

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

FRANK MILLER,
Claimant,
v.
YELLOWSTONE PLASTICS, INC.,
Employer, and TWIN CITY FIRE
INSURANCE COMPANY, Surety,
and
STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND,
Defendants.

IC 2019-024650

ORDER

FILED

JUL 31 2023

INDUSTRIAL COMMISSION

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

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

1. Claimant has failed to sustain his burden of proof on causation.
2. All other issues are moot or resolved, including ISIF liability.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to


all matters adjudicated.

ORDER - 1

DATED this 28th day of July, 2023.

INDUSTRIAL COMMISSION





Thomas D. Limbaugh, Chairman


Thomas P. Baskin, Commissioner


Aaron White, Commissioner

ATTEST:


Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of July, 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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ORDER - 2

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

FRANK MILLER,

Claimant,

v.

YELLOWSTONE PLASTICS, INC., Employer,
and TWIN CITY FIRE INSURANCE
COMPANY, Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND,

Defendants.

IC 2019-024650

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

FILED:

JULY 31, 2023

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John Hummel, who conducted a hearing in Idaho Falls on December 9, 2022. Claimant, Frank Miller, was present in person; Stephen Meikle, of Advantage Legal Services, represented him. David P. Gardner, of Hawley Troxell, represented Defendants Employer, Yellowstone Plastics, Inc., and Surety. Twin City Fire Insurance Company. Anthony M. Valdez, of Valdez Law Office, LLC, represented Defendant State of Idaho, Special Indemnity Fund (ISIF). The parties presented oral and documentary evidence. Post-hearing depositions took place and the parties later submitted briefs.¹ The matter came under advisement on July 11, 2023.

¹ Without asking permission to exceed the page limitation of 30 pages specified by J.R.P. § 11(A), Claimant submitted a brief comprised of 48 pages plus an appendix consisting of an exhibit that was already admitted into evidence. Defendants objected to this violation of the rule. Claimant requested leave to file the brief exceeding the page limitation after it was filed. To the extent that the brief exceeded the page limitation, the excess pages are stricken and will be disregarded in this decision.

ISSUES

1. Whether Claimant sustained an injury from an accident arising out of and in the course of employment.
2. Whether Claimant's condition is due in whole or in part to a preexisting and/or subsequent injury or condition.
3. Whether and to what extent Claimant is entitled to the following benefits:
 - a. Medical care;
4. Temporary partial and/or temporary total disability benefits;
5. Permanent Partial Impairment (PPI);
6. Permanent Partial Disability (PPD);
7. Whether Claimant is entitled to permanent total disability pursuant to the odd lot doctrine or otherwise;
8. Whether ISIF is liable under Idaho Code § 72-332;
9. What is the correct apportionment, if any, of the Carey formula;
10. Whether Claimant is entitled to attorney fees pursuant to Idaho Code Section § 72-804; and,
11. Whether Claimant's condition resolved following the August 25, 2019 accident.

CONTENTIONS OF THE PARTIES

Claimant contends that he was totally and permanently disabled as a result of the industrial accident of August 25, 2019 combined with his preexisting impairments. Claimant alleges that his supervisor engaged in rough horse play with him by kicking his leg out from under him that resulted in Claimant falling and injuring himself; Claimant twisted his back and injured it further going down. Claimant filed a complaint against ISIF alleging that Claimant's last injury in the industrial accident combined with his preexisting impairments to hold ISIF liable for a portion of Claimant's disability.

Defendants Employer and Surety submit that there are no additional disability benefits awardable to Claimant. Defendants allege that Claimant had an extensive medical history of lower back injuries and treatment that account for his disability, if any. Defendants allege that this is a case that involves a temporary aggravation of a preexisting condition. No further medical treatment is warranted and all compensable medicals have been paid. No further benefits, including time loss benefits, are owed. Claimant's condition resolved itself.

Defendant ISIF contends that it "shouldn't be here as a party." If Defendant Employer and Surety's position is determinative, and the evidence shows that Claimant suffered only a temporary aggravation of a preexisting condition, then ISIF has no liability. In the alternative, Claimant is not at maximum medical improvement and it is inappropriate to determine his permanent disability, thus again ISIF should not be a party to the case.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Claimant's Exhibits A through P;
3. Defendant Employer and Surety's Exhibits 1 through 9;
4. Defendant ISIF's Exhibits 10 through 12;
5. The testimony adduced at the hearing held on December 9, 2022;
6. The post-hearing deposition of Lynn Stromberg, M.D., taken on February 9, 2023;
7. The post-hearing deposition of Benjamin Blair, M.D., taken on December 14, 2022; and,
8. The post-hearing deposition of Delyn Porter, M.A., CIS, CIWICS, taken on February 9, 2023.

All unresolved objections in the depositions are overruled.

FINDINGS OF FACT.

1. **Claimant's Background** Claimant was born on August 14, 1970 in Dillon, Montana, and was 52 years old at the time of hearing. Tr., 19:7-8; Ex. P:11. He lived his life in Montana and eastern Idaho. Ex. P:11.

2. Claimant resided in Menan, Idaho, at the time of hearing. *Id.* at 5-6.

3. Claimant finished the 9th grade and then dropped out of school because of personal family circumstances. Later in 2004, he received a high school equivalency GED. *Id.* at 12-16; Ex. P:11.

4. Claimant went to primary school and middle school in Montana and Idaho. Ex. P:11. During his school years, Claimant participated in various sporting activities such as wrestling, boxing and taekwondo. He also rode BMX bicycles and motorcycles and ran. Pastimes throughout his life included active pursuits such as fishing, hunting, and camping. Tr., 19:17- 20:4.

5. **Work History.** At age 16 in 1986, Claimant went to work as a moving specialist for Allied Van Lines/Roche Moving & Storage. His duties included moving, lifting, pulling and storing furniture and other items. A significant amount of bending, squatting, walking, and climbing was also involved. *Id.* at 20:8-21:15. He worked for that company until approximately 2000. *Id.* at 24:21-25; Ex. P:13.

6. Claimant next worked for LC Insulation as a commercial and residential insulation installer for approximately two years from 2000 to 2002. He did not describe his specific job duties or activities for that company, but presumably it involved general labor installing and maintaining insulation in residential and commercial buildings. Tr., 24:24-25:13; Ex. P:13.

7. In 2003, Claimant went to work for H&K Contractors as a heavy equipment operator on a hot plant. He worked for that employer until 2019. A hot plant is a machine that

mixes aggregate that a crusher produces and turns it into hot oil to lay down on roads for asphalt. Claimant's job was to feed the aggregate into the hot plant. As it was a mobile plant, he also was required to do "set ups and tear downs." Claimant spent a lot of time running in reverse on the hot plant, which required him to turn and twist his neck frequently. If the hot plant broke down, he would be engaged in activities such as cutting, welding, and fabricating. He also engaged in a great deal of lifting and shoveling. In short, this was a very heavy occupation. Tr., 25:12-31:6; Ex. P:13.

8. Claimant was on long-term disability status with H&K from December 2017 to June 2019. Ex. 10:4 (Claimant's Discovery Responses).

9. **Prior Injuries and Medical Treatment.** Records of Claimant's industrial accident claims filed with the Industrial Commission indicate that of 13 reported claims, six of those claims involved the low back. *See*, Ex. 4:39-40; Tr., 91:7-9. Claimant was unfamiliar at hearing with many of the claims he filed or their nature. *Id.* at 91:10-11. The most consequential of his injuries will be discussed herein.

