

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JAMES P. DANIEL,
Claimant,

v.

STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND,
Defendant.

IC 2004-000302

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

Filed May 5, 2017

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Douglas A. Donohue who conducted a hearing in Boise on June 24, 2016. Clinton Miner represented Claimant. Paul Augustine represented ISIF. The parties presented oral and documentary evidence. The record was held open for Claimant to submit a non-redundant set of exhibits which was later received without objection from Defendant. The parties submitted briefs. The case came under advisement on November 25, 2016. Referee Donahue submitted proposed findings of fact and conclusions of law to the Commission for approval. The Commission has reviewed the same and concludes that further treatment is warranted for the issue of ISIF liability. Accordingly, the Commission declines to adopt the proposed decision and issues these findings of fact and conclusions of law. The outcome of the case is unchanged from the recommendation of the Referee.

ISSUES

The issues to be decided according to the Notice of Hearing are:

1. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;
2. Whether and to what extent Claimant is entitled to disability in excess of impairment, including total permanent disability;
3. Whether Claimant is entitled to permanent total disability under the odd-lot doctrine;

4. Whether ISIF is liable under Idaho Code § 72-332; and
5. Apportionment to establish ISIF's share of liability under *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984).

CONTENTIONS OF THE PARTIES

Claimant contends he is totally and permanently disabled as an odd-lot worker. The industrial accident increased his pre-accident restrictions. His pre-accident lifting restriction of 50 pounds was reduced post-accident to 35 pounds with additional restrictions on motion and position changes. His pre-existing conditions constituted a hindrance at work and in seeking work. These were aggravated or accelerated by his industrial accident. Claimant's pre-existing conditions combine with the injury caused by the industrial accident to result in total permanent disability.

ISIF contends Claimant's symptoms from his industrial accident resolved within a month or two. Claimant failed to show that the industrial accident caused an aggravation or acceleration of pre-existing conditions. Medical testimony agrees it did not. Before and after the industrial accident Claimant suffered from a progressive degenerative lumbar spine condition. Whatever permanent disability Claimant experienced is wholly related to that pre-existing condition. Claimant failed to show that other so-called pre-existing conditions included impairment, restrictions, or hindrance to his work. Claimant failed to show the "combining" element required for ISIF liability. Moreover, Claimant failed to qualify as an odd-lot worker; his brief attempt at temporary work is insufficient to meet the criteria, and he has failed to show either a reasonable job search or that such efforts would be futile.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant;
2. Claimant's exhibits 6, 7, 10, 15, and 24 submitted post hearing; and

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 2

3. Defendants' exhibits 1 through 32.

FINDINGS OF FACT

Prior Medical Records

1. Claimant suffered injuries from two motorcycle accidents during the 1970s, including a broken right foot, broken left femur, broken left hip, broken right ankle, a broken left hand at the thumb, and a concussion. Claimant is left-hand dominant.

2. As a result of the progression of his injuries from the motorcycle accident, Jeffrey Hessing, M.D., performed a left total hip replacement in September 2000. Claimant's Exh. 15, p. 361. He noted that Claimant's left leg was "a few millimeters" longer than the right and later confirmed the length discrepancy at 6mm on January 3, 2001. ISIF Exh. 17, pp. 531, 534. On December 7, 2001, Claimant presented with low back pain including a recent severe spasm, right leg pain with tingling and numbness into his right foot, and other left-sided complaints. Dr. Hessing suspected these symptoms were unrelated to his hip and suggested there might be a disc herniation. ISIF Exh. 17, p. 535. Claimant underwent a bone scan, MRI, and neurologic evaluation. On December 21, 2001, Dr. Hessing informed Claimant that he thought the MRI was "consistent with significant pathology in his low lumbar region with moderate foraminal stenosis of both left and right side" and suggested that Claimant pursue non-operative treatment for his radicular symptoms. ISIF Exh. 17, p. 540.

3. Kasey Lewis, D.C., evaluated Claimant's lumbar and pelvic injuries in November 2001. He opined that imaging supported "the presence of a severe L4, L5, S1 intervertebral degenerative disc, which contributes to subjective complaints" and that Claimant was "permanent stationary at this time." ISIF Exh. 13, p. 418. He opined that Claimant was permanently disabled "due to the injuries and weakened lumbopelvic region," had lost

“approximately half of his pre-injury capacity for lifting, bending, and stooping,” and that he believed Claimant “can not work more than one hour.” ISIF Exh. 13, p. 419.

