BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY D. PICKENS,

Claimant,

v.

PETERSEN STAMPEDE DODGE,

Employer,

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Surety,

Defendants.

IC 2013-032785

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

FILED
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INDUSTRIAL COMMISSION

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 July 30, 2019. Bryan S. Storer represented Claimant, Gary D. Pickens, who was present in person. Susan R. Veltman represented Defendant Employer, Petersen Stampede Dodge, and Defendant Surety, Insurance Company of the State of Pennsylvania. The parties presented oral and documentary evidence, took post-hearing depositions, and submitted briefs. The matter came under advisement on April 6, 2020.

PRIOR PROCEEDINGS

The Referee held a prior hearing in this matter on January 29 and February 16, 2016. That hearing resulted in a decision dated August 12, 2016 that held as follows:

1. Claimant proved that his need for the proposed lumbar surgery, and any medical care related to it, was causally related to his industrial accident, reasonable and compensable.

2. Defendants were liable for Claimant's unreimbursed medical expenses, pursuant to Idaho Code § 72-432. This specifically includes the medical care that Claimant received from Dr. Marsh, the MRI of February 23, 2015, and any unreimbursed chiropractic expenses of Dr. Price related to Claimant's industrial condition. Pursuant to *Neel*, 147 Idaho 146, 149, 206 P.3d 852, 855 (2009), Claimant was entitled to recover 100% of the invoiced amounts of these medical expenses. Defendants, however, were not liable for Claimant's acupuncture treatment by Wang Medical.

3. Claimant failed to prove his entitlement to temporary disability benefits from June 9, 2015 through the date of hearing.

4. Defendants were liable for attorney fees pursuant to Idaho Code § 72-804 because they did not have reasonable grounds to deny Claimant compensation in the form of medical treatment, including surgery, related to his industrial condition.

ISSUES

The issues to be decided as the result of the July 29, 2019 hearing are as follows:

1. Whether the industrial accident caused the left hip condition for which Claimant is now seeking benefits.

2. Whether Claimant is medically stable, and if so, the date thereof.

3. Whether and to what extent Claimant is entitled to the following workers' compensation benefits:

    a. Medical care, including but not limited to the hip surgery that Claimant already obtained on his own.

b. Temporary partial and/or temporary total disability benefits.

c. Permanent partial impairment.

d. Permanent partial disability.

4. Whether Claimant is entitled to total and permanent disability, pursuant to the Odd-Lot Doctrine or otherwise.

5. Whether apportionment for a preexisting condition pursuant to Idaho Code § 72-406 is appropriate.

6. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

7. Whether and to what extent Defendants may apply for a credit against benefits previously paid against any additional benefits owed.

CONTENTIONS OF THE PARTIES

Claimant argues that his left hip condition is industrially related and that the surgery that he obtained on his own should be covered by Surety. He acknowledges that he had a prior hip injury in 1977, but that it was so remote in time and asymptomatic for decades that it is reasonable to conclude that the industrial accident is responsible for his hip condition, not the prior injury. Claimant further argues that the delay in obtaining back surgery, which was authorized by the first decision, caused him to walk with an antalgic gait that exacerbated his left hip. As for disability, Claimant argues that he is now unable to work, whereas he worked consistently before the industrial accident, and that seeking work would be futile, thus he is an Odd-Lot worker who is permanently and totally disabled.

Defendants argue that Claimant has preexisting osteoarthritis in his left hip related to his prior injury, and the need for hip replacement surgery is neither directly related to the industrial accident, nor a compensable consequence of that accident. Defendants argue that all TTD

payments due and owing have been paid. Claimant is at MMI and has received PPI payments due and owing that are related to the industrial accident. Defendants deny that Claimant has any permanent disability, either partial or total, related to the industrial accident, and that attorney fees are not appropriate. Finally, Defendants argue that Claimant received several overpayments on certain medical benefits for which Defendants are entitled to receive a recoupment from future benefits owed.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Joint Exhibits A through U, with the exceptions of Exhibit G:90 and the portion of Exhibit M:13 discussing a previously undisclosed chart note, per the Order of September 4, 2019 and evidentiary rulings during the July 30, 2019 hearing;
2. The testimony of Claimant admitted at the July 30, 2019 hearing;
3. The post-hearing deposition testimony of the following expert witnesses:
    a. Daniel Marsh, M.D., taken August 20, 2019;
    b. Douglas Crum, taken September 3, 2019;
    c. Timothy Eugene Doerr, M.D., taken December 13, 2019; and
    d. Barbara K. Nelson, M.S., CRC, taken January 9, 2020;
4. Claimant's Exhibits ("CE") 1 through 10, admitted at the previous hearing;
5. Defendants' Exhibits ("DE") 1 through 15, admitted at the previous hearing;
6. The testimony of Claimant, Tanner Pickens, Trevor Knesal, and Charles Mattson, taken at the previous hearing; and
7. The post-hearing deposition testimony of Daniel Marsh, M.D., taken on February 24, 2016, and David Price, D.C., taken on March 1, 2016.

OBJECTIONS

All unresolved evidentiary objections from either the hearing or post-hearing depositions are overruled.

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

FINDINGS OF FACT

1. **Previous Findings**. The findings contained in the August 12, 2016 decision are incorporated herein by reference as though set forth in full, with the exception noted below.

2. Finding No. 2 of the August 12, 2016 decision stated that Claimant sustained a left hip fracture in the 1977 automobile accident that resulted in a "total hip arthroplasty." This was incorrect; Claimant's surgeon "basically rebuilt the hip," but without a joint replacement. Tr., 42:19-24. Claimant described the surgery as follows:

> Q. Okay. And do you recall the surgery that was done to your left hip?
> A. Yes, I do. The accident I was in, I was hit head-on as a passenger in a Ford Econovan. And where I was sitting took the impact, and I tried to jump to the back of the van, which where the impact hit, it crushed my right foot, pinning me. And then you have the ball in the socket [of the left hip], and it popped out the back of the socket leaving 78 breaks.
> Dr. Lynn McLaughlin went in and put pins in the ball to extend the ball, shaved off bone off of my hip, to make a calcium deposit, and pasted it on.

Id. at 53:12-23.

3. **Left Hip Recovery and Treatment After 1977 Accident**. It took Claimant approximately two years to recover fully from the 1977 automobile accident. Thereafter, he was able to resume his normal, vigorous physical activities, including but not limited to karate, snow skiing, water skiing, golf, tennis, road bike racing, mountain biking, and hunting. The only previous activity that he was unable to return to was sky diving. *Id.* at 54:2-25.

4. One physical limitation that Claimant experienced after the accident and his recovery was the inability to sit cross-legged because he did not have full rotation of the left hip. Tr., 54:13-15. Claimant was also left with a slight limp in his left leg. DE 3:8 (23:19-20).

5. No physician assigned Claimant any work restrictions because of his hip injury suffered in the 1977 automobile accident. Tr., 55:1-3.

6. Claimant had several intervening accidents and injuries between his 1977 automobile accident and industrial accident in 2013. These included a 1987 eye injury, 1989 broken ankle, 1991 lower back injury, 1994 re-injury of his lower back, and 2005 automobile accident. None of these accidents or injuries affected his left hip or otherwise re-injured it. *Id.* at 55:4-56:4.

7. From the completion of his recovery from his 1977 automobile accident until his 2013 industrial accident, a period in excess of 30 years, Claimant did not have any additional injuries to his left hip nor did he seek medical treatment or rehabilitation for it. Furthermore, he did not require any accommodations or work restrictions on account of his left hip during this time. *Id.* at 56:13-57:4.

8. **Industrial Accident, December 4, 2013**. On December 4, 2013, Claimant was involved in sales training for Employer. He and three other sales associates-in-training were trying out vehicles as part of their training. They returned to Petersen's lot in mid-morning. After they parked, Claimant proceeded to exit the vehicle. He was seated behind the driver in the backseat. As he was exiting the vehicle, his feet became caught underneath the driver's seat. Claimant began to fall and as he was falling, he grabbed the car door, which "jerked and wrenched" his lower back when he caught himself on the door while his feet were still inside the vehicle. Claimant's back was a "little sore" at the time and it bothered him the rest of the workday. He mentioned to his

sales manager that day that he had hurt his back. When he got home from work, upon stepping out of his truck, Claimant experienced "the most excruciating pain" down his left leg. He could not put weight on his left leg, and he could not walk. His son had to come and physically assist him into the house. That night Claimant sat up in a chair because he could not lie down to sleep. The next morning, he called Dr. Price's office to schedule an appointment. Tr., 42:13-46:20 (first hearing transcript).