10. In or about 1998, Claimant had a work-related injury while working for Roche Moving/Allied Van Lines. A bed that he and the other movers were lifting up a flight of stairs fell on Claimant and forced him to the bottom of the stairs. The bed landed on Claimant, injuring his lower back. *Id.* at 21:25-22:6.

11. Claimant sought medical treatment "and they found out that I had a ruptured disk in my lower back, which resulted in – the final deal was having a fusion done in my back." Claimant had complications from the surgery and ended up having three surgeries to address the situation. Tr., 22:11-20.

12. Claimant consulted with Dr. Brent Greenwald, MD, after having been referred by an emergency physician, Dr. Simon, on January 3, 1998. Dr. Greenwald performed the fusion

surgery on Claimant's lower lumbar spine at L5-S1 and treated him through March 21, 2000. Ex. 8:269.

13. Claimant asserted that he had "excellent success" from his fusion and related surgeries. "I was able to carry on with gainful employment. I could go – well, I went to the LC Insulation after Roche Moving & Storage. I could climb ladders. I could reach over my head. I could bend. I could squat. I could take insulation bats into homes. I could fill the hoppers with insulation, if we had to spray insulation. I done excellent." Tr., 24:3-10.

14. Claimant received a lump sum workers' compensation settlement of \$50,000 as a result of the 1998 injury. Ex. 10:12.

15. Dr. Greenwald assigned Claimant a permanent lifting restriction of 50 pounds and minimal flexion/extension rotation as a result of the 1998 injury. Ex. 11:3.

16. Claimant had a work-related injury and accident while working for H&K on July 4, 2016. He and a supervisor were moving a sheet of iron, when Claimant pulled "something in my back that caused an aggravation of my old injury." Tr., 32:17-33:2.

17. Claimant received medical pain treatment from Doctors Robert E. Johnson, D.O. and Prashanth Manjunath, M.D., for his July 14, 2016 injury. They placed a neurostimulator in Claimant's lower back and also ordered physical therapy and steroid injections for Claimant; surgery was not performed. Tr., 33:15-20; *see also*, Exs. H, I, and J (medical records).

18. Claimant continued working light duty at H&K during his medical treatment. He could not do the heavy lifting or operate the machinery, but he was placed in a "scale house" for light duty, where he could weigh trucks, print tickets, and take the tickets out to truck drivers on the scales. Tr., 33:21-34:4.

19. Claimant did not receive an overall lump sum workers' compensation settlement or

award as a result of his 2016 injury at H&K. Rather, his medical expenses were covered by private insurance and the limited lump sum settlement that he received from the workers' compensation surety covered his deductible premium amounts attributable to implantation of the spinal cord stimulator. Ex. 10:12. Claimant did not receive an impairment rating for this injury. *Id.* at 13.

20. **Subject Employment.** Claimant went to work as a print press operator assistant for Employer in June 2019. His employment there lasted less than a year because of his industrial accident and injury on August 25, 2019. Employer was in the business of manufacturing plastic printed materials. Ex. P:13; Tr., 17:1-17.

21. His duties for Employer included "changing the rolls of plastic on the machines." He would also monitor and fill ink pots on the printing presses with ink, and clean, mop, and sweep the printing press room. *Id.* at 17:17-20.

22. **Industrial Accident/Incident.** On August 25, 2019, towards the end of his shift, Claimant was waiting at one of the printing presses to "push the button" to change the roll on the printing press. His supervisor Matt Knudson approached Claimant and pointed to a pallet of rolls. When Claimant looked over at the pallet, Mr. Knudson tripped him and Claimant felt his back pull and twist. Knudson caught Claimant to keep him from falling to the floor. Both of them laughed about the incident afterwards, but Claimant felt embarrassed nonetheless. Tr., 42:24-44:9.

23. Claimant described the incident in his November 5, 2020 deposition as follows:

Q. [By Mr. Gardner] Tell me what happened.

A. [Claimant] I was basically leaning up against part of the press watching the roll, waiting to do the roll change, when my supervisor, Matt Knudson, came up. He pointed over at a pallet full of rolls that I looked over at.

As I looked over at them, my foot was basically swiped out from underneath me. As I started to fall, Matt tried to catch me. I felt something in my back pull and twist. We kind of laughed about it a bit. It was rather embarrassing. And within a few minutes, the pain just got to the point where I went to my other supervisor, who was there in the area, and I told him what had happened, and that I was experiencing

difficulties and pain, and I felt like I needed to go home.

Q. So, Matt comes up to you and he pointed at some pallets or some rolls?

A. It was a pallet that had rolls on it that I changed to put onto the machine. So basically when – I'm sorry. Basically when he pointed over to the rolls – he pointed. I turned my attention away from everything right here and around me. He was standing to the opposite side of where I looked away to when I was tripped.

Q. And who tripped you?

A. Matt Knudson.

Q. How did he trip you?

A. My leg was kicked out from underneath me.

Q. And how did he do that? Did he just, like, kick your leg?

A. I didn't see his exact motions and things. *All I know is that his foot made contact with the back of my foot.* I was swooped out from underneath me, and I lost balance and began to fall. [Emphasis added.]

Q. Did you fall all the way to the ground?

A. He caught me before I hit the ground really hard.

Q. So he caught you from behind?

A. No, in front of me.

Q. So were you falling forward or to the rear?

A. To the rear. Basically, I was almost falling in a straight down position.

Q. And then he grabbed you?

A. He grabbed me up around underneath my shoulders and tried to catch me the best he could.

Q. And so it was at that moment of just kind of falling back. Did you twist your back at all?

A. The motions of this whole event, something twisted and pulled in my back,

and I started feeling it through shooting pain.

Q. Did you feel pain immediately?

A. Within minutes.

Q. Did you say something to Matt about it?

A. Matt walked away and I don't know where he was in the warehouse at the time, but my other supervisor was in the direct vicinity of where I was. So I approached him and I believe he approached Matt. Matt filled out emails, and admitted and acknowledged the whole situation.

Q. Who was the other supervisor?

A. Trent Albertson.

Q. Is Matt kind of a jokester? Is this something that he does to people?

A. I can only assume so. I don't know specifically really because I don't have a very strong or long relationship with Matt. I hadn't known him very long.

Q. I just wondered did anyone else say anything about, oh, Matt does this all the time. Or did anyone make a comment like that?

A. Oh, I've heard several comments that Matt horseplays all the time in the work area and work zone. And at that time during that week one of our safety meetings was about horseplay in the work zone, which Matt put on.

Claimant Dep., Ex. 9:287 (41:21-44:25).²

24. Surety accepted Claimant's claim and, pending correspondence with Claimant's counsel, began paying medical and time loss benefits. *See. e.g.,* Ex. E:1-2.

25. Claimant went on light duty in Employer's workplace. *See.* Ex. E.

26. **Medical Care Following Industrial Accident.** Claimant initially sought medical treatment at Community Care. *See,* Ex. K:1-5. From Community Care, Claimant was referred to Mountain View Hospital Occupational Health Solutions. *Id.* at 6. At Mountain View, he was

² Neither Matt Knudson nor Trent Albertson testified about the incident either in deposition or at hearing. Claimant's account of the episode remains the only evidence of it in the record.

authorized by Surety to see Dr. Manjunath of Bingham Memorial Hospital to “address causation,” which was completed. *Id.* at 7. On August 26, 2019, Dr. Manjunath limited Claimant to no reaching below waist, no twist or bend, no continuous walking, and no carrying, pushing or pulling weight in excess of 11-25 pounds. *Id.* at 12.

27. On September 9, 2019, that clinic provided Claimant with a return to work note that specified no lifting more than 15 pounds, and no prolonged sitting, standing, or walking, with the observation that Claimant was “able to work as tolerated.” *Id.* An MRI was authorized. *Id.* at 9.