4. In December 2001, James Redshaw, Ph.D., M.D., examined Claimant in a neurological consultation. He diagnosed mechanical back pain, opined that Claimant “likely has some compressive neuropathy in the right foot possibly related also to trauma in the distant past and left lateral femoral cutaneous nerve irritation also possibly related to his surgery.” ISIF Exh. 14, p. 421. He recommended conservative treatment. ISIF Exh. 14, p. 421. If conservative treatment failed, Dr. Redshaw suggested a referral to a pain clinic for a trial of facet injections. *Id.*

5. Claimant visited Timothy McHugh, M.D., for follow-up related to his hypertension. ISIF Exh. 4. On May 14, 2003, Dr. McHugh noted that Claimant “complains of increasing weakness and pain ever since his left total hip 3 years ago” and “he has lumbar disc disease at L4-L5.” ISIF Exh. 4, p. 123. Dr. McHugh provided a referral to Richard Radnovich, D.O., on November 10, 2003. ISIF Exh. 4, p. 127.

6. Dr. Radnovich began treating Claimant for low back, hip, and leg pain on November 17, 2003. At that time, Claimant indicated that he believed he had a “swollen disk between L4 & L5” for the past three years. ISIF Exh. 3, p. 86. Dr. Radnovich’s notes reflect Claimant’s belief that his low back and left hip pain was caused by a motorcycle accident, with “associated symptoms includ[ing] numbness in feet and weakness.” ISIF Exh. 3, p. 83. Dr. Radnovich also stated “It should be noted that HE HAD HIP REPLACEMENT 3 YEARS AGO and pain has been worse since.” (emphasis in original). ISIF Exh. 3, p. 83. Dr. Radnovich treated Claimant with massage, injections, medication, and narcotic analgesics. On

December 10, 2003, Dr. Radnovich excused Claimant from work for two days. ISIF Exh. 3, p. 106. Claimant treated on December 18 and 31, 2003, reporting leg soreness and fluctuating pain.

7. On December 31, 2003, Dr. Radnovich noted indications of “painful spasm, painful trigger point, neuritis, painful scar tissue, improvement with previous injections and failure of conservative treatment” before providing a trigger point injection, osteopathic manipulative therapy, scar tissue injection, and sciatic nerve block. ISIF Exh. 3, p. 114.

Industrial Accident and Medical Care: 2004

8. Claimant worked for his employer, MotivePower, Inc. for more than five years before his January 2004 industrial accident. His assignments varied, and lighter work was generally assigned after he underwent a hip replacement in 2000. Nevertheless, he returned to work and continued working to the date of the subject industrial accident.

9. On January 4 or 5, 2004, Claimant slipped on a patch of ice in his employer’s parking area. The occurrence of the accident is not in dispute. The date uncertainty merely reflects possible recording errors in medical records.

10. Claimant first sought medical care on January 6 from John Crites, M.D., at Primary Health. Claimant complained of mid-back pain with radiation of pain into shoulder and left hip. X-rays showed no fracture. Dr. Crites diagnosed a left buttock contusion and a “left chest with rib injury.” ISIF Exh. 8, p. 285

11. A January 13 MRI showed spondylotic changes throughout the spine. No acute findings were described. Thoracic spine disc herniations were described in context with the spondylotic changes. Lumbar degeneration, with disc bulges and bone spurs, was also noted. ISIF Exh. 8.

12. Physical therapy under the supervision of Michael Gibson, M.D., was provided by St. Alphonsus Rehabilitation Services (“STARS”). Physical therapy began January 15 and

continued through April. ISIF Exh. 5. The records indicate Claimant was cooperative and that he improved. A pre-existing leg length discrepancy was salient in therapy considerations. ISIF Exh. 5.

13. On February 6, Claimant visited Richard Radnovich, D.O. Claimant reported “his leg was better until he fell at work.” ISIF Exh. 3, p.70. On examination Dr. Radnovich noted increased muscle tone and diffuse tenderness of the lumbar spine. He imposed no restrictions beyond “avoid aggravating activities.” ISIF Exh. 3, p. 70.

