

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

NICKOLE THOMPSON

Claimant,

v.

BURLEY INN, INC.,

Employer,

and

MILFORD CASUALTY INSURANCE CO.,

Surety,

Defendants.

IC 2019-013978

ORDER

FILED

JUN 13 2022

INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Brian Harper 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 recommendation of the Referee. The Commission concurs with this recommendation.

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, IT IS HEREBY ORDERED that:

1. Claimant has proven by a preponderance of the evidence her left hip condition was causally related her work accident of March 28, 2019.
2. Claimant has proven by a preponderance of the evidence that she is entitled to medical care benefits associated with treatment of her left hip, including surgery and subsequent care, at the *Neel* rate.

3. Claimant has proven by a preponderance of the evidence that she is entitled to total temporary disability benefits from February 13 to June 11, 2020.

4. Claimant has proven by a preponderance of the evidence her entitlement to benefits for disability based on medical factors, commonly known as permanent partial impairment (PPI) at the rate of 7% whole person.

5. Claimant has proven by a preponderance of the evidence a permanent partial disability of 15%, inclusive of her 7% whole person permanent impairment from her industrial accident of March 28, 2019.

6. Claimant has failed to prove by a preponderance of the evidence her entitlement to attorney fees under Idaho Code § 72-804.

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

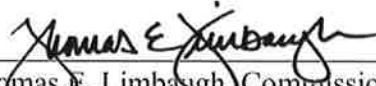
DATED this the 10th day of June, 2022.



INDUSTRIAL COMMISSION



Aaron White, Chairman



Thomas E. Limbaugh, Commissioner



Thomas P. Baskin, Commissioner

Attest:



Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June, 2022, a true and correct copy of the foregoing **ORDER** was served by email transmission and regular United States Mail upon each of the following:

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

FILED

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INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a remote video hearing on August 16, 2021. Matthew Vook of Twin Falls represented Claimant. Rachael O'Bar of Boise represented Defendants. The parties produced oral and documentary evidence at the hearing and submitted briefs. Three post-hearing depositions were taken. The matter came under advisement on March 25, 2022.

ISSUES

The parties agreed the following issues were to be decided:

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

2. Whether and to what extent Claimant is entitled to the following benefits:
 - a. Medical Care;
 - b. Temporary partial and/or temporary total disability (TPD/TTD);
 - c. Disability based on medical factors, commonly known as permanent partial impairment (PPI);
 - d. Permanent partial disability (PPD); and
 - e. Attorney fees.¹

CONTENTIONS OF THE PARTIES

Claimant asserts she injured her left hip as the result of an industrial accident which occurred on March 28, 2019. Medical care, including surgery to repair a labral tear in her left hip, was initially covered by Defendants. When that surgery failed to yield any positive results, Claimant sought, and eventually underwent, a total left hip replacement surgery. Relying on the opinions of their IME physician, Defendants refused to authorize or pay for such surgery, and related time loss benefits. They also denied PPI and PPD benefits. Claimant is entitled to her medical expenses at the *Neel* rate, and temporary disability benefits associated with the surgeries. She also is entitled to benefits for her permanent impairment and disability. Attorney fees are warranted as well.

Defendants acknowledge Claimant suffered a work accident in March 2019. Her initial treatment was covered. When, during the course of treatment, Claimant's treating physician agreed to hip replacement surgery, Defendants sought an IME. The IME physician found no evidence of hip involvement related to Claimant's industrial accident; the hip findings were incidental and preexisting. Hip replacement surgery on the 39-year-old Claimant was not

¹ In her Opening and Reply briefs, Claimant asserts "All other issues were reserved." There was no further elaboration. In reviewing the hearing transcript there was no discussion of bifurcating issues made at the hearing, no indication by the Referee or any counsel that there were other issues which were reserved, and no indication as to what those "reserved" issues were. In reality, the hearing issues are complete and final, there are no "reserved" issues recognized by this decision.

reasonable or necessary, and not related to her work accident. Claimant suffered no PPI and no PPD. Defendants are not liable for any of Claimant's denied medical expenses, nor are they liable for any other benefits claimed in this matter. Finally, Defendants argue that the Commission should carve out an exception to the *Neel* doctrine where, such as in this case, Claimant's medical care was covered by Medicaid.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at hearing;
2. Joint exhibits (JE) A through O admitted at hearing;
3. Defendants' exhibits (DE) 1 through 4, admitted at hearing; and
4. The post-hearing deposition transcripts of William May, M.D., Roman Schwartsman, M.D., and Cali Eby, taken on September 9, November 12, and December 22, 2021, respectively.

The objections made during the depositions are overruled.

FINDINGS OF FACT

Accident and Post-Accident Medical History

1. On March 28, 2019, Claimant was working for Employer in its breakfast room when she tripped over a stack of mats while on her way to a freezer. She was able to catch herself on a metal food prep table, but as she did, she felt a sharp pain in her low back/upper left buttock area.

2. The day of the accident Claimant sought treatment at Riverview Urgent Care in Burley. Her chief complaint was constant low back pain. Claimant's initial diagnosis was

ligament sprain of lumbar spine. Claimant received symptomatic treatment. She was placed on work restrictions which allowed her to continue most of her regular duties but no heavy lifting.

3. Claimant continued to complain of lower left-sided back pain shooting into her left leg, which she described as feeling like a pinched nerve. She was prescribed physical therapy.

4. Physical therapy, NSAID medications, muscle relaxants, and narcotic pain relievers all failed to alleviate Claimant's complaints. By her May 9, 2019 office visit at Riverview, Claimant complained of pelvis/low back pain, which her physical therapist described as "pelvic alignment" problems. JE A, p. 13. She was prescribed a pelvic belt and a "dry needle" treatment.

5. The dry needle procedure worsened Claimant's pain complaints and no other treatment or prescription medication proved effective. Claimant stated it felt like her "hip keeps coming out of place," which caused her extreme pain. *Id* at 20.

6. On May 15, 2019, Claimant underwent a lumbar MRI. The radiologist interpreted it as showing "[m]oderate disc space narrowing at L5-S1 with diffuse disc bulge asymmetric to the left contributing to mild bilateral neural foraminal narrowing left greater than right." He also found "facet related spondylosis ... without significant spinal canal or neural foraminal narrowing." JE J, p. 215.

7. Claimant was referred to David Christensen, M.D., at Intermountain Spine in Twin Falls for further evaluation. Claimant saw Dr. Christensen on June 5, 2019. Dr. Christensen performed an in-office MRI and x-rays of Claimant's lumbosacral spine. The diagnostic films showed L5-S1 moderate degenerative disc disease, mild to moderate facet arthropathy at L3 through S1 with broad L5-S1 disc bulge without neural compression. Dr. Christensen diagnosed lumbosacral spondylosis at L5-S1 as well as left SI joint inflammation and possible left hip labral tear. He recommended exercise, continued PT, possible TENS unit trial, bracing,

and possible future injections to address ongoing symptoms. He also ordered a left hip MRI with arthrogram to assess the suspected labral tear.