28. On September 27, 2019, the diagnosis was “lumbar strain = radiculopathy” and Claimant was prescribed Tramadol for pain. Similar work restrictions were stated. *Id.* at 13.

29. The MRI, dated August 18, 2019, revealed a small posterior midline disc extrusion at L4-5. At L5-S1, there was evidence of a “dorsal fusion without evidence of complication.” There was no impingement on the spinal canal. *Id.* at 15. Claimant continued to treat with Occupational Health Solutions until November 1, 2019. *Id.* at 19.

30. Dr. Manjunath’s records from Bingham Memorial Hospital are contained in Exhibit L and illustrate the care that Claimant received for pain control. On September 3, 2019, Dr. Manjunath noted as follows: “Patient presents for follow-up due to an acute flareup of low back pain radiating to bilateral L4 and L5 dermatomes following an accidental injury last week at work.” Ex. L:1. Claimant’s pain level was rated at 7/10, shooting, intermittent, relieved by opioids and worsened by prolonged sitting. *Id.* Dr. Manjunath further noted in pertinent part as follows:

Based on clinical history, physical exam and imaging findings patient has pain secondary to following diagnoses:

Lumbar post laminectomy syndrome...

Patient presents for follow-up acute flareup of bilateral lower extremity radicular pain following an accidental injury at work last week. I will order an MRI lumbar spine to rule out worsening spinal stenosis and follow-up after the MRI. [Emphasis added.]

Ex. L:2.

31. On September 11, 2019, Dr. Manjunath wrote a “To Whom It May Concern” letter to the attention of Surety. It read as follows:

Mr. Frank Miller... worsened radicular pain... due to an injury at work on 8/25/2019. In my Opinion, this injury aggravated his previous back injury on a more probable than not basis. I have ordered an MRI to assess any changes to his spine related to his injury.

I expect this aggravation to be temporary but may last up to 12 weeks. I have instructed Mr. Miller to avoid bending, twisting and lifting heavy weights more than 15 pounds until he is fully recovered. I anticipated maximum medical improvement in approximately 3 months’ time.

Id. at 8.

32. On September 18, 2019, the results of the MRI were delivered. It described “MR imaging of the lumbar spine.” The findings of the MRI were as follows:

The lumbar spinal canal and foramina developmentally normal in size. Mild lower lumbar hyper lordosis. There is an artifact from the Intrathecal nerve stimulator wires. They enter the spinal canal at L1-2 extending superiorly. Due to this the conus medullaris is not well seen. The discs from T11 through L4 normal in appearance. Is no impingement of the spinal canal at these levels. There is no significant impingement in the intervertebral foramina at these levels either.

At L4-5 there is a mild disc bulging with a small posterior disc extrusion measuring 15 mm in width. 13 mm in craniocaudal dimension and 4-5 mm in maximal thickness. There are early facet degenerative changes. There is mild narrowing of the thecal sac and foramina.

At L5-S1 a dorsal fusion is present with paired pedicle metal rods. A laminectomy is present. [There] is no impingement on the thecal sac. There is mild residual foraminal narrowing.

Ex. L:9. The opinion of the radiologist was as follows:

1. Neurostimulator wires enter the spinal canal at L1-2 with a small amount of adjacent ferromagnetic artifact but due to this the lower cord and conus medullaris cannot be visualized. No abnormalities are seen between T11 and L4 otherwise.

2. At L4-5 there is a small posterior midline disc extrusion measuring up to 4-6 mm in thickness mildly narrowing the thecal sac.

3. At L5-S1 there is dorsal fusion without evidence of complication. There is no impingement on the spinal canal and mild narrowing of the foramina.

Ferromagnetic artifact is present.

Id. at 9-10.

33. On September 24, 2019, Claimant presented to Dr. Manjunath for follow-up and MRI review. Claimant complained of “ongoing low back pain radiating to bilateral L4 and L5 dermatomes following an accidental injury at work.” *Id.* at 4. Dr. Manjunath noted that a previous spinal cord stimulator implantation had been “unhelpful” to Claimant’s pain. Claimant found opiates to be helpful. *Id.* Dr. Manjunath noted further that Claimant’s “[r]ecent MRI lumbar spine findings remain unchanged compared to his previous MRI back in 2016. I will refer him for physical therapy with the goal to improve functioning/core strengthening. Follow-up after physical therapy. He declines spine surgery consultation.” *Id.* at 5. [Emphasis added.] Claimant received information concerning the benefits of smoking cessation. *Id.* at 6.

34. On October 22, 2019, Claimant followed up with Dr. Manjunath; he “complained of debilitating left-sided low back pain above the level of previous spinal fusion surgery along with repetitive radiation of pain down the left lower extremity.” Dr. Manjunath’s diagnosis was still lumbar post laminectomy syndrome. He referred Claimant to Dr. Huneycutt for consideration of surgical options. Ex. L:11-12.

35. Claimant received an initial physical therapy evaluation at Rehab Authority on October 2, 2019. The subjective summary was as follows:

Frank Miller is a 49 year old male who presents to therapy today. Frank reports *a long history of spine issues starting in 1998*. He states that he had 4 prior surgeries with eventual fusion. He has continued to work over the years and reports he has tried numerous options to control his pain including injections, an indwelling spinal cord stimulator, and numerous medications. He states the second spinal cord stimulator made a significant difference in his pain and then he started going to the gym faithfully and was able to build up a significant exercise program. He lost 20 lbs and his back pain was significantly improved. He was able to return to fishing and walking for recreation.

He recently started working a new job and had an incident where *he was tripped at*

*work landing on his back*³ and since that time he has had a return of significant back pain and LE symptoms in both legs. He also reports severe groin pain, toes burning and falling asleep and bilateral burning in the anterior thighs.

Since this incident he has tried different settings on his stimulator with no success although they are continuing to try new settings. His doctor did mention another injection but he does not want to do that unless he has to. He really wants to try PT first to see if we can get his symptoms calmed down and possibly get back to his gym program. [Emphasis added.]

Ex. M:1.

36. The assessment of the physical therapist was in pertinent part as follows:

We are seeing Frank for a significant flare up of back pain. He had done well for quite some time but was tripped at work leading to a severe flare up of symptoms. He reports that he is still trying to work light duty but in that role he is doing lots of sitting, which is bothering his back as well. He is very willing to try any activity we ask but he was very limited in what he could perform yesterday. I gave him a basic home program to try to start getting some movement in his system and also gave him some gentle glides for the LE's...

The patient's rehab potential is poor.

Id at 2-3.

37. Claimant underwent five more sessions of PT. His symptoms did not improve but rather worsened over time. At the last visit on October 18, 2019, Claimant reported that he had "been having increased thigh symptoms describing it as feeling like a lightening bolt." He stated not having any improvement of symptoms with worsening symptoms as of the date of the visit.

38. Claimant presented to Dr. W. Scott Huneycutt, M.D., for a surgery consultation on January 23, 2020. Dr. Huneycutt noted Claimant's previous lumbar surgery from which "the patient reports he did remarkably well. More recently, the patient experienced a second⁴[???] and distinct injury at work in or around August 2019, which resulted in intense mechanical low back pain with left lower extremity radiation of weakness, pain and numbness." Dr. Honeycutt further

³ This conflicts with other evidence in the record that Claimant did not fall to the floor during the incident of August 25, 2019. Claimant did not fall to the floor but was caught by Matt Knudson.

⁴ Dr. Honeycutt was apparently unaware that Claimant had several previous injuries to his lower back.

noted that Claimant had had a spinal cord stimulator implanted. He observed that Claimant's "second injury was apparently following his spinal cord stimulator placement and the patient reports he is debilitated with pain currently." Ex. N:1.