14. A February 20 X-ray revealed degenerative changes at L4-5, L5-S1 with no acute fracture. ISIF Exh. 3, p. 72.

15. After an examination in late March, Kevin Krafft, M.D., noted Claimant reported an exacerbation of symptoms with new low back pain. His notes do not contain sufficient detail to determine if Dr. Krafft considered whether this exacerbation was caused by the industrial accident, nor do they indicate whether he considered this exacerbation to be temporary or permanent. He suggested that physical therapy be modified. ISIF Exh. 7.

16. Colin Poole, M.D., evaluated Claimant’s leg length discrepancy on April 6. He noted the industrial accident by history along with the reported absence of MRI findings related to it. Dr. Poole treated Claimant’s left thigh complaints as a function of his leg length discrepancy. He opined Claimant was not a candidate for surgical reduction of the discrepancy and suggested leg length correction via shoe inserts and lifts. ISIF Exh. 6.

17. An April 16 EMG performed by Dr. Krafft was “not consistent with a significant radiculopathy.” Claimant’s Exh. 7, 15; ISIF Exh. 23, pp. 649-651.

18. On May 20, Claimant sought treatment from his long-time treating family physician, Timothy McHugh, M.D., at Cherry Lane Family Clinic. He actually saw David

Butuk, M.D., for symptoms unrelated to the industrial accident. By history, Claimant denied ongoing back pain or other symptoms which might be related to the industrial accident. In follow-up visits in 2004 and 2005, Claimant sometimes reported such symptoms, but these were not addressed by these physicians. Where Claimant's low back is mentioned in examination during these follow-up visits, no objective signs are noted. ISIF Exh. 4.

19. A May 21 MRI showed spondylitic changes at L4-5 and L5-S1 without neural compromise. Howard King, M.D., opined Claimant was not a surgical candidate on May 27. He suggested a referral to Michael Sant, M.D. ISIF Exh. 21, p. 599.

20. On May 26, after limited records review, medical consultant August Mantia, M.D., advised Claimant's employer that a proposed second MRI should not be approved and that an "immediate IME" be provided. ISIF Exh. 12.

21. On June 18, a steroid injection at L4-5 was performed by surgeon Christian Gussner, M.D.

22. In June 2004, Claimant presented to Michael Sant, M.D. for a second opinion on the viability of surgical intervention. Dr. Sant opined that Claimant had persistent low back, left hip, and anterior thigh pain and provided conservative medical treatment through July 2004. ISIF Exh. 20.

23. In July and August 2004, Scott Fletcher, D.C. provided conservative chiropractic treatment. ISIF Exh. 19.

24. On August 4, 2004, Dr. Sant opined that he was at a loss as to what treatment to offer Claimant. "I do not know where his ongoing pain is coming from and therefore it makes it very difficult to treat this." ISIF Exh. 20, p. 577. He suggested an IME with a neurosurgeon. Dr. Sant recommended that Claimant be limited to working four hours per day with limited

bending, stooping, and mild position changes until he could “get this sorted out.” ISIF Exh. 20, p. 577.

25. On August 13, 2004, Paul Montalbano, M.D., provided a neurosurgical consultation. Claimant reported left thigh pain beginning April 2004 and increasing thereafter. Dr. Montalbano reviewed earlier 2004 medical records and examined Claimant. He ordered a lumbar x-ray which showed mild intervertebral joint degenerative changes but no evidence of spinal instability. Dr. Montalbano recommended against surgery and for continued conservative measures. ISIF Exh. 2.

26. An August 20 CT scan showed a small, left L4-5 disk protrusion with degenerative disease at L5-S1. ISIF Exh. 2, p. 58. A lumbar myelogram was also performed that day.

27. Upon review of the post-myelo CT scan on August 30, Dr. Montalbano recommended surgical intervention to include a left L4-5 microdiscectomy. ISIF Exh. 2. Dr. Montalbano initially opined that a 2001 MRI showed a disc protrusion at L5-S1; however, upon review of the films of the December 7, 2001 lumbar MRI, the December 7, 2004 MRI, August 13, 2004 x-rays, and the August 20, 2004 post-myelo CT, Dr. Montalbano revised that conclusion and opined on September 22, 2004 that the L4-5 disc protrusion was unchanged in these films and that Claimant’s symptomatology pre-existed the 2004 accident. ISIF Exh. 2, p. 64. He withdrew his surgical recommendation on October 25, 2004. ISIF Exh. 2, p. 67.

