BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RANDY LARKIN, Claimant, v. FLUOR IDAHO, LLC, Employer, and NEW HAMPSHIRE INSURANCE CO., Surety, Defendants.	**IC 2017-054413** **ORDER** FILED AUG 24 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. Based upon the totality of the evidence, Claimant has proven by a preponderance of the evidence that he gave proper notice of his accident under Idaho Code §§ 72-701 through 704.

2. Based upon the totality of the evidence, Claimant has proven by a preponderance of the evidence that his low back condition exclusively at L4-5, for which Claimant seeks medical benefits was caused by the industrial accident in question.

3. Based upon the totality of the evidence, Claimant has proven a right to reimbursement of past medical charges associated with his compensable injuries, and diagnostic work up with Dr. Judy, as set forth in JE 29, and reasonable future medical benefits associated with his L4-5 disc herniation treatment.

4. Based upon the totality of the evidence, Claimant has proven his entitlement to temporary disability benefits while in a period of recovery and not yet medically stable, subject to limitations set out in Idaho Code §§ 72- 403, 408 and 409, in an amount to be determined by the parties.

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

DATED this the 24th day of August, 2022.

INDUSTRIAL COMMISSION

Aaron White, Chairman

Thomas E. Limbaugh, Commissioner

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

Thomas P. Baskin, Commissioner

ATTEST: INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 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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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RANDY LARKIN, Claimant, v. FLUOR IDAHO, LLC, Employer, and NEW HAMPSHIRE INSURANCE CO., Surety, Defendants.	**IC 2017-054413** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED AUG 24 2022 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 hearing on bifurcated issues in Pocatello, Idaho on July 16, 2021. James Ruchti represented Claimant. David Gardner represented Defendants. The parties produced oral and documentary evidence at the hearing, and submitted briefs. Two post-hearing depositions were taken. The matter came under advisement on June 23, 2022.

ISSUES

The issues for hearing were limited to:

1. Whether Claimant complied with the notice requirements set forth in Idaho Code §§ 72-701 through 704, and whether such requirements are tolled pursuant to Idaho Code § 72-604;

2. Whether Claimant suffered an injury from an accident arising out of and in the course of his employment;

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

4. Whether and to what extent Claimant is entitled to medical care and temporary disability benefits.

The issues of permanent impairment, permanent disability and attorney fees are reserved.

CONTENTIONS OF THE PARTIES

Claimant asserts he injured his low back on November 29, 2017, in an accident at INL while working for Employer. Employer knew of the accident and injury that day, and at the very latest, Claimant gave notice of the accident to his supervisor on December 4, 2017. By December 20, 2017, Surety was aware of the claim. On December 21, Claimant gave a recorded statement to Surety. Surety wrongfully denied the claim, (except for limited medical treatment for a brief time), leading to the instant proceedings. Claimant is entitled to medical treatment moving forward and reimbursement at the *Neel* rate for past medical treatment costs he has incurred. He is also entitled to temporary disability benefits for the time he was and is unable to work. Other elements of his claim are reserved for future hearing.

Defendants deny all elements of Claimant's claim. They deny he suffered a low back injury in the course and scope of his employment on November 29, 2017. Instead, Claimant's low back has been an ongoing source of pain and medical treatment for years. He was even treated for low back pain the day before the alleged accident in question. His current low back condition is not causally connected to the alleged work accident but is a natural progression of a preexisting condition. In any event, Claimant did not provide proper notice of any potential accident as required by Idaho Code § 72-701. Claimant is not entitled to any benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at hearing;

2. Joint exhibits (JE) 1 through 33 admitted at hearing; and

3. The post-hearing deposition transcripts of Tom Faciszewski, M.D., and Stephen Hansen, M.D., taken on December 30, 2021, and February 15, 2022, respectively.

The objections made during the depositions are overruled. Claimant's motion to strike portions of Dr. Faciszewski's deposition are denied, as his review of additional documents after the time of hearing but before his deposition did not lead to any additional, altered, or previously undisclosed opinions. He simply acknowledged that the additional documents he first saw shortly before his deposition, to his mind, bolstered his previously disclosed opinions.

FINDINGS OF FACT

While many of the facts in this case are contested, the following are not subject to further analysis or scrutiny. Contested facts are analyzed and discussed in the DISCUSSION AND FURTHER FINDINGS section of this document.

1. At the time of hearing Claimant was a 57 year old journeyman iron worker. His last employment date was November 30, 2017, at which time he was laid off as part of a "reduction in force" while working as a contract employee for Employer at Idaho National Laboratory (INL).

2. On November 29, 2017, Claimant was handling steel beams with co-employee Randy Rupe (Randy), also known as "Stretch" due to his large height. Also present was Patrick Stuard, another ironworker. Each beam weighed about 200 pounds. Specifically, the beams were placed on sawhorses where the employees would work on them. The beams were then carried to a nearby pallet for stacking. The procedure entailed Claimant lifting and carrying one end of the beam while Randy lifted and carried the other.

3. While lifting one of the beams from the sawhorse, Claimant felt pain in his lower back which impacted his activities for the remainder of the workday. Claimant did not on that date, or the next, his final day at INL, make any formal report of injury, although he had the opportunity to do so.

4. On December 4, 2017, Claimant sent a text to his immediate supervisor, Whipple "Whip" Edmo (Whip), which stated in part, "Wip [sic] gave it 4 days and back not getting better, going to have to go to doctor. Who do I talk to. [sic] I'm getting a ride into town. So stoved up can't drive...." JE 14, p. 124. Whip responded, "What are you talking about[?]," to which Claimant replied, "When I tweeky my back wed [sic] with them beams that is why the doe [sic - DOE] guy came and I told him I was fine but I'm not." *Id* pp. 125, 126. Claimant was not provided any information that day on who to contact or where to seek medical care.

5. On December 20, 2017, Claimant again sent a text to Whip, which included the following, "Wip [sic] my back is f***ed up [,] I need to go to the f***ing doctor. Ask Pat and stretch [sic] and the doe [sic] guy it will be on camera[;] now who do I talk to [about] what needs to be done[?] ...." *Id* p. 127. Whip gave Claimant the phone number for the project manager, Kory Edelmayer, and the following day provided Claimant with numbers for Surety's representative and another individual.

6. On December 21, 2017, Claimant gave a recorded statement to Surety representative Janica Pap regarding the incident at INL.

7. Surety denied the claim and refused to pay for much of Claimant's medical treatment, although it did briefly authorize medical care with Idaho Sports Medicine and Spine, where he was seen by S. Luke Nelson, P.A., and Stephen Hansen, M.D.

8. Claimant was examined by Tom Faciszewski, M.D., at Surety's request on December 17, 2019. Thereafter, Surety discontinued benefits to Claimant.

