inferior corner of the L3-L4 disc and that is bone. He further testified that Dr. Adams' operative report indicates that he found bone which is not an acute finding. He testified that it takes a period of time, often years for the bone spurs to develop. He testified that his review of records indicated that bone spurs appeared to be present back to 2016.

Dr. Mayer was presented with a hypothetical question beginning on page 47 of the doctor's deposition and continuing to page 48. Clarification of the hypothetical question was made inasmuch as the question assumed Plaintiff injured his low back in 2019 while working for GM. The date was inaccurate and was corrected to indicate 2009. The hypothetical is not necessarily consistent with all of the evidence that came in at the time of trial. Both defense counsel for GM and Plaintiff's counsel objected to the hypothetical on that basis. I will accept the answer at this time and incorporate what weight to be given to the answer in the following portions of this opinion. Dr. Mayer was asked whether he had an opinion to a reasonable degree of medical certainty whether Plaintiff suffered a work related injury on November 14, 2018 or thereafter. Dr. Mayer responded that he found no evidence to support the hypothesis that the event of November 14, 2018 specifically caused any acute pathology of the spine that would have

lead to the surgical intervention that was performed 9 or 10 months later. The incident represented a minor traumatic event. He defined a major traumatic event as trauma associated with a long bone fracture and/or solid organ injury.

As to restrictions on work activities, Dr. Mayer testified that if Plaintiff had achieved a solid arthrodesis at the L3-L4 fusion level and in absence of neurological abnormality, Dr. Mayer would find no reason to prohibit Plaintiff from resuming normal vocational or avocational activities unrestricted. The restrictions would not be due to a work related event.

Dr. Mayer would anticipate a return to work anywhere from 6 months to 18 months from the time of the fusion surgery.

On cross-examination by Plaintiff's counsel, Dr. Mayer agreed that he examined the Plaintiff at the request of Nexteer's third party administrator. His current practice is not entirely performing independent medical examinations but involves treating an assortment of people with a variety of spine related problems. He agreed that the vast majority of his evaluations are done at the request of defendants and insurance companies.

He agreed that he reviewed two lumbar MRIs. He agreed that findings in an MRI can be impacted by such things as motion and positioning. He agreed that MRIs are not a substitute for clinical evaluations. It is possible surgery could reveal things that are different than what appears on an MRI. He agreed that with disc herniations, they can get bigger or they can reabsorb and then can reabsorb and get bigger again. He also agreed that lumbar radiculopathy is often seen in association with a disc herniation. He agreed that radiculopathy represents a medically distinguishable condition if it is objectively provable. He also agreed that radiculopathy is frequently a pain producer which necessitates clinical treatment. He further agreed that surgery can be the best view of what is occurring in the spine.

Dr. Mayer further agreed that Plaintiff underwent two surgical procedures discounting the implantation of the spinal cord stimulator. Dr. Mayer was not in any position to dispute the interoperative findings of the treating surgeon. When asked whether minor trauma can cause a disc herniation, Dr. Mayer answered as follows:

> A. People can complain of symptoms after a minor event. Anatomically we can't produce a disc herniation without some other injury to the spine. There's no anatomic model that has demonstrated that. So when a person has complaints and they have minor trauma and you present and find a disc herniation, you can't actually legitimately tell then when that disc herniation occurred. I've published on - -
>
> (Mayer dep., pg. 58-59)

Dr. Mayer agreed that as a clinician, history is important and that the onset of symptoms is an important part of history. He further agreed that the onset of perceived radicular symptoms can be an important part of history.

Plaintiff's counsel questioned Dr. Mayer as to whether simple things such as sneezing or sexual intercourse can result in disc herniations. In response, Dr. Mayer testified as follows:

> A. People can become symptomatic after those things and, again, the science behind disc herniations is shown that at least experimentally you cannot herniate a disc in a single event unless there is some other injury to the spine.
>
> So what we can say is that the person can complain of symptoms following even, but it doesn't mean that that event is what actually cased the disc herniation. There's a strong body of literature on that and I myself have contributed to it. It's very hard to herniate a disc with a single event. In the absence - -
>
> Q. Okay. Well, Doctor - -
>
> A. - - of some other injury to the spine.
>
> (Mayer dep., pg. 60)

When asked whether those simple events can significantly aggravate a disc and make it symptomatic, Dr. Mayer indicated that a person can complain of pain which leads to a diagnosis and if the diagnosis is a herniated disc that matches the pain, treatment is required.

As to Plaintiff's alleged injury in 2009 or 2010 while working for GM, Dr. Mayer indicated that the history Plaintiff gave was that there was an injury after which he ended up having surgery. He could not be more specific than that. Without the operative report, Dr. Mayer does not know why a fusion was done initially.

Dr. Mayer agreed that when it comes to bending, lifting, twisting and turning, the two areas of the spine that take the bulk of the stress with regard to those activities would be L5-S1 and L4-5. He disagreed that with a fusion at L5-S1 the stress with respect to bending, lifting and twisting would be at L4-5 and L3-4. He indicated further that the next stress transition is at L4-5 and not at L3-4. He further explained the basis for his opinion as follows:

> A. What I'm saying is the change of stress is adjacent to the level of the fusion and I don't - - I'm unaware of any scientific data that says if I fuse 5-1, I'm going to have increased rate of degeneration at 3-4. That's what I'm saying. To think that is speculation.
>
> We know adjacent segment degeneration does occur, but it's a combination of biomechanical and biological factors, but

> it's adjacent segment. That's the catch. You're extrapolating up the L3-4 and I am unaware of any scientific data that changes the stress loads at 3-4 that would precipitate adjacent segment degeneration following a 5-1 fusion. That's specifically what I'm saying.
>
> (Mayer dep., pg. 63)

Dr. Mayer was provided a copy of a lumbar MRI dated November 10, 2010 and agreed that the finding as to L3-4 and L4-5 appeared to be within normal limits. He also testified that he would not be in a position to dispute that MRIs taken postoperatively within a year following the fusion showed rapid development of degenerative disc disease at L3-4 and L4-5.

Dr. Mayer was asked whether age, genetics and activity are the three factors that lead to degenerative discs. Dr. Mayer agreed with the age and genetic factors but disagreed that activity is one of the factors. He testified that there is no evidence that vocational or avocational activities are a cause of any significance for disc degeneration and in fact loading on the disc has beneficial effects on the disc. He further testified that his opinion is based upon his education, training, experience and knowledge of the scientific literature. He agreed that other physicians could have different opinions than his own. When asked whether narcotic pain medication can mask radiculopathy, Dr. Mayer responded that it can help pain acutely but will not change numbness or weakness or reflex loss. He agreed that minor injuries can produce subjective complaints of pain but to establish a causal relationship to radiculopathy must be objectively verified. Symptoms do not establish a diagnosis. Objective verification would include clinical evaluations such as reflex changes, sensory losses and muscle weakness. He agreed that he would not be in a position to dispute Dr. Adams' clinical evaluation of Plaintiff leading up to either surgical procedures. While he could not dispute Plaintiff's complaints of pain in the lumbar spine, Dr. Mayer disagreed that one should anticipate Plaintiff would have some level of pain and discomfort because of the two fusions indicating that proper patient selection doing the right surgery should not result in a lifetime of pain. He agreed someone can have pain following fusions. Pain can be limiting depending on tolerance and choice. A person will make a determination as to their level of ability to function which is not a measurable thing. Some people may choose to accept a degree of pain and function normally and others may choose not to function normally.

Dr. Mayer was also asked whether he was in a position to dispute the reasonableness and necessity of Plaintiff's treatment with regard to his low back. Dr. Mayer responded as follows:

> A. As I said in my report, I cannot find an indication for the fusion surgery. I don't find the criteria present preoperatively that would have necessitated a fusion, and I just looked at his original MRI. He had a herniated disc. There's no instability mentioned. There is no - - it was an MRI, but there was no malalignment of

> the spine, there's no spondylolisthesis. I'm not even sure why he had the L5-S1 fusion not having looked at that MRI, but that's back then.
>
> (Mayer dep., pg. 71-72)

With regard to Plaintiff's second surgery, Dr. Mayer did not examine Plaintiff prior to that surgery, but if Plaintiff had objective evidence of radiculopathy and was not responsive to nonoperative treatment and had nerve compression, it would have been appropriate to decompress the nerve. Dr. Mayer agreed that the lumbar myelogram of June 20, 2019 followed by a CT scan are important and are used to help elicit a cause for someone's pain. He agreed those were the first studies that showed a pinched nerve at the L3-L4 level. He further testified that plain radiographs do not show the nerve. The myelogram would be a better study to look specifically if there is a compression through a neuroforamin.

On final questioning by Plaintiff's counsel, Dr. Mayer reiterated that failed back syndrome is a term that has fallen into disfavor and should not be used. He further testified that it does not really tell anything other than a person had surgery and now has pain and it is kind of a "waste basket term."

On cross-examination by counsel for Defendant GM, Dr. Mayer testified that he would agree that post-surgically as it relates to the L5-S1 level, Plaintiff obtained a solid fusion and that there have been no additional pathological changes at the L5-S1 level. He also agreed that Plaintiff had advised him that after his first surgery he returned to work initially with restrictions and then moved to the tool room and the ultimately was working without restrictions.

On further re-cross examination by Plaintiff's counsel, Dr. Mayer agreed that he would be in no position to dispute a history of Plaintiff continuing to have pain with restrictions not being honored.

Deposition Exhibit 1 is the medical report of Dr. Mayer dated December 10, 2019. Deposition Exhibit 2 is Dr. Mayer's report dated January 23, 2020. Deposition Exhibit 3 is Dr. Mayer's report dated June 2, 2021. A review of the reports does not reveal anything inconsistent with the doctor's testimony at the time of the deposition.

JOHN N. STOKES

Defendant Nexteer also offered the deposition testimony of John Stokes taken on August 20, 2021. Mr. Stokes is a rehabilitation counselor. His curriculum vitae was inserted into the record of the deposition without objection by either defense counsel or Plaintiff's counsel.

Mr. Stokes met with Plaintiff on June 16, 2021. He took a history from Plaintiff and also was provided two medical records listing restrictions or lack thereof. Using the restrictions he also performed a job search and compiled a report dated June 29, 2021. Mr. Stokes' report was inserted into the record subject to both defense counsel for GM and Plaintiff's counsel's objecting to any inadmissible hearsay contained in the report.

Mr. Stokes took a brief history of Plaintiff's occupation as a former tool and die maker alleging lumbar spine injuries. Part of Plaintiff's history indicates possession of a valid commercial driver's license with no points or restrictions. Plaintiff also had farm and motorcycle endorsements. The medical records Mr. Stokes had available were the deposition transcript of Dr. Paul Cullis setting forth restrictions and the report of Dr. Mayer indicating no long term indication for restrictions.

Plaintiff's educational, history and work experience are consistent with his testimony at the time of the hearing. He reported earning $30 per hour at the time of his injury with an average weekly wage of $2,1113.30.

Mr. Stokes identified Plaintiff's transferable skills set froth on page 19 of the deposition. He further stated in his report that Plaintiff's experience and qualifications transfer into the following occupations in the universe of jobs available: a range of unskilled, semi-skilled and skilled jobs performed at varying physical exertion levels based on the medical opinions provided on the case. Mr. Stokes' report identified four jobs classified at the sedentary physical exertion level; four jobs classified at the light physical exertion level; and nine jobs classified in the medium physical exertion level. Wages at the sedentary level range from $439 per week up to $542 per week. Wages for the light level range from $396 per week up to $677 per week. For the medium level, wages range from a low of $500 per week up to $1,101 per week.

Plaintiff reported to Mr. Stokes that he had been looking for work since September, 2019 having registered with Michigan Works and having his resume uploaded to that website. Plaintiff advised Mr. Stokes that he checks job listings on a regular basis, responding only to those jobs relating to his past relevant work. Plaintiff reported having received telephone calls from prospective employers for initial screening. Upon further questioning however, Plaintiff claims that he is dropped from consideration from employment due to the nature of work.

Mr. Stokes conducted a labor market survey on June 20 and June 21, 2021. Online job posting website research included Michigan Works/Michigan Talent Connect and Indeed.com and Simplyhired.com. Mr. Stokes reported that prospective employers are contacted to verify wages, physical demands and educational requirements when that information is not provided in the job postings. For jobs where actual rates of pay could not be ascertained, wage data

was obtained from the Bureau of Labor Statistics/US Department of Labor. Because of Plaintiff approaching advanced age, the job search was filtered to include only those semi-skilled and skilled jobs consistent with the Plaintiff's past relevant work as well as those that provide on the job training. The search included only those jobs located within 50 miles of Plaintiff's Owendale, Michigan home. Mr. Stokes' report identified ten prospective jobs set forth on page 23 through page 28. The report indicates the jobs provide wages ranging from $400 to $1,605 per week. The highest paying job was at Trillium Staffing Solutions as a general laborer providing a wage of $1,605 per week. All of the jobs are consistent with the medical opinion of Dr. Mayer and none of the jobs comport with the medical opinion of Dr. Cullis. The labor market research failed to identify any available jobs providing wages meeting or exceeding the Plaintiff's pre-injury wage earning capacity of $2,113.03.

