BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

PATRICK STEPHENS, Claimant, v. ARLO G. LOTT TRUCKING, INC., Employer, and NATIONAL INTERSTATE INSURANCE COMPANY, Surety, Defendants.	**IC 2016-002375** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** March 2, 2018

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John C. Hummel, who conducted a hearing in Boise on June 22, 2017. Attorney Richard S. Owen represented Claimant, Patrick Stephens, who was present in person. Attorney Lora Rainey Breen represented Defendant Employer, Arlo G. Lott Trucking, Inc., and Defendant Surety, National Interstate Insurance Company. The parties presented oral and documentary evidence at hearing, took post-hearing depositions, and submitted briefs. The matter came under advisement on November 15, 2017.

ISSUES

The issues to be decided by the Commission according to the notice of hearing and as agreed by the parties at a pre-hearing telephone conference on June 19, 2017, are as follows:

1. Whether the industrial accident caused the condition for which Claimant seeks benefits;

2. Whether and to what extent Claimant is entitled to the following benefits:

   a. Medical care; and

   b. Temporary partial and/or temporary total disability benefits;[1]

3. Whether Claimant is entitled to reimbursement for full invoiced medical expenses pursuant to the *Neel* doctrine; and

4. Whether Claimant's medical expenses should be apportioned between industrial related and non-industrial related causes, thereby limiting the liability of Defendants for the same.

CONTENTIONS OF THE PARTIES

Claimant alleges that he suffered an acute aggravation of a preexisting degenerative arthritic shoulder, which was previously asymptomatic, in the industrial accident on January 6, 2016. He claims medical benefits, including coverage for a total shoulder replacement recommended by Miers Johnson, M.D. He also claims the full-invoiced medical expenses, per *Neel v. Western Construction, Inc. and Advantage Workers Compensation Insurance Company*, 147 Idaho 146, 206 P.3d 852 (2009), for treatment of his shoulder that Defendants disallowed.

Defendants do not dispute that the industrial accident occurred. They accepted the claim but disagree about the compensability of treatment for Claimant's shoulder, based upon the opinion of their independent medical examiner, Roman Schwartsman, M.D. They aver that the industrial accident neither caused nor permanently aggravated Claimant's preexisting shoulder

[1] At the conclusion of the hearing and in post-hearing briefing, counsel for Claimant indicated that the issue of temporary disability benefits was moot because Surety was currently paying them. Tr., 70:1-8; Claimant's Opening Brief at 20. Thus, the only issues addressed in this decision are causation, medical benefits, applicability of *Neel*, and apportionment of medical benefits.

arthritis. They assert instead that the industrially related injury was an acute injury to Claimant's right biceps tendon requiring a minor arthroscopic surgical procedure, a biceps tenodesis. Because Defendants have accepted Claimant's acute biceps injury and have agreed to cover the surgery proposed to repair it, they argue that the *Neel* doctrine is inapplicable. Defendants further urge the Commission, if Claimant's total shoulder replacement surgery is determined industrially related and medically reasonable, to find that apportionment of medical expenses is appropriate for his preexisting shoulder arthritis.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Testimony of Claimant taken at hearing and at pre-hearing deposition (Ex. 16);
2. Joint Exhibits 1 through 16, admitted at the hearing; and
3. Transcripts of the following post-hearing depositions:
    a. Miers Johnson, M.D., taken June 28, 2017; and
    b. Roman Schwartsman, M.D., taken July 7, 2017.

After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. **Claimant's Background; Education**. Claimant was sixty-one years of age at the time of hearing. Tr., 11:23-24; 12:3-4. He was born in Spokane, Washington and grew up on a family ranch there; his family later moved to Arkansas, Missouri, and ultimately, Idaho, where they resided in Homedale and Caldwell. *Id*. at 12:14-13:3. Claimant attended high school in Caldwell through the eleventh grade. *Id*. at 13:3-11.

2. **Work History**. After working in the Caldwell agricultural industry as a youth, Claimant began a life-long trucking career. He drove milk delivery trucks and cement mixers, then began working as a long-haul truck driver in 1978. His career as long-haul truck driver lasted until his position with Employer. He traveled over six million miles as a truck driver. His work included driving various kinds of truck rigs and hauling many different kinds of products and commodities. Tr., 13:11-14:10. Two of his longest tenures as a truck driver were self-employment in his own trucking enterprise from 1987 to 2003, and thereafter as a truck driver for Walmart from 2003 to 2012. Ex. 16:5-7.

3. **Prior Medical History and Injuries.** Claimant denied any symptoms in his right shoulder prior to the industrial accident. Tr., 21:7-9. He did not seek treatment for any problems in his right shoulder before the accident. *Id*. at 21:2-6. There is no history of medical treatment related to either of Claimant's shoulders prior to the industrial accident in the record.

4. Claimant had a neuroma removed from one of his feet in the 1980s. While he missed three to four weeks from work to recover from the excision of the tumor, he had no long-term residual effects nor did he suffer any impairment. *Id*. at 18:1-19:1.

5. In the 1980s Claimant "fell off a load of lumber" and subsequently received chiropractic treatment for back pain. Ex. 16:11. There are no medical documents in the record relating to this injury.

6. In or about June 2009, Claimant fell backwards while he was stepping out of a truck in Prince George, Canada. At that time he was a truck driver for Walmart. He injured his right wrist, sustaining a compression fracture that required the surgical implantation of a plate and screws on June 24, 2009. The surgery took place at Good Shepherd Hospital in Hermiston, Oregon. Tr., 19:1-24; Ex. 4:3, 8-10. Claimant experienced no loss of range of motion from the

injury and denies any residual effects, including any impact on his ability to drive a truck. Tr., 20:10-21:1; Ex. 16:10.

7. On March 15, 2011, Claimant underwent a minor outpatient procedure on his left hand/wrist, also at Good Shepherd Hospital. The operation was a left 4th and 5th finger A1 pulley release to treat stenosing tensosynovitis. Ex. 4:67. Claimant did not recall this surgery in his deposition testimony. Ex. 16:11. It was not the subject of his examination at hearing.

8. There is no record that Claimant received impairment ratings related to either of his right wrist or left finger release surgeries.

9. **Subject Employment**. Claimant began working as a truck driver for Employer in February 2014. Tr., 15:15-23. He hauled cattle feed to Texas, New Mexico, and California, with trips that lasted two to four weeks. *Id*. at 16:1-10. The trucking rig that Claimant drove for the majority of his work for Employer was a "commodity trailer," with a "walking floor." A walking floor consists of mechanical slats that move back and forth to unload materials out of the back of the trailer. The trailer cover was a tarp. Other workers would load the product into the trailer with a loader or conveyor while Claimant was required to sweep and clean the trailer between loads. The most physical part of the job for Claimant was to remove and replace the tarps and to clean the trailer; he was not responsible to load the trailer himself. Claimant was also responsible to unload the trailer using the walking floor mechanism. Tarping the trailer required him to use a hand crank with both hands. *Id*. at 16:14-23; 34:14-37:6.