9. Claimant has a long history of medical issues, including an L4-5 discectomy from a work accident in 1986, an automobile accident in 1999 which injured his back, neck, shoulder and right knee, another work injury in 1999 in which he injured his hip and ankle, a 2002 work injury involving his back, wrist, shoulder and hip, and another auto accident in 2009, wherein he injured his low back, knee, neck, and wrist. Claimant received treatment for his low back pain in 2011, was seen for aggravation of his chronic back pain from doing yard work in 2014, and was seen by Michael Miller, D.C., at Aspen Ridge Chiropractic the day before the incident in question for an initial treatment of his entire spinal column, shoulders, pelvis, and lower extremities.

DISCUSSION AND FURTHER FINDINGS

ACCIDENT UNDER IDAHO CODE § 72-102(18)

10. Idaho Code § 72-102(18)(b) defines accident as "an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury." "An 'accident' occurs in doing what the workman habitually does if any unexpected, undesigned, unlooked-for or untoward event or mishap, connected with or growing out of the employment, takes place." *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 105, 666 P.2d 629, 632 (1983), quoting *Hammond v. Kootenai County,* 91 Idaho 208, 209, 419 P.2d 209, 210 (1966). However, it is axiomatic that to obtain workers compensation benefits, Claimant bears the burden of showing an "accident" caused an "injury" as well as an "injury" caused by an "accident." *See* Idaho Code § 72-102(17). The terms, though definitionally interrelated, are not synonymous. Proof of the occurrence of an accident is not sufficient to prove the occurrence of an injury. *Clark v. Shari's Management Corp.*, 155 Idaho 576, 314 P.3d 631 (2013). Idaho Code § 72-102(17)(c) defines "injury" as follows:

> (c) "Injury" and "personal injury" shall be construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. The terms shall in no case be construed to include an occupational disease and only such nonoccupational diseases as result directly from an injury.

To prove an injury, Claimant must do more than prove the onset of pain. Manifestation of symptoms is not sufficient to prove injury, i.e. violence to the physical structure of the body. *Konvalinka v. Bonneville County*, 140 Idaho 477, 95 P.3d 628 (2004). To prove an injury, Claimant must adduce competent medical evidence establishing that it is more probable than not that the subject accident caused damage to the physical structure of his body.

11. Defendants contest the claim that Claimant had an unexpected untoward event or mishap connected to his work at INL on November 29, 2017. They claim that Claimant's inconsistent rendition of facts, coupled with discrepancies from witnesses, results in a situation where Claimant has failed to prove by a preponderance of the evidence that *any* mishap took place as alleged. Instead, it is more likely that Claimant had a symptomatic back prior to November 29, and when he was laid off he was motivated to claim his ongoing back pain was really the result of a sudden harmful event which occurred on his last day of work (and less than 24 hours after he was seen at the chiropractor's office for a chronically painful back which was getting worse with time).[1]

12. To support their argument, Defendants point to Claimant's long history of low back and hip complaints, the progressive nature of his low back ailments, his course of medical treatment, including his notes at the chiropractor the day before the alleged incident, and the fact that Claimant did not report any injury until after he was laid off and left the job site without picking up his tools, signing his Field Termination Slip, or noting any injury from the day prior

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[1] Claimant also testified at hearing his union health insurance ceased when he was laid off, so he had no insurance to cover ongoing medical treatment for his back without worker's compensation benefits.

to a supervisor. Defendants also assert that Claimant has changed his story related to the accident on several occasions, which damages his credibility and subjects his rendition of facts told at hearing to increased scrutiny. Witness testimony is also at odds with Claimant's version of the facts. Finally, Dr. Faciszewski's opinion that Claimant did not suffer an accident as defined above on the day in question should carry significant weight.

13. Regarding Claimant's credibility, Defendants cite numerous examples where Claimant has made either inconsistent or clearly inaccurate statements concerning his health, injuries, and symptoms, including;

- Notes from Claimant's initial medical treatment records indicate Claimant had no previous back injury to "this area," when in fact Claimant had numerous low back injuries, and even surgery, to his low back. Also, pain was noted as "gradually worsening" and not sudden in onset, contrary to Claimant's testimony.

- In a recorded statement with Surety, Claimant denied any previous low back care in the year preceding the accident, when in fact he had sought chiropractic treatment the day before the accident.

- Claimant's testimony that his pain felt at work was due to lifting the beam and was sudden in onset, but Aspen Ridge notes indicate Claimant had been experiencing low back pain for years and it had become substantially worse in the days preceding his trip to the chiropractor.

- Claimant denied pain in his extremities, tingling, or leg weakness during his initial treatments but complained of such symptoms at his February 1, 2018 visit with Ortho Idaho.

- At his IME Claimant told Dr. Faciszewski that he had experienced right hip pain and started limping on the date of the accident, but Claimant had consistently complained of left sided pain resulting from the accident and testified during the hearing that he had limped for years. Then on April 20, 2020, Claimant complained of a history of right inguinal pain from the accident but mentioned nothing about left sided pain even though he testified the right sided pain was preexisting and he injured his left side in the accident.

- Claimant has always been inconsistent in his medical reports, even going back to 2009 when he told his physician he had no previous major medical problems despite having previously undergone a discectomy surgery, been involved in a major car accident which injured his spine, and had fallen off a roof, injuring his back and hip.

14. While it is an interesting (implied) hypothesis that Claimant, upset with his termination, concocted a story after the fact wherein he injured his back on his last full day of work in order to obtain medical coverage for a longstanding back problem which needed treatment at a time when Claimant had no medical insurance, the weight of the evidence is contrary to the hypothesis. Claimant has consistently maintained that he injured his low back as described herein, an event that was witnessed by his co-workers and which Claimant (incorrectly) believed was caught on camera.

15. Claimant testified at hearing that he and Randy were prepping beams weighing approximately 200 pounds on the morning of the accident. When the beams were ready for stacking, he and Randy would lift them and move them to a nearby pallet where they were stacked. Randy was about a foot taller than Claimant, so when the beams were lifted, Claimant bore the greater weight as the beam sloped down toward him.

16. As Claimant and Randy lifted a beam from the sawhorse Claimant felt a sharp pain in his low back and down his left leg from buttocks to foot. Claimant immediately set his end down on the ground, grabbed his back, and cussed. He and the other two employees took their morning break at that time. After that, Claimant attempted to move another beam, but it was more than he could stand. He and Patrick Stuard, who had been on fire watch duty, traded job assignments. Claimant took the fire watch, which required no lifting, while Patrick prepped the remaining beams with Randy.

