BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GREGORY LUCAS, Claimant, v. NORTHCON, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2009-000033** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed: May 11, 2018

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John C. Hummel, who conducted a hearing in Boise on July 21, 2017. Taylor Mossman-Fletcher represented Claimant, Gregory Lucas, who was present in person. Neil D. McFeeley represented Defendant Employer, Northcon, Inc., and Defendant Surety, Idaho State Insurance Fund. The parties presented oral and documentary evidence at hearing, took one post-hearing deposition, and submitted briefs. The matter came under advisement on January 11, 2018.

ISSUES

The issues to be decided are as follows:

1. Whether Claimant's condition is due in whole or in part to a preexisting injury or condition;

2. Whether and to what extent Claimant is entitled to the following benefits:
    a. Medical care;
    b. Permanent partial impairment;
    c. Permanent partial disability;
3. Whether apportionment for a preexisting condition pursuant to Idaho Code § 72-406 is appropriate; and
4. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant contends that his industrial accident of December 30, 2008 loosened the prosthesis from his 2003 total right hip replacement and hastened the need for its revision. He argues that the costs of that surgery and related care are compensable. He contends that future palliative care, including acupuncture recommended by his treating physician, Eric T. Sandefur, D.O., should be compensable. Claimant further alleges that he is entitled to an impairment of the lower extremity as determined by Robert Friedman, M.D. Finally, he contends, based upon the work restrictions assigned by Dr. Sandefur, that he has a permanent partial disability in the amount of 60%, inclusive of impairment.

Although Defendants paid for Claimant's right hip replacement revision surgery and related care,[1] they deny that the need for this medical care was industrially related. They emphasize that prior to the 2008 industrial accident, Claimant had significant prior injuries and medical conditions, including severe degenerative arthritis in his right hip that resulted in a total hip replacement in 2003. They contend that the need for the revision of the total hip replacement was due to the prosthesis normally wearing out and not due to trauma from the industrial

[1] Claimant acknowledged that Defendants had paid almost all of the remaining medical bills related to his right hip as of January 9, 2018, with a small, unpaid balance remaining of $257. Claimant's Reply Brief at 9.

accident. Because they deny that the need for hip revision surgery was industrially related, Defendants deny liability for further medical care related to the same. Defendants argue that Dr. Friedman's impairment rating is not credible because he failed to appropriately apportion Claimant's preexisting hip condition. To the extent that Claimant has any disability, Defendants contend that it is due entirely to preexisting conditions and not the industrial accident, thus they are not liable for Claimant's disability benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's testimony taken at hearing and at his depositions taken on June 15, 2015 and June 29, 2017;[2]
2. Joint Exhibits A through PP, admitted at the hearing;
3. Joint Exhibit QQ admitted by post-hearing order on February 2, 2018 pursuant to the parties' stipulation; and
4. The deposition transcript of the testimony of Eric T. Sandefur, D.O., taken on September 21, 2017.

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

FINDINGS OF FACT

1. **Claimant's Background and Education**. Claimant was 58 years of age at the time of hearing. He was born in Portland, Oregon, where he attended school until age 16. His family then moved to Sunriver, Oregon. He graduated from high school in Bend, Oregon in January 1977. After high school, he attended a one-year program at a bible college and then

[2] Both deposition transcripts are contained in Ex. FF.

attended general studies courses at Central Oregon Community College from 1978 to 1979. Tr., 28:15-32:4; Ex. OO:2-3.

2. Adult education for Claimant concentrated on the construction industry in which he worked throughout his career. He took a computer-assisted drafting course at Blue Mountain Community College in Baker City in 2002 and received a certification. Claimant also took classes with the goal of obtaining his international project management certification, but he did not complete them. In 2009 he obtained a lead abatement certification after attending a two-day seminar. Tr., 32:14-33:9; Ex. OO:2-3.

3. After sustaining a back injury in a 1998 automobile accident, Claimant received occupational therapy and retraining provided by the Oregon Division of Vocational Rehabilitation. He attended some courses on journalism and grant writing in Baker City. He could not recall whether he received a certificate for these studies. Claimant ultimately did not pursue journalism as a career path; rather, he recovered sufficiently to return to work in construction, the only occupation he "had ever known." Tr., 149:9-151:25; Ex. OO:3.

4. **Prior Vocational History**. Claimant's first job in high school was for a ski shop, due to his interest in competitive freestyle skiing. From 1976 to March 1984, Claimant worked in his father's construction company in Sunriver, Lucas and Sons, which built high-end homes. Claimant then moved to Alaska where he was self-employed in a similar construction business, The Finishing Touch Construction, from March 1984 to 1986. From 1986 to July 1990, Claimant worked for Sears and Roebuck as a corporate carpenter on prototype projects, store remodels and new store construction. From August 1990 to October 1992, Claimant worked with his parents on remodeling and building homes. Claimant resumed his self-employment in construction in Colorado in November 1992; he remained in this capacity until September 1997. He then

returned to Alaska to work as a construction project manager for Kink River Construction from October 1997 to April 1998. He was out of work recovering from injuries sustained in an automobile accident from May 1998 until 2000. He worked as a paint line manager for a ranching company in Baker City, Oregon from early 2001 until July 2001. Thereafter, he worked briefly as a project manager for a sewer project and wetlands construction in La Grande, Oregon, until August 2001. Claimant worked for Fred Meyer Stores as an assistant receiving manager from August to September 2001. From October 2001 until late 2002, he was engaged in remodeling his parents' home. Thereafter he worked until March 2003 as a project manager for an architecture firm, JDL Architects, on a condominium construction project. From March 2003 to late 2003, Claimant recovered from hip replacement surgery and was out of work. From late 2003 to 2007, Claimant returned to self-employment as a construction contractor in Colorado. From February 2007 to October 2008, he continued self-employment as a construction contractor in Oregon. Ex. JJ:1-4; Ex. II:1; Tr., 33:25-48:2.

5. **Medical History Prior to Industrial Accident**. Claimant has an extensive history of past medical conditions and injuries. The following findings summarize the significant health events he experienced, both industrial and non-industrial.

6. Claimant injured his neck while skiing in 1977. He strained ligaments and tendons in his neck, which caused severe swelling and a temporary numbness in his feet and hands. He received eight months of physical therapy. Despite his lengthy recovery, Claimant considered his only residual effect was a neck kink that occurred sporadically. He did not believe that the injury impaired him from any work activities. *Id*. at 48:13-50:5.

7. Claimant was involved in an automobile accident in 1978. The accident mildly exacerbated his preexisting neck injury from skiing. The primary consequence of this accident

was that his medical provider extended his ongoing physical therapy by three additional months. The accident did not significantly affect any other body parts nor did Claimant believe that it interfered with his ability to work. Tr., 50:11-25.

8. The next significant injury Claimant sustained was in another automobile accident on February 14, 1998. The accident was a head-on collision. Claimant received an initial evaluation in an emergency room; thereafter he sought a consultation with an orthopedic surgeon in Alaska. An MRI showed that he had sustained a prolapsed disk at L5-S1 with left nerve root encroachment. There was also degenerative disk disease noted at L4-5 and L5-S1. Claimant sought another evaluation with Dr. Sandefur of St. Elizabeth's Health Services, Orthopedic Clinic, in Baker City, Oregon, on April 20, 1998. He complained of lower back discomfort with pain radiating down into his left leg. Claimant was taking Vicodin for pain relief. Dr. Sandefur recommended surgery. *Id*. at 51:1-52:7; Ex. A:1-3.

9. Dr. Sandefur performed a laminectomy and discectomy at L5-S1 on May 12, 1998. Claimant tolerated the procedure well and received a discharge on May 14, 1998. His discharge diagnosis was herniated disk L5-S1. Dr. Sandefur prescribed pain medication and physical restrictions, including no work. *Id*. at 9-16.

10. While Claimant received physical therapy post-surgery, Dr. Sandefur followed his recovery in appointments through October 1998. Claimant remained off work during this time. *Id*. at 17-23. On October 9, 1998, Dr. Sandefur noted that Claimant had an acute worsening of his symptoms and ordered an MRI. *Id*. at 24. The MRI, performed on October 13, 1998, showed a significant amount of scar tissue. *Id*. at 25-26.

11. Upon referral from Dr. Sandefur, Claimant consulted with Norwyn Newby, M.D., a neurosurgeon in Bend, Oregon. Dr. Newby recommended a repeat surgery on Claimant's back

to excise the scar tissue and to perform an instrumented fusion at the L5-S1 level. Dr. Sandefur concurred with Dr. Newby's recommendations and Dr. Newby performed the surgery in December 1998. Ex. A:26; Tr., 52:13-53:15.

12. After an extended period of occupational therapy that lasted through 2000, Claimant recovered from his second back surgery, which he believed enabled him to return to work without restrictions. Nevertheless, he continued to have significant residual sciatic pain into his left leg. Tr., 54:12-55:25. Although he may not have had physician-assigned work restrictions as a result of his February 1998 automobile accident, nevertheless he continued to take both Ibuprofen, 800 mg, twice a day, and occasionally took Hydrocodone/Acetaminophen, 5 mg/500 mg, for his left leg sciatic pain that was residual to the February 1998 accident. Ex. OO:21-22. Claimant described his residual left leg sciatic pain as a "constant problem," as follows: "I got the use of my leg back, so it [lumbar surgery] was worth that. It's not weak or anything, but the sciatic always hurts, but I have learned to deal with it, unless it gets really bad." Tr., 54:6-10. In cross examination at hearing, Claimant stated in pertinent part as follows:

> Q. [By Mr. McFeeley] All right. And then, you said that your low back problem really doesn't affect your employment, although you acknowledge that it limits your ability to sit or to stand and that your sciatic – at least on your left side is a constant problem, is that correct?
>
> A. The back itself doesn't bother me, but yes, the residual effect is in my sciatic and that's the result of the back injury, yeah.

Id. at 128:10-17.

13. Claimant's counsel asked him to clarify what effect his back injury had on his subsequent employability, as follows:

> Q. [By Ms. Taylor Mossman-Fletcher] Okay. And, again, your back issues that you had following those two surgeries in 1998, did those symptoms in our [sic] back ever preclude you from obtaining or sustaining the employment that you did have after that time?

A. Not gaining or – whatever you –

Q. Sustaining.

A. Sustaining. *I am sure it affected at times what I could do*.

Tr., 152:1-8 [emphasis added].

14. In or about 2002, Claimant was diagnosed with Type II Bipolar Disorder. Since this diagnosis he has received medication therapy to control and manage the illness. Prior to treatment, his bipolar disease, when it manifested as depression, intermittingly interfered with his ability to function, including work. Following medical management of the illness beginning in 2002, however, he no longer experienced debilitating depression. Ex. OO:21; 23.

15. In mid-2002, Claimant's right hip became painful. His hip continued to bother him and his symptoms increased until they interfered with his ability to work and he lost his job with JDL Architects. He returned to St. Elizabeth Health Services for evaluation on January 13, 2003. X-rays showed severe degenerative arthritis in his right hip. Barbara L. Tylka, M.D., noted that Claimant had experienced increasing symptoms over the past 10 months in his right groin and right SI joint, with deep muscle pain in his right thigh, calf, and shin. Claimant told Dr. Tylka that when he was 26 years old, a physician had told him he had arthritis in his right hip. Claimant was 43 years of age at the time of consultation. Dr. Tylka began him on a course of anti-inflammatory medications and suggested that he consider surgery if he did not experience any significant improvement in his symptoms. Tr., 56:5-22; Ex. A:39-40.

16. Claimant's hip symptoms did not improve. Dr. Sandefur performed a right total hip arthroplasty on March 4, 2003. Dr. Sandefur followed Claimant through May 2003. On May 19, 2003, Dr. Sandefur concluded that Claimant had made satisfactory progress, with some mild hip girdle weakness, and that he should continue with physical therapy. Ex. A:64-73.

17. Claimant recalled that Dr. Sandefur advised him that previous models of the hip prosthesis would last only 10 to 15 years, however the newer model that Dr. Sandefur used, with a ceramic femoral head, would last 20 to 25 years.[3] Tr., 58:12-19.

18. Claimant had temporary physical restrictions during his recovery from the right hip replacement surgery. Dr. Sandefur, however, did not assign any permanent restrictions. After recovery, Claimant returned to full-time work; he recalled that he did not have any residual effects from the surgery other than he would notice a twinge in his right hip if he was lifting something very heavy. He further recalled that his right hip condition, after he returned to construction work, did not prevent him from performing any of the usual physical tasks associated with his construction trade, including lifting or walking. *Id*. at 57:8-60:19; Ex. A: 64-73.

19. Claimant next injured himself in a work-related accident on January 9, 2006 in Crested Butte, Colorado. He slipped and fell on ice and sustained a severe sprain to his left ankle and a MCL (medial collateral ligament) tear and medial meniscus tear of his right knee.[4] Claimant also had an automobile accident on March 16, 2006 that temporarily exacerbated his ankle symptoms. Ex. M:1-2. He underwent two surgeries on his left ankle, a Bostrum repair (a repair of the lateral ligaments) on March 8, 2007, and an arthroscopic partial synovectomy (debridement of scar tissue) on October 8, 2007. Ex. I:1; Ex. J:2; Ex. M:1.

