BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ERICA DAVIS, Claimant, v. HARBOR FREIGHT TOOLS, Employer, and SAFETY NATIONAL CASUALTY CORP., Surety, Defendants.	**IC 2020-010906** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** FILED NOV 07 2023 INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a bifurcated hearing in Boise, Idaho, on June 13, 2022. Bryan Storer represented Claimant at the hearing. Nathan Gamel represented Defendants. The parties produced oral and documentary evidence at hearing and submitted post-hearing briefs. One post-hearing deposition was taken. The matter came under advisement on August 10, 2023.

The undersigned Commissioners have reviewed the record and the proposed decision. By and large, the undersigned agree with the findings made, analysis applied and conclusions reached by the Referee in a difficult case. Additional elaboration supporting the proposed decision is added by the undersigned, principally at Paragraphs 61-68, inclusive. Other minor changes and additions have been made, but the decision we endorse remains, in essence, that of the Referee.

ISSUES

The issues for resolution in this bifurcated hearing are:

1. Whether Claimant suffered an injury from an accident arising out of and in the course of employment;
2. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;
3. Whether Claimant's condition is due in whole or in part to a subsequent injury, disease, or cause; and
4. Whether and to what extent Claimant is entitled to the following benefits;
    a. Medical care;
    b. Temporary disability benefits, either partial or total; and
    c. Attorney's fees.

CONTENTIONS OF THE PARTIES

Claimant contends she injured her low back on May 1, 2020, while in the process of moving a heavy toolbox at work. Her symptoms escalated the next day as she was twisting to exit her vehicle, but the original injury caused her to seek medical treatment, including surgery. Claimant is entitled to unpaid past and future medical benefits, time loss benefits, and attorney fees. Benefits for disability (medical and from all causes) were reserved for subsequent determination.

Defendants point to a drastic change in Claimant's rendition of the facts, including when and where her pain originated, when denying her claim for benefits. Claimant's lack of credibility requires the Commission to discount her (and her witnesses') hearing testimony. Her lack of candor with her treating physicians led them to make observations and opinions based on

inaccurate information. Her expert medical witness is biased, but even he acknowledges the Claimant's shifting stories are problematic. Given these factors, Claimant has failed to carry her burden of proof on causation.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's testimony, both at hearing and in prehearing deposition (DE 13);
2. Hearing testimony of witnesses Aaron Heath and Raelynn Davis;
3. The post-hearing deposition testimony of witness James Bates, M.D., taken on November 1, 2022;
4. Claimant's exhibits (CE) A through O admitted at hearing; and
5. Defendants' exhibits (DE) 1-16 admitted at hearing.

Objections made during Dr. Bates' deposition are hereby OVERRULED.

FINDINGS OF FACT

1. At the time of hearing Claimant was 44 years old. She lived with her daughter Raelynn Davis, and live-in partner, Aaron Heath, in an apartment in Nampa.

2. Claimant testified that prior to the subject accident, described below, she had two remote back injuries, one in 2002 and the other in 2008. She testified that she had fully recovered from those injuries with no residual problems or work restrictions prior to May 1, 2020, the date of the accident in question.

3. Claimant began working for Employer on December 19, 2019. Her duties included offloading and stocking freight. Her job description included the ability to lift up to 50 pounds. For heavier items, more than one employee would "team lift" the item. Claimant's job required a high volume of lifting, pushing, pulling, stooping, twisting, squatting, and bending, often while

holding items. Claimant's shift was typically from 4 p.m. to midnight, except on Sundays, when she began her eight-hour shift at noon. Saturday was typically her day off.

4. On Friday, May 1, 2020, between 5 and 6 p.m., Claimant and two co-workers (Nathan and Denise) were assembling a large two-piece toolbox. Claimant testified at hearing that while attempting to lift the 150-pound toolbox top piece onto the bottom toolbox with Nathan, Denise, who was utilizing a hydraulic lift cart to support the toolbox, removed the cart from under the toolbox prematurely, causing Claimant and her co-worker to strain to catch the box before it hit the ground. Claimant testified at hearing that she immediately felt significant pain in her low back as the result of this accident. [1] In her deposition, Claimant testified differently, as discussed herein.