17. Claimant gave a recorded statement to Surety on December 21, 2017, wherein he relayed his story. During the conversation he stated that "me and it (the I beam) went to ground." The Surety representative then asked, "So you dropped it?" to which Claimant replied "Pretty much so, yes." JE 13, p. 113. At all other times, including under oath at hearing, Claimant

testified that he did not actually drop the beam, but did set it down quickly. (This "discrepancy" was apparently one factor used by Surety to deny Claimant's claim for benefits, as Surety saw this as an inconsistency in Claimant's rendition of the accident. [2])

18. Whipple Edmo, Randy Rupe, and Patrick Stuard were all deposed. While none of the witnesses gave testimony which was entirely consistent with Claimant's version of how the accident occurred, their overall testimony at deposition, (taken some four years after the event), supported the fact that Claimant did hurt his back while working with the beams shortly before he was laid off.

19. Patrick Stuard remembered teasing Claimant about hurting his back before he realized it was serious, at which time he apologized. He recalled watching Claimant favoring a leg, like "he pinched a nerve maybe." Claimant was also holding his back and bent over in discomfort. Patrick took over for Claimant prepping the I beams for the remainder of the day. He also specifically recalled Claimant telling Whip that he had hurt his back on the day of the accident while Whip was in the truck bay.

20. Randy Rupe also recalled Claimant hurting his back while carrying a beam from the sawhorses to the pallet. While so doing, on one occasion Claimant had to quickly set his end of the beam down on the ground before reaching the pallet. Patrick Stuard had to replace Claimant in moving the beams. Claimant also was holding his back, cussing, and walking around after the incident. Thereafter Claimant did not participate in prepping the I beams.

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[2] In his deposition, Randy Rupe was asked if he disagreed with the assertion that Claimant "dropped" the beam. Randy gave a perfectly common-sense response when he testified, "It's kind of hard to answer because, I mean, I know that he put the beam down in a quick fashion. So, in a way I kind of agree with [the assertion Claimant dropped the beam]. But at the same time, I disagree, because he didn't drop it." Rupe Depo. p. 23. Likewise, the Referee finds this distinction to be nit picking, as even Claimant's answer, "pretty much," signifies the minor distinction between actually dropping something and rapidly setting it down. He got rid of it in a hurry. That is the point of relevance.

21. Whipple Edmo testified he was informed that Claimant had hurt himself by his co-workers on the day of the accident but did not personally talk with Claimant that day. Whip in turn notified his supervisor Kory Edelmayer when he was informed that Claimant had been injured. Whip heard from Claimant directly on December 4 through text messages regarding Claimant's back issues.

22. Claimant's testimony on the events was credible. His insistence since the outset that the event was captured on camera (even though it turned out such was not the case) bolsters the weight given his testimony. It is doubtful Claimant would have suggested to Whip and the Surety that the event was captured on camera if there really was no event for the camera to capture.

23. Defendants' argument that Claimant's inconsistent testimony on issues regarding his injury may be examined when discussing other issues for resolution, but on the narrow issue of whether an accident actually occurred on November 29, 2017, the totality of the evidence is strongly weighted in Claimant's favor.

24. When the record as a whole is considered, Claimant has proven by a preponderance of the evidence that he suffered an injury from an accident arising out of and in the course of his employment on November 29, 2017.

ACCIDENT UNDER IDAHO CODE §§ 72-701 through 704

25. Idaho Code § 72-701 provides, in pertinent part:

> No proceedings under this law shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable but not later than sixty (60) days after the happening thereof, and unless a claim for compensation with respect thereto shall have been made within one (1) year after the date of the accident....

26. Idaho Code § 72-702 requires that the notice must be in writing. However, notice required under Idaho Code § 72-701 is sufficient, even if the formal requirements

are not met, so long as "...the employer, his agent or representative had knowledge of the injury or occupational disease or...the employer has not been prejudiced by such delay or want of notice." Idaho Code § 72-704. Notice is sufficient if it apprises the employer of the accident arising out of and in the course of employment causing the personal injury. *Murray-Donahue v. National Car Rental Licensee Association,* 127 Idaho 337, 339, 900 P.2d 1348, 1350 (1995).

27. While Defendants make a weak attempt to argue Claimant did not give proper notice of his injury, even a cursory review of the record proves otherwise. While it would have been nice if Claimant had filled out a report of injury on the day it occurred, the fact remains that Whip testified he knew of the accident and informed his superior of it on the day it occurred. Ignoring that testimony, there are written text messages between Claimant and Whip mere days after the accident. Finally, Surety took a recorded statement from Claimant within the 60-day time frame for giving notice. There is simply no credible evidence that Defendants did not have the opportunity to investigate the accident in a timely manner. Clearly, Claimant gave adequate notice of the accident within the framework of Idaho Code §§ 72-701 through 704.

28. When the record as a whole is considered, Claimant has proven by a preponderance of the evidence that he gave proper notice of his accident under Idaho Code §§ 72-701 through 704.

MEDICAL CONDITION CAUSATION

29. Claimant carries the burden of proving his medical conditions for which he seeks care are causally related to his industrial accident. *Callantine v Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). It is not enough for Claimant to prove an industrial accident

happened; he must also prove the medical expenses he incurred, or treatment he seeks is for a condition which resulted from that accident. Defendants are only liable for medical treatment incurred or sought as a result of the industrial injury. Defendants are not liable for medical treatment and expenses unrelated to such accident. *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 130 P.3d 1097 (2006). The fact that Claimant suffered a covered injury to a particular part of his body does not make Defendants liable for all future medical care to that part of the Claimant's body, even if the medical care is reasonable. *Id.* On the other hand, a preexisting disease or infirmity does not disqualify a workers' compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983).

30. Claimant carries the burden of proving, to a reasonable degree of medical probability, that the injury for which benefits are claimed is causally related to an accident arising out of and in the course of employment, *Wichterman v. J.H. Kelley, Inc.,* 144 Idaho 138, 158 P.3d 301 (2007); he must establish this proof by way of physician's testimony or written medical record—supporting the claim for compensation to a reasonable degree of medical probability. See, e.g. *Hart v. Kaman Bearing & Supply,* 130 Idaho 296, 939 P.2d 1375 (1997). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). In determining causation, it is the role of the Commission to determine the weight and credibility of testimony and to resolve conflicting interpretations of testimony.

31. The issue for resolution is whether the conditions for which Claimant seeks benefits (low back and bilateral hernias) are causally related to his work accident in question.

This determination hinges on the weight assigned to the totality of the evidence adduced herein, including testimony of conflicting medical experts.

32. Claimant acknowledged treatment at Aspen Ridge Chiropractic on November 28, 2017, but claimed it was due to the recommendations of his co-workers who encouraged him to see if the chiropractor could treat his hip. He listed all of his aches and pains when he filled out the intake sheet, including his neck, back, wrist, shoulders, and lower extremities, but testified the focus of his visit was his right hip, which for years had bothered him and caused him to limp.