8. Claimant presented at Cassia Regional ER on June 12, 2019, complaining of increased left hip pain and was given a pain shot and encouraged to follow up with her treating physician.

9. On June 16, 2019, Claimant underwent a left hip MRI with contrast. It was read as showing mild to moderate left hip osteoarthritis with cartilage thinning and acetabular subchondral cyst formation, as well as a partial thickness tear of the left anterior superior labrum. While the right hip was not scanned in detail, mild right hip osteoarthritis was noted as an incidental finding.

10. For reasons unclear in the record, Claimant ended up at St. Luke's Orthopedics in Twin Falls on June 18, 2019, where she was seen by PA-C Mitch Robinson (who worked with William May, M.D.), with complaints of left hip and groin pain since the date of her industrial accident. PA Robinson recommended arthroscopic debridement and labral repair for Claimant's subchondral acetabular cyst and labral tear.

11. Claimant continued to complain of constant pain and difficulties with daily activities through this period, visiting an ER and her primary care physician for prescription pain medication and treatment. Her recommended labral repair surgery was authorized by Surety.

12. On July 29, 2019, Dr. May performed Claimant's debridement and labral tear repair arthroscopic surgery. Thereafter, physical therapy was initiated.

13. At Claimant's five-week checkup, she complained of severe pain with therapy. Dr. May felt Claimant was "getting a lot of synovitis from the irritation" and suspended Claimant's physical therapy. He prescribed anti-inflammatory and pain medications. He took her off work for one month. JE E, p. 127.

14. Claimant's complaints did not abate. In fact, by mid-September 2019, Claimant was back at her primary care physician complaining of the intractable pain. Her physician refilled her narcotic pain medication, but suggested Claimant would need to see a pain management specialist if she did not get relief. Claimant repeatedly asked if she could get a total hip replacement, as she needed the doctors to "fix" her problem. JE D, p. 88.

15. At her September 24, 2019 office visit with Dr. May, Claimant was adamant that she wanted a total hip arthroplasty. Dr. May indicated he would review her case with his colleagues to get their thoughts. If they agreed that a total hip replacement was Claimant's best option, Dr. May would seek to have one of them perform the surgery. In furtherance of this plan, Dr. May scheduled Claimant for a second opinion examination with Michael Gustavel, M.D., a Boise orthopedist, on October 1, 2019.

16. Three days after her visit with Dr. May, on September 27, 2019, Claimant was back at her primary care physician's office, demanding an MRI. She suspected something had gone wrong in her prior surgery. Claimant was using crutches.

17. The MRI taken that day was read as showing a small left hip effusion, mild to moderate left, and mild right, hip osteoarthritis, stable from the previous MRI in June 2019. There was no evidence of a complication from the previous surgical repairs.

18. On October 1, 2019, Dr. Gustavel examined Claimant after taking her history. He felt Claimant's left back/buttock pain could be originating from her low back but found it difficult to assess due to her hip symptoms. The doctor felt an ultrasound-guided left hip injection could help to establish the source of Claimant's pain complaints. He surmised that if the hip injection helped Claimant's pain, she would then be a candidate for either a repeat arthroscopy or

a total hip arthroplasty. If the injection did not help, he would consider low back epidural/facet injections.

19. Claimant testified the hip injection provided her relief for four days before the pain returned. Dr. Gustavel recommended a referral to a Dr. Poole for a total left hip arthroplasty.

20. For reasons not in the record, Claimant did not see Dr. Poole. Instead, she returned to Dr. May. Dr. May sought authorization from Surety for the arthroplasty.

21. Surety did not approve the surgery. Instead, it scheduled Claimant for an IME with Boise orthopedic surgeon Roman Schwartsman, M.D. The examination took place on December 3, 2019.

22. Dr. Schwartsman reviewed medical records and diagnostic films from the time of Claimant's work accident forward, took a detailed history from Claimant, and conducted a physical examination.

23. As a result of his detailed history taking, provocative testing results, and medical record/film review, Dr. Schwartsman believed Claimant suffered no hip injury in her industrial accident. He did believe she injured her low back. He felt the mechanism of her accident did not allow for a hip injury but could account for her low back findings. Claimant's testing pointed to low back injury as well. Dr. Schwartsman noted Claimant had a documented left-sided L5-S1 disc herniation with radiculopathy, which correlated with her pain complaints. He felt Claimant needed further evaluation and possible low back treatments on an industrial basis. He recommended she be evaluated by Paul Montalbano, M.D., a Boise spine surgeon, to determine causation and further treatment needs.

24. Findings on Claimant's hip were, in Dr. Schwartsman's opinion, preexisting degenerative, non-industrial, and bilateral. While he acknowledged Dr. Gustavel's lidocaine and

steroid injection relieved “some of her symptoms,” Dr. Schwartzman felt that finding was not definitive as showing a permanent symptomatic hip condition as one would expect that outcome in light of Claimant’s postoperative hip inflammation. JE G, p. 194.

25. Dr. Schwartzman specifically disagreed with the recommendation for hip replacement surgery, as he felt Claimant’s symptoms were not coming from her hip, and the bilateral degenerative changes seen on diagnostic films did not rise to the level of meriting such surgery.

26. No PPI rating was given that day because Dr. Schwartzman opined that Claimant was not at MMI and needed further low back evaluation by Dr. Montalbano. Claimant was capable of light duty work in the interim.

27. Surety denied the request for hip replacement surgery after reviewing Dr. Schwartzman’s opinion letter.

28. Rather than wait for evaluation by Dr. Montalbano, (which eventually was set for February 12, 2020, wherein he found that with regard to her low back, Claimant was medically stable without impairment and/or restrictions and she could return to work), Claimant pressed her desire to undergo hip replacement surgery with Dr. May. She testified her anxiousness to have the surgery was due in part to her belief that after the end of the year she would no longer have Medicaid available to her and her pain was unrelenting.

29. In his December 10, 2019 office notes, Dr. May justified his decision to proceed with a left total hip arthroplasty by noting the previous labral tear repair did nothing to lessen Claimant’s pain complaints and she did have a small area of degenerative changes on her femoral head. When he sent Claimant to Dr. Gustavel for a second opinion, the hip injection she received from him provided complete relief of her symptoms for several days before they returned.

Dr. May interpreted the fact that Dr. Gustavel referred Claimant for a surgical consultation of a total hip arthroplasty as evidence that Dr. Gustavel thought “she should have a hip replacement”. JE E, p. 144.