In his summary, Mr. Stokes opined that if the medical opinion of Dr. Cullis is deemed controlling, Plaintiff has sustained a total loss of his pre-injury wage earning capacity. If the opinion of Dr. Mayer was deemed controlling, Plaintiff has not sustained any loss of his wage earning capacity.

On further direct-examination by counsel for Defendant Nexteer, it appeared that according to Plaintiff's history provided to Mr. Stokes, he was a semitruck driver from 1998 to 2003. Plaintiff did not inform Mr. Stokes of any administrative tasks such as negotiating contacts, creating bills, cashing checks, and keeping books and taxes. Mr. Stokes confirmed that Plaintiff denied any knowledge of basic software or typing skills.

As to the current labor market in the sedentary unskilled labor position, Mr. Stokes testified that it was certainly "not optimal" compared to other physical exertion levels. He further testified that light jobs can now be performed at the sedentary level with the American with Disabilities Act allowing people to sit at benches to perform jobs that normally would have been performed in a standing position and further because the heavier parts of a light job such as lifting 20 pounds would only be performed occasionally during the day.

On cross-examination by Plaintiff's counsel, Mr. Stokes agreed that unskilled sedentary jobs in today's labor market is not optimal. He agreed that the labor market survey indicated jobs paying wages between $400 and $1,605 per week. He agreed that the jobs identified in his report were consistent with the restrictions from Dr. Mayer. Further, Mr. Stokes agreed that none of the jobs listed were consistent with the restrictions provided by Dr. Cullis. He agreed that restrictions from Dr. Cullis would result in Plaintiff having no residual wage earning capacity. Mr. Stokes has not performed any updated labor market survey. He further agreed that he found no jobs in the labor market survey that either met, equaled or exceeded Plaintiff's maximum wage of $30 per hour at the time of his injury.

Plaintiff did advise Mr. Stokes about his job search activity. Plaintiff was on the Michigan Talent Connect database. Michigan Talent Connect is the Michigan Works job finding website.

Plaintiff further indicated that he had no typing skills and no knowledge of basic business programs such as Microsoft Office Suite. Plaintiff did provide his resume to Mr. Stokes which did not indicate any physical restrictions. Mr. Stokes agreed that the medication taken by Plaintiff, i.e., Norco, Flexeril, and Neurontin, do not necessarily present difficulties in placing an individual in a job. In Mr. Stokes' past experience, if an individual can present a document from a physician that indicates that despite the use of narcotic pain medication there is no contraindication for a person able to work then it does not become a factor when it comes to employment. Certain jobs such as commercial driving would be contraindicated. Plaintiff did report having some drowsy side effects from the Norco.

On cross-examination by counsel for Defendant GM, Mr. Stokes testified that Plaintiff reported taking Norco three times a day. As to Plaintiff's resume, Mr. Stokes did not actually look online to see if it was on the Michigan Talent Connect or Michigan Works website. He would need a username and password from Plaintiff to determine if it was actually on the website.

Mr. Stokes testified that it is fair to say that in the current labor market, it was his experience that there has been an increase in wages for even unskilled jobs due to the lack of candidates and the number of open positions. Some of those jobs would fall within the light job or even sedentary category. He further testified that Plaintiff had the capability of performing work under Dr. Cullis' recommendations regarding restrictions and earn at least minimum wage. He reiterated that if Dr. Mayer's opinions were accepted Plaintiff would have no loss of wage earning capacity.

On further re-direct examination by counsel for Defendant Nexteer, Mr. Stokes testified that the 10 jobs in his report are not the only positions that he found.

Plaintiff did not indicate to Mr. Stokes the dosage of any medication he was taking.

As to checking someone's resume on Michigan Talent Connect, Mr. Stokes testified that he would need permission from the Plaintiff to do so unless he were a prospective employer. Plaintiff did not provide Mr. Stokes the name or contact information of any of the employers from whom he had reported getting telephone calls. He further did not supply Mr. Stokes with the number of employers he had spoken to.

During the period of March, 2020 through June, 2021, Mr. Stokes testified that the COVID-19 pandemic brought about closure of a lot of businesses and businesses conducting interviews by phone. Sometimes companies would interview people and it would be several months before they could start work depending on how their business was affected by the pandemic. He testified however that sedentary positions such as sitting and greeting customers such as a Walmart Greeter would not have been as affected because they were considered retail store jobs and grocery stores were considered necessary so they would not have been as affected by the pandemic.

On further cross-examination by Plaintiff's counsel, Mr. Stokes reiterated that pursuant to Dr. Cullis' restrictions, Plaintiff could certainly perform sedentary jobs. He agreed those jobs were essentially entry level. With regard to his labor market survey, Mr. Stokes testified that he specifically used the restrictions indicating no lifting greater than 10 pounds and the ability to change positions. When asked whether the restrictions of Dr. Cullis would limit the job category to sedentary, Mr. Stokes testified as follows:

> A. It's restricted range of light only in the fact that it's possible that he could be standing for at least half of the work shift, depending upon how he was feeling. So that's why it's possible -- that's why it wouldn't be viewed as a strictly sedentary position and why it would be a restricted range of light.
>
> Also, a job can be classified as light, even though the person may not be lifting any more than ten pounds at any given time on the job. The fact that the person could stand, just simply stand and work for at least six hours would classify as a light job.
>
> (Stokes dep., pg. 45-46)

Mr. Stokes also testified that utilizing Dr. Cullis' restrictions, Plaintiff would be unable to perform his work at Defendant Nexteer.

GERALD SCHELL, MD

Defendant GM offered the deposition testimony of Dr. Gerald Schell taken on September 2, 2021. Dr. Schell is a board certified neurosurgeon. His curriculum vitae was typed into the record as well as attached to the deposition as Exhibit 1 without objection.

At the request of Defendant GM, Dr. Schell examined the Plaintiff on December 1, 2020. After taking histories from Plaintiff as well as reviewing diagnostics and medical records and conducting a clinical examination, Dr. Schell prepared a written report dated December 6, 2020. He made one correction in his report indicating that reference to a motor vehicle accident was inaccurate. On page 4 of the doctor's report, the phrase "MVA" should be stricken and substituted for the phrase "work injury." The doctor's report was typed into the record as well as attached to the deposition transcript as Exhibit 2

subject to defense counsel for Nexteer's objection with regard to hearsay. Counsel for Plaintiff had no objection to the insertion of the report.

Plaintiff reported to Dr. Schell that he was involved in a work injury on September 7, 2010. He described the injury as slipping on the floor while doing heavy lifting. Plaintiff disclosed his subsequent treatment including decompressive lumbar laminectomy and interbody fusion at L5-S1 on February 23, 2011 performed by Dr. Adams. He returned to work thereafter. The second injury Plaintiff reported was on or around November 14, 2018 when he was reaching upward to do something when his lower back felt "funny." Plaintiff reported having another lumbar fusion with Dr. Adams at L3-4 on September 6, 2019. He experienced little relief with physical therapy. He is managing his pain with Norco, Flexeril, and Neurontin.

Dr. Schell set forth the imaging records he reviewed beginning with an x-ray of the lumbar spine on April 17, 2008 which begins on page 13 of his deposition culminating in a CT of the lumbar spine dated September 3, 2019 appearing on page 15 of the deposition.

The Plaintiff also reported a work related injury in 2015 working at Nexteer while lifting a die. Plaintiff further reported that he used to do a lot of hunting and fishing but was unable to do these activities since the accidents.

Plaintiff described the pain in the lumbar spine as cramping and shooting. Pain radiates to the right thigh and right knee. Plaintiff reported the severity as 7 on a scale of 0 to 10. Plaintiff reported that the pain is severe and is the same all the time. Symptoms are aggravated by bending or twisting and walking. Stiffness is present all day.

Dr. Schell's examination of Plaintiff indicated positive findings for back pain and positive findings for numbness.

Dr. Schell made a diagnosis of chronic back pain with radiculopathy and a history of spinal fusion. He answered yes to the question as to whether medical documentation supported a causal relationship between the accidents and the injuries alleged. He further stated that Plaintiff did have prior back pain but was able to work. Medical services were necessary. Dr. Schell made no comment as to what, if any, restrictions he would place on Plaintiff.

Dr. Schell concluded his report by indicating that in the immediately preceding year, he has devoted the majority of his professional time to active clinical practice in his specialty and/or the instruction of students in an accredited medical school or clinical research programs for physicians in his specialty.

On further direct-examination, Dr. Schell reiterated that Plaintiff had surgery on his back on 2011 after a work injury. Dr. Mark Adams performed a

fusion at L5-S1. Plaintiff returned to light duty work and had problems with back pain on and off over the years but eventually was doing fairly well and was very active. Plaintiff reported a further injury in 2018. Plaintiff reported he twisted or lifted something but it sounded like he had a pop that he experienced in his back that was something different than what he normally experienced. He had further surgery by Dr. Adams in 2019. The latter surgery was at the L3-4 level. The first surgery was at the L5-S1 level.

Dr. Schell reiterated that his clinical examination revealed a decreased range of motion with Plaintiff's back and Plaintiff was stiff when he moved. He did not see any major atrophy, weakness or significant neurological deficit. Plaintiff had a relatively normal gait. Motor examination was normal as well as the sensory examination. He reiterated his diagnostic impression that Plaintiff was having low back pain with radiculopathy with post operative arachnoiditis. He believed Plaintiff had scar tissue after the back surgeries with ongoing pain.

Counsel for Defendant GM presented a lengthy hypothetical question to Dr. Schell beginning on page 25 of the deposition. This hypothetical referred to Plaintiff's initial employment with GM and subsequent injury on September 7, 2010 followed by treatment and surgery by Dr. Adams. The hypothetical also included further alleged injuries reported by Plaintiff and further referral to Dr. Adams following an injury in 2018 while working for Defendant Nexteer. A second surgery was performed at the L3-4 level. The hypothetical question included references to Dr. Cullis' deposition testimony indicating that the pathology at the L5-S1 level was completely separate and distinct from the pathology at the L3-4 level. Dr. Schell was asked whether after his review of various studies if he agreed with Dr. Cullis' statement to which Dr. Schell indicated that he did.

Counsel for GM also gave a further hypothetical question to Dr. Schell discussing the testimony of Dr. Mayer who testified that Plaintiff had a solid fusion at the L5-S1 level and that there had been no additional pathological changes at that level over various studies. Dr. Schell testified that he agreed with the statement and testimony by Dr. Mayer.

Dr. Schell was asked whether after his review of histories and his clinical examination Plaintiff recovered from the initial injury at the L5-S1 level after undergoing surgery. In response, Dr. Schell reiterated his opinion that it seemed Plaintiff had a good outcome from his L5-S1 fusion but he had off and on continuing pain with his back but he did agree that Plaintiff did have a pretty good outcome of that L5-S1 fusion.

On cross-examination by Plaintiff's counsel, Dr. Schell testified that Plaintiff's surgery at the L5-S1 level in 2011 was related to the work incident set forth by counsel for Defendant in 2010. Dr. Schell further stated that Plaintiff was able to go back to work and so he believed that particular injury was treated and

was stable. He further stated that if imaging studies showed changes at other levels, he did not know that you could put that on the 2010 injury.

He agreed that Plaintiff had a post traumatic disc that required a fusion. He testified that there are extra stresses in the spine that are displaced mechanically when the spine is fused. There would be increased incidents of problems after a spinal fusion. He agreed that it was not uncommon for people to have some level of pain, discomfort, and requiring some level of limitations following a surgical procedure such as a fusion. Dr. Schell further testified that after his fusion, Plaintiff developed degenerative disc disease which did not surprise him. He agreed that doing activities that involve bending, lifting, and twisting would place additional stress upon the spine and will accelerate the degenerative process. He agreed that once the degenerative disc disease at a level develops, it is more susceptible to injury.

