

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KAREN CUNNINGHAM,

Claimant,

v.

JOINT SCHOOL DISTRICT NO. 2,

Self-Insured Employer,

Defendant.

IC 2017-007936

IC 2018-011996

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION
FILED**

SEP 10 2020

INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Sonnet Robinson, who conducted a hearing on February 13, 2020. Claimant, Karen Cunningham, was present in person and represented by Randall Schmitz of Boise. Defendant was represented by Michael McPeck of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken. The matter came under advisement on September 4, 2020 and is ready for decision.

ISSUES

The issues to be decided and clarified at hearing are:

1. Whether Claimant is entitled medical care pursuant to Idaho Code § 72-432;
2. Whether Claimant is entitled to total temporary or partial temporary disability benefits related to her industrial accident and medical care (TTD/TPD);
3. Whether or not Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.¹

¹ The issue of attorney's fees was not included in Claimant's request for emergency hearing, and it was not included on the notice for hearing. However, Defendant was aware it was an issue and responded to it both in their opening at hearing and in their reply brief; at no time did Defendant object to its inclusion as an issue. Defendant has consented to its inclusion as an issue to be decided.

CONTENTIONS OF THE PARTIES

Claimant contends that she requires a lumbar surgery and associated TTDs due to her industrial accidents of February 22, 2017 and April 28, 2018, which aggravated her pre-existing low back condition. Her treating physician, Dr. Montalbano, related the need for surgery to her accidents because she was asymptomatic prior to the accidents and because of positive findings on her MRI and bone scan.

Defendant contends that the surgery proposed is neither reasonable nor necessary. The bone scan relied upon by Dr. Montalbano demonstrates inflammation, which can be caused by arthritis; moreover, the bone scan does nothing to prove Claimant's inflammation is acute and caused by the accident versus her arthritis. Lastly, Claimant is a poor candidate for surgery.

Claimant responds that her pre-existing degenerative lumbar spine condition has demonstrably progressed since it was first identified, converting from "subtle" degenerative changes in 2009 to a disc protrusion in 2018, with Claimant's pain complaints only occurring after the accident. Further, Dr. Montalbano did not rely exclusively on the bone scan to determine Claimant's need for surgery was due to the accident: he considered her medical history, his exam, her MRIs, her symptoms, and her failure of conservative measures.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Claimant's Exhibits (CE) A-KK, admitted at hearing;
3. Defendant's Exhibits (DE) 1-44, admitted at hearing;

4. The testimony of Claimant, Karen Cunningham, Burt Cunningham, Hollie Cunningham, Lisa Verdi, RN, Tiffany Brown, RN, Kristen Carp, and Denise Gray, taken at hearing;

5. The post-hearing depositions of Paul Montalbano, MD, Michael Hajjar, MD, and R. David Bauer, MD.

All outstanding objections are overruled.

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 was 49 years old at the time of hearing and had worked as a paraprofessional with special needs students for Defendant since 2014. Tr. 17:9-18:13.

2. **Relevant Medical History.** Claimant was involved in a motor vehicle accident on July 14, 2009, injuring her neck and back. CE Z:1264. Claimant was seen at the ER and followed up with her primary care physician, Robert Franklin, MD. *Id.* Claimant underwent a course of chiropractic treatment, and was referred to Michael Hajjar, MD, and Christian Gussner, MD, for her cervical spine and lumbar spine respectively. DE 3:18-19.

3. On September 30, 2009, Claimant saw Dr. Gussner. Dr Gussner recorded that Claimant had prior chiropractic treatment in Las Vegas one to two times for her low back, with complete relief of her symptoms. DE 6:39. Since the motor vehicle accident, Claimant had low back pain which was “constant, stabbing, and radiat[ing]” down her back and into her legs. *Id.* Dr. Gussner referred her to physical therapy and continued her pain medications. *Id.* at 40.

4. On October 30, 2009, Claimant returned to Dr. Gussner to review her lumbar MRI results. Dr. Gussner recorded that the lumbar MRI showed an L5-S1 protrusion and bilateral L4-

L5 foraminal stenosis. DE 6:42. Claimant underwent an ESI shot at her left L5-S1, which provided about a 30% reduction in pain. *Id.* at 45.

5. Dr. Hajjar also reviewed the lumbar MRI and recorded it showed “some subtle degenerative changes at the L5-S1 disc with some subtle disc bulges.” DE 5:29. Dr. Hajjar opined that no intervention, including surgery, was necessary for Claimant’s low back based on the MRI. *Id.* By December 12, 2009, Claimant’s low back was “significantly better.” *Id.* at 30. Dr. Hajjar eventually performed a C4-C5 and C5-C6 fusion for Claimant’s neck injury with good results. *Id.* at 31-38.

6. Claimant had a lifting injury to her low back in 2011. CE Y:1231. Claimant presented to Matthew Hales, DC, on September 28, 2011, and reported bilateral radiating low back pain. *Id.* Claimant treated with Dr. Hales from September 28, 2011 until October 28, 2011 for 12 sessions. *Id.* at 1231-1242. On January 5, 2012, Claimant presented to Dr. Hales and reported a “[v]ery sore low back, just started out of nowhere.” *Id.* at 1243. Claimant treated with Dr. Hales again on January 10 and 12. *Id.* at 1244-1245. On April 2, 2012, Claimant saw Dr. Hales and reported “constant sharp and tightness discomfort in the low back.” *Id.* at 1246.

7. On November 26, 2012, Claimant reported “frequent bilateral low back pain” to Eric Dahl, DC. *Id.* at 1247. Claimant treated with Dr. Dahl again on November 28, 2012 and reported improvement after treatment. *Id.* at 1248. On January 28, 2013, Claimant reported low back pain to Dr. Dahl, which was improved with treatment. On November 7, 2013, Claimant treated with Dr. Dahl again, reporting constant shooting pain and achy discomfort in her buttocks; Claimant treated again on November 8 and reported improvement with treatment. CE Y:1249-1251. There are no other records of low back pain after this appointment.

8. **Industrial Accident – February 22, 2017.** On February 22, 2017, Claimant was with Student One² on the playground at Willow Creek Elementary; she was transitioning him back inside, when Student One started running away from her. Tr. 19:21-20:7. Claimant described the accident as follows:

Once I caught up to my student we were both running full speed and I was calling on the radio - - the walkie-talkie at the same time I was chasing him... by the time I caught him the momentum of me grabbing the back of his coat and taking him over to [the] left into the grassy area so he wouldn't get hurt, I put myself over the top of him, so as not to hurt him and he is fighting, fighting, fighting. He's very strong.