33. After his work accident, Claimant first went to the emergency room at Eastern Idaho Regional Medical Center on December 17, 2017, complaining of left lower back pain which had gradually worsened since its onset on November 29 while Claimant was lifting something heavy. He was given narcotic pain medication and advised to follow up with an orthopedist.

34. Claimant then saw Wendy Swope, APRN, on January 22, 2018.[3] (The medical record incorrectly notes the date of accident as December 20, 2017. It also incorrectly lists Claimant's muscle strain complaint as occurring on February 1, 2018.) Claimant complained at that time of low back pain which "shoots down his left leg." JE 23, p. 602. Claimant had been using a borrowed TENS unit with some relief. Claimant was unable to complete the left sided straight leg test due to pain. Claimant had difficulty walking and could not stand up straight. APRN Swope diagnosed muscle strain and left sided sciatica. She prescribed a TENS unit and over the counter ibuprofen.

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[3] Claimant testified he sought treatment on December 19, 2017 for his back pain, but could not see a physician because he did not have a worker's compensation claim number and lacked the cash or health insurance to pay for the visit. Thereafter, he again contacted Whip to find out how to get coverage. When Surety denied his claim, he had to wait until he obtained Medicaid coverage to begin treatment, which accounts for the delay in treatment.

35. On February 1, 2018, Claimant sought care with Benjamin Blair, M.D. for low back pain radiating into his left lower extremity. Claimant noted at that time that his low back complaints were worsening with time. Claimant acknowledged longstanding right hip issues with pain in his hip and groin. X rays taken that visit showed "marked degenerative changes diffusely throughout the lumbar spine;" Dr. Blair felt Claimant probably had a herniated disc. Also, Claimant had preexisting right hip pain exacerbated by Claimant's left sided pain and weakness affecting his gait. Dr. Blair ordered an MRI which was not completed due to insurance issues.

36. Dr. Blair authored a letter on March 12, 2019, in which he opined Claimant had suffered an injury in a work-related accident on November 29, 2017.

37. Thereafter, Surety authorized Claimant to be seen by Dr. Hansen, and his PA, Luke Nelson. At his first visit on June 27, 2019, Claimant reported low back pain radiating into his left lower extremity with numbness and tingling and progressive weakness. He also had bilateral groin and left sided buttocks pain. Claimant's left straight leg test was positive. X rays of that date showed loss of lumbar lordosis, loss of disc height at L2-3 and L5-S1. PA Nelson's original diagnosis was lumbar disc degeneration, lumbar spondylosis, lumbar radiculitis, and lumbar stenosis.

38. An MRI was ordered. It showed loss of disc height with osteophyte complexes throughout Claimant's lumbar spine, multilevel spinal canal stenosis greatest (severe) at L2-3 and L3-4. Claimant also had right paracentral disc extrusion with caudal extension superimposed on a broad based disc bulge at L4-5 and severe lateral recess stenosis.

39. Comparing Claimant's 2019 condition with medical notes from 2013, PA Nelson felt Claimant's condition was "much worse." JE 20, p. 447. PA Nelson thought injections and possible surgical intervention might be appropriate, but he needed to consult with Dr. Hansen.

40. Dr. Hansen first saw Claimant on July 24, 2019. Claimant's complaints were lower back pain into left lower extremity, right groin pain. Claimant's pain was worse with sitting and walking. TENS and Norco had not been helpful lately. His walking was limited. Lateral flexion extension radiographs of Claimant's lumbar spine showed severe degenerative disc disease with dynamic spondylolisthesis at L3-4 and 3 mm retrolisthesis. The films also demonstrated severe osteoarthritis and degenerative disc disease of Claimant's right hip.

41. Dr. Hansen also reviewed films from Aspen Chiropractic dated November 28, 2017. Those films showed diffuse spondylosis throughout Claimant's thoracic spine. Claimant's cervical spine demonstrated a 4 mm anterolisthesis of C3 on C4, with loss of normal lordosis, anterior osteophytes with severe degenerative disc disease from C4 through C7. The November 2017 films also showed severe disc height loss at L5-S1 and anterior osteophytes from L1 through S1 with a 3 mm retrolisthesis at L3-4.

42. Dr. Hansen recommended lumbar transforaminal epidural steroid injections which were performed on Claimant's first two visits. Long term treatment included a recommendation for laminectomy decompression surgery and possible stabilization of his spondylolisthesis. Dr. Hansen noted Claimant had no symptoms in his right lower extremity except his groin, but he felt Claimant might have more right sided issues once he was more ambulatory. At that time, Claimant could only walk a few feet due to severe hip pain. Dr. Hansen speculated that Claimant could need a revision laminectomy at L4 and stabilization of his lumbar spine.

43. On return visits of August 15 and September 5, 2019, Claimant reported the injections reduced his pain by 85% but his right groin pain persisted. By September, Dr. Hansen felt Claimant's right hip condition warranted review by a hip surgeon, as it was causing

Claimant the most grief and took priority over other issues. Dr. Hansen believed Claimant needed a right hip replacement. After the hip replacement Dr. Hansen felt Claimant would likely also need a major laminectomy decompression surgery. At L4 Claimant would need a revision laminectomy.

44. At his November 14, 2019 visit with Dr. Hansen, Claimant complained of bilateral lower back pain with a "compression" feeling and numbness and weakness in both legs, worse on left than right.

45. In December 2019 Surety arranged for Claimant to be seen by IME physician Tom Faciszewski, M.D. He reviewed medical documents, examined Claimant on December 17, and prepared a report which concluded that Claimant suffered no acute injury on November 29, 2017. Details of his report and post-hearing deposition, as well as Dr. Hansen's March 24, 2021 "rebuttal" report and post-hearing deposition, will be discussed in detail below. After Dr. Faciszewski's report Surety denied Claimant further benefits.

46. In February 2020, Claimant underwent right hip replacement surgery, which helped his walking ability.

47. When Claimant next saw Dr. Hansen in March 2020, he continued to complain of left buttock pain, left groin, left thigh, and radiating leg pain. Claimant had numbness in the ball of his left foot and first two toes. Sitting, rising to standing, and laying down were all still painful. Dr. Hansen suspected Claimant might have a hernia due to continuing inguinal pain. He felt a general surgical consult was in order.

48. Claimant was diagnosed with two small bilateral (possible) [4] hernias by general surgeon Claine Judy, D.O. Hernia surgery was originally scheduled for late April 2020

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[4] Dr. Judy's notes of May 19, 2021 state the "hernias" might not even be true hernias, but only "extension of retroperitoneal fat." JE 26 p. 659.

but postponed indefinitely. Based on pain complaints markedly out of proportion to the findings, by May 2021, Dr. Judy felt Claimant should be seen by a pain management physician for management of Claimant's low back complaints, instead of proceeding with hernia surgery.