Plaintiff's counsel presented Dr. Schell with a hypothetical question involving Plaintiff's alleged injury in November, 2018 where Plaintiff was removed from the tool room where he did restricted work and went out to do regular work. The hypothetical included Plaintiff having increased problems with his back and leg when he bent over to deal with a part. The hypothetical included reference to an MRI and CAT scan showing a bigger bulge at the L3-4 level and a disc herniation with impingement. The doctor was asked whether those hypothetical facts if accurate would be the cause of the additional disc herniation and radiculopathy that led to the second fusion as a result of Plaintiff's continued employment at Defendant Nexteer. Defense counsel for Nexteer objected to the question on the basis that the hypothetical question was incorrect as to history. I would overrule the objection since I think the hypothetical question does contain facts that are substantially supported by the evidence in the case. Dr. Schell answered in the affirmative to the question. Dr. Schell agreed that Plaintiff had two distinct fusions at L3-L4 and L5-S1. Dr. Schell did agree that a fusion represents a change in the discogenic structure of the spine. He did not categorize it as significant pathology. He did not think of a fusion as pathology.

When asked whether Plaintiff would still have pain in his back and have difficulty standing for any period of time and have difficulty walking for any period of time given the fact that he has two fusions in his spine, Dr. Schell responded as follows:

> A. Generally, the reason the spine is fused is so that it doesn't cause pain. Pain is usually a reflection of hypermobility around scar tissue of nerves in an area of surgical intervention of disc pathology.
>
> If there is no compression and there is a fusion, generally there is none, back pain. That's when the fusion is done, to begin with. So, if there is a solid fusion, I would not expect the pain to be from the area where the fusion is.

(Schell dep., pg. 39)

Dr. Schell testified that he believed scar tissue is the cause of Plaintiff's pain together with some changes at the L2-3 disc.

Dr. Schell would agree with restrictions placed by Dr. Cullis of no repetitive bending, lifting or twisting and a 10 pound weight limit. He believed that the prognosis for Plaintiff in general is good but the prognosis of normal activities is not good.

On final cross-examination by Plaintiff's counsel, Dr. Schell indicated that a spinal cord stimulator might make sense to help the Plaintiff.

On cross-examination by counsel for Defendant Nexteer, Dr. Schell confirmed that Plaintiff had been treating with his family doctor, Dr. Scadden in 2012 and 2014. There had also been some imaging studies performed. Dr. Schell's recollection was that Plaintiff had injections before his first fusion but not after. Upon review of Matrix Surgery Center records, Dr. Schell indicated that Plaintiff had an injection on April 12, 2010 which was before his first surgery. Plaintiff had further injections in 2013, 2014 and in 2015. He confirmed that Plaintiff had been on Norco for a long time. Dr. Schell confirmed that Norco can cause habituation. Dr. Schell said he had a vague recollection that there were some back issues before Plaintiff's initial work injury. Plaintiff had possibly seen a chiropractor as well as Dr. Scadden.

Dr. Schell noted that in his report he described the injury event in 2018 as when Plaintiff was standing and reaching upward to do something when his lower back felt funny. Plaintiff did not describe any heavy lifting or twisting of any kind. He was not sure whether Plaintiff reported to the medical department the following day.

With regard to the lumbar MRI of December 3, 2012, Dr. Schell testified that there were some mild changes when directed to L3-4 and L4-5. When asked whether the degenerative process builds on itself and continues unless there is an intervention, Dr. Schell responded as follows:

> A. I don't believe that's true. We have lots of patients who have degenerative processes, which are very stable.
>
> Q. Okay. The nature of the degeneration is after a certain age or a certain amount of time or post traumatically something will degrade? It will slowly, because of the forces upon it, it will break down.
>
> A. It's possible. It's just as likely that it won't. I mean, there are so many areas of the spine that show areas of degeneration that they stay stable for years and years. And there are some areas that will, like you say, break down over time, and we can't predict which ones those will be, unfortunately.

(Schell dep., pg. 45-46)

Dr. Schell testified that osteophyte formation is an age related issue. It does not happen immediately after a traumatic event. The x-ray of January 25, 2019 showing a prominent posterior osteophyte formation at L3-4 would not be related to a 2018 lifting/bending incident.

Dr. Schell was shown a copy of the MRI report of March 13, 2019 and read the impression set forth in the report into the record as follows:

> A. Post-surgical changes at L5-S1 remain stable from prior examination. Degenerative disc desiccation and bulging annulus mainly at L3-4 causing minimally effacement of the ventral thecal sac and mild compromise of the right L3 neuroforamen. These findings are similar to a prior examination. No focal central disc or central herniation.

(Schell dep., pg. 47)

Dr. Schell testified further that the MRI of 2019 was compared to the MRI done on July 30, 2016. Dr. Schell agreed that the neuroradiologist who reviewed the two films indicated that the changes at L3 and L4 were similar to what was seen in 2016. The 2019 MRI report was marked as Exhibit 3 and attached to the transcript of the deposition.

As to EMGs, Dr. Schell did not believe he had reviewed EMGs after 2018 and did not believe that there were any done.

Dr. Schell's "sense" was that Plaintiff's hunting and fishing activities curtailed after the lifting related accident of 2018.

Dr. Schell further testified that his "testing" regarding pain is by observation to see how someone moves, stands, sits, talks and other motions. Part of his routine is to have a patient do range of motion, bending, turning and palpate the back for lumbar spasms. He did not see that there were any positive findings.

When asked what medical documentation supported the causal relationship between Plaintiff's 2018 accident and his back problems, Dr. Schell testified as follows:

> A. His history of onset of significant pain in his back and findings showing that he had changes. The fact that he was able to work and do his activities of daily living prior to that. The fact that he wasn't after that. He had positive imaging. He was seen by a specialist and subsequently, had a surgical intervention.

(Schell dep., pg. 50)

He went on to indicate that aggravation of the pathology noted at the L3-L4 level which included disc space narrowing, bulging disc and impingement on the L3 nerve were the specific changes which he attributed to the 2018 accident.

Dr. Schell testified that there are various forms of herniation. He further testified that there are many different classifications of herniations. He also testified that a bulge can be as bad as a herniation clinically if it is combined with other associated surrounding pathologic changes in that segment. He agreed that some physicians might describe something as a bulge and that another reviewer might describe a herniation.

Dr. Schell testified that failed back syndrome is a very general broad term about people who had back surgery who still have a lot of back problems and the doctors cannot figure it out. Dr. Schell does not really use the term but rather tries to find out what is wrong with the patient rather than using a broad category of diagnosing failed syndrome.

As to the use of narcotic medication as it relates to pain complaints, Dr. Schell testified that if someone has been taking a certain about of medication and getting used to it and then starts to get off it, the patient can feel like they are having more pain.

On re-cross examination, Dr. Schell testified that an osteophyte will form in an area where there is an abnormal stress. The body tries to keep itself from moving. An osteophyte forms at a joint. If there is inflammation in a joint that is moving, the body tries to put calcification down forming an osteophyte so there is less movement and hopefully less pain. He agreed you might see osteophyte formation after someone has a fusion and returns to heavy work.

Dr. Schell was presented with a medical department notation from Defendant Nexteer indicating Plaintiff being removed from the tool room to work on “4 west” and began doing increased lifting, pushing and was machining a new jaw plate and his back locked up when he bent over. Dr. Schell testified that the entry was consistent with the history that Plaintiff’s counsel gave to the doctor when he asked his hypothetical question. The entry was on December 21, 2018.

Dr. Schell agreed with Dr. Cullis’ testimony that a CT scan is a more sensitive study to determine whether there is a pinched nerve or whether there is a disc herniation. He further agreed that the CT myelogram indicating a disc herniation with impingement at the L4 nerve would be consistent with Plaintiff’s history of trauma.

Deposition Exhibit 1 is Dr. Schell’s curriculum vitae. Deposition Exhibit 2 is Dr. Schell’s narrative report of December 1, 2020 which was placed into the deposition. Deposition Exhibit 3 is a lumbar MRI report of March 13, 2019 discussed during the course of the questioning of Dr. Schell.

EXHIBITS

Plaintiff's Exhibit 1 is the deposition testimony of Dr. Cullis taken on November 3, 2020 which has been previously summarized.

Plaintiff's Exhibit 2 is the deposition testimony of Ms. Robb taken on July 19, 2021 which has been previously summarized.

Plaintiff's Exhibit 3 are plant medical records which include records from both Defendant GM and Defendant Nexteer. The top record on this exhibit is a physical examination form dated August 16, 2006. Plaintiff answered in the negative with regard to the questionnaire asking whether Plaintiff has any musculoskeletal problems. Almost all of the questions are answered in the negative. The last page of this form indicates Plaintiff is able to do any job assignment offered with his signature on the page. A further medical surveillance questionnaire was prepared on November 29, 2006. All of the questions are answered in the negative with regard to any problems. Plaintiff did report an injury to the medical department on April 14, 2008 indicating he was changing out anvils and lifting back up rings out of a die pot the previous day. Back pain was minor on the day of the incident but Plaintiff had a hard time getting out of bed on April 14th and had some tingling in his right leg. The onset date was April 14, 2008 and the visit to the medical department was on April 15, 2008. Plaintiff was seen again regarding that incident on April 17, 2008. It appears that an examination was conducted on April 15, 2008 in the medical department and no abnormal findings were reported. Plaintiff was seen again on October 5, 2009 reporting an incident that occurred the previous day when he slipped off a platform in front of the press and wrenched his right hip. One of the notes in this entry indicates Plaintiff's gait was even and steady but Plaintiff does appear to walk a little stiffly on his right side. The diagnosis was strains and sprains of hip and thigh. Plaintiff was seen throughout the remainder of 2009 in October, November and December with the same complaints of pain in the hip and back with reference being made to the injury occurring when Plaintiff slipped off the platform in front of the press as previously documented in the plant medical records. On November 17, 2009 there is a note with reference to MRI results with the impression being a bulging disc at L5-S1. The note further indicates that it could be very small and does not seem that it would be symptomatic. Dr. Herrick ordered an EMG of the lower extremities. On March 30, 2010 the entry indicates Plaintiff's last day of work was November 18, 2009. Plaintiff presented a note from Dr. Scadden with restrictions of a 30 pound weight restriction with an expiration date of May 12, 2010 at which time Plaintiff is available for full duty without restrictions. Plaintiff was treated in the medical department on September 7, 2010. Arrangements appear to have been made for Plaintiff to see Dr. Adams. Plaintiff was seen on October 12, 2010 regarding an incident occurring on September 7, 2010. Plaintiff was wrenching bolts when the bolt snapped lose and jerked his back. The note indicates that Plaintiff had

injured his back in November around deer season in 2009 and now it hurts again. The note further indicates Plaintiff will see Dr. Adams in a couple of weeks. Plaintiff was seen on September 15, 2020 again indicating that his back continues to hurt. A note of January 5, 2011 indicates an appointment was made with Dr. Adams for February 1, 2011 with surgery scheduled for February 23, 2011. The note also references again the onset date of the problem with Plaintiff's back is September 7, 2010 when Plaintiff was wrenching and loosening bolts when the bolts snapped and jerked his back. On September 6, 2011, Plaintiff returned to work with restrictions from Dr. Adams of no lifting greater than 25 pounds until the date of next treatment, November 22, 2011. The note further indicates that a job was available. A note of August 29, 2011 references another return to work with restrictions from Dr. Adams of no lifting greater than 25 pounds. Restrictions appear to be in place until November 22, 2011. It appears Plaintiff may have returned to work on September 15, 2011 with restrictions of no lifting over 15 pounds with sitting or standing as needed for one month. On November 22, 2011, Plaintiff's restrictions from Dr. Adams were renewed with some modifications including no lifting greater than 30 pounds, no pushing, pulling or repetitive bending or stooping, no heavy" housework." The note indicates that Plaintiff has already talked to his supervisor, Jerry Grisham, and that the job he has been doing is within the new restrictions. Plaintiff indicates he is feeling pretty good and has less stiffness every day. On May 25, 2012 Plaintiff brought in new updated restrictions from Dr. Adams. Plaintiff indicated that he was feeling better. The restrictions indicate no lifting greater than 30 pounds and no pushing, pulling, repetitive bending, stooping and twisting. Plaintiff indicates that he is able to do his current job. Plaintiff was seen on June 19, 2012 complaining that he was given jobs that are not within his restrictions. He further states that he pulled his back out again when he was sent over to department 54 to do changeover on 4 die parts. An examination at that time did not reveal any significant findings other than complaint of pain on the left side of the lower back and right hip down the leg. Plaintiff reported to the medical department on June 26, 2012 with an additional restriction of only 40 hours per week. Plaintiff indicates that he is having more problems especially when he works overtime. Previous restrictions from Dr. Adams were to continue until the next visit with Dr. Adams on August 24, 2012. On August 27, 2012 Plaintiff presented renewed restrictions from Dr. Adams with the removal of the hourly restriction. At that time the restrictions were approved for three months. It appears Plaintiff was not seen in the medical department again until August 22, 2014 reporting that he was leaning into a press and drilling a broken bolt when his feet slipped out from under him due to the oily floor. Plaintiff complained of low back pain. Plaintiff was seen on several more occasions in August, 2014 with the same complaints. Arrangements were made for Plaintiff to undergo a lumbar MRI on September 6, 2014. On September 8, 2014 the entry refers to an x-ray of September 6, 2014 along with an MRI of the same date. The MRI is read to show a stable appearance of the post-operative laminectomy at L4-L5 and L5-S1 with placement of transpedicular screws and prosthetic disc at L5-S1. The note also indicates mild chronic degenerative changes of the lumbar spine