28. On October 14, 2004, R. Tyler Frizzell, M.D. reviewed records and examined Claimant at the request of Claimant’s former attorney. He opined that diagnostic imaging showed no progression of Claimant’s degenerative spine disease between 2001 and 2004. Left thigh symptoms, similar to Claimant’s current complaint, were reported November 10, 2003.

Upon examination, symptoms were consistent with a left L4-5 radiculopathy related to a foraminal disc herniation. Dr. Frizzell recommended surgery, but noted it would not ameliorate all of Claimant's pain. Authorization for surgery was sought from and approved by Claimant's health insurance carrier. ISIF Exh. 1.

29. On October 25, Dr. Montalbano opined Claimant's left L4-5 "foraminal disc herniation is not the cause of the patient's symptoms." ISIF Exh. 2, p. 67.

30. On October 26, 2004, Dr. Frizzell performed a left L4-5 facetectomy and diskectomy. Dr. Frizzell observed a "broad based bilateral protrusion." ISIF Exh. 1, p. 19.

31. Dr. Frizzell released Claimant to light duty work effective November 17, 2004. ISIF Exh. 1, p. 25.

32. On November 30, Claimant wrote Dr. Frizzell asking about a relationship between his thoracic spine condition and the industrial accident. ISIF Exh. 1, p. 27.

33. On December 14, Claimant visited spine surgeon David Verst, M.D. After examination, Dr. Verst diagnosed degenerative disc disease and facet syndrome at the cervicothoracic junction. He performed a cervical CT myelogram which showed degenerative cervical changes as well. ISIF Exh. 9.

34. A post-surgical MRI of Claimant's lumbar spine was performed on December 21. It showed possible epidural fibrosis and/or a small amount of recurrent or residual disc material which did not impinge a nerve root. ISIF Exh. 1.

Medical Care: 2005—Hearing

35. In a February 22, 2005 follow-up visit with Dr. Frizzell, Claimant reported increased subjective symptoms. ISIF Exh. 1. By a May follow-up visit this had subsided somewhat, with Dr. Frizzell noting it was "actually considerably better following surgery." ISIF Exh. 1, p. 41.

36. On August 30, 2005, James Bates, M.D. performed an EMG which suggested a left S1 radiculopathy but the results were too nonspecific to opine further. ISIF Exh. 22.

37. On August 4, 2005, Dr. Frizzell recommended a pain management referral to The Idaho Pain Center for Richard DuBose, M.D., and his PA-C, Thomas Rambow. ISIF Exh. 1.

38. A September 2, 2005 lumbar MRI showed postoperative changes at L4-5. ISIF Exh. 10, pp. 313-315. On September 15, 2005, Dr. DuBose and PA-C Rambow noted that nerve conduction studies indicated a left S1 radiculopathy not shown on the recent MRI. ISIF Exh. 10, p. 315.

39. After a few visits for pain management, Dr. DuBose and PA-C Rambow noted that other physicians had opined that Claimant's condition and the industrial accident were not related. ISIF Exh. 10. However, they did not offer an opinion on the issue. A November 8, 2005 follow-up note states:

[T]here seems to be some confusion whether the L5-S1 disc space is actually [...] a problem. Nerve conduction studies would support the fact that he does have a radiculopathy following an L5-S1 distribution. His recent scans do not support this fact. I have reviewed every record except for chart notes from Dr. Montalbano. I believe there remains some doubt as well.

ISIF Exh. 10, p. 317. By December 1, 2005, they had concluded that the source of Claimant's problems was at L4-5 "despite the findings he had on his nerve conduction studies." ISIF Exh. 10, p. 318. Dr. DuBose and PA-C Rambow continued to explore diagnosis and causation and to provide pain relief in follow-up visits, along with Shane Maxwell, D.O., for the next 10 years. ISIF Exh. 32. They noted Claimant's belief that the condition and industrial accident were causally linked, but again, did not themselves so opine. Implantation of a dorsal column stimulator was discussed at several visits beginning in 2006; there was also consideration of a multilevel fusion beginning in late 2009. ISIF Exh. 10. Claimant and these physicians operated

under the assumption that the spinal cord stimulator would be paid for by Claimant, potentially out of settlement proceeds from his workers' compensation claim. ISIF Exh. 10. A September 26, 2007 follow-up note records that Claimant "continues to pursue his insurance company to pay for a spinal cord stimulator trial." ISIF Exh. 10, p. 374. Dr. Maxwell's last recorded mention of the spinal cord stimulator appeared in 2011. ISIF Exh. 10, p. 383.