9. **Left Hip Symptoms Following Industrial Accident**. Chiropractor David N. Price, D.C. examined Claimant the day following his accident on December 5, 2013. Among other diagnoses related to Claimant's lower back, Dr. Price diagnosed the following: "[p]ossible hip trauma (sprain/strain with TFL and IT band tightness)." CE: 2:27.

10. Jacob W. Kammer, M.D., of St. Alphonsus Occupational Medicine Clinic, also examined Claimant on December 5, 2013. He noted in pertinent part as follows: "*Most of the pain appears to be coming from the hip* and radiating down the leg and left buttocks." CE 1:8 (emphasis added.) In a follow-up examination on January 8, 2014, Claimant reported to Dr. Kammer that activity increased pain in his left hip and leg. CE 1:19.

11. Kevin R. Krafft, M.D., observed in his first evaluation of Claimant on January 21, 2014 that Claimant "continues to have pain in the same distribution, namely in the left hip and low back..." CE 3:39.

12. At a treatment appointment with Wang Medical on August 28, 2014, Claimant reported pain located above the left hip. DE: 9:1-2.

13. On September 9, 2014, Dr. Krafft reported that Claimant "continues to have left hip and leg pain." CE 3:52.

14. On October 9, 2014, Saint Alphonsus Rehabilitation Services (STARS) prescribed Claimant a TENS unit for ongoing pain in the low back and left hip. CE 4:131.

15. In a follow-up examination on November 25, 2014 with Dr. Krafft, however, Claimant reported that his "hip feels fine" while his lower back had intense pain. CE 3:57.

16. When Daniel R. Marsh, M.D., of Exodus Pain Clinic first examined Claimant on February 17, 2015, he noted that Claimant had a sharp pain from his L4-5 region that went into the left lateral hip. He further noted Claimant's 1977 accident and trauma to the left hip, but that Claimant had returned to a high level of functioning thereafter and that the hip was "unrelated" to the industrial injury. CE 6:145-146. Dr. Marsh made a similar assessment on March 24, 2015. CE 6:159-160.

17. On February 12, 2016, Dr. Marsh noted that Claimant was "having more pain on the left into the left hip." Dr. Marsh repeated his conclusion that the left hip pain was unrelated to the industrial injury. Ex. B:6.

18. On February 17, 2016, Dr. Price stated his belief that Claimant's diagnosis was "still applicable to his current condition" and included possible hip trauma. Ex. D:2.

19. On referral from Dr. Marsh, Claimant underwent a lumbar MRI on September 26, 2016. As read by Anthony P. Giague, M.D., the MRI report concluded in pertinent part as follows: "Remarkably abnormal left hip joint with flattening and deformity of the left femoral head. This finding is likely the sequela of prior avascular necrosis or trauma." Ex. F:1.

20. **Back Surgery: November 17, 2016**. Claimant underwent an anterior lumbar interbody fusion at L4-5 and L5-S1 on November 17, 2016. William D. Bradley, M.D., performed the surgery at West Valley Medical Center in Caldwell. Richard Martin, M.D., also attended. Claimant tolerated the procedure without complications. Ex. H:7-12.

21. **Post-Back Surgery Hip Symptoms**. In following Claimant's progress post-surgery on December 2, 2016, Julie Franden, N.P., noted that Claimant was "doing really well with therapy, making good progress," however he still had "quite a bit of atrophy in the thigh area." Ex. I:27.

22. On March 7, 2017, Molly Lodger, PT of the Spine Institute reported that Claimant "continues to have difficulty with: pain into left leg, uncertainty in weight bearing through left leg, and inconsistent performance of left leg strength, ROM, and reaction time." Ex. G:77.

23. On June 9, 2017, Stephen Wren, PA-C, of the Spine Institute, recorded that Claimant's current symptoms included "left leg pain along lateral thigh to lateral ankle, numbness bilateral thighs." Ex. G:88.

24. On June 12, 2017, Paula Jo Moore, PT, of Saint Alphonsus Rehabilitation Services (STARS) observed Claimant with "[v]ariable pain in LB and left LE throughout the day." Ex. L:6. Additionally, Claimant "[c]annot walk with normal gait, and cannot walk longer distances." He also "[h]as increased pain driving his vehicle," and "[c]annot carry more than 10 # in his hands." *Id.*

25. On September 8, 2017, STARS recorded Claimant's "[b]ack and left hip pain stay[ing] at a level of 5/10." Ex. L:32. Further noting, "[w]hen he first gets up from sitting or in the morning, it takes several trial steps to get his legs under him." *Id.*

26. Dr. Bradley of the Spine Institute noted on September 11, 2017 that Claimant presents "[s]till severe with LLE pain; primarily greater troch to lateral knee." Ex. G:92. Claimant "walks with cane in right hand," and "trundelinburg [sic] gait very apparent." *Id.* Dr. Bradley also "[v]oiced continued concern that hip is possible cause of continued pain," and understood "that prior to the accident, his hip was asymptomatic." Ex. G:93.

27. **Dr. Doerr's IME: October 19, 2017**. Timothy Doerr, M.D., performed an IME of Claimant on behalf of Defendants on October 19, 2017. Regarding the left hip, Dr. Doerr opined in pertinent part as follows:

> It is clear that the patient's severe left hip post-traumatic degenerative joint disease was pre-existing and unrelated to the patient's 12/04/13 industrial injury. The patient's left hip is currently asymptomatic. To the extent that the patient may have sustained a temporary exacerbation of his pre-existing severe left hip post-traumatic degenerative joint disease, the patient has reached Maximum Medical Improvement with no Permanent Partial impairment and no permanent work restrictions warranted. The patient does not require any further treatment directed towards his left hip as a result of the 12/4/13 industrial injury. Any further treatment directed toward the left hip would be more medically probable than not due to the patient's pre-existing severe left hip post-traumatic degenerative joint disease and unrelated to the patient's 12/4/13 industrial injury.

Ex. M:16.

28. On June 24, 2019, Dr. Doerr completed a supplemental records review of medical records generated concerning Claimant since his IME. Dr. Doerr opined that none of the records, including other physicians' IMES, changed his original opinions concerning Claimant's left hip. Ex. M:25-26.

29. **Further Hip Symptoms**. STARS noted on October 20, 2017, that Claimant "was trying to walk with a better gait pattern," but it was "difficult due to lack of hip mobility." Ex. L:47. Further, Claimant "[w]as walking with a stick, and "still unable to sit upright due to restriction of hip mobility." *Id.*

30. Dr. Bradley observed on December 11, 2017, regarding Claimant as follows: "Continuing disabling pain LLE. Likely mixed picture from spine/hip. Planning appt with hip surgeon Dr. Pool." Ex. G:96.

31. **Tom Faciszewski, M.D., IME**. On February 13, 2018, Tom Faciszewski, M.D., of Independent Medical Examinations, completed an IME of Claimant. Claimant's chief complaints

were "low back, groin, left hip, anterior thigh, and lateral leg pain." Ex. O:9. Claimant stated that "any amount of weightbearing in the lower left extremity will increase his left lower extremity pain. He uses a cane in his right hand to take the weight off the left leg." Dr. Faciszewski diagnosed his left hip as follows: "History of left hip osteoarthritis secondary to motor vehicle accident in 1977 and subsequent hip reconstruction, preexisting, permanent aggravation secondary to injury of 12/4/2013." He additionally opined as follows: "On a medically more probable than not basis, the prior hip condition was permanently aggravated by the 12/4/2013 injury. His left hip osteoarthritis has progressed but for the accident of 12/4/2013 and the treatment recommended, at this point would be a total hip arthroplasty." Ex. O:13-14.

32. Dr. Faciszewski further noted that Claimant was not MMI for the lumbar injury at the time of the IME, and "further treatment for his low back should not be addressed until he has recovered from his left total hip arthroplasty." Ex. O:14

33. **Additional Hip Symptoms**. Jared D. Armstrong, M.D., of St. Luke's noted on April 10, 2018, concerning Claimant as follows: "Currently he reports severe left hip pain that is primarily located on the outside of his hip. He has some pain that radiates into the groin and into the buttock region ... The pain is aggravated with any prolonged standing, walking, raising from a seated to a standing position, bending type of activities." Ex. P:1.

34. In a preoperative appointment prior to a total left hip arthroplasty, Claimant reported severe left hip pain to Dr. Armstrong. Ex. P:9.