20. Claimant attended extensive physical therapy following his ankle surgeries. With regard to his right knee, Claimant received physical therapy initially in Colorado and later in

[3] Dr. Sandefur's records do not reflect that he advised Claimant regarding the expected life expectancy of the prosthesis. Ex. A:39-73. In his deposition, however, Dr. Sandefur stated that his standard practice was to tell patients that the device would have a life expectancy of 15 to 20 years. In Claimant's case, Dr. Sandefur would not have projected a life expectancy greater than 15 to 20 years for the prosthesis. Sandefur Dep. 8:12-9:7; 22:6-14.

[4] Claimant incorrectly identified his right knee injury as an ACL (anterior cruciate ligament) tear in hearing testimony. Tr., 61:6-7. He was also unsure of the date of the injury. *Id*. at 2-4.

Oregon. An MRI demonstrated a MCL and meniscal tear in his right knee. Ex. M:1. Claimant underwent arthroscopic surgery on his right knee by Blake Nonweiler, M.D., in Bend, Oregon on June 2, 2008. The surgery was a medial femoral condylar chondroplasty. Ex. N:2.

21. Following Claimant's ankle and knee surgeries, Keith Kadlecik, PT, of Cascade Occupational Medicine Physicians, Inc. in Bend, performed a functional capacity examination (FCE) of Claimant on April 8, 2008. Ex. L. During the FCE, Mr. Kadlecik observed that Claimant walked with a noticeable limp in his left leg. *Id*. at 11. Mr. Kadlecik determined that it was appropriate for Claimant to perform work in the light work range as defined by the U.S. Department of Labor. *Id.* at 1. Claimant showed that he was significantly limited by pain while performing the physical aspects of the examination, including bending, squatting, kneeling, twisting and lifting. Additionally, walking on uneven surfaces was problematic for Claimant. *Id*. The FCE report also stated that the maximum amount of weight that Claimant could safely lift on a frequent basis was 13 pounds. *Id*. at 10.

22. At hearing, Claimant had difficulty recalling the details of his 2008 FCE, and in particular, the restrictions it identified, such as performing in the light work category or lifting to a maximum of 13 pounds. He agreed that the injuries he sustained in his January 9, 2006 accident temporarily incapacitated him, but he did not agree that he was permanently restricted in the manner suggested by the FCE. Tr., 135:24-138:7.

23. Claimant underwent an IME requested by Pinnacol, the surety for his January 9, 2006 work accident. Gregory Reichhardt, M.D., a physiatrist, performed the IME on April 23, 2006. Ex. M:1. Among the records that Dr. Reichhardt reviewed was the April 8, 2006 FCE. *Id*. at 6. The questions that the surety asked Dr. Reichhardt to address, however, related to his March 16, 2006 automobile accident that exacerbated his left ankle injury, not the January 9,

2006 slip and fall accident at work. Dr. Reichhardt determined that Claimant was at maximum medical improvement from the March 16, 2006 injury, and had no permanent work restrictions related to it. Without explanation or detail, Dr. Reichhardt concluded that Claimant "did sustain a permanent injury to his ankle relative to his January 2006 injury." He did not assign any permanent work restrictions or an impairment rating to the ankle injury from January 2006. Ex. M:7-8.

24. Claimant asserted that he did not experience any aggravation of his right hip as a result of his left ankle and right knee injuries. Tr., 61:19-24; 63:16-24. He also believed that he did not sustain any long-term physical consequences to his right knee; his left ankle, however, remained sensitive enough to touch and pressure that he could not wear a high top boot. *Id*. at 64:11-23. Nevertheless, Claimant believed that he regained full function of both his ankle and knee after physical therapy and he was not prevented from returning to work again in October 2008, this time for Employer. Tr., 65:24-67:4.

25. At hearing Claimant responded to questioning by Defendants' counsel regarding his functionality at the time that he took the position with Employer in 2008, in pertinent part as follows:

> Q. [By Mr. McFeeley] And then you told counsel that – and I don't want to put words in your mouth, but that you were – by the time you started work at Northcon in I guess October of 2008, that you weren't really having any medical problems; is that correct?
>
> A. Yeah. That's correct.
>
> Q. That's not really what you told the work comp people in Colorado, though, was it?
>
> A. At the time that I went to work with Northcon I wasn't having any serious issues. The Pinnacle [sic; Colorado surety] – I was talking to them about my left foot – I don't know if that letter was before or after my debridement, you know, the scar tissue, but that surgery was fairly close to

> when I went to work for Northcon and – that's a good question. I do know that Northcon was the first full-time job that I had been offered and participated in for a length of time, because of those surgeries, and it was not creating a problem for me to do that.

Tr., 121:10-122:2.

26. **Subject Employment**. Claimant returned to Oregon and began work for Employer, a construction company headquartered in Hayden, Idaho, in October 2008. His position was Project Supervisor/Lead Carpenter. He was responsible to solicit construction projects, draft project bids, manage all phases of a construction project, hire sub-contractors, interpret blueprints and plans, perform carpentry work as needed, manage billing and bookkeeping, and ensure quality control. The position was a combination of supervisory, managerial, and manual labor work. Claimant described the physical requirements of the position as follows: "Climbing up on the walls. Rolling trusses. Putting beams up. Driving the Pettibone [forklift]. Making the cuts. Lifting beams. And, you know, minor framing that goes along with that." *Id*. at 43:5-45:12; Ex. JJ:1.

27. **Industrial Accident**. On December 30, 2008, Claimant was working for Employer at the Yakima Airport in Yakima, Washington. The project was construction of a new security area on one of the airport's concourses. On this date, the work area was already framed and sheet-rocked. Because of his experience taping sheetrock, Claimant took the lead in taping of the sheetrock, which was expected to take three or four days to finish. He had two workers with him on this task. On this occasion, they were working in a room with a nine-foot ceiling. Claimant could not quite reach the top of the tapered sheetrock to fill it in so that it would be flat. He used a bucket to stand on to reach where he needed to work. As Claimant was reaching to the right to fill in the sheetrock before he had to move the bucket, he lost his balance and fell. The fall propelled him "like a rocket" into the next room, landing on his back. He instantly became

aware that he had twisted his right leg during the fall. The resulting pain in his right hip took his "breath away." Claimant lay there for several minutes before getting up and going out to the concourse where he sat in a chair until lunchtime. After that, assuming that he had sustained a simple strain or sprain, he resumed working for the rest of the workday. Tr., 67:5-69:16.

28. Due to pain, Claimant slept poorly on the night of December 30, 2008. On the next morning, December 31, 2008, he went to the jobsite to ensure that the work was proceeding as planned and then went to a hospital in Yakima for evaluation. *Id*. at 69:16-22.

29. Claimant telephoned his supervisor the next day and informed him of the injury. He stated that he had fallen on ice outside the work site. His reason for lying was that he was embarrassed by the circumstances of the accident, in which he had been using a bucket instead of a ladder to reach the sheetrock. He believed that as the onsite safety officer, he was setting a bad example. Employer then recorded the accident as a slip and fall on ice in the first report of injury dated December 31, 2008. Claimant subsequently informed his supervisor of the actual and correct circumstances of the accident, i.e., that he had fallen off a bucket while performing sheetrock work. *Id*. at 69:25-72:17; Ex. O:1.[5]

30. **Medical Treatment and Post-Accident Events**. Michael Hauke, M.D., evaluated Claimant's industrial injury in the emergency department of Yakima Valley Memorial Hospital on December 31, 2008. Claimant complained of right hip pain at a level 6 out of 10 after his fall. Dr. Hauke noted a mild discoloration and bruises on Claimant's right hip. Dr. Hauke's history noted Claimant's previous orthopedic injuries requiring surgeries and that he had undergone a total right hip replacement. An X-ray evaluation of the right hip was unremarkable. Dr. Hauke did not observe any loosening of the hip prosthesis or bony

[5] Ex. O:1 was the First Report of Injury that Employer filed on December 31, 2008. It stated the events related to the injury as Claimant "slipped and fell on ice."

abnormality at this time. He diagnosed a right hip contusion, administered Ibuprofen, and discharged Claimant with instructions to follow up with the hospital's occupational health clinic in three to five days, and to rest. Claimant also received a prescription for Percocet. Ex. Q:1-9.

31. In the weeks after his accident, Claimant experienced swelling "like a golf ball … on the inside of the groin." He also had a bruise on the outside of his right hip that was extremely painful and radiated down to his ankle. Tr., 74:1-75:6.

32. Claimant remained on light duty with Employer until he returned to the company's headquarters in Coeur d'Alene for New Years. *Id*. at 75:17-23. Employer sent him to a local clinic. *Id*. at 20-22.

33. Jim Johnson, M.D., evaluated Claimant at the North Idaho Medical Care Center in Post Falls on January 6, 2009. Claimant was still reporting his work accident to medical providers as a slip and fall on ice. He reported a pain level of six in his right hip. Dr. Johnson noted Claimant's artificial right hip and back fusion. Dr. Johnson diagnosed a contusion/strain of the right hip, prescribed Vicodin, recommended three physical therapy sessions, and ordered the following work restrictions: no lifting in excess of 20 pounds, no pushing/pulling in excess of 20 pounds, and limited bending, twisting and squatting. Ex. R:1-5.

34. Claimant's recollection was that Dr. Johnson restricted him from working entirely for two weeks. Tr., 75:22-23. He also recalled that he returned to Dr. Johnson at the conclusion of the two weeks and "basically begged him to be able to go back to work and he said you can go back to work as long as you're not doing anything heavy." Claimant then returned to work for Employer in Everett, Washington, but did not perform any heavy labor. Tr., 75:25-76:11.[6]

[6] Dr. Johnson's records do not include any notation of a second office visit with Claimant. The only appointment recorded was on January 6, 2009. Ex. R:1-5.

35. Claimant sought further treatment for his injury at The Everett Clinic on February 10, 2009. Kevin Thomas, M.D., evaluated Claimant, prescribed Vicodin pending further evaluation, and referred him to the clinic's occupational medicine department for further evaluation. Ex. S:1-5.

36. Jiho H. Bryson, M.D., an occupational health specialist with The Everett Clinic, evaluated Claimant's right hip on February 11, 2009. Claimant reported that he slipped and fell on ice, twisting his right hip, and had intermittent hip discomfort since with a minimum pain level of 2 increasing to level 7 out of 10. Claimant expressed concern that his pain was not improving. Dr. Bryson reviewed X-rays ordered by Dr. Thomas; her impression was a possible loosening of the femoral component of the total hip prosthesis. Her assessment was right hip strain with potential loosening of hip prosthetic. Dr. Bryson discontinued physical therapy and took Claimant off work, observing as follows: "I think taking him off work is safest until we sort out if he truly has a loose prosthetic in his hip." Claimant planned to return to the care of Dr. Sandefur, who performed the 2003 right hip arthroplasty, for further evaluation. Ex. S:6-7.

37. The findings of the X-ray of Claimant's right hip, taken on February 10, 2009, as read by Kirby F. Winfield, M.D., were in pertinent part as follows: The total right hip prosthesis was in satisfactory alignment; there were no fractures; and there was "substantial radiolucency"[7] of the interface of the femoral component and the interrochanteric femur, which could be a sign of loosening of the prosthesis. Obtaining interoperative or post-operative imaging for comparison was recommended to confirm whether the prosthesis had loosened. Ex. S:8.

38. Claimant ceased any further work for Employer after Dr. Bryson restricted him from work on February 11, 2009. Tr., 76:12-18. While he returned to Oregon, he did not return

7 *Stedman's Medical Dictionary*, 28th Ed., p.1624, defines radiolucency as a "region of radiograph showing increased exposure, either because of greater transradiancy of the corresponding portion of the subject or because inhomogeneity in the source of radiation, such as off-center positioning."

immediately to the care of Dr. Sandefur in Baker City; rather, he moved temporarily to Bend, where his brother lived. In Bend, he first sought a consultation with Dr. Nonweiler, who had performed Claimant's knee surgery in 2008. *Id*. at 77:22-24.

39. Dr. Nonweiler examined Claimant on February 23, 2009. He noted that Claimant "has some questions about his right hip. He is status post total hip arthroplasty and has had some aching pain in it. He was told he needed to get a bone scan of it." Dr. Nonweiler reviewed the February 10, 2009 X-ray of the right hip and noted that "it does look like he has proximal osteolucency." He concluded that Claimant needed a bone scan. Ex. T:41.

40. On or about February 26, 2009, Claimant was involved in an automobile accident in Bend. Another vehicle "T-boned" Claimant's vehicle at the speed of 50 miles per hour. His left shoulder hit the door panel. Claimant received evaluation and treatment in the emergency department of St. Charles Medical Center. He underwent CT scans of the neck, chest, abdomen and pelvis, as well as X-rays of the shoulder, which showed an AC joint separation. Christopher F. Richards, M.D., diagnosed Claimant with cervical strain, acromioclavicular separation, and abdominal wall strain. Dr. Richards did not record any aggravation of Claimant's hip as a result of the accident. Claimant denied that the automobile accident injured or aggravated his hip. Tr., 78:25-81:18; Ex. U:2-13.