49. Claimant treated with Dr. Hansen on an ongoing basis through 2020 and into February 2021, receiving steroid injections which were helpful for up to three months at a time in reducing Claimant's ongoing back pain which by that time was radiating into his bilateral lower extremities with corresponding weakness, albeit worse on the left.

50. Dr. Hansen believed that decompression surgery was needed but wanted to wait until Claimant's hernias were repaired. In the meantime, the injections were useful in providing Claimant with some relief. Dr. Hansen last saw Claimant on February 26, 2021.

51. By the time of hearing Claimant had not had either the hernia surgery or the lumbar decompression surgery.

Causation Experts

52. Both Dr. Hansen and Dr. Faciszewski authored causation reports and were deposed. Their opinions are set out below.

Dr. Faciszewski's Report

53. As noted above, on December 17, 2019, Dr. Faciszewski wrote a report to Surety in which he opined that Claimant suffered from chronic low back, bilateral hip and buttock pain, and neck pain, which were all unrelated to his accident of November 29, 2017. He further found Claimant had right and left hip flexion contractures with likely severe osteoarthritis, multi-level lumbar degeneration and stenosis, L3-4 and L4-5 central and lateral recess, and L5-S1 bilateral foraminal stenosis, all of which were preexisting and all unrelated to any alleged work accident.

54. Dr. Faciszewski concluded Claimant suffered no specific acute injury on November 29, 2017; rather he had chronic, progressive bilateral hip osteoarthritis, and a natural progression of his lumbar stenosis which had progressively impacted his ability to walk.[5] Claimant's bilaterally degenerated hips and hip flexion contractures were his primary pain generators. Claimant needed additional medical treatment for his hips initially, and thereafter possibly his lumbar spine. Claimant's lumbar stenosis was, in Dr. Faciszewski's opinion, aggravated by his hip flexion contractures. None of the proposed medical treatment would be related to Claimant's work accident.

Dr. Hansen's Report

55. On March 24, 2021, Dr. Hansen prepared a report to Claimant's attorney in which the doctor answered various questions posed to him, after reviewing certain medical records. Therein, he opined the accident in question resulted in a lumbar strain, lumbar radiculitis, bilateral lower extremities, primarily left, exacerbation of Claimant's L4-5 disc extrusion which worsened his lumbago, and bilateral inguinal hernias. He pointed to Dr. Blair's records showing Claimant had a positive straight leg raise test with symptoms consistent with lumbar radiculitis. Dr. Hansen believed the straight leg test "suggests an actual disc injury," whereas chronic spinal stenosis would not trigger a positive finding. Dr. Hansen stated that a "positive straight leg raise is almost always caused by a disc extrusion or an exacerbation of a disc extrusion." JE 20, p. 518.

56. Dr. Hansen also felt the MRI taken approximately 20 months after the accident showed increased signal intensity at L4-5, suggestive of an acute or subacute injury. Although the disc extrusion is eccentric to the right and Claimant's primary symptoms are left sided,

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[5] Dr. Faciszewski noted the Aspen Chiropractic notes constituted supporting evidence of the chronicity and natural progression of Claimant's lumbar stenosis and hip osteoarthritis.

Dr. Hansen explained the fact Claimant had a previous laminotomy which enabled the spinal canal on the right to accommodate the disc extrusion without creating significant right lower extremity symptoms.

57. Dr. Hansen felt Claimant's medical treatment to date had been reasonable and necessary and in the future Claimant would need diagnostic injections and probably surgery if his continuing symptoms warranted. While Claimant had "considerable degeneration and spondylosis in his lumbar spine, which [made] him susceptible to injury," Dr. Hansen opined the preexisting conditions were not responsible for Claimant's symptoms post accident. JE 20, p. 519.

58. Dr. Hansen acknowledged Claimant did have preexisting chronic low back, bilateral hip and buttock pain, and neck pain, as found by Dr. Faciszewski. However, Dr. Hansen opined (and noted Dr. Blair shared the same diagnosis) the accident actually worsened Claimant's L4-5 disc extrusion, which incited his lumbar radiculitis. In March of 2021, Dr. Hansen felt Claimant was a surgical candidate and but for the accident in question would not otherwise have been one.

59. Dr. Hansen agreed that Claimant's hip flexion contractures and osteoarthritis were preexisting and not caused or contributed to by the work accident. However, Claimant's bilateral hernias, which went undiagnosed for some time because Claimant thought the pain therefrom was part of his back injury, were caused by the accident in question.

60. Dr. Hansen framed the causation question as, "not whether [Claimant] had chronic … back pathology prior to the work injury. *** [T]he issue is whether the work injury exacerbated the stenosis and lumbar radiculopathy." Dr. Hansen noted the symptoms Claimant described at Aspen Chiropractic the day before his work accident were not sufficient to warrant surgery, but since the accident, Claimant's symptoms "have indeed worsened, as has his physical exam findings." *Id* at 520.

61. As of the time of his report, Dr. Hansen believed Claimant would need decompressive laminectomies at L1-3 and a revision laminectomy and bilateral decompression at L4-5. Dr. Hansen felt these surgical interventions should wait until Claimant had fully healed from his (then anticipated) hernia surgery.

Dr. Hansen's Deposition Testimony

62. Dr. Hansen was deposed on February 15, 2022. Therein, he noted when Claimant first presented at his office on June 27, 2019, he was experiencing pain in his low back, left leg, bilateral groin pain, and left buttock pain. Claimant rated his pain at 10/10. He had weakness in several muscle groups associated with the L4-L5 nerve distribution, and a positive straight leg raise test. Dr. Hansen pointed out Dr. Blair's office notes also note a positive straight leg raise test in early February 2018. APRN Swope's notes from January 22, 2018 indicated Claimant was unable to complete his left straight leg raise test due to pain.

63. Dr. Hansen made a point of noting Claimant's groin pain and left lower extremity pain, by history, were not issues for Claimant prior to the work accident in question. Claimant acknowledged his right buttock pain and hip pain predated that accident.

64. Epidural steroid injections consistently improved Claimant's pain complaints on a temporary basis. The last time Dr. Hansen saw Claimant was on February 26, 2021; Claimant received an injection on that date (as he had on visits of April and August 2020, and February 1, 2021.) On that last visit, Dr. Hansen's final diagnosis was spinal stenosis, lumbar radiculopathy, and retrolisthesis at L3-4, with significant degenerative changes in Claimant's lumbar spine. By that time Claimant had undergone his right hip replacement surgery which helped several but not all of Claimant's symptoms.