with no compression fracture or enhancing lesion. The restriction Plaintiff presented from Dr. Adams on September 25, 2014 indicated that Plaintiff would be able to return to work on that date but only working 40 hours a week. The Plaintiff was advised that the hours limitation was a management issue and that Plaintiff must speak with his union and/or supervisor. On December 9, 2014 Plaintiff apparently was returning to work. His last day of work was December 5, 2014. Apparently, Plaintiff was being treated at Matrix Surgery Center and brought in a return to work slip indicating Plaintiff could return to work on December 9, 2014. On June 29, 2015 Plaintiff reported to the medical department that he tweaked his lower back when he was trying to loosen a bolt. Plaintiff complained of a lot of discomfort when getting out of a chair. There is no other entry for 2015. Plaintiff visited the medical department on July 11, 2016. Plaintiff reports that on that date he was working in the tool room at the Bridgeport Mill. The note further indicates that as he was pulling on a super spacer to slide it off the mill to install a kurt vice, he felt a sudden pain in his lower back. Plaintiff was treated in the medical department at that time and Ibuprofen was administered. Plaintiff was treated several more times in July, 2016 with arrangements made for Plaintiff to have a further lumbar MRI done on July 30, 2016. An entry of August 1, 2016 refers to a lumbar MRI done on July 30, 2016 indicating post-operative changes in the lower lumbar spine; mild degenerative changes; no spinal stenosis; mild to moderate foraminal narrowing greatest at L3-4. Plaintiff was treated on several more occasions in August, 2016 such as ice packs being applied. Plaintiff was treated on 4 occasions in September and October, 2016. On December 21, 2018 Plaintiff reported to the medical department indicating that he had been pulled from the tool room to work on the floor two weeks ago and has been doing increased pushing, pulling and lifting. The note further indicates that Plaintiff was bending over to machine a new jaw plate for 9603 when his low back locked up. Plaintiff was seen in the medical department on 5 or 6 occasions in January, 2019. On February 7, 2019 Plaintiff reported to the medical department with a restriction from Dr. Scadden indicating that Plaintiff should avoid excessive bending or stooping and no lifting over 20 pounds. The restriction was to be permanent. During the remainder of February, 2019, it appears there was some investigation regarding whether Plaintiff's claim would be a workers' compensation claim. Plaintiff was last treated in 2019 on March 5th. There are several notes in the plant medical records during the month of March, however, Plaintiff was only present on one occasion and it does not appear that he sought any treatment on that occasion. On March 13, 2019 an MRI was performed and the report indicated post-surgical changes at L5-S1 remain stable from the prior examination. There was a further finding of degenerative disc desiccation and bulging annulus mainly at L3-L4 level causing minimal effacement of the ventral thecal sac and mild compromise of the right L3 neuroforamina. The note further indicates the findings are similar to prior examinations. No focal central disc herniation or central canal stenosis was found. There are no medical department entries for April, 2019. Only 3 entries appear in May, 2019 with no treatment being rendered. On June 6, 2019 it appears Plaintiff was seen by the plant medical director who evaluated Plaintiff's

symptoms. The pain had increased in his low back. According to the note of June 24, 2019, Plaintiff did have a myelogram the previous week. No results of the myelogram are reported in this note. On June 28, 2019, Plaintiff was in the medical department for clearance to return to work. Plaintiff reported having pain in his back down his leg. On July 18, 2019 Plaintiff was in the medical department indicating that he needed further surgery and was waiting approval from workers' compensation before the surgery date is set. The note indicates that the Plaintiff denies any treatment at this time indicating that he was just updating the medical department. Plaintiff then left the medical department to begin his shift. An updated note was placed in the medical department on August 5, 2019. Plaintiff was not present. The note indicates that the myelogram of the lumbar spine on June 20, 2019 did not appear to have significant findings outside of the evidence of a prior fusion. The note further indicates that the incident of Plaintiff's back locking up in December, 2018 did not result in a change in pathology and therefore the claim would not be a workers' compensation claim. The note of August 8, 2019 indicates Plaintiff's confirmation that surgery with Dr. Adams is scheduled for June 26, 2019. The note of August 20, 2019 indicates that an IME would have to be done before approval is given for the surgery scheduled to be done by Dr. Adams. The note of August 22, 2019 indicates Plaintiff's being notified of an independent medical examination appointment for October 15, 2019 with Dr. Mayer. Plaintiff is unsure as to whether surgery should be rescheduled. The note of September 20, 2019 indicates Plaintiff will be off until November 25, 2019 when he is scheduled to return for examination by Dr. Adams. An entry of November 25, 2019 is a note from Michigan Spine and Brain Institute indicating that Plaintiff was under the professional care of that institute. The notes indicates that Plaintiff is to remain off work until his post-operative appointment is scheduled which occurs on February 4, 2020. The note indicates that Plaintiff is not able to return to work. The restrictions noted are no lifting more than 10 pounds and no pushing, pulling, twisting or stooping. Plaintiff brought in a note from his doctor on February 24, 2020. The note indicates Plaintiff has a follow up appointment on April 23, 2020. Restrictions are the same as in the previous note. The February 24, 2020 note is the last record in this exhibit.

Plaintiff's Exhibit 4 is an employee incident form dated December 21, 2018 bearing Plaintiff's signature. This incident report does indicate that Plaintiff was pulled from the tool room to work on the floor two weeks previously. Plaintiff indicates he was machining a new jaw plate for 9603 when he bent over and his back locked up.

Plaintiff's Exhibit 5 are records of Dr. Mark Adams. It appears Plaintiff was first seen on January 26, 2010 for consultation at the request of Dr. Herrick. Plaintiff indicates to Dr. Adams that he injured his back about a year previously while he was working and lifting a press. He described lifting and twisting and heard a pop and a pain sensation in his back shooting down his right leg. Dr. Adams found a disc herniation at L5-S1 toward the right. Initial treatment was

recommended to be an injection with the possibility of surgical intervention. Plaintiff was seen next on October 26, 2010 with the same back complaints. It appears the injections did not last. An MRI was recommended. Plaintiff was next seen on November 23, 2010. Plaintiff was not improving. The doctor's note indicates findings at L5-S1 with disc herniation matching Plaintiff's pain into his right side. Plaintiff was seen on March 4, 2011 for a post-op evaluation. A fusion at L5-S1 was performed. Plaintiff reports that he is not doing a whole lot better. The diagnosis was lower back pain secondary to a disc herniation at L5-S1. Plaintiff was seen on May 24 2011 indicating "he is doing great." He does have quite a bit of stiffness. Plaintiff was to follow up in two months. Plaintiff was next seen on July 26, 2011 indicating that he is doing really well. Plaintiff indicated that he would like to return to work. The note indicates that written restrictions were given for Plaintiff to start in September. Plaintiff was next seen on November 22, 2011. The Plaintiff indicated that he is feel really good with very little back pain. Restrictions were continued until he was seen again. Plaintiff's visit on May 24, 2012 indicates a 6 month follow up. At that time Plaintiff was complaining of low back pain with numbness in the upper right leg. Plaintiff indicated he would like to try some physical therapy. Plaintiff was seen again on August 24, 2012. Plaintiff indicates improvement as a result of the surgery but still has some slight discomfort with soreness and stiffness in the lower back. He completed 12 sessions of physical therapy which helped but the Plaintiff indicated that there was nothing more they could do for him so he discontinued therapy. Plaintiff was seen on November 20, 2012 with increased pain in the lower back radiating into the bilateral hips. Plaintiff had started further physical therapy on November 19, 2012. The next visit occurred on January 13, 2014. MRI had been performed by that time. The notes indicate that Dr. Adams reviewed the results of the MRI and did not see anything surgical at that time. Conservative therapy was advised to be continued. Plaintiff's next visit occurred on April 22, 2014 again with the chief complaint of back pain. Plaintiff indicates he was doing well and was given Neurontin which he states has helped extremely with the burning sensation he was having in the right leg. He complained of some right thigh numbness but no pain and no back pain. The next visit occurred on September 25, 2014. Plaintiff was there to discuss increase in pain. Plaintiff was experiencing constant stabbing pain across his lumbar region and numbness throughout his right leg. An MRI of September 6, 2014 indicated a stable appearance of the post op laminectomy findings at L4-L5 and L5-S1 levels. Also noted were mild chronic degenerative changes of the lumbar spine. No compression fracture enhancing lesion. On January 22, 2015, Plaintiff was seen following treatment at Matrix. Since Plaintiff's last appointment he had undergone a series of two lumbar epidural injections and RACZ procedure. Plaintiff continued to complain of constant pain that radiates from his lower back and down his right leg. Plaintiff was next seen on May 13, 2019. Plaintiff reports that the surgery in 2011 allowed him to walk again however his pain has never completely gone away. At that time Plaintiff was complaining of constant heavy low back pain with burning and numbness on the outer part of his right thigh. This particular note was prepared by Nurse Practitioner Helen

DeCorte. Plaintiff was seen on July 15, 2019 following completion of a lumbar myelogram. The CT lumbar spine post myelogram indicated post surgical changes at L5-S1 that remained similar to the prior MRI of March, 2019. Degenerative disc space changes were seen at L3-L4 with a mild to moderate broad based right paracentral disc herniation. The note indicates that the findings were similar to the prior examination. The note further indicates that a posterior lumbar interbody fusion at L3-4 level was recommended. Pre-surgical consultation occurred on August 27, 2019 with surgery scheduled for September 6, 2019. The impression at that time was degenerative disc disease in the lumbar spine; lumbar disc herniation with radiculopathy; and failed back surgical syndrome. Surgery was performed on September 6, 2019 for an interbody fusion at L3-4. Post-op visit occurred on September 20, 2019. Plaintiff feels it is too soon to tell if his surgery has helped. On November 25, 2019, Plaintiff reports doing fair since the surgery with no real noticeable improvements. The impression was the same. Further treatment occurred on February 24, 2020. Plaintiff indicated his pain remains the same. Plaintiff was continuing to complain of sharp low back pain with burning and numbness that travels down his right leg from his hip to his knee. When seen on May 21, 2020, Plaintiff's complaints were substantially the same as in the previous note. When seen on July 16, 2020, Plaintiff had completed an x-ray and an MRI of the lumbar spine. The MRI was done on June 18, 2020 revealing post-surgical changes at L3 through S1 showing the fusions. The impression remained substantially the same. The balance of Dr. Adams' records contain various diagnostic studies all of which have been previously discussed in prior exhibits. These records also include operative reports regarding Dr. Adams' surgeries upon Plaintiff.

Plaintiff's Exhibit 6 are records of Matrix Pain Management. The first visit to the clinic appears to be on September 9, 2020 at the referral of Dr. Adams. Plaintiff reports lumbar pain. Plaintiff reports two fusion surgeries by Dr. Adams in 2011 and 2019. At that time, Plaintiff appears to have been seen by Dr. Michael Papenfuse. A physical examination was performed. Various modes of treatment were provided to Plaintiff including a spinal cord stimulator. The trial implantation occurred on November 3, 2020. When seen on November 9, 2020, Plaintiff indicated that he noticed a difference with the trial. Symptoms were still the same in the low back. A further implantation was performed on December 22, 2020. On December 29, 2020 Plaintiff reported back pain again with pain radiating into the right leg. Plaintiff was next seen on January 6, 2021 indicating that he was able to cut his Norco in half. Overall, Plaintiff was doing extremely well at that point. The final record on this exhibit is a treatment dated of January 20, 2021. Plaintiff indicates he was very pleased with his progress at that point. Plaintiff still indicated that various activities such as lifting, standing and work activities make his pain worse.