5. Claimant worked the remainder of her shift and did not report her injury to anyone, including her supervisor or the co-employees who were assisting her to lift the toolbox.[2]

6. Claimant's hearing testimony concerning her physical state from the time of the accident until she went shopping the next day differs significantly from her sworn deposition testimony. Because it is not realistically possible to reconcile the two versions, both will be set out and discussed below.

Deposition Testimony

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[1] Nathan had a different recollection of the incident. He claimed Claimant lost her grip while lifting and Denise let go of the hydraulic lift cart to help support the toolbox. In her deposition, Claimant testified that when Denise pulled the hydraulic lift, she and Nathan lost their grip on the toolbox, and it dropped to the floor. Claimant and Nathan then picked it up and Claimant "went on about my day." DE 13, p. 94 (pg. 37 of Claimant's depo.).

[2] Nathan wrote in his witness statement that he was unaware that Claimant hurt herself during this team lift. Denise wrote in her witness statement that Claimant made no complaints at the time of the incident or thereafter. Claimant testified at hearing that she did not say anything to either co-employee because she "had no responsibility to report" to them.

7. In her deposition, taken on October 14, 2020, Claimant testified that at the time immediately following the work accident, her "adrenaline was going" and that she only "felt a little something, but I didn't think anything of it." DE 13, p. 95 (pg. 38 of Claimant's depo.). She further testified that during the remainder of her shift she did not have a lot of pain. When she arrived home after midnight she was "a little sore" but figured she would sleep it off.

8. Claimant testified at deposition that when she arrived home she went to bed at 3 a.m. and awakened around 2 p.m. on Saturday afternoon. Prior to going to bed she just relaxed, took a shower, put her feet up and watched a movie. When she awoke she was still "a little sore" which she thought was "normal" and something she could "walk off." *Id.* (pg. 40 of Claimant's depo.)

9. Later that Saturday afternoon, Claimant went grocery shopping with her daughter. Claimant drove to and from the grocery store. When she arrived back at her apartment around 4 p.m., she testified she parked quite close to the adjacent car, such that she had to hold the top of her car door while pulling herself up to exit her car without damaging the adjacent car, hereinafter referred to as the "car incident."[3] As Claimant pulled herself up with both feet on the ground, she felt an instant pain which went down the right side of her body and wrapped around her ankle. The pain was so intense Claimant could not stand on her right leg and had to have her daughter help her get up to their second-floor apartment. Claimant recalled the pain was unlike anything she had ever experienced. DE 13:95-96, Claimant's depo. p. 41-43.

10. Claimant sat in her recliner for two hours. It was a struggle for her to get up. The intense pain increased even more when she attempted to sit in the recliner a second time. At

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[3] At the time of this event, Claimant was 5 feet, 2 inches tall and weighed between 245 and 250 pounds. She was described by doctors as morbidly obese.

first, she could not figure out what had happened, but then as she was thinking about why her back was hurting so badly, the thought occurred to her that perhaps her pain was related to the incident at work the previous day. As she stated, "as I was thinking about it, I went 'Oh my gosh. I wonder if this is because of that box?' That scenario made sense to her. DE 13, p. 96 (pg. 37 of Claimant's depo.)

11. Claimant sought no medical treatment that Saturday. She went in to work on Sunday to report the accident and was directed where to seek medical treatment.

Hearing Testimony

12. At the hearing on June 13, 2022, Claimant testified after her daughter. Claimant confirmed her daughter's testimony that she had to call her daughter to assist her up to their apartment after Claimant got home from work at 12:30 a.m. on Saturday morning. Claimant testified that her back pain was so bad she "couldn't get out of the car." Her daughter had to help Claimant up the stairs. Tr. p. 72. Claimant further testified that her back, but not her leg, was painful prior to her going to bed at 3 a.m.

13. Claimant testified that she was in significant pain from the time of the accident at work through the remainder of her shift; at home after work; before, while, and after shopping. But she asserted she was not one to complain because she has an extremely high pain threshold. She acknowledged her pain was exacerbated when getting out of her car on Saturday afternoon, including right leg pain for the first time.