30. In his pre-operative examination, Dr May noted Claimant had “pain with any type of movement of the right hip.” *Id* at 146. He also noted the x-rays did not show any severe arthritic changes although MRI scans showed some mild signal changes in her femoral head. Dr. May consulted Claimant on the fact that the surgery might not afford her complete symptom relief. She might also have low back issues contributing to her pain profile even though her “back doctor [Dr. Christiansen] did not feel this was coming from her back.” Claimant wanted to proceed with surgery anyway to "see if that will take care of her problems." *Id* at 148.

31. Claimant underwent a left total hip arthroplasty on December 18, 2019.

32. At her initial post-surgical office visit, on January 28, 2020, Claimant saw David Hermansen, PA-C. Claimant noted some continuing pain but felt her condition was much better than before the surgery. PA Hermansen noted Claimant had been on chronic pain medication for over a year but was trying to taper down. He did not refill her pain prescription that day. The surgical incision site was still tender. Claimant was using a cane and there was some mild atrophy in her quadriceps muscles, with weak hip flexors. Claimant acknowledged her left leg was still weak and she needed to lift it in and out of cars. Upon examination, Claimant also had pain over the greater trochanter with internal and external rotation. Resisted abduction of her hip was also painful. She was diagnosed with trochanteric bursitis of her left hip. Physical therapy was initiated. She was given sedentary-level work restrictions.

33. By her six-month mark, Claimant was better, with no complaints of severe pain. She had sensations of “getting stuck” at times when she bent over, with some tenderness

in the front of her groin and hip area. Her range of motion was excellent. Her muscles were strong and intact. She had a “little bit” of pain with flexion against resistance with tenderness over her anterior psoas muscle. X-rays were unremarkable. Claimant declined additional physical therapy due to her improved condition. Dr. May released Claimant from his care. No mention was made of restrictions or impairment.

34. Claimant sought an impairment rating and permanent restriction recommendation from Richard Wathne, M.D. He conducted a record review and examination of Claimant on July 28, 2020. At that time Claimant walked without aids and described intermittent groin pain with some bending issues. She indicated that she could not sit for prolonged periods due to posterior pain. She was not doing any strengthening exercises.

35. On examination, Claimant had good range of motion, very mild groin discomfort with flexion and rotation with tenderness over her left greater trochanter. She had negative straight leg raise testing and some weakness to resistive hip flexion on her left. Claimant also had tenderness in the left greater sciatic notch which she claimed reproduced the pain she has with prolonged sitting.

36. Significant imaging findings included degenerative disc disease with facet arthrosis at the L5-S1 level, as shown on Claimant’s May 2019 lumbosacral MRI. X-rays of Claimant’s left hip and left hip arthrogram of June 2019 revealed mild degenerative changes and a partial thickness anterior superior labral tear. Postoperative x-rays of the total hip revealed overall good alignment and positioning of Claimant’s hip replacement components.

37. Dr. Wathne opined Claimant had exacerbated her underlying early osteoarthritis of her left hip joint in her industrial accident on a more probable than not basis. She enjoyed moderate success from the total hip replacement and her continuing symptoms were due to

weakness in her abductors and flexors. Dr. Wathne suggested Claimant work on strengthening her hip abductor and flexor muscles as well as doing low back stretching and strengthening exercises in conjunction with a core strengthening program. Dr. Wathne felt Claimant had reached maximum medical improvement.

38. Dr. Wathne assigned Claimant a 25% left lower extremity impairment rating, which he attributed 50% to preexisting condition and 50% to the work-related injury. This resulted in a 12% left lower extremity rating, or 7% whole person PPI rating attributable to Claimant's work injury. Dr. Wathne also assigned Claimant permanent restrictions of no running, no lifting greater than 40 pounds, with limited climbing and bending at the waist.

39. Dr. May agreed with Dr. Wathne's diagnosis and assessments of Claimant's impairment and restrictions, although he was a bit surprised Dr. Wathne apportioned her impairment, as he does not see apportionment that often.

Vocational Rehabilitation Assessment

40. Claimant hired Cali Eby, a disability management specialist from Boise, to provide a vocational assessment. As part of the report preparation, Ms. Eby reviewed medical records, interviewed Claimant via Zoom videoconferencing on September 23, 2020, and noted the permanent restrictions imposed by Dr. Wathne, which placed Claimant in the "limited medium" job category. (Medium category envisions lifting up to 50 pounds and Claimant was restricted to lifting 40 pounds.) Claimant's education, job history, and transferable skills were considered.

41. When interviewed, Claimant reported to Ms. Eby "difficulty and pain when bending over." Claimant's stated pain included occasional sharp pain in addition to a dull ache. Claimant also limited herself in lifting from floor level (any weight) and bending/stooping due to

“pain” in bending and raising back up. Claimant believed she could sit for up to an hour and stand in one place up to an hour as well. Claimant told Ms. Eby that she has trouble with laundry, cleaning the tub, sweeping, mopping, and sleeping all due to her hip pain.

42. At the time of her interview, Claimant and her husband were running an on-line selling site through eBay in which they were selling a variety of goods which they acquired at auctions, garage sales, etc. In 2019, they made close to \$30,000 in profit. Claimant set up the listings and photographed the items and her husband handled shipping and customer service. Claimant also had a real estate license but had sold only one property at the time of the interview. She did not want to pursue that as a career. Claimant had a significant history in retail sales including at JC Penny and various grocery and retail stores. She felt she could do this type of work if she could avoid heavy lifting.

43. With this background in mind, Ms. Eby consulted the *Dictionary of Occupational Titles* to assist in analyzing Claimant’s transferable skills in relation to her job restrictions and capabilities. Claimant’s restrictions placed her in a light to light-medium physical exertion level. Ms. Eby then looked at the O*NET database of occupational information put out by the Department of Labor to categorize Claimant’s skills from past employment. Using all this information, Ms. Eby then reviewed several labor market data sets to look at jobs Claimant could do before and after her permanent restrictions were imposed to conclude that pre-injury, Claimant had access to approximately 7,177 jobs in her labor market (Twin Falls) and 2,149 jobs after permanent restrictions were imposed by Dr. Wathne, which resulted in a 51.5% loss of labor market access.

44. Claimant was making \$9.00 per hour at the time of her accident. The jobs available to her at the time of hearing met or exceeded that figure. Ms. Eby noted Claimant had no loss of earning capacity from her accident.

45. Averaging Claimant's loss of labor market access and her loss of wage-earning capacity resulted in Claimant's permanent partial disability rating of 25.8% according to Ms. Eby. She made no attempt to look at newer data from 2021 to see how changes in the labor market in the Twin Falls area would impact her conclusions, although she speculated in her deposition that the more-recent data probably would not make a "significant" change in her numbers. Eby Depo. p. 15.