Plaintiff's Exhibit 7 are Plaintiff's job search logs beginning on November 4, 2019. These logs are in typewritten form. The logs contain various headings as follows: job title; organization name; job posting city; job code number; the

date applied; notes; and a column labelled “work within restrictions.” Except for the first page and last page there are 23 entries on every page. The first page contains 21 entries and the last page has 11 entries. There are over 300 entries. The vast majority of these jobs were applied for either online or by emailing a resume. Several jobs appear to be applied for with the notes indicating “job applied.” There is no explanation in the log or at the time of the hearing as to what that means. Hundreds of different jobs are primarily in the Saginaw, Bay and Midland areas. The variety of jobs include such positions as maintenance technician, truck driver, tool and die repair, school bus driver, sales associate, general laborer, production worker, general auto mechanic, construction worker, security officer, janitor, meat cutter, heavy equipment mechanic, and machine operator. The log does not contain any information regarding the rate of pay. Some of the jobs listed appear to be jobs where Plaintiff may not have the requisite education, background and skills. Example, Plaintiff applied for a nursing position at Valley Allergy Clinic. Plaintiff also applied for a position as a meat cutter at Pat’s Food Center. Application was also made as a school counselor as Richfield Public School Academy. Underneath the column that is labelled “work within restrictions” the word “no” is inserted in every job listing. There is no explanation either in this log or at the time of the hearing as to what the specific meaning is of the word “no” in this column. The number of jobs applied for on each date varies rather significantly. For example, it appears that only one online application was made on November 4, 2019; however, 14 online applications were made on November 12, 2019. This pattern seems to be the same throughout the remainder of 2019 and into April, 2020. Thereafter, it appears that Plaintiff’s applications by resume and/or online applications was done no more frequently than anywhere from 4 to 5 times monthly up to 10 times monthly.

Plaintiff’s Exhibit 8 are the records of Munson Chiropractic. These records show a first treatment date of August 23, 2006 through January 25, 2010. It appears that on the first date of August 23, 2006, a new patient information form was prepared which is at the end of the exhibit. The handwriting that appears on this form is illegible. The following two pages are not copied sufficiently so that it can be read at all. On August 25, 2006, however, the note indicates that the Plaintiff presented himself with low back pain into bilateral hips as well as neck pain into the bilateral shoulders. A 5 level adjustment was performed to the cervical, thoracic, lumbar spines and sacrum and pelvis. Subsequent to that date and throughout the remainder of 2006, Plaintiff made the same complaints to the same areas of his spine and also was given a 5 level adjustment to all of those areas. Plaintiff was seen a total of 9 times in 2006. In 2007, Plaintiff was seen almost on a monthly basis for a total of 10 times with the same complaints and received the same treatment from Dr. Munson. Plaintiff was seen a total of 14 times during 2008. Plaintiff’s complaints again were the same and he received the same treatment as in 2006 and 2007. In 2009, Plaintiff was treated 32 times beginning on March 16, 2009. Plaintiff at that time complained of the same types of pain in the same spinal areas.

Adjustments were performed on each occasion. Most of the treatment in 2009 occurred in July when Plaintiff was seen 21 times and August when again, Plaintiff was seen 12 times. The complaints were always the same and the treatment was always the same. Plaintiff was only seen one time in September, 2009 and 4 times in October, 2009. Plaintiff did not treat again at the clinic until January, 2010 with the final treatment on January 25, 2010. None of these notes made reference to any onset or injuries sustained by Plaintiff.

Plaintiff's Exhibit 9 are wage calculations from September 9, 2018 through September 8, 2019. This exhibit calculates the highest 39 weeks and the average weekly wage of $1,738.92 with a workers' compensation weekly rate of $921. The wage information in this exhibit was run through the Workers' Disability Compensation Agency to determine the average weekly wage and the workers' compensation weekly rate.

Defendant Nexteer's Exhibit A is the deposition transcript of Dr. Mayer taken on June 29, 2021 which has been previously summarized.

Defendant Nexteer's Exhibit B is the deposition transcript of Mr. Stokes taken on August 20, 2021 which has been previously summarized.

Defendant Nexteer's Exhibit C contains an Application for Hearing filed by Plaintiff on July 20, 2011 together with a Voluntary Payment Agreement signed by this Magistrate on April 10, 2013 requiring payment of $3,990.05 by General Motors to the Plaintiff together with an opinion and order of the same date.

Defendant Nexteer's Exhibit D are wage records beginning January 7, 2011 through October 11, 2019. There are several other pages of what appear to be wage records which are unspecified as to what date they cover or what category they fall into.

Defendant Nexteer's Exhibit E is a copy of a letter dated April 17, 2020 from Nexteer Human Resources Department to Plaintiff informing him that his employment had been terminated effective April 17, 2020 and that benefits will end on April 30, 2020.

Defendant Nexteer's Exhibit F are several Applications for Hearing filed by Plaintiff against Nexteer Automotive on August 30, 2019; October 31, 2019 and October 27, 2022. All the applications alleged injury and disability to the low back.

Defendant Nexteer's Exhibit G is a copy of Social Security Earnings records certified by the Social Security Administration on May 21, 2012. These records show Plaintiff's earnings at various employers beginning in 1994 and

continuing through 2010. The most recent listed employers on these records are Delphi Corporation and Nexteer Automotive.

Defendant Nexteer's Exhibit H is a copy of Agency Form 105A signed by Plaintiff on November 14, 2011. The information on the form includes Plaintiff's educational background and prior employment history which is not inconsistent with his testimony. Also contained in this exhibit are job detail forms regarding his employment prior to his employment with Defendant GM and Defendant Nexteer. Also attached to this exhibit is a copy of Plaintiff's resume again showing Plaintiff's employment prior to his employment with the Defendants. The resume also includes Plaintiff's educational background and certifications. The final document in this exhibit is an application for employment with Delphi dated August 16, 2006. The information on the application also sets forth Plaintiff's previous education and work experience and employment prior to the Defendants.

Defendant Nexteer's Exhibit I are copies of Plaintiff's driver's licenses beginning with an expiration date of February 6, 2011 up to and including the expiration date of February 6, 2023. All of the licenses contain no restrictions other than the last one which indicates corrective lenses. The licenses contain various license types such as "CA" "C" and "CY, NT" "CY, F."

Defendant Nexteer's Exhibit J is a Scheurer Hospital Emergency report for a date of service of October 19, 2009. Plaintiff reports an injury to his back two weeks prior while at work. Plaintiff indicates he was lifting something but cannot remember what it was or what he was doing. Physical examination at that time noted tenderness in the paraspinal region, more on the right than on the left. It is also reported that Plaintiff has pain with straight leg raising on both sides. The emergency room diagnosis was "acute low back pain." The last page of this exhibit appears to be a report signed by Dr. Todd Britt also dated October 19, 2009. The impression given by Dr. Britt is "acute lumbar sprain."

Defendant Nexteer's Exhibit K are 7 physical examination forms. The first form is dated August 16, 2006. There is a notation on the front page indicating that Plaintiff states occasional low back pain. The document is signed by Plaintiff on August 16, 2006 indicating he is able to do any job assigned and offered. The second document is dated January 24, 2012 recording a history of restrictions in the spine back in February, 2011. In this form Plaintiff indicates that he is not in good health and without physical disability and cannot work any assignments that he is given. There is no signature page on this form. The physical examination form of August 10, 2012 indicates disc repair in 2011 with a further notation that Plaintiff has restrictions. Once again the form indicates Plaintiff cannot do any work assignments that he might be given. Also once again there is no signature on this form. The next one is dated August 22, 2013. The information on this form is substantially the same as the previous form. Plaintiff does indicate however that he is able to do any work assignments that

he may be given. There is no signature page on this form. The form dated August 26, 2016 is labelled “physical assessment/authorization for training.” Plaintiff indicates that he is in good health and without physical disability and can do any work assignments that he may be given. There is no signature page. The form dated December 11, 2017 does indicate Plaintiff’s prior surgery, 4 or 5 years previously. Plaintiff indicates that he is without physical disability and can work any assignments given to him. There is no signature page. The final form is dated January 23, 2019. Plaintiff does indicate that he is unable to work any assignments.

Defendant Nexteer’s Exhibit L is an employee incident or injury report dated August 22, 2014 signed by Plaintiff on the same date. Plaintiff reports that the injury occurred on August 22 while leaning into a press drilling broken bolts when his feet slipped from under him on oily floors. Plaintiff indicates symptoms included heavy tightness in his low back and also pain. This exhibit also contains an incident report dated June 29, 2015 reporting an injury that states “was indicating in a part with I loosened a tight bolt and when it snapped loose and started his back.” A further form injury report is dated July 11, 2016 reporting an injury when he slid a super spacer chuck off the mill to install a kurt vice. When he was pulling on the super spacer he felt like he pulled a muscle. The final form in this exhibit is dated December 21, 2018 indicating that he was machining a new jaw plate when he bent over and his back locked up.

Defendant Nexteer’s Exhibit M is a print out of Plaintiff’s prescription medication from Scheurer Family Pharmacy in Pigeon. The exhibit sets forth dates beginning in March, 2019 and up to October, 2021.

Defendant Nexteer’s Exhibit N is a photo of a pick up truck and a trailer dated September 30, 2021. Plaintiff did identify himself as the person in the picture. The picture depicts Plaintiff walking behind the trailer attached to the pick up truck.

Defendant Nexteer’s Exhibit O are medical records of Dr. Paul Scadden. Records cover a date of service from November 16, 2020 through September 6, 2022. On November 16, 2020 Plaintiff was seen for a comprehensive physical examination. The Plaintiff indicates that he is feeling well. He continues to have chronic back pain but sees his pain clinic for this problem. There were a number of assessments made at that time which included chronic bilateral low back pain without sciatica; history of lumbar surgery; failed back syndrome; and chronic pain syndrome, lower back. Treatment on June 3, 2021 appears to be hypertension. The visit on August 4, 2021 was a follow up due to his treatment for tongue surgery for squamous cell carcinoma at the University of Michigan Hospital in July, 2021. On December 8, 2021 Plaintiff was seen for another comprehensive physical examination following his squamous cell surgery of the tongue in July, 2021. On June 8, 2022 Plaintiff had a visit to discuss his hypertension. Plaintiff indicates that his back pain issues come and go.

Treatment on June 29, 2022 was a follow up for his depression type symptoms. Plaintiff indicates that he does not like a motion to do anything once he is out of bed. He does not do much during the course of the day. Plaintiff reports a history of chronic back pain that impedes his ability to work. Plaintiff reports a simple slip and fall the day previously on his right hand. Treatment on August 11, 2022 was for depression. The final date of service on this exhibit is September 6, 2022 again for a follow up due to depression. Plaintiff reports that his condition is no worse but is not getting any better.

Defendant Nexteer's Exhibit P are invoices from Heck Repair Company. These invoices indicate work that was performed on certain equipment. The invoices were the subject of Mr. Heck's testimony at the time of the hearing.

Defendant Nexteer's Exhibit Q is a surveillance video of the Plaintiff for the dates of September 15, 2022, September 30, 2021, and September 7, 2021. The first portion of the video is the surveillance conducted on September 15, 2022 beginning at 8:34 a.m. The video for this date concludes at approximately 2:00 p.m. Plaintiff is seen throughout the time of the video. Plaintiff first appears walking to a pick up truck with no apparent problems. Another man appears in the video who is unidentified. It appears that the other man is working on the semi tractor-trailer. Plaintiff is seen holding a hose bending over at the waist appearing to provide assistance to the other man working on the tractor-trailer. Plaintiff is then seen down on one knee. I identify the other man to be Mr. Heck who is one on the witnesses in the case. Beginning at about 11:15 a.m. Plaintiff is seen back at the semi tractor-trailer. The first portion of this segment shows Plaintiff standing watching Mr. Heck working. Plaintiff then walks with a piece of equipment into a barn. Plaintiff is then seen apparently looking into the body of the dump box bent over slightly above waist level. He is performing some function underneath the dump box but it cannot be determined exactly what he is doing. Plaintiff's upper body is blocked by the dump box. Both men are seen walking away into the barn carrying some items. They return to the vehicle with Plaintiff shown carrying a gun like instrument. The men appear to be working on the same truck with Plaintiff being underneath the dump box. Plaintiff is then seen moving a cart into a barn. Plaintiff is again seen using a hose, a pump, drill, or sander in the back of the trailer standing. Plaintiff is seen working with a handle on the back of the trailer. For approximately 20 minutes, Plaintiff is seen working underneath the dump box using what appears to be a wrench. Mr. Heck was working on another part of the tractor trailer. Plaintiff does not appear to be in any discomfort. At approximately 1:00 p.m. Plaintiff is still working on the truck and is also seen using a hammer in the back of the truck. Plaintiff is seen climbing into the trailer to work underneath the dump box. He is seen sitting on a tire and performing some work which cannot be seen. Plaintiff is then seen exiting and slightly bending while sitting. Plaintiff's position is slightly bending while sitting on a tire and then is seen bending over further at the waist. Plaintiff exits the truck at about 1:09 and returns at 1:55 and is seen underneath the

dump box kneeling on tires working inside the trailer. Plaintiff is then seen working until the end of this portion of the tape at approximately 2:00 p.m.

The second portion of the video is dated September 30, 2021. Plaintiff is seen walking at a gas station and then getting into a pick up truck with a trailer.