Witness Testimony

14. Claimant called Aaron Heath and her daughter Raelynn as witnesses at hearing. Both lived with Claimant at the time of the accident in question.

15. Mr. Heath testified he worked a night shift. He typically left home around 3 p.m. and returned around 6:30 a.m. However, he initially claimed he was there when Claimant came home from work early Saturday morning and that she was in severe pain. He also initially claimed he was present when Claimant returned from the grocery store on Saturday afternoon, and that she was crying both when she came home from work and when she returned from shopping. He later acknowledged he was not home when Claimant returned to the apartment from work early on that Saturday morning. He testified Claimant never mentioned the car incident to him.

16. Upon further questioning, Mr. Heath could not specifically recall whether Claimant told him of the work accident before or after she returned from shopping on that Saturday afternoon. He thought she may have told him she hurt herself either in the morning when he got home from work or in the afternoon before he left for work, and before she left to go shopping.

17. On cross examination, Mr. Heath acknowledged that he had spoken with Claimant's counsel just before the hearing started, but testified he could not recall what they had spoken about.

18. Raelynn Davis was called to testify at hearing. She was 17 at the time of hearing and was 15 at the time of the accident in question.

19. Ms. Davis testified that Claimant called her at 12:30 a.m. on May 2, when Claimant arrived at the apartment after work. Claimant asked her to come to the car and assist Claimant because she could not get out of the car due to the pain she was experiencing. Interestingly, Ms. Davis testified that Claimant first told her she thought her pain was related to the work accident sometime after that Saturday, May 2.

20. Ms. Davis testified that she observed Claimant shuffle walking and taking baby steps prior to going to the store. Ms. Davis further testified that she accompanied Claimant to the store in Caldwell.

21. Ms. Davis acknowledged Claimant drove to and from the store. Ms. Davis testified she did all the lifting while at the store and Claimant had trouble walking while in the store. Ms. Davis claimed she "had to help [Claimant] a little bit" going back up the stairs after shopping.

22. On cross examination, Ms. Davis admitted she also spoke with Claimant's counsel just prior to testifying, but she too could not recall if they spoke about the car incident.

Statement to Third Party Adjuster

23. On May 7, 2020, Claimant gave a recorded statement to Gallagher Basset, the third party adjuster assigned by Surety to adjust claims in Idaho. Claimant described the incident with the toolbox that occurred on Friday, May 1,2020, at 5 to 6pm in the stock room of Harbor Freight. Two associates, Nathan and Denise, called for assistance locating the top and bottom banks of a toolbox which had been requested by a customer. After instructing the associates to get a hydraulic lift cart in order to execute an orderly transfer of the heavy toolbox components, she and Nathan began a "team lift," bending from the knees to lift the heavy box onto the hydraulic lift cart. Meanwhile, Claimant noticed Denise was taking the hydraulic lift cart away. Claimant lost her grip on the toolbox when she yelled to Denise to bring it back. Nathan struggled to maintain his end of the "team lift" and then managed to get part of the box on top of the cart. Claimant assisted him in getting the toolbox the rest of the way onto the cart, and they delivered the complete toolbox to the customer. In leading the associates, Claimant perceived a need to expedite because they were working under social distancing guidelines of no more than 25 people in the building at a time. She gave a description of her physical experience of the injury:

> I didn't feel anything at the time. I didn't hear a pop. I didn't feel anything. I had done several other load outs that day. Nothing out of the ordinary. I didn't feel anything out of the ordinary. I got off shift at 12. You know, I was a little sore, but I am - I'm sore almost every day because it's such a physical job. And then I had Saturday off. I woke up at 2 O'clock in the afternoon and got up. I was a little sore. Didn't think anything of it; just typical aches and pains. I took my daughter to the grocery store, and I didn't have a problem – you know – ambulating or anything in the grocery store. We loaded the stuff in the car. Drove home. I went to open the car door and I practically fell out the car door because of the – I just got a shock through my leg. You know, I thought it was real strange because I had never felt anything like that before. So, she had to help me get up the stairs. And then I got into the apartment and I had to hold onto the wall and put all my weight on my left leg to get off my right because putting any weight on my right was causing a shooting pain. She gave me 6 ibuprofen and had me put my legs up on the recliner. I sat for a couple of hours. Then I needed to use the restroom. Got up to use the restroom and shooting pain again. And when I came to sit back down on the couch the pain was so bad that it was shooting from from my hip – right hip rear area, all the way down to my ankle. And I ended up laying on my left side because I had to - I couldn't touch that part of my body to anything.