DISCUSSION AND FURTHER FINDINGS

46. The initial dispute centers on whether Claimant's left hip condition and hip replacement surgery are causally related to her work accident of March 28, 2019. Claimant argues an entitlement to her past medical care related to her total left hip arthroplasty surgery performed by Dr. May. Defendants deny causation.

Causation

47. Claimant has the burden of proving, by a preponderance of the evidence, all the facts essential to recovery. *Evans v. Hara's, Inc.*, 123 Idaho 473, 479, 849 P.2d 934, 940 (1993). She must prove not only that she injured her left hip in the work accident, but also that her subsequent surgeries to those areas resulted therefrom.² *See, e.g., Seamans v. Maaco Auto Painting*, 128 Idaho 747, 918 P.2d 1192 (1996). Claimant is required to establish a probable

² Even though Defendants' expert witness opined Claimant's left hip labrum tear was not caused by, or related to, her industrial accident, Defendants paid for treatment associated with that condition, including arthroscopic repair of the torn labrum. Defendants do not seek reimbursement for costs or time loss benefits associated with such treatment which they paid and its causal connection to the accident in question is not at issue.

connection between cause and effect to support her contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973).

48. Proof sufficient for medical causation requires medical testimony that supports a claimant's claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). To prove that a causal relationship is medically probable requires Claimant to demonstrate that there is more medical evidence for the proposition than against it. *Jensen v. City of Pocatello*, 135 Idaho 406, 18 P.3d 211 (2000). The Commission is not required to construe facts liberally in favor of the Claimant when the evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 834 P.2d 878 (1992).

49. Defendants acknowledge the information available at the time Claimant's labral tear was discovered supported the decision to repair that tear, and Defendants were reasonable in paying for such treatment, even though their expert witness, Dr. Schwartzman, subsequently denied the labral tear was in any way related to Claimant's industrial accident. In fact, Dr. Schwartzman opined that Claimant suffered no hip injury whatsoever in her workplace accident. Defendants rely on Dr. Schwartzman's opinions and testimony to anchor their denial of benefits associated with Claimant's hip replacement surgery.

50. In contrast to Dr. Schwartzman, records and/or testimony of Drs. May, Gustavel, and Wathne all support the idea that Claimant sustained an injury to her left hip in her industrial accident.

51. Resolution of the medical causation issue involves consideration of Claimant's medical history, treatment notes, and testimony of the two physicians, Drs. May and Schwartzman, who were deposed.

Records from Drs. Christensen, Gustavel, and Wathne

52. While Claimant was initially seen at Riverview Urgent care for what she described as low back pain and pain in her lower left side of her back with shooting pain into her leg (JE A), before long Claimant was referred to Dr. Christensen due to Claimant's continuing symptoms. It was he who first diagnosed a possible left labral tear, although his medical notes are silent on causation.

53. Dr. Gustavel's notes indicate Claimant had a left hip issue which warranted a surgical consultation for a total left hip arthroplasty. In an "absence from work" excuse letter, Dr. Gustavel stated "[Claimant's] absence is physician advised due to an injury." DE 3 p. 51. While not the strongest endorsement for causation, this letter does indicate Claimant's left hip condition was due to an injury, not a chronic disease or degenerative process.

54. Dr. Wathne's role was to provide an independent medical evaluation and impairment rating for Claimant. He connected Claimant's left hip and buttocks pain with her work accident, which he labeled as "an exacerbation of underlying early osteoarthritis of the left hip following the on-the-job injury of 3/28/2019...." JE F p. 189. He concluded Claimant's hip replacement surgery was 50% due to the accident and 50% due to preexisting conditions. *Id.* His opinions were grounded in his review of medical records and films, and his post-surgical examination of Claimant. He made no attempt to explain his opinions in greater detail.

Dr. May

55. Dr. May was Claimant's primary treating physician for her hip complaints, performed the hip replacement surgery, and provided Claimant's most direct opinion on causation during his deposition of September 9, 2021.

56. Regarding the mechanism of injury, Dr. May testified that if Claimant jammed her hip or forced it to go in a different direction than she was situated it could cause injury to her hip. He further noted it “seemed reasonable that if [Claimant] tripped and tried to catch herself and then started having pain that that could be a result of that injury.” May Depo. p. 8.

57. Dr. May discussed the arthritis he saw in Claimant’s hip ball and socket joint, which he described as mild, the “beginning of some mild wear.” *Id* at 10. Dr. May testified that even though the wear was mild, and could easily be asymptomatic, some people with that level of arthritis could be symptomatic.

58. Given Claimant’s continued severe pain complaints after the labrum repair surgery, Dr. May suspected Claimant had developed synovitis, or “irritation of the surgical site” (also defined as “inflammation of the hip lining” by Dr. Schwartzman at p. 26 of his deposition) from overly aggressive post-surgical physical therapy or other activity.

59. Dr. May testified that after labrum repair surgery he likes to give his patients up to a year for pain symptoms to resolve, and he was reluctant to perform a total hip replacement surgery on a person as young as Claimant. Claimant was not willing to wait, so Dr. May suggested a second opinion from Dr. Gustavel. Dr. May felt that it was possible that even with the small amount of wear he saw on Claimant’s femoral head, she may have no other option than a total hip replacement surgery “if nothing else work[ed].” (Dr. May noted Claimant had been treated with anti-inflammatories, injections, physical therapy, and rest. Furthermore, long-term narcotic use was not desirable.) He wanted to get a second opinion on his assessment. He sent Claimant to Dr. Gustavel for that second opinion.

60. Dr. May testified that Dr. Gustavel, after giving Claimant a diagnostic cortisone injection, “suggested that she would need a hip replacement, if her pain didn’t get better.”

May Depo. p. 14. (It is unclear how Dr. May knew of Dr. Gustavel's conclusion as it is not specifically contained in any record in this file.) Dr. May also felt the injection did delineate Claimant's pain as coming from her hip as opposed to her low back.

61. Claimant's hip replacement surgery was successful and she was doing quite well at the six-month mark post surgery. Even though Dr. May was reluctant to perform the surgery on Claimant due to her age, he testified he had no choice "because the patients dictate how much pain they're having and how much they can tolerate." *Id.* at 16.

62. Dr. May reiterated his agreement with Dr. Wathne's opinion that Claimant sustained an exacerbation of her underlying osteoarthritis of the left hip following the on-the-job injury of March 28, 2019. Dr. May based his opinion on the fact that Claimant had some mild wear in that joint prior to the work accident, but it had been asymptomatic until she tripped at work. As such, Dr. May felt like the accident caused Claimant's joint to start bothering her.

63. Dr. May also agreed with Dr. Wathne's impairment rating and permanent restrictions. He testified the restrictions imposed by Dr. Wathne were "standard restrictions that we would put on a hip replacement." May Depo. p. 18.