Id. at 23:21-22:7. Claimant and another teacher then carried Student One back to the school while he was kicking, biting, and screaming. *Id.* at 23:2-6. Student One was placed in the "quiet room," which did not have a door; Claimant braced herself against a room divider to keep Student One in the quiet room, while Student One rammed the room divider with the full force of his body, and this continued for approximately two hours. Clt. Depo. 40:15-42:2. Claimant reported that she had injured her neck and back and was referred to Saint Alphonsus for treatment. Tr. 24:2-20.

9. On February 25, 2017, Claimant presented to Saint Al's Urgent Care. DE 12:93. Claimant reported neck and low back pain, but relayed she was more concerned with her neck pain because of her previous fusion. *Id.* Claimant was diagnosed with cervical strain, lumbosacral strain, and neck pain; Claimant was prescribed anti-inflammatories, muscle relaxants, and pain medication and was instructed to follow-up with occupational health. *Id.* at 96-97.

10. On March 3, 2017, Claimant followed-up with St. Al's Occupational Health and saw Travis Smith, PA. DE 13:100. Claimant's low back exam showed "paraspinous muscle tenderness in the lower lumbar area following about an L4-L5 level with tightness, but no acute

² At the parties' request, this decision will refer to the student involved in both accidents as "Student One." Tr. 7:9-8:5.

spasming appreciated. She has near full lumbar flexion and extension. But does complain of pain on range of motion testing.” *Id.* at 101. Claimant was issued work restrictions and prescribed physical therapy. *Id.* at 102. By April 14, 2017, Claimant’s low back pain had “improved significantly,” her previous tightness had improved, her lumbar flexion had also improved and she had no pain on return extension, but she was still having neck pain. *Id.* at 106. At her follow-up appointment on May 2, 2017, Claimant reported her low back pain continued to improve, but her neck pain was worsening; PA Smith ordered a cervical MRI and further physical therapy. *Id.* at 111. At follow-up on May 10, 2017, Claimant felt her symptoms were not getting worse, but were not improving either; Claimant’s cervical MRI showed changes from her 2009 cervical MRI, and Claimant was referred to Dr. Hajjar. *Id.* at 114.

11. Claimant saw Dr. Hajjar on June 16, 2017; Claimant reported she was currently experiencing back pain on her intake form. DE 16:196, 200. Dr. Hajjar recorded Claimant’s most recent MRI showed an acute disk herniation at C6-C7, that she had failed nonsurgical treatment, and recommended an extension of her previous neck fusion. *Id.* at 197. The surgery was authorized on July 18 and Claimant underwent surgery on July 27. CE R:1084, 1083.

12. On August 17, 2017, Claimant returned to Dr. Hajjar and reported doing very well; Dr. Hajjar issued a light-duty work release to begin August 28th, allowing Claimant a gradual return to full-time work, no overhead work, and no lifting above 15-20 pounds. CE R:932-933. Claimant attempted a return to work at that date but was in so much pain she was instructed by her employer to take off work again. DE 19:241. On September 6, 2017, Dr. Hajjar recommended a course of physical therapy before Claimant returned to work and took her off work until her next appointment on October 13, 2017. CE R:930.

13. On October 10, 2017, at physical therapy, Claimant reported increased soreness in her lower back. DE 14:158.

14. On October 13, 2017, Dr. Hajjar recorded that Claimant was “okay,” but was “concerned that any abrupt impact that might occur at work in taking care of an unpredictable child might affect her recovery. Therefore, we will hold off on return to work for another few weeks...” DE 16:206.

15. On December 1, 2017, Claimant returned to Dr. Hajjar and reported her neck pain was worsening. *Id.* at 209. On December 15, 2017, Dr. Hajjar recommended another surgery because Claimant had developed pseudoarthrosis. *Id.* at 213. On January 8, 2018, Claimant underwent her second industrially-related cervical fusion. DE 21:263.

16. On February 16, 2018, Claimant returned to Dr. Hajjar and was reportedly happy with the results of her second surgery; Dr. Hajjar kept her off work until March 30, 2018. DE 16:215-216.

17. On April 4, 2018, Claimant reported to her physical therapist that she had more pain in her back and chest. CE W:1201.

18. Claimant saw Dr. Hajjar again on April 11, 2018 and reported “multiple pain issues;” Dr. Hajjar recorded his opinion that Claimant was “safe and ready” to go back to work, but that Claimant was “very reluctant” to go back. DE 14:218. Dr. Hajjar released Claimant to full-duty work at this appointment. *Id.* at 219. Claimant went back to work on April 17, 2018. DE 23:280.

19. **Industrial Accident – April 25, 2018.** On April 25, 2018, Claimant was in the extended resource room of Willow Creek Elementary with Tiffany Brown, a nurse, Kristen Carp, another paraprofessional, and Denise Gray, a special education teacher. Tr. 31:2-38:13. Claimant

was working with a wheelchair-bound student when Student One entered the room. *Id.* What happened next is disputed.

20. Claimant described that Student One came up behind her, put his hands on her shoulders, and screamed in her ear, startling her, causing her to jump. *Id.* Student One then tried to get into Claimant's lap for a hug, but she held him off, causing nearly both to be knocked to the ground. *Id.* Student One was reportedly 150 pounds at the time of both accidents. *Id.* at 23:11-3.

21. Tiffany Brown wrote a statement on April 27, 2018 wherein she described that Student One placed his hands on Claimant's shoulders for about a minute or so and then tried to give Claimant a hug, to which Claimant said no. DE 26:313 Student One then backed away and Ms. Gray told Student One he needed to go back to what he should be doing. *Id.* At hearing, Ms. Brown testified to essentially the same facts but clarified that she did not hear Student One yell, see Claimant jump, or remember Claimant pushing Student One away. Tr. 92:7-94:12; 102:14-16.

22. Kristen Carp wrote a statement on May 8, 2018. She wrote "I saw [Student One] come into [the] classroom, happy to see Karen. He went for a hug and Karen immediately put both hands up and asked for [a] high 10." DE 29:323. At hearing, Ms. Carp admitted it was possible Claimant was holding up her hands to stop Student One. Tr. 113:21-23.

23. Denise Gray wrote a statement on April 27, 2018. Ms. Gray wrote

"[Student One] entered from the direction she was facing. He tried to hug her and I told him not to. Karen told him that she could give him a side hug and she did. He tried again to hug her and I yelled at him to get off of her. He complied."