65. Claimant's positive left straight leg test informed Dr. Hansen's opinion that "there was an acute incident that happened because that is not something you have with chronic ongoing stenosis." Hansen Depo. p. 45. Additionally, although Claimant had significant preexisting spinal stenosis, it had been relatively asymptomatic. Dr. Hansen acknowledged Claimant's disc extrusion shown on MRI could have predated the work accident, but the "new symptoms" and positive straight leg raise were evidence to Dr. Hansen that the November 29, 2017 accident "either caused the disc herniation or else exacerbated it somehow." *Id.*

66. Claimant's hip arthritis was severe enough prior to the accident that Claimant would have had a hip replacement surgery regardless of whether he aggravated his hip in the accident or not. As such, Dr. Hansen agreed Claimant's hip condition and right hip replacement surgery were not causally connected to his work accident.

67. Dr. Hansen rebutted Dr. Faciszewski's opinions by noting that prior to the work accident there was no evidence Claimant had muscle weakness or a positive straight leg raise, even though he did have ongoing chronic low back and hip pain for years. Dr. Hansen also opined Claimant's groin pain, which Dr. Hansen labeled as hernia, was "new" and probably caused by his work accident as well.

68. Dr. Hansen believed the symptoms outlined at Aspen Ridge Chiropractic the day before the accident were "much different than the ones he exhibited after his work injury." *Id* at p. 50.

69. At his deposition, Dr. Hansen testified he would need to see Claimant again before he could make a valid surgical recommendation. He noted he had not seen Claimant in about a year, and Claimant's condition may have changed. The last time Dr. Hansen saw

Claimant, his plan was to do a few more diagnostic injections and then determine the best surgical approach for Claimant's conditions, which would likely include some type of back surgery. Without confirming Claimant's current condition, Dr. Hansen preliminarily believed Claimant would benefit from laminectomies from L1 to L3 to correct Claimant's stenosis. "Pertinent to [Claimant's] work injury, he needs treatment at L4-5 to address his left-sided lumbar radiculopathy."[6] Hansen Depo. p. 52. Dr. Hansen also believed Claimant was planning on having hernia surgery, which the doctor also felt was related to the work accident.

70. In cross examination, Dr. Hansen testified that he had begun the process of submitting a surgical request to Medicaid or Medicare in February 2021 but Claimant "didn't want to pursue it at the time." *Id.* at 58. Dr. Hansen has only speculation on why Claimant did not follow through with the proposed surgery.

71. While Dr. Hansen agreed that Claimant listed pain in his left lower extremity at Aspen Ridge Chiropractic on the day before the work accident, he pointed out that not all leg pain is "radiculopathy." Having said that, Dr. Hansen acknowledged that the pain listed by Claimant at the chiropractor's visit for his *right* lower extremity "sounds to me like some radicular pain." *Id.* at 61. That right lower extremity pain would be consistent with Claimant's bulging disc. In Dr. Hansen's view, "if [Claimant] was having right lower extremity symptoms prior to his work injury and then after his work injury he starts having left lower extremity symptoms, ... that's a completely different animal." *Id.* at 62.

72. Dr. Hansen agreed that an MRI taken in 2009 showed Claimant had degenerative changes, and disc bulges similar to the 2019 MRI, but felt comparison of

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[6] The treatment was previously defined by Dr. Hansen as bilateral L4-5 decompression surgery.

the MRIs was not instructive. As he explained, MRI scans are one piece of information used by him to make decisions, but ultimately, in addition to reading MRI findings, he must listen to the patient's symptoms and rely on his physical examination. He does not, as he put it, "treat the MRI scan." Dr. Hansen pointed out that MRIs provide good information, but do not present the whole story.

73. When asked how the subject accident could have caused Claimant's current complaints when an MRI in 2009 showed the same degenerative conditions, Dr. Hansen pointed out that while Claimant certainly had long-standing lumbar spine issues, including radiculopathy, previously Claimant was not diagnosed with the muscle weakness documented by Dr. Hansen in those muscles "powered by the L5 nerve on the left." Hansen Depo. p. 66. Claimant's medical records from 2011 stated Claimant had normal strength and normal sensation at that time.

74. Dr. Hansen admitted Claimant had a positive left straight leg raise test in 2009, and probably one in 1986 as well, when he underwent surgery on his lumbar spine. However, to Dr. Hansen, those findings are irrelevant because "bodies heal." As he noted, a positive straight leg raise test indicates an inflamed nerve, but if there is no corresponding muscle weakness, that is evidence the nerve is still working well. If the nerve is simply inflamed, the diagnosis is radiculitis, which may well be a temporary condition from which one can heal. Epidural steroid injections are useful for eliminating that inflammation. On the other hand, if one has nerve compression, weakness, and sensory loss, that is a different injury. So, while Claimant had longstanding spinal stenosis and problems at L4-5, he did not have weakness or sensory loss prior to his work accident. Those issues first arose after Claimant's work injury in question.

75. Dr. Hansen did affirm that the only level in Claimant's spine that is related to his work accident is L4-5; all other issues in Claimant's lumbar spine are unrelated. Further, Dr. Hansen was not aware of Claimant's condition as of the time of the doctor's deposition, and therefore he could not definitively opine on the state of Claimant's condition or need for surgery as of February 2022.

76. Dr. Hansen acknowledged Claimant's complaints of groin pain may be caused from his low back.

Dr. Faciszewski's Deposition Testimony

77. Dr. Faciszewski was deposed on December 30, 2021. He testified his review of the record indicated Claimant had a significant history for chronic low back and bilateral lower extremity pain. In 1986, Claimant had a hemilaminotomy at L4-5, back injury in 2009 which resulted in back and left lower extremity pain, and multiple steroid injections predating 2017.

78. Dr. Faciszewski pointed out the "inconsistencies" in the record of exactly how the injury occurred, noting one record has Claimant falling off a beam, unlike what he told other providers. He labelled this as "a variety of different descriptions" of what he told his health care providers. Faciszewski Depo. p. 10.

79. The most notable observation at the IME was Claimant's near inability to walk; he had a severe antalgic limp, severely restrictive range of motion in his bilateral hips, with corresponding lower extremity atrophy. Claimant was unable to stand erect due to his hip condition.

80. After reiterating the diagnoses made in his written report, Dr. Faciszewski testified that Claimant sustained no acute injury in the event of November 29, 2017.

His rationale for this conclusion was that Claimant was exhibiting the natural progression of his lumbar stenosis which, combined with the natural history of Claimant's bilateral hip osteoarthritis, led to his progressively decreased ability to ambulate. The principal cause for Claimant's symptoms and conditions as of the date of Dr. Faciszewski's IME in December 2019 was his severe right hip osteoarthritis and likely left hip osteoarthritis.

81. Dr. Faciszewski opined that Claimant did not "sustain any injury or long-term alteration in the natural history progression of his hip or back conditions" as the result of his November 29, 2017 work incident. Faciszewski Depo. p. 15.