64. When asked if Claimant's issues stemmed from her hip or her low back, Dr. May testified that he treated Claimant solely for hip complaints and she did not really complain about her low back. All his testing and the cortisone injection results also pointed to Claimant's hip as a source of her pain. Nothing he saw indicated Claimant had a back injury during the time he was treating her.

65. Dr. May saw no indication that Claimant, but for the work accident in question, would have needed a hip replacement by December 2019, although he speculated that at some point in her future her hip might have started bothering her without a precipitating accident.

Nothing he saw on the MRI scans would lead him to believe Claimant needed a hip replacement purely from an anatomical standpoint. Dr. May also testified that in his opinion Claimant would not have improved without treatment.

66. In cross examination Dr. May testified that the torn labrum was a pain contributor prior to its repair but not thereafter. Claimant's basis for the arthroplasty was her continued pain complaints even after the labrum repair. The timing was due to Claimant's continuing pain despite conservative treatment as well as her inability to tolerate the non-surgical management of her complaints. Dr. May was unaware of any additional non-surgical options available to Claimant which were not tried prior to her hip replacement surgery. He was also unaware part of Claimant's push for surgery was due to her belief her Medicaid benefits were going to be expiring soon.

67. Dr. May did not recall giving Claimant any specific restrictions when he released her from his care six months post-surgery. He does give general admonitions to his hip replacement patients not to bend greater than 90 degrees, not to lift heavy objects, and not to run or jog. He also instructs them on specific ways to turn their bodies without torquing their hips. Dr. May noted that Dr. Wathne's restrictions were based on the surgery, not on Claimant's condition prior to surgery. As such, restrictions are not apportioned. Dr. May also reiterated his agreement with his prior note which indicated Claimant "had a preexisting condition which was aggravated by her work injury." May Depo. p. 30.

Dr. Schwartzman

68. In addition to preparing reports as discussed above, Dr. Schwartzman was deposed on November 12, 2021. In his testimony, Dr. Schwartzman expanded on his theory that Claimant could not have injured her hip in her industrial accident. He testified that during his "meticulous" interview of Claimant at the time of his IME, she described her movements during the tripping

event with sufficient clarity and detail that he could eliminate the labral tear as being caused by this event. Claimant described no twisting motion needed to tear the labrum. Dr. Schwartzman claimed he did not rely on any other medical records regarding Claimant's mechanics, because those would be secondhand information, and hearsay compared to his firsthand interview of Claimant. Dr. Schwartzman noted that if Claimant did not injure her hip in the accident, any and all treatment on or for her hip could not be causally related to her work accident.

69. Dr. Schwartzman also concluded Claimant's body mechanics in her accident supported the finding of an annular tear at L5-S1, which involved left-sided nerve root involvement.

70. Reviewing Dr. May's operative report, Dr. Schwartzman noted various typographical inaccuracies which he felt largely invalidated the record's relevance. For example, he noted the record spoke of Claimant's "humeral femoral" head instead of "femoral" head, and an observation of Claimant's "colon acetabulum" which makes no sense. Dr. Schwartzman was also critical of Dr. May's lack of detailed characterization of observations made during the surgery. At best, Dr. Schwartzman could surmise from the record that Dr. May observed an undefined labral tear, maybe acute, maybe chronic, and arthritic changes in her hip. Dr. Schwartzman opined the labral tear was likely chronic given the other operative findings.

71. MRI films from pre- and post-surgery dates show only mild to moderate arthritic changes in Claimant's left hip. Even then, without a four-part scale delineating the percentage of cartilage lost, the MRI findings are subjective. But, even with the subjective "mild to moderate" designation, Dr. Schwartzman opined those findings would not support a total hip arthroplasty. Instead, the September 2019 MRI suggests Claimant's complaints were not the result of any hip anatomy. Importantly, the MRI was read as showing the weight-bearing surface

cartilage thinning in Claimant's left hip was "stable," meaning not progressed from the prior (June 11, 2019) film. Likewise, Claimant's arthritis had not progressed from June until September.

72. With these findings, Dr. Schwartzman opined that the correct course of treatment for Claimant would have been to first accurately diagnose the cause of Claimant's pain and then proceed from there. Arthroplasty was not indicated based on the radiologic information provided by the MRIs. Dr. Schwartzman would not perform a total hip replacement without "full thickness cartilage loss involving a significant portion of the weight-bearing surfaces of the hip." Schwartzman Depo. p. 17.

73. Dr. Schwartzman testified that hip replacement surgery is designed to do one thing; "alleviate the pain from loss of smooth articular surfaces." *Id* at 18.

74. Dr. Schwartzman testified that he could not say what the hip replacement surgery "fixed." He noted Claimant "had sufficient cartilage on this MRI, that a hip replacement is not going to address any of the issues that [sic – and] a hip replacement is designed to address." Schwartzman Depo. p. 21.

75. Dr. Schwartzman agreed with Dr. Montalbano's findings and disagreed with the conclusions of Drs. Wathne and May on the subject of causation and recommended treatment.

76. On cross examination, Dr. Schwartzman acknowledged that theoretically a person with the level of osteoarthritis seen on Claimant's MRIs could be symptomatic but felt it would be highly unlikely.

77. Dr. Schwartzman testified that trauma can exacerbate the presentation of early arthritis by causing "something else." For example, he noted trauma can cause synovitis which would present as a painful hip. He did not recall seeing evidence of synovitis in the radiologist reports. Likewise, progression of the arthritis can result in pain symptoms as the cartilage loss

increases, but that was not evident in the serial MRI films. All changes seen in the MRIs and Dr. May's surgical records were chronic in nature.

78. Dr. Schwartzman doubted the hip replacement surgery improved Claimant's condition dramatically. Instead, he noted Claimant had reason (secondary gain) to present as substantially cured by the surgery, because, as Dr. Schwartzman put it, "if she went through a procedure and in the end was no better off than before, she would look somewhat silly and awkward for having gone through a procedure that didn't make her better." Claimant would be inclined to "want to feel better," which could color her testimony. On top of that, there was a financial motivation to improve after this "fairly expensive" surgery. *Id.* at 28.

79. Dr. Schwartzman testified he reads the "cover letters" from the surety requesting answers to specific questions as part of his IME assignment *after* conducting the examination. Any information, including that which may be inflammatory or scandalous, contained therein does not influence his examination or opinions, nor does he rely on any information contained in the letters when forming his opinions. He is not interested in the adjustor's opinions or observations.