41. The findings of a bone scan performed on March 4, 2009, according to Dave Krieves, M.D., were in pertinent part as follows: "The patient has a right total hip prosthesis. There is a mild to moderate increased uptake of radionuclide at the margins of the femoral component of the prosthesis." Dr. Krieves noted that the findings were "nonspecific. They suggest the possibility of femoral component loosening or infection. Correlation with plain x-rays of the right hip may be helpful in evaluation." Ex. T:40.

42. Dr. Nonweiler reviewed the results of the bone scan with Claimant on the following day, March 5, 2009. Claimant reported no change in his symptoms. Dr. Nonweiler told Claimant that he did not think his prosthesis was "overtly loose," but he could not really comment on whether there might be some mild loosening. He referred Claimant to James Hall, M.D., an orthopedic surgeon, for further evaluation. Ex. T:38.

43. Dr. Hall met with Claimant to evaluate his right hip pain on March 30, 2009. For the first time Claimant reported to a medical provider that the industrial accident involved falling off a bucket and twisting his hip, bruising it, rather than a slip and fall on ice. Claimant reported his hip pain as continual in the moderate to severe category. Dr. Hall's physical examination was unremarkable for any significant findings. His assessment was as follows: "Right total hip arthroplasty. Date of surgery was 2003 with recent fall and contusion to hip. There is no evidence of acute fracture or loosening." Dr. Hall instructed Claimant to follow up within two months. Ex. T:28-29.

44. Claimant returned to Dr. Hall on May 22, 2009. Dr. Hall noted that the lateral aspect of Claimant's right hip continued to be sensitive but was improving. Claimant still had a "fair amount of pain" with weight bearing in the groin and anterior thigh. Dr. Hall ordered lab work to rule out an infection as a potential cause of the increased uptake noted on his hip bone scan. He released Claimant to return to work with restrictions in a sedentary/light capacity with no lifting in excess of 15 to 20 pounds, no climbing, bending, stooping or kneeling. Ex. T:25-26.

45. On July 3, 2009, Dr. Hall noted that Claimant continued to have groin and thigh pain concurrent with activities of daily living. Dr. Hall concluded that Claimant would not obtain significant relief from a revision of his total hip replacement at that time, due to a potential for an increase in thigh pain from the procedure. Ex. T:22-23.

46. On November 30, 2009, Claimant met with Dr. Sandefur in Baker City for a second opinion regarding treatment of his injuries sustained in the February 2009 automobile accident. Dr. Sandefur recommended surgical reconstruction of his left shoulder. Ex. A:74-76.

47. As recommended by Dr. Sandefur, Claimant returned to Bend for a left shoulder open acromioclavicular reconstruction, performed by Timothy S. Bollum, M.D., on December 31, 2009. The purpose of this surgery was to correct acromioclavicular joint chronic separation that Claimant suffered as a result of his February 26, 2009 automobile accident. Claimant recovered well from this surgery. Ex. T:14-15; Tr. 82:18-83:25.

48. Claimant returned to Dr. Hall for office visits on January 4, March 24, and May 17, 2010. He continued to complain of persistent right hip and groin pain, with decreased thigh pain. On his final office visit, Claimant reported a dramatic decrease in his ability to perform activities of daily living due to his pain. At the final visit, Dr. Hall assessed as follows: "Based on his x-rays he does have proximal osteolysis around his noncemented stem. His stem appears to be fixed well. I have seen this type of reaction around this particular noncemented stem in the past with minimal symptoms. In addition he has a small osteolytic region around his acetabular component. He has a ceramic, femoral head." In light of Claimant's continued pain, Dr. Hall discussed continued medical management as opposed to surgical intervention, for which he estimated only a 50% chance of improvement of symptoms. Additionally, Dr. Hall warned Claimant of increased possibility of significant anterior thigh pain resulting from revision of his femoral stem. Ex. T:2-11.

49. Claimant had a different recollection of Dr. Hall's recommendation regarding right hip revision surgery. He recalled that "Dr. Hall and his associate determined I needed a hip

replacement and really wanted to get it done …" Nevertheless, Claimant decided to hold off on surgery. Tr., 81:19-:82:4.

50. Surety scheduled Claimant for an IME with Stanley J. Waters, M.D., in Boise on January 20, 2010. Dr. Waters noted Claimant's extensive orthopedic history and reviewed records and imaging related to his right hip. At the IME, Claimant complained of right lateral hip pain and deep anterior thigh pain related to activity. Upon physical examination, Claimant was able to walk normally. He had some visible disuse atrophy of his right gluteus compared to his left. He was tender to palpation over both the right and left trochanteric bursa. Claimant exhibited positive Wadell signs with pain out of proportion and inconsistencies during the examination. When distracted, he did not demonstrate the same degree of pain around his right hip. He had equal range of motion in both hips. Ex. X:1-3.

51. Dr. Waters concluded that Claimant was at MMI with respect to his injury in the 2008 industrial accident. He opined that Claimant had sustained a traumatic trochanteric bursitis[8] to the right lateral hip as a result of the accident. In reviewing the radiographic imaging, Dr. Waters did not find evidence of loosening of the right hip arthroplasty. Rather, his impression was that the thigh pain Claimant was experiencing was related to an uncemented femoral implant. He assigned a 1% whole person impairment to Claimant's injury, based upon a Class I, Grade D hip trochanteric bursitis related to a soft tissue contusion. Dr. Waters opined that any radiographic lucencies around the femoral implant and any heterotopic ossification were related to his preexisting total hip arthroplasty, not the industrial accident. Ex.X:3-4.

[8] Bursitis is an inflammation of the bursa, which is a sac filled with synovial fluid found at joints, including the trochanter, one of the bony prominences near the proximal end of the femur. *Stedman's Medical Dictionary*, 28th Ed., pp. 280, 282, 2035.

52. Claimant disagreed with the IME of Dr. Waters and wrote a letter on March 23, 2010 to Surety's claims adjuster to express his concern. He stressed that he had experienced no problems with his right hip prior to the industrial accident. Claimant stated that he had "continuous pain averaging level 3 to 4," with difficulty going up or down stairs and an inability to work or engage in any physical pursuits or hobbies such as hunting or hiking. Ex. PP:1-2.

53. On the basis of the IME by Dr. Waters, Surety denied further medical treatment for Claimant's right hip. Claimant, however, desired continued treatment because "nothing was improving." He believed that the doctors he had seen except Dr. Waters had all told him that he needed hip revision surgery. In particular, Dr. Hall, according to Claimant, warned him of "possible crippling" if he did not have a hip revision. Tr., 85:7-86:7.[9]

54. In or about March 2010, Claimant did not feel capable of full-time work. He continued to live in the Bend area with his brother and performed miscellaneous construction work, "odd jobs," for friends. In mid 2011, he returned to Colorado. He continued to experience pain symptoms in his right hip that caused him almost every day to lie down and take weight off of his leg. In Colorado he worked for Colorado Log Homes, for which he managed the construction of a hunting lodge at the Coors Ranch and also managed another, smaller project, a custom home. This position was 85% supervisory and 15% labor, with minimal physical labor. After this brief period of work, he lived with a friend on a ranch for six or seven months, performing miscellaneous chores, and then returned to reside with his parents in Sumpter,

[9] As noted above, Claimant's characterization of Dr. Hall's statements and advice are not reflected in the medical records. There is no mention in Dr. Hall's notes that he warned Claimant that he was risking being crippled without the hip revision surgery. Rather, at their last consultation on May 17, 2010, Dr. Hall discussed with Claimant the benefits of medical management versus surgery due to the risk that surgery would not improve his symptoms but actually worsen them. Ex. T:2.

Oregon in or about September 2012. Tr., 87:21-92:8; Ex. FF:15 (Claimant Dep. 6/15/2015, 59:18-60:11).[10]

55. After returning to live with his parents in Sumpter in September 2012, Claimant had no further regular employment. He occasionally performed light duty, odd jobs such as patching sheetrock or fixing a pipe. If he worked more than a half a day it was "too much." Furthermore, he did not seek regular employment after September 2012. Claimant's right hip remained "extremely" painful. Tr., 93:11-13; 94:16-95:19.

56. Claimant denies that he returned to Sumpter solely to care for his aging parents, who, he recalled, "could still drive. They could still take care of things." Rather, he returned to reside with them because he believed that he could no longer perform full-time construction work. Nevertheless, he considered it a "blessing" to be able to spend more time with his parents. Tr., 93:5-8; 146:17-23.[11]

57. Claimant returned to Dr. Sandefur in Bend for evaluation of his right hip on May 16, 2013. His report was of constant pain, "especially when he is doing any walking or standing and if he tries to work or tries to carry anything with extra weight it causes markedly increased symptoms." Dr. Sandefur's physical examination showed the following: Claimant's

[10] "Colorado Log Homes" appears to have been an assumed business name for Claimant's self-employment partnership or joint venture enterprise. There was also an ambiguity between Claimant's testimony in his deposition and at hearing regarding the length of this employment; in his deposition, Claimant stated that he "did that almost for a year," Claimant Dep. (6/15/2015), 59:21-24, whereas at hearing he indicated that the Coors project lasted only two months and the smaller project two weeks. Tr., 91:9-11. From the context, it appears that the "almost a year" that Claimant referred to in deposition was not the entire amount of time he spent working but rather the length of his stay in Colorado. The actual amount of time working was less, as stated above.

[11] At the time of Claimant's deposition on June 15, 2015, Claimant was providing some care for his elderly parents; he kept "an eye on them." His mother, who was 80, had Parkinson's Disease and his father, who was 82, had congestive heart failure. He drove them to medical appointments in Baker City, cleaned their house, mowed their lawn, and provided companionship. He lived in an apartment above their garage. Ex. FF:3 (Claimant Dep. 6/15/2015, 9:17-11:13). By the time of hearing in 2017, Claimant provided more assistance for his parents, including generally maintaining their home, cooking, performing chores, and doing yard maintenance. His father died two months prior to the hearing and Claimant assisted him prior to his passing but did not bathe or lift him; hospice attendants assisted with the latter duties. Tr., 145:10-146:5; 156:12-157:16.

right hip flexion beyond 110 degrees caused increasing pain in the groin; there was pain with resisted hip flexion and hip abduction; muscle strength was slightly diminished; and Claimant walked with a slight limp on the right side. Dr. Sandefur ordered X-rays of the right hip that showed some osteolysis near the femoral component and the acetabulum of Claimant's prosthesis. The imaging also showed some bone fragments above the greater trochanter "which would be consistent with a small greater trochanteric avulsion fracture." Dr. Sandefur advised Claimant that the imaging raised some concerns that that there was loosening compared to the scans taken in Bend in 2010, thus it appeared that the osteolysis or loosening had progressed. Dr. Sandefur attributed the greater trochanter fracture to Claimant's industrial injury. He concluded that the fall at work was a major contributing factor to these conditions. Dr. Sandefur would not have expected to see this degree of loosening so soon after the 2003 surgery. He opined that Claimant would need a revision of at least the femoral component, and possibly even the acetabulum, in the "near future." Ex. A:77-78.

58. On August 5, 2013, Claimant applied for Supplemental Security Income (SSI) benefits based upon disability. Ex. Y:3.[12] He stated in his application that his disability began on January 1, 2009. *Id*. at 4. He reported earning $6,000 from January 2013 through the date of application under the trade name "Gregory Lucas Odd Jobs." *Id*. at 6.

59. Charles E. Hofmann, M.D., with Saint Alphonsus Medical Group in Baker City, performed a medical examination in connection with Claimant's SSI application on January 4, 2014. Claimant reported his disabling conditions as twofold, as follows: 1.) his low back injury and resulting fusion from his automobile accident in 1998 and 2.) his congenital hip disease, including a total right arthroplasty in 2003 and accident in 2008 that loosened his prosthesis,

[12] Claimant incorrectly identified his application date for Social Security as May 2014 at hearing. Tr., 158:1-5. SSA documents admitted as Exhibit Y show the correct date of application as August 5, 2013. Ex. Y:3.

requiring surgery. Dr. Hoffman noted that Claimant was "a 54-year-old male referred by Disability Determination Services for evaluation of nerve damage to his left leg and degenerative disease of his right hip." Ex. Y:15.

60. Dr. Hofmann described Claimant's medical history in pertinent part as follows:

> The patient states that he was involved in a motor vehicle accident in 1998 injuring his low back. He ultimately came to discectomy without improvement in his pain and subsequently had a lumbar fusion. The pain initially improved but *over time, he has been plagued with worsening pain radiating down his left leg*. The pain is *made worse by standing for prolonged periods of time and with activities such as bending and lifting*. He had been working as a contractor prior to his accident but is no longer capable of performing that kind of work regularly. He has been able to find an occasional odd job here and there but essentially has not worked for the past several years.
>
> The patient also has a history of congenital hip disease. It became severe enough that 10 years ago he underwent right total hip replacement. Postoperatively, the patient did well until 2008, when he fell. He was seen in the Emergency Room and ultimately diagnosed with a loosening of his prosthetic shaft. Over time, the loosening has worsened. Evidently his orthopedist feels that at the present time reoperation is a treatment that could be worse than his present problems so further surgery has been delayed. The patient states he feels his right leg is unstable. He tends to stub his toe and fall. His right hip contributes to his difficulties in performing activities such as standing for prolonged periods of time or walking long distances. He states that the hip pain radiates down his right leg.