10. **Industrial Accident**. On January 7, 2016,[2] Claimant was in Wendell, Idaho delivering a load of calcium for Employer to a cattle feed business, JD Heiskell & Co. Instead of

[2] The notice of injury, complaint, answer, and the medical records refer to an injury date of January 7, 2016. Upon being prompted, Claimant agreed at hearing that the date of injury was January 7, 2016. Tr., 21:10-13. Nevertheless, this cannot be reconciled with Claimant's testimony that he did not see a doctor until the following day after his injury and his first doctor visit with Dr. Johns occurred on January 7, 2016. Dr. Johns noted on January

a walking floor trailer, the trailer in which he transported the product on this occasion was a "hopper" trailer, which has a gate at the bottom of each hopper that is opened to release the flow of the product for unloading. There were three hoppers on this trailer. When Claimant reached the delivery station, the product did not flow as it should have due to moisture clumping it, requiring him to beat on the four sides of each hopper to release it. He also unrolled the tarp covering the trailer by himself using a hand crank. He used a three-pound rubber mallet to beat the hoppers, swinging the mallet in an underhand motion. After an hour of performing this work, he felt and heard a pop or snap in his right shoulder while he was beating a hopper that had a cavity in it that resisted breaking loose. Although he immediately felt pain, Claimant continued with the task until he could not handle it anymore due to the pain and discomfort. At this point he called Employer, informed a safety manager that he had been injured, and requested another driver to assist him in unloading. Another driver arrived to assist him but did so for less than an hour before becoming frustrated with the difficulty of the task and left. With increasing pain and discomfort, Claimant continued unloading the hoppers on the trailer until the job was completed. The entire time spent in this activity was approximately three to four hours. He felt his shoulder was "extremely painful" at the conclusion of the job. He then returned the truck to Employer's lot located in Jerome, Idaho. The office was closed. On the following day, January 7, 2016, he was experiencing a "lot of pain," having had trouble sleeping due to his discomfort. He felt weakness and pain in his right upper extremity to the extent that he had difficulty picking up a coffee cup. He went to Employer's office to discuss the injury with the safety manager, who sent him to the St. Luke's Occupational Medicine Clinic in Twin Falls for assessment. Tr., 21:10-28:16; Ex. 1:1; Ex. 5.2.

7, 2016 that Claimant's symptoms "started before today, but got worse today." Ex. 5:2. January 6, 2016, therefore, was the correct date of the industrial accident.

11. **Medical Treatment and Return to Work**. Brian Johns, M.D. evaluated Claimant at the St. Luke's Clinic on January 7, 2017. Claimant reported that when "he tries to reach across and behind the other [left] shoulder, he has pain in armpit, lateral upper arm and medial upper arm." He attributed his symptoms to "rolling tarps and hoppers, beating on the side of the hopper." The symptoms became worse the day after injury, waking Claimant from his sleep. Upon exam, Claimant demonstrated painful right shoulder abduction and forward flexion to only 90 degrees. Dr. Johns assessed "shoulder strain" and prescribed anti-inflammatory medication with Hydrocodone at bedtime, use of ice, and range of motion exercises. He restricted Claimant from climbing ladders, overhead reaching with the right arm, and no commercial driving. Ex. 5:1-4.

12. Dr. Johns ordered an X-ray of Claimant's right shoulder, interpreted by James Dunn, M.D., performed on the same day, January 7, 2016. The results of the X-ray showed mild acromioclavicular degenerative change, mild to moderate glenhumeral degenerative change, and no evidence of an acute displaced fracture. *Id*. at 5.

13. Claimant returned to the St. Luke's Clinic for follow-up a week later on January 14, 2016. He reported feeling "a little better, but not much." Claimant described a bump on his lateral upper arm and stated that it hurt to lift his right arm. Dr. Johns noted that Claimant had "an arm mass which concerns me somewhat. It is subtle." He opined that ultrasound imaging of both Claimant's arm and shoulder would be helpful. He continued Claimant's previous work restrictions. Dr. Johns then referred Claimant for further evaluation to a sports medicine specialist, Chad J. Johnson, D.O., of St. Luke's Sports Medicine Clinic. *Id*. at 5:9-10.[3]

[3] To avoid confusion with another Dr. Johnson identified *infra*, Miers Johnson, M.D., Dr. Chad Johnson will be identified as Dr. C. Johnson and Dr. Miers Johnson will be identified as Dr. M. Johnson.

14. Dr. C. Johnson examined Claimant on January 26, 2016 for pain in his right shoulder joint that radiated down into his biceps. Claimant received a referral for ultrasound evaluation, management and treatment options. The most significant finding from the physical examination of Claimant was "a palpable soft tissue abnormality in the right arm between the biceps and triceps. He has marked tenderness over the bicipital groove, consistent with being over the long head of the bicep tendon." An exam of the left shoulder was negative for any abnormalities. Dr. C. Johnson then performed an ultrasound examination of Claimant's right shoulder and upper extremity, which revealed a deep hematoma, but with no overt muscle tearing, although this was the "likely etiology." The ultrasound revealed no "true impingement" in the shoulder joint. There was significant swelling about the long head of the bicep tendon sheath. He diagnosed biceps tendinitis of the right shoulder and shoulder strain. He advised Claimant that the hematoma could be conservatively managed, provided it continued to recede. He recommended an ultrasound-guided steroid injection to manage the biceps tendinitis, to which Claimant agreed. Dr. C. Johnson recommended follow-up with Dr. Johns and released Claimant with a 25 pound weight limit and no reaching at or above shoulder level as restrictions. Ex. 6:2-5.

15. Dr. Johns referred Claimant to physical therapy at Jerome Physical Therapy. Clinton Axman, DPT, NPI, evaluated Claimant on February 4, 2016. Claimant reported to Mr. Axman that the steroid injection he received from Dr. C. Johnson had helped but he still had pain in the lateral arm around the insertion of the deltoid where there was also a palpable lesion. The area was very tender upon palpation. After evaluation, Mr. Axman provided therapeutic exercises to Claimant including education. Thereafter, Mr. Axman provided two more therapy sessions to Claimant on February 9 and 11, 2016. Assessment at the final session was that

Claimant's pain was significantly decreased, with minimal difficulty in performing exercises. Claimant was still unable to do overhead lifting and was still feeling a "grinding sensation" around his subacromial space. Mr. Axman noted that Claimant was expected for more visits, however there are no further records of physical therapy for him. Ex. 7:1-5.

16. Claimant returned to Dr. Johns who noted that he had "finished therapy, is independent in his exercise program, and reports that his shoulder is feeling back to normal. He no longer has any pain. The fullness or bump in the right upper arm is diminishing." Dr. Johns did not palpate any tenderness about the right shoulder and observed normal strength without pain with resisted biceps flexion. Dr. Johns discharged Claimant at maximum medical improvement without impairment and no continued work restrictions. He encouraged Claimant to continue home exercises. Ex. 5:13-14.