39. Claimant brought his recent MRI study with him to the appointment. According to Dr. Huneycutt, it showed "adjacent segment failure at L4-L5 with desiccation collapse and disk extrusion at this adjacent segment." His impression was "failure of the construct versus adjacent segment failure versus both." Dr. Huneycutt recommended further evaluation and studies, including a lumbar CT scan and a left lower extremity nerve conduction study. *Id.* at 2.

40. Claimant returned to Dr. Huneycutt on April 23, 2020 to review the results of his studies. He reported that he remained "markedly symptomatic with intense intractable low back pain and agonizing painful left lower extremity radiation..." Dr. Huneycutt's impression was that of adjacent segment failure with disc herniation and associated radiculopathy in a patient with a previous lumbar fusion. He discussed treatment options with Claimant, who chose surgical intervention in the form of an L4, L5, S1 redo-lumbar decompression with instrumental stabilization. Claimant was taken off work. Ex. N:4-8.

41. There are no further records of Dr. Huneycutt's care of Claimant. Claimant did not follow through on the planned surgery for financial reasons; he was no longer covered by work insurance and Surety denied the surgery.

42. **Independent Medical Examinations.** Neurosurgeon Michael V. Hajar, M.D., performed an IME of Claimant with respect to his July 14, 2016 work injury, at the request of the surety in that claim. Dr. Hajar's credentials are known to the Commission.

43. Dr. Hajar summarized Claimant's diagnosis as follows:

Mr. Miller is a 46-year-old gentleman with a history of previous lumbar surgery done about 20 years ago. He has done very well from surgery and medically stable

since that time. The claimant had a reported injury on July 14, 2016, but his first date of medical contact was not until three months later. Based on the radiographic studies, there is no new injury that has been present in Mr. Miller's condition including any type of disc injury. There is no signature degenerative change, fracture, or any other problem. Therefore, the claimant at worst has a simple transient lumbar strain that occurred on July 14, 2016, in the setting of previous lumbar decompression and full revision at L5-S1 and very subtle minimal degenerative lumbar spondylosis and stenosis at the L4-5 level.

Ex. 7:261.

44. Dr. Hajar opined as follows: "I do not believe the claimant has any permanent impairment as a result of the July 14, 2016 work injury. He had a simple lumbar strain and therefore his impairment is simply 0% of the whole person." Dr. Hajar further opined that treatment with a spinal cord stimulator was contraindicated. Claimant had reached MMI at the conclusion of his physical therapy, with respect to the injury with no residuals and no permanent impairment. Ex. 7:264.

45. At Surety's request, Dr. Lynn J. Stromberg, M.D., performed an IME dated September 20, 2020 for the subject injury. His credentials are known to the Commission. He noted as follows:

Mr. Miller gives a history of previous lumbar problems, having injured himself working for a moving company in 1998 and subsequently having a lumbar fusion procedure. He aggravated the lumbar condition in 2016 while moving an iron plate. He subsequently had a dorsal column stimulator placed in 2017. He reports he had lots of fiddling and adjustments with the device, overall had a somewhat neutral experience with the device. He is not using it currently. More recently, on 08/25/2019, Mr. Miller sustained an injury at work when another person kicked his foot out from under him and he fell. After a few minutes, he noted that he had low back pain and discomfort extending into the front and back of both legs, left greater than right. The next day, he was in a significant amount of pain. He went to Community Care and was prescribed some Norco, which he didn't really care to take. Eventually, he was sent to physical therapy, which he says was a miserable experience. He was referred to Dr. Manjunath, with whom he had worked previously, who indicated that he may have just had a flare of his lumbar condition. Eventually, he was referred to Dr. Honeycutt for evaluation and he was told that he had a new injury above his old fusion and a fusion surgery was suggested. Dr. Honeycutt inquired as to whether he would like to have the stimulator removed and

Mr. Miller opined that he would maybe just leave it in in case was useful at some time in the future.

He now complains of low back pain broadly in his lumbar region, left side more than the right. He has discomfort in the left posterior buttock and lateral thigh and in the front of the thighs bilaterally. Both legs have burning, tingling, and numbness. He feet go numb intermittently. He also has some burning sensation and occasionally his feet feel like ice cubes. His companion pointed out that his left leg was getting smaller since the injury.

I inquired as to his current work activities. He indicated that he was taken off work by Dr. Manjunath.

Ex. 8:267.⁵

46. Dr. Stromberg's impression was as follows:

Mr. Miller had a lumbar fusion procedure in 1986. He subsequently had progression degenerative disease of the L4-5 facets, which now is fairly severe. He is developing lateral instability developing at this segment. About four years ago, he had a dorsal column stimulator placed for continuing lumbar symptoms but had less than full success with the device and is currently not using it. He was involved in a work incident involving a minor fall over a year ago. *The complaints do not fit normal anatomic distributions very well.* Nerve conduction/EMG studies reveal chronic S1 radiculopathy, which is manifest in the loss of muscle mass in the left calf. The nerve conduction/EMG studies would indicate that this is purely an S1 phenomenon. This segment has been fused for over 20 years. [Emphasis added.]

Ex. 8:272.

47. In an addendum dated October 26, 2020, Dr. Stromberg observed in pertinent part as follows: "There is no objective evidence of injury sustained from the work incident of 08/25/2019. The discomfort extending into the front and back of both legs does not correlate with his findings on examination or MRI scan or nerve conduction studies." *Id.* at 273.

48. Dr. Stromberg assigned a 12% whole person impairment rating to the medical condition resulting from Claimant's 1998 lower back injury. *Id.* at 273. Dr. Stromberg noted in pertinent part as follows:

⁵ Nearly the entirety of Dr. Stromberg's IME introduction is quoted above for its excellence in summarizing both pre and post injuries and medical care.

Mr. Miller has reached Maximum Medical Improvement with regards to the work incident of 08/25/2019. Based on the American Medical Association's Guides to the Evaluation of Permanent Impairment, 6th Edition, Table 17-4, Mr. Miller has a Class II impairment of the lumbar spine, noting that he has some S1 radiculopathy and a fused segment. This would have a default rating of 12% WPI.

It seems apparent that the claimant's previous lumbar condition, which resulted in the fusion of the L5-S1 segment, was a Workmen's Compensation claim; however, I have no documentation of this, nor do I have an impairment rating. Given that he had a fused segment and residual radiculopathy at S1 from this original incident, this would result in the aforementioned 12% WPI rating. (I do not know which book or system was used to do an impairment rating or if one was done.)

Currently, the claimant has the same impairment rating. There has been no structural change relative to the cited work injury of 08/25/2019. The entire impairment is related to the condition of the lumbar spine that preexisted the 8/25/19 injury report. [Emphasis added.]

Ex. 8:273.

49. At Claimant's request, Dr. Benjamin Blair, M.D., performed an IME of Claimant on March 31, 2021. Ex. O:1. Dr. Blair's credentials are known to the Commission.

50. Dr. Blair noted Claimant's previous injuries and symptoms in the lumbar spine. "He underwent multiple lumbar decompressive surgeries and eventually underwent a lumbar instrumented fusion by Dr. Greenwald in Idaho Falls." Noting that Claimant did well post-operatively, he was functioning at a "very high level" until his July 2016 lifting injury at H&K. This is when Claimant developed severe left lower extremity radiculopathy. After undergoing multiple injections with minimal relief, Claimant eventually underwent implantation of a spinal cord stimulator, which eventually, through trial and error, brought him significant relief. Again, Claimant reported functioning at a high level once the stimulator was adjusted properly. Ex. O:7.