Id. (emphasis added).

61. Based upon Claimant's medical history, imaging and physical examination, Dr. Hofmann determined that Claimant had certain physical restrictions, based upon both conditions, as follows: Claimant could stand for 30 minutes at a time with regular breaks up to 2 hours per day; he could walk for 15 minutes at a time with regular breaks up to 1 hour per day; he could sit for 2 hours per day with regular breaks up to 8 hours per day; he could lift and carry up to 25 pounds occasionally and up to 10 pounds frequently; and Claimant's ability to travel was limited to 8 hours at a time. Dr. Hofmann did not articulate which condition, Claimant's lumbar injury/left leg radiculopathy or right hip, determined particular restrictions Ex. Y:15-16.

62. The Social Security Administration (SSA) approved Claimant's application and awarded him SSI benefits effective as of the date of his application. He also received Medicaid benefits based upon his receipt of SSI. Claimant continued to receive SSI and Medicaid through the date of hearing. He also continued to perform occasional light duty, odd jobs and he reported that income to the SSA. Tr., 157:20-158; 160:4-9.[13]

63. In a letter to Claimant's counsel dated May 15, 2014, Dr. Sandefur commented on additional X-rays of Claimant's right hip and bone scan that Dr. Sandefur had not previously reviewed. He opined that the imaging, compared to previous imaging ordered by his office, showed further osteolysis or loosening around the femoral component. Dr. Sandefur concluded in pertinent part as follows:

> Based on the fact that Mr. Lucas was less than 6 years out from when he had the initial hip replacement, I would not expect to see the increased uptake on the bone scan, and as a result taking that finding as well as the finding of the x-ray showing progressive osteolysis around the femur, it still makes me concerned that there is further loosening of the femoral prosthesis.
>
> As result of the fact that Mr. Lucas was not having any pain or discomfort in the hip prior to his fall in December 2008, I do believe that his fall and mechanism that he landed on the hip had to contribute to his right hip pain, and had to play a part in the early loosening of the proximal part of the prosthesis.

Ex. BB:1.

64. Dr. Sandefur re-evaluated Claimant's right hip on June 5, 2014. He noted that since the last time he saw Claimant in his office a year before that his reported pain had increased significantly, with "fairly significant groin pain all the time." Activities worsened the pain. Claimant also reported some instability of the leg when walking or performing activities. A physical examination revealed limited range of motion of the hip, with significant pain in both

[13] While the parties submitted Claimant's SSI application as Ex. Y, they did not include any SSA determination letters or other documents for the record, thus findings about his eligibility and receipt of benefits are based upon his testimony.

active and passive flexion and significant weakness with resisted hip abduction. Hip X-rays from January revealed increased osteolysis around the proximal femoral component of the prosthesis. Dr. Sandefur's impression was "increasing right hip pain, most likely secondary to loosening of the femoral component." He recommended another bone scan as a next step. Ex. QQ:1.

65. During 2014, Surety's claims examiner corresponded several times with Dr. Waters, Defendants' IME physician, to revisit his opinion regarding whether Claimant's right hip condition was related to the industrial accident. Dr. Waters responded to the May 16, 2013 report by Dr. Sandefur as well as further imaging studies. In his last letter to Surety, dated September 2, 2014, Dr. Waters reaffirmed his initial opinion that Claimant's industrial accident had not resulted in a loosening of his total hip replacement. He noted in pertinent part "it is not unusual for bone scans to have increased uptake – even at 5 to 6 years out from a total hip arthroplasty." He suggested consultation with an independent radiologist to review all relevant imaging for a further answer to Surety's inquiry. Ex. AA:1-11.

66. Defendants' counsel engaged a radiologist, Benjamin K. Hom, M.D., of Boise, to review Claimant's CT scan of August 13, 2014 and bone scan of July 15, 2014 and to prepare a report. It does not appear that counsel provided Dr. Hom with any prior imaging of Claimant's hip, as recommended by Dr. Waters. Upon reviewing this imaging, Dr. Hom concluded that it was more probable than not that the prosthesis had loosened, but that it was not the result of a traumatic event but rather a chronic process. Ex. CC:3.[14]

67. In or about the winter of 2014/2015, Claimant returned briefly to Colorado to retrieve his possessions from storage and transport them back to Oregon. He was at a public

[14] Defendants did not introduce an original report by Dr. Hom into the record but rather only a copy of a letter from Defendants' counsel briefly summarizing Dr. Hom's opinion, to which Dr. Hom replied and ascribed by signing the letter.

storage unit at nighttime when he slipped and reinjured his left ankle on asphalt. Claimant received evaluation and treatment by Christopher B. Hirose, M.D., and his associates of Saint Alphonsus Coughlin Clinic in Boise from February 20 to August 28, 2015. Dr. Hirose ordered both X-rays and an MRI of Claimant's ankle. At his final appointment on August 28, 2015, the plan of treatment was for Claimant to first undergo hip revision surgery and then re-evaluate the unresolved injury of his left ankle. As of the date of hearing, Claimant was still experiencing left ankle pain and expected to have surgery at some point in the future to address it. Tr., 96:15-98:6; Ex. DD.

68. Claimant's counsel engaged Robert H. Friedman, M.D., a physiatrist, to conduct an independent records review of Claimant's medical records related to his right hip. On May 20, 2015, he wrote counsel a letter setting forth his opinions. He disagreed with the opinion of Dr. Waters that Claimant has sustained trochanteric bursitis, which he noted that no other physician had diagnosed. Rather, Dr. Friedman opined that the medical records and imaging supported the conclusion of Dr. Sandefur that Claimant's prosthetic femoral component had loosened. He noted that the radiologic and bone scans after the industrial accident of December 31, 2008, together with Claimant's symptomatology, demonstrated a reaction consistent with loosening. Dr. Friedman opined that this evidence, to a reasonable degree of medical certainty, demonstrated that the worsening of Claimant's prosthesis was due to the industrial accident. He further opined that Claimant would require revision surgery to correct the defect. He also disagreed with the PPI rating of Dr. Waters. He opined that Claimant would be best evaluated for impairment under table 16-4 of the hip regional grid for a total hip replacement under the 6th edition of the AMA *Guides to Evaluation of Permanent Impairment*. Claimant's impairment fit under class III for a fair result of the surgery with instability and

loosening of hardware. The default rating for this would be a grade C, or 37% of the lower extremity. Under the net adjustment formula, Claimant would receive a net adjustment of -1 for clinical studies, clinical exams and functional history. This would then place Claimant in grade B, or a 34% impairment of the lower extremity. Apportionment was appropriate because Claimant had a previous good result from his prosthetic hip. Post-implant, Claimant would have been rated as class II, defaulting to a grade C with a net adjustment of -2 for clinical studies, clinical exams, and functional history, changing his impairment to grade A or a 21% impairment of the lower extremity. Subtracting the result immediately following hip replacement to Claimant's status post-industrial injury, Claimant had a net impairment of 13% of the lower extremity attributable to his industrial injury. Dr. Friedman further opined that Claimant had not reached MMI because his prosthesis continued to loosen, which would continue until he received definitive surgical treatment for this condition, as indicated by Dr. Sandefur. Finally, Dr. Friedman disagreed with the conclusion of Dr. Hom that Claimant's prosthesis had loosened but that it was the result of a chronic disease process rather than traumatic injury. He noted that Claimant had no significant complaints of right hip pain prior to the industrial accident, indicating a permanent aggravation of Claimant's preexisting prosthetic implant, hastening the need for its revision. If Claimant received the definitive surgical treatment of a revision, with significant improvement to his alignment and function, then a repeat impairment rating would be warranted. Ex. EE:1-3.

69. Surety authorized Claimant's right hip revision surgery in or about June or July 2015.[15] Dr. Sandefur scheduled the surgery for the fall of 2015, however it was delayed because Claimant had a tooth infection that required a course of antibiotics. Tr., 98:9-99:8.

[15] There is no evidence explaining the reason for Surety's decision to reverse its earlier decision regarding

70. Dr. Sandefur performed a revision of the femoral prosthesis of Claimant's right hip arthroplasty on January 12, 2016 at Saint Alphonsus Regional Medical Center in Baker City. The operative findings were as follows: "There was noted to be significant osteolysis around the proximal third to half of the femoral prosthesis. There was still some bony fixation in the mid-portion but also showed evidence of osteolysis and looseness distally. The acetabular cup was well fixed to the acetabulum with no obvious signs of osteolysis or loosening." Dr. Sandefur replaced the femoral prosthesis and its ceramic head. Ex. A:88-90.

71. Claimant remained in the hospital for two days to recover and received a discharge on January 14, 2016, at which time his providers determined that he had tolerated the surgical procedure well, without complications, and had recovered sufficiently to return home. He received prescriptions for pain medications, including Norco and Meloxicam. Ex. A:111-112.

72. Claimant felt immediate relief after the revision procedure. His leg/thigh pain ceased, although he still had pain in the hip itself. He used a walker for only one day, then a cane for a week and half, after which he felt stable enough that he no longer needed support to walk. Tr., 100:1-11.

73. The recovery process progressed well until Claimant's first physical therapy appointment on January 25, 2016. During that appointment he had an episode of intense pain on the right side of his lower right thigh and felt a pop while he was attempting to get up from the therapy table. Claimant presented to the emergency room of Saint Alphonsus in Baker City the following day with a complaint of discomfort in his right mid-thigh region. X-rays were unremarkable and Claimant's hardware was intact. David A. Richards, M.D., Claimant's

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coverage of surgery for Claimant's right hip. Nevertheless, because the authorization for surgery followed so closely in time after Dr. Friedman's opinion in May 2015, it is reasonable to infer that Dr. Friedman's opinion was at least a factor in Surety's decision to cover hip revision surgery. Defendants, however, characterized the decision as follows: "Nevertheless, the State Insurance Fund in June of 2015 *on a humanitarian basis* authorized the hip revision surgery." Defendants' Post Hearing Response Brief at 16 (emphasis added).

attending emergency physician, suspected a soft tissue problem. Dr. Sandefur examined Claimant on February 5, 2016 and determined that he had a resolving hematoma or seroma of the right hip incision. Dr. Sandefur drained a bloody discharge from the affected area. At the February 8, 2016 checkup, Claimant was still draining blood; Claimant was then scheduled for a minor surgical procedure called an "I and D of the hemotoma" (incision and drainage). Dr. Sandefur performed the I and D as an outpatient procedure on February 10, 2016. The operative findings showed that several sutures of Claimant's incision had ruptured, causing the hematoma. At a February 25, 2016 follow-up appointment, Dr. Sandefur noted that Claimant was doing well, his incision was intact with staples, and there was no drainage but slight irritation. Claimant reported some pain and muscle tightness along the iliotibial band. He was continuing with physical therapy. Ex. A:113-151; Tr. 101:8-102:22.

74. Claimant attended a course of physical therapy through September 2016 at Saint Alphonsus in Baker City. *Id*. at 102:23-103:1; Ex. GG. Upon his discharge from therapy on September 23, 2016, Micah Maly, PT, noted that Claimant, despite sporadic therapy attendance, had met most of the goals for physical therapy and had significantly reduced his lateral right hip pain. Claimant continued to complain of a sore "knot" in his muscle in the gluteal fold region on the right side. *Id*. at 23-24.

75. Rodrigo Lim, M.D., a neurologist with the Grande Ronde Hospital Regional Medical Clinic in La Grande, Oregon, conducted a neurological consultation for Claimant on October 5, 2016. Claimant was concerned that he might be suffering from a neurological condition based upon muscle tightness in his calves. Dr. Lim ordered nerve conduction studies and blood tests. Ex. HH:1-3. Claimant's lab work was normal with the exception of a flag for a high reading for antibodies to Lyme Disease. *Id*. at 21. It does not appear that Claimant had the

nerve conduction studies ordered by Dr. Lim. There are no further records for office visits with Dr. Lim in the record.

76. Dr. Sandefur continued to follow Claimant's progress in recovering from his right hip revision surgery. X-rays taken on March 28, 2016 showed a stable prosthesis with no signs of osteolysis or loosening. Ex. A:152. At the office visit on November 14, 2016, Claimant reported that he felt his hip was doing well. He still had muscle spasms in the right leg, but they were diminishing. He did not have significant or deep groin pain. *Id*. at 159. In response to a letter from Surety, Dr. Sandefur handwrote on Surety's letter on November 30, 2016 responsive notes indicating that Claimant had reached MMI on November 14, 2016, and continued to have the same 1% whole person PPI Dr. Sandefur had assigned in 2010. Dr. Sandefur stated that there were no changes to Claimant's work restrictions following the original hip replacement in 2003. *Id*. at 161.