35. **Total Left Hip Arthroplasty: July 11, 2018**. Dr. Armstrong performed a total left hip arthroplasty on Claimant on July 11, 2018 at St. Luke's. There were no complications and Claimant tolerated the procedure well. Ex. P:18-24.

36. **Post Arthroplasty Hip Symptoms**. On August 31, 2018, Dr. Armstrong observed Claimant as follows: "Hip is doing well and has minimal pain since 6 hours after surgery." Ex. P:28.

37. **Dr. Bates IME: October 15, 2018**. Dr. James Bates examined Claimant in an IME on October 15, 2018, and noted that Claimant "continues to have complaints of left buttock pain, leg pain, pain radiating throughout the area of the back, hip, and leg … Therefore, the exacerbation of the left hip is in relationship to the December 4, 2013 injury." Ex. Q:11. Dr. Bates found that Claimant's "presentation was appropriate, no nonorganic findings, or symptom magnification behavior was evident. It was consistent with the physical findings and history of having had surgery of the lumbar spine and left hip." Ex. Q:12.

38. Dr. Bates concluded that Claimant was medically stable "from a structural standpoint" at the IME appointment. However, Claimant could benefit from "10-12 visits of physical therapy with a therapist trained in soft tissue treatment, ASTYM, fascial distortion model, mobility of the tissue" followed by a good independent home exercise program. Ex. Q:10-11.

39. Although Dr. Bates did not opine Claimant was at maximum medical improvement he did assign Claimant a 15% PPI rating for the lumbar injury with 6% attributable to the December 2013 accident and 9% for a preexisting impairment awarded in 1992. For Claimant's hip injury Dr. Bates assigned a 21% lower extremity PPI rating with 7% attributable to the preexisting impairment. The 14% lower extremity PPI attributable to the accident equates to a 6% whole person impairment. Using the combined value chart Claimant has a 12% whole person impairment attributable to the December 2013 accident. Ex. Q:11

40. Dr. Bates further opined it was medically necessary for Claimant to remain off work from the time of the lumbar surgery, and believed that as of the October 15, 2018 IME, Claimant may return to sedentary level work with the following temporary restrictions to include:

> Frequent changes of positions, sitting, standing, and walking, with maximum position of sitting or standing 30 minutes at a time. Walking 5 minutes at a time. Rare bending and stooping. No squatting. Work at sedentary level, but with the ability to change positions as noted above.

Ex. Q:12. Dr. Bates noted permanent restrictions were "not appropriate until maximal functional improvement." Ex. Q:10.

41. There is no evidence to suggest Claimant attended any further therapy or care until December 17, 2018.

42. **Dr. Marsh Follow-up Visit.** On December 17, 2018, Claimant followed-up with Dr. Marsh, who assessed Claimant as follows:

> The left hip became painful and had THA 7-11-18 with Dr. Armstrong. He has residual pain after that surgery also. Clearly Gary had a pre-existing Left Hip problem but was highly functional and asymptomatic. His left hip was injured when he fell 12-4-2013 and was further exacerbated over time. He has a permanent exacerbation of the left hip pain. Drs. Bates, Armstrong and Bradley and I are in agreement on this.

Ex. B:12.

43. Dr. Marsh spent 60 minutes with Claimant and noted Claimant's pain levels were significant and that Claimant had "obvious pain with arising." *Id.* Further, he noted that Claimant is "limited in activities of daily living" and gave the following permanent work restrictions:

> He should not engage in any bending, stooping or twisting. His lifting restrictions is rare lifting up to 15 lbs waist height only. Sitting and standing should be limited to no longer than 15 min without a break to recline. He Should be limited to 4 hrs a day with periodic hourly breaks

Ex. B:14.

44. **Work Restrictions.** Claimant received assessments for work restrictions by Drs. Doerr, Bates, and Marsh.

45. First, on October 19, 2017, Dr. Doerr opined Claimant had reached MMI and gave "a permanent 30 pound frequent and 50 pound occasional lifting restriction" for the lumbar injury. Ex. M-16. Dr. Doerr added general hip replacement restrictions of no squatting, crawling, crouching or high impact activities for Claimant on June 24, 2019.

46. Second, on October 15, 2018, Dr. Bates gave Claimant "temporary" restrictions to include "frequent changes of position, sitting, standing, and walking, with maximum position of sitting or standing 30 minuets at a time." Ex. Q:12. Claimant was limited to 5 minutes walking, no squatting, with rare bending and stooping. *Id.*

47. Third, on December 17, 2018, Dr. Marsh assigned Claimant permanent work restrictions to "not engage in any bending, stooping or twisting" and up to 15 pounds of rare lifting waist height only. Ex. B:14. Also, Claimant should be limited to a four-hour day, with periodic breaks to recline, and limit sitting and standing to 15 minutes.

48. **Vocational Evidence**. *Douglas Crum.* On April 25, 2019, Douglas N. Crum, C.D.M.S. delivered a vocational report on behalf of Claimant. Ex. R. He personally interviewed Claimant and reviewed the following information: wage and income information; discovery; the Commission's previous findings; Claimant's resume; IMEs; and medical history. Ex. R:1. He also reviewed Claimant's educational history, social history and employment history. *Id.* at 8-10.

49. On a pre-injury basis Mr. Crum determined that Claimant had access to 15.5% of the jobs in his labor area, assuming no physical restrictions. On a post-injury basis, both Dr. Marsh and Dr. Doerr have assigned permanent physical restrictions related to Claimant's lumbar spine injury. Dr. Marsh recommended the following restrictions:

- No bending, stooping or twisting;
- Lifting: rare up to 15 pounds, waist height only;
- Sitting and standing: limited to no longer than 15 minutes with a break to recline; and
- Work should be limited to 4 hours a day with periodic hourly breaks.

Ex. R:11.

50. Mr. Crum determined that based upon the restrictions of Dr. Marsh, Claimant had less than a sedentary physical capacity. Based upon these restrictions, Claimant was no longer able to perform sales and customer service positions, including automotive sales. *Id.* at 11-12.

51. Mr. Crum concluded as follows: "In my opinion, based on the restrictions recommended by Dr. Marsh, Mr. Pickens [Claimant] does not have the physical capacity to perform any other type of employment for which he is otherwise qualified." *Id.* at 12.

52. Mr. Crum noted Dr. Doerr's restrictions for Claimant as no lifting more than 30 pounds on a frequent basis and no lifting more than 50 pounds on an occasional basis. Based upon these restrictions, Mr. Crum opined that Claimant would have sustained a de minimis reduction in labor market access and wage earning capacity; he would have sufficient skills to restore his time-of-injury wage earning capacity using the restrictions of Dr. Doerr. *Id.*

53. For pre- and post-wage earning capacity, Mr. Crum noted that Claimed earned approximately $50,000 per year at the time of injury. He did not require any accommodations and had worked for the employer since 2009 on a full-time basis. In Mr. Crum's opinion, utilizing the restrictions of Dr. Marsh, Claimant no longer had "realistic access to full-time or even part-time jobs in his labor market." Thus he had sustained a 100% loss of wage-earning capacity. Utilizing the restrictions of Dr. Doerr, however, Claimant would not have sustained any measurable loss of wage-earning capacity. *Id.* at 12.

54. Mr. Crum assessed that prior to the industrial accident of December 4, 2013, Claimant was not subject to any preexisting permanent physical restrictions that might combine with the injury to cause permanent disability. *Id.*

55. Using the restrictions of Dr. Marsh, Mr. Crum concluded his report by determining that Claimant had lost 100% access to his pre-injury labor market and wage-earning capacity. He further opined that Claimant was an Odd-Lot worker under the restrictions of Dr. Marsh. Ex. R:13.

56. Based upon Dr. Doerr's restrictions, Mr. Crum opined that Claimant would not have sustained any measurable loss of labor market access or wage-earning capacity. *Id.*

57. *Crum Deposition.* Claimant took the deposition of Mr. Crum on September 3, 2019.

58. Mr. Crum is a vocational rehabilitation consultant in private practice in Boise, Idaho. Crum Dep., 5:9-10. His qualifications are well known to the Commission.

59. Mr. Crum determined, using Dr. Marsh's restrictions, that it would be futile for Claimant to seek employment and, essentially, he was unemployable. "[O]utside extraordinary circumstances he is not going to find reliable work in the labor market." *Id.* at 16:11-17.

