

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LORI KEELE,

Claimant,

v.

CITIBANK,

Employer,

and

INSURANCE COMPANY OF THE STATE OF
PENNSYLVANIA,

Surety,
Defendants.

IC 2013-034253

ORDER

FILED

FEB 24 2023

INDUSTRIAL COMMISSION

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

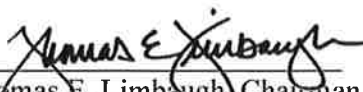
Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant is entitled to surgery in the form of fusion and decompression at C4-5.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 24th day of February, 2023.



INDUSTRIAL COMMISSION


Thomas E. Limbaugh, Chairman


Thomas P. Baskin, Commissioner



Aaron White, Commissioner

ATTEST:



Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February, 2023, a true and correct copy of the foregoing **ORDER** was served by regular United States mail and Electronic Mail upon each of the following:

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

FILED

FEBRUARY 24, 2023

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John Hummel, who conducted an emergency hearing in Boise on July 12, 2022. Claimant, Lori Keele, was present in person; Taylor Mossman-Fletcher, of Boise, represented her. Mark D. Sebastian and Matthew O. Pappas, of Boise, represented Defendant Employer, CitiBank, and Defendant Surety, Insurance Company of the State of Pennsylvania. The parties presented oral and documentary evidence, took post-hearing depositions and later submitted briefs. The matter came under advisement on January 4, 2023.

ISSUE

The sole issue to be decided by the Commission as the result of the hearing is as follows: whether and to what extent Claimant is entitled to surgery in the form of a fusion and decompression at C4-5.

CONTENTIONS OF THE PARTIES

This is not a case in which the necessity or reasonableness of medical care is at issue. Rather, as noted above, the sole issue is whether Claimant's proposed neurosurgery, a fusion and decompression at the level of C4-5, is related to or caused by the industrial accident. Claimant argues that surgery is necessary because of the adjacent segment damage caused by her 2014 surgery, a C6-7 fusion, which was related to her industrial accident in 2013, thus surgery at C4-5 is covered under the compensable consequences doctrine. Defendants, however, deny that surgery at the C4-5 level is related but rather attributable to a much older surgery that Claimant underwent in 1995, a C5-6 fusion, thus the proposed surgery is nonindustrial.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The testimony taken at the hearings dated July 12, 2022, December 20, 2017, and August 18, 2017;
3. Joint Exhibits 1- 69;
4. The deposition testimony of Claimant taken on April 10 and 11, 2017;
5. The deposition testimony of Eric Gabiola, taken on February 14, 2017;
6. The deposition testimony of Paul J. Montalbano, M.D., taken on July 19, 2022;
7. The deposition testimony of Michael V. Hajjar, MD, taken on September 7, 2022;
8. The deposition testimony of Paul J. Montalbano, M.D., taken on May 23, 2018;
9. The deposition testimony of Craig W. Beaver, PhD, taken on April 19, 2018;
10. The deposition testimony of Rodde D. Cox, M.D., taken on April 18, 2018;

11. The deposition testimony of Olurotimi Ashaye, M.D., taken on February 26, 2018; and
12. The deposition testimony of Robert H. Friedman, M.D., taken on February 14, 2018.

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

FINDINGS OF FACT

1. **Claimant's Background.** Claimant was born in Ogden, Utah on December 16, 1967. She grew up in Ogden, Utah, Post Falls, Idaho, and Spokane, Washington. Claimant's Dep. (Vol. I), 7:12-19.

2. After Spokane, Claimant with her father moved to Fresno, California, where she graduated from high school in 1986. She remained in Fresno until approximately age 22. *Id.* at 8:12-25.

3. Other than a tonsillectomy at age 5, Claimant does not recall having any medical issues growing up or in high school. *Id.* at 9:1-4; 10:6-8. She was also involved in a minor mini-motorbike accident at age 10 in which she skinned her knees but did not require significant health care. *Id.* at 10:9-25.

4. Claimant attended one year of college at Fresno State, with a major of child psychology. Beginning in high school, she worked at a McDonald's in Fresno for four years. She finished in management of the store. *Id.* at 11 at 7-12:18.

5. Following her tenure at Fresno State, Claimant met and married Michael Shane Keele in 1989. She had three children with Mr. Keele and remained married to him for thirteen years. *Id.* at 16:20-17:8. They moved to Idaho Falls in 1990. *Id.* at 19:1-3.

6. Claimant remarried on March 24, 2015, and is now known as “Lori M. Gabiola.” Tr. (August 18, 2017; Vol I), 24:3-11. For purposes of this record, however, Claimant will continue to be referred to as “Lori Keele.”

7. **Employer.** Administrative notice is taken that all relevant times, Employer operated a bank and financial services institution in multiple locations, including Meridian, Idaho.

8. **Claimant’s Employment with Employer.** Claimant began working for Employer at its Call Center located in Idaho Falls in or about 1997. Her position was customer service and on call. In that position she would take calls from customers and assist them with their accounts. Since this Call Center was devoted to the customers of Sears Credit Services, which Employer had purchased, Claimant also helped Sears stores with credit card issues. *Id.* at 29:2-27.