17. Claimant explained that he was "broke" and "had to make money" as the reason he reported such a significant improvement in his shoulder and upper arm symptoms to Dr. Johns on February 12, 2016. He was staying in a motel in Bliss, running out of money, and wanted to return to work. He asked Dr. Johns for a full release to return to work. He hoped that he could return to work successfully despite not feeling fully capable of performing the physical demands of his job as a truck driver. Tr., 32:24-33:22; 55:18-56:2.

18. Claimant returned to full duty work with Employer. Management refrained from assigning him to walking floor trailers and instead assigned belt trailers, which he considered easier to unload. Belt trailers had slanted sides; a conveyor belt at the bottom unloaded product. He was still required to tarp the trailer using a manual crank. He remained in the Wendell area but then transferred to Caldwell in mid-April 2016. *Id*. at 33:23-34:9; 37:7-22.

19. While he was initially capable of performing his job after returning to work for Employer, Claimant found it increasingly difficult to do so as his pain and discomfort in his right shoulder and upper arm progressively worsened. He had difficulty shifting gears, steering the truck, stepping in and out of the truck cab, and performing the physical demands of the job like tarping. By September 2016 he felt unsafe functioning as a truck driver and sought a return to treatment. Surety directed him to return to Dr. Johns in Twin Falls for evaluation. Tr., 38:3-39:7.

20. Dr. Johns re-evaluated Claimant on September 12, 2016 at the Twin Falls St. Luke's Clinic. Claimant reported to Dr. Johns that after discharge, he resumed work "throwing tarps over commodity trailers" and "he seemed to be doing fine for a couple of months. The last couple of months, 'it's really gone downhill fast.' No new injury. It gradually got worse." Claimant also reported sleep difficulties due to shoulder pain. Upon exam, Claimant demonstrated "audible creaking crepitus throughout the active and passive and resisted motion of the right shoulder, most markedly with resisted external rotation." He had only 40 degrees of active abduction and at the extreme of passive motion (50 degrees) demonstrated audible creaking crepitus. Dr. Johns administered oral prednisone because he did not think a steroid injection would benefit Claimant due to the condition of his shoulder. He also prescribed Hydrocodone, encouraged liberal icing, and ordered work restrictions, including no climbing ladders, no overhead reaching with the right arm, no lifting over 10 pounds, and no commercial driving. Dr. Johns further recommended that an MRI should be scheduled. Ex. 5:15-17.

21. St. Luke's transferred Claimant's care to its Nampa Occupational Health Clinic. Claimant consulted with Howard Shoemaker, M.D., an occupational medicine specialist, for the first time on September 19, 2016. Claimant told Dr. Shoemaker that "he never really improved" despite being declared at maximum medical improvement on February 12, 2016, because he had

to keep working, and that his right shoulder symptoms had progressively worsened. Upon exam, Claimant's right shoulder demonstrated diffuse tenderness extending into the biceps and over the acromiocalvicular joint. Dr. Shoemaker observed in pertinent part as follows: "Both the mechanism of injury and the physical examination support an acute work related right shoulder injury which started back in January 2016. He improved over the next month and was discharged from care on February 12, 2016 however the patient said he never really resolved. His job requires a lot of repetitive shoulder activity and a lot of strenuous shoulder activity which he says has been causing his shoulder to worsen over the last several months." Dr. Shoemaker agreed with Dr. Johns that Claimant should have an MRI. He restricted Claimant to no commercial driving, no lifting in excess of 10 pounds, maximum push/pull of 20 pounds, no reaching above the right shoulder, and limited reaching below the shoulder. He prescribed Norco and Medrol. Ex. 8:6-9.

22. Dr. Shoemaker evaluated Claimant again on September 26, 2016, with no changes in Claimant's condition, restrictions, or medication. He noted that "the mechanism of injury and physical examination continue to support a work related right shoulder injury which occurred back in January." Further treatment options were pending Surety's approval of an MRI. *Id*. at 13-15.

23. Claimant underwent an MRI arthrogram for his right shoulder on October 5, 2016 at St. Luke's, ordered by Dr. Shoemaker. The findings, as interpreted by Shane K. Ball, M.D., were as follows:

> 1. Severe degenerative changes in the glenohumeral joint with full thickness cartilage loss throughout majority of the joint.
> 2. Severe synovial thickening throughout the glenhumeral joint and extending along the biceps tendon. There are also possible cartilage joint bodies scattered throughout the joint and along the biceps tendon sheath.

> 3. Attenuation of the supraspinatus and infraspinatus tendons with no discrete tear visualized. Probable linear split tear in the cephalad fibers of the subscularis tendon.
> 4. Blunting and fraying of the inferior and posterior labrum.

Ex. 9:1-2.

24. Dr. Shoemaker met with Claimant on the following day, October 6, 2016. He noted that Claimant's "MRI arthrogram shows severe degenerative joint disease without any obvious acute injury." Nevertheless, he concluded that "the mechanism of injury and the physical examination support an acute aggravation of severe pre-existing condition of degenerative joint disease of the right shoulder." Dr. Shoemaker determined that "the only reasonable treatment would be a total joint replacement." He recommended an orthopedic consultation to confirm his opinion. Ex. 8:21-22.

25. Upon referral from Dr. Shoemaker, Claimant consulted with Miers Johnson, M.D., an orthopedic surgeon with Saint Alphonsus Medical Group on October 20, 2016. After examining Claimant and reviewing his MRI, Dr. M. Johnson assessed as follows: "Patient has severe osteoarthritic changes of the right shoulder most likely aggravated by his injury. He has been previously treated by steroid injection and physical therapy without significant improvement. Anti-inflammatories do not seem to help. I don't feel that anything would help him short of a right total shoulder replacement." Ex. 10:2-3.

26. Claimant followed up with Dr. M. Johnson's office on November 18, 2016. On this occasion PA Kathleen Fossen evaluated him. She observed that Claimant's MRI "demonstrated degenerative joint disease and loose bodies but otherwise intact rotator cuff" in his right shoulder. She noted that the "patient has failed conservative treatment. At this point what he would benefit from would be a total shoulder arthroplasty. We will submit this to work

comp to see if they will approve the surgery." She ordered no change in work restrictions. Ex. 10:6-7.

27. Claimant followed up with Dr. M. Johnson on December 15, 2016. His finding regarding Claimant's diagnosis of severe osteoarthritic changes in the right shoulder, most likely aggravated by his injury, remained unchanged. Dr. M. Johnson added the following observation: "I don't feel that anything would help him short of a right total shoulder replacement. I think it's quite likely that his work has aggravated a pre-existing condition in his shoulder. He states that he was not having problems with the shoulder until after his accident." *Id*. at 10-12.

28. Dr. M. Johnson followed Claimant in office visits on January 16, April 10, and June 8, 2017. Claimant continued to complain of severe right shoulder pain. Dr. M. Johnson's opinion regarding etiology of Claimant's complaint and the need for surgery remained unchanged. Work restrictions of no commercial driving, no lifting above five pounds with right arm, and no overhead work with right arm continued. *Id*. at 13-24.