60. Counsel for Defendants inquired of Mr. Crum on cross examination in pertinent part as follows:

> Q. Mr. Crum, of the restrictions that Dr. Marsh gave that you testified about today, is there any aspect of the restrictions that are a deal breaker as far as Mr. Pickens being totally and permanently disabled?
> A. Well, no bending or stooping is pretty significant and standing limited to 15 minutes at a time with a break to recline is very significant. I don't know of any jobs that would allow for that.
> Q. Okay.
> A. And, then, he also limited him to four hours per workday. Again, periodic work breaks. I – I just can't think of a job that he could do that would be within those limitations.

Id. at 19:13-20:4.

61. *Barbara K. Nelson.* Barbara K. Nelson, M.S., CRC, delivered a vocational report concerning Claimant at the request of Defendants on July 18, 2019. Ex. U.

62. Ms. Nelson is a vocational rehabilitation consultant, based in Boise, Idaho. Ex. U:1. Her qualifications are well known to the Commission.

63. Ms. Nelson reviewed all the medical information provided by Defendants' counsel. *Id.* at 2. She also reviewed the previous Industrial Commission decision, transcript of hearing, and relevant records of the Industrial Commission Rehabilitation Division. *Id.* She completed an extensive review of Claimant's past employment and wage history. *Id.* at 16-24. She then reviewed the various medical opinions from doctors in the case, focusing on whether they opined on causation and whether they assigned restrictions. *Id.* at 24-26.

64. For non-medical factors, Ms. Nelson noted Claimant's age of 60 years old as a potential deterrent to employability, however "seniors are faring somewhat better. Those with computer skills, such as Mr. Pickens are doing the best." *Id.* at 26. For education, Ms. Nelson described Claimant's bachelor's degree as a "definite employment enhancer." *Id.* at 27. For transferable skills, Ms. Nelson concluded that the reader "will get a sense of the enormity of job skills he [Claimant] has mastered that well [sic]transfer to a plethora of jobs." *Id.*

65. Ms. Nelson concluded that if the opinions of Dr. Doerr regarding the cause of the left hip problem, and the nature of Claimant's restrictions were adopted, Claimant would have no disability in excess of impairment. *Id.* at 29.

66. If the opinion of Dr. Bradley, Claimant's treating physician, were adopted, Ms. Nelson concluded that Claimant would have sustained a final disability rating of 20%, inclusive of impairment, based solely upon loss of labor market access. She would not apportion

any of the disability to preexisting problems. Claimant would suffer no wage loss under this scenario. *Id.*

67. If the opinions of Dr. Marsh were adopted regarding the cause of Claimant's hip problem and the nature of his restrictions, Ms. Nelson concluded that Claimant "would essentially be unemployable." Ex. U:29-30.

68. *Nelson Deposition.* Defendants took Ms. Nelson's deposition on January 9, 2020.

69. As part of Ms. Nelson's process, she met with Claimant for a personal interview. Nelson Dep., 6:8-10.

70. Following the issuance of her report, Ms. Nelson reviewed additional information in the form of the transcript of the second half of the bifurcated hearing, Mr. Crum's deposition, and Dr. Marsh's deposition. *Id.* at 7:3-8.

71. Ms. Nelson confirmed her opinion that if Dr. Marsh's medical opinion were adopted regarding restrictions, "it would be pretty difficult to find competitive employment …" *Id.* at 8:9-10.

72. Ms. Nelson also confirmed her determination that if the restrictions of Dr. Doerr were adopted, Claimant would not have any disability in excess of permanent impairment. *Id.* at 8:11-16.

73. She further affirmed her determination that if the restrictions of Dr. Bradley, Claimant's back surgeon, were adopted, Claimant would have a permanent disability inclusive of 20 percent impairment. *Id.* at 8:20-9:2.

74. If Dr. Marsh's restrictions were adopted, Ms. Nelson found the following to be most restrictive to his employment prospects: "The fact that he needs to change position as often as Dr. Marsh outlines is pretty restrictive. And the fact that he needs to recline on a regular basis

is also very restrictive and has pretty profound vocational implications." *Id.* at 10:8-12. She further noted as follows: "Where we get into more problems is that he can't sit or stand for longer than 15 minutes without a break to recline. And that's what's bad as far as his employability. And then, of course, the fact that he would only be able to work for four hours would restrict him from full-time employment, and then during that four-hour period Dr. Marsh would like him to take a break every hour, so that's very restrictive." Nelson Dep., 11:1-8.

75. **Medical Depositions**. *Daniel Marsh, M.D.* Claimant called Daniel Marsh, M.D., a physiatrist, in a deposition held on August 20, 2019. Claimant previously deposed Dr. Marsh on February 24, 2016 in connection with the first hearing in this matter. His credentials are well known to the Commission.

76. Dr. Marsh was a treating physician for Claimant and thus did not issue an IME report.

77. The first day that Dr. Marsh examined Claimant was on February 17, 2015, Claimant was already experiencing hip pain. Marsh Dep., 6:10-12.

78. Dr. Marsh explained his understanding of Claimant's prior 1977 hip injury, recovery from the same, and hip condition prior to the industrial accident, based upon Claimant's history, as follows:

> He had a very traumatic injury. The femur, I believe, was driven through the acetabulum and had to be rebuilt. He had two surgeries. And that was in 1977. Two years later I note that he was back hunting. Did very well and returned hunting, guiding, road biking, skiing, full contact karate, horse riding, rafting, backpacking. He did have limited hip rotation. He could do scissor splits with full split when he was one foot from the ground. He was good enough that he beat the national champion of Uganda.
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>
> Q. And what is your understanding of his hip symptoms preceding this injury on – in 2013.
>
> A. He was completely asymptomatic.

Q. And so it's your understanding that from that 1977 time period and the recovery for those years are after he went decades without any hip pain?
A. That's correct.

Marsh Dep., 6:15-7:6.

79. Dr. Marsh opined that at first Claimant's radicular pain "overlapped" his hip pain. *Id.* at 8:9-19.

80. Dr. Marsh opined how the industrial accident would injure Claimant's left hip, as follows:

> Well, the best description of his hip condition is by Dr. Bradley when he talks about arthrosis and that's a condition where the – joint is really limited in motion. As he described he could do – he couldn't do internal rotation, but he could do a scissor split. So it was – he would move in some planes, but in others he was very limited and if – and he describes limited range of motion in his hip, limited hip rotation, and so when he's falling out of the vehicle and his feet are locked under the seat, he is twisting and rotating, and that's going to have an impact on his hip.

Id. at 9:6-17.

81. Dr. Marsh further described a secondary mechanism for injury to Claimant's left hip as a result of the industrial accident, namely, the radicular pain he was experiencing in his left leg stemming from his accident related lumbar injury caused Claimant to walk with an antalgic gait and have an antalgic posture, resulting in disuse atrophy in the left hip. "And he was doing that for three years, I believe, without getting treated … I believe that him walking – walking around for three years and having an antalgic gait has definitely contributed to the acceleration of his – his hip pain." *Id.* at 9:22-10:22.

82. Dr. Marsh described the interplay of the two "insults" to Claimant's left hip as follows: "I think he wrenched his hip when he came out of the vehicle and I – and that was the first insult. I think the second insult is the fact that he is limping and not moving normally. Even his abnormal gait is more abnormal now that he's having so much pain and this is clearly not

something that you can do without paying a price and the price is that you have an acceleration of your pain and so I see a clear relationship." *Id.* at 11:4-12.

83. Dr. Marsh stated in pertinent part as follows regarding causation: "Clearly Gary had a preexisting left hip problem but was highly functional and asymptomatic. His left hip was injured when he fell December 4, 2013, and that was further exacerbated over time. He had a permanent aggravation I would say now but exacerbation is what I said – of left hip pain and, then, I noted that I agreed with Dr. Bates, Dr. Armstrong, and Dr. Bradley." Marsh Dep., 12:20-13:2.

84. Dr. Marsh explains several of his initial records in which he stated that Claimant's left hip is "unrelated to this injury" as a mistake that "was something perpetuated in the – in the record, but I go on to say that his left hip was injured again in 2013 and since then has progressed due to antalgic gait compensation." *Id.* at 13:6-14.

85. Dr. Marsh further opined that Claimant's lumbar fusion at L4-L5, once it was completed, further "increased the vulnerability of his hip" due to adjacent segment problems, thus accelerating the degeneration of the hip further. *Id.* at 17-13-18:16.