9. The physical requirements of Claimant’s job were sedentary; she sat to do her work and used a phone and a computer all day. There were no lifting requirements. Claimant worked an 8-hour shift. *Id.* at 29:18-30:1.

10. Claimant continued to be employed by Employer through the date of her industrial accident and thereafter.

11. **Prior Medical History.** Claimant had neck surgery on July 31, 1995. The etiology of the need for surgery was unknown. Claimant’s neurosurgeon, Dr. Stephen Marano, M.D., noted in pertinent part as follows: “This lady states there was no inciting event, but somewhere around 7 – 8 years ago she had a gradual onset of neck and shoulder pain and this went on for quite some time.” Ex. 3:0001. Before having surgery performed, Claimant received conservative measures in the form of physical therapy, which was not successful. Tr. (August 18,

2017; Vol I) 43:22-44:10. Dr. Marano performed a level one, anterior discectomy and fusion at C5-6 on Claimant on July 31, 1995. Ex. 2:0005. Although Claimant experienced brief instances of neck pain thereafter, her experience of the surgery was a good result, generally reducing her neck and shoulder pain. *See, e.g.*, Ex. 3:00022. The fusion itself failed to take and Claimant would later be diagnosed with resultant C5-C6 pseudoarthrosis. Ex. 17:00779; Hajjar Dep. 8:6-21.

12. The medical record reflects that Claimant received medical evaluations concerning neck pain between her July 31, 1995, surgery and her industrial accident. For example, on February 18, 1998, Murray Sturkie, M.D. evaluated Claimant for neck pain at the St. Luke's Urgent Care Clinic. Dr. Sturkie noted Claimant's C5-6 fusion in 1995 and her present complaints of sharp pain in the anterior part of the neck. He assessed acute cervical pain and prescribed Voltaren. Ex. 4:00219-00220.

13. On October 21, 2010, Dr. Amy Baruch, M.D. of St. Luke's Urgent Care Meridian, evaluated Claimant for neck pain and weakness in her upper extremities. Dr. Baruch noted Claimant's history of a fusion. In reading Claimant's cervical spine imaging, Dr. Baruch noted degeneration disk disease and disk space narrowing at the C5-C6 level; otherwise normal cervical spine. Ex. 4:00221-0222.

14. On August 2, 2011, Dr. James Weiss, M.D. of Primary Health noted that Claimant had presented with neck pain and that she had a 16-year history of neck pain. Ex. 3:0022-0023.

15. **Industrial Accident.** On the morning of December 22, 2013, at approximately 8:00 a.m., Claimant experienced a slip and fall on ice in Employer's parking lot located in Meridian, Idaho. In falling, both of Claimant's feet went out from underneath her and her head

and neck hit the running sideboard of her car, a 2004 Chevy Tahoe. Claimant also hit her tailbone when she fell. Ex. 1:00001-00002. (First Report of Injury or Illness.); Tr., 58:19-59:5 (Vol. I; August 18, 2017).

16. Claimant got up slowly after her fall; she was in a lot of pain. She went to work where she ended up informing her supervisor of the slip and fall. Claimant worked for approximately four hours until her pain symptoms (tailbone, neck pain, and headache) became too much to handle and her supervisor authorized her leaving work to go to the hospital. Claimant's husband drove to her workplace and took her to St. Luke's Regional Hospital, Meridian. *Id.* at 60:15-62.25.

17. **Medical Care following Accident.** Claimant reported to staff at St. Luke's Meridian on December 22, 2013, that she slipped on ice and hit her head at 8:00 a.m. that morning while at work. Dr. James Weiss, M.D., family physician, dictated the history as follows: "This is a 46-year-old female who comes to the ED for evaluation after suffering a ground-level fall around 0800 this morning. The patient states that she was getting out of her car when she slipped on the ice and fell backwards. She hit her head and neck on the car bumper and her tailbone on the ground." Ex. 4:00295.

18. Dr. Weiss ordered morphine and Norco for pain; CT scans of Claimant's head and cervical spine; and XRAY of the Sacrum Coccyx. *Id.* at 00296. Indications of the head CT and cervical spine CT were trauma. *Id.* at 00297-00298. Similarly, the findings as to the Sacrum/Coccyx CT indicated trauma. *Id.* at 00299. Dr. Weiss's impression was minor head injury with cervical strain and sacral contusion. *Id.* at 00300. Claimant was discharged home with instructions on how to manage medications. *Id.* at 00303.

19. The findings of Claimant's CT scan were as follows: C4-5: mild facet hypertrophy. Mild annular bulge without central canal or foraminal stenosis. C5-6: severe disc narrowing with reactive endplate change of the posterior disc osteophyte complex resulting in mild deformity anterior aspect of the canal and moderate bilateral foraminal stenosis; C6-7: mild facet hypertrophy and left uncovertebral joint hypertrophy. There is no central canal stenosis but there is moderate to severe left foraminal narrowing and mild right foraminal narrowing. Ex. 4:00298.