The third portion of the video is dated September 7, 2021 at approximately 8:45 a.m. Plaintiff is seen talking outside with Mr. Heck and another man standing at a building with the sign reading McDonald's Food Center.

Defendant Nexteer's Exhibit R is a photo dated March 3, 2022 depicting a trailer which appears to have a three wheeler resting on top of the trailer.

Defendant Nexteer's Exhibit S are several photographs. The first 3 photos depict a trailer with several tires on top of it. The next 3 photos depict a boat sitting on a trailer. There is a further photo of a trailer with tires on it. There is a photo of what appears to be Plaintiff's home again depicting the boat and other equipment that I cannot determine. A further photo depicts further equipment at what appears to be Plaintiff's home including a trailer. The final 2 photographs appear to show Plaintiff's home as well as a red pick up truck and what appears to be a mobile home.

Defendant Nexteer's Exhibit T are surveillance reports prepared in connection with the surveillance conducted by STT Security. These reports commence on July 28, 2021 with a last entry of September 29, 2022. The contents of these reports were the subject of examination and cross-examination of the witness who testified with regard to the surveillance of Plaintiff. It appears that 3 different investigators prepared these reports.

Defendant Nexteer's Exhibit U is a copy of a grievance filed by Plaintiff dated September 12, 2017 wherein Plaintiff and the Union protest managements failure to offer all available overtime to the Plaintiff. There appears to have been a disposition of this grievance but the writing is illegible. There is a further document attached to this exhibit labelled "adjustment to earnings/hourly employees." It may be that this grievance was settled by the payment of double overtime to the Plaintiff with the document dated October 13, 2017.

Defendant Nexteer's Exhibit V is a copy of the lumbar MRI report of December 3, 2012. The impression indicates that there was a comparison to a prior examination of November 10, 2010 showing interval post surgical changes with dorsal transpedicular with a further showing of screws and intradiscal prothesis at L5-S1 level. No disc herniation, central canal stenosis or neuroforamin compromise is noted. The body of the report indicates mild degenerative broad based disc bulge at L3-L4 and L4-L5 without disc herniation or nerve root compression.

Defendant GM's Exhibit A is the deposition transcript of Dr. Schell taken on September 2, 2021 which has been previously summarized.

ANALYSIS AND FINDINGS

As will be discussed in more detail hereinafter, Plaintiff has filed several Applications for Hearing commencing on August 30, 2019 through October 27, 2022 against both Delphi/General Motors (hereinafter, GM) and Nexteer Automotive Corporation (hereinafter, Nexteer). While the Applications alleged numerous dates of injury, the only type of injury alleged is to Plaintiff's "low back." It is, therefore, Plaintiff's burden of proof by a preponderance of the evidence that he sustained a low back injury while employed by one or both Defendants (see, Aquilina v General Motors Corporation, 403 Mich 206 (1997); and Section 851 of WDCA). If Plaintiff successfully proves such an injury, it is Plaintiff's further burden to prove that he is disabled as a result of his proven low back injury pursuant to Section 301(4) and/or Section 301(5) of the WDCA.

A. Claim against Defendant GM

Plaintiff began working for Delphi Corporation, a predecessor to Defendant GM, as a tool and die maker on September 15, 2006 after passing a pre-employment physical on August 15, 2006. He described his job in general terms as building and repairing equipment. This would require pushing and pulling 70 to 80 pounds of force, sometimes in awkward positions. He used various types of tools such as wrenches and pry bars. Individual parts weighed 25 to 30 pounds to be assembled in equipment weighing hundreds of pounds. He admitted that he had hoists to assist with the heavier weights. Plaintiff's description of his job duties was not seriously challenged by either Defendant.[1]

Plaintiff reported injuries to the medical department of Defendant GM in April, 2008 and October, 2009 as set forth in the summary of his testimony (see, Opinion, pg. 3-4; see also, Plaintiff's Exhibit 3). Plaintiff testified he felt a significant change in his back pain as a result of an injury on September 7, 2010. Plaintiff testified he was using an Allen wrench and a pry bar on a die that had separated at which time he felt a "snap" in his back with pain radiating down his leg (Opinion, pg. 5; Plaintiff's Exhibit 3). Plaintiff acknowledged that he was placed in the tool room where he "did nothing" until he went off work for surgery by Dr. Adams which took place on February 27, 2011. He also acknowledged that the restrictions imposed by the plant medical department in September, 2010 was only for 30 days.

[1] Sometime between Plaintiff's date of hire in 2006 and late 2010, Defendant GM took control of Nexteer in an arrangement not specifically described at the time of hearing but not disputed by any party. Defendant Nexteer assumed ownership/control of the Delphi/GM facility as of December 1, 2010, again not disputed by any party. Plaintiff's job duties as a tool and die maker remained the same.

Plaintiff was seen by Dr. Mark Adams on October 6, 2010 and November 23, 2010 with back complaints. Dr. Adams interpreted an MRI as revealing a disc herniation at L5-S1. He performed an L5-S1 fusion on February 27, 2011. Plaintiff was seen by Dr. Adams on March 4, 2011, May 25, 2011 and July 26, 2011 at which time Plaintiff indicated he was doing "really well" and wanted to return to work. Plaintiff testified he did return to work for Defendant Nexteer on September 6, 2011 with restrictions from Dr. Adams (Plaintiff's Exhibit 4). He continued working for Defendant Nexteer until 2019.

I believe it is significant to note once again that the events described above in April, 2008, October, 2009 and especially September, 2010 were not seriously disputed by Defendants. As set forth above, all of the events are supported by Plaintiff's testimony, Defendant's GM medical department records, and records of Dr. Adams. Moreover, in response to a hypothetical question from Plaintiff's counsel which I find is in accord with the evidence presented, Dr. Cullis did testify that Plaintiff's disc problems and resulting surgery in 2011 were related to Plaintiff's employment:

> Doctor, he was using, on 9/7 of '10 he was using a wrench to loosen bolts, And, Doctor, if should be noted that he saw Dr. Adam in January of 2010 and they talked about potentially doing surgery, but wanted to try conservative treatment including injections which he did do and then he returned back to work in March.
>
> But, Doctor, he was using a wrench to loosen bolts when the bolt snapped and he jerked his back. He noticed an immediate recurrence of back pain with these right leg symptoms. And he notified his employer of it immediately and in fact the employer arranged for referral with Dr. Adams.
>
> He saw Dr. Adams in the Fall in 2010 and Dr. Adams said boy, of boy it looks like you've really reaggravated things, it looks like we're probably going to have to look at doing surgery. And he continued working in pain and he worked up until he had surgery by Dr. Adams.
>
> Doctor, you should be aware that the surgery occurred on 2/23 of '11. Dr. Adams noted that there was a disk herniation, an impressive disk herniation noted at that time. He did a diskectomy and he also did a fusion at the L5-S1 level.
>
> Doctor, if in fact you assume the history of these three injuries did occur and that this gentleman continued to do bending, lifting and twisting thereafter do you have an opinion within a reasonable degree of medical certainty as to whether the disk herniation and the surgeries were caused or significantly aggravated by his employment specifically the injuries described?

> MS. BARRETT: Before you answer I'd like to place an objection to the hypothetical to the extent it does not conform to the proofs that are presented at the time of trial.
>
> MR. KING: I would raise the same objection.
>
> A. It is me opinion within a reasonable degree of medical certainty that the injuries that you described in the course of his employment over that period of time caused the disk herniation which required surgery by Dr. Adams in 2011.
>
> (Cullis dep., pg. 11-13)[2]

Likewise, Dr. Schell related Plaintiff's surgery in 2011 to the work incident in 2010:

> Q. (BY MR. BURNS:) Well, I meant the incident in 2010 that Ms. Barrett described in her hypothetical where he twisted on this platform.
>
> Doctor, assuming that history to be accurate, would you agree that the work at General Motors caused or significantly aggravated this gentleman's back problem that led to his fusions?
>
> MS. BARRETT: Subject to proofs
>
> MR. KING: I'm also going to object because it's mischaracterizing some of the facts regarding plaintiff's pre-2010 treatment and post-2010 treatment.
>
> MS. BARRETT: Agree. I would join.
>
> A. I think that there is no question that the surgery at the L5-S1 was related to the work accident.
>
> (Schell dep., pg. 31-32)

I accept the opinions of Dr. Cullis and Dr. Schell as dispositive on the issue of causation.[3] Both are well qualified and credentialed physicians. Dr. Cullis is a board certified neurologist; Dr. Schell is a board certified neurosurgeon. I acknowledge Dr. Mayer's board certification as an orthopedic surgeon. However, a through review of his testimony indicates to me that the thrust of his opinions and testimony was with regard to whether any distinguishable medical pathology was shown by virtue of Plaintiff's employment

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[2] Defense counsel's objections are overruled. The facts set forth in the hypothetical are substantially in accord with the evidence presented.

[3] "The magistrate's choice of which medical expert opinion or opinions to adopt is within his or her discretion and we defer to that choice if it is reasonable. The magistrate need not adopt expert opinions in their entirely but may give differing weight to differing portions of testimony." (*Isaac v Masco Corporation,* 2004 ACO #81)

with Defendant Nexteer, specifically at L3-L4. Indeed, the specific question asked of Dr. Mayer regarding any work related injury was with regard to whether Plaintiff sustained such an injury on November 14, 2018 or thereafter to which he testified as follows:

> THE WITNESS: I found no evidence to support the hypothesis that the event of November 14, 2018, specifically caused any acute pathology of the spine that would have led to the surgical intervention that was performed nine months later, or ten months later actually. It to me represented a minor traumatic event.
>
> (Mayer dep., pg. 49)

Based upon the above discussion and analysis, I find that Plaintiff has sustained his burden of proof showing that he did suffer an injury to his low back as a result of his employment with Defendant GM as of September 7, 2010.

The next issue which must be decided is whether Plaintiff suffered a disability as a result of his occupational injury at Defendant GM. Section 301(4) of the WDCA is quite clear with regard to the definition of “disability”:

> "Disability" means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work-related disease.

Plaintiff testified that he returned to work from his lumbar fusion surgery at Defendant Nexteer on September 6, 2011. He returned to his same job as a tool and die maker. He initially returned to work with restrictions. These restrictions eventually expired after one and a half years according to Plaintiff’s testimony. A review of Plaintiff’s entire testimony does not reveal any evidence of Plaintiff taking any time off from work following his return to work in 2011. A review of all Defendant Nexteer’s medical department records reveals only two occasions when Plaintiff missed some days of work in August, 2014 to September, 2014, and December 5, 2014 to December 9, 2014. Plaintiff was seen in Defendant Nexteer’s medical department only a handful of times between 2014 and 2019. Equally significant, Plaintiff presented no evidence that he sustained any wage loss after his return to work in September, 2011 except after 2019 when he was employed by Defendant Nexteer. Any wage loss sustained by Plaintiff may have been between February 27, 2011 and September 6, 2011. It appears that Plaintiff may have been paid benefits for that period of time. On April 10, 2013, this Magistrate signed a Voluntary Payment Form indicating that Defendant GM was to pay benefits to the Plaintiff for the period between February 22, 2011 through September 5, 2011 (see, Defendant’s Nexteer’s Exhibit C). Moreover, even if the above payment was not attributable to the foresaid period of time, Plaintiff’s claim for any benefits would be barred by the provisions of Section 381(2) of the WDCA:

> Except as provided in subsection (3), if any compensation is sought under this act, payment shall not be made for any period of time earlier than 2 years immediately preceding the date on which the employee filed an application for a hearing with the agency.

Plaintiff's initial Application for Hearing was filed on August 9, 2019, considerably later than September 6, 2011.

For all of the above reasons, I find that while Plaintiff sustained an occupational injury to his low back as described above as a result of his employment with Defendant GM as of September, 2010, I further find that Plaintiff has suffered no "disability" as defined by Section 301(4)(a) and therefore his claim against Defendant GM is hereby denied.

B. Claim against Defendant Nexteer

Plaintiff has also claimed a low back injury against Defendant Nexteer. As referred to above, Plaintiff returned to work at Defendant Nexteer in September, 2011 following his lumbar fusion surgery at L5-S1 in February, 2011. He returned as a tool and die maker performing the same job duties he had performed for Defendant GM. Defendant Nexteer's medical department records reveal Plaintiff's visits subsequent to September, 2011 as set forth in Plaintiff's Exhibit 3 previously summarized. These records do not indicate a significant number of visits between September, 2011 through December, 2018. The complaints were always regarding Plaintiff's low back. At various times Plaintiff reported specific incidents and at various times he was given work restrictions on the basis of recommendations from one or more of Plaintiff's treating physicians, primarily Dr. Adams. As mentioned in Part A of this opinion, Plaintiff lost little or no time from work during this period.