40. Claimant last visited Dr. Frizzell in March 2006. Dr. Frizzell noted significant ongoing pain, but opined that he could provide no additional treatment from a surgical standpoint. ISIF Exh. 1, p. 48. Dr. Frizzell's notes show that later in 2006 Claimant phoned in questions and complaints but did not visit.

41. On September 5, 2006, Barbara Quattrone, M.D., examined Claimant for purposes of assessing his application for Social Security Disability. Her report addressed his then-current conditions without opining about causal relationships. ISIF Exh. 26. Claimant was eventually found eligible for SSD benefits retroactive to March 31, 2006. Claimant's Exh. 24.

42. On February 23, 2007, Dr. McHugh confirmed he had "never treated Mr. Daniel for his physical injuries allegedly sustained[]while on the job." ISIF Exh. 4, p. 158.

43. On May 4, 2011, Dr. Montalbano reviewed records and examined Claimant at the request of his employer's surety. Claimant reported increased pain since the 2004 accident. Dr. Montalbano noted the records showed Claimant was "clearly symptomatic" immediately before the accident. He opined that Claimant's condition pre-existed his 2004 industrial injury. ISIF Exh. 2, p. 66.

44. On November 26, 2012, Bill Jordan provided a vocational disability report. ISIF Exh. 30. Using Dr. Quattrone's proposed restrictions he opined that Claimant had a 48% permanent partial disability without regard to causation or apportionment for pre-existing

conditions. He noted that Dr. Montalbano's opinion that Claimant suffered no permanent impairment from the subject accident would result in a zero disability rating referable to the subject accident.

45. Dr. Radnovich saw Claimant on June 11, 2013 for back and leg pain. Claimant's Exh. 6. His restrictions included:

no prolonged standing, no squatting, no stooping, no crawling, no repetitive climbing (as in ladders and stairs), no overhead work. No repetitive bending, twisting, or lifting. Max lift 25 lbs. no lifting above shoulder level, no lift and carry greater than 10 lbs. No exposure to low frequency vibration, no unprotected heights.

Claimant's Exh. 6.

46. On September 25, 2015, Dr. Frizzell repeated his October 2004 assessment and opined that he "agree[d] with Dr. Montalbano that Mr. Daniel's surgery was necessitated entirely by his pre-existing condition in that this condition was not aggravated by the January 2004 accident." ISIF Exh. 1, p. 53. Dr. Frizzell averred that he reached his opinion after reviewing his file regarding Claimant as well as records provided to him by the ISIF.

DISCUSSION AND FURTHER FINDINGS OF FACT

47. 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).

48. 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). 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). *See also*

Dinneen v. Finch, 100 Idaho 620, 626–27, 603 P.2d 575, 581–82 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

49. The Referee observed Claimant at hearing, noting that nothing in Claimant’s demeanor suggested that he was not credible. Of course, the Commission may not disturb this finding without having observed Claimant. The Referee also noted that there were minor discrepancies in Claimant’s testimony and his medical records. As did the Referee, where contemporaneously prepared medical records conflict with Claimant’s testimony, the Commission gives greater weight to medical documentation than Claimant’s testimony.

50. In this case, Claimant alleges that he is totally and permanently disabled. Further, Claimant seeks to hold the ISIF responsible for some portion of his alleged total and permanent disability. Idaho Code § 72-332(1) assigns liability to the ISIF when a Claimant is totally and permanently disabled as a result of the combined effects of a work accident and a pre-existing condition or conditions. That section provides:

If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease arising out of and in the course of his employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease, including scheduled and unscheduled permanent disabilities, and the injured employee shall be compensated for the remainder of his income benefits out of the industrial special indemnity account.

Idaho Code § 72-332(1).