86. Dr. Marsh denied that at any time during his examinations of Claimant that he displayed nonorganic findings, symptom magnification, or evidence of secondary gain in how he presented his symptoms. "I see Mr. Pickens as very credible and very honest and very forthright, so I don't see any evidence of that." *Id.* at 21:5-20.

87. Dr. Marsh agreed that "this whole complex … the combination of the low back, hip, there is a cycle that developed after the injury in 2013." *Id.* at 23:19-23.

88. Dr. Marsh commented on his view of the kind of work restrictions appropriate for Claimant, following his two surgeries, as follows:

> Yeah, I mean that's a – it's a tough situation. It really needs to be a very much light duty. It really needs to be cognitive work and not physical work. It really needs to be work where he is able to pick and choose his position and, really, the only thing that I can think of is, you, know, some type of customer support or sales where you have a headset and you're able to change your position, you're not sitting in front of me and I feel restricted to stay here, but, rather I can move, come and go as I please, and that's the kind of situation that he would need, where you could recline in bed with a computer or whether he could sit or stand and change his position ad lib.

Marsh Dep., 24:7-20.

89. Dr. Marsh opined that the delay in obtaining his lumbar surgery caused a worse condition for Claimant's left hip. *Id.* at 25:14-20.

90. Dr. Marsh agreed that Claimant was at maximum medical improvement (MMI) but it was more likely than not that Claimant's condition would get worse with time. *Id.* at 30:7-9.

91. Dr. Marsh concluded that a permanent aggravation to Claimant's left hip occurred because of the industrial accident and that the total hip arthroplasty that he later underwent was necessitated by the industrial accident. *Id.* at 30:21-25.

92. *Timothy Eugene Doerr, M.D.* Defendants took the deposition of Timothy Eugene Doerr, M.D., an orthopedic surgeon, on December 13, 2019. Doerr Dep., 4:1-16. Dr. Doerr's credentials are well known to the Commission.

93. Dr. Doerr examined Claimant for an IME on October 19, 2019. *Id.* at 5:4-7. Dr. Doerr's report is admitted into evidence as Exhibit M. He reviewed the medical records to date concerning Claimant in connection with the IME. *Id.* at 5:14-16. Following the IME, Dr. Doerr reviewed additional medical records generated after the date of the IME through June 7, 2019, for which he issued addendum reports. *Id.* at 6:1-25. Dr. Doerr's last addendum report was dated June 24, 2019. *Id.* at 7:1. Following the hearing, Dr. Doerr reviewed portions of Claimant's

testimony at hearing, the post-hearing deposition of Dr. Marsh, and a copy of surveillance video taken of Claimant. *Id.* at 7:3-9.

94. Dr. Doerr reviewed radiographic studies of Claimant as part of his IME. Doerr Dep., 11:11-13. He also took some X-rays on October 17, 2017 as part of his evaluation to further examine Claimant's hip joint. *Id.* at 11:14-21.

95. Dr. Doerr opined that Claimant reached MMI on October 19, 2017, the date of his IME report. *Id.* at 13:8-10. Additionally, Dr. Doerr assigned Claimant a permanent partial impairment of 3% of the whole person attributable to the injury of December 4, 2013 for his lumbar spine. Overall, Dr. Doerr assigned a 6% WPI but 3% was attributable to a preexisting lumbar condition dating back to 1991 in the medical records. *Id.* at 13:16-21.

96. Dr. Doerr assigned the following restrictions to Claimant's back because of the December 4, 2013 accident: a 30-pound frequent lifting restriction and a 50-pound occasional lifting restriction. *Id.* at 14:8-11. As of the date of the deposition, he continued to opine that those were the correct restrictions. *Id.* at 14:12-14.

97. Dr. Doerr concluded that no further treatment was necessary for Claimant's back because of the 2013 injury. *Id.* at 14:15-18.

98. Dr. Doerr opined that the 2013 accident caused only a temporary aggravation of Claimant's preexisting left hip post-traumatic degenerative joint disease associated with his 1977 automobile accident. Dr. Doerr opined that Claimant had reached MMI at the time of his IME on October 19, 2017. Therefore, according to Dr. Doerr, the need for Claimant's total hip arthroplasty was 100% attributable to preexisting conditions and unrelated to the December 4, 2013 injury. *Id.* at 15:2-14.

99. Reading X-rays taken of Claimant's left hip on October 19, 2017, Dr. Doerr stated as follows:

> The femoral head or the ball is severely flattened.
> There's no joint space left consistent with severe posttraumatic arthritis, and there are bone spurs around the socket contributing to the deformity.
> ...
> There's no question that this is due to previous severe hip trauma and not due to the mechanism of injury which I recall, was getting out of the back of a compact car and catching his foot and twisting.

Doerr Dep., 24:17-21; 24:25-26:3.

100. Dr. Doerr concluded that the "six-month rule" applied to Claimant's left hip, as follows:

> Well, generally, there's a consensus that if someone has a preexisting condition that becomes – that returns to baseline for six months, it's medically more probable than not due to preexisting – it's more medically probable than not any recurrent symptoms after that time frame would be due to the preexisting condition and unrelated to any exacerbation.

Id. at 28:20-29:3.

101. Dr. Doerr opined that because there was no mention of hip symptoms in Claimant's medical records beginning after March 24, 2015, he met the conditions of the six-month rule. *Id.* at 28:4-10.

102. Dr. Doerr concluded that Claimant's left hip pain symptoms would have continued to progress, regardless of the December 4, 2013 injury or whether he had a lumbar injury. *Id.* at 29:21-30:3.

103. When asked to disregard his own opinions of causation, and assume the hip was related to the injury, Dr. Doerr agreed with the opinion of Dr. Bates as to the permanent impairment of Claimant's left hip, 7% of the whole person or 14% lower extremity impairment of the left hip. *Id.* at 30:8-11, 31:2-12.

104. The last evaluation of Claimant's hip surgeon, Dr. Armstrong, was August 31, 2018. Under the assumption that the hip was related to the injury, Dr. Doerr believed that Claimant had reached MMI as of that date. *Id.* at 30:8-11, 31:18-32:5.

105. Still following the same assumption, Dr. Doerr would assign the following permanent restrictions to Claimant's left hip: no squatting, crawling, crouching, or high-impact activities, considering Dr. Armstrong's report. In addition to the restrictions previously noted for the lumbar injury. *Id.* at 30:8-11, 32:8-13.

106. Dr. Doerr disagreed with Dr. Marsh's permanent restrictions as being inconsistent with Claimant's injuries, treatments, and outcomes. *Id.* at 32:23-33:1.

107. Under cross examination, Dr. Doerr agreed that there were no medical records in the fifteen years prior the 2013 industrial accident that indicated that Claimant was having any hip problems, physical therapy related to the hip, or any physical limitations related to the hip. *Id.* at 35:13-36:11.

108. Dr. Doerr agreed that prior to the industrial accident, Claimant demonstrated "a high level of activity – there's no question." *Id.* at 37:10-11.

109. Dr. Doerr agreed that the records show that prior to the industrial injury of 2013, Claimant was not using a cane to ambulate, and was using a cane after the accident, and it was due to the aggravation of his low back and left hip. *Id.* at 48:14-23.

110. Dr. Doerr agreed that Claimant had an antalgic gait early on after December 4, 2013. *Id.* at 49:16-18. He also agreed that antalgia could potentially create some leg atrophy, which was not present prior to the accident. *Id.* at 49:19-25.

111. Dr. Doerr agreed that the "natural history of severe hip arthritis is fluctuations in severity, so it [reports of pain followed by no pain] wouldn't be unusual." *Id.* at 52:16-18.

112. Dr. Doerr further agreed that there was no documentation of a pattern of hip pain in the 15 years prior to the industrial accident. *Id.* at 53:9-14.

113. Dr. Doerr stated that there were no research studies that validate the "six-month rule," as follows: "I don't know that there's a mechanism where you can do a research study to validate that." Doerr Dep., 55:8-9.

114. Dr. Doerr found that Claimant exhibited nonorganic symptoms during his examination by leaning on a ski pole and by moaning and grimacing. *Id.* at 69:4-74:5. "The combination of moaning and facial grimacing is inconsistent with the way patients present with hip arthritis." *Id.* at 75:3-5. Nevertheless, he agreed that Claimant's hip pathology was severe enough to warrant a total hip arthroplasty. *Id.* at 76:14-16.

115. When asked to describe what kind of secondary gain Claimant was seeking, as documented in Dr. Doerr's report, Dr. Doerr stated as follows: "Well, I don't think there's necessarily a way to ascertain that." *Id.* at 77:8-11. He added further as follows: "I don't have any objective evidence to define what the secondary gain could possibly be." *Id.* at 78:22-25.