DE 27:314. At hearing, Ms. Gray clarified that while she thought Claimant was facing the direction Student One entered, she was "not necessarily" saying Claimant saw Student One approach. Tr. 124:14-18.

24. Claimant reported her injury via text to Ms. Gray the next day. CE J:114. In the text, Claimant states that she had been up all night with neck pain from “[Student One] grabbing me and scaring me.” *Id.* Ms. Gray responded that she was sorry to hear that, that she hoped Claimant felt better, and thanked her for letting Ms. Gray know she would be out. *Id.*

25. Claimant presented to David Landis, PA, on April 27, 2018. DE 29:315. Claimant reported neck and low back pain. *Id.* Claimant’s low back exam was normal except for some tenderness and pain at the endpoints of her range of motion. *Id.* at 316. Claimant was prescribed pain medications and a cervical collar; Claimant was taken off work and referred to Cody Heiner, MD, due to her cervical spine’s complex treatment history. *Id.* at 317. PA Landis recorded “[l]umbar exam was brief with more focus on her cervical spine complaints.” *Id.*

26. Claimant saw Dr. Heiner on April 30, 2018. *Id.* at 318. Dr. Heiner recorded his impression that Claimant suffered a mild aggravation of her underlying chronic neck pain without any new pathology; Dr. Heiner referred Claimant to a psychologist, Mack Stephenson, MD, and a spine surgeon, Paul Montalbano, MD. *Id.* at 318, 322.

27. On June 5, 2018, Claimant saw Dr. Montalbano. DE 30:324. Claimant reported she hurt her neck and low back in the April 25th incident. *Id.* Dr. Montalbano ordered MRIs of Claimant’s neck and low back, a CT scan of Claimant’s neck, X-rays of Claimant’s low back, and prescribed Flexeril, diclofenac, and Ultram. *Id.* at 325. Dr. Montalbano recorded: “I have made it quite clear to Ms. Cunningham that after the above workup is completed if there is no evidence to support her subjective complaints it would be my opinion she has continued to reach medical stability and I would not recommend any additional workup.” *Id.*

28. Claimant was deposed on June 6, 2018. DE 31. At the time of her deposition, Claimant described her physical condition as follows: “[p]ain in my neck that goes down and in

between my shoulders. Migraine headaches. My left elbow has pain and tingling. Numb fingers. Severe pain in my lower back, that goes across my lower back.” *Id.* at 376. Claimant stated that her current pain was “very different” than the type of pain that had caused her to seek chiropractic care in the early 2010s; her low back pain made it hard to bend, twist, or crouch down. *Id.* Claimant said her low back pain started after the February 2017 accident, but got better with physical therapy, and was now “much more severe” after the April 2018 incident and was getting progressively worse. *Id.*

29. Claimant’s lumbar X-ray was read on July 13 as showing “moderate narrowing of the L5-S1 disc space” and “degenerative disc disease” at that level. DE 30:326. Claimant’s lumbar MRI showed degeneration at L3-S1; the technician recorded their impression as follows: “L5-S1: Disc and end plate degenerative change. Disc bulge with moderate left paracentral disc protrusion which contacts the left S1 nerve root. There is moderate left foraminal stenosis.” DE 32:379. Claimant returned to Dr. Montalbano on August 8, 2018; Dr. Montalbano recorded there was no evidence of significant nerve root compression or gross instability in Claimant’s lumbar spine. DE 30:327. Dr. Montalbano diagnosed lumbar spondylosis without myelopathy/radiculopathy and lumbosacral disk degeneration and ordered a bone scan. *Id.* at 328. Dr. Montalbano diagnosed pseudoarthrosis at Claimant’s C6-C7 level. *Id.*

30. Claimant saw Dr. Gussner on August 20, 2018. CE Q:890. Dr. Gussner reviewed Claimant’s imaging and conducted a physical exam. *Id.* at 863-867. Dr. Gussner started Claimant on gabapentin and recommended a left L5-S1 ESI shot. *Id.* at 867. Claimant underwent the ESI shot on August 30, 2018. *Id.* at 860. At follow-up on September 12, 2018, Claimant reported gabapentin resulted in blurry vision and bad dreams and the ESI shot provided 0% pain relief;

Dr. Gussner decided to trial Claimant on Lyrica and recorded “her goal is avoid opiates but she is really struggling to find something that will relieve even 30-40% of her pain...” *Id.* at 857-858.

31. Claimant’s bone scan was conducted on September 14, 2018 and showed the following low back findings: “moderate uptake anteriorly at the L5/S1 level is greater than expected for typical postoperative change (unless the surgery was recent)... The differential diagnosis is advanced L5/S1 disc degeneration or a possible pseudoarthrosis.” DE 26:388.

32. At follow-up on September 19, 2018, Dr. Montalbano wrote that the bone scan showed increased uptake at the C6-C7 level consistent with pseudoarthrosis and “significant” uptake at the L5-S1 level secondary to inflammatory diskitis. DE 30:330. Dr. Montalbano recommended surgery for Claimant’s cervical spine. *Id.*

33. Claimant followed up with Dr. Gussner on September 26, 2018. CE Q:850. Dr. Gussner recorded Lyrica resulted in blurry vision and no pain relief; Dr. Gussner continued Claimant on Norco. *Id.* at 853.

34. At her follow-up appointment on October 4, 2018, Dr. Montalbano recommended surgery for Claimant’s low back. DE 30:333. He wrote to the claims examiner as follows: “In terms of her low back pain and claimed injury, I would defer to this to you in terms of causation. I am unaware really of the specifics of her work related injury. If you would like me to review her work related injury please feel free to send me those records.” *Id.* at 333. Dr. Montalbano indicated Claimant wanted to proceed with her low back surgery first because her low back pain was “out of proportion” to her neck pain. *Id.* Dr. Montalbano referred Claimant to Robert Calhoun, PhD, for a neuropsychological evaluation. *Id.* at 334.

35. Claimant saw Dr. Calhoun on October 12, 2018. DE 37:390. Dr. Calhoun interviewed Claimant, conducted personality tests, and reviewed records. *Id.* Dr. Calhoun

recommended six sessions of cognitive behavioral pain management therapy. *Id.* at 398. Claimant returned to Dr. Calhoun for four sessions, and on January 9, 2019, Dr. Calhoun opined that there were no psychological factors that would preclude her from being a reasonable candidate for spine surgery. *Id.* at 403.