DE 14, Telephone Interview of Claimant by Breanna Thomas of Gallagher Basset, in Boise, Idaho (May 7, 2020).

Statements to Medical Providers

24. On May 3, 2020, Claimant first sought treatment for her back pain. She was seen by a nurse practitioner at Primary Health in Caldwell. Her history included the fact that Claimant presented complaining of a work injury. Claimant reported "that she had pain in her right buttocks. *** [Y]esterday the pain was worse. *** [I]t was painful to move but after using [heat and ice] she was able to get up and move around at home. Today … the pain is worse." CE D, p. 1. Claimant was prescribed medication and told to ice her low back. She was taken off work.

25. Claimant next saw Stephen Martinez, M.D., at Primary Health on May 6. Her history included the events of the work accident. It was noted that after the accident, Claimant "was able to continue working on the date of injury. However, 2 days later she experienced severe pain in the low back with radiation to the right buttock. Persistent and severe low back and right

buttock pain prompted her to seek medical treatment." CE D, p. 5. Claimant was diagnosed with a lumbar strain and sciatica after examination. Her treatment regimen continued, and she was kept off work.

26. Surety denied Claimant's claim sometime between Claimant's next medical appointment on May 13, 2020, and May 22, 2020, when she called Primary Health informing them of the denial and seeking the MRI anyway. CE D:12 and 15.

27. After an MRI on May 29, 2020, Claimant was referred to Thomas Manning, M.D., neurological surgeon, who saw her on July 23, 2020. Dr. Manning's notes, after detailing the mechanics of the work accident, state, "[s]he had the immediate onset of back pain that day but was able to make it through the workday. She states by the following day, she began to develop right leg pain." CE G, p. 1. Dr. Manning diagnosed an L5-S1 disc herniation with right S1 radiculopathy. He prescribed physical therapy and epidural steroid injections and placed her on light duty work restrictions.

28. Claimant's symptoms worsened after her injection. A repeat lumbar MRI and a thoracic MRI were completed. Due to ongoing symptoms, in late October 2020, Dr. Manning suggested an L5-S1 microdiscectomy, which was performed in December 2020.

29. After surgery, Claimant again went to physical therapy starting on January 19, 2021. Notes from her first visit indicate Claimant's injury occurred when the toolbox slipped and she grabbed it. Those notes further state Claimant "felt sore afterwards, woke up the next day with some soreness. Tried squeezing out of her car, twisting, and got pain from her right side down into her right leg and ankle." CE I, p. 4.

30. Claimant testified at hearing that she had mentioned the car incident to every provider (Primary Health NP, Dr. Martinez, and Dr. Manning, and pre-and post-surgery physical

therapists) and if each of them (other than the post-surgical physical therapist) did not include that subsequent event in their records, such omission was not Claimant's fault.[4] Hrg Tr 95:17 – 96:14.

31. Defendants scheduled Claimant for an independent medical examination with Paul Montalbano, M.D., a neurological surgeon, who saw Claimant on March 3, 2021. His notes state in part:

> She reports that she was lifting a heavy toolbox weighing 120-170 pounds with another worker. She felt immediate pain in her low back, but she finished her work and the next day she was not working. As she was getting out of her car the following day at a grocery store she experienced severe pain involving her right leg, involving her buttock, posterior and calf.

DE 9, 73. Dr. Montalbano also noted Claimant continued to have some pain in her low back and right leg after the microdiscectomy surgery in December, and pain limited her lifting to around 15 pounds. Claimant rated her pain at 5+ out of 10 and her pain was divided equally between her low back and right leg.