20. Claimant followed up with Primary Health Medical Group on January 2, 2014. She had complaints of neck pain radiating down her left arm. Jeremy D. Frix, P.A., prescribed her Robaxin and re-prescribed Norco. Ex. 3:00031.

21. Claimant next sought evaluation and treatment from Stephen C. Martinez, M.D., with Primary Health. Claimant reported continued moderate to severe neck pain, as well as left arm numbness and tingling. Although she had a prior neck fusion, Claimant stated that her symptoms had been quiet for the past 20 years prior to the slip and fall injury. Dr. Martinez released Claimant to full duty work and re-prescribed the same medications for her. He observed in pertinent part as follows: "This condition is deemed (on a more probable than not basis) work related as her previous cervical spine degeneration symptoms were quiescent for the past 20 years prior to this DOI." Ex. 14:00644.

22. Claimant then received a referral from Dr. Martinez to Dr. Paul Montalbano, M.D., a neurological surgeon. In a letter to Dr. Martinez dated February 12, 2014, Dr. Montalbano observed that conservative measures had failed to improve Claimant's condition, which is C7 Radiculopathy. "Due to weaknesses, I have recommended surgical intervention, which would include a C6-7 anterior cervical decompression, fusion and instrumentation."

Claimant consented to the procedure. Ex. 15:00658-00659. Dr. Montalbano took Claimant off work. *Id.* at 660.

23. On February 26, 2014, Claimant returned to Dr. Montalbano and informed him that she wished to try conservative measures before surgery. Dr. Montalbano then prescribed physical therapy in addition to an epidural steroid injection. Ex.15:00663.

24. Claimant underwent a four-week course of physical therapy at Intermountain Physical Therapy. She received a discharge on April 14, 2014. Ex. 16:00740.

25. On March 19, 2014, Dr. Montalbano opined that Claimant was much improved with the administration of a steroid injection. He prescribed continued physical therapy and a follow-up home exercise program. Ex. 15:00667. Dr. Montalbano assessed that Claimant could return to work on light/sedentary duty. *Id.* at 00668.

26. On May 21, 2014, Dr. Montalbano observed that Claimant had been doing quite well with physical therapy and a home traction machine. He opined that she had reached medical stability and returned her to work with no restrictions. *Id.* at 00673-00674.

27. On July 2, 2014, Claimant returned to Dr. Montalbano with renewed complaints of neck pain, headaches, and cervical radiculopathy. *Id.* at 00675.

28. On July 20, 2014, Dr. Montalbano recommended a bone scan for the persistence of Claimant's neck pain. *Id.* at 00676. He also recommended that she return to work on a light duty/sedentary basis. *Id.* at 00677.

29. The bone scan, as read by Dr. Shane McConegle, M.D., found in pertinent part that Claimant's cervical spine showed prominent focal activity in the cervical spine at the C5-6 level corresponding with advanced spondylosis and degenerative disc space narrowing. *Id.* at 00681.

30. On August 20, 2014, Dr. Montalbano recommended surgical intervention in the form of “a C5-C6 anterior cervical decompression, fusion and instrumentation.” Ex. 15:00687. On September 8, 2014, Dr. Montalbano performed the surgery. Ex. 15:00694. The procedure was a C5-C6 and C6-C7 microscopic anterior cervical complete/radical discectomy for compression and a C5-C6 and C6-C7 anterior cervical arthrodesis. Ex. 17:00779. On referral from Dr. Montalbano, Claimant sought treatment and evaluation by Rodde D. Cox, M.D., a physiatrist with Boise Physical Medicine & Rehabilitation Clinic, on November 5, 2014. Dr. Cox took a history of her present illness and past medical history, which he found significant for “previous neck fusion in 1994¹ at C5-6.” Dr. Cox diagnosed Claimant with cervical radiculopathy, status post C5-6 and C6-7 fusion, which appeared to be stable. Dr. Cox arranged for her a new physical therapist. He explained the importance of weaning off Norco. He prescribed Cymbalta for depression and pain management. Claimant was to return in 3 to 4 weeks. Ex. 22:00920-00921.

31. Claimant returned to Dr. Cox for follow-up on December 3, 2014. She reported that she had been unable to wean off Norco and was taking two every six hours. Claimant still had headaches. Dr. Cox’s plan was to schedule her for trigger-point cervical injections, which were performed on December 16, 2014. *Id.* at 00925-00926.

32. At a follow-up appointment on January 9, 2015, Claimant was “doing reasonably well.” She felt the trigger point injections were useful. She rated her neck pain at 2 or 3 out of 10. She remained on narcotics but attributed them to her acid reflux condition. Dr. Cox renewed a prescription for Robaxin initially prescribed by another provider. Claimant was scheduled for acid reflux surgery; Dr. Cox stated that the clinic would get Claimant back into physical therapy

¹ The surgery was actually performed in 1995.

following that surgery. Claimant was considering trigger point injections into the posterior area of the cervical spine. *Id.* at 00928.

33. On February 4, 2015, Claimant followed up with Dr. Cox. She was doing “reasonably well,” but complained of headaches which Dr. Cox opined were not related to the industrial injury. Dr. Cox felt she was approaching stability from her neck standpoint. Ex. 22:00932.