36. On October 29, 2018, Defense counsel wrote to Dr. Montalbano and included Claimant's 2009 accident related records, her early 2010s chiropractic treatment, her primary care physician records, her 2017 injury records, her deposition, and the witness statements from the 2018 accident. Montalbano Depo. Ex. 2. Dr. Montalbano reviewed these records, but it is unclear if he ever responded to Defense counsel's queries. Montalbano Depo. 18:12-19:12.

37. Claimant underwent her third cervical surgery on February 11, 2019 to correct the pseudoarthrosis at her C6-C7 level. CE T:1143. Claimant followed up with Dr. Montalbano on February 20, 2019 and reported doing well. *Id.* at 1118.

38. On April 16, 2019, Dr. Hajjar responded to a letter from Defendant. DE 16:220. Dr. Hajjar reviewed records and provided his "unequivocal" opinion that Claimant's low back condition was completely related to her pre-existing degenerative condition, and not either work injury. *Id.* at 225.

39. On May 29, 2019, Claimant saw Dr. Montalbano again; Dr. Montalbano opined that if Claimant's low back condition was asymptomatic for six months prior to her work-related injury, then her current low back condition was related to the work accident based on his review of her records and history. DE 30:348.

40. On July 17, 2019, Dr. Montalbano ordered repeat lumbar MRIs and X-rays; Dr. Montalbano recorded that if these scans showed no change, he would continue to recommend Claimant undergo lumbar surgery. CE T:1115. On August 14, 2019, Dr. Montalbano reviewed the

lumbar MRIs and X-rays, opined they showed no interval change, and continued to recommend surgery. *Id.* at 1114.

41. Claimant was examined by R. David Bauer, MD, for an independent medical exam at Defendant's request on October 17, 2019. DE 38:404. Claimant was accompanied by Lisa Verdi, RN, a legal nurse consultant. Dr. Bauer conducted an examination, reviewed records, and issued a report. *Id.* Dr. Bauer diagnosed the following: (1) cervical strain related to the February 23, 2017 incident on a more probable than not basis, (2) lumbar strain related to the February 23, 2017 incident on a more probable than not basis, (3) post cervical surgery with adjacent segment degenerative changes in the cervical spine, treated surgically with three surgeries, neither aggravated by nor accelerated by the incidents in question, (4) lumbar degenerative disease, neither aggravated by nor accelerated by the incidents in question, and (5) history of depression and anxiety. *Id.* at 438-439.

42. Dr. Bauer opined that the degenerative findings in Claimant's low back would have been present regardless of either the February 2017 or April 2018 incidents and were a result of the progression of Claimant's previously documented degeneration. Dr. Bauer wrote "[t]he peer reviewed medical literature demonstrates that the types of incidents that are described would not change the structure of the lumbar spine, nor would they aggravate the preexisting degenerative change." *Id.* at 442. Dr. Bauer opined that Claimant was "an extremely poor candidate for surgery" based on his review of the medical literature regarding worker's compensation claimants and low back surgery. *Id.* Regarding Claimant specifically, Dr. Bauer found that Claimant's depression and anxiety were "likely the major factor in her ongoing subjective complaints of neck and back pain." *Id.* at 444. Dr. Bauer opined that if surgery was pursued, he agreed an anterior lumbar fusion was appropriate followed by physical therapy, but that he would not recommend surgery for Claimant

regardless of etiology. *Id.* at 445. Dr. Bauer concluded with his opinion that the April 2018 accident, as described by Claimant and “assuming the worst,” would have resulted in a soft tissue injury that would have resolved over time, and that Claimant’s current complaints were the result of her progressive degenerative changes. *Id.* at 448.

43. Claimant returned to Dr. Montalbano on October 23, 2019, who recommended bilateral facet joint injections; Dr. Montalbano wrote that if Claimant did not improve after the injections, he would again recommend surgery. CE T:1112. On November 12, 2019, Claimant received bilateral facet joint injections. *Id.* at 1146. On November 20, 2019, Claimant reported only very brief relief with the shots, and then a return of symptoms five days afterwards. *Id.* at 1111.

44. On December 5, 2019, Claimant’s attorney wrote to Dr. Montalbano regarding Claimant’s condition. DE 30:351. Claimant’s attorney included Dr. Bauer’s October 17 report and asked a series of questions regarding Claimant’s treatment. *Id.*

45. On December 11, 2019, Dr. Montalbano wrote that Claimant was not at MMI regarding her low back and was under restrictions due to her low back. DE 30:354. Regarding causation, Dr. Montalbano wrote:

In terms of causation of her low back pain, I believe this is related to both injuries...

Dr. Bauer did relate that she is [an] extremely poor candidate for surgery for her low back pain. I respectfully disagree with his opinion based on several factors. The only reason we operated on her neck at the C6-7 was based on the positive bone scan consistent with a pseudoarthrosis at the level C6-7. She did well from this operation. Her symptomology has resolved. It would be appropriate to expect the same result after her above lumbar surgery given that she has a significant bone scan finding at the level of L5-S1 as she did involv[ing] the interspace at the level C6-7. One can surely extrapolate that the above issues.

In terms of a psychological component, Ms. Cunningham is not addicted to narcotics. She has been evaluated by Dr. Calhoun who cleared her for surgery. I do

not understand Dr. Bauer's opinion that she is [an] extremely poor candidate for surgery given the above statements.

Id. at 355.

46. Dr. Bauer responded to Dr. Montalbano's opinion by letter dated January 13, 2020. DE 38:450. Dr. Bauer dismissed Dr. Montalbano's opinion because it was flawed by the "proctor hoc fallacy;"³ in other words, Dr. Montalbano concluded that because Claimant was symptomatic after the incidents and was not symptomatic before, therefore, her symptoms were caused by the incidents. Dr. Bauer elaborated

"[h]owever, there is excellent peer reviewed literature that conclusively demonstrates that the incident in question does not alter the structure of the lumbar spine, nor does it create low back illness. Ms. Cunningham does not have any structural lesion that would correspond to her subjective complaints. All imaging findings are degenerative and preexisting. These imaging-based degenerative features are likely part of normal aging and unassociated with pain. Severe degeneration is routinely identified in otherwise asymptomatic individuals. It has been shown that these structural variables detected on imaging have extremely weak association with subsequent back pain episodes and no association with disability or future medical care. It is not the injury that predicts long term back pain complaints but the worker in whom the injury occurred. One cannot conclude that the long term subjective complaints in the lower back are related to this incident.