116. **Social Security Disability**. Claimant applied for Social Security disability benefits in August 2017 and the Social Security Administration approved his application in the same year. Ex. N; Tr., 138:18-139:8. The basis of his application was the condition of his back and hip because of the industrial accident. Tr., 141:23-142:10.

117. **Surveillance Video**. Defendants submitted surveillance video taken of Claimant on June 5 and July 29, 2019. *See*, Ex. T. The videos depict Claimant driving in his automobile, presumably from his home, to another location, where he met with a man who has a small child with him. Claimant periodically leaned up against the vehicle throughout the video. He was not

using a cane nor was he walking long distances. There was no depiction of bending or stooping. *Id.*

118. **Claimant's Credibility at Hearing.** Claimant appeared to testify credibly at hearing.

119. **Claimant's Condition at Hearing**. Claimant stood and shifted a great deal in his seat and appeared uncomfortable throughout the hearing.

120. Claimant described his current pain as follows: "I have consistent pain from the low back, hip, all the way down to my left ankle." Tr., 96:25-97:1.

121. Regarding activities of daily living, Claimant described his condition as follows:

> Q. And how are you generally able to function and get around. I mean, describe – let's say, if you need to go out and go grocery shopping. What do you do to prepare yourself for that?
> A. I end up taking ibuprofen. I do have some leftover pain pills that if I do something – like say, go to the store, if I'm there too long, I'll go home and take one of those on top of ibuprofen to try and knock down the pain.
> REFEREE HUMMEL: And when you say "pain pills," do you mean narcotic pain pills?
> THE WITNESS: Yes. Norco, Gabapentin. But I don't take a full tablet. I'll take like a half a tablet, quarter tablet, because I just need to take the edge off.
> REFEREE HUMMEL: But you are able to go grocery shopping.
> THE WITNESS: Oh, I have to, yes.
> I put my own gas in my truck when I need it every 6 to 7 weeks. I go grocery shopping. Most of the times I'm at home. I mean I really don't leave my house that often.

Id. at 97:7-98:3.

122. Claimant denied that he was able to participate in previous physical activities like hiking, biking, and swimming. Claimant has been unable to resume any of the physically active sports that he previously enjoyed. *Id.* at 142:12-22.

123. Claimant stated that he lacks the strength in his left leg to step up on his front porch, and that he must "plan every step." *Id.* at 98:11-13.

124. According to Claimant, what he does "all day long with the pain that goes down my back to my leg, is I'm constantly trying to move. I can lean up next to the wall just right, and I can hit a spot, and I get relief from pain." Tr., 99:3-7.

125. Claimant has trouble sleeping a full night's sleep because of pain. *Id.* at 99:15-19. Claimant is never without pain. *Id.* at 100:2-3.

126. Claimant used to go to social gatherings and other activities, such as "Live After Five," in downtown Boise, or to the mall or concerts. Now he avoids such activities because of the concern of "getting knocked over. I mean, I don't want anything to happen." *Id.* at 102:6-13.

127. Responding to the video surveillance of him, Claimant stated in pertinent part as follows:

> Q. So if Defense Counsel has a video of you from sometime in the past doing nothing more but standing around and walking, that's not inconsistent with what you're saying?
> A. Correct.
> Q. You could still stand in a position?
> A. Right… If I lean up next to a wall, I can get a longer sense of relief by standing and leaning back. I don't know how that pushes everything one way or another, but that is really comfortable. I mean, for a certain period of time, and then I've got to move around and stretch.

Id., at 118:11-17; 21-119:1.

DISCUSSION AND FURTHER FINDINGS

128. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). 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).

129. **Causation**. A claimant must prove that he was injured as the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). 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). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217-18 (2001).

130. Claimant carried the burden of proving causation. *Serrano v. Four Seasons Framing*, 157 Idaho 309, 317, 336 P.3d 242, 250 (2014) (*quoting Duncan v. Navajo Trucking*, 134 Idaho 202, 203, 998 P.2d 1115, 1116 (2000)). "The proof required is 'a reasonable degree of medical probability' that the claimant's 'injury was caused by an industrial accident.'" *Id.* (*quoting Anderson v. Harper's Inc.*, 143 Idaho 193, 196, 141 P.3d 1062, 1065 (2006)). Put another way, the "claimant has the burden of proving a probable, not merely a possible, causal connection between the employment and the injury or disease." *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 332, 179 P.3d 288, 295 (2008) (*quoting Beardsley v. Idaho Forest Indus.*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995)). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Estate of Aikele v. City of Blackfoot*, 160 Idaho, 903, 911, 382 P.3d, 352, 360 (2016) (*quoting Jensen v. City of Pocatello*, 135 Idaho 406, 412, 18 P.3d 211, 217 (2000)). "The Commission may not decide causation without opinion evidence from a medical expert." *Serrano*, 157 Idaho at 317, 336 P.3d at 250 (*quoting Anderson*, 143 Idaho at 196, 141 P.3d at 1065).

131. The direct and natural consequences rule addresses the proximate legal cause of a subsequent injury and evaluates the compensability of a subsequent injury or aggravation related to a prior industrial injury. "The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury." 1 A. Larson & L. Larson, Workers' Compensation (2011) § 10.01, pp. 10-2 through 10-3. The rationale is that the original industrial injury is the cause of all that follows.

132. In Idaho, the direct and natural consequences rule is recognized. In *Mulnix v. Medical Staffing Network, Inc.*, 2010 IIC 0368, 2010 WL 4337035, the claimant suffered an industrial injury that required left shoulder surgery. She subsequently suffered a left shoulder labral tear during therapy for her original industrial injury. The Commission found that the additional medical treatment necessitated by the labral tear sustained during therapy was compensable, expressly noting as follows:

> When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct. Larson's, The Law of Worker's Compensation, § 13.

Mulnix, 2010 IIC 0368, 2010 WL 4337035, at 8. *See also*, *Gerdon v. Con Paulos, Inc.,* 2012 IIC 0085, 2012 WL 5398867 (L3-4-disc bulge permanently aggravated by participating in rehabilitation therapy for original industrial accident deemed related and thus compensable.)

133. The Commission previously found that Claimant's lumbar spine injury was related to the subject accident, and authorized Claimant's fusion surgery. The issue here is the compensability of Claimant's left hip. It is undisputed that Claimant had a previous serious injury to, and reconstructive surgery for, his left hip in 1977, due to an automobile accident. It is also

undisputed that Claimant underwent no further treatment after 1978 for that injury, that he returned to a high level of physical activity (biking, hiking, martial sports, hunting, fishing, swimming, etc.) with no limitation, and that he had no further complaints of hip pain until sustaining the December 4, 2013 industrial accident. Of course, Claimant was left with a limited rotation of his left hip and a slight limp in his left leg, but again, this did not prevent him from participating for years in what would be considered vigorous physical activities for anyone.

134. Such a lengthy period (1978 to 2013) belies a conclusion that the injury Claimant sustained to his left hip in the industrial accident was merely a temporary aggravation. Nevertheless, more than temporal causation is required. In this regard, Dr. Marsh adequately described the mechanism of injury to Claimant's hip while exiting the vehicle on the Employer's premises.

135. Furthermore, there was a secondary mechanism injuring Claimant's hip consisting of his antalgic gait caused by his lumbar injury. Claimant went without surgical treatment for his lumbar condition for approximately three years and during that time he walked with an antalgic gait that put further stress and pressure on his left hip.

136. Dr. Doerr's theory was that Claimant sustained a mere temporary aggravation because there was a six-month gap in medical records discussing his hip. Dr. Doerr pointed to this as the "six month rule"; if symptoms subside in the medical record for a period of six months, the condition is deemed to return to baseline, and it is the original condition or injury that is the true cause of the patient's symptoms. Dr. Doerr admitted, however, that there are no scientific studies supporting this community standard. Furthermore, simply because there was six-month gap in records does not mean that Claimant was not continuing to experience left hip pain. The sum of records following the industrial accident adequately establishes that Claimant suffered left hip

symptoms in a pattern just as Dr. Doerr described, sometimes waxing, sometimes waning, but always present.

137. Finally, Dr. Doerr's medical opinion on causation of the left hip is in the minority of physicians who have examined Claimant. Dr. Marsh was a treating physician for Claimant and concluded that causation was due to the industrial accident. Notably, the IMEs of both Dr. Faciszewski and Dr. Bates concluded that the causation of Claimant's left hip was on an industrial basis.