77. At a February 16, 2017 appointment, a year following surgery, Dr. Sandefur noted that Claimant's hip was doing "much better," although he still has some hip weakness and groin pain. Claimant was no longer walking with a limp. His X-rays showed a stable prosthesis with good bony growth around the femoral head. For lifetime restrictions, Dr. Sandefur prescribed no running or jumping, with no lifting in excess of 30 pounds. *Id*. at 162-163. At his last appointment with Dr. Sandefur prior to hearing on July 14, 2017, Claimant reported some increasing muscle spasm or soreness around the right hip associated with driving back and forth to Boise. Dr. Sandefur diagnosed chronic iliotibial band tendinitis/tightness. He recommended acupuncture. Ex. A:165-166.

78. On July 13, 2017, Dr. Friedman wrote a letter to Claimant's counsel that summarized his opinion based upon a review of records following the revision of Claimant's

total hip replacement. He noted that Dr. Sandefur's records from February 16, 2017 indicated that Claimant did not have the pain he had before the surgery and was not walking with a limp. He also noted Dr. Sandefur's restrictions. Using the *Guides*, Dr. Friedman determined that Claimant should be rated under table 16-4 for a total hip replacement, class II due to a good result, stable and functional, defaulting to grade C, a 25% impairment of the lower extremity. Accounting for a net adjustment of +1 for clinical studies and functional history, per Dr. Sandefur's report, Claimant's impairment would be increased to a grade D, or a 27% lower extremity impairment. Unlike the prior occasion when Dr. Friedman rated Claimant's right hip for impairment, it does not appear that he apportioned the impairment between the original degenerative arthritis/arthroplasty and the industrial injury/revision. Ex. EE:4.

79. **Vocational Analysis**. Claimant's counsel engaged the services of Douglas N. Crum, C.D.M.S., to conduct a vocational analysis regarding Claimant. The Commission is acquainted with the credentials of Mr. Crum through his previous reports and testimony admitted in various workers' compensation proceedings. He delivered a report on July 10, 2017, approximately a week prior to the hearing. Ex. II.

80. To prepare his report, Mr. Crum interviewed Claimant in person on June 30, 2017. He also reviewed all relevant medical records, imaging studies, physical therapy records, and Claimant's deposition transcripts. Ex. II:1.

81. Mr. Crum noted that subsequent to his lumbar spine injury in 1998, Claimant applied for Social Security disability benefits, however the SSA denied his application. Ex II:2.[16]

[16] There are no records pertaining to this earlier SSA application in the record and it was not the subject of Claimant's examination either at hearing or in his depositions. It is reasonable to infer, however, that the only reason this fact appeared in Mr. Crum's report is that Claimant reported to Mr. Crum that he had applied for SSA benefits after his 1998 accident and injury. It may also be reasonably inferred that Claimant applied for such benefits due to his inability to work following that accident.

82. Mr. Crum noted the evaluation of Dr. Hofmann, the Social Security Medical Examiner, of Claimant on January 2, 2014, related to the "nerve damage to his left leg and degenerative disease of the right hip." He further noted that of the work restrictions that Dr. Hofmann assigned to Claimant, there was "no way to tell which restrictions apply to the right hip, and those apply to the lumbar spine/left leg problems, and whether any of those restrictions predate the 2008 injury." *Id*. at 3.

83. Per Mr. Crum's interview, Claimant felt that some days he could work on his feet all day, but because his hip is not the same everyday, on other days he would not be able to work at all. On average, Claimant believed he could walk, stand, and climb/descend stairs three to four hours per day. Claimant could not sit for eight hours. He had not tried to pursue a full-time job in construction, because he could not consistently work a full eight to 10 hour day that is usually required. *Id*. at 5.

84. Mr. Crum noted that after his 1998 lumbar spine injury, Claimant participated in a retraining program for journalism in Oregon, however this never became a financially viable occupation for him. *Id*. at 6.

85. At the time of his interview with Mr. Crum, Claimant was earning about $400 per month through odd jobs, mostly "maintenance things." *Id*.

86. With respect to a determination of disability, Mr. Crum noted that after his 2003 right hip arthroplasty, no physician assigned permanent physical restrictions for Claimant. After the 2008 industrial injury and his right hip arthroplasty revision surgery in 2016, it appeared that Claimant had a good recovery but he had increased problems with ambulation and being on his feet, as well as prolonged sitting. Dr. Sandefur also assigned permanent restrictions on

February 26, 2017, including no running or jumping, and avoiding lifting or carrying anything in excess of 30 pounds. Ex. II:9.

87. Mr. Crum noted Claimant's residence in Sumpter, which is approximately 29 miles west of Baker City. The relevant geographical labor market had a base of 68,000 workers. Mr. Crum opined that due to his physical restrictions, Claimant was no longer competitive for his previous occupation of construction management/supervisory/superintendant positions. On a pre-injury basis, Claimant would have had access to 10% of the jobs in his labor market, which consisted of construction management/supervisory/superintendant positions, construction labor jobs, security work, cleaning and custodial jobs, production/assembly jobs, as well as entry-level customer service work such as cashiering. Employer had made it clear that Claimant could not return to work without a full release. Claimant was 49 years of age at the time of injury and 58 years of age at the time of interview; aside from performing light duty, odd jobs, he had not had regular employment for approximately nine years. Mr. Crum considered Claimant's age a significant factor in his re-employability. On a post-injury basis, Claimant had access to approximately 4% of the jobs in his labor market, a 60% loss in access. *Id*. at 10.

88. At the time of injury, Claimant was earning approximately $42,000 per year, or $20.19 per hour. Mr. Crum opined that Claimant would no longer be able to earn a similar wage based upon his restrictions. He further opined that Claimant's best vocational options within his labor market were as follows: vehicle cleaner, light truck/delivery driver, production helper, other production worker, woodworking machine operator, assembler/fabricator, and janitor/custodian, with an average wage of $14.00 per hour, resulting in 31% loss in wage earning capacity. Ex. II: 10.

89. Mr. Crum concluded his analysis by opining that based upon all of the medical and nonmedical factors, Claimant had sustained a permanent partial disability of 60%, inclusive of impairment. *Id*. at 11.

90. Defendants did not engage the services of a vocational expert.

91. **Deposition of Dr. Sandefur**. Claimant's counsel took the deposition of Dr. Sandefur, Claimant's treating surgeon, on September 21, 2017. This was the only post-hearing deposition of a physician. Defendants did not depose any physicians.

92. Dr. Sandefur is a 1992 graduate of the College of Osteopathic Medicine of Pacific. He completed an orthopedic residency in 1997 and practiced orthopedic surgery in Baker City for 20 years as of 2017. As an orthopedic surgeon, he regularly performed total joint replacements (knees, hips, and shoulders), knee arthroscopies, shoulder arthroscopies, carpal tunnel surgeries, and fracture care. He has performed hip replacement surgeries since his residency, for 25 years. He became board certified in orthopedic surgery in 2000. Sandefur Dep., 4:12-5:14.

93. After Dr. Sandefur performed the original total hip replacement surgery for Claimant in 2003, he did not assign any permanent work restrictions. He recalled in pertinent part as follows: "I mean, typically what I tell patients after a hip replacement is, I prefer they don't run or jump, and that they can do normal activities as it feels comfortable at that point. He would expect the prosthesis he implanted to last 15 to 20 years under normal circumstances. *Id*. at 7:20-8:17.

94. Dr. Sandefur's first opportunity to evaluate Claimant's right hip again after his industrial accident of December 2008 was on May 16, 2013. He recalled that Claimant told him that he was doing "extremely well" with his hip until the accident when he fell. Claimant had

seen several doctors in Bend but continued to have "fairly constant pain all the time if he was doing any walking, or standing … or carrying anything to work caused increased pain." Sandefur Dep., 9:14-25.

95. Based upon X-rays he ordered on May 16, 2013, Dr. Sandefur had a concern of loosening of the prosthesis. The basis of his opinion was that Claimant "still had very thick cortical bone. So I would expect if it was ten years out from when he had the replacement, that I wouldn't expect loosening. And he had been doing well, until he had that fall in 2008." *Id.* at 10:4-25. Dr. Sandefur advised Claimant that he would need a revision of the prosthesis "in the near future, since his pain had increased over the past three years," however Surety did not authorize the revision surgery at that time. *Id*. at 11:11-22.

96. When he performed the revision surgery in January 2016, Dr. Sandefur found that almost two-thirds of the prosthesis was loose around the proximal half. He also found it significant that there was no loosening around the cup side of the prosthesis because if there had been a loosening of both sides, then it would have been due to a problem with the bone or a failure of the prosthesis itself, or something else was going on. "But the cup side still looked good. It was just the stem working its way loose." Dr. Sandefur would not have expected this kind of loosening in a patient who was 13 years from the original surgery. *Id*. at 12:4-21.

97. Dr. Sandefur opined that the three-year delay between 2013 when he found it necessary to do the surgery and 2016 when he finally was able to do so contributed to a delayed recovery time for Claimant. Claimant had to lengthen his right leg back out because it had shortened due to disuse. He also had scar tissue and muscle tightness. Sandefur Dep., 13:9-23.

98. Dr. Sandefur reaffirmed his opinion, communicated in a letter to Surety dated November 18, 2016, that Claimant was at MMI. Dr. Sandefur agreed with a 1% impairment

rating for Claimant in that letter and explained it as follows: "I basically answered, and said yes, he [Claimant] was still impaired. I mean, he's still got some disability. I don't do disability exams, or impairment ratings, or anything, so …" Dr. Sandefur did not use the *Guides* in responding to Surety, and if an impairment rating were requested for a patient, ordinarily he would refer the patient to a physiatrist. *Id*. at 14:18-16:9.

99. Dr. Sandefur also reaffirmed the work restrictions he assigned Claimant on February 16, 2017. Because his examination showed that Claimant still had some weakness and discomfort with his hip muscles, especially hip flexion, Dr. Sandefur restricted Claimant from running or jumping and from lifting or carrying weight greater than 50 pounds.[17] *Id*. at 17:7-13.

100. **Claimant's Condition at Hearing**. At the time of hearing, and as noted above, Claimant assisted his mother,[18] who had Parkinson's Disease, with basic activities of maintaining the home, such as cooking, cleaning, shopping, maintaining the yard, etc. He also drove her to appointments. He was able to perform these chores without difficulty, with the exception that mowing the lawn and driving to Baker City increased his pain symptoms. It sometimes took Claimant two days to complete mowing the lawn. In driving to Baker City, he needed to stop frequently at rest stops. Tr., 108:9-110:9.

101. Before the industrial accident, Claimant engaged in pastimes of hunting, fishing, camping, bowling, and golfing. The only activity he felt capable of doing after the accident was fishing, if it did not require walking too far. Tr., 110:10-111:1.

102. Claimant believed that his pain symptoms eventually resolved after his 2003 hip arthroplasty, which meant for him that he had no limitations and no "bothersome pain." After his

[17] It is possible that Dr. Sandefur misread his chart notes from February 16, 2017 at his deposition, as the notes reflect that the lifting/carrying restriction was 30 pounds. Ex. A:162-163.

[18] His father, for whom Claimant had also cared, passed away two months prior to the hearing. Tr., 144:24-145:1.

2016 revision surgery, however, Claimant's pain symptoms, while they subsided somewhat, had not resolved by the date of the hearing. *Id*. at 111:7-112:2.

103. Claimant viewed his job prospects in construction in Sumpter as poor. He observed that although there were two construction contractors in Sumpter who would "love to hire" him, his pain and limitations would make working for them impractical. He noted that these builders "have a time frame" and "can't adjust" to his schedule. As for other job prospects locally, Claimant thought he might be able to work in one of two marijuana retail establishments if there was an opening. He considered himself a "people person," thus he thought he could fit "a lot of different jobs. Unfortunately, in Sumpter they are not living wage jobs." *Id*. at 112:3-113:4.

104. **Credibility**. Defendants argue that the "biggest elephant in the room" in this case is "Claimant's lack of credibility or at least the lack of accuracy of his recollections of his medical history." They allege that Claimant was "forced to acknowledge that he had multiple accidents and injuries over his life, but has testified that except for the hip revision surgery, after each injury he recovered quickly without any long term limitations and little long term pain. The medical records, however, paint a different story." Defendants' Post Hearing Response Brief at 18. Claimant responds that requiring him to remember every detail of all his injuries, which were substantial and occurred over a long period of time, is "hardly a fair request to make." Claimant's Reply Brief at 2. Claimant further argues that he did not, in fact, minimize his prior injuries in testimony but rather accurately testified about them to the best of his ability. *Id*.

105. Defendants inflate the extent of Claimant's lack of candor concerning his prior conditions and symptoms. For example, Claimant did acknowledge that it took him two years to recover from his 1998 automobile accident that resulted in two back surgeries including a fusion at the L5-S1 level. He also admitted that he had residual sciatic pain in his left leg. Tr., 54-55:25.

106. Nevertheless, at least some of Defendants' criticism of Claimant's credibility hits the mark. For example, when Defendants' counsel asked Claimant at hearing whether, contrary to his testimony that at the time he began his position with Employer in October 2008 that he wasn't "really having any medical problems," whether he had told a different story to "the work comp people in Colorado," Claimant answered as follows:

> A. At the time that I went to work with Northcon I wasn't having any serious issues. The Pinnacle [Colorado surety] – I was talking to them about my left foot – I don't know if that letter was before or after my debridement, you know, the scar tissue, but that surgery was fairly close to when I went to work for Northcon and – that's a good question. I do know that Northcon was the first full-time job that I had been offered and participated in for a length of time, because of those surgeries, and it was not creating a problem for me to do that.