80. When asked if there could be any credence to the thought that the surgery to repair Claimant's labral tear could actually have caused further problems with her left hip, Dr. Schwartzman responded, "[y]es, but I could not make those statements to a reasonable degree of certainty and the highest degree of probability. Those statements would have to imply iatrogenic injury from the surgery itself..." Dr. Schwartzman acknowledged such a thing was possible but would call for speculation on his part. He further stated, "I would not be able to definitively testify to that." *Id.* at 34. Pressed further on this issue on re-direct examination, Dr. Schwartzman testified that there was no "objective" medical evidence that "clearly" supported the idea that the labral repair in any way caused or contributed to the need for Claimant's hip replacement. *Id.* at 36.

81. Dr. Schwartzman acknowledged that Dr. Gustavel also recommended hip replacement surgery, but that information did not alter his opinion, “because my opinion is based on objective evidence in this case, not anybody else’s subjective interpretation.” He elaborated by noting his opinion that “the objective evidence in this case does not merit a hip replacement. And the objective evidence in this case is the MRI finding.” *Id* at 37.

Causation Analysis

82. Claimant must establish a causal connection between the accident and her resulting hip condition.

83. Defendants argue Dr. May’s testimony is insufficient. They point to the record where Dr. May, when discussing the mechanism of injury, testified, “it seemed reasonable that if she had tripped and tried to catch herself and then started having pain that that could be a result of that injury.” In Defendants’ opinion, Dr. May’s statement is “hardly sufficient to establish a probable, not merely possible, connection ... to support compensability....” Def’s Reply Brief, p. 20. However, this argument ignores Dr. May’s testimony wherein he stated that he agreed that on a more likely than not basis Claimant sustained an exacerbation of her underlying early osteoarthritis in her left hip following her work accident and based his opinion on the fact Claimant had a preexisting condition (early osteoarthritis) by x-ray but was asymptomatic prior to the accident. Immediately after her work accident Claimant became consistently symptomatic. As he put it, “I have to suspect and feel like the injury caused the joint to start bothering her.” May Depo. p. 18. He also testified that all indications in the medical records support that fact that Claimant injured her hip, not her low back, in the accident in question.

84. Dr. Schwartzman opined that Claimant did not injure her hip in the work accident. His rationale was that Claimant’s body mechanics during the accident, as relayed by her

months after the accident and in response to Dr. Schwartzman's detailed history taking, would not allow for a hip injury.

85. The problem with Dr. Schwartzman's theory – lack of mechanism for hip injury – is that it relies on Claimant remembering and being able to describe exactly how she responded to a sudden, unexpected tripping accident at work wherein she stumbled forward and caught herself on a metal table. Without a video capture of the event, it is unlikely that Claimant or anyone could recall exactly what each limb was doing during this split-second reaction to tripping and lurching forward. Whether Claimant did or did not twist or rotate her trunk as she stumbled, or if so, to what degree, would be very difficult to recall exactly. Even if she had a particular memory of what she believed happened, the chance that Claimant's recollection months after the fact was completely accurate is doubtful. While Dr. Schwartzman presented no evidence that he is a biomechanical engineer, or a biomechanical expert of some other sort, even if he was so qualified, his opinion could be no better than Claimant's ability to accurately and exactly recall her precise body mechanics during this accident.

86. Dr. Schwartzman could not say whether the labrum tear was or was not acute even though he suspected it was chronic due to the presence of arthritic changes in Claimant's bilateral hips.

87. The preponderance of the medical testimony establishes that fact that Claimant had asymptomatic preexisting osteoarthritis in her left hip at the time of her work accident. No physician has indicated otherwise. The weight of the evidence, when taken as a whole, supports the finding that Claimant's work accident exacerbated, or "lit up" her previously asymptomatic arthritic condition, as testified to by Dr. May and stated by Dr. Wathne.

88. Dr. Schwartzman's opinion that while Claimant may have injured her low back but not her hip in the work accident finds no support elsewhere in the record. Dr. Montalbano found no evidence of low back injury. As stated in his letter of February 26, 2020, he determined after reviewing an MRI of Claimant's low back that her symptomology was not one of "lumbar spondylosis and our imaging studies and of [sic – are] normal." JE H p. 200. The hip injection provided Claimant complete relief for a period of days, which is evidence of hip involvement. Dr. Schwartzman's explanation that Claimant's relief was due to the fact that lidocaine was administered into the area where she recently had surgery and was experiencing postoperative inflammation fails to explain why, if Claimant's original pain complaints were not from her hip, she experienced complete pain relief, instead of a reduction of pain. After all, pain from Claimant's low back would not be ameliorated with a steroid injection into her hip.

89. Aggravation, exacerbation, or acceleration of a pre-existing condition caused by a compensable accident is compensable in Idaho Worker's Compensation Law. *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994). As noted in *Thom v. GTE Northwest*, IIC 92-810818 (April 20, 1999) (citing to *Bowman v Twin Falls Construction Company, Inc.*, 99 Idaho 312, 316, 581 P.2d 770, 774 (1978)), "[i]t has long been the law in the state of Idaho that a pre-existing disease or infirmity of an employee is compensable under the arising out of employment requirement of an industrial accident and injury if the employment aggravated, accelerated, or lit up a pre-existing condition."

90. Based upon the totality of the evidence, Claimant has proven by a preponderance of the evidence her left hip condition was causally related her work accident of March 28, 2019.

Medical Benefits

91. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. However, an employer is only obligated to provide medical treatment necessitated by an industrial accident and is not responsible for unrelated medical treatment. *Williamson v. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d 1365 (1997). “An employer cannot be held liable for medical expenses unrelated to any on-the-job accident or occupational disease.” *Sweeney v. Great West Transp.*, 110 Idaho 67, 71, 714 P.2d 36, 40 (1986).

92. Defendants argue there was no reason for the hip replacement surgery. Claimant and her husband pressured Dr. May into performing an unreasonable surgery rather than simply waiting for her pain to subside from her first hip surgery. Although Defendants point to no expert testimony regarding what conservative treatments were left untested, they claim Dr. May agreed to expedite the surgery without exhausting alternative, less aggressive treatment options. Claimant had no criteria Dr. Schwartzman utilizes for such a surgery; no bone-on-bone arthritis, no significant progression of the mild arthritis seen on either the MRI or at the time of her first surgery, no avascular necrosis, and no complete loss of cartilage. In fact, Dr. Schwartzman testified he could not explain what the surgery was designed to “fix.” Claimant’s hip replacement surgery was only “moderately” successful and resulted in months of postoperative pain, as well as the need for future care. Claimant has not proven the surgery was reasonable or necessary.

93. While Dr. Schwartzman testified as to the criteria he uses when deciding to perform total hip replacement surgery, both he and Dr. May agree that the purpose of that surgery is to alleviate pain. Dr. Schwartzman apparently believes the pain level needed to justify hip replacement manifests only in the presence of the criteria set out above – significant cartilage loss, avascular necrosis, or advanced arthritis. Dr. May likewise saw nothing objective on MRI which justified surgery. However, as Dr. May noted, and Dr. Schwartzman implied, hip replacement surgery is pain driven. Dr. May felt Claimant’s subjective pain complaints after conservative treatment was exhausted justified the surgery.