32. After examination and medical record review, Dr. Montalbano diagnosed Claimant as having suffered a lumbar strain as the result of her work accident. That strain had resolved by the time of his examination. Her complaints at the time of examination were, in Dr. Montalbano's opinion, unrelated to her work accident. He found no objective findings to account for Claimant's

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[4] By the time of her Reply Brief, Claimant's story had changed a bit. She wrote that she "has steadfastly maintained that it was the toolbox incident that caused her injury and that getting out of the car irritated that already-present injury. [She] did not ascribe the car incident as the cause of her injury. Hence, when she presented at Primary Health, she provided a history that she felt was relevant at the time." Claimant acknowledged she might not have mentioned the car incident "because she did not ascribe the injury to the car incident." Finally, she argues, "[t]here was no motive… to have given any other history than that which she thought was relevant under the circumstances." Cl. Reply Brief, p. 3. Although this scenario is not contained in the record, and is merely argument, it is not unreasonable to understand why Claimant did not mention the specifics of the car incident once she had convinced herself her problems stemmed from the work accident. However, as the Referee also concluded, such logic does not explain why she completely changed her story at hearing, and why her witnesses went out of their way to support such a story, even to the point of testifying unbelievably.

ongoing symptoms. Claimant's onset of symptoms which led to surgical intervention occurred when she was getting out of her car and were unrelated to her work injury. Regarding her work-related lumbar strain, Claimant had reached MMI without any permanent partial impairment or work restrictions.

33. Claimant scheduled an appointment with James Bates, M.D., at the recommendation of her attorney, because, as she testified at hearing, her back was still bothering her.

34. Claimant first saw Dr. Bates on January 20, 2022. Claimant's recorded history in Dr. Bates' initial notes does not reference the car incident.

35. Dr. Bates felt Claimant's ongoing back pain was due to "hypersensitivity of the tissues," not ongoing nerve compromise. He recommended exercise and cupping procedures.

36. On her first follow-up visit, Claimant augmented her history by reiterating to Dr. Bates that she first felt pain while at work, but the pain became worse the next day "as she was getting out of her car." CE K, p. 4.

37. Over the course of treatment with Dr. Bates, Claimant's low back complaints improved, as did her ability to perform activities of daily living.

38. On March 11, 2022, Claimant's counsel wrote a less-than-objective analysis of the state of Claimant's workers' compensation claim to Dr. Bates, followed by a check-the-box series of questions. Counsel did mention the car incident, but highly minimized its significance, instead stating that during her deposition Claimant "mentioned that she felt additional pain when stepping out of her car after the toolbox accident and injury. Defendants are now denying the claim on the basis of a probable subsequent injury (merely getting out of her car)." Counsel then added his opinion that it appeared to be "far more probable than not that the disk herniation was related

to the May 1, 2020 … accident that [sic, than] the mere act of getting out of her car the next day." CE K, p. 15. He then asked Dr. Bates to agree that Claimant's injuries and complaints were more likely than not caused by her work accident "as opposed to her merely getting out of her car[.]" Dr. Bates agreed with this assessment.

39. Defense counsel then attempted to sway Dr. Bates' opinion by authoring his own six-page rendition of the facts according to Claimant's deposition, the transcript of which was included as an attachment to the letter. Dr. Bates was then asked if reviewing Claimant's deposition transcript and counsel's letter caused the doctor to change his opinion, and to explain his rationale for his decision. Dr. Bates did not respond to this letter, although he indicated to Claimant he had received it. Dr. Bates was deposed on November 1, 2022, and his testimony will be discussed below.

DISCUSSION AND FURTHER FINDINGS

Accident, Causation, - Subsequent Injury and Credibility Analysis

40. The first noticed issue is whether Claimant suffered an injury from an accident arising out of and in the course and scope of her employment. No serious argument was presented to call into question the occurrence of a work-related accident, defined by Idaho Code § 72-102(17)(b) as "an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury." At a minimum, Claimant suffered a lumbar strain, as diagnosed at her first visit to Primary Health, and later confirmed by Dr. Montalbano, Defendants' expert witness.