Based upon a review of Plaintiff's testimony and the medical evidence presented, I believe it is fair to say that while Plaintiff continued to complain of back pain throughout the above period, it was not until November or December, 2018 that Plaintiff experienced a significant change in his symptoms. At that time, Plaintiff was taken out of the tool room and placed out on the floor. In the process of working on a broken clip using a hammer, Plaintiff bent over a railing, firstly at the knee level and then at waist level. He further testified that he had never experienced that type of pain in the past. This incident was reported to Defendant Nexteer's medical department (Plaintiff's Exhibit 3) and an incident report was prepared (Plaintiff's Exhibit 4). Plaintiff testified that he continued working but his back pain intensified.

Plaintiff saw Dr. Adams on May 13, 2019. He had last seen Dr. Adams prior to that date on January 22, 2015. When Plaintiff saw Dr. Adams in July, 2019 a CAT scan was reviewed by Dr. Adams showing degenerative disc changes at L3-L4 with a broad based paracentral disc herniation (Plaintiff's

Exhibit 5). A lumbar intrabody fusion at L3-L4 was performed by Dr. Adams on September 6, 2019. Plaintiff last worked on September 5, 2019.

It is Plaintiff's claim that the event of November/December, 2018 as described above resulted in a significant change in Plaintiff's low back, i.e., a herniated disc at the L3-L4 level requiring the aforementioned surgery by Dr. Adams in September, 2019. Defendant denies that the November/December, 2018 event caused any pathological change in Plaintiff's low back, relying fairly extensively on the opinion and testimony of Dr. Phillip Mayer. It is, therefore, incumbent upon us to examine not only Dr. Mayer's opinions but that of Dr. Cullis, Dr. Schell as well as other medical records admitted into evidence.

Defendant Nexteer's Trial Brief correctly quotes Dr. Mayer's opinion that the herniation at L3-L4 "was not traumatic but rather was degenerative" (see, Defendant Nexteer's Brief, pg. 2, and Dr. Mayer's deposition, pg. 46). Dr. Mayer further testified that his review of imaging studies in 2016 and 2019 revealed no change including herniation at L3-4:

> Q. And within the records you reviewed, when was the first time this herniation at L3-4 was seen?
>
> A. Well, I'd have to look back at the imaging studies that I have. We know that he had the bon spurs. You're referring to the herniation. I know we first saw bone spurs in 2016 by the imaging studies I have and when you compare those to 2019, it was said that they basically look the same. So I would at least date it back to 2016.
>
> (Mayer dep., pg. 46-47)

Defendant Nexteer also finds support for its opinion in the testimony of Dr. Schell (see, Defendant Nexteer's Brief, pg. 3-4). Dr. Schell's opinion and testimony will be discussed in more detail hereinafter.

I believe it is significant to examine several diagnostic studies performed subsequent to Plaintiff's return to work at Defendant Nexteer in September, 2011, especially as they relate to findings at the L3-L4 level. The following MRIs and CAT scans were attached to Dr. Cullis' deposition as Exhibits 2, 4 and 5. An MRI of the lumbar spine was performed on September 6, 2014. No herniated disc or spinal stenosis appeared at L3-L4 (Exhibit 5). A further MRI was performed on July 30, 2016 finding a mild disc bulge with mild effacement of the thecal sac at L3-L4. Also mild to moderate hypertrophy of the facets were present along with mild to moderate foraminal narrowing bilaterally (Exhibit 4). There was no reference to any herniation. The CAT scan was performed on June 20, 2019 showing the following at the L3-L4 level:

> At L3-L4 level, there is moderate to broad-base right paracentral disc herniation along with endplate osteophytic spur effacing the thecal sac and in close approximation to the intraspinal right L4

> nerve root. Asymmetric right posterolateral disc bulge and endplate osteophytic spur and hypertrophy of the facet joints causing mild to moderate compromise of the right L3 neural foramina.

Contrary to Dr. Mayer's opinion, I believe these diagnostic studies sufficiently demonstrate a change in pathology at the L3-L4 level of Plaintiff's spine. Likewise, this change is at a different level than Plaintiff's previous back injury and surgery at the L4-L5 level.[4]

Moreover, Dr. Cullis testified that diagnostic studies he reviewed in 2009 and 2010 did not show pathology at the L3-L4 level:

> Q. Doctor, I'm going to ask you to assume the following facts. I'm going to ask you to assume that Mr. Lejeune is an individual who is a long-time tool and die maker - -oh, Doctor, before I do that, no - - before I do that, Doctor, those MRIs that were done in 2010 and in 2009 did they show any pathology whatsoever at the L3-4 level?
>
> A. They did not specifically. There is no pathology at the L3-4 level on those MRIs.
>
> Q. Doctor, I also have x-rays one done on 4/17 of 2008 and one done on 10/8 of '09 do those show any pathology whatsoever at the L3-4 level?
>
> A. No, sir.
>
> (Cullis dep., pg. 9)

He also testified regarding the findings on Dr. Adams' operative report of September 6, 2019:

> Q. Now, Doctor, would the gold standard be the actual operative report though?
>
> A. Yes, sir.
>
> Q. Doctor, you were aware that this gentleman did undergo a final surgical procedure on or about 9/6 of '19?
>
> A. Yes.
>
> Q. And now, Doctor, at that juncture Dr. Adams indicated he was able to view, to actually see an impressive, a calcified disk herniation at the L3-4. Is that consistent with those, with that MRI and CY myelogram?

[4] See, footnote 2.

> A. Yes. Especially with the CT myelogram and that is a distinct new problem which had not been present previously before these injuries in 2018.
>
> (Cullis dep., pg. 17-18)

Finally, Dr. Schell testified somewhat similarly:

> Q. Okay. Now, Doctor, I'm gonna touch on one other particular area and that is the fact that this gentleman had a CT myelogram. Doctor, I read a lot of your treatment notes. And back in the day, sometimes after an MRI, you would actually order a CT myelogram; is that correct?
>
> A. Very commonly.
>
> Q. And, Doctor, it's my understanding we took the deposition of Dr. Cullis and he said, frankly, with the dye it can be just a more sensitive study to determine whether there is a pinched nerve or whether there is a disc herniation. Agreed?
>
> A. Yes.
>
> Q. And, Doctor, the CT myelogram that was done in this case showed a disc herniation with impingement at the L4 nerve root level. Would that be consistent with this gentleman's history of trauma?
>
> A. Yes.
>
> (Schell dep., pg. 56)

As stated at the outset of my analysis and findings, I believe Plaintiff's description of his job duties as a tool and die maker were not seriously disputed by Defendants. Indeed, Defendant Nexteer's Trial Brief does not challenge Plaintiff's description as inaccurate. Likewise, the Brief does not question the accuracy of its own medical department record showing a report of injury on December 21, 2018 in the manner described therein (Plaintiff's Exhibit 3). Likewise, Defendant Nexteer does not question the injury report prepared on the same day (Plaintiff's Exhibit 4). Moreover, Plaintiff was seen in Defendant Nexteer's medical department on five or six occasions in January, 2019 (Plaintiff's Exhibit 3).

As noted in the summary of Dr. Cullis deposition, Plaintiff's counsel presented Dr. Cullis with a hypothetical question in connection with a request for Dr. Cullis' opinion regarding causation. I find that the facts set forth in question is supported by the evidence presented at trial summarized in the first portion of this opinion and therefore I overrule any objections to the question and accept Dr. Cullis opinion:

A. It's my opinion within a reasonable degree of medical certainty that the injuries you described at work in or around 2018 significantly aggravated the underlying pathology as described earlier on. And specifically that it caused entrapment of the right L4 nerve root requiring further surgery by Dr. Adams in September 2019.

(Cullis dep., pg. 17-18)

Likewise, Dr. Schell testified as to the cause of Plaintiff's back problem at L3-L4 as it relates to Plaintiff's employment duties and injury:

Q (BY MR. BURNS:) Okay. Now, Doctor, with - - the fact that he - - after his fusion, that he started to develop degenerative disc disease doesn't surprise you, correct?

A. No.

Q. And you would agree, Doctor, if he is doing activities that involved bending, lifting, and twisting, that's gonna place additional stress upon the spine and will accelerate that degenerative process, correct?

A. Yes.

Q. Okay. Now, Doctor, once you start developing degenerative disc disease at a level, you would agree that level is more susceptible to injury, correct?

A. Yes.

Q. Now, Doctor, this gentleman described an incident that occurred in 2018 in November. And, Doctor, he reported it to the plant medical two days after the incident and he basically said, hey, you guys pulled me out of this tool room where I did this restricted work, put me back out on my regular work. My back started to bother me more, and more, and more. And then I was bending over to weld this plate and my back just blew up on me. And that was the history you took, correct?

MR. KING: I'm going to object. There is absolutely nothing to show that that is the history that he took.

MR. BURNS: The blew-up part, Counsel, was what I was referring to.

MR. KING: Again, I would object. He did not described any bending.

Q. (BY MR. BURNS:) Okay. Well, the record, he will - - at the time of trial, he will definitely indicate that he was bending to put this part in the machine to weld it when his back went on him.

So, Doctor, if you - - if you assume that this - - the accuracy of that history that this gentleman went back to work,

> was pulled out of his restricted work, was doing more strenuous physical work, started to have increased problems with his back, started to have some pain going down his leg, he was getting by and he was still trying to work when he bent over to deal with this part and his back went out.
>
> Doctor, if you assume the - - and, Doctor, if you assume thereafter that there was a much bigger bulge that showed up on MRI at the L3-4 and then they did a CAT scan actually that showed there was a disc herniation with impingement.
>
> Now, Doctor, if that's - - if those are - - if those are the facts, would you agree that this gentleman's continued employment at Nexteer caused this additional dis herniation and radiculopathy that led to the second fusion?
>
> MR. KING: I will again renew my objection.
>
> A. Yes.
>
> (Schell dep., pg. 35-37)[5]

There is no ambiguity regarding Dr. Mayer's opinions. He clearly stated that the findings in Plaintiff's lumbar spine both at the L5-S1 level and the L3-L4 level were not traumatic. Moreover, while acknowledging other physicians could have differing opinions, he testified that "there is no evidence that vocational or avocational activities are a cause of any significance for disc degeneration and, in fact, loading on the disc has beneficial effects on the disc" (Mayer dep., pg. 67).

I do not believe Dr. Mayer's opinions are supported by the facts of this case. I believe the opinions of Dr. Cullis and Dr. Schell are consistent with the evidence presented and adopt them as persuasive.[6] I find, therefore, that Plaintiff has sustained his burden of proof in proving an injury to his low back as of September 5, 2019.

Section 301(4)(a) of the WDCA defines "disability" as follows:

> "Disability" means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work-related disease…

An initial showing of disability requires Plaintiff to demonstrate the following pursuant to Section 301(5):

> (5) To establish an initial showing of disability, an employee shall do all of the following:

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[5] Defense counsel's objections are overruled. The facts presented to Dr. Schell in Plaintiff's counsel's questions are supported by the evidence presented at trial as set forth above.

[6] See, footnote 2.

> (a) Disclose his or her qualifications and training, including education, skills, and experience, whether or not they are relevant to the job the employee was performing at the time of the injury.
>
> (b) Provide evidence as to the jobs, if any, he or she is qualified and trained to perform within the same salary range as his or her maximum wage earning capacity at the time of the injury.
>
> (c) Demonstrate that the work-related injury prevents the employee from performing jobs identified as within his or her qualifications and training that pay maximum wages.
>
> (d) If the employee is capable of performing any of the jobs identified in subdivision (c), show that he or she cannot obtain any of those jobs. The evidence shall include a showing of a good-faith attempt to procure post-injury employment if there are jobs at the employee's maximum wage earning capacity at the time of the injury.

Plaintiff testified that he has a high school diploma and began training as a tool and die maker in 1985. He disclosed his employment history up to his employment with Defendant GM as set forth in the summary of his testimony. From 2006 forward he worked as a tool and die maker for Defendant Delphi/GM and Defendant Nexteer until 2019. Defendant Nexteer's Exhibit H also includes the aforementioned information. Plaintiff has satisfied the requirements of Section 310(5)(a).

Plaintiff did not testify as to what he earned while working for employers prior to Defendant GM and Defendant Nexteer. Moreover, Plaintiff did not disclose the wages earned from those prior employers in Agency Form 105A (Defendant Nexteer's Exhibit H). However, Plaintiff did testify that his highest earnings were in 2007 at $113,000 with an hourly rate of $35.94 on January 4, 2011 and $29.00 an hour as of January 31, 2011. I take judicial notice that wages as a tool and die maker at Plaintiff's employers prior to 2006 could not possibly be as high as the wages he earned at Defendant Nexteer. I find that Plaintiff's highest wages were earned while worked for Defendant GM and Defendant Nexteer. Plaintiff has satisfied the requirements of Section 301(5)(b).