DE 38:450-451. Dr. Bauer then explained the efficacy of utilizing the SPECT bone scan for various back diagnoses and concluded with his opinion that the literature showed a SPECT scan was not a useful tool for predicting successful lumbar fusions for axial low back pain. *Id.* at 452.

47. On January 25, 2020, Wanda Roberson with Intermountain Claims sent Dr. Bauer Claimant's imaging, including X-rays, MRIs, and a CT scan. Bauer Depo. Ex. 4. Dr. Bauer opined that the low back imaging showed degenerative findings consistent with Claimant's age and did not show a traumatic herniation. *Id.*

³ Post hoc ergo propter hoc is a Latin phrase meaning "after this, therefore because of this" and is a logical fallacy. "Post hoc, ergo propter hoc." Merriam-Webster.com Dictionary, 2020.

48. Claimant and her husband testified at hearing on February 13, 2020. Claimant recalled that she had no low back pain from 2013, the date of her last chiropractic treatment, until the accident in February 2017. Tr. 46:14-22. Claimant's husband testified that after the first accident in February 2017, Claimant "constantly" complained of low back pain. Tr. 72:20-24.

49. Dr. Montalbano was deposed on February 26, 2020. Dr. Montalbano agreed that the type of accidents Claimant experienced could cause Claimant's pain. Montalbano Depo. 10:3-5. Dr. Montalbano explained he disagreed with Dr. Bauer's opinion regarding Claimant's condition because Dr. Bauer did not address the fact that Claimant was asymptomatic prior to the work accident, nor did he explain why Claimant's bone scan was positive at her L5-S1 degeneration and not nearby levels. *Id.* at 22:6-19. Dr. Montalbano would have agreed with Dr. Bauer that surgery was not indicated if Claimant only had positive findings on her X-rays and MRIs and mild uptake on her bone scan, however, Claimant had "markedly positive" uptake at her L5-S1 level. *Id.* at 22:23-23:11. Dr. Montalbano testified that Claimant had tried all other reasonable modalities to alleviate her pain, and at this point her choices were to live with the pain or have the fusion surgery. *Id.* at 23:13-24:6. Dr. Montalbano attributed 50% of the need for surgery to Claimant's first accident and 50% to the second accident. *Id.* at 28:17-24.

50. On cross-examination, defense counsel questioned Dr. Montalbano regarding the other positive findings on the bone scan and their significance. Dr. Montalbano explained that although the bone scan showed uptake at other locations in Claimant's body, that uptake was "mild"; Claimant's C6-C7, the level of her failed cervical fusion, and L5-S1 showed moderate uptake: "[a]nd where I recommend surgery based on positive bone findings is that there has to be significant uptake. It can't be mild - - like it is in her AC joint, in her knees, elbows, and wrists - - it's got to be significant." *Id.* at 34:17-36:19. When asked what the medical literature said about

the efficacy of bone scans in determining whether to proceed to low back surgery, Dr. Montalbano responded:

There's studies out there in the literature that's for and against it, but I've been using bone scans for almost 30 years. And if you have a patient with positive bone scan correlate with their MRI scan, I'd operate on that patient every day of the week and twice on Sundays when they fail conservative measures, and they'll have a great result.

Id. at 37:22-38:8. Dr. Montalbano reiterated that he utilized his exam, Claimant's history, her failure of conservative measures, and her imaging, including her MRIs, X-rays, CT scans, and the bone scan, in reaching his recommendation for surgery. *Id.* at 38:9-19.

51. On re-direct, Dr. Montalbano explained that a bone scan shows inflammation, but the inflammation can be degenerative, infectious, plastic, or traumatic, and that in this case, it was disk degeneration that was causing an inflammatory response. *Id.* at 44:16-45:1.

52. Dr. Hajjar was deposed on May 20, 2020. Dr. Hajjar explained his opinion that Claimant's need for surgery was unrelated to the April 2018 accident because of her history of previous low back symptoms and documented degenerative condition: "if the symptoms predate the injury, accident, or event and there is no change in the X-rays... then that leads to my opinion." Hajjar Depo. 19:7-20:19; 22:22-25. Dr. Hajjar recalled that when he treated Claimant "[w]e hadn't talked much about her low back. It seemed to affect her off and on over time." *Id.* at 19:25-20:1. Dr. Hajjar opined that bone scans were "sort of useless" in terms of establishing causation "because the scan doesn't tell you whether or not the findings or problems started from a specific event or an accident or if it is just a longstanding, chronic degenerative issue." *Id.* at 23:18-25. Regarding the decision to have surgery, Dr. Hajjar said it was a clinical decision about whether or not her symptoms were bad enough to proceed. *Id.* at 24:13-17. Dr. Hajjar did not provide an opinion on

whether the proposed surgery was reasonable or not but was instead focused on causation. *Id.* at

19:4-5. Defense counsel wrapped up with the following inquiry:

Q: [Mr. McPeek] Now, do you attach any significance to a period of time that a person who has had a symptomatic degenerative condition may have not been having symptoms or seeking medical treatment, in terms of the causation decision?

A: Well it depends on what the records show. Most of the treatments that can be offered to people are finite over a short period of time, and they are taught to manage the issues or conditions over time after that. So, no, there is no specific guideline or rule that I have about a period of time. Many times, you will see significant lapses in a patient's history that have nothing to do with their actual status.

Q: Those may be a period of several - -

A: Months.

Q: - - years?

A: It could be years.

Id. at 24:21-25:12.

53. On cross-examination, Dr. Hajjar agreed that a traumatic event could cause an asymptomatic condition to become symptomatic. *Id.* at 26:23-27:3. Claimant's counsel posed a hypothetical scenario to Dr. Hajjar wherein a patient has an accident, is complaining of low back pain, had an MRI five years prior which showed mild degenerative changes at L5-S1, but had been asymptomatic for four years, and a new MRI showed worsened degenerative changes: would the worsened findings on the MRI be due to the accident? Dr. Hajjar responded, no, the worsening of the degeneration would not be due to the accident, degeneration will always continue over time, however, the conversion of this hypothetical patient's asymptomatic status to symptomatic would be due to the accident. *Id.* at 30:25-32:24. Dr. Hajjar added that in the context of Claimant's case, his issue with causation was that when he first saw Claimant in June of 2017, he had no notes where she complained of back pain. *Id.* at 33:3-5.