29. **Independent Medical Examination**. On January 23, 2017, Surety requested that Roman Schwartsman, M.D., an orthopedic surgeon, perform an independent medical examination (IME) of Claimant. Ex. 12:1-2. Dr. Schwartsman met with Claimant on February 7, 2017, took his medical history, reviewed the medical records of Dr. Johns and Dr. Shoemaker, and read the MRI. In a letter to Surety dated February 7, 2017, Dr. Schwartsman opined that Claimant's "current symptoms as they relate to the long head of the biceps are directly causally related to the industrial event of 01/07/16." This was due to a subluxation of the long head of the biceps. He diagnosed biceps tendonosis, not medically stable, requiring surgery. As for the "degenerative changes in the shoulder, these are pre-existing nonindustrial changes." If the

biceps condition were treated and reached MMI, Dr. Schwartsman stated that it would be rated at 3% upper extremity. Ex. 13:1-2.

30. Dr. M. Johnson reviewed Dr. Schwartsman's IME report. On his copy of the last page of the report, Dr. M. Johnson hand wrote as follows: "Do not feel biceps tenodesis ō total shoulder." Ex. 14:5. In his deposition, he explained that this was medical shorthand for "Do not feel biceps tenodesis indicated without total shoulder." M. Johnson Dep., 26:25-27:13.

31. **Claimant's Employment After September 2016**. Claimant continued to work as a truck driver for Employer after his release from treatment on February 12, 2016, until he received work restrictions from Dr. Johnson on September 12, 2016 that included no commercial driving. Ex. 5:15-17; Tr., 45:12-16. After September 12, 2016, Employer did not have any available work within Claimant's restrictions; he did not work thereafter and continued to receive temporary disability benefits through the date of the hearing. *Id*. at 46:3-15; 62:9-12. Employer terminated his employment in or about February 2017. *Id*. at 48:11-17. As of the date of hearing, Claimant had not sought any alternative employment because he believed the effort would be futile, remarking as follows: "Who is going to hire a one arm man?" *Id*. at 62:13-14.

32. **Claimant's Condition At Time Of Hearing**. Claimant drove to the hearing using only his left hand because of the weakened condition of his right shoulder and upper arm. *Id*. at 58:15-59:2. His shoulder condition interfered with his ability to clean his home, cook meals, and lift objects with his right arm like coffee cups. *Id*. at 59:3-15. Claimant demonstrated that he was able to move his right arm up from the front of his body only approximately a quarter of the way while standing. *Id*. at 59:16-60:14.

33. **Claimant's Credibility**. Claimant is not a consistently accurate historian. During cross examination at hearing, he testified that Dr. C. Johnson told him that he needed a total

shoulder replacement on January 26, 2016, only twenty days after the industrial accident. Tr., 51:12-52:15. Dr. C. Johnson, however, did not recommend surgery on that date; rather, he administered a steroid injection and recommended follow up with Dr. Johns in the Occupational Medicine Clinic. Ex. 6:2-5.[4] The first physician to recommend a total shoulder replacement was Dr. Shoemaker on October 6, 2016. Ex. 8:21.

34. During his deposition, when questioned about his past injuries and illnesses, Claimant recalled the neuroma in his foot and his 2009 wrist fracture injury requiring surgery, however he did not recall being treated for left 4th and 5th finger stenosing tensosynovitis with a pulley release in 2011. Ex. 4:67; Ex. 16:10-11.

35. Due to these discrepancies, where Claimant's testimony differs from facts recounted in medical records, more weight is afforded to the medical records than to Claimant's testimonial recollection. Nevertheless, Claimant's problem with consistently recalling accurate details of his medical treatment in certain instances does not necessarily mandate completely discrediting his testimony, specifically with regard to the development of symptoms in his right shoulder. Claimant testified at hearing that he had no history of seeking medical care for his right shoulder, nor did he have any symptoms in his right shoulder prior to the industrial accident on January 6, 2016. Tr., 21:2-9.

36. The crucial issue in this case is whether the industrial accident permanently aggravated Claimant's severely arthritic right shoulder, thus allowing compensability, or whether the accident was inconsequential to that preexisting condition, requiring non-compensability. Defendants question Claimant's credibility on this matter, claiming that his denial of prior shoulder problems is "highly unlikely," given "the extent of his arthritis seen on the MRI."

[4] It is possible that Claimant conflated Dr. C. Johnson with Dr. M. Johnson.

Defendants' Responsive Brief at 7. In this regard, they argue that Claimant "has not been fully honest with doctors when it comes to his shoulder symptoms." *Id*. They point to Claimant's testimony at hearing in which he admitted that he was not "exactly" honest with Dr. Johns in their February 12, 2016 office visit in which Claimant reported that he no longer had any pain. Ex. 5:13.

37. The fact that Claimant concealed his continuing pain symptoms from Dr. Johns on February 12, 2016 first arose during direct examination at hearing, not cross examination. Claimant explained that he was running low on money to support himself, living in a motel in Bliss and needing to return to work, which led him to ask for a full release from Dr. Johns and to report to the doctor that his shoulder pain had abated, despite the fact that he was still experiencing shoulder pain. Tr., 33:7-22.

38. Claimant's admission at hearing regarding this episode actually reflects positively on his credibility. If Claimant had wished to offer deceptive testimony and avoid the issue of his false report to Dr. Johns, he could have simply asserted that he was, at least temporarily, feeling better in February 2016, and thus he was accurately reporting his symptoms at that time. At hearing, Claimant voluntarily admitted what happened and believably explained why it happened. Furthermore, in his first consultation with Dr. Shoemaker on September 19, 2016, Claimant recounted the same story that he later testified to at hearing: "The patient states he never really fully improved but just had to keep working." Ex. 8:6.

39. Claimant's inaccurate symptom reporting to Dr. Johns on February 12, 2016 does not demonstrate that his testimony was deceptive about whether he had any shoulder symptoms prior to the industrial accident. Rather, it reflects that he was an employee running out of viable economic options who made a decision to continue working, despite the health consequences.

40. Claimant otherwise testified forthrightly and with candid demeanor at hearing regarding his shoulder symptoms and how they arose only after the industrial accident. His testimony in this regard receives support from the medical records, in which there is no mention whatsoever of right shoulder pain symptoms prior to the industrial accident, despite the fact that Claimant underwent surgery on his right hand/wrist in 2009 and left trigger finger releases in 2011. Ex. 4. The medical histories taken at the time of those procedures do not reflect any shoulder symptoms. *Id*.

41. Prior to beginning work for Employer in February 2014, Claimant spent approximately 11 years as truck driver for Walmart from 2003 to 2014. Ex. 16:6. Claimant's work for Walmart was the least physically-demanding truck driving assignment of his career; he was not required to load or unload or perform other tasks like the tarping or beating on the side of a hopper trailer to dislodge product, as he was required to perform for Employer. *Id*. Claimant recalled in pertinent part in his deposition as follows:

> Q. Physically speaking tell me about what you would have to do with the Walmart trucks?
>
> A. That is the only reason we went there is because it is so easy. You don't even have to fuel your own trucks or wash your own windows.