41. The real controversy is not whether Claimant suffered an industrial accident on May 1, 2020, but whether she suffered an injury arising from that accident greater than a lumbar strain, which resolved and resulted in no permanent impairment. The second listed

issue – whether the condition for which Claimant seeks benefits, i.e., her L5-S1 disc injury necessitating surgery, was caused by the industrial accident – is highly contested, and dovetails into the third listed issue, to wit, whether Claimant's condition is due in whole or in part to a subsequent injury, disease, or cause. These companion issues must be decided prior to considering the fourth noticed issues of medical care, TTD benefits and attorney's fees.

42. To obtain workers compensation benefits, Claimant bears the burden of proving the extent of injury caused by her accident. *See* Idaho Code § 72-102(17). Proof of the occurrence of an accident is not sufficient to prove the nature and extent of the proposed injury. *Clark v. Shari's Management Corp.*, 155 Idaho 576, 314 P.3d 631 (2013). To prove the cause of her L5-S1 disc injury, Claimant must adduce competent medical evidence establishing that it is more probable than not that the subject accident caused or contributed to the L5-S1 disc injury leading to her treatment including injections, therapy, medication, surgery, and post-surgical treatments.

43. Dr. Montalbano opined that Claimant suffered nothing more than a lumbar strain as the result of her work accident, which had resolved prior to his examination. Claimant's L5-S1 disc injury was unrelated to the lumbar strain suffered at work. He based his opinion on Claimant's history stated to him that her onset of severe pain involving her right leg, buttock, posterior thigh, and calf symptoms, which led to surgical intervention, occurred when she was getting out of her car the day after her workplace back strain. He was not deposed.

44. Dr. Bates agreed with Claimant's counsel's "check-the-box" assessment that "her current lumbar injuries (primarily L5-S1 disc injury) and radicular complaints more likely than not causally related to the subject May 1, 2020 lumbar spine 150 lb. toolbox accident and injury

(primarily right L5/S1 disk herniation) as opposed to her merely getting out of her car." He attached a letter to support this. CE K, p. 16 and 18. Dr. Bates was deposed.

45. In his deposition Dr. Bates testified that according to his notes, Claimant's initial history included her report of injuring her back at work while lifting a toolbox with another employee, and she felt an increase in pain "a day or so later" but, according to his testimony, the doctor's main focus was on reversing Claimant's pain and not on taking a detailed history. Bates Depo. p. 8.

46. Dr. Bates acknowledged Claimant's L5-S1 disc protrusion is consistent with the mechanism of injury of twisting and lifting the toolbox. However, as he testified, Claimant's L5-S1 disc protrusion was also consistent with "other ways" of producing the disc protrusion. *Id.*

47. When asked if it was common for individuals with a disc injury such as Claimant's to develop radiating leg and buttock pain gradually over the course of a day or so, Dr. Bates noted nerve root compression injuries can progress, and such presentation is fairly common.

48. During direct examination, Dr. Bates agreed that more probably than not Claimant suffered a strain and a disc injury during her work accident and that her lumbar surgery was related to her work-related disc injury. He further acknowledged that "over the course of the next few visits (after her initial visit with Dr. Bates) she did mention that she did have some increased pain when she got out of her car shortly after the incident at work." Bates Depo. p. 15.

49. By examining Claimant, Dr. Bates determined she suffered from hypersensitivity of her back tissue, a condition for which there is "no real good explanation." Dr. Bates further pointed out that disc injuries such as Claimant's can occur without any significant event, and jerking and twisting such as Claimant described can put strain on muscles and soft tissues and can result in strains and sprains of ligaments and muscles. Additionally, "[s]ome studies seem

to show" that a person's "location component" has been identified as being a component in disc injuries. *Id* at 17, 18.

50. Dr. Bates' treatment has been focused on treating Claimant's soft tissue to allow her to gain mobility. She was improving with these treatments and physical therapy but was not at MMI as of the date of his deposition. Dr. Bates felt there was no reason to alter Dr. Manning's post-surgery lifting limit of 30 pounds, which Claimant could still not lift as of November 2022.