51. In Dr. Blair's opinion, Claimant's "diagnosis relating to the 08/25/19 work-related injury is that of a permanent aggravation of a preexisting symptomatic degenerative spondylosis at the L4-L5 level." *Id.* at 9.

52. Dr. Blair further opined in pertinent part as follows: “In my opinion, *I believe the 08/25/19 work-related injury directly caused the permanent aggravation as described above...* “[A]lthough Mr. Miller certainly had significant preexisting problems in the lumbar spine, ... Mr. Miller was functioning at a very high level prior to the 2016 injury. In addition, after extensive treatment, including a spinal cord stimulator placement, Mr. Miller was, again, functioning at a high level with relatively little lower extremity radicular type symptomology, until the 08/25/19 work-related injury.” Ex. O:10. [Emphasis added.]

53. For permanent impairment, Dr. Blair opined as follows:

Mr. Miller does have a permanent physical impairment due to the 08/25/19 work-related injury. According to the *AMA Guides to Evaluation of Permanent Impairment, 6th Edition*. I believe falls under the Lumbar Spine Regional Grid, Category, Class 2 – with “Lumbar stenosis at a single level... and may have documented signs of radiculopathy at the clinically appropriate level,” for a 12% default rating. Utilizing the Net Adjustment formula; Functional History Adjustment Spine – PDQ score of 131, Grade Modifier 4, Physical Examination Adjustment: Spine with significant atrophy of the lower extremity – Grade Modified 4. Clinical Studies Adjustment Spine – Grade Modifier 2. *This gives a Net Adjustment of +4 for a final whole person impairment, Class 2, Grade E. of 14%*. Please note, *I believe there is no apportionment to preexisting conditions*. Although Mr. Miller certainly had preexisting conditions prior to the 2019 injury, after adjustment of the spinal cord stimulator he was functioning at a very high level and was relatively asymptomatic. I believe had it not been for the 2019 work-related injury, he would not have sustained the permanent aggravation of his degenerative spondylosis at the L4-5 level. The above impairment is directly related to this aggravation and, therefore, again, I believe there is no apportionment to preexisting conditions. [Emphasis added.]

Id. at 11.

54. For permanent physical restrictions due to the 08/25/19 work related injury, Dr. Blair opined as follows:

I believe Mr. Miller also has *significant physical restrictions due to the 08/25/19 work-related injury*. Again, although Mr. Miller was symptomatic, his symptoms improved to the point that he sought meaningful work-related activity at Yellowstone Plastics directly prior to the 08/25/19 injury. By Mr. Miller’s relayed history, he has been unable to work since that time due to the severity of his

symptoms. I believe Mr. Miller's physical restrictions are directly due to the 08/25/19 work-related injury and include no lifting greater than 10 pounds on an occasional basis and 5 pounds on a frequent basis. No repetitive bending, twisting, squatting, or kneeling. No standing or walking greater than 30 minutes without a change in position... Had it not been for the 08/25/19 injury, I do not believe Mr. Miller would necessitate the above restrictions. [Emphasis added.]

Ex. O:11-12.

55. Dr. Blair opined that Claimant's prognosis was "poor." Claimant remained "remarkably symptomatic" for over 1&1/2 years following his 2019 injury. Extensive nonoperative treatment had yielded little, if any, relief. On a more probable than not basis, Dr. Blair opined that Claimant's symptoms would continue in the foreseeable future, without surgical intervention. *Id.* at 10.

56. Dr. Blair opined that surgery recommended by Dr. Huneycutt on 4/23/20 in the form of a lumbar fusion at the L4-5 level was reasonable for Claimant and was medically necessary to improve Claimant's quality of life. The most recent injury on 08/25/19 had not resolved despite conservative therapy. Because of Dr. Huneycutt's surgical recommendation, Dr. Blair opined that if Claimant underwent the surgery, he would apportion 75% of the need for the surgery to the 08/25/19 injury and 25% to preexisting conditions. *Id.* at 10-11.

57. **Medical Depositions.** Defendants took the deposition of Dr. Stromberg on February 9, 2023. Stromberg Dep., 1:14-15.

58. Dr. Stromberg was an orthopedic spine surgeon self-employed under his own practice known as Western Spine in Idaho Falls, Idaho. *Id.* at 5:7-12.

59. Dr. Stromberg's "consulting practice" (i.e., IMEs and similar consulting) was limited to 10% of his practice. Otherwise, 90% of his practice was devoted to treating patients with orthopedic spine issues. *Id.* at 8:9-20.

60. To prepare his IME report, Dr. Stromberg reviewed relevant medical records, including X-ray films and MRIs. Sometimes he reviewed the records before the physical examination and sometimes after. He did not indicate which in this report. Stromberg. Dep. 10:3-12:18.

61. Dr. Stromberg's most significant impression about Claimant's pre-industrial injury history was as follows: "I noted that per history he had had a lumbar disc injury. He had a recurrence of herniation and, anyway, ended up in a third surgery which resulted in the fusion of L5-S1, and he had a residual S1 deficit." *Id.* at 12:21-25. Beyond that, Dr. Stromberg noted that Claimant had continued discomfort that was not controlled, thus the spinal cord stimulator was implanted. "And then eventually the incident in question occurred, and he had recommendations for a surgery. And I think there was a debate as to whether or not remove the stimulator." *Id.* at 13:1-7.

62. The three back surgeries and the implantation of the spinal cord stimulator all predated the industrial injury in 2019, which Dr. Stromberg found significant. *Id.* at 13:17-25.

63. Claimant told Dr. Stromberg that he was not currently using the spinal cord stimulator because it required a lot of manipulating and Claimant had a fairly neutral experience of it. Stromberg Dep., 14:1-9.

64. Claimant did not report the July 2016 work injury at H&K Contractors to Dr. Stromberg. *Id.* at 14:20-15:6.

65. Upon physical exam of Claimant, Dr. Stromberg had the following observations:

Q. [By Mr. Gardner]. All right. So let me ask you a little about the examination

itself. Did you examine Mr. Miller in preparing your opinions in your report?

A. [Dr. Stromberg]. Yes.

Q. And that examination occurred on what date?

A. 9-10-20.

Q. And what information did you gain from the examination?

A. Aside of the known permanent S1 radiculopathy on the left side, he appeared to be neurologically intact. He had feelings that were somewhat inconsistent with what he had reported in his symptomology.

Q. Can you explain that?

A. He expressed severe discomfort and on the intake paperwork he rated his pain ... as a nine out of ten. And yet he was able to bend over, touch his toes, extend. He was able to climb into his vehicle without difficulty. So I found that discordant.

Also on a diagram he had indicated he had, quote, all of the above on the area that he circled, which means, you know, pain, numbness, pins and needles, tingling, you know, all of the things that were in the key. On the examination he said he had paresthesia generally in his feet, which weren't objectively verified by EMGs.

And so I found some of these things inconsistent.

Stromberg Dep., 15:14-16:19.

66. Claimant's straight leg test was negative also, which indicated that the nerve was not being impinged. *Id.* at 17:1-13. On other physical examination tests, Claimant reported back pain when he should not have, which was inconsistent. *Id.* at 17:14-18:5.

67. Claimant manifested physically S1 radiculopathy as previously documented in his pre-industrial accident medical history. He also had some left calf atrophy, which was also documented in pre-accident history. *Id.* at 18:6-20.

68. Dr. Stromberg's opinion as to whether Claimant had sustained an injury in the industrial accident was as follows:

Q. [By Mr. Gardner.] Okay. Alright. So, Dr. Stromberg, based upon your education and experience and training as an orthopedic surgeon, along with your

review of the medical records and examination, did you form an opinion regarding whether Mr. Miller sustained any injury relative to the August 25, 2019 accident?