Id. at 20.

42. For over a decade prior to the subject employment, therefore, Claimant had a position with minimal physical demands unlikely to exacerbate his underlying degenerative shoulder arthritis. This fact reinforces that it was unlikely that Claimant's shoulder would have become symptomatic during that time, requiring treatment. This is an additional reason to find that Claimant was testifying accurately when he described experiencing no such symptoms prior to January 6, 2016.

43. In summary, for all of the foregoing reasons, Claimant testified credibly at hearing and in his deposition regarding his shoulder condition and the post-accident onset of his pain symptoms.

DISCUSSION AND FURTHER FINDINGS

44. The provisions of the Idaho Workers' Compensation Law should be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990) (retraining benefits statute liberally construed to permit payment of travel-related retraining expenses rather than requiring claimant to pay them from his subsistence-level temporary disability benefits). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992) (substantial evidence supported Commission's finding that the industrial accidents did not cause claimant's breathing problems, where medical evidence was conflicting).

45. **Causation; Permanent Aggravation of Preexisting Condition**. Claimant has the burden of proving that the condition for which compensation is sought is causally related to an industrial accident. *Callantine v Blue Ribbon Supply*, 103 Idaho 734, 734-735, 653 P.2d 455, 455-456 (1982) (alleged industrial accidents neither caused nor aggravated claimant's thoracic outlet syndrome). There must be evidence of a medical opinion, whether by physician's testimony or written medical record, supporting the claim for compensation to a reasonable degree of medical probability. No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 901 591 P.2d 143, 148 (1979) (physician's testimony supported finding that industrial accidents caused Claimant's hysterical neurosis). A claimant is required to establish a probable, not merely a

possible, causal connection between an injury and a claimed condition. *Dean v. Dravo Corporation*, 95 Idaho 558, 561, 511 P.2d 1334, 1337 (1973) (physician's testimony raised an ambiguity whether there was a possibility rather than a probability of a causal connection, requiring remand for rehearing).

46. "The rule is well established in this jurisdiction that an injury, resulting partly from accident and partly from a pre-existing disease, is compensable if the accident aggravated or accelerated the ultimate result; and it is immaterial that the claimant would, even if the accident had not occurred, become totally disabled by reason of the disease." *Woodbury v. Frank B. Arata Fruit Co.*, 64 Idaho 227, 130 P.2d 870, 875 (1942) (benefits awarded where industrial accident aggravated claimant's breast cancer, accelerating the need for surgery). Thus, an employee may obtain workers' compensation benefits for an aggravation or acceleration of his preexisting condition but only if the aggravation or acceleration results from an industrial accident. *Koch v. Micron Technology*, 136 Idaho 885, 886, 42 P.3d 678, 679 (2002) (claimant failed to prove that an industrial accident aggravated a preexisting condition.) *See also*, *Woody v. Seneca Foods*, 2013 IIC 0039, 0039.20 (May 23, 2013) ("It is well-settled that the permanent aggravation of a preexisting condition is compensable.")

47. As noted previously, the critical dispute in this case is whether the industrial accident of January 6, 2016 permanently aggravated Claimant's preexisting severe shoulder arthritis, or whether that preexisting condition is solely responsible for his need for shoulder surgery. There is no dispute that Claimant's right shoulder, as revealed on his MRI, was severely arthritic and that the condition predated the industrial accident. Claimant relies upon the opinions of both Dr. Shoemaker and Dr. M. Johnson for his contention that the industrial accident aggravated or accelerated his arthritic shoulder. Defendants rely upon the IME report and

testimony of Dr. Schwartsman for their argument that while the industrial accident caused an acute injury to his biceps tendon that is compensable, Claimant's right shoulder arthritis was not aggravated or accelerated by the industrial accident, and thus a total shoulder replacement is not compensable. This decision has already discussed the relevant medical records pertaining to these opinions. A discussion of the deposition testimony of Dr. M. Johnson and Dr. Schwartsman follows.

48. *Dr. M. Johnson*. Dr. M. Johnson is a board-certified orthopedic surgeon practicing medicine in Nampa. M. Johnson Dep., 4:19-5:8. Twenty percent of his practice is devoted to treatment of shoulder injuries. *Id*. at 5:11-16. The balance of his practice consists of knee joint replacement surgeries, hip replacement surgeries, and arthroscopic surgeries of the knees and shoulders. *Id*. at 23:12-19. Dr. M. Johnson's credentials are well known to the Commission, as his testimony or medical records have been received into evidence in 13 past cases.

49. Claimant informed Dr. M. Johnson that "he injured his shoulder when he was trying to unload a chemical trailer. He said the chemical was becoming stuck and he had to bang on the side of the trailer to free it up to unload it." *Id*. at 6:1-4.

50. Dr. M. Johnson observed that "the most dramatic aspect of his findings," after conducting a physical examination, was severe crepitation in the right shoulder joint with significant movement limitation in all directions, with severe pain, including significant pain over the biceps tendon. *Id*. at 6:20-7:2.

51. Dr. M. Johnson reviewed imaging for Claimant's MRI. The MRI showed severe osteoarthritic changes of the right shoulder, with "some tearing of the glenoid labrum" and "significant synovitis, which is an inflammation of the lining of the joint we see frequently after

trauma of some type or overuse of the shoulder." In general, he agreed that Claimant's shoulder was a "mess." M. Johnson Dep., 7:12-25.

52. Dr. M. Johnson concluded, after examining Claimant, taking his history, and reviewing his imaging studies, that Claimant's industrial injury had aggravated his severe osteoarthritic changes of the right shoulder and that a total shoulder replacement surgery was the indicated treatment. He explained his reasoning for these conclusions as follows:

> Well, the severe degeneration changes of the shoulder had been long standing. We don't see those with an acute injury. And then he told me that he really had not had significant trouble with the shoulder prior to that injury in there.
>
> But at the stage that I saw him, I think any other recommendation for treatment would be ineffective, and I felt that he needed a shoulder replacement surgery.

Id. at 8:7-14. When asked how his understanding of the injury from the industrial accident could cause symptoms in a patient who did not have symptoms before, Dr. M. Johnson explained as follows:

> I see lots of people that have fairly severe arthritic changes, not just in the shoulder, but in the knees, and really they had been doing quite well until there was some type of injury or something that happened that sort of put them over the edge where they started becoming severely symptomatic.

Id. at 9:18-23. Dr. M. Johnson offered these opinions to a reasonable degree of medical probability. *Id*. at 16:3-6.