34. On April 7, 2015, Dr. Cox determined that Claimant had reached maximum medical improvement for her cervical condition. He assigned a 15% whole person impairment to her condition. He also assigned permanent work restrictions of lifting up to 35 pounds occasionally and avoiding repetitive head turning. *Id.* at 00933. Upon prompting from Surety, he added that there would be a 6% apportionment from her prior surgery in 1995. *Id.* at 00935.

35. On April 29, 2015, Claimant sought treatment and evaluation from Dr. Sandra A. Thompson, M.D., of The Pain Center located in Boise. She complained of ongoing neck and shoulder pain following cervical fusion surgery. She also complained of ongoing facial pain of an unknown etiology. Dr. Thompson’s plan was to discontinue Norco and substitute Butrans patches. Also, Dr. Thompson would initiate treatment with Zofren. She ordered an MRI of the cervical spine. Ex. 31: 01427-01428.

36. Claimant continued to treat with Dr. Thompson until July 8, 2015, when Dr. Thompson discharged Claimant from her care for violating their pain contract by seeking Norco from another physician on two separate occasions. *Id.* at 01437.

37. Claimant sought pain management care from Dr. William Binegar, M.D. with Pain Care Boise on May 8, 2015. Ex. 32:01441. Dr. Binegar performed occipital nerve injections on Claimant to address her headaches. *Id.* at 01448. Thereafter, Dr. Binegar performed bilateral

C5-C6 facet injections to address neck pain. Those injections were repeated three times through August 27, 2015. Ex. 32:01460, 01462, and 01467. On September 14, 2015, Dr. Binegar performed C5-C6 bilateral frequency ablation for her neck pain. *Id.* at 01472.

38. Dr. Binegar continued to perform a number of different kinds of injections on Claimant through the end of his care of her. The purpose of these injections and the radio frequency ablations was to ameliorate her neck pain. *Id.* at 01488-01502. She was referred back to physical therapy for a trial of a TENS unit. *Id.* at 01506.

39. Dr. Binegar referred Claimant to Dr. Daniel Marsh, M.D. for further follow-up of her neck and head pain on February 20, 2017. Ex. 35:01587. Dr. Marsh observed on May 31, 2017, that Claimant was injured in a slip and fall with whip lash type injury. She also suffered from post laminectomy syndrome. *Id.* at 01589. He decided to refer her to IMI for another ablation on the right side. Meanwhile, Dr. Marsh planned another diagnostic block. *Id.* at 01590.

40. Dr. Montalbano evaluated Claimant once again on August 21, 2018. She presented for evaluation of neck pain as well as right posterior shoulder discomfort. Reviewing an MRI dated August 9, 2018, Dr. Montalbano noted that Claimant had a “solid arthrodesis from C5-C7.” Instrumentation was well placed. Nevertheless, the “MRI scan demonstrates severe lateral recess stenosis on the right at 4-5 with compression of the right C5 nerve root... In terms of the etiology of her symptomatology, I do relate this to next segment degeneration at the level of C4-5 which is related to her prior construct.” Dr. Montalbano opined that Claimant carried the diagnosis of mid cervical region C4-5 disc degeneration, disc with radiculopathy, disc displacements and cervical region spondylosis with radiculopathy. Dr. Montalbano recommended a course of Relafen and physical therapy. If these conservative measures failed, he

would endorse an extension of her fusion to the level of C4-5 with associated decompression. Ex. 15A:00276.

41. On October 24, 2018, Dr. Montalbano ordered a bone scan “to further elucidate the etiology of her symptomology.” Claimant was not improved with conservative measures. Ex. 15A:00279.

42. On November 20, 2018, Dr. Montalbano interpreted the bone scan as showing increased uptake involving her facet joints at C2-3, C3-4, and C4-5. Furthermore, he opined that the “etiology of her symptomatology emanates from next segment degeneration. Although it is multiple levels, she was asymptomatic prior to her fusion at the level of C5-6 and C6-7 and therefore I relate this to next segment degeneration.” “Surgical intervention to address this issue would include removal of her prior anterior cervical buttress plate and extension of her fusion to the level of C2-3, C3-4, C4-5.” Claimant consented to the operation. *Id.* at 00281.

43. Surety denied coverage of Dr. Montalbano’s proposed surgery. Ex. 32A:00429.

44. Upon referral from Dr. Binigar, Claimant sought another opinion from St. Luke’s Northwest Neurosurgery Associates on January 28, 2020. Stephanie Breiuh, P.A.-C, evaluated her at her first appointment. Ms. Breiuh took a medical history that included past surgeries and conservative measures. She reviewed Claimant’s most recent imaging studies. She concluded that Claimant had spinal stenosis and at C4-5 adjacent to her previously placed construct at C5-7. Claimant did not wish to pursue further conservative measures but rather undergo surgery. Ms. Breiuh discussed extension of her fusion to C4-C5. Ex. 26:02610-02613.

45. Claimant was scheduled for surgery with Dr. Derek L. Martinez, M.D., but decided not to go through with it prior to the surgery. Tr., 22:1-10 (Vol. III, 7/12/2022).