82. In cross examination, Dr. Faciszewski relied on 2009 medical records relating to Claimant's low back and left lower extremity treatment following a car accident to support his opinion that Claimant's low back complaints after the work accident were simply the natural progression of his spinal stenosis symptoms. He also curiously testified that Claimant "did not seek significant medical care, definitive, until, quite frankly, after he saw me [in December 2019]. *Id.* at 25. (The response ignores the treatment he was undergoing with Dr. Hansen in this time frame. Also, as noted by Claimant's counsel, Claimant had difficulty with paying for treatment prior to Dr. Hansen due to lack of funds and Surety's decision to deny the claim.)

83. When asked about Claimant's testimony under oath that when he went to the chiropractor the day before his accident, he listed all his complaints, but emphasized his hip pain to the chiropractor, Dr. Faciszewski disputed Claimant's testimony; instead, he denied that Claimant would have emphasized his hip to the chiropractor. Dr. Faciszewski cited as authority for this conclusion his opinion that "the medical record has many discrepancies about where his specific pain is at any specific point in time." He went on

to note that Claimant "was unsure with me of exactly where his pain was specifically...." Faciszewski Depo. p. 21.

84. Dr. Faciszewski offered his opinion that "[t]his is a gentleman who basically does not want to go see the doctor. He doesn't want to seek care. He would rather medicate with whiskey; and ergo, he was having significant problems beforehand."[7] The doctor then cited to the Aspen Ridge Chiropractic notes as authority for his conclusion. *Id.* at 26. He further pointed to a lack of medical records from 2013 to late 2017 as proof Claimant was putting up with his progressive low back and hip symptoms.

85. Dr. Faciszewski refused to acknowledge that perhaps the lack of medical records was indicative of the fact Claimant's low back condition was not severe enough to warrant medical intervention during that time frame. When posed with that hypothesis, Dr. Faciszewski responded, "if that's true and that's the logic for after 2017, he clearly wasn't continuing to work was he?" Faciszewski Depo. pp. 26, 27.

Causation Analysis

86. 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).

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[7] There are several references in the record that Claimant tried to treat his pain with whiskey and THC/CBD.

As stated in *Henderson v. McCain Foods, Inc.,* 142 Idaho 559, 563, 130 P.3d 1097, 1101 (2006), "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). The fact that an employee suffered a covered injury to a particular part of his or her body does not make the employer liable for all future medical care to that part of the employee's body, even if the medical care is reasonable." Thus, Claimant must prove not only that he suffered an industrial injury, but also that the medical treatment sought is due in whole or in part to that injury.

Lumbar Spine

87. Claimant herein must prove not only that he injured his lumbar spine in the work accident of November 29, 2017, but also that his need for medical treatment results from the accident at issue. *See, e.g., Seamans v. Maaco Auto Painting*, 128 Idaho 747, 918 P.2d 1192 (1996). Proof requires medical testimony that supports his 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). Establishing a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). Rather, Claimant is required to establish a probable connection between cause and effect to support his contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973). 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). 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. *See, e.g., Hart v. Kaman Bearing & Supply,* 130 Idaho 296, 939 P.2d 1375 (1997).

88. Claimant has met his *prima facie* burden of proof with the testimony of Dr. Hansen, who testified that Claimant suffered new muscle weakness and loss of left lower extremity sensation due to an exacerbation of Claimant's stenosis and lumbar radiculopathy. Dr. Hansen opined that the symptoms of which Claimant complained the day before the work accident, when seen at Aspen Ridge Chiropractic, were not sufficient to warrant surgery. His condition after the accident, and due to the accident, certainly warranted surgery at L4-5.

89. Dr. Hansen provided reasonable explanations for the interplay between Claimant's preexisting conditions and his low back condition after the accident in question. He explained the significance of Claimant's positive left straight leg testing as evidence of an acute injury. He distinguished Claimant's preexisting hip conditions, which were symptomatic well before the work accident, from Claimant's preexisting low back conditions, which were relatively asymptomatic before the accident, at least to the point where Claimant was able to work and conduct his affairs of daily living.

90. In contrast, Dr. Faciszewski argued that no injury at all, even a transient muscle strain, occurred while Claimant was working on November 29, 2019. Instead, all of Claimant's conditions with which he presented after that date were nothing more than the manifestation of the natural progression of Claimant's degenerative and progressive disc disease and hip osteoarthritis. Whatever medical treatment such conditions warrant would be the result of Claimant's natural progression of his disease processes.

91. The parties agree that Claimant's hip condition and subsequent medical treatment was unrelated to his work accident. The parties also agree that Claimant's need for surgical treatment for his stenosis at L1-3 would not be related to the accident in question. The disagreement is limited to treatment for Claimant's herniated disc at L4-5, and hernia surgery, discussed below.

92. Trying to interpret the sparse, conclusory opinions of Dr. Faciszewski, and giving them a broad interpretation, it appears he may be arguing that Claimant's presentation in December 2019 would have been identical with or without the occurrence of the "alleged" work accident in question. In other words, whatever injury the supposed accident might have caused, it did not contribute in any way to Claimant's presentation at the time of the IME, or his need for hip and low back medical treatment or surgery. Had Claimant not been working on November 29, 2019, his medical condition and complaints would have been no different than they were because he worked on that date. While Dr. Faciszewski did not actually make any such statement, that is a fair interpretation of his otherwise conclusory opinions.

93. Dr. Faciszewski's opinion is much like that of Dr. Hansen when he noted that even if the work accident had flared Claimant's hip condition, he was destined for hip replacement surgery regardless of that fact. As such, the accident did not contribute to the need for hip surgery. Dr. Faciszewski appears to make that same argument for all of Claimant's conditions, including his herniated disc at L4-5.

94. The primary problem with Dr. Faciszewski's opinion is that he offers no real supporting evidence. He points to the fact that Claimant hurt his low back in the distant past and then speculates that he simply endured the increasing symptoms of his progressive condition until he was forced (or had the financial opportunity) to seek treatment. Dr. Faciszewski does not even try to rebut Dr. Hansen's opinions. Perhaps his only rebuttal is to point out that every finding of Dr. Hansen is consistent with the progression of Claimant's conditions. However, if that is his rebuttal, he forgot to mention it.

95. Further, Dr. Faciszewski appears unwilling to admit Claimant could have even suffered a transitory muscle strain on November 29, 2017. Instead, he seems to echo Surety's theory that inconsistent statements of how the accident occurred equate to the fact that no accident occurred. This position weakens his credibility. The supposed "inconsistencies" are trivial and can be explained by the imprecision of communication which befall all of us from time to time. Emphasizing the discrepancies in physicians' note taking should not be used as a foundation for discounting Claimant's testimony. Dr. Faciszewski's testimony, with his emphasis on trivial matters, and his questionable conclusions,[8] cast an air of bias which further diminishes the weight of his testimony.

96. Reviewing the totality of the record, the opinions of Dr. Hansen carry more weight than the opinions of Dr. Faciszewski.