54. Dr. Bauer was deposed on June 16, 2020. Dr. Bauer testified that after he stopped doing surgery about three years ago, his practice had focused on forensic examinations using evidence-based medicine. Bauer Depo. 6:19-22; 11:7-13:25. Dr. Bauer described Claimant's physical exam as normal with subjective pain complaints. *Id.* at 22:1-2. Dr. Bauer also conducted simulated compression tests to detect non-physiological symptoms and explained:

Simulated compression of her back caused increased back and leg pain. What that means is I put my hands on her shoulders, and I grunted as if I am pushing down. Literally, I just put my hands on her shoulders. I asked her if that increased pain; and she said "Yes." That is a sign of - - that is a non-physiologic sign because just placing my hands on her shoulders would not put any increased pressure in the discs of her back. There are so many discs between where I put my hands and her shoulders and her low back that the force is just not dissipated.

Bauer Depo. 19:14-20:1. Dr. Bauer explained it was important to test for non-physiological responses because if someone has several non-physiological responses, they are less likely to have a good result from surgery. Dr. Bauer did not think low back surgery was reasonable because (1) based on peer reviewed literature he did not think there was a causal relationship between the incident and her complaints and (2) fusion surgery was "not often successful" in workers' compensation patients, especially if they had been on opioids for a long term or had a history of anxiety and depression. *Id.* at 23:12-24:2. Regarding both accidents, Dr. Bauer accepted Claimant's account as true in arriving at his opinions and classified both of her accidents as "minor trauma":

A major trauma is one where the body sustains a spinal fracture, a long-bone fracture - - basically, somebody has been, in my New-York-ism, messed up by their injury. Anything else - - car accidents up to sixty miles an hour, falls of significant height, being thrown to the ground - - the incidents described by Ms. Cunningham would be described as minor trauma because they did not result in any of these other perturbations. Ms. Cunningham's description of the trauma was still a minor injury because she didn't have the other conditions.

Id. at 27:19-28:16. Dr. Bauer based his opinion on a study by Dr. Eugene Carragee which concluded that minor traumas do not lead to changes in the structure of the spine or long-term low back illness. Dr. Bauer did opine that a person with degenerative disease in their low back could suffer an aggravation by these types of incidents, specifically by developing radiculopathy, but that Ms. Cunningham never had any evidence of radiculopathy.

55. On cross-examination, Dr. Bauer reiterated that an asymptomatic degenerative condition can be converted to a symptomatic condition by a traumatic event but opined that because “there is no change to the structure of [Claimant’s] degeneration, ergo it is not aggravated.” *Id.* at 40:2-13. Dr. Bauer affirmed that he saw no low back complaints in Claimant’s medical records from 2009 to 2017.⁴ *Id.* at 58:8-12.

56. Dr. Bauer testified that regardless of the work accident, Claimant would have had the protrusion seen on her July 2018 lumbar MRI because Claimant’s degenerative condition would have worsened since her 2009 low back MRI; in other words, the accident did not cause the protrusion, Claimant’s degenerative condition did. *Id.* at 59:25-61:13. Dr. Bauer based this opinion on the Carragee study and said “[i]t can be applied directly to Ms. Cunningham because she fits the population that was studied.” *Id.* at 61:23-24. Regarding why Claimant complained of low back pain only after the February 2017 accident, Dr. Bauer emphasized that they were subjective complaints and that “[y]ou cannot tie those subjective complaints to the degenerative findings since those identical degenerative findings are in a widespread asymptomatic population.” *Id.* at 61:25-62:11. Dr. Bauer reiterated that it was more probable than not that Claimant’s persistent pain complaints were related to her anxiety, depression, and worker’s compensation claim versus her accidents based on the Carragee study. *Id.* at 62:12-63:2.

⁴ It does not appear Dr. Bauer had Claimant’s chiropractic records from 2011 to 2013.

57. Dr. Bauer admitted it was not impossible for Claimant's L5-S1 condition to be related to the February 2017 accident, but it was his opinion that it was not related on a more probable than not basis. *Id.* at 63:10-23. Dr. Bauer explained his opinion would be different if Claimant had complained of leg pain within 24-48 hours after injury and had imaging showing a disc herniation compressing the nerve root because in that scenario the timing and anatomical findings would match the complaints. *Id.* at 64:20-65:6.

58. **Condition at Hearing.** At the time of hearing, Claimant testified that her low back symptoms had worsened since the second alleged injury. Tr. 42:1-2. Claimant explained that her symptoms depended on the day, but described shooting pain down to almost her knees, muscle spasms, and a "constant deep ache." Tr. 42:5-10.

59. **Credibility.** Claimant, her husband, her daughter, and Ms. Verdi all testified credibly. Ms. Brown, Ms. Carp, and Ms. Gray also testified credibly, however, all three admitted that their recollections were better at the time of their statements, and none seemed to have a good memory of what occurred on April 25, 2018 by the time of hearing.

DISCUSSION AND FURTHER FINDINGS

60. A worker's compensation claimant has the burden of proving, by a preponderance of the evidence, all the facts essential to recovery. *Evans v. Hara's, Inc.*, 123 Idaho 473, 479, 849 P.2d 934 (1993). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447-48, 74 P.2d 171, 175 (1937).

61. **Injury/Accident.** Idaho Code § 72-102(18) defines injury and accident: "(a) "Injury" means a personal injury caused by an accident arising out of and in the course of any employment covered by the worker's compensation law. (b) "Accident" means an unexpected,

undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury.” Causation is an issue whenever entitlement to benefits is at question. *Gomez v. Dura Mark, Inc.*, 152 Idaho 597, 601, 272 P.3d 569, 573 (2012). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). A pre-existing disease or infirmity of the employee does not preclude a workers’ compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983).

62. Defendant does not dispute that an accident occurred on February 22, 2017 that caused injury and has accepted and paid for her three cervical surgeries. Defendant also does not dispute that an “incident” occurred on April 25, 2018 but contend that it did not cause injury to Claimant’s low back. Per Idaho Code § 72-102(18)(b), to be an accident, it must cause injury. Defendant has not argued the April 2018 “incident” was not an “unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred.” This Referee is convinced by the evidence presented that the April 2018 incident meets at least that criteria for an accident despite the conflicting accounts from eyewitnesses. In *Spivey v. Novartis Seed Inc.*, 137 Idaho 29, 43 P.3d 788 (2002), reaching across a conveyer belt to pick up a seed was deemed an “accident,” and in this case, even the mildest version of the incident (that Student One just gave Claimant a high ten per Ms. Carp) would be an accident under that portion of the statute and case law as long as it caused injury as well.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 22

63. Further, Claimant was very consistent in her re-telling of the April 2018 incident, to every single provider, at hearing, and at deposition. Ms. Carp, Ms. Gray, and Ms. Brown all testified they were engaged in other matters when the incident occurred; Ms. Gray and Ms. Brown were going over paperwork and Ms. Carp was attending to her special needs student at that time. Moreover, their statements at the time mostly correlate with Claimant's recollection of what caused injury: Student One tried to give Claimant a hug. Claimant's version of the April incident is accepted for purposes of this decision.