51. To trigger ISIF liability, the injured worker must demonstrate that (1) he suffered from a pre-existing impairment, (2) which was manifest, (3) which constituted a subjective hindrance to claimant’s employability, and (4) which combined with the work accident to cause

total and permanent disability. See *Bybee v. State Industrial Special Indem. Fund*, 129 Idaho 76, 921 P.2d 1200 (1996).

52. In order to satisfy the fourth element, the Court has required a showing that the claimant would not have been totally and permanently disabled “but for the pre-existing impairment.” See *Garcia v. J.R. Simplot Co.*, 115 Idaho 966, 772 P.2d 173 (1989).

53. In evaluating the instant matter, let it be assumed that Claimant is totally and permanently disabled. Let it further be assumed that Claimant’s pre-existing low back, left hip, and left leg conditions resulted in impairments which were manifest and which constituted a subjective hindrance to Claimant’s employability prior to the subject accident. The most problematic requirement for Claimant lies in proving that the subject accident “combined with” his documented pre-existing conditions to cause total and permanent disability. This necessarily requires of Claimant that he prove that the work accident produced a permanent, as opposed to a temporary, injury. Otherwise, it could not be said that the work accident “combined with” the pre-existing condition to cause total and permanent disability. As developed below, we are unable to conclude that the work accident caused anything but a temporary injury, or that it accelerated, aggravated, or in some other way combined with Claimant’s pre-existing conditions to cause total and permanent disability. Rather, the medical evidence establishes that if Claimant is totally and permanently disabled as of the date of hearing, that condition is solely the result of the natural progression of his pre-existing conditions.

54. Claimant visited his treating physician for injections to ease symptoms of his pre-existing condition less than one week before the industrial accident. He next visited this physician one month after the industrial accident. The record does not show it likely that

the January 4, 2004 industrial accident increased or affected in any way Claimant's ongoing medical regimen related to his pre-existing condition.

55. Claimant's medical care immediately after the accident was for a left buttock contusion, mid-back and rib pain. This is quite different from the chronic low back and leg pain with paresthesias which predated the accident. Claimant's assertions of ongoing chronic exacerbation of low back and leg pain with paresthesias arose months afterward.

56. Medical records show that the history provided by Claimant to some of the physicians who examined him after the industrial accident omitted mention of a symptomatic pre-existing condition. If mentioned, Claimant denied or minimized the symptoms that were recorded days before the accident. Physicians who treated Claimant under the assumption that his symptoms began or greatly increased immediately after the industrial accident were not provided accurate information about the pain and other symptoms documented in the record as existing just prior to the accident.

57. Doctors Montalbano and Frizzell reviewed medical records related to treatment provided before the industrial accident. Both opined that Claimant's pre-existing condition, and not the accident, was the cause of his symptoms. Both opined that Claimant's pre-existing condition, and not the accident, was the reason surgery was required. The record does not show other physicians have persuasively opined to link the industrial accident to any condition or symptoms extant at the time of surgery or thereafter.

58. No physician has rated Claimant for permanent impairment caused by the industrial accident. To the extent any physician has recommended permanent restrictions greater than had been suggested before the accident, none have provided a causal link between the additional restrictions and the industrial accident.

59. The parties rely heavily on Claimant's subjective reports of pain, specifically when he rates that pain on a scale of one to ten. While subjective complaints do factor into medical opinions, they do not rise to the level of an objective clinical finding. The record does not show it likely that any physician deems these numbers correlative over time, or indicative of diagnostic or causal data to support any opinion.

60. Claimant failed to show the industrial accident caused more than a temporary increase in symptoms which subsided to baseline with relative promptness. Claimant failed to show he likely aggravated, exacerbated, or accelerated his pre-existing condition as a result of the industrial accident.

61. For these reasons, we conclude that even if all other elements of the prima facie case against the ISIF are met, Claimant's case nevertheless fails because he cannot satisfy the requirement of demonstrating that his total and permanent disability is the result of the combined effects of the work accident and his pre-existing conditions.

62. All other issues pertinent to evaluation of ISIF liability are moot.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has failed to prove that his total and permanent disability is a result of the combined effects of the work accident and his pre-existing conditions.

2. All other issues relating to potential ISIF liability are moot.

DATED this 5th day of May, 2017

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

_____/s/_____
Thomas P. Baskin, Commissioner

_____/s/_____
R.D. Maynard, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of May, 2017, a true and correct copy of FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER were served by regular United States Mail upon each of the following:

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