Tr., 121:18-122:2. Thus, in this response Claimant continued to adhere to his position that he suffered no continuing problems from January 9, 2006 prior work accident that injured his left ankle and right knee. Yet, he did not actually answer counsel's question. He did not explicitly deny that he had told a different story to the workers' compensation system in Colorado. It would be easy to miss Claimant's failure to answer because he populated his response with extraneous details about debridement, scar tissue, surgeries, etc., that deflected from the critical issue.

107. The above-quoted testimony was typical of Claimant. He demonstrated his capacity as a lengthy storyteller at hearing, providing many and sometimes irrelevant details when responding to questions. In some witnesses this is a benign trait, however in Claimant's case, it came across as an over-eagerness to convince or at times to deflect from the issue at hand.

108. There are other examples in the record of Claimant's testimony that demonstrated a lack of candor, the purpose of which appeared calculated to portray his claim in the best light

possible, despite the facts. While he admitted that his original account of the December 31, 2008 industrial accident was a false one, i.e., that he slipped and fell on ice instead of the true account that he fell off a bucket while taping sheetrock, Claimant repeated the lie to at least three medical providers until he finally told the true story to Dr. Hall on March 30, 2009. Ex. T:28. Claimant's reasons for lying about the accident are understandable – as an experienced construction professional he was ashamed to admit to an unsafe work practice, among other reasons – yet the episode demonstrated his capacity to falsely portray events in what he perceived to be his best interest.

109. Claimant recalled encounters with medical professionals for which there was no record and/or for which the recorded details did not match. For example, he claimed that Dr. Sandefur told him that the more-modern hip prosthesis he implanted had a life expectancy of 20 to 25 years, Tr., 58:12-19, not the 15 to 20 years that was Dr. Sandefur's standard practice to advise hip replacement patients. Sandefur Dep., 22:6-14. If Claimant's recollection were correct, then it would put the need for revision so well below the life expectancy of the prosthesis that it would make it easier to conclude that the slippage was due to the accident and not normal wear and tear.

110. Claimant had only one recorded office visit with Dr. Johnson in Post Falls on January 6, 2009, at which Dr. Johnson restricted him to light duty. Ex. R:1-5. Claimant, however, recalled that Dr. Johnson took him off work altogether for two weeks; Claimant recalled that he then returned to Dr. Johnson at the conclusion of two weeks to "beg" him to release him to return to work. There is no record that the latter office visit occurred, nevertheless Claimant's account would appear to demonstrate his diligence and eagerness to return to work.

111. Claimant distinctly recalled that Dr. Hall advised him that he required a hip revision surgery at their final appointment on May 17, 2009. Tr., 81:19-82:4. Later in his hearing testimony, Claimant's account of Dr. Hall's prognosis became even more dramatic – Dr. Hall warned him of "possible crippling" if he did not have a hip revision. Tr., 85:7-86:7. Dr. Hall, however, recommended no such thing; rather, he recommended conservative, medical management of Claimant's right hip due to his concern that surgery would not improve Claimant's condition. Ex. T:2.

112. Like the encounter with Dr. Johnson and his recollection of Dr. Sandefur's prognosis for the life expectancy of his prosthesis, Claimant's recollection of his consultation with Dr. Hall appears to have been an attempt to portray his claim in the most possible favorable light. Claimant's account, if true, would demonstrate that a physician was recommending surgical intervention from a very early point in his claim, less than five months after the industrial accident. It is, of course, possible that Claimant conflated Dr. Hall's advice with a later physician's recommendation, but given what appears to be a series of similar incidents, the conclusion that Claimant was again exaggerating or fabricating events is a reasonable one.

113. As it turns out, Claimant's dissembling, at least with regard to the medical compensability of his claim, was entirely unnecessary, as will be explained below. It is also important to acknowledge that Claimant experienced a great deal of serious medical treatment from numerous accidents and conditions, including seven orthopedic surgeries between 1998 and January 12, 2016, when he underwent the revision of his right hip arthroplasty. Claimant is correct – it would be difficult for anyone to accurately recall details given such a lengthy and complicated medical history. Nevertheless, the examples detailed above demonstrate more than a mere inability to accurately recall a few details.

114. Given Claimant's documented lack of credibility, particularly with regard to his limitations from past injuries, more weight is afforded to medical records where they conflict with Claimant's testimony. Furthermore, in light of its unreliability, Claimant's testimony is subject to heightened scrutiny to corroborate pain complaints, functional limitations and other details for consistency with the record.

DISCUSSION AND FURTHER FINDINGS

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

116. **Causation; Permanent Aggravation of Preexisting Condition**. Claimant has the burden of proving that the condition for which compensation is sought is causally related to an industrial accident. *Callantine v Blue Ribbon Supply*, 103 Idaho 734, 734-735, 653 P.2d 455, 455-456 (1982) (alleged industrial accidents neither caused nor aggravated claimant's thoracic outlet syndrome). There must be evidence of a medical opinion, whether by physician's testimony or written medical record, supporting the claim for compensation to a reasonable degree of medical probability. No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 901 591

P.2d 143, 148 (1979) (physician's testimony supported finding that industrial accidents caused Claimant's hysterical neurosis). Claimant is required to establish a probable, not merely a possible, causal connection between an injury and a claimed condition. *Dean v. Dravo Corporation*, 95 Idaho 558, 561, 511 P.2d 1334, 1337 (1973) (physician's testimony raised an ambiguity whether there was a possibility rather than a probability of a causal connection, requiring remand for rehearing).

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

118. Like the claimant in *Woodbury*, 64 Idaho 227, 130 P.2d 870, 875, who would have been required eventually to have breast cancer surgery but whose industrial accident accelerated the need for surgery, Claimant here sustained an industrial accident that accelerated the need for revision of his right hip arthroplasty, despite the fact that it would have likely worn out and required revision after 15 to 20 years. Such acceleration of the need for surgery that

would have become necessary eventually is nevertheless compensable under Idaho's Workers' Compensation Law.

119. Despite Claimant's lack of credibility on various details, discussed above, his pain complaints concerning the right hip were consistently documented and began only after the industrial accident of December 30, 2008. There is no question from the medical records immediately following the accident that Claimant had injured and badly bruised his right hip. Although this might have simply been the result of bad sprain/strain and contusion, the symptoms persisted and imaging over time confirmed a significant osteolucency that was highly suggestive of loosening of the prosthesis. While the need for revision surgery did not become clear until later, the accident that accelerated that need occurred less than six years after Claimant's original hip replacement surgery, significantly less than the 15 to 20 year life expectancy of the prosthesis.

120. The need for surgery, while still not explicitly apparent for several years, became urgent with the opinion of Dr. Sandefur documented on May 16, 2013, Ex. A:77-78, and communicated again by letter on May 15, 2014. Ex. BB:1. Dr. Friedman's IME on May 20, 2015 confirmed Dr. Sandefur's opinion. Ex. EE.

121. Defendants, however, relied upon the original IME of Dr. Waters of January 20, 2010, that any radiographic lucencies around Claimant's right hip femoral implant were related to his preexisting total hip arthroplasty and not the industrial accident. Rather, he diagnosed Claimant's industrial injury as merely a traumatic trochanteric bursitis. Ex X:3-4. Furthermore, as late as September 2, 2014, when the evidence of prosthetic loosening had become more pronounced through imaging and continuing pain complaints, Dr. Waters opined that it was "not unusual" to observe osteolucency around hip replacements even five to six years after surgery,

and thus more likely than not the industrial accident had not loosened Claimant's prosthesis. Dr. Waters qualified his opinion, however, by recommending that Surety consult with an independent radiologist to review all relevant imaging available for Claimant's right hip. Ex. AA:1-11.

122. Thereafter, Defendants' counsel engaged a radiologist, Dr. Hom, who, after reviewing only a CT scan and a bone scan from 2014, apparently opined that the prosthesis had loosened (contrary to Dr. Waters) but that it was not the result of a traumatic event but rather a chronic process. Ex. CC:3. No original report from Dr. Hom was included in the record and perhaps one does not exist, which is why his opinion was memorialized in a summary letter that Defendant's counsel drafted himself and to which Dr. Hom assented. This opinion was insufficiently reliable to find that Claimant's condition was chronic rather than industrially related.

123. While Defendants cast their decision to cover Claimant's hip revision surgery as a "humanitarian" act, nevertheless the weight of reliable medical evidence consisting of the assessment of Claimant's treating physician and the IME opinion of Dr. Friedman demonstrated otherwise. By the time of Dr. Friedman's opinion in May 2015, it was becoming increasingly difficult to deny compensability at this point, thus Defendants agreed to cover the surgery.

124. Finally, the operative findings from Dr. Sandefur's surgery confirmed that there was significant osteolysis around the proximal third to half of the femoral prosthesis. Ex. A:88-90. This proved that Dr. Sandefur and Dr. Friedman were correct all along and that the significant translucency shown on imaging was evidence of loosening, requiring a revision of the prosthesis. Dr. Sandefur also reasonably explained in his deposition why the operative findings demonstrated that the loosening was due to the industrial accident and not due to a chronic

process of the bone or due to a failure of the prosthesis itself. Dr. Sandefur would not have expected this kind of loosening from a patient who was 13 years from the original surgery Sandefur Dep., 12:4-21.

125. For the foregoing reasons, Claimant's December 30, 2008 industrial accident accelerated the need for revision of his right hip arthroplasty. The industrial accident thus caused Claimant's hip condition, which was not due to a preexisting condition.

126. **Medical Benefits**. Idaho Code § 72-432(1) provides in pertinent part as follows: "The employer shall provide for an injured employee such reasonable … medicines … as may be reasonably required by the employee's physician … immediately after an injury … and for a reasonable time thereafter." Claimant bears the burden of proving that medical expenses are due to an industrial injury and must produce medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State of Idaho, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995) (medical testimony failed to demonstrate an industrial cause of damage to claimant's knee). A physician, not the Commission, must determine whether medical treatment is required; the Commission's role is to determine whether, based upon the totality of the circumstances, the medical treatment determined required by a physician is reasonable. *Chavez v. Stokes*, 158 Idaho 793, 798, 353 P.3d 414, 419 (2015) (bill for medical helicopter transport of claimant following his finger injury was reasonable medical care). Reasonable medical treatment may include palliative measures even though they are not curative. *Poss v. Meeker Machine Shop*, 109 Idaho 920, 925, 712 P.2d 621, 624 (1985) (denial of pain medication and additional physical therapy was supported by the evidence). The employer's obligation to provide medical care may or may not extend to palliative care that does not result in functional improvement to an employee's

condition following medical stability, depending upon the totality of facts and circumstances. *Rish v. Home Depot*, 161 Idaho 702, 706, 390 P.3d 428, 432 (2017) (Commission erred in determining post-MMI palliative care was not reasonable because it did not improve claimant's functionality). 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. *See*, Idaho Code § 72-706(5) (right to medical benefits not affected by statute of limitations).

127. As noted above, a definitive causal link existed between the industrial accident of December 30, 2008 and the need for the revision of Claimant's total right hip arthroplasty that Dr. Sandefur performed on January 12, 2016 and any related care. The credible opinions of Dr. Sandefur and Dr. Friedman support a finding that replacement of Claimant's right femoral prosthesis, and any related care, was necessary. Under the totality of the circumstances, such treatment was reasonable.

128. The evidence further demonstrates that Claimant experienced continuing pain related to his right hip condition following MMI that requires palliative care. Per *Rish*, 161 Idaho at 706, 390 P.3d at 432, Claimant is entitled to further palliative care as determined necessary by Dr. Sandefur, or another physician to whom Dr. Sandefur refers Claimant. This includes the acupuncture recommended by Dr. Sandefur.

129. Claimant may also be entitled to other future care as anticipated by Idaho Code § 72-432, but such care is not at issue in this proceeding.

130. As noted, Defendants provisionally accepted responsibility for expenses associated with the right hip revision. It is alleged that some small amount of those charges (approximately $257) is yet unpaid (but not yet denied), perhaps through oversight. The parties are urged to resolve this matter consistent with this decision finding the procedure compensable.

131. **Permanent Partial Impairment (PPI).** Permanent impairment is defined in statute as "any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive 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, elevation, traveling, and nonspecialized activities of bodily members." Idaho Code § 72-424.

132. The Idaho Supreme Court has held that it is a "fundamental principle that the Industrial Commission, rather than the claimant's treating physician, is the fact-finder and ultimate evaluator of impairment. The physician, as an expert witness, may provide information helpful to the Commission." *Urry v. Walker and Fox Masonry Contractors*, 115 Idaho 750, 755-756, 769 P.2d 1122, 1127-1128 (1989) (Industrial Commission applied improper legal standard in finding that claimant's impairment had not changed following subsequent injury). The Court also held as follows: "A doctor should take complaints of pain into account when reaching an opinion regarding impairment. But his opinion on these matters is not binding upon the Commission." *Id*., 115 Idaho at 756, 769 P.2d at 1128.