53. Dr. M. Johnson answered "possibly" when asked whether subluxation of the biceps tendon could cause Claimant's shoulder to become symptomatic where it wasn't symptomatic before. *Id*. at 16:12-16. Nevertheless, he would not perform the biceps subluxation procedure recommended by Dr. Schwartsman without performing the right total shoulder replacement surgery. His reasoning was that "I would end up just doing it and he [Claimant] would still be in tremendous pain… I mean, it really wouldn't solve his problem. Whereas when

we do the total shoulder, we take care of that anyway." M. Johnson Dep., 16:17-17:1. Dr. M. Johnson observed that he was "kind of surprised that he [Dr. Schwartsman] would say that [recommend only biceps subluxation surgery] in somebody with such bad arthritis. To me it's just so straightforward that that's the only procedure that would solve this guy's problem." *Id*. at 17:11-14.

54. Counsel for Defendants asked Dr. M. Johnson whether, given Claimant's severe preexisting arthritis, he would have required a total shoulder replacement before the industrial accident occurred, as follows:

> Q. … [P]hysiologically when you're looking at somebody who has bone on bone issues, wouldn't he have needed a total shoulder replacement even prior to the accident, the industrial accident? If somebody had looked in there and seen that, would that still have been your recommendation?
>
> A. We don't treat the X-rays. You know, obviously, if he was asymptomatic, no.
>
> Q. Okay.
>
> A. If he was symptomatic, yes, that would be the treatment of choice.
>
> Q. Okay. And so even as of the date of the accident itself, you wouldn't have recommended physical therapy or anything like that? It would have essentially been a total shoulder?
>
> A. No. I probably would have recommended physical therapy because he had been asymptomatic prior, and I would always give them a chance to try to return to that previous level of function if they were comfortable, you know, and get away without having a surgical procedure in there. But if they fail to progress, then I would have pushed for the total shoulder.

Id. at 21:9-22:5.

55. Counsel for Defendants asked what, physiologically, in Claimant's shoulder made the condition a matter for workers' compensation. Dr. M. Johnson replied as follows: "Is that he

had injury that made him symptomatic, and that was the beginning of the claim." M. Johnson Dep., 28:14-19. Counsel for Claimant then followed upon in pertinent part as follows:

> Q. Do you stand by your opinion, Doctor, that this man's accident has made him symptomatic and is the reason he needs shoulder surgery at this time?
>
> A. Yes. And I would qualify that by the fact that you don't have any other previous treatments for this surgery – or for this shoulder, I mean.

Id. at 31:15-20.

56. *Dr. Schwartsman*. Dr. Schwartsman is a board-certified orthopedic surgeon currently practicing in Boise. Fifty percent of his practice is devoted to shoulder surgeries with the remainder attributable to hip and knee replacement surgeries.[5] Schwartsman Dep., 5:5-17; Ex. 15. Dr. Schwartsman has either testified or his medical records have been received into evidence in 28 past Commission cases; his credentials are well known to the Commission.

57. To prepare his IME report, Dr. Schwartsman met with Claimant, took his history (including a thorough description of the accident/injury), conducted a physical examination, reviewed the medical records of Dr. Johns and Dr. M. Johnson, and viewed Claimant's MRI imaging. He took Claimant's history before reviewing records. *Id*. at 8:15-10:10; 12:24-13:12. Claimant described his accident to Dr. Schwartsman as involving attempting to dislodge feed from a chute of a trailer with a rubber mallet, using an underhanded motion with his arm extended, whereupon he began experience a sharp, stabbing pain in his right shoulder. Dr. Schwartsman concluded that this action put strain/stress on the long head of the biceps. *Id*. at 10:16-12:10.

58. During his physical examination of Claimant, Dr. Schwartsman observed significant crepitus and grind in Claimant's right shoulder, typical of an arthritic joint where the

[5] Dr. Schwartsman did not differentiate whether the fifty percent figure was solely from shoulder replacement surgeries or whether that included arthroscopic shoulder procedures.

surfaces of the components of the joint are not smooth but rather rough. Schwartsman Dep., 15:15-23. In reviewing the MRI, Dr. Schwartsman found most significant the fact that the long head of the biceps was subluxated out of the bicipital groove; in other words, it was a dislocated biceps, which Dr. Schwartsman determined was consistent with the mechanism of injury and Claimant's pain reports. The remainder of the findings on the MRI was, however, in Dr. Schwartsman's opinion, reflective solely of arthritic changes in the glenhumeral joint of the shoulder and the atrophy of the rotator cuff. *Id*. at 19:23-20:18.

59. Dr. Schwartsman determined, based upon a reasonable degree of medical certainty, that there were two issues with Claimant's upper extremity, as follows: first, an acute injury to Claimant's biceps pulley mechanism related to the industrial accident (biceps tenodesis), caused by the particular way in which he was using the rubber mallet during the incident; and second, preexisting, chronic arthritis in Claimant's right shoulder, unrelated to the industrial accident and which "is not something that would reasonable [sic] be said to have been aggravated by the injury,[6] because the patient already had end-stage arthritis." *Id*. at 21-3-25.

60. When asked to comment on Dr. M. Johnson's opinion that he would not perform a biceps tenodesis surgery without also performing a total shoulder replacement for Claimant, Dr. Schwartsman posited what he would do for him if Claimant were a "cash-paying patient," presenting two options, as follows: First, he would offer a biceps tenodesis to the patient, a "minor outpatient surgical procedure," as reasonable to perform "on the assumption that the patient's acute and significant pain is coming from the disruption of the biceps pulley and the

[6] Claimant's counsel moved to strike Dr. Schwartsman's testimony related to the issue of "aggravation," because his IME letter and report did not use that term, thus counsel argued that it was a new opinion that had not been disclosed prior to hearing. Schwartsman Dep., 22:9-23. Counsel's point is technically correct – the IME letter and report did not use the term "aggravation." Ex. 13:1-5. Nevertheless, Dr. Schwartsman stated in his letter to Surety in pertinent part as follows: "As far as the degenerative changes in the shoulder, these are pre-existing nonindustrial changes." *Id*. at 1. Dr. Schwartsman's statement in this regard necessarily excludes aggravation as industrially-related, thus the objection is overruled. He was not required to use a magic word.

subsequent subluxation of the biceps." Second, because Dr. Schwartsman would not expect a biceps tenodesis alone "to relieve any and all arthritic pain," he agreed that Claimant would ultimately require a total shoulder replacement "if he wants a certain amount of pain relief and a certain amount of function." Schwartsman Dep., 24:13-25:19.

61. Dr. Schwartsman would "not be in a hurry" to perform a total shoulder replacement on Claimant, a "61 year old male," because Claimant "seemed to be living with this arthritis reasonably well, functioning at a fairly high level. He further assumed that Claimant intends to continue working, and physical activity such as swinging a mallet would be precluded by the loss of function with that procedure. Additionally, he would not perform a total shoulder replacement because it would likely fail before the expiration of Claimant's life expectancy of 78 years, requiring revision or fusion at some point. *Id*. at 25:24-26:19.