46. On January 2, 2021, Claimant sought another opinion from Dr. Bruce Anderson, M.D. Ex. 61:02781. Since two other surgeons had recommended fusion surgery, Dr. Anderson suggested that Claimant follow through on those recommendations. *Id.* at 02783.

47. On February 23, 2022, Claimant returned to Dr. Montalbano for a consultation. Dr. Montalbano ordered X-rays and an MRI of the cervical spine. He noted that Claimant's current condition was related to the prior fusion at C5-C7. Ex. 15A:00287.

48. On April 6, 2022, Dr. Montalbano noted that the MRI showed significant central canal stenosis and cord compromise at the level of C4-C5. He further noted that Claimant was at "significant risk for spinal cord injury if surgery is not performed." *Id.* at 00290.

49. **Independent Medical Examinations.** *Michael V. Hajjar, M.D.* Defendants, through counsel, hired Dr. Hajjar, a neurosurgeon, to perform an independent medical records review of Claimant. He delivered his report on February 5, 2019. Dr. Hajjar's credentials are known to the Industrial Commission. Ex. 53:02350.

50. Dr. Hajjar noted as "a preexisting condition, Ms. Keele underwent a C5-6 anterior cervical decompression and stabilization under the care of Dr. Marano in the mid-1990s. She had almost 20 years between that surgery and the current injury. It was noted from notes in 2011 that she still had some ongoing neck pain..." *Id.*

51. Dr. Hajjar concluded as follows:

At the present time, Ms. Keele has been noted on radiographic studies and clinically to have findings that are consistent with next segment degenerative changes occurring at the C4-5 level. There is spinal canal compromise, potential for spinal cord compression and some subtle but present myelopathic signs noted in the medical record... In Ms. Keele's case the surgery that would have prompted the next segment degenerative change is not the surgery done in 2014 but the original fusion surgery done at C5-6 in the mid 1990s. Therefore, in my opinion, the next segment change that relates to the need for the current treatment is accelerated or precipitated by the patient's preexisting condition including her

1999 [sic] surgery and not the work related injury from late 2013 or its treatment rendered by Dr. Montalbano. Ex. 53:02351.

52. Dr. Hajjar further concluded that “100%” of Claimant’s current condition was due to preexisting factors. He attributed 0% of Claimant’s current condition, including the need for additional surgery which he did not dispute, to Claimant’s December 2014 surgery. Ex. 53:02351.

53. **Vicken Garabedian, M.D.** Defendants requested a records review from Dr. Garabedian, who is a neuroradiologist. He delivered a report on April 30, 2019. Dr. Garabedian’s qualifications are contained in a curriculum vita contained in Exhibit 55.

54. Dr. Garabedian agreed with Dr. Hajjar’s conclusion that the “unfortunate progression of disease in the cervical spine which is most pronounced at C4-5 in my opinion is related to the C5-6 original surgery in the 1990s resulting in altered biomechanics and progressive adjacent segment failure.” Ex. 55:02367.

55. **Paul Rubery, M.D.** Claimant sought a records review/ “second opinion” from Dr. Paul Rubery, an orthopedic surgeon, who delivered his report on an unknown date. Dr. Rubery’s qualifications are stated in a curriculum vita in his report. Ex. 60:02775.

56. Dr. Rubery did not opine on the etiology of Claimant’s condition. He did agree that fusion surgery at C4-5 would be reasonable. He advised Claimant that she did not “have to rush into surgery.” *Id.* at 02779.

57. **Bruce J. Anderson, M.D.** Claimant sought a second opinion/records review from Dr. Anderson on January 28, 2021. Dr. Anderson is a neurosurgeon with St. Luke’s Regional Medical Center. Ex. 61:02783.

58. Dr. Anderson did not opine on the etiology of Claimant's condition. He advised her that since two other neurosurgeons have recommended fusion surgery, she should go ahead with that plan. *Id.*

59. **Medical Depositions. Paul J. Montalbano, M.D.** Dr. Montalbano is a neurosurgeon practicing in Boise. Montalbano Dep., 5:3-5. His qualifications are known to the Industrial Commission. His deposition was taken on July 19, 2022.²

60. The last time Claimant was seen in Dr. Montalbano's clinic, she brought an MRI demonstrating "progressive changes at the level of C4-5 with severe central canal stenosis and known instability at that level, and at that point in time, I recommended surgery which would include extension of her prior fusion from C5 to C7 up to the level of C4-6, with associated decompression." *Id.* at 6:1-6.

61. Dr. Montalbano defined "next segment degeneration" as referring to 'adjacent levels of the spine in regards to a fusion.' *Id.* at 6:11-12. In Claimant's case, "she had a prior fusion from C5 to C7, and that fusion takes away mobility at those levels." *Id.* at 6:13-14. According to Dr. Montalbano, this leads to additional stress and makes the spine prone to degenerative changes, as seen in Claimant's next segment degeneration. *Id.* at 6:19-24.

62. Dr. Montalbano recommended urgent surgical intervention, because Claimant's progressive disc herniation or disc protrusion, is causing spinal cord compression. *Id.* at 7:7-10.