94. Dr. May testified to the effect that Claimant’s preexisting, asymptomatic early osteoarthritis was exacerbated by the violence of her work accident on her left hip. While her hip condition looked rather benign on film, her subjective pain was unrelenting, even after her torn labrum was repaired. Testing supported the idea Claimant’s left hip was the source of her pain and two physicians recommended hip replacement surgery when all other non-surgical treatment options were exhausted. While Dr. May was reluctant to perform the surgery, he recognized his lack of other solutions. Claimant was aggressive in pushing for this surgery, in large part because the pain was more than she could tolerate. Her pain drove Dr. May’s decision to perform hip replacement surgery. Once the surgery was performed Claimant began a recovery process which ultimately led to her nearly complete recovery with little to no pain by the time of hearing, and only slight loss of function when bending or entering/exiting vehicles.

95. Dr. May testified it was possible for Claimant to be symptomatic with the mild to moderate arthritic changes found on MRI and during her first surgery. Dr. Schwartzman agreed that in very rare cases one could have pain complaints with an MRI presentation similar to Claimant’s. There is nothing in the record to successfully rebut Claimant’s pain complaints

as being related to the aggravation of her previously asymptomatic arthritic left hip. The fact that most people with similar levels of arthritic hip changes would be asymptomatic is neither here nor there.

96. Claimant also had mild arthritic changes in her right hip which caused her no discomfort. One must then question why her left hip was exquisitely symptomatic after her work accident when her right hip remained asymptomatic up to the time of hearing if not due to the exacerbation of her left hip arthritis caused by the work accident, as set out in Dr. May's testimony.

97. Defendants' argument that Claimant would have had her symptoms dissipate had she just waited for the surgically caused inflammation to resolve is purely speculative.

98. When the entire record is considered, the opinions of Dr. May, as supported by Drs. Gustavel and Wathne, carry more weight than the testimony of Dr. Schwartzman on the issue of whether Claimant's hip replacement surgery was reasonable, necessary, and causally related in whole or in part by her industrial accident of March 28, 2019.

99. Claimant is entitled to benefits for her medical care associated with treatment for her left hip from the time Defendants denied her further medical treatment until the time of hearing.

100. Defendants argue if the treatment in question is deemed compensable, the *Neel* Doctrine (*Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 852 (2009))³ should not apply, because "the premise upon which *Neel* has been adopted simply does not apply here, as the surgery and subsequent medical care were fully covered by Medicaid,

³ The *Neel* Doctrine stands for the proposition that if claims for medical expenses are denied and later deemed compensable by the Commission, defendants are required to pay those medical expenses at the full invoice amount. See *Millard v. ABCO Construction, Inc.*, 161 Idaho 194, 384 P.3d 958 (2016).

and Medicaid specifically prohibits balance billing.” The Commission notes that the *Neel* Court was aware of this practice:

The workers' compensation system is comparable to the system used by private insurers in which they enter into agreements with health care providers for contractual adjustments of the provider's bills. The provider then agrees that it will not seek to recover the contractually adjusted amount from the insured.

Neel v. Western Const., Inc., 147 Idaho 146, 206 P.3d 852 (Idaho 2009).

However, the Court did not feel it necessary to create a different rule where providers who accept private insurance also agree to forgo balance billing of the patient.

101. Rather than spend time analyzing in depth the history of *Neel*, its purpose and pitfalls, it is sufficient to note that *Neel* is a creature of Idaho’s Supreme Court and if any carving is to be done on the doctrine, it is up to the Supreme Court, not the Commission, to do the carving. By raising the issue herein, Defendants have preserved the issue for appeal.

102. Based upon the totality of the evidence, Claimant has proven by a preponderance of the evidence that she is entitled to medical care benefits associated with treatment of her left hip, including surgery and subsequent care, at the *Neel* rate.

Temporary Disability Benefits

103. Idaho Code § 72-102 (10) defines “disability,” for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees “during the period of recovery.” The burden is on Claimant to present

medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 605 P.2d 939 (1980).

104. Defendants stopped paying temporary disability benefits to Claimant on February 13, 2020. On June 11, 2020, Dr. May released Claimant from further medical care. During these four months Claimant was under a sedentary work restriction, and Employer offered Claimant no suitable work. These points are not in dispute.

105. Defendants argue they are entitled to a credit for income Claimant received during this time frame from an internet sales business (eBay) she and her husband owned and operated since before Claimant's accident. They make no legal argument and cite to no legal authority as to why they are entitled to a credit for whatever net profit Claimant and her husband brought in on their side business between February 13 and June 11, 2020, if any.

106. Defendants did not establish that the business made any net profit during this timeframe. At best they speculate that since the business made a profit in the 2020 tax year, some of that profit must have come in the months in question.

107. Claimant did not begin the internet sales business in response to not getting work from Employer, nor was this her attempt to seek out and find alternative work once she no longer had work with Employer. In other words, Claimant did not work at her eBay business in lieu of working for Defendants. Claimant's income from working for Employer was lost while she was in a period of recovery from her surgery, and any money she and her husband made on their side business which existed before the work accident does not inure to Defendants' credit. Defendants have failed to make a requisite showing they are entitled to a credit if Claimant's family business made any net profit while she was in a period of recovery.

108. Based upon the totality of the evidence, Claimant has proven by a preponderance of the evidence that she is entitled to total temporary disability benefits from February 13 to June 11, 2020.

Permanent Partial Impairment

109. Permanent impairment is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and a claimant's position is considered medically stable. See Idaho Code § 72-422; *Henderson v. McCain Foods*, 142 Idaho 559, 567, 130 P.3d 1097, 1105 (2006). Idaho Code § 72-424 provides that the evaluation 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 other activities. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989).

110. Dr. Wathne assigned Claimant a 25% lower extremity PPI rating, with 50% attributable to her preexisting conditions. Dr. May agreed with the rating. No other physicians have opined on Claimant's PPI rating, which, when converted to a whole person rating and taking into account the 50% apportionment equates to a 7% whole person PPI rating.

111. Defendants made no argument against this rating. The undersigned sees no reason to question the rating which appears from the entirety of the record to be reasonable and appropriate.

112. Based upon the totality of the evidence, Claimant has proven by a preponderance of the evidence her entitlement to benefits for disability based on medical factors, commonly known as permanent partial impairment (PPI) at the rate of 7% whole person.

Permanent Partial Disability

113. 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 impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. 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 the 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. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment 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).