51. On cross examination Dr. Bates conceded he only took a very brief look at defense counsel's letter and Claimant's deposition testimony in June, 2022, prior to his deposition. *Id.* at 24: 13. However, he did review an approximate ten-page section to which he was directed by defense counsel's letter. *Id* at 24:15-25:3. Further, he acknowledged that in his conversations with Claimant she did not describe any immediate ramifications of her work injury, such as her pain level when arriving home after work, any inability to sleep due to pain, inability to go up and down stairs, difficulty driving her car to the grocery store the next day, problems at the store with gathering groceries, or walking through the store and out to her car thereafter. Dr. Bates admitted he had no recall of Claimant ever mentioning pain radiating into her right leg prior to her exiting her car at her apartment on the day following her work accident. *Id.* at 34:33 – 35:5.

52. Dr. Bates agreed that Claimant was an obese woman who was "awkwardly" pulling herself out of her car when she experienced radiating leg pain for the first time. *Id. at* 36:1-3.

53. Dr. Bates testified that by looking only at the medical records provided by Claimant's counsel to him, (in which Claimant did not include details of radicular pain while exiting a vehicle), causation would be a "slam dunk." But when he considered Claimant's deposition testimony regarding her exiting her car and the onset of radicular pain, it raised "some

question of what really happened," as both incidents (work and car) "could be considered as possible mechanisms of injury …." Bates Depo. pp. 39, 40.

54. When confronted with Claimant's deposition testimony, Dr. Bates did not change his opinion, instead stating "but it gave me more information that I had to address and, then, look at what is the probability of – from one incident compared to the other when both of them were plausible." *Id* at 48. Claimant's counsel did not follow up on this statement with redirect questioning.

55. The Idaho Supreme Court has bifurcated credibility findings "…into two categories, 'observational credibility' and 'substantive credibility.'" *Painter v. Potlatch Corp.*, 138 Idaho 309, 313, 63 P.3d 435, 439 (2003). Observational credibility "goes to the demeanor of the appellant on the witness stand and it requires that the Commission actually be present for the hearing in order to judge it." *Id.* In contrast, substantive credibility "may be judged on the grounds of numerous inaccuracies or conflicting facts and does not require the presence of the Commission at the hearing." *Id. Knowlton v. Wood River Med. Ctr.,* 151 Idaho 135, 254 P.3d 36 (Idaho 2011).

56. A fact finder's considerations of a witness's demeanor on the stand includes: "the manner in which a witness tells his or [or her] story; the advantages he [or she] appears to have had for gaining accurate information on the subject, the accuracy and retentiveness of his [or her] memory; his [or her] capacity for consecutive narration of acts and events; his [or her] apparent frankness and intelligence, and numerous other considerations…" *Darner v. Southeast Idaho In-home Services*, 122 Idaho 897, 900, 841 P.2d 427, 430 (1992). The Commission did not observe Claimant or the other witnesses while they testified. Therefore the Commission does not disturb the Referee's observational credibility determinations. However, the Commission has reviewed

the record and agrees with the substantive credibility determinations made by the Referee which appear mainly in the discussion below, but also in footnote 4 above.

57. To the Referee, it was abundantly clear that there are two irreconcilable versions of Claimant's pain level and her disabilities and limitations in the hours following her accident at work. By her own admission, Claimant decided the pain she was in after exiting her car on Saturday was due to her work accident. Once she made that decision, when presenting her history to her physicians, she was able to discount the new and disabling pain she experienced when trying to squeeze out of her car the day after her work accident.[5] Instead, the entire car episode was reduced to an acknowledgement that she had an "increase in pain" on Saturday, offered almost as an aside when discussing her history with her physicians. The Commission concurs with the Referee on this perception of Claimant's interaction with her medical providers.