97. When the record as a whole is considered, Claimant has proven by a preponderance of the evidence that his low back condition exclusively at L4-5, for which Claimant seeks medical benefits, was caused by the industrial accident in question.

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[8] Dr. Faciszewski specifically emphasized as important the perceived "discrepancies" throughout the record, both with the facts of the accident and the location of Claimant's pain, when those were minor points easily overshadowed by the consistencies in the record. Further, his unwillingness to even entertain the notion that Claimant was not suffering grievously before 2017, even though Claimant was able to perform his work and daily living tasks before the accident, but had to turn down work thereafter, was speculative at best. His conclusion that Claimant shuns medical treatment does not find support in the record, as there are several instances in the medical records of Claimant showing up at the ER with pain complaints with no obvious medical emergency. *See, e.g.,* JE 21. Claimant treated at Aspen Ridge Chiropractic on the recommendation of co-workers which does not square with a man who shuns doctors whenever possible. He asked for a medical referral just days after his accident in question, after waiting only four days to see if his pain would subside.

Bilateral Hernias

98. Claimant bears the same burden of proof on his hernia claim as he does on his lumbar spine complaints. That burden is set out above in paragraph 87.

99. Dr. Hansen opined that Claimant's bilateral "hernias" were causally related to the accident in question. Defendants presented no expert testimony in rebuttal. However, there is evidence in the record which impacts Dr. Hansen's opinion.

100. Claimant consistently complained of right sided or bilateral groin pain as evidenced by the medical records. After his hip replacement his groin pain continued. Dr. Hansen sent Claimant to Dr. Judy for hernia consultation.

101. Claimant mentioned right sided inguinal pain at his first visit with Dr. Judy, who ordered an ultrasound to look for evidence of hernia. The ultrasound showed what appeared to be a small right inguinal hernia as well as a small left hernia.

102. With time Claimant's groin pain became so severe that Dr. Judy began to doubt that Claimant's pain was due to the hernias; the doctor even questioned their existence as true hernias. In office notes dated May 19, 2021, Dr. Judy found no palpable hernias, but was unable to fully examine Claimant due to his tenderness. Claimant's pain profile did not fit with his "hernia" findings. Dr. Judy thought the ultrasound might have simply detected extensions of retroperitoneal fat and not actual hernias. He chose not to operate on Claimant. Instead, he felt Claimant's severe pain might be coming from his back radiculopathy. He suggested pain management.

103. The current state of the record does not support the fact that Claimant has bilateral hernias, based on Dr. Judy's office notes. He believes Claimant "most likely" has spermatic cord lipoma. There is no evidence in the record that such lipoma is related to trauma in general, and the accident of November 29, 2017 in particular. Additionally, if Claimant does have hernias,

it is unlikely they are the source of Claimant's groin pain. Finally, even if Claimant does have hernias, Dr. Judy did not feel surgery was warranted. Dr. Judy suggested no further medical care for the "hernias;" instead, he felt Claimant's medical care for his groin pain should focus on his low back condition.

104. When the record as a whole is considered, Claimant has failed to prove by a preponderance of the evidence that he has hernias (bilateral or unilateral) which were caused by his industrial accident of November 29, 2017.

MEDICAL CARE

105. As noted above, 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.

106. Since Claimant has proven a causal connection between his medical condition at L4-5 and the accident in question, he is entitled to reasonable medical treatment related to this condition, both past and future.

107. Regarding past medical treatment, Claimant's expenses associated with his visit/treatment with providers Eastern Idaho Medical Center, Swope, Blair, and Hansen not previously paid by Surety are recoverable at the *Neel* rate. These charges include diagnostic films, injections, prescriptions, and associated medical expenses. Diagnostic ultrasound testing and charges associated with Dr Judy's work up are likewise payable at the *Neel* rate. Claimant has compiled a list of charges he claims are due for past care under JE 29. Defendants raised no objection to those charges. It is therefore assumed the individual

charges are not in dispute, only their compensability. Since the issue of compensability has been resolved herein, the associated medical charges are recoverable benefits to the extent such charges are consistent with the findings herein.

108. Regarding future medical treatment, Claimant is entitled to reasonable and necessary 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 and for a reasonable time thereafter for treatment of his L4-5 disc herniation.

109. When the record as a whole is considered, Claimant has proven a right to reimbursement of past medical charges associated with his compensable injuries as set forth in JE 29, and reasonable future medical benefits associated with his L4-5 disc herniation treatment.

TEMPORARY DISABILITY

110. Injured workers are entitled to disability benefits during 'the period of recovery.' I.C. §§ 72–408, 72–423; *Hernandez v. Phillips,* 141 Idaho 779, 781, 118 P.3d 111, 113 (2005). The Idaho Supreme Court has found that this period "ends when the worker is medically stable." *Hernandez,* 141 Idaho at 781, 118 P.3d at 113 (citing *Jarvis v. Rexburg Nursing Ctr.,* 136 Idaho 579, 586, 38 P.3d 617, 624 (2001), noting that "medical stability" is synonymous with "maximum medical improvement").

111. Dr. Hansen testified Claimant was not medically stable when he last was treated by the doctor in 2021. Dr. Faciszewski opined Claimant was at MMI with regard to any alleged work-related injuries (none in his opinion) at the time of the IME in December 2019, and in fact had never not been at MMI and thus was not entitled to any TTD benefits.

112. When the record as a whole is considered, and consistent with the other findings herein, Claimant has proven his entitlement to temporary disability benefits

while in a period of recovery and not yet medically stable, subject to limitations set out in Idaho Code §§ 72- 403, 408 and 409, in an amount to be determined by the parties. In the event the parties cannot reach such agreement, the issue may be revisited in the subsequent hearing on this bifurcated matter.

CONCLUSIONS OF LAW

1. Based upon the totality of the evidence, Claimant has proven by a preponderance of the evidence that he gave proper notice of his accident under Idaho Code §§ 72-701 through 704.

2. Based upon the totality of the evidence, Claimant has proven by a preponderance of the evidence that his low back condition exclusively at L4-5, for which Claimant seeks medical benefits was caused by the industrial accident in question.

3. Based upon the totality of the evidence, Claimant has proven a right to reimbursement of past medical charges associated with his compensable injuries, and diagnostic work up with Dr. Judy, as set forth in JE 29, and reasonable future medical benefits associated with his L4-5 disc herniation treatment.

4. Based upon the totality of the evidence, Claimant has proven his entitlement to temporary disability benefits while in a period of recovery and not yet medically stable, subject to limitations set out in Idaho Code §§ 72- 403, 408 and 409, in an amount to be determined by the parties.

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 9th day of August, 2022.

INDUSTRIAL COMMISSION

Brian Harper

Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 2022, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION** weas served by email transmission and by regular United States Mail upon each of the following:

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