62. Dr. Schwartsman qualified his opinion that a less invasive, more conservative biceps procedure should be performed first, by stating that he would ultimately defer to Dr. M. Johnson, a "highly qualified surgeon," on the appropriate course of treatment. He did not "necessarily disagree" with Dr. M. Johnson that "doing just the biceps tenodesis may not be in the patient's best short-term interest." Nevertheless, to a reasonable degree of medical certainty, he could relate the need for a biceps tenodesis to the industrial accident, but he could not do so for the total shoulder replacement because Claimant's end-stage cartilage loss objectively predated the accident, according to the MRI results. Because of the severity of Claimant's arthritis (no cartilage left in his ball-and-socket joint to aggravate further), Dr. Schwartsman thus did not believe that the industrial accident could have "meaningfully" aggravated the condition. Claimant's "subjective comments" take a "second position" to the "objective evidence" of the MRI. *Id*. at 28:18-31:20.

63. Dr. Schwartsman did not review Claimant's X-ray taken in January 2016 before formulating his opinion, which showed "mild to moderate glenhumeral change." Nevertheless, he asserted that "the MRI would certainly trump a plain X-ray." Schwartsman Dep., 32:13-33:12.

64. Dr. Schwartsman acknowledged that Claimant had no documented history of shoulder complaints prior to the industrial accident, nevertheless he assigned that fact no importance because it was merely a matter of "subjective" symptoms. He observed in pertinent part as follows: "That's a subjective statement from the patient, who does have secondary gain issues in this case, as you would have to admit." *Id*. at 34:7-36:22.

65. Dr. Schwartsman admitted that the biceps tendon injury plays a role, albeit a "minor" one, in the stability of the shoulder joint. *Id*. at 46:23-47:16.

66. *Weighing the Medical Evidence*. The preponderance of the evidence favors the opinions of Claimant's treating physicians, Dr. Shoemaker and Dr. M. Johnson, who each independently determined that the industrial accident aggravated or accelerated Claimant's preexisting severely arthritic shoulder, requiring surgery. The opinion of Defendants' IME physician, Dr. Schwartsman, carries less weight, for the reasons discussed below.

67. "An employer takes an employee as it finds him or her; a preexisting infirmity does not eliminate the opportunity for a workers' compensation claim provided the employment aggravated or accelerated the injury for which compensation is sought." *Spivy v. Novartis Seed, Inc.*, 137 Idaho 29, 34, 43 P3d. 788, 793 (2002) (claimant's preexisting arthritis was not a bar to recovery when she injured her shoulder removing defective seeds from a conveyor belt in employer's processing plant). Defendants and their medical expert, Dr. Schwartsman, focus on the fact that Claimant's shoulder arthritis was so severe that it was "bone on bone" in the

glenhumeral joint prior to the industrial accident of January 6, 2016. Like the claimant in *Spivy*, 137 Idaho at 34, 43 P3d at 793, however, Claimant here suffered an identifiable injury in the industrial accident. His physical activity of swinging a rubber mallet for three to four hours to dislodge product stuck in the truck trailer's hopper bins was sufficient to aggravate or accelerate his preexisting arthritis, which was previously asymptomatic. It is reasonable to find, as Dr. Johnson did, that Claimant's physical work activity on this occasion did "something" to cause his previously-asymptomatic shoulder arthritis to become painful and disabling; had Claimant continued in a much less physically demanding trucking position like the one he enjoyed at Walmart for 11 years prior, it is less likely that he would have become symptomatic, requiring treatment.

68. The evidence is undisputed that Claimant had no shoulder symptoms prior to the accident. As discussed in detail above, Claimant's testimony in this regard was credible. The evidence is also undisputed that medical records prior to the accident disclose no history of treatment for Claimant's right shoulder. Dr. Schwartsman's assertion that Claimant's report of no symptoms should be disregarded as "subjective" is suspect, particularly when his opinion migrated to claiming that Claimant had secondary gain motives. That conclusion has no support in the record.

69. Furthermore, it is simply not true, as Dr. Schwartsman and Defendants assert, that there is no objective medical evidence that the industrial accident resulted in identifiable injury only to Claimant's biceps tendon and not his shoulder joint. Dr. M. Johnson testified that Claimant's MRI showed "significant synovitis, which is an inflammation of the lining of the joint we see frequently after trauma of some type or overuse of the shoulder." M. Johnson Dep.,

7:19-21. Given this finding, it is difficult to credit Dr. Schwartsman's "assumption" that Claimant's pain was localized solely in the biceps tendon. Schwartsman Dep., 25:7-9.

70. Dr. Schwartsman admitted that the biceps tendon does have a role, albeit a minor one in his estimation, in stabilizing the shoulder joint. Schwartsman Dep., 46:23-47:16. Even if the primary or sole physical injury to Claimant's upper right extremity as a result of the industrial accident was to the biceps tendon, nevertheless the shoulder was necessarily involved as a result of the biceps tendon injury per Dr. Schwartzman's concession that the biceps tendon plays a minor role in stabilizing the joint. The biceps tendon passes through and attaches to the shoulder bone. Based upon the medical record, it is reasonable to find that the biceps tendon injury had a role in destabilizing Claimant's arthritic shoulder, demonstrating an industrial cause of Claimant's complaints. It is evident from the medical testimony that the physiology of the upper extremity is complex and the elements of the shoulder joint and biceps tendon cannot be viewed in isolation, as the Defendants would have it.

71. For all the foregoing reasons, Claimant has proven that the industrial accident of January 6, 2016 permanently aggravated or accelerated the severe preexisting arthritis in his right shoulder. Treatment of the shoulder is industrially-related.

72. **Medical Care**. Idaho Code § 72-432(1) requires an employer to provide reasonable medical care that is related to a compensable injury. Claimant bears the burden of proving that medical expenses are due to an industrial injury and must produce medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State of Idaho, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995) (medical testimony failed to demonstrate an industrial cause of damage to claimant's knee). A physician, not the Commission, must determine whether medical treatment is required;

the Commission's role is to determine whether, based upon the totality of the circumstances, the medical treatment determined required by a physician is reasonable. *Chavez v. Stokes*, 158 Idaho 793, 798, 353 P.3d 414, 419 (2015) (bill for medical helicopter transport of claimant following his finger injury was reasonable medical care).

73. Both Dr. Shoemaker and Dr. M. Johnson determined that treatment of Claimant's industrially-related shoulder injury by means of a total shoulder replacement was necessary, and further, that it was the only course of treatment that would effectively alleviate Claimant's pain symptoms. Ex. 8:21-22; Ex. 10:2-3. Dr. Schwartsman, although he preferred to initially provide more conservative care in the form of a biceps tenodesis, nevertheless agreed that a total shoulder replacement was a reasonable course of treatment and within the standard of care. Schwartsman Dep., 29:5-7. Under these circumstances, there is sufficient medical evidence to find that a total shoulder replacement is reasonable and related to a compensable injury.

74. Treatment of Claimant's right shoulder by means of a total shoulder replacement is reasonable medical care and entitled to coverage pursuant to Idaho Code § 72-432(1).