64. As noted above and by Defendant at hearing, causation is always at issue, and to prevail, Claimant must show that it is more probable than not that the February 2017 accident and/or the April 2018 "incident" caused an injury to Claimant's low back. Drs. Hajjar, Bauer, and Montalbano each gave opinions on whether Claimant's February 2017 and/or April 2018 accidents could have caused an aggravation or acceleration of Claimant's low back condition; all three experts accepted Claimant's version of what happened on April 25, 2018 in reaching their conclusions. Drs. Hajjar, Bauer, and Montalbano all agreed that Claimant's low back imaging showed no acute findings, that Claimant suffered a pre-existing degeneration condition at the level of the proposed surgery and that a bone scan shows inflammation but not necessarily the cause of the inflammation or when it started.

65. **Dr. Hajjar.** Dr. Hajjar opined that Claimant's low back complaints were not related to either incident. The crux of Dr. Hajjar's opinion is that because Claimant had low back symptoms prior to the injury and had no acute findings on her imaging, that therefore Claimant's low back was entirely related to her degenerative condition. The low back symptoms that Dr. Hajjar relies on were last recorded in January 2013, four years and a month before her first industrial accident. When confronted with a similar hypothetical to Claimant's situation, where

the patient had been asymptomatic for four years, with documented degenerative findings, but had an accident and was thereafter symptomatic, Dr. Hajjar did agree that the accident was to blame for the conversion of the degenerative condition from asymptomatic to symptomatic. Dr. Hajjar attempted to differentiate Claimant from that hypothetical by stating that he had no notes from his initial June 2017 appointment where she complained of low back pain, stating this was one of his objections to relating Claimant's symptoms to her accident. However, Claimant did report back pain on her intake form. Further, in developing his written opinion, Dr. Hajjar had Claimant's occupational health records wherein she complained of low back pain right after the first accident. Dr. Hajjar offered no further clarification on why Claimant's case was distinguishable from Claimant's counsel's hypothetical.

66. Dr. Hajjar testified that "a lot" of his opinion was based on Claimant's history of low back complaints. Hajjar Depo. 29:14-19. Dr. Hajjar does not explain the four-year lapse in reported low back complaints, other than to state "[m]any times, you will see significant lapses in a patient's history that have nothing to do with their actual status." *Id.* at 25:6-8. Claimant and her husband consistently testified that Claimant's low back was asymptomatic for years prior to the February 2017 accident, which is correlated by her medical records: Claimant sought treatment for other chronic ailments during this four-year time frame, and there is no mention of low back pain. See CE Z. Dr. Hajjar's opinion is rejected.

67. Dr. Bauer's opinion is essentially that the peer reviewed medical literature does not support a causal relationship between the accidents and Claimant's symptoms. Dr. Bauer does not believe Claimant's pre-existing degenerative condition was aggravated because Claimant's imaging shows only degenerative changes, with no evidence of acute injury, and Claimant suffered minor trauma, which does not alter the structure of the spine. Further, Claimant's pain complaints

are subjective and more likely caused by her history of depression, anxiety, and the fact that this is a worker's compensation claim. Dr. Bauer does acknowledge a degenerative condition can be aggravated or accelerated by an accident, such as by developing radiculopathy or suffering a burst fracture.

68. Dr. Bauer's opinion, as applied, requires there to be changes to the structure of the degeneration to prove aggravation or acute findings: "there is no change to the structure of [Claimant's] degeneration, ergo it is not aggravated." Dr. Bauer relies on a study where the researchers had a pre-trauma MRI and a post-trauma MRI which Dr. Bauer asserts proved that minor trauma does not change the structure of the spine or lead to long-term, low back illness. However, Dr. Montalbano never suggests Claimant's lumbar spine structure was altered, or that the accident created Claimant's degenerative low back condition. Insofar as Dr. Bauer is responding to a theory of injury not made by Dr. Montalbano, Dr. Bauer's opinion is rejected.

69. Dr. Bauer believes that Claimant's depression, anxiety, and her worker's compensation claim are the cause of her low back pain on a more probable than not basis. Dr. Bauer does not explain why Claimant was asymptomatic for four years prior to her injury even though she was diagnosed with and treating for depression and anxiety during that time and had previously injured her low back and litigated that claim. See Tr. 58:25-59:5. Dr. Bauer also does not address that Dr. Calhoun, who treated Claimant specifically for the purpose of evaluating and managing her pain, cleared Claimant for surgery. Dr. Bauer's opinion is well researched, but there is very little in it that addresses Claimant specifically. Dr. Bauer's opinion on whether Claimant suffered an aggravation of her pre-existing condition is rejected.

70. Dr. Montalbano opined that Claimant's asymptomatic degenerative condition was converted to a symptomatic condition by both work accidents, attributing 50% to each.

Dr. Montalbano's reasoning is that Claimant was asymptomatic for at least six months prior to the first accident and was thereafter symptomatic and that Claimant's bone scan showed moderate uptake at her L5-S1, which Dr. Montalbano opined was a "significant factor" in determining causation. Montalbano Depo. 22:20-22. Dr. Montalbano's opinion is essentially that Claimant's moderate inflammation as shown on the bone scan and her pain correlate with her conversion from asymptomatic to symptomatic, therefore demonstrating injury, specifically inflammatory diskitis. Dr. Montalbano's opinion is simple and logical.

71. Further, Dr. Montalbano was initially skeptical of Claimant; in his first appointment with Claimant, Dr. Montalbano "made it quite clear" that if there was no evidence to support her complaints, he would declare her at MMI and not recommend further treatment. DE 30:325. Dr. Montalbano also had the benefit of observing, examining, and treating Claimant for at least a year and a half by the time of his deposition. Both these factors add more credibility to Dr. Montalbano's opinion that Claimant suffered an aggravation of her pre-existing low back condition.