138. For the foregoing reasons, Claimant has established that the industrial accident of December 4, 2013 permanently aggravated his left hip. Causation is thus established.

139. **Medical Treatment**. An employer shall provide reasonable medical care for a reasonable time after an injury. Idaho Code § 72-432(1). A "reasonable time" includes the period of recovery before medical stability, but may include a longer period. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001). Reasonable medical treatment benefits may continue for life; there is no statute of limitation on the duration of medical benefits under Idaho Workers' Compensation Law.

140. A claimant bears the burden of showing that medical treatment required by a physician is reasonable. Idaho Code § 72-432(1). A claimant must support his or her workers' compensation claim with medical testimony that has a reasonable degree of medical probability. *Hope v. ISIF*, 157 Idaho 567, 572, 338 P.3d 546, 552 (2014), *citing Sykes v. CP Clare & Co.*, 100 Idaho 761, 764, 605 P.2d 939, 942 (1980). The reasonableness of treatment is dependent upon the totality of the facts and circumstances of the individual being treated. *Harris v. Independent School District No. 1*, 154 Idaho 917, 303 P.3d 605 (2013). Totality of the facts and circumstances is a

factual determination, but not a retrospective analysis with the benefit of hindsight. *Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015).

141. It is for the physician, not the Commission, to decide whether the treatment is required; the only review the Commission is entitled to make is whether the treatment was reasonable. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). Where there is both a positive and a negative diagnosis between two qualified doctors, the fact finder may examine the methodologies of both physicians to determine which physician is more credible. *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 759, 302 P.3d 718, 727 (2013). It is the role of the Commission to determine the weight and credibility of testimony and resolve conflicting interpretations of testimony. *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 565, 130 P.3d 1097, 1103 (2006).

142. All the medical authorities in this case, including Dr. Doerr, agreed that the treatment of a total arthroplasty surgery for Claimant's left hip was required. Such treatment, including necessary pre-operative and post-operative care, was not only necessary but reasonable. These authorities include the IMEs from Dr. Facizewski and Dr. Bates. As such, these expenses must be reimbursed by Defendants. These expenses are compensable pursuant to Idaho Code § 72-432. Furthermore, pursuant to *Neel v. Western Construction, Inc.*, 147 Idaho 146, 149, 206 P.3d 852, 855 (2009), Claimant is entitled to recover 100% of the invoiced amounts of these medical expenses that he incurred and that Defendants did not reimburse.

143. **Medical Stability**. Medical stability, or MMI, "essentially means that a worker has achieved the fullest reasonably expected recovery with respect to a work-related injury." *Perkins v. Jayco*, 905 N.E.2d 1085, 1088-1089 (Ind. App. 2009). A claimant attains MMI on the "date after which further recovery from, or lasting improvement to, an injury can no longer reasonably be

anticipated, based upon reasonable medical probability." *Lemmer v. Urban Electrical, Inc.*, 947 So.2d 1196, 1198 (Fla. App. 2007). "A finding of MMI is precluded where treatment is being provided with a reasonable expectation that it will bring about some degree of recovery, even if treatment ultimately proves ineffective." *Id.* In determining whether a claimant has reached MMI, the Commission may consider such factors as a return to work, the extent of the injury, and, most importantly, whether medical evidence or testimony shows that the injury has actually stabilized. *See, Westin Hotel v. Industrial Comm'n of Illinois*, 865 N.E.2d 342, 356 (Ill. App. 2007).

144. On August 31, 2018, Claimant came in for his eight-week follow-up appointment with Dr. Armstrong, the orthopedic surgeon who performed his total left hip arthroplasty. Claimant reported being "very happy" with his surgery. X-rays showed the "hip arthroplasty implants in place, no signs of subsidence, loosening or other complication." Dr. Armstrong released Claimant from care with the suggestion that he could follow back up in 3 to 4 years or sooner if he had any questions or problems. Ex. P.28.

145. It is reasonable to find that Claimant reached medical stability from his left hip condition on August 31, 2018, the date that Dr. Armstrong released him from care.

146. With a finding that the hip injury was caused by the industrial accident, Dr. Doerr's opinion that Claimant was MMI as of October 19, 2017 is not adopted. As such, in line with the majority of medical opinions[1], it is reasonable to find Claimant did not reached medical stability for the lumbar injury and thus the industrial accident until December 17, 2018, the date of Claimant's last visit with Dr. Marsh.[2]

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[1] Dr. Facizewski opined Claimant's MMI could not be addressed until recovery from the hip arthroplasty. Ex. O:14. Dr. Bates thought Claimant could benefit from further treatment, and although believed Claimant was stable, he was not yet at MMI. Ex. Q:11.

[2] Dr. Marsh testified that from Claimant's last visit and understanding Claimant's

147. **Temporary Disability Benefits**. Temporary partial and total disability entitlement are evaluated according to statute. Idaho Code § 72-408. It is payable throughout the period of recovery to the date of MMI. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001). Idaho Code § 72-102 (11) defines "disability" for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present medical evidence of the extent and duration of the disability to recover income benefits for such disability. *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 605 P.2d 939 (1980).

148. The record shows that Defendants began paying Claimant total temporary disability benefits (TTDs) on November 17, 2016 in connection with his lumbar surgery. *See*, Ex. J:1. TTDs continued until July 20, 2017, when Claimant failed to attend the scheduled IME with Dr. Doerr, despite an order from the Commission requiring him to attend. Ex. J:3. Claimant later submitted to the IME with Dr. Doerr on October 19, 2017. Ex. M. As noted above, Claimant later became medically stable from the industrial accident on December 17, 2018.

149. Claimant is thus ineligible for TTDs from July 20, 2017 until October 18, 2017, pursuant to Idaho Code § 72-434, for refusing a medical examination. He is entitled to further TTDs from October 19, 2017, the date that he submitted to Dr. Doerr's IME, through December 17, 2018, the date that he became medically stable.

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conditions that Claimant was at MMI, but due to the fusion he would likely get worse. Marsh Depo., 29:4 – 30:14.

150. **Permanent Partial Impairment (PPI).** "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Waters v. All Phase Construction*, 156 Idaho 259, 262, 322 P.3d 992, 995 (2014).

151. Since, as developed infra., Claimant is totally and permanently disabled, it is unnecessary to consider whether Claimant is entitled to additional PPI benefits. However, Defendants are entitled to apply PPI benefits paid to date to their obligation to pay benefits for total and permanent disability under I.C. 72-408. *Dickinson v. Adams County*, 032117 IDWC, IC 2013-028122 (2014); *Oliveros v. Rule Steel Tanks, Inc.*, 165 Idaho 53, 438 P.3d 291 (2019).

152. **Disability**. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425.

153. The test for determining whether Claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced Claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on Claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

154. Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the advisory opinions of vocational experts. *See*, *Eacret v. Clearwater Forest Industries*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State of Idaho, Industrial Special Indemnity Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon Claimant. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

155. Total permanent disability may be established using either the 100% method or the Odd-Lot Doctrine. Under the 100% method, Claimant must prove his medical impairment and non-medical factors combine to equal a 100% disability. Under the Odd-Lot Doctrine, Claimant must show he was so injured that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist, absent business boom, the sympathy of the employer, temporary good luck, or a superhuman effort on Claimant's part. *See, e.g. Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984).

156. Claimant has the burden of proving Odd-Lot status. *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). He may establish total permanent disability under the Odd-Lot Doctrine in any one of three ways: (1) by showing that he has

attempted other types of employment without success; (2) by showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or (3) by showing that any efforts to find suitable work would be futile. *Lethrud v. Industrial Special Indemnity Fund*, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995). Here a finding of total and permanent disability rests on proving that Claimant is an odd lot worker since Claimant does not have medical impairment and non-medical factors that combine to equal a 100% disability. Both vocational experts, Mr. Crum and Ms. Nelson, agreed that if the restrictions recommended by Dr. Marsh were adopted, Claimant would have less than sedentary physical capacity and would be considered essentially unemployable. Conversely, they agreed that if the restrictions recommended by Dr. Doerr were adopted, Claimant would have no disability in excess of impairment. The case for Claimant's total and permanent disability, therefore, rests upon which physician's restrictions are adopted.

157. Dr. Marsh recommended the following restrictions: no bending, stooping or twisting; lifting rarely up to 15 pounds, waist height only; sitting and standing; limited to no longer than 15 minutes with a break to recline; and work should be limited to 4 hours a day with periodic hourly breaks. Ex. R:11.