63. Dr. Montalbano addressed why he fixed the failed fusion at C5-6 when he addressed the issue at C6-7, as follows: "Going in and fixing C6-7 and not addressing the failed fusion at 5-6 does not make any sense. You have to fix both. Nevertheless, "[b]ecause both

² A previous deposition of Dr. Montalbano was taken on May 23, 2018.

levels were fixed, her risk of next segment failure doubled because you're adding another level at 6-7." *Id.* at 7:19-23.

64. Dr. Montalbano addressed whether Claimant was asymptomatic from her failed fusion from 1995 as follows: "It's not surprising that Ms. Gabiola [Claimant] was asymptomatic related to that failed fusion in 2000 – from 2000 – or 1995 to when her injury was in 2013." Montalbano Dep., 9:12-14.

65. As to Claimant's symptomology following the 2014 surgery, Dr. Montalbano noted as follows: "But in 2018, three years later, she had a persistent subluxation. There was progressive spinal cord compression, and questionable cord signal change, which is bruising of the spinal cord." *Id.* at 10:6-9.

66. Dr. Montalbano apportions the causation of Claimant's condition as follows: "a third to be related to her prior fusion at C5-6, a third related to prior fusion at C6-7, and a third related to a degenerative condition given the fact that they were multiple levels above her fusion." *Id.* at 12:1-5. He later updated his opinion on apportionment to include 85% attributable to the 2014 surgery and 15% attributable to the 1995 surgery and general degeneration. *Id.* at 22:16-23:1; 13:14-17.

67. Dr. Montalbano argues that the opinions of Dr. Hajjar and Dr. Garabedian are actually consistent with his, as follows:

So had she not been injured in 2014, that asymptomatic failed fusion at C5-6 never would have been fixed because she was asymptomatic. But because she developed an issue below her fusion at C6-7, if she didn't have the prior fusion – or the prior surgery at 5-6, she wouldn't have developed additional need for surgery at 6-7, and then in 2014 you actually stabilize both those segments, and by so doing you increase the rigidity of the spine at those two levels causing next segment failure.

So their opinion regarding next segment failure coincides with mine. They just choose to ignore multi-level fusion as opposed to a single level fusion at 5-6.

Id. at 14:12-23.

68. Dr. Montalbano specifically addressed the opinion of Dr. Garabedian, as follows: “So if you accept his opinion that the progression of the disease in the cervical spine at 4-5 is related to the original surgery [in 1995], it doesn’t follow suit that you ignore the additional surgery in 2014, which included fixing the 5-6 pseudoarthrosis, making it more rigid, and adding another level at C6-7.” *Id.* at 19:27-22.

69. **Michael Hajjar, M.D.** Defendants took the deposition of Dr. Hajjar, a neurosurgeon, on September 7, 2022. His credentials are known to the Commission.

70. Dr. Hajjar agreed that Claimant was currently suffering from next level degeneration at the C4-C5 level. Hajjar Dep., 6:23-7:2.

71. Dr. Hajjar expressed his opinion on the etiology of next level segment degeneration, as follows:

My opinion has always been in this case that the problem at C4-5 is related to the 1990s problem and surgery, even though Ms. Keele was pseudoarthrotic at the C5-6 level. We see patients who undergo these surgeries who end up having non-healed fusions often, and they still develop next segment changes at some point often because that surgery, even though it didn’t fully heal, will still lead to additional strain on the segment above the original operation.

Id. at 8:6-14.

So it’s not like that C4-5 level was normal 100% at the time of her second surgery. She had more subtle wear and tear that happened to progress and that progression, in my opinion, is still based on the 1990-something surgery.

Id. at 9:12-16.

72. Dr. Hajjar disagreed with Dr. Montalbano on whether the two-level fusion he performed in 2014 added more stress resulting in next level segment degeneration. “I don’t think there’s any data that shows that longer fusions lead to more stress and more propensity to develop next segment changes versus single fusions. A two-level fusion isn’t a long fusion

anyway. And so, I don't agree with that statement that doing C6-7, adding to C5-6 made C4-5 more likely to go bad." *Id.* at 12:4-9.

73. Dr. Hajjar reaffirmed his opinion stated in his report that "In Ms. Keele's case the surgery that would have prompted the next segment degenerative change is not the surgery done in 2014 but the original fusion done at C5-6 in the mid-1990s." Hajjar Dep., 12:11-14.

74. Dr. Hajjar admitted that he had never met Claimant or conducted a physical examination of her, nor has he taken her history. *Id.* at 16:20-17:1. His only role was to review records provided to him by defense counsel. *Id.* at 17:2-9.

75. Dr. Hajjar agreed that she was "relatively asymptomatic" between her 1995 fusion and her 2013 injury. *Id.* at 19:11-15. He did not find evidence of any major treatment that would indicate Claimant was symptomatic from her prior fusion. *Id.* at 19:16-19.

76. **Claimant's Condition at Hearing.** Claimant explained that "my quality of life is nothing. The pain is just debilitating." Tr., 28:3-4 (Vol. III, 7/12/2022).