A. [Dr. Stromberg.] Yes.

Q. And what is that opinion?

A. My opinion is that his subjective complaints were excessive relative to the objective findings, and I couldn't find objective findings that an injury had occurred.

A. But if he suffered a, you know, a standing height fall to ground, one would say that it is reasonable to expect that there could be a contusion or strain of something. But there's not objective evidence that there was physical harm.

Stromberg Dep., 19:21-20:7; 20:17-21.

69. Dr. Stromberg did not see a mechanism of injury from Claimant's report of falling and being caught that would cause permanent injury. *Id.* at 20:4-8.

70. Dr. Stromberg agreed with the proposition that Dr. Manjunath's finding that there was no change between Claimant's 2016 MRI and his 2019 MRI supported Dr. Stromberg's opinion that there was no evidence of acute injury from the industrial accident. *Id.* at 22:5-22.

71. As to Dr. Blair's opinion on the MRIs, Dr. Stromberg testified as follows:

Q: [By Mr. Gardner.] And if Dr. Blair testified that there was essentially no change between the 2016 MRI and the 2019 MRI, would you agree with that?

A. [Dr. Stromberg.] I looked at those films, I would say that there may have been some progression of degenerative change. Outside of that I don't see any evidence of acute injury.

Id. at 21:22-22:4.

72. As to whether any permanent impairment was incurred as a result of the industrial accident, Dr. Stromberg stated as follows: "Lacking evidence of injury, there is no assignable impairment." Stromberg Dep., 21:16-22.

73. Dr. Stromberg opined that Claimant did not require any further treatment as a result of the industrial accident. *Id.* at 22:23-23:4.

74. Counsel for Claimant and Dr. Stromberg had the following relevant exchange:

Q. [By Mr. Meikle.] Okay. And what if at the hearing my client described – Mr. Miller described when he turned, his back was twisting. Would that change your opinion about whether you could expect an injury to the back with a twisting back as a person is falling?

A. [Dr. Stromberg.] It doesn't change my review of the objective data nor does it change my assessment of his credibility.

Q. Okay. So are you saying that objective testing always reveals a person's injury?

A. If the right test is done, usually it will.

Stromberg Dep., 29:2-10; 29:20-30:9.

75. Dr. Stromberg stated that he would not recommend further treatment for Claimant because his “degenerative disease is chronic and progressive. He has not developed any instability, and therefore does not need stabilization. The stenosis that he has is minor. There's no EMG evidence that it's affecting the nerves. And so I wouldn't recommend any intervention at this time.” *Id.* at 32:19-25.

76. Claimant took the deposition of Dr. Blair on December 14, 2022. Blair Dep., 2:1-5.

77. Dr. Blair practiced orthopedic spinal surgery medicine in Pocatello, Idaho. *Id.* at 5:24. He performed approximately 600 such surgeries per year. *Id.* at 15-16.

78. Dr. Blair performed a physical examination of Claimant on the same day, March 21, 2021, as he reviewed his MRIs and CAT scans. Blair Dep., 7:11-8:8.

79. Dr. Blair acknowledged that in his report he mistakenly identified Claimant's original 1998 injury as “2019.” He corrected this on the exhibit. *Id.* at 9:17-25.

80. Dr. Blair made the following observations about Claimant's appearance and symptoms: "That the main one – *the exam is basically benign. He was walking in pain.* He had his wound that had healed from his previous spine surgery, and he had some shrinking of muscles on his left leg." [Emphasis added.] Blair Dep., 10:17-20.

81. Dr. Blair opined that Claimant's "problem – his symptoms were coming from the L4-5 level and so that – that's the area that I *assume is the area of injury* because I don't see any other problems and that is consistent with his symptoms..." [Emphasis added.] Blair Dep., 12:8-12.

82. Dr. Blair admitted that Claimant "had an MRI in 2016 that show pretty much the same as the 2019[???]. The 2019 showed progression, but he had had surgery at the L5-S1 that looked good, and he had degenerative changes at L4-5 directly above." [Emphasis added.] *Id.* at 12:20-24.

83. The following exchange occurred:

[By Mr. Meickle]: So as the present injury of August 25, 2019, what did you see in the MRIs and the scans and the rest of the radiographic studies in regard to that particular injury?

A. I think I see the cause of his symptoms, the level that his symptoms are happening at L4-5. *I don't see anything particular that I can point to that says that is directly from the injury of 8/2019.* Because I think a lot of that pre-existed the injury as far as the x-ray findings are concerned. I think, again, the injury aggravated what was already there.

Q. All right. And I see in the studies your discussion on the September 18, 2019, entry about a central disc bulge at L4-L5.

A. Yes.

Q. Is that the same as the secondary disc bulge at L4-5 referred to in December 26, 2016?

A. Yes. I would have to compare them to say if it was worse, but, yes, that's the same.

Id. at 13:5-23 [Emphasis added.]

84. Counsel asked Dr. Blair to describe Claimant's current physical injuries, as follows:

[By Mr. Meikle]: And at the time you examined him and reviewed the records and the studies, what are his [Claimant's] physical injuries?

A. I think a permanent aggravation of those degenerative changes to the point that he's remained in pain from the time of the injury until – I mean, I don't know his current status, but at least through March 31, 2021 [the date of Dr. Blair's examination].

Blair Dep., 17:4-11.

85. The following exchange concerned Dr. Blair's ultimate opinion on Claimant's diagnosis:

[By Mr. Meikle]: Were you able to develop an opinion as to a diagnosis as to the nature of his physical and medical injuries – Mr. Miller's physical and medical injuries?

A. Yes.

Q. And what was that opinion?

A. That he had sustained a permanent aggravation of his pre-existing symptomatic degenerative spondylosis at the L4-5 level due to his 8/25/2019 work injury.

Blair Dep., 18:6-15.

86. Dr. Blair described Claimant's mechanism of injury as follows: "I think it was some sort of practical joke by a co-worker. Someone kicked out a chair behind him." *Id.* at 18:22-24.⁶

87. When asked about the causal relationship between the industrial accident and injury, Dr. Blair responded as follows:

⁶ This is incorrect. The record is clear that Claimant was standing when his supervisor kicked out his leg from behind and caught him.

[By Mr. Meikle]: So was there a causal – did you have an opinion as to whether there was a causal relationship of his injuries regarding his work on August 25, 2019?

A. Yes. No, I think that injury caused the permanent aggravation.

Q. And how would it do that?

A. I think the jarring to his body.

A. I think because he – I mean, he has extensive records with Dr. Manjunath that gives a very good baseline. He had seen Dr. Manjunath pretty much every month and Dr. Manjunath is describing his condition on a daily basis, so he had a very good picture of what his baselines is. It's not meeting someone once or twice. I mean, he's seeing someone for over a year on a monthly basis that describes him doing fairly well functioning with the spinal cord stimulator and the opioids and there is a change – a marked change on that particular day of the injury, as far as his symptoms are concerned.

And pre-2019 injury, Dr. Manjunath is not considering any sort of surgery and post – Dr. Manjunath tries and doesn't succeed in controlling pain and sends him to a surgeon to be evaluated.

Blair Dep., 19:10-16; 20:7-22.

88. Dr. Blair's prognosis of Claimant was as follows:

At the time that I saw him I don't think it was good. He had over a year and a half of nonoperative treatment after his 2019 injury, and he was still in a lot of pain; so at that point without anything further [surgically], yeah, I would say *he had reached MMI from his injury*, and I would think given that, that he probably would continue to have that level of pain.