133. There are three impairment ratings of physicians in the record, as follows: that of Dr. Waters, who rated Claimant's industrial hip injury at 1% impairment of the lower extremity due to a diagnosis of trochantric bursitis, Ex. X:3-4; that of Dr. Sandefur, who also assigned a 1% impairment of the lower extremity, Ex. A:161; and that of Dr. Friedman, who rated Claimant's injury both prior to and after MMI and the corrective surgery to replace his hip prosthesis. Dr. Friedman's first impairment rating, which accounted for apportionment for

Claimant's preexisting degenerative arthritis and first prosthetic implant, found Claimant had a net 13% impairment of the lower extremity. Ex. EE:1-3. His subsequent, post-MMI rating determined that Claimant had a 27% impairment of the lower extremity, without apportionment for Claimant's preexisting condition. *Id*. at 4.

134. The 1% impairment rating assigned by Dr. Waters is easily discredited as it was based upon an incorrect diagnosis of trochanteric bursitis and a faulty assessment of Claimant's hip condition, that the progressive osteolucency observed on imaging was not the result of loosening of Claimant's femoral prosthesis.

135. Dr. Sandefur acknowledged in his deposition that he does not regularly perform impairment ratings and did not use the *Guides* in answering Surety's query of November 18, 2016 regarding impairment, that Claimant had a 1% impairment of the lower extremity. He explained in testimony that he did so because Claimant "was still impaired" and had "still got some disability." Sandefur Dep., 14:18-16.9. Dr. Sandefur is an orthopedic surgeon and his expertise does lie in the area of impairment ratings like a physiatrist. His rationale for the impairment rating demonstrated that he did not employ any analysis to the rating other than determining that Claimant had some level of impairment and disability. Therefore, his opinion on impairment is also entitled to no weight.

136. Dr. Friedman is a physiatrist who regularly performs impairment ratings. His qualifications are well known to the Commission. He utilized the *Guides* in his impairment analysis and correctly classified Claimant's impairment under table 16-4 for a total hip replacement with appropriate adjustments. His final rating of 27%, however, did not account for apportionment of Claimant's prior hip condition and original arthroplasty, as his first rating did. It is appropriate, therefore, to complete the calculation by subtracting the result that

Dr. Friedman calculated for Claimant's impairment "immediately after his total hip arthroplasty up to the time of his industrial injury from his industrial injury caused worsening of his prosthetic function." Ex. EE:2.

137. Dr. Friedman previously determined that Claimant had a 21% impairment of the lower extremity following his total hip arthroplasty in 2003 up to the time of his industrial injury. *Id*. If this is subtracted from his impairment that Dr. Friedman determined for Claimant at MMI following the arthroplasty revision surgery of January 12, 2016 (27%), this results in a net impairment, after apportionment, of 6% of the lower extremity.

138. Claimant sustained a net partial permanent impairment of the lower extremity in the amount of 6% as result of the industrial accident.

139. **Permanent Partial 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 section 72-430, Idaho Code." Idaho Code § 72-425.

140. The test for determining whether Claimant has suffered a permanent disability is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988) (claimant at time of hearing was earning a salary equal to his pre-injury employment and did not present significant evidence of disability).

141. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995) (claimant's limitations preexisted industrial injury, thus he had no disability in excess of his impairment).

142. The proper time for determining Claimant's disability under most circumstances is the time of the hearing. *Brown v. Home Depot*, 152 Idaho 605, 609, 272 P.3d 577, 581 (2012) (Commission's finding regarding disability was reached in error because it was based upon his circumstances at time of medical stability rather than hearing).

143. Claimant bears the burden of proving that he has suffered a disability. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 34, 714 P2d 1, 3 (1985) (claimant failed to establish disability where her complaints of chronic back pain were not supported by an anatomical cause of her pain or physical evidence of injury). "[A] permanent disability rating need not be greater than the impairment rating if, after consideration of the non-medical factors in Idaho Code § 72–425, the claimant's 'probable future ability to engage in gainful activity' is accurately reflected by the impairment rating." *Graybill*, 115 Idaho at 293, 766 P.2d at 764.

144. In *Poljarevic v. Independent Food Corporation*, 2010 IIC 0001 (permanent work restrictions assigned to claimant by independent medical examiner were appropriate), the Commission observed as follows:

> In assessing Claimant's permanent partial disability, it is first helpful to understand whether Claimant's permanent impairment has caused a loss of functional capacity, which impacts his ability to engage in physical activity. Indeed, a loss of functional capacity figures prominently in all cases involving a determination of an injured worker's disability in excess of physical impairment. *Absent some functional loss, it is hard to conceive of a factual scenario that would support an award of disability over and above impairment*; if the injured worker is physically capable of performing the same types of physical activities as he performed prior to the industrial accident, then neither wage loss nor loss of access to the labor market is implicated.

Id. at 2010 IIC 0001.7 (emphasis added).

145. As developed *infra*, where it is alleged that Claimant's disability is the product of accident-caused and pre-existing impairments, the Commission's first task is to evaluate Claimant's disability from all causes combined. Claimant has a number of pre-existing conditions which may be vocationally relevant. His 1998 motor vehicle accident led to two low back surgeries, including a single level fusion at L5-S1. The record does not disclose whether Claimant was given an impairment rating by a treating or evaluating physician for this injury, although it is reasonable to conclude that this injury did result in ratable impairment. Claimant's 2003 right hip revision did result in ratable impairment of 21% of the lower extremity. Finally, the 2006 industrial injury resulted in ratable impairments for Claimant's left ankle.

146. Following the 2016 revision of Claimant's right hip arthroplasty, Dr. Sandefur gave Claimant permanent limitations against running, jumping, and putting his hip in awkward positions. He also advised Claimant to avoid lifting more than 30 pounds. These limitations are the same as those Dr. Sandefur would have given to Claimant for his pre-existing hip condition,

with the exception of the 30 pound lifting restriction, which he specifically attributed to the revision procedure.

147. It is more difficult to understand the functional limitations attributable to Claimant's pre-existing low back condition. Medical records contain Claimant's self-reported description of the impact of his low back condition on his ability to engage in functional activities. For example, on or about August 24, 2004, Claimant was seen at Eastern Oregon Medical Associates for evaluation of low back pain, at which time the following history was recorded:

> The patient is a 45 year old male who presents today with complaints of low back pain for the past three days. The pt. has had a history of low back pain that originated from a MVA in 1998. Since then he's had a spinal fusion of L5 and S1 and then a follow up surgery performed by Dr. Nuby in Bend for removal of scar tissue. The patient states that he has permanent sciatic nerve damage on the left. He has not been able to return to his former work of construction. He complains that it is hard for him to sit or stand for a long time.
>
> …
>
> The patient states that he does work hit and miss whenever he can get a contract supervising job he is able to do that however cannot perform the actual labor.

Ex. Z:182-183. Similarly, in connection with his application for Social Security disability, Claimant was evaluated by Charles Hofmann, M.D. on January 2, 2014. Concerning Claimant's history of low back injury, Dr. Hofmann recorded the following:

> The patient states that he was involved in a motor vehicle accident in 1998 injuring his low back. He ultimately came to discectomy without improvement in his pain and subsequently had a lumbar fusion. The pain initially was improved but over time, he has been plagued with worsening pain radiating down his left leg. The pain is made worse by standing for prolonged periods of time and with activities such as bending and lifting. He had been working as a contractor proior [sic - prior] to his accident but is no longer capable of performing that kind of work regularly. He has been able [sic-to] find an occasionally odd job here and there but essentially has not worked for the past several years.

Ex. Y:15. Therefore, Claimant has previously reported to medical providers that as a result of his low back injury and L5-S1 fusion he was unable to return to his customary occupation in the construction industry.

148. Beyond this type of historical information, however, there is very little in the record to quantify the extent and degree of the functional limitations referable to Claimant's 1998 low back injury. The disability determination evaluation performed by Dr. Hofmann is problematic for at least two reasons. Dr. Hofmann identified Claimant's disabling conditions as degenerative disc disease of the lumbosacral spine and congenital hip disease of the right hip. He gave Claimant the following limitations/restrictions:

> Based on all the medical evidence available to me including my own objective findings, the following is my opinion in the claimant's ability to engage in work-related activities.
> 1. I believe he could stand for 30 minutes at the [sic - a] time and with regular breaks could do so 2 hours a day.
> 2. I believe he could walk for 15 minutes at a time and with regular breaks and could do so for 1 hour a day.
> 3. I believe he could sit for 2 hours a day and with regular breaks could do so 8 hours a day.
> 4. I believe he could lift and carry up to 25 pounds occasionally and up [sic - to] 10 pounds frequently.
> 5. He has not limitations in his ability to hear, speak or handle objects.
> 6. His ability to travel is limited only by his inability to sit for prolonged periods of time.

Ex. Y:16-17. The first problem is that it is impossible to understand from Dr. Hofmann's report the extent to which the restrictions he identified are referable to the low back versus the right hip. Second, it must be recalled that Dr. Hofmann's evaluation was conducted at a time when Claimant was still in a period of recovery following 2008 industrial accident and prior to the corrective revision surgery performed by Dr. Sandefur. Therefore, the limitations/restrictions identified by Dr. Hofmann may, to some extent, represent temporary restrictions. In the final

analysis, Dr. Hofmann's report is not helpful in quantifying the extent and degree of the limitations referable to Claimant's 1998 low back injury.

149. More help might be obtained from the April 8, 2008 FCE conducted by Keith Kadlecik, PT, following Claimant's 2006 industrial accident involving injuries to his right knee and left ankle. That FCE was performed prior to the subject accident, at a time when Claimant's low back and right hip conditions were medically stable. The April 8, 2008 FCE was evidently ordered because Claimant had been pronounced medically stable for his left ankle injury and, indeed, the FCE appears to focus on that injury. As part of the evaluation, Claimant's self report of his functional tolerances was as follows:

	Client's Estimate of Maximum Tolerance
Strength	
Lifting	2-3 mins ->20lbs
Lifting	3-4hrs<20lbs
Carrying	2-3 hrs<20lbs
*Pushing	1/2hr
*Pulling	1/2hr
Mobility	
Sitting	6hrs
Static Standing	15mins
Dynamic Standing	5hrs
Walking	10mins
Agility	
Stairs/Ladders	1-2hrs
Balancing	1hr
Bending/Stooping	30mins
Crouching/Squatting	None
Crawling	4-6hrs
Above-Shoulder Work	2hrs
Low-Level Work	30mins
Coordination	
Driving	2hr before he needs to stop and walk around before continuing

Ex. L:7-8. To test the reliability of the evaluation, Claimant was also asked to self-rate his ability to perform certain work tasks. Claimant perceived himself to be capable of performing light-duty work. Testing performed as part of the FCE measured Claimant's ability to balance, crouch/squat, crawl and use a ladder. His lifting ability was also measured. Claimant demonstrated an ability to complete a maximum of four lifts of 13 pounds each in a 20 second period. This testing was terminated due to a reported increase of left ankle pain. FCE findings were summarized as follows:

> Mr. Lucas is considered appropriate for work within the light work range as defined by the U.S. Department of Labor. He demonstrated good body mechanics and object control with the lifting indicated in this report
> He was significantly limited by verbal and/or physical pain complaints while performing the physical ability portions of this test to include bending, squatting, kneeling, etc.
> Especially those activities requiring the left ankle to Dorsi-flex beyond 90 degrees, or be in a twisted position.
> Although client demonstrated an ability to work within the light demand level, I feel that walking on uneven surfaces may be restrictive for placement into some job markets.
> Worker's abilities are limited by pain.

Ex. L:1. Again, the 2008 FCE is not particularly helpful in teasing out the individual limitations/restrictions referable to the pre-existing right hip, low back, left ankle, and right knee injuries. Nevertheless, it does provide a non-specific assessment of Claimant's functional abilities immediately prior to the subject accident. The findings are not inconsistent with Claimant's self-report of his functional capacity referenced in the other medical records referenced above.

150. In his report, Mr. Crum synthesized some of the same pre- and post-injury medical records. He acknowledged that following the 2003 hip replacement Claimant may have had some "subjective limitations." He also acknowledged that after Claimant's 1998 low back injury, Claimant received retraining for a lighter-duty job and pursued a claim for Social Security

disability benefits referable to his low back injury. He was also aware that Claimant has had permanent left lower extremity pain as a result of the 1998 low back injury. Mr. Crum's report does not reflect that he reviewed the 2008 FCE. Nevertheless, through Dr. Reichhardt IME, Mr. Crum was aware of Claimant's self-reported functional abilities which Dr. Reichhardt pulled from the FCE. Mr. Crum was aware of the January 2014 evaluation performed by Dr. Hofmann which described limitations/restrictions given to Claimant because of his low back and right hip conditions. He noted that there was no way to tell which restrictions were related to the right hip and which related to the low back. Mr. Crum acknowledged that Claimant may have been given permanent restrictions following the 2003 hip replacement. Mr. Crum was aware of Claimant's deposition testimony that prior to the December 30, 2008 industrial accident, it was difficult for Claimant to spend all day on his feet because of his right hip.