158. Dr. Doerr's restrictions, for the back were no lifting in excess of 30 pounds on a frequent basis and no lifting in excess of 50 pounds on an occasional basis, and provided general hip replacement restrictions to include no squatting, crawling, crouching, or high-impact activities. Doerr Dep., 14:12-14, 32:6-13.

159. Dr. Marsh's restrictions are more credible than those of Dr. Doerr, for the following reasons. First, Dr. Marsh is Claimant's treating physician and is more familiar with Claimant's condition. Second, Dr. Doerr last examined Claimant prior to the hip replacement surgery on

October 19, 2017, and the additional restrictions for the hip were only general, not specific to Claimant. Dr. Marsh last examined Claimant after recovery from the hip replacement surgery on December 17, 2018. Third, Dr. Marsh's December 2018 permanent restrictions follow the temporary restrictions assigned by Dr. Bates from October 2018.[3] Fourth, Dr. Doerr's lumbar restrictions are based on the opinion that Claimant was MMI for the industrial accident at the October 19, 2017, examination. However, Dr. Faciszewski did not believe Claimant was MMI for the lumbar injury at the February 13, 2018, IME, and Dr. Bates concluded Claimant was not even at MMI for the lumbar injury at the October 15, 2018 IME. Fifth, Dr. Doerr's opinions on nonorganic symptoms and secondary gain stand alone in the record as unsupported by any other medical authority. All other physicians found Claimant to present credibly. Finally, the Social Security Administration found Claimant to be disabled based upon the record of injuries that he sustained in the industrial accident.

160. Therefore, by adopting and applying Dr. Marsh's restrictions to Claimant, it would be ineffectual for Claimant to seek employment, rendering him essentially unemployable. This meets the third prong of the *Lethrud*, 126 Idaho 560, 563, 887 P.2d 1067, 1070, test, by showing that any efforts to find suitable work would be futile.

161. For the foregoing reasons, Claimant is totally and permanently disabled.

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[3] Dr. Bates gave Claimant temporary restrictions at the October 15, 2018, IME however Dr. Bates also noted Claimant could benefit from further treatment. There is no evidence to suggest that Claimant had any improvement following the October 15, 2018 assessment. Thus, it is reasonable that the permanent restrictions provided in December 2018 by Dr. Marsh are similar to the temporary restrictions given by Dr. Bates in October 2018.

162. **Apportionment**. As this decision has found that Claimant is totally and permanently disabled, apportionment pursuant to Idaho Code § 72-406(a) does not apply, as such apportionment applies only in "cases of permanent disability less than total."

163. **Attorney Fees**. Claimant has requested attorney's fees pursuant to Idaho Code § 72-804, which reads as follows:

> 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.

164. Claimant argues that it was unreasonable for Defendants to rely upon Dr. Doerr's medical opinions to deny Claimant benefits. *See*, Claimant's Opening Brief at 29. Nevertheless, while this decision has chosen not to adopt Dr. Doerr's opinions, that does not render them completely without merit or lacking reasonable grounds. Defendants did not contest Claimant's claim for benefits unreasonably. The request for attorney fees is denied.

165. **Recoupment**. Defendants allege that they reimbursed medical expenses in the amount of $2,910.60 during the time that Claimant failed to submit to an IME, July 20, 2017 until October 18, 2017. *See*, Defendants' Responsive Brief at 24. Claimant does not dispute the amount but claims that the failure to attend the IME scheduled with Dr. Doerr was due to a "miscommunication." *See*, Claimant's Reply Brief at 14.

166. Nevertheless, the record shows that Defendants were required to obtain an order to compel Claimant to attend the IME. *See*, Order Compelling Claimant's Attendance at IME (June

27, 2017). Claimant still failed to attend the IME when it was initially scheduled. Idaho Code § 72-434 provides in pertinent part “no compensation shall be payable for the period during which such failure or obstruction [to attend an IME] continues.”

167. Although Idaho Code § 72-434 permitted Defendants to stop compensation payments during the time Claimant failed to attend the IME, such issues of recoupment shall be addressed under Idaho Code § 72-316. Voluntary payments of income benefits under Idaho Code § 72-316 may be recouped as follows:

> Any payments made by the employer or his insurer to a workman injured or afflicted with an occupational disease, during the period of disability, or to his dependents, which under the provisions of this law, were not due and payable when made, may, subject to the approval of the commission, be deducted from the amount yet owing and to be paid as income benefits; provided, that in case of disability such deduction shall be made by shortening the period during which income benefits must be paid and not by reducing the amount of the weekly payments.

168. As such, it is clear any overpayments may be recouped by deducting the amount from income benefits yet owed, but only by shortening the period during which the future income benefits are to be paid. However, as is the case here, in cases of total and permanent disability there is no way to "shorten" the period during which Claimant is entitled to the payment of total and permanent disability. Thus, because Claimant is totally and permanently disabled, Defendants may not recoup any overpayment of income benefits.

CONCLUSIONS OF LAW

1. Causation for Claimant’s left hip condition has been established and the same is compensable.

2. Medical care attributable to Claimant’s left hip, including but not limited to the total left hip arthroplasty, was necessary and reasonable. Unreimbursed expenses previously

incurred by Claimant in connection with this treatment are reimbursable according to the *Neel* Doctrine.

3. Claimant reached medical stability from the industrial accident on December 17, 2018, Claimant's last appointment with Dr. Marsh.

4. Claimant is ineligible for TTDs from July 20, 2017 until October 18, 2017, pursuant to Idaho Code § 72-434 for refusing a medical examination. He is entitled to further TTDs from October 19, 2017 through December 17, 2018, his date of medical stability.

5. The issue of permanent partial impairment is moot.

6. Claimant is totally and permanently disabled, and is entitled to the payment of benefits therefore pursuant to Idaho Code § 72-408 from his date of medical stability forward. PPI benefits paid to date shall be credited against Defendants' obligation to pay benefits due under Idaho Code § 27-408.

7. Apportionment pursuant to Idaho Code § 72-406(b) is not appropriate.

8. Claimant is not entitled to an award of attorney fees.

9. Pursuant to Idaho Code § 72-316, Defendants are not entitled to recoup any overpayment in medical benefits paid between July 20, 2017 and October 18, 2017, the time during which Claimant failed to submit to an IME.

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 21st day of August, 2020.

INDUSTRIAL COMMISSION

John C. Hummel, Referee

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 17th 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 and Email upon each of the following:

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sjw

BEFORE THE INDUSTRIAL COMMISSION O F THE STATE OF IDAHO

GARY D. PICKENS, Claimant, v. PETERSEN STAMPEDE DODGE, Employer, and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Surety, Defendants.	IC 2013-032785 **ORDER** FILED NOV 1 2 2020 INDUSTRIAL COMMISSION

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. Causation for Claimant's left hip condition has been established and the same is compensable.

2. Medical care attributable to Claimant's left hip, including but not limited to the total left hip arthroplasty, was necessary and reasonable. Unreimbursed expenses previously

incurred by Claimant in connection with this treatment are reimbursable according to the *Neal* doctrine.

3. Claimant reached medical stability from his left hip condition on August 31, 2018, the date that Dr. Armstrong released him from care.

4. Claimant is ineligible for TTDs from July 20, 2017 until October 18, 2017, pursuant to Idaho Code § 72-434 for refusing a medical examination. He is entitled to further TTDs from October 19, 2017 through August 31, 2018.

5. The issue of permanent partial impairment is moot.

6. Claimant is totally and permanently disabled.

7. Apportionment pursuant to Idaho Code § 72-406(b) is not appropriate.

8. Claimant is not eligible for attorney fees.

9. Pursuant to Idaho Code § 72-434, Defendants are entitled to recoup medical benefits in the amount of $2,910.60, which were paid between July 20, 2017 and October 18, 2017, the time during which Claimant failed to submit to an IME.

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

DATED this 10th day of November 2020.

INDUSTRIAL COMMISSION

Thomas P. Baskin, Chairman

Aaron White, Commissioner

Thomas E. Limbaugh, Commissioner

ATTEST:

Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of November, 2020, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail and Email upon each of the following:

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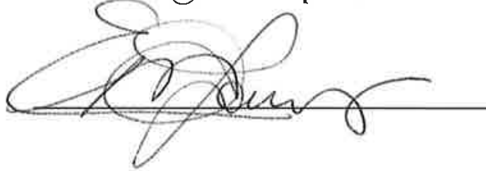

sjw