Id. at 21:8-15.

89. Dr. Blair opined that the surgery proposed by Dr. Honeycutt was reasonable and necessary. *Id.* at 21:22-22:1.

90. Dr. Blair explained his 25%/75% split apportionment on the need for surgical treatment as follows:

He [Claimant] certainly had pre-existing conditions. I mean, apportionment like this is very hard. It's very subjective, but I think – I look at it as what are the chances

that he would end up having this surgery anyway, and I would say at most 25 percent chance down the road that he would end up having this surgery, which means 75 percent chance that he wouldn't. Which now that he needs the surgery, you have to attribute it to something, and I think the injury is what I would attribute it to. So I guess that's where I came up with those numbers, but that's a very subjective sort of thing.

Q. [By Mr. Meikle]: All right. It's your best educated guess?

A. Yes.

Blair Dep., 22:20-23:8.

91. Dr. Blair explained his impairment rating of Claimant as follows:

Q. [By Mr. Meikle]: Now does Mr. Miller have a permanent physical impairment?

A. Yes.

Q. And if so, did you rate his PPI or his permanent physical injury?

A. Yes. 14 percent whole person.

Q. And how did you arrive at that?

A. It was basically based on the diagnosis of lumbar stenosis at the L4_5 level, which was I mean, pretty much the same as Dr. Stromberg had given him, except that I went the next step of doing the grade modifiers, which Dr. Stromberg didn't do, so that it brought it from 12, which is his initial default rating that I have, to 14 percent.

Id. at 23:21-24:9.

92. Dr. Blair explained his lack of apportionment to pre-existing conditions as follows:

"By Mr. Miller's relayed history that he was functioning at a high level without restrictions directly prior." *Id.* at 25:2-4.

93. Dr. Blair found it significant that Claimant's spinal cord stimulator was working for him, at least partially, prior to the industrial accident, but did not function after the accident.

Id. at 25:5-26:4.

94. Dr. Blair did not review the IME report from Dr. Hajar. *Id.* at 28:8-10.

95. Dr. Blair agreed that the disc bulge he observed on the 2019 MRI study was also present in the 2016 study. He did not do any comparison to determine if there was any changes to that bulge between the two studies. *Id.* at 29:19-30:6. He further agreed that Dr. Manjunath found that there were no changes between the 2016 and 2019 MRI studies. Blair Dep., 30:10-16.

96. Dr. Blair agreed that Claimant had an “extensive” prior medical history regarding his lumbar spine. *Id.* at 30:22-25. Dr. Blair was aware that Claimant was still taking opioid pain medications while working for Employer. *Id.* at 32:16-22. He further agreed that Claimant had visits with Dr. Manjunath in April, May and June of 2019 to refill his pain medication prescriptions, immediately prior to going to work for Employer. *Id.* at 33:5-9. While seeing Dr. Manjunath, Claimant continued to complain of chronic left lower extremity pain, up to and immediately prior to the industrial accident; Dr. Blair agreed. Blair Dep., 33:16-18.

97. Dr. Blair believed that Claimant fell to the floor during the industrial accident. “I think that’s what I pictured. That’s what I’m picturing now. I’m not sure at the time what he described.” *Id.* at 33:20-25.⁷

98. Dr. Blair assumed that Claimant was working at a “very high level at a very physical job” at Employer because that is what Claimant reported to him. *Id.* at 34:14-19. He did not confirm this information with Employer, nor did he review any job survey or job description of Claimant’s position at Employer. *Id.* at 34:16-35:7.

99. **Post-Accident Work Activities & Claimant’s Condition.** When Claimant returned to work after the accident, Employer had him perform light duties such as checking the tags on fire extinguishers to see if they were expired, photocopying, inspecting the printing plates, checking that chemicals were safely stored in cabinets, and performing similar tasks of a light

⁷ Claimant did not fall to the floor. Matt Knudson grabbed him before he could fall to the floor.

nature. Claimant also completed various trainings during this period. Claimant filled out a daily work log form required by Employer that described his work activities for each day, contained in Exhibit E. The logs extend from August 30, 2019 to April 23, 2020. *Id.* at 3-11; 26-48. The forms asked Claimant to state whether he had been asked to work outside his restrictions, to which he uniformly said “no.” The forms also document many days when Claimant was in pain and/or called in sick to work because of pain or went to a doctor’s appointment. *Id.* at 3-11; Tr., 55:4-5. Claimant felt that his pain was worsening and extending further into his arms and legs and feet during this period of time. Tr., 66:7-12.

100. April 23, 2020 is the last day that Claimant worked for Employer. Tr., 64:21-22. Claimant had received a “no work” order pending surgery from Dr. Huneycutt, which he gave to Employer. *Id.* at 68:2-12.

101. Employer stopped paying Claimant wages after his last day at work. Claimant stated that he had a lot of trouble in obtaining time loss benefits thereafter from Surety. He did not work elsewhere because he was in too much pain and Dr. Huneycutt had released him from work pending surgery. Surety did not approve the surgery. *Id.* at 72:4-17.

102. Claimant felt that he was unable to perform any of the previous jobs he had before Employer because the strength requirements were beyond his capabilities and were “very physically demanding.” *Id.* at 73:1-8.

103. Claimant’s partner Kristy Miskin helped Claimant with tasks he could no longer do at home, such as mowing the lawn or performing other yard work. Claimant could still attend to his own personal hygiene. “But as far as any of the cleaning and yard work and shoveling snow, those duties have all been passed to Kristy.” *Id.* at 80:20-81:11. All of the physical work in Claimant’s home was done by Ms. Miskin. *Id.* at 81:12-14.

104. **Unemployment; SSD.** Claimant did not work for any other employer following his employment with Employer, nor did he attempt to become employed. He did not apply for unemployment insurance benefits. As of the date of the hearing, he was receiving Social Security Disability benefits in the monthly amount of \$1,403.00. Claimant applied for SSD prior to his employment with Employer. He filed that application at the suggestion of the disability carrier for H&K. No Social Security records were offered into evidence. *Id.* at 86:5-88:10. Nevertheless, the record reflects that Claimant applied for SSD on July 30, 2018, a year before he became employed with Employer. *Id.* at 114:4-9. Claimant received a favorable decision from SSA awarding him SSD benefits on September 18, 2020. *Id.* at 115:2-8.

105. **Kristy Miskin's Testimony.** Claimant's partner, Kristy Miskin, also testified at hearing. *Id.* at 124:18-20. She was Claimant's companion and helped him. They began living together in June 2019, having been acquainted for 30 years beforehand and started dating after that. *Id.* at 125:4-14. Having resided with Claimant a few months beforehand, Ms. Miskin was living with Claimant at the time he had the accident at Employer. Tr., 125:22-24.

106. Ms. Miskin stated that prior to the industrial accident, she and Claimant split all household chores, including cooking, cleaning, maintaining the yard, and shopping. They also engaged in outdoor pursuits, such as camping and hiking. After the accident, she noted that Claimant became incapable of participating in those activities, which required her to take up the slack on household chores and foreclosed outdoor activities. She also noted that Claimant developed major sleep problems after the accident. *Id.* at 126:5-128:7.

107. **Claimant's Condition at Hearing.** Claimant stated that he had "extreme amounts of pain. I'm always in pain. It never lets up. I'm trying to find a position that's comfortable. If I'm lucky, it only lasts a few moments." *Id.* at 48:7-10.

108. Claimant added as follows:

When I'm sitting, I get incredible amount of burning in the top parts of my thighs right here [indicating] that is unbearable. I get shooting pain down my legs into my feet. My feet bother me. I have some pain in my back.