114. Defendants produced no expert testimony on the subject of Claimant's claim for permanent partial disability in excess of her impairment rating. They did cross examine Claimant's expert, Ms. Eby. Therein, they questioned the timing of her analysis and the fact

she did not update her analysis in light of the fundamental labor shift since 2020 when Ms. Eby wrote her report using “backward looking” data such as the *Occupational Employment Quarterly* from the 2019 Twin Falls labor market, as well as other 2019 surveys. Labor shortages have been widespread since the pandemic altered “business as normal” and there is a far greater market for workers in many fields, including, if not especially, in the service and retail trades. Ms. Eby’s speculation that updating her analysis to late summer 2021 would not change her conclusions is not convincing.

115. The second troubling aspect of Ms. Eby’s report comes from Claimant’s listing of her subjective complaints to Ms. Eby, which were far greater than Claimant’s symptoms mentioned at hearing. At hearing, Claimant discussed her hip “sticking” like the “tin man” but did not testify to ongoing pain and limitations such as those found in Ms. Eby’s report, which took into account Claimant’s then-current symptoms nearly a year before the hearing. Claimant’s conveyed limitations when discussing her status at the time of her interview with Ms. Eby may have been accurate for that time frame, but by the time of hearing in August 2021, many of those symptoms had apparently resolved. For example, Claimant told Ms. Eby she was limited to walking no more than six blocks, had trouble with pain (not just locking) with rising from a bending position, and had pain lifting even very light weights from floor level due to pain in rising. Claimant also believed she could not sit or stand for more than one hour at a time. These limitations were not raised at hearing. Instead, Claimant testified she felt wonderful, more than 90% improved. Regarding her pain level, she claimed to be “a hundred percent” improved, and her “pain is no longer there.” Tr. p. 36. She discussed the issues with bending as described herein.

116. Claimant convincingly testified she could not return to her time-of-injury employment due to excessive bending/lifting. Her 40 pound lifting restriction will limit her ability

to work certain jobs. But her real estate license, her skills learned in operating a profitable eBay business with her husband, her retail skills, and a healthy economy in the Magic Valley all open employment doors for Claimant should she choose to return to the work force. As Ms. Eby noted, Claimant's \$9.00 per hour wage is largely a thing of the past, and Claimant has a very real probability to earn significantly higher hourly wages now than she was earning at the time of her injury.

117. While the injury and subsequent surgical hip replacement did affect Claimant's capacity for gainful employment, based upon all the evidence, including Claimant's testimony at hearing detailing the extent of her recovery, Claimant's transferable skills, and her relatively young age, Ms. Eby's analysis overstated Claimant's permanent disability. While her advisory opinion is helpful, Claimant's permanent disability by the time of hearing, taking into account her permanent restrictions which will impact the number of jobs available to her, Claimant has proven her entitlement to permanent partial disability benefits in the amount of 15%, inclusive of her 7% whole person impairment rating.

118. Based upon the totality of the evidence, Claimant has proven by a preponderance of the evidence a permanent partial disability of 15%, inclusive of her 7% whole person permanent impairment from her industrial accident of March 28, 2019.

Attorney Fees

119. The final issue is Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804. Attorney fees are not granted as a matter of right; they may be recovered only under the circumstances set forth in Idaho Code § 72-804 which provides:

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.

The decision that grounds exist for awarding attorney fees is a factual determination which rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

120. Claimant argues it was unreasonable for Defendants to continue to rely on Dr. Schwartzman's opinion up through the hearing. They argue the doctor's opinion that Claimant did not injure her hip in her work accident has been proven wrong by her recovery. Defendants' blind reliance on a flawed expert opinion resulted in Claimant being denied benefits when they were due, and certainly after it became obvious that Dr. Schwartzman was wrong.

121. Secondly, Claimant argues Defendants should be assessed attorney fees because of a pattern of unreasonable behavior during the pendency of this claim which "may" have resulted in benefit delays. To begin with, Employer dictated that Claimant must undergo an MRI before sending her to a specialist. Employer also supplied false information to Surety regarding Claimant's light duty work hours and earnings. Finally, the adjuster included "falsehoods, misstatements, and half-truths" in her letter to Dr. Schwartzman in "a blatant attempt to influence an independent expert's opinion."

122. Often when a claim is denied, a surety does so, at least in part, based on reliance on their expert's opinion. Sometimes that reliance is deemed to be misplaced after hearing and the surety becomes obligated to pay benefits, often medical care at the *Neel* rate, based on that misplaced reliance. The question becomes whether the reliance was unreasonable, not in hindsight, but at the time the surety relied or maintained reliance on it. In the present case,

Dr. Schwartzman's opinion was not so far beyond the pale that Defendants should be assessed attorney fees for not capitulating to pay for a hip replacement once Claimant finally recovered without further complaints. Dr. Schwartzman was able to defend his position quite well, even at his post-hearing deposition. His arguments, while not sufficient to carry the day, were nevertheless reasonable and thought provoking. Relying on his opinion even through hearing was not unreasonable.

123. Claimant has failed to prove her other basis for attorney fees. By her own admission, the actions of Employer and Surety "may" (or may not) have resulted in some delay, but do not rise to a level required for Idaho Code § 72-804 fees. Likewise, comments of an inflammatory nature in a referral letter to a physician are never strategically a good idea, and can impact the weight given to an expert's opinion, but in this case Dr. Schwartzman convincingly testified he in no way relied on any information contained in Surety's referral letter in coming to his opinions. The referral letter, even if unwise, does not fall within the four corners of Idaho Code § 72-804 and is not a basis for an award of attorney fees in this case.

124. Based upon the totality of the evidence, Claimant has failed to prove by a preponderance of the evidence her entitlement to attorney fees under Idaho Code § 72-804.

CONCLUSIONS OF LAW

1. Claimant has proven by a preponderance of the evidence her left hip condition was causally related her work accident of March 28, 2019.

2. Claimant has proven by a preponderance of the evidence that she is entitled to medical care benefits associated with treatment of her left hip, including surgery and subsequent care, at the *Neel* rate.

3. Claimant has proven by a preponderance of the evidence that she is entitled to

total temporary disability benefits from February 13 to June 11, 2020.

4. Claimant has proven by a preponderance of the evidence her entitlement to benefits for disability based on medical factors, commonly known as permanent partial impairment (PPI) at the rate of 7% whole person.

5. Claimant has proven by a preponderance of the evidence a permanent partial disability of 15%, inclusive of her 7% whole person permanent impairment from her industrial accident of March 28, 2019.


6. Claimant has failed to prove by a preponderance of the evidence her entitlement to attorney fees under 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 16th day of May, 2022.

INDUSTRIAL COMMISSION



Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June, 2022, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION** were served by email transmission and by regular United States Mail upon each of the following:

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