151. Inexplicably, even though Mr. Crum was aware of medical and other records suggesting that the pre-existing conditions discussed *infra* did affect Claimant on a permanent basis, Crum's disability assessment is founded on the unsupported assumption that Claimant had no functional limitations prior to the subject accident:

> "On a preinjury basis, Mr. Lucas had apparently not been assigned any permanent physical restrictions for either his right hip or his low back or any other pre-existing condition."

Ex. II:10. Based on this assumption, Mr. Crum proposed that Claimant's pre-injury labor market consisted of construction management/supervisory jobs, construction labor, security work, cleaning and custodial jobs, production/assembly jobs, as well as customer service jobs.

152. Based on Claimant's age, education, transferrable job skills, and lack of physician-imposed restrictions, Mr. Crum proposed that on a pre-injury basis, Claimant had access to approximately 10% of the jobs in his labor market.

153. Mr. Crum proposed that it was only as a result of the industrial accident that Claimant was assigned limitations/restrictions against engaging in certain activities. Mr. Crum assumed that on a post-injury basis, Claimant was, for the first time, restricted from engaging in running or jumping or lifting more than 30 pounds. Based on this assumption, Mr. Crum opined that the accident-produced restrictions would make Claimant competitive for only 4% of his labor market. Therefore, Claimant has suffered a 60% loss of access to his labor market as a direct consequence of the work injury.

154. Mr. Crum's assessment of Claimant's loss of access to the labor market referable to the work injury is fatally flawed because of his erroneous assumption that Claimant was unfettered by his pre-existing conditions and had no loss of functional ability prior to the subject accident. In fact, the 2008 FCE strongly suggests that Claimant's pre-injury limitations/restrictions are more onerous than those given by Dr. Sandefur following the January 2016 revision surgery. If Claimant's pre-existing limitations/restrictions are greater than those caused by the subject accident, or, if the limitations caused by the subject accident are not, in some way, additive to Claimant's pre-existing limitations/restrictions, no part of Claimant's current loss of labor market access can fairly be attributed to the subject accident.

155. There are other problems with Mr. Crum's report. As noted, he identified labor market access loss of 60%. He also identified wage loss of 31%, representing a comparison of Claimant's $20.19 per hour time-of-injury wage against the average wage he might be expected to earn in his residual labor market. Ordinarily, labor market access loss and wage loss are both considered by the Commission in evaluating disability. Depending on the particular facts of a case, one factor may be deemed of more significance than the other. For example, a worker whose time-if-injury job paid minimum wage might not suffer any wage loss as a consequence

of an industrial injury, even though he may have lost access to 80% of his time-of-injury labor market. Such a scenario might warrant rejection of averaging wage loss and labor market access loss (in this example 40%) to arrive at Claimant's accident-caused disability. Such an approach would minimize the most significant element of Claimant's disability, i.e., his significant accident-caused loss of access to his pre-injury labor market.

156. Therefore, although there are no hard-and-fast rules about whether the averaging convention should be used, Mr. Crum should have, at the very least, explained why, under the peculiar facts of this case, it is appropriate to disregard Claimant's wage loss in favor of evaluating his disability based solely on what Mr. Crum perceived to be his accident-produced loss of labor market access. This he failed to do.

157. Claimant has testified that he was relatively unhindered by any of his pre-existing conditions, and this, of course, is an assumption made by Mr. Crum. Nevertheless, as Defendants have argued, Claimant is not a reliable historian in this regard; his testimony is disfavored in light of medical records establishing that Claimant had significant pre-injury limitations/restrictions, probably exceeding those imposed by Dr. Sandefur following the January 2016 hip revision. While it is clear that Claimant is significantly disabled at the present time, because of Mr. Crum's failure to consider the limitations/restrictions articulated by the 2008 FCE, it is difficult to understand the full extent of Claimant's current disability. For example, the limitations/restrictions to which Claimant has admitted, and those identified by testing, may result in labor market access loss greater than 60%.

158. **Apportionment.** Idaho Code § 72-406(1) provides as follows: "In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting

physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease." In *Horton v. Garrett Freightlines, Inc.*, 115 Idaho 912, 772 P.2d 119 (1989) (Commission failed to take into account impairments to claimant's left hip, shoulders, and back in evaluating the degree of permanent disability), the Idaho Supreme Court held that Idaho Code § 72-406 requires a two-step process to determine whether a claimant's permanent partial disability should be apportioned, as follows: first, determine the claimant's disability based upon all impairments, including preexisting impairments and impairment from industrial injury; and second, apportion the liability of employer based upon the degree to which the industrial injury contributed to claimant's disability. *Id*., 115 Idaho at 917, 772 P.2d at 124.

159. "There is a presumption the Commission by its experience is able to judge the causative factors in a particular case, and the Commission is 'allowed a degree of latitude in making an apportionment.'" *Page v. McCain Foods*, 145 Idaho 302, 308-309, 179 P.3d 265, 271-271 (2008) (Commission erred by failing to make separate finding as to disability and then apportioning disability between preexisting conditions but rather simply stating the amount of disability after apportionment without explanation), *citing Reiher v. Am. Fine Foods*, 126 Idaho 58, 62, 878 P.2d 757, 761 (1994) (Commission erred by apportioning claimant's disability according to his impairment ratings). Nevertheless, the Commission must explain its apportionment determination with sufficient analysis to determine whether it is supported by substantial and competent evidence. *Reiher*, 126 Idaho at 62, 878 P.2d at 761.

160. Citing *Page*, 145 Idaho at 309, 179 P.3d at 272, Defendants argue that apportionment is "not an affirmative defense because a claimant continues to bear the burden on the issue of whether he or she has suffered disability related to the specific industrial accident."

Defendants' Post Hearing Brief at 34. Nevertheless, this is not an entirely accurate statement of the law of apportionment under Idaho Code § 72-406(1); while Claimant bears the burden of proving disability, once disability has been shown, Defendants must show that at least a portion of the disability is due to a preexisting condition. As the Commission recently observed in the case of *Ayala v. Robert J. Meyers Farms, Inc.* 2018 WL 1830470 (April 9, 2018), in pertinent part as follows:

> Where a claim for disability less than total is before the Commission, so is the issue of whether Employer bears full responsibility for Claimant's disability. See *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008). In keeping with *Barton v. Seventh Heaven Recreation, Inc.*, 2010 IIC 0379 (2010), Claimant bears the burden of persuasion on the issue of whether he has suffered disability referable to the subject accident. However, once Claimant makes a prima facie showing in this regard, the burden of going forward with evidence that some portion of Claimant's disability is, in fact, referable to a pre-existing condition, shifts to Defendants. See *Albright v. MGM Construction, Inc.*, 102 Idaho 269, 629 P.2d 665 (1981); *Keenan v. Brooks*, 100 Idaho 823, 606 P.2d 473 (1980) (Bistline, J., and Donaldson, J. specially concurring).

Id., 2018 WL 1830470.41.

161. While it is clear that Claimant is significantly permanently disabled at the present time, the evidence discussed in the prior section establishes that the subject accident did not materially add to Claimant's current disability. As noted, vis-à-vis the right hip, the only additional limitation imposed by the industrial accident is Dr. Sandifer's 30 pound lifting restriction. Nevertheless, the evidence discussed infra strongly suggests that the 30 pound lifting restriction is less onerous than the limitations/restrictions articulated in the 2008 FCE. For these reasons, Defendants have met their burden of coming forward with evidence establishing that Claimant's disability should be apportioned between the subject accident and his pre-existing condition. From the foregoing, it cannot be concluded that any part of Claimant's current disability over and above impairment is referable to the subject accident.

162. **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.

163. The decision that grounds exist for awarding attorney fees is a factual determination that rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976) (surety did not unreasonably delay determination of employee's claim, thus was not liable for attorney fees).

164. Defendants had a reasonable basis to initially deny Claimant's hip revision surgery, based upon the 2010 IME opinion of Dr. Waters. This held true until Dr. Sandefur, Claimant's treating physician and surgeon, issued a definitive and clear causation opinion in May 2013, which Dr. Sandefur reaffirmed in both May and June 2014, that connected the need for hip revision surgery to the industrial accident. Defendants appropriately returned to Dr. Waters for another opinion, who repeated his earlier opinion that the condition was not industrially-related and did not require revision surgery, however he qualified that opinion by recommending that Surety obtain the opinion of a radiologist on Claimant's imaging. At that point, it behooved Defendants to obtain a thorough opinion from a radiologist, but they did not do so. They supplied Dr. Hom, the radiologist, with a CT scan and bone scan only from 2014, but did not provide him with any prior imaging for comparison. Ex. CC:3. The record does not even contain an actual

report from Dr. Hom, but rather a letter from Defendants' counsel in which Dr. Hom assented to counsel's conclusions by signing the letter. *Id.* Furthermore, Dr. Hom's report, such as it was, discredited the assessment of Dr. Waters that the significant radiolucency observed on Claimant's imaging was not the result of loosening of the prosthesis. And the conclusion attributed to Dr. Hom, that the loosening was due to a chronic disease process, was presented with no explanation or rationale.

165. Thus, Dr. Hom's opinion was not a reasonable opinion upon which to rely, and even if it had been entitled to some reliance, it demonstrated that the opinion of Dr. Waters, insofar as it denied that the radiolucency on imaging demonstrated loosening of the prosthesis, was suspect. Dr. Waters unreasonably resisted the conclusion that the osteolucency progressively apparent on Claimant's imaging was the result of loosening of the hip prosthesis. Furthermore, the operative findings from the 2016 hip revision surgery conclusively demonstrated the errors of the opinions of both Dr. Waters and Dr. Hom.

166. Surety's decision to ultimately cover Claimant's surgery was no mere act of humanitarian kindness but rather a concession that Dr. Sandefur and Dr. Friedman were correct. Particularly after Dr. Friedman confirmed the opinion of Dr. Sandefur in 2014, it was no longer viable for Defendants to rely upon either Dr. Waters or Dr. Hom. It is unfortunate that Surety could not have come to this decision at least a year, if not two years, earlier. Under such circumstances, the delay in approving surgery was unreasonable and justifies an award of attorney fees pursuant to Idaho Code § 72-804.

167. Based upon their unreasonable delay of approval for Claimant's hip revision surgery, Defendants are liable for attorney fees under Idaho Code § 72-804.

CONCLUSIONS OF LAW

1. Claimant's December 30, 2008 industrial accident accelerated/aggravated his total right hip arthroplasty originally performed in 2003. This condition is compensable.

2. Defendants are liable for medical expenses related to Claimant's January 12, 2016 right hip revision surgery and associated care, including reasonable palliative care as determined necessary by Claimant's physician, including Dr. Sandefur's recommendation for acupuncture.

3. Claimant is entitled a net 6% permanent partial impairment of the lower left extremity as a result of the industrial accident.

4. Claimant has no net permanent partial disability referable to his industrial injury. Defendants have established that all of Claimant's disability is referable to his preexisting impairments under Idaho Code § 72-406(1).

5. Due to their unreasonable delay of Claimant's hip revision surgery, Defendants are liable for attorney fees pursuant to Idaho Code § 72-804.

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 __23rd____ day of ___April_____, 2018.

INDUSTRIAL COMMISSION

_/s/_____
John C. Hummel, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __11th____ day of _____May_____, 2018, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

TAYLOR MOSSMAN-FLETCHER
MOSSMAN LAW OFFICE
611 W HAYS ST
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PO BOX 1368
BOISE ID 83701-1368

sjw

_/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GREGORY LUCAS, Claimant, v. NORTHCON, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2009-000033** **ORDER** Filed: May 11, 2018

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

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

1. Claimant's December 30, 2008 industrial accident accelerated/aggravated his total right hip arthroplasty originally performed in 2003. This condition is compensable.

2. Defendants are liable for medical expenses related to Claimant's January 12, 2016 right hip revision surgery and associated care, including reasonable palliative care as determined necessary by Claimant's physician, including Dr. Sandefur's recommendation for acupuncture.

3. Claimant is entitled a net 6% permanent partial impairment of the lower left extremity as a result of the industrial accident.

4. Claimant has no net permanent partial disability referable to his industrial injury. Defendants have established that all of Claimant's disability is referable to his preexisting impairments under Idaho Code § 72-406(1).

5. Due to their unreasonable delay of Claimant's hip revision surgery, Defendants are liable for attorney fees pursuant to Idaho Code § 72-804.

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

Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804. Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, plus an affidavit in support thereof. In particular, the parties must discuss the factors set forth by the Idaho Supreme Court *Hogaboom v. Economy Mattress,* 107 Idaho 13, 684 P.2d 990 (1984). The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to any representation made by Claimant, the objection must be set forth with particularity. Within seven (7) days after

Defendants' response, Claimant may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees.

DATED this __11th____ day of _____May_____, 2018.

INDUSTRIAL COMMISSION

__/s/_____
Thomas E. Limbaugh, Chairman

__/s/_____
Thomas P. Baskin, Commissioner

__/s/_____
Aaron White, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __11th____ day of _____May_____, 2018, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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