When I'm standing up to try to get some relief from the burning, I get the shooting pains down my legs. My feet feel like they are swelling up too big to be in my shoes and uncomfortable. And I have the radiating pain in my back. I can't stand for very long periods of time at all.

When I sit, I'm constantly moving, fidgeting, standing up for a minute to get relief from the burning. It just goes back and forth all day.

Id. at 48:11-25.

109. Claimant complained of poor sleep due to intractable pain. *Id.* at 49:1-24.

110. Claimant agreed that he had "chronic pain;" a burning sensation in his upper legs down into his feet; sitting was preferable to standing but not comfortable nonetheless; and occasional numbness and tingling in his upper extremities. Tr., 107:20-109:12.

111. Claimant had not gotten the surgery recommended by Dr. Honeycutt as of the date of the hearing. The purpose of the surgery was to decrease his pain radiating down his legs and increase his ability to sit and stand. *Id.* at 113:7-19.

112. Claimant appeared disabled in the hearing room. He walked with an antalgic gait. He required frequent change of positions. He further required frequent breaks.

113. **Credibility.** Claimant and Ms. Miskin both generally testified credibly at hearing.

FURTHER FINDINGS AND DISCUSSION

114. 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).

115. **Causation/Accident/Injury.** 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).

116. 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).

117. 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).

118. In *Konvalinka v. Bonneville County*, 140 Idaho 477, 95 P3d 628 (2004), the Idaho Supreme Court held in pertinent part as follows: “The definition of ‘injury’ is further restricted by Idaho Code § 72-102(17)(c), which states that the term ‘shall be construed to include *only an injury caused by an accident, which results in violence to the physical structure of the body.*’” *Id.*, 140 Idaho at 479, 95 P3d at 630 [Emphasis added.] *See also, Hutton v. Manpower, Inc.*, 143 Idaho 573, 575, 149 P3d 848, 850 (2006) (“In fact, the Court has previously held that an accident occurs if ‘the strain of the claimant’s ordinary and usual work resulted in violence to the physical structure of the body.’” [Citations omitted.] The *Konvalinka* Court further held that “[t]o establish that a mishap or event occurred, an injured worker must do more than show an onset of pain while at work.” 140 Idaho at 479, 95 P3d at 630.

119. In *Konvalinka*, a court reporter’s repetitive motions, during long hours of work, which aggravated her pre-existing arthritic condition, did not constitute an accident and injury within the meaning of workers’ compensation law. *Id.*, 140 Idaho 477, 95 P3d 628.

120. Here, Claimant argues that he suffered an accident and injury when his supervisor tripped him and he fell but was caught before he fell to the floor. Claimant felt something “twist” in his lower back. There is no dispute about these facts. Nevertheless, the objective medical evidence in the record does not support, as it did not in *Konvalinka*, that this incident led to violence being done to the physical structure of Claimant’s body, as the following analysis demonstrates.

121. Claimant had an MRI in 2016 after his accident at H&K which established a baseline, that showed that he already had significant degenerative changes at L4-5 constituting next segment failure, as it was immediately adjacent to where he had the fusion done from the 1998 accident. The 2019 MRI, done following the industrial accident, showed no objective or identifiable changes from the 2016 MRI, other than perhaps mild degenerative changes between the two MRIs. There is thus insufficient evidence that the 2019 industrial accident added any significant violence to the structure of Claimant's lower lumbar spine that was not already preexisting.⁸

122. The objective medical evidence supports Dr. Stromberg's opinion that no distinct, new injury occurred, over Dr. Blair's opinion that the accident resulted in a permanent aggravation of the preexisting conditions in Claimant's lumbar spine. Both IME doctors and Claimant's treating physician, Dr. Manjunath, all agreed that there were no appreciable differences between the 2016 and 2019 MRIs.

123. The best that Dr. Blair could offer was that Claimant's spinal cord stimulator was working for him, at least partially, prior to the industrial accident, but did not function after the accident. This is belied by the fact that Claimant had problems with the spinal cord stimulator all along, requiring constant changes in its settings.

124. Relying solely upon Claimant's subjective history, Dr. Blair opined that Claimant was functioning at a "very high level" immediately prior to the industrial accident, but immediately descended into unrelenting pain and left leg sciatica after the accident. Nevertheless, temporality

⁸ Claimant argued that Dr. Honeycutt found evidence of a "new herniated disk (sic) at L4-5 above his previous surgical area, *see*, Claimant's Opening Brief at 17, however this was belied by the evidence of the fact that the 2016 and 2019 MRIs essentially had the same findings.

alone, without objective medical evidence supporting it, is insufficient to demonstrate that an injury occurred from an accident. *Swain*, IIC 2005-528388.

125. Furthermore, while Dr. Blair was correct that Claimant was functioning in that he sought and performed the job at Employer prior to the industrial accident, the record does not support a corollary finding that Claimant had no consequences whatsoever from his previous conditions. Rather, the record shows that Claimant sought and obtained opioid medication in the three months prior to becoming employed with Employer, he applied for SSD one year prior to becoming employed with Employer based upon his preexisting conditions, and in 2000 Dr. Greenwald assigned Claimant a 50-pound lifting restriction and a restriction consisting of minimal flexion/extension as a result of the 1998 accident.

126. In sum, it appears that Dr. Blair did not have the full picture of Claimant's actual condition prior to the industrial accident, thus his temporal causality thesis is drawn into serious doubt.

127. Dr. Blair admitted in his deposition in pertinent part as follows: "I think I see the cause of his symptoms, the level that his symptoms are happening at L4-5. *I don't see anything particular that I can point to that says that is directly from the injury of 8/2019.*" Blair Dep., 13:9-12 [Emphasis added]. He further admitted that the disc bulge at L4-5 viewed in the 2019 MRI was the same one viewed in the 2016 MRI. This is the same problem at L4-5 that preexisted the industrial accident and constituted adjacent segment failure, not the sequelae of the industrial accident.

128. Furthermore, Dr. Blair got the mechanism of injury wrong, recalling that Claimant had a chair pulled out from under him and fell to the floor, when what actually happened was that he was tripped and started to fall but was caught by Matt Knudson before he fell to the floor.

129. The objective medical evidence in this case supports Dr. Stromberg's opinion that no new injury occurred. It does not support Dr. Blair's opinion otherwise. Without medical evidence supporting that an injury occurred, there is no causal connection between the 2019 industrial accident and Claimant's pain symptomatology, which the Referee has no reason to doubt is real. Nevertheless, the intersection of Claimant's pain and the temporality of the industrial accident is insufficient to prove that an injury occurred.

130. Claimant has failed in his burden of proving that the condition for which compensation is sought is causally related to the industrial accident. *See, e.g., Callantine*, 103 Idaho 734, 653 P.2d 455.

131. **Remaining Issues Moot or Resolved.** Because Claimant has failed in his burden of proving causation, his claim for further medical and disability benefits also fails. The remaining issues are moot and/or resolved. Claimant is not eligible for further medical care as a result of the industrial accident, nor is he entitled to PPI or disability in excess of impairment. Defendants Employer and Surety are not liable for attorney fees as they acted reasonably in relying on Dr. Stromberg's opinion that Claimant's condition was related solely to his preexisting conditions. Furthermore, ISIF is not liable and there is no need to calculate the *Carey* formula.

CONCLUSIONS OF LAW

1. Claimant has failed to sustain his burden of proof on causation.
2. All other issues are moot or resolved, including ISIF liability.

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 31th day of July, 2023.

INDUSTRIAL COMMISSION

John C. Hummel

John C. Hummel, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of July, 2023, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail and via email upon each of the following:

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