75. **Application of the *Neel* Doctrine.** In *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 852 (2009), the Idaho Supreme Court held that that a surety that initially denies a workers' compensation claim that the Commission subsequently determines to be compensable may not review for reasonableness a claimant's medical bills that were incurred prior to the time that the claim was deemed compensable; a surety may, however, review for reasonableness medical bills that were incurred after the claim was deemed compensable. *Id*. at 147 Idaho at 149, 206 P.3d at 855. In *Neel*, the surety initially denied the claim and claimant incurred over $100,000 in medical expenses. *Id*. The Idaho Supreme Court held that Claimant was entitled to recover the full-invoiced amount of such expenses incurred prior to the

Commission determining that the claim was compensable. *Neel*, 147 Idaho at 149, 206 P.3d at 855. In this case, Claimant makes the following assertion concerning the application of *Neel* to the payment of denied medical bills:

> Claimant contends that in this case, all of the treatment which Claimant has and will obtain has been denied by Surety in this matter. There is no dispute about this denial. Claimant requests that the Commission determine that all of the medical care relating to Claimant's right shoulder replacement be found compensable and apply the *Neel* doctrine according to the holding set forth above.

Claimant's Opening Brief at 22. Therefore, Claimant apparently contends that medical expenses incurred prior to the date of hearing, as well as medical expenses which <u>will</u> <u>be</u> incurred subsequent to the date of this decision should all be paid at 100% of the invoiced amount. Per Claimant, this follows from Defendant's denial of responsibility for Claimant's shoulder arthroplasty, and bills should be paid at 100% of the invoiced amount notwithstanding that the surgery had not taken place as of the date of hearing. Claimant's argument is contrary to the rule of *Neel*.

76. As of the date of hearing, additional testing of some type was contemplated before Claimant would be approved for surgery. *See* Clt. Brief at 8. As far as the record shows, the arthroplasty has not yet been performed. The date of the Commission's decision on the issue of compensability is the line-in-the-sand that demarks those bills which must be paid at the full invoiced amount and those which may be reviewed for reasonableness. It is unclear if there are any bills for services rendered in connection with Claimant's shoulder prior to the date of hearing that have been denied. If there are, then bills for such services must be paid 100% of the invoiced amount. Obviously, the Commission has no evidence concerning whether shoulder treatment has been rendered between the date of hearing and the date of this decision. If Claimant has received care for his shoulder between the date of hearing and the date of this

decision, which care was denied by Surety, and which care would be compensable pursuant to this decision, then bills for such services, as well, must be paid at 100% of the invoiced amount. Nevertheless, since there is no evidence in the record relating to this period of time, this decision can only speak generally to Defendants' obligation.

77. For prospective treatment, i.e., treatment which has not been yet rendered, but which is authorized pursuant to this decision, Surety is authorized to review for reasonableness, bills for such treatment as they arise. *Neel* contemplates that it is only for services that have been rendered prior to the date of the finding of compensability that Surety must pay the full invoiced amount.

78. As noted, the possibility exists that the shoulder arthroplasty has been accomplished between the date of hearing and the date of this decision. This surgery likely included the biceps tendon procedure for which Defendants have agreed to be responsible. Defendants argue that they should not be held responsible for the payment of the full invoiced amount of Claimant's medical and surgical care related to the shoulder replacement, since they had previously agreed to pay for one of the procedures which would necessarily be performed as a part of that larger surgery. Because performing the biceps tendon surgery without addressing Claimant's need for shoulder arthroplasty is not medically indicated by the evidence, this argument is not persuasive. The biceps tendon procedure could only reasonably be performed in the context of the larger shoulder arthroplasty, which Defendants denied. Making the offer to authorize the biceps tendon surgery alone is meaningless and effectively a denial; Defendants authorized something they knew that Claimant's treating physician was never going to agree to perform. Therefore, if Claimant has undergone the shoulder arthroplasty and related biceps tendon surgery between the date of hearing and the date of this decision Defendants are

responsible for the payment of the entirety of that procedure at 100% of the invoiced amount of the costs associated therewith.

79. **Apportionment.** Defendants contend that expenses for Claimant's shoulder replacement surgery should be apportioned as follows: Defendants should pay that portion of expenses associated with the biceps tendon repair, and Claimant should be charged with the expenses fairly associated with replacing the shoulder joint. This argument presupposes that Claimant's need for shoulder replacement is entirely personal to him and unrelated to the subject accident. Nevertheless, because the subject accident did permanently aggravate the Claimant's shoulder arthritis, causing him to require shoulder replacement sooner than he would otherwise have needed it, apportionment is inappropriate.

CONCLUSIONS OF LAW

1. The industrial accident of January 6, 2016 permanently aggravated or accelerated Claimant's preexisting right shoulder arthritis, therefore that condition is compensable.

2. A total right shoulder replacement surgery and directly-related care for Claimant are reasonable and compensable medical expenses.

3. For denied[7] shoulder care rendered prior to the date of this decision, Claimant shall be reimbursed at 100% of the invoiced amount for bills associated with such treatment. Future care deemed compensable in this decision, may be reviewed for reasonableness by Defendants.

4. Apportionment of medical expenses is not appropriate in this case.

[7] Consistent with the decision, such "denied shoulder care" includes the biceps tendon procedure previously authorized by Defendants.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this _9th_____ day of February 2018.

INDUSTRIAL COMMISSION

_/s/_____
John C. Hummel, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _2nd_____ day of __March_____, 2018, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

RICHARD S OWEN
OWEN & FARNEY
P O BOX 278
NAMPA ID 83653

LORA RAINEY BREEN
BREEN VELTMAN WILSON
1703 W HILL RD
BOISE ID 83702

sjw

__/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

PATRICK STEPHENS, Claimant, v. ARLO G. LOTT TRUCKING, INC., Employer, and NATIONAL INTERSTATE INSURANCE COMPANY, Surety, Defendants.	**IC 2016-002375** **ORDER** March 2, 2018

Pursuant to Idaho Code § 72-717, Referee John C. Hummel submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. The industrial accident of January 6, 2016 permanently aggravated or accelerated Claimant's preexisting right shoulder arthritis, therefore that condition is compensable.

2. A total right shoulder replacement surgery and directly-related care for Claimant are reasonable and compensable medical expenses.

3. For denied shoulder care rendered prior to the date of this decision, Claimant shall be reimbursed at 100% of the invoiced amount for bills associated with such treatment. Future care deemed compensable in this decision, may be reviewed for reasonableness by Defendants.

4. Apportionment of medical expenses is not appropriate in this case

5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this __2nd____ day of ___March_____, 2018.

INDUSTRIAL COMMISSION

__/s/_____
Thomas E. Limbaugh, Chairman

__/s/_____
Thomas P. Baskin, Commissioner

__/s/_____
Aaron White, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ___ day of _____, 2018, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

RICHARD S OWEN
OWEN & FARNEY
P O BOX 278
NAMPA ID 83653

LORA RAINEY BREEN
BREEN VELTMAN WILSON
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sjw _____