77. Claimant qualified for Social Security Disability and Medicare. *Id.* at 28:5-7.

78. Claimant described her current life in more detail as follows:

And my – my life has changed. My poor husband, you know, knew me as active and we used to go on trips all the time. We have a timeshare in McCall. We used to go there all the time. We would go to Vegas. We would go once a month to see our grandkids. We have four grandbabies in Idaho Falls. We haven't seen them in a year because I don't dare interact with them. They are – they are active. I don't bike. I don't play tennis. I don't swim. I just want to get back to that. I don't go out with my friends – our friends anymore because I never want to do anything. I mean we are still friends, but they are tired of me saying no. It's just – it's just hard, you know, to do anything with the pain. It just aggravates – anything aggravates it.

Id. at 35::12-36:3.

79. **Claimant's Credibility.** Claimant testified credibly at hearing.

DISCUSSION AND FURTHER FINDINGS

80. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

81. **Medical Causation.** Claimant bears the burden of proving that the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). There must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his contention. *Dean v. Dravo Corporation*, 95 Idaho 958, 560-61, 511 P.2d 1334, 1336-37 (1973).

82. The compensable consequences doctrine is recognized in Idaho. A subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if there is a demonstrable causal connection between the compensation sought and the work-connected injury. *Sharp v. Thomas Brothers Plumbing*, 510 P.3d 1136 (2022). The permanent aggravation of a preexisting condition or disease is compensable. *Bowman v. Twin Falls Construction Company, Inc.*, 99 Idaho 312, 581 P.2d 770 (1978).

83. No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 901, 591 P.2d 143,

148 (1979). While a temporal relationship is always required to support a finding of causation between an accident and the injury, the existence of a temporal relationship alone, in the absence of substantive medical evidence establishing causation, is insufficient to satisfy Claimant's burden of proof. *Swain v. Data Dispatch, Inc.* IIC 2005-528388 (February 24, 2012). The Industrial Commission, as the fact finder, is free to determine the weight to be given to the testimony of a medical expert. *Rivas v. K.C. Logging*, 134 Idaho 603, 608, 7 P.3d 212, 217 (2000). "When deciding the weight to be given an expert opinion, the Commission can certainly consider whether the expert's reasoning and methodology has been sufficiently disclosed and whether or not the opinion takes into consideration all relevant facts." *Eacret v. Clearwater Forest Industries*, 136 Idaho 733, 737, 40 P.3d 91, 95 (2002).

84. An employer is required to provide reasonable medical care for a reasonable time. Idaho Code § 72-432(1). A reasonable time includes the period of recovery, but may or may not extend to merely palliative care thereafter, depending upon the totality of facts and circumstances. *Harris v. Independent School District No. 1*, 154 Idaho 917, 303 P.3d 604 (2013). What constitutes reasonable medical care is to be determined by a totality of the circumstances approach. *Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015). It is for the physician, not the Commission, to decide whether the treatment is required; the only review the Commission is entitled to make is whether the treatment was reasonable. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

85. **Coverage of Claimant's Cervical Condition.** As noted above, this case is not about the reasonableness or necessity of the treatment that Claimant is seeking for her cervical spine. Rather, the sole question is one of causation, whether the need for surgery is causally related to the industrial accident and injury.

86. The evidence this Referee finds persuasive demonstrates that the subject accident is the cause of Claimant's need for surgery at C4-5. Claimant required surgery in 1995 to fuse her C5-6 segment. The evidence establishes that at some point after the 1995 surgery, the fusion failed, leaving Claimant with a fibrous union only at C5-6. Montalbano Dep. 9. The fibrous union preserved some of Claimant's C5-6 motion, and decreased the risk of injury to the adjacent segment at C4-5. Montalbano Dep. 7-8. The medical records reflect that Claimant did seek occasional treatment for neck pain following the 1995 surgery, but her complaints and need for care were much greater following the 2014 surgery. The C6-7 fusion performed at the time of that surgery was directly related to the injuries Claimant suffered as a result of the subject accident. The C5-6 fusion was deemed necessary only because of the need to treat Claimant's work-related injury at C6-7. In other words, but for the C6-7 work related injury, the C5-6 failed fusion would not have been restored. Montalbano Dep. 25. Dr. Montalbano explained that fusing C6-7 places more stress on the failed C5-6 fusion that would inevitably lead to further compromise of the C5-6 level. Failure to address C5-6 at the time of the C6-7 fusion would only lead to a need for further surgery to fix C5-6. Avoiding multiple surgeries decreases risk to the patient, so fixing C5-6 at the time of the C6-7 fusion was strongly indicated. Montalbano Dep. 7-8, 19-20, 25. Therefore, the fusion of C5-6 is causally related to the need to repair the work-related lesion at C6-7, and, by this path, is shown to be causally related to the accident as well.

87. The 2014 fusion at two levels in turn caused the accelerated degeneration of the C4-5 disc space. Dr. Montalbano persuasively testified that the C5-7 construct places more strain on the C4-5 space and accelerated the degeneration of that level. Montalbano Dep. 7-8, 24-25. From this it follows that the need for the proposed C4-5 surgery is causally related to the subject accident.