72. The weakest aspect of Claimant's case is that Claimant's low back reportedly improved from physical therapy after her first accident and before her second accident. However, Claimant still reported back pain in June 2017, October 2017, and April 2018. Further, Claimant testified that she was more focused on her neck pain at that time, and that although physical therapy helped her, her low back pain never really went away. Tr. 27:17-19. This makes sense as Claimant was suffering from a failed cervical fusion and underwent another surgery during that time frame. Dr. Hajjar's testimony also supports her recollection; he testified that her low back affected her "on and off" during his treatment of her neck. Hajjar Depo. 19:25-20:1. Dr. Montalbano also testified that this was his understanding of Claimant's history and he still related her need for

surgery to both accidents. Montalbano Depo. 25:1-7. Dr. Montalbano's opinion that Claimant suffered an aggravation of her pre-existing condition is accepted.

73. **Medical Care.** Idaho Code § 72-432(1) requires an employer to provide an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter.

74. Dr. Bauer has opined that the surgery proposed by Dr. Montalbano is unreasonable. Dr. Bauer opined that lumbar fusions in a worker's compensation setting where claimants have been on opioids and have a history of anxiety and depression are "often not successful." Dr. Bauer cites to a number of studies for this proposition in his report but offers no specific details on how those studies apply to Claimant. Dr. Bauer's opinion raises more questions than it answers. How often are the surgeries unsuccessful? How long does a claimant have to be on opioids before the success rate starts to fall? How severe does the depression or anxiety have to be before it starts to effect surgical outcomes? Dr. Bauer gives no details on what about Claimant specifically, or the surgery specifically, forms the basis for his opinions as found in the literature he cites.

75. Dr. Hajjar did not opine on whether the proposed surgery was reasonable or not, stating that was a decision that a physician and patient make together based on the severity of the symptoms; he only opined on causation.

76. Dr. Montalbano explained he would agree with Dr. Bauer that surgery was not indicated based on Claimant's MRI and X-rays alone. Dr. Montalbano testified it was the addition of moderate vs. mild update at Claimant's L5-S1 which tipped the scales in favor of surgery, although he also considered his exam, her history, her imaging, and her failure of conservative

measures in making his recommendation for surgery. Dr. Montalbano did admit his use of a bone scan in this way was controversial in the scientific community, stating that there were studies for and against utilizing it to recommend surgery, however, he was confident based on his experience that Claimant would have pain relief with the fusion surgery. Moreover, Dr. Montalbano emphasized that Claimant had tried many other modalities to alleviate her pain: anti-inflammatories and muscle relaxants, physical therapy, significant weight loss (60 pounds by the time of hearing), and the “tincture of time.” The only option left to alleviate her pain was the fusion surgery he proposed. Dr. Montalbano’s opinion is accepted.⁵

77. **TTD/TPDs.** Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to disabled employees “during the period of recovery.” Claimant is entitled to TTD benefits for her surgery and period of recovery.

78. **Attorney’s Fees.** Claimant argues she is owed attorney’s fees. Idaho Code § 72-804 provides:

Attorney’s fees — Punitive costs in certain cases. If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

Defendant denied Claimant’s low back claim by way of letter on October 24, 2019. DE 40:462.

Claimant argues Defendant unreasonably denied her claim for lumbar surgery, but also argue for

⁵ Claimant’s health insurance has paid \$3,950.70 for Claimant’s low back treatment at an invoiced rate of \$13,194.96. CE JJ. The parties did not notice, argue, or brief how these bills should be treated.

attorney's fees due to Defendant "improperly interfer[ing] with her health care... fail[ing] to provide Dr. Hajjar with the necessary medical imaging for him to offer an informed opinion on causation, and then hir[ing] a biased and uncredible defense doctor." Clt's Opening Brief, p. 27. There are only three triggers for an award of attorney's fees under Idaho Code § 72-804: (1) an unreasonable denial, (2) neglecting or refusing to pay benefits owed after a written claim, (3) and discontinuing benefits without reasonable grounds. There is evidence of unreasonable interference by Defendant in attempting to return Claimant to work after her second cervical surgery, particularly when comparing Defendant's representation of what Claimant's job entailed to Dr. Hajjar versus what the job site evaluation showed. See DE 19:237; DE 24:306-311; CE L:118-119. However, this is not a basis for an award of attorney's fees.

79. Defendant's denial of Claimant's low back claim was reasonable. Defendant had conflicting statements of what happened during the April 2018 accident, a previous history of low back complaints, and no acute findings on Claimant's MRIs and X-rays. Claimant's request for attorney's fees is denied.

CONCLUSIONS OF LAW

1. Claimant suffered an aggravation of her pre-existing degenerative lumbar condition on February 22, 2017 and on April 28, 2018;
2. Claimant is entitled to the lumbar fusion surgery required by Dr. Montalbano;
3. Claimant is entitled to temporary disability benefits during her period of recovery from her surgery;
4. Claimant is not entitled to attorney's fees.

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 28th day of October, 2020.

INDUSTRIAL COMMISSION

Sonnet Robinson

Sonnet Robinson, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 2020, 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:

RANDALL SCHMITZ
1226 E KARCHER RD
NAMPA ID 83687

ERIC BAILEY
PO BOX 1007
BOISE ID 83701-1007

Eric Robinson

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KAREN CUNNINGHAM,

Claimant,

v.

JOINT SCHOOL DISTRICT NO. 2,

Self-Insured Employer,

Defendant.

IC 2017-007936

IC 2018-011996

ORDER

FILED

APR 13 2018

INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Sonnet Robinson submitted the record in the above-entitled matter, together with her 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 recommendation 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. Claimant suffered an aggravation of her pre-existing degenerative lumbar condition on February 22, 2017 and on April 28, 2018;
2. Claimant is entitled to the lumbar fusion surgery required by Dr. Montalbano;
3. Claimant is entitled to temporary disability benefits during her period of recovery from her surgery;
4. Claimant is not entitled to attorney's fees.

ORDER - 1

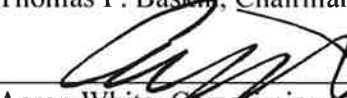
5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 6th day of November, 2020.

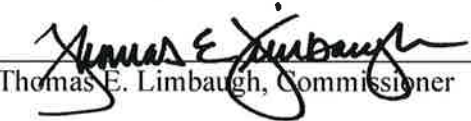
INDUSTRIAL COMMISSION



Thomas P. Baskin, Chairman



Aaron White, Commissioner



Thomas E. Limbaugh, Commissioner

ATTEST:

Kameron Slay
Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November 2020, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

RANDALL SCHMITZ
1226 E KARCHER RD
NAMPA ID 83687

ERIC BAILEY
PO BOX 1007
BOISE ID 83701-1007

ge