Dr. Cullis and Dr. Schell, whose opinions I have found to be controlling, have placed restrictions upon Plaintiff's physical ability to earn wages. Dr. Cullis testified that Plaintiff should avoid repetitive lifting, bending or stooping; change of position as needed; and no lifting over 10 pounds. He further testified that with the above restrictions, Plaintiff could not perform the duties of his previous employment (Cullis dep., pg. 20). Dr. Schell testified he agreed with Dr. Cullis' restrictions (Schell dep., pg. 39-40). Neither vocational expert found any jobs within Plaintiff's restrictions that paid his maximum wages. Plaintiff has satisfied the requirements of Section 301(5)(c).

Section 301(5)(d) requires Plaintiff to make a "good faith attempt to procure post injury employment if there are jobs at the employee's maximum wage earning capacity at the time of the injury." However, as set forth above, neither vocational expert found any jobs that paid Plaintiff his maximum wages. It has been fairly recently held by the Appellate Commission that under the circumstances described above, Plaintiff has no obligation to search for work (Lavrack v GMC, 2021 ACO #8).[7] However, I believe the obligation is relevant in this case for the following reasons.

As mentioned above, Dr. Cullis and Dr. Schell both testified that Plaintiff can work within restrictions. Therefore, he is not totally disabled but rather partially disabled. Section 301(4)(a) defines partial disability as follows:

> A disability is partial if the employee retains a wage earning capacity at a pay level less than his or her maximum wages in work suitable to his or her qualifications and training.

Section 301(8) states the following with regard to the benefits to which Plaintiff is entitled if partial disabled:

> If a personal injury arising out of the course of employment causes partial disability and wage loss and the employee is entitled to wage loss benefits, the employer shall pay or cause to be paid to the injured employee as provided in this section weekly compensation equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the employee's wage earning capacity after the personal injury, but not more than the maximum weekly rate determined under section 355. Compensation shall be paid for the duration of the disability.

Section 301(4)(c) states the following:

> A partially disabled employee who establishes a good-faith effort to procure work but cannot obtain work within his or her wage earning capacity is entitled to weekly benefits under subsection (7) as if totally disabled.

The issue, then, is whether Plaintiff make a good faith effort to search for work? Plaintiff's testimony and job logs are less than compelling.

Plaintiff's testimony on both direct and cross-examination was rather scant. He identified Plaintiff's Exhibit 7 which he said was prepared by his wife based on information from websites. He had some interviews but when prospective employers found out about his restrictions, he received no offers. He did not identify the prospective employers, to whom he spoke, nor the types of jobs he applied for, nor the rate of pay. The job logs were summarized on pages

[7] Commissioner Ries concurred in the result but disagreed with the majority opinion regarding Plaintiff's obligation to search for work.

47-48 of this Opinion. Underneath the column labelled "work within restrictions," the word "no" is inserted in every job listing. No explanation was provided either at the time of the hearing or in the logs as the specific meaning of the word "no" under this column. On cross-examination, Plaintiff admitted he listed jobs for which he knew he was unqualified.[8] The Appellate Commission has held that "firing a resume at random targets on a website without proper follow-up or anything else, as noted in Baxter, is akin to throwing a rock into a lake and hoping to hit a fish." (Davis v Wolverine Packing Company, 2019 ACO #13).

The seriousness of Plaintiff's intentions to seek employment is also somewhat suspect given the timing of his application for Social Security Disability Benefits within a month of his last day of work on September 5, 2019. Plaintiff testified that he did so because Dr. Adams advised him it may take a year to recover from his surgery. Plaintiff offered the records of Dr. Adams (Plaintiff's Exhibit 8). No such advice was found in his records. In fact, in November, 2019 Plaintiff reported no noticeable improvement from surgery and in February, 2020, Plaintiff reported that his pain remained the same.

Mr. Stokes testified that he conducted a labor market survey on June 20, 2021 and June 21, 2021. He reported 10 available positions (Stokes dep., pg. 23-27). A review of Plaintiff's job logs reveal only two of the prospective employers set forth by Mr. Stokes: Trillium Staffing and Gielow Pickles.[9]

One cannot ignore the surveillance video offered by Defendant Nexteer summarized above (Defendant Nexteer's Exhibit Q). The actions seen on the video do not support Plaintiff's claim that he is incapable of some type of employment. At no time is he seen exhibiting discomfort while performing several tasks assisting Mr. Heck. In fact, the video discloses Plaintiff performing activities such as bending and carrying objects which would appear to be in excess of Dr. Cullis' and Dr. Schell's restrictions. The surveillance videos cast doubt on the credibility of Mr. Heck's testimony. He testified on examination by Plaintiff's counsel that he has never given work to the Plaintiff. He admitted that he and Plaintiff are "buddies." A friend in need is a friend indeed!

Again fairly recently, the Appellate Commission in Marks v GMC, 2021 ACO #4 took the opportunity to deal with the issues of good faith efforts to secure post injury employment. The magistrate found that subsequent to a certain date (January 1, 2017) Plaintiff had not conducted a sufficiently documented job search and therefore ordered a reduction in benefits. The Appellate Commission

[8] In addition to the jobs mentioned in the summary of Plaintiff's Exhibit 7, Plaintiff also applied for the following jobs which he appeared to be unqualified: electrical engineer; social worker; literacy coach; assisted living director.

[9] I take note that in Casler v Damico Contracting, Inc., 2013 ACO #65, the Appellate Commission found that Plaintiff's failure to apply for the jobs identified by his own expert was evidence of Plaintiff's failure to perform a good faith effort to secure post injury employment. I see no reason not to apply the same standard whereas in this case, Plaintiff failed to apply for most of the jobs identified by Defendant's expert.

reversed the magistrate finding that the evidence did support an adequate job search. Set forth below is the description of Plaintiff's job search efforts in Marks:

> Rehabilitation counselor John Stokes met with plaintiff in May 2013, and concluded that he could perform a wide range of unskilled jobs and a restricted range of semi-skilled jobs consistent with his qualifications, training, and functional capacities. (Mr. Stokes August 23, 2013, deposition at 11, 16.) Mr. Stokes conducted labor market research in June 2013, which revealed no available work that would have paid plaintiff his maximum pre-injury wages. *(Id.* at 22.) Mr. Stokes identified various lesser-paying job openings for positions that he stated plaintiff could perform. *(Id.* at 19-22.)
>
> Plaintiff testified that he applied for all the jobs identified by Mr. Stokes when he was informed of them. (Transcript at 23.)[5] However, all positions had already been filled. *(Id.* at 20-23.) Plaintiff's then-voluntarily paid benefits were reduced from $723.00 to $461.66. *(Id.* at 1718.)
>
> Mr. Stokes updated his labor market research in 2014. (Mr. Stokes August 1, 2014, deposition at 4, 7.) Once again, he identified a number of jobs he testified were then available and within plaintiff's capacity to perform, although none paid wages in the same salary range as plaintiffs prior maximum wage jobs. *(Id.* at 8-12.) Plaintiff investigated but testified that all the jobs except one were already filled. (Transcript at 20-26.) He applied for that job but was not hired. *(Id.* at 28-29.)
>
> Mr. Stokes again updated his research during October 2015. (Mr. Stokes November 30, 2015, deposition at 20.) However, by the time plaintiff was provided with Mr. Stokes's report, all jobs except one had been filled. (Transcript at 30-31.) Plaintiff applied for that job, but did not get it. *(Id.* at 29-30.)
>
> Plaintiff testified that he continued looking for work and did not limit his applications to the sort of work he had performed for defendant. (Transcript at 32, 34.) He also submitted resumes to various online job placement websites. *(Id.* at 32, 60.) Plaintiff had several interviews, either in person or over the phone, and also received job leads by email. *(Id* at 34.) He indicated that he applied for at least two or three jobs every day and would have taken any job within his restrictions. *(Id.* at 34, 36.)
>
> Logs documenting plaintiff's job search efforts beginning in April 2013 were admitted as Plaintiffs Exhibit #8. The logs were separated by year, and the logs for 2013 through 2016 were printed in "landscape" format, horizontally on the page, with columns for name of the business where contact was made, position applied for, contact person, phone number, address, and result. The 2017 log was printed instead in "portrait" format, vertically on the page, which resulted in the cutting off of the address and result columns. (Plaintiff's Exhibit #8.) Plaintiff explained, "That's my fault. I tried to split it the other way. I'm just not that computer savvy." (Transcript at 58.)

> (Footnote 5: Apparently, plaintiff was not given any of Mr. Stokes' recommendations until well after they were made, but plaintiff immediately acted on new leads each time he was given some. (Transcripts at 20, 23, 29, 31.)
>
> (2021 ACO #4, pg. 4-5)

Plaintiff's job search efforts in the instant case are a far cry from Mr. Marks' efforts. I do not find Plaintiff's testimony or evidence regarding his efforts to be credible. I further find that he has failed to sustain his burden of proof that he conducted a "good faith effort to procure work" as required by Section 301(5)(d) and therefore is not entitled to weekly wage loss benefits.

The parties do not agree on Plaintiff's average weekly wage. Plaintiff submits that his bonus should be included in the calculation of his average weekly wage; Defendant claims that the September 18, 2018 performance bonus is "not a fundamental part" of Plaintiff's wages and should not be included.

The issue of whether a bonus is properly included as an element of an employee's wage was discussed in Anderson v Steelcase, 1998 ACO #372 and Robertson v George Belfer Dum and Barrell Company, 1999 ACO #580. The Anderson case held that bonuses are includable in calculating wages based upon the following:

> We begin by reaffirming this Commission's previous holdings that bonuses paid to employees in compensation for their work are wages for purposes of calculating the average weekly wage. See *Stafford, supra,* as well as *Kurz/Sperry v Michigan Wheel Corp,* 1997 ACO #681. We concur in the magistrate's assessment of the nature of Steelcase's bonus payments, and the legal effect thereof. Intuitively, bonus payments are wages. The bonuses provided by Steelcase have been routinely paid (albeit at varying slims) on a quarterly and annual basis for many decades (since 1944). They are part of the basic compensation scheme established by Steelcase for paying their employees. They are an integral part of the remuneration system utilized by the employer and expected by employees. A key factor making Steelcase a highly attractive place of employment is the system of bonus payments. The bonuses are treated as taxable income. It defies common sense to view these bonuses as anything less than wages.

Robertson, came to the same conclusion stating:

> Defendants also challenge the magistrate's inclusion of plaintiff's bonus in the average weekly wage calculation. Defendants assert that the bonus is a fringe benefit which may not be used to increase plaintiff's compensation benefit rate above two-thirds of the state average weekly wage. They cite The Wages and Fringe Benefits Act, MCL 408.471(e). The Commission has previously held that this provision does not govern the question before us and that even discretionary bonuses fall within the category of wages, rather than

> fringe benefits.[8] Defendants argue that the bonus plaintiff received in this case represents an exception to the general rule because it was a one time bonus given early to help plaintiff with family expenses. As the magistrate found, the company periodically paid its employees bonuses, given at Christmas time or the end of the year. Plaintiff prevailed upon the employer to pay the bonus early because of his personal need. The timing of the payment does not alter its character as part of a pattern of incentive payments. The magistrate did not err in finding this payment to be wages.

Defendant claims that the bonus should not be included in Plaintiff's wages because it did not occur weekly and was not related to performance. Under the holdings in both Robertson and Anderson, supra, these factors are not relevant. In fact, Robertson specifically states that "timing of the payment does not alter its character as part of a pattern of incentive payments."

I find that Plaintiff's average weekly wage for the 2019 date of injury is $1,738.92.

CONCLUSIONS

Plaintiff sustained an injury while employed by Defendant GM as set forth above. Plaintiff however, has failed to sustain his burden of proof that he sustained any disability as a result of that injury and therefore his claim against Defendant GM is denied.

Plaintiff has sustained his burden of proof that he sustained an injury to his low back while employed by Defendant Nexteer also as set forth above. Plaintiff's average weekly wage at the time of his injury was $1,738.92. Plaintiff has failed to sustain his burden of proof that he made a good faith effort to search for post injury employment also as set forth above. Therefore, Plaintiff's claim for weekly benefits based upon his injury with Defendant Nexteer is hereby denied. Defendant Nexteer is responsible for all reason and necessary medical expenses related to Plaintiff's back injury as set forth above.

WORKERS' COMPENSATION
BOARD OF MAGISTRATES

_____
E. LOUIS OGNISANTI, MAGISTRATE (246G)

Signed on January 19, 2023, at Saginaw, Michigan.