88. In fact, even if it be assumed that the need for the C5-6 fusion is wholly unconnected to the C6-7 fusion, and was performed only coincidentally to the C6-7 fusion (a finding that this Referee does not make), the proposed C4-5 surgery is still compensable. Dr. Montalbano persuasively explained what seems obvious to a lay person; the longer two-level fusion caused more damage, more quickly, to Claimant's C4-5 disc space than would a one-level fusion at C5-6. Montalbano Dep. 7, 24. Therefore, Claimant's need for C4-5 surgery is still causally related to the C6-7 lesion, and by this route, to the work accident. The fact that the accident might be only a cause, as opposed to the only cause, of the need for surgery is not a challenge to Claimant's entitlement to medical care. The employer takes Claimant as she comes and the fact that Claimant may suffer from a pre-existing condition is not a defense to her entitlement to benefits. *Wynn v. J.R. Simplot Co.*, 666 P.2d 629, 105 Idaho 102 (1983). The opinion of Dr. Montalbano is entitled to more weight than those of Dr. Hajjar and Dr. Garabedian because he was Claimant's treating physician and surgeon, whereas Dr. Hajjar and Dr. Garabedian merely reviewed records. Dr. Montalbano, on the other hand, performed Claimant's 2014 surgery, took her medical history, and evaluated her in various office visits. In Dr. Garibaldian's case, he is not a surgeon but rather a neuroradiologist.

89. The opinions of Dr. Hajjar and Dr. Garabedian ignore the impact of the 2014 surgery, almost as if it did not occur. The 1995 surgery was not the procedure that set Claimant up for failure of the C4-5 disc. Dr. Montalbano made it clear that the C5-6 disc space would never have been re-fused absent the accident related need to fuse Claimant at C6-7. Montalbano Dep. 14:12-23. The two-level fusion that resulted from the 2014 surgery is the condition that accelerated the degeneration of the C4-5 disc space. Absent the subject accident Claimant would

not have undergone the 2014 surgery, would not have suffered accelerated degeneration at C4-5 and would not now need the C4-5 fusion proposed by Dr. Montalbano.

90. The record includes testimony from doctors related to apportionment of the medical expense of the surgery. Legally however, apportionment does not appear to have been independently argued as an issue for consideration. The issue before the Commission was stated as follows in the June 14, 2022, order setting this matter for hearing: "...whether Claimant is entitled to receive as a workers' compensation benefit surgery in the form of a fusion and decompression at C4-5." At hearing, the issue was stated slightly differently: "...whether and to what extent claimant is entitled to the following medical benefits: surgery in the form of a fusion and decompression at C4-5." Tr. 5:8-10 (Vol. III, 7/12/2022) (emphasis supplied). This articulation of the issue, to which the parties assented, would potentially admit the inclusion of the question of whether responsibility for the payment of the prospective surgery should be apportioned between the subject accident and the pre-existing injury and surgery at C5-6. However, neither party argued for or against apportionment of medical benefits in their briefing, and the issue is deemed abandoned. Even if this Referee were to consider the issue of apportionment, there is little evidence supporting it.

91. Idaho Code statutorily authorizes apportionment of disability for preexisting impairment or different injuries. "Such authority has been judicially interpreted to include apportionment of hospital, medical and kindred expenses." *Earl v. Swift & Co.*, 467 P.2d 589, 93 Idaho 546 (1970). The apportionment of medical expenses and total temporary disability benefits is a factual issue which will be upheld on review when supported by substantial and competent evidence. *Blang v. Liberty Northwest Ins. Corp.*, 125 Idaho 275, 278, 869 P.2d 1370, 1373 (1994) (holding expenses would not be apportioned due to unique circumstances). In

circumstances where an injury with a second employer, however minimal, accelerated or aggravated and permanently worsened a condition and causes the need for the medical treatment, the Commission frequently attributes liability for medical expenses to the surety liable at the time of the most recent accident. *Hall v. Wal-Mart Stores, Inc.*, 082401 IDWC, IC 97-015081 (Idaho Industrial Commission Decisions, 2001). Dr. Montalbano did testify to apportionment of “indications for surgery”, opining that 85% was attributable to the 2014 procedure, with 15% attributable to the 1995 procedure and other degenerative issues. Montalbano Dep. 22:16-23:1; 13:14-17. However, he is also clearly of the view that absent the need to fuse C6-7, there would have been no need to fuse C5-6 in 2014. It is this accident-related multi-level fusion that is responsible for the acceleration of Claimant’s C4-5 degeneration. This Referee finds no persuasive evidence establishing that the surgical costs should be apportioned between the subject accident and a pre-existing condition. *Brooks v. Standard Fire Insurance Co.*, 117 Idaho, 1066, 793 P. 2d 1238 (1990).

92. For all these foregoing reasons, Claimant’s current condition is causally related to her 2013 accident and injury and subsequent surgery in 2014.

CONCLUSIONS OF LAW

1. Claimant is entitled to surgery in the form of fusion and decompression at C4-5.

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 2nd day of February, 2023.

INDUSTRIAL COMMISSION

John C. Hummel

John C. Hummel, Referee

ATTEST:

Shannon Carver
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February, 2023, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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