58. The Referee found that "Claimant's hearing testimony, and the testimony of her live-in witnesses seemed contrived, and when held in comparison to her more candid deposition testimony, is afforded no weight." The Commission has no basis to disagree with this assessment and adopts the Referee's determination to give no weight to the hearing testimony of claimant, her daughter, or Mr. Heath, insofar as their testimony contradicts the account Claimant gave in her deposition. Claimant's deposition testimony regarding her level of pain in the hours immediately following the industrial accident is further supported by the recorded statement she gave to Gallagher Basset on May 7, 2020. Likewise, that report of minimal discomfort comports with

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[5] The Commission adopts another credibility finding of the Referee about an inconsistency between Claimant's hearing and deposition testimony: The fact Claimant, upon returning to her apartment after grocery shopping, had to think for some time about the root cause of her pain before reaching the conclusion it was work related, severely cuts against hearing testimony that Claimant was miserable all day on Saturday, shuffle stepping such that she needed help going down the stairs to go shopping, and needed her daughter's help in the store.

statements by witnesses, Nathan and Denise, who were not aware of Claimant's purported injury or pain at the time of the industrial accident. DE 3, pp. 8-9.

59. Further, the Commission agrees with the Referee's analysis of the significance of the alleged "call" made by Claimant to her daughter at the time Claimant arrived home from work following the accident. Notably, proof of the assertion made by both Claimant and her daughter at hearing, i.e., that Claimant had to call her daughter for help at 12:30 a.m. on Saturday, May 2, 2020, would be the type of "smoking gun" proof of veracity of Claimant's hearing testimony that one would assume she would do whatever it took to procure. Those cellphone records could prove she made such a call. Instead, the Referee had to order the parties to obtain the records, and even then, they wilted in the face of the carrier's objection to producing the records without a court order. Claimant did not request an order from the Commission to aid in securing the records, but rather simply gave up pursuit.[6] (*cf Winder v. Bingham Mechanical, Inc.*, IC 2022-002236, [August 4, 2023], where the parties obtained a subpoena from Referee Donohue when the cellphone carrier balked at producing phone records. With the subpoena, the parties obtained the sought-after records.)

60. The Commission adopts the Referee's determination that the weight of the evidence supports Claimant's deposition testimony, to wit, she tweaked her back at work, thought it would go away with time, went home after her shift without notifying her supervisor of the incident or

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[6] Once again, the Commission adopts the Referee's analysis in support of a credibility and weight- of-the-evidence determinations: It could be noted Defendants likewise did not pursue production, but the burden of proof rests with Claimant. Furthermore, Defendants have no idea if such a call exists, so for them to strenuously pursue production would be analogous to "buying a pig in a poke" and potentially cement the case against them. On the other hand, if Claimant really did call her daughter that morning, such knowledge, coupled with the fact that the existence of the call history would constitute very strong evidence in Claimant's favor, should have been enough motivation for Claimant to expend maximum effort to get those records for presentation to the Commission. Claimant's tepid attempt, which was made only after a Commission order, is strong evidence that no such call was made.

even mentioning it in passing to co-workers that she hurt her back. She watched a movie, went to bed and slept without incident that night. She was able to drive and go shopping, without difficulty the next day. Only upon trying to awkwardly exit out of her car without hitting the adjacent automobile did she feel a sudden, acute, severe pain that disabled her from that point forward.

61. However, simply finding that Claimant's radiating, disabling lumbar spine pain first presented as she was squeezing out of her car does not automatically mean she cannot prove causation. It is certainly within the realm of possibility that Claimant injured her back at work on Friday, and while producing only minimal symptoms initially, the work accident "set her up" for further injury as the result of some damage to her muscles, tendons, or even the bony structure of her spine. Then, the additional twisting while awkwardly getting out of her car the following day disrupted the precarious stasis, resulting in Claimant's L5-S1 disc injury. On such evidence it could be found that a demonstrable causal connection exists between the work accident and the workers' compensation benefits that are sought. *Sharp v. Thomas Brothers Plumbing*, 170 Idaho 343, 510 P.3d 1136 (2022). In fact, that theory was inferred by Claimant in briefing.

62. Regardless of the path to compensability she chooses to assert, Claimant must prove her claim to a reasonable degree of medical probability; she must prove that there is more medical evidence supporting causation than not. *Tenny v. Loomis Armored United States, LLC*, 168 Idaho 870, 489 P. 3d 457 (2021). Physician opinions are not binding on the Commission, but are advisory only. *Dilulio v. Anderson Wood Company, Inc.*, 153 P.3d 1175, 143 Idaho 829 (2007). The Commission, as fact finder, is free to draw its own conclusions as to the credibility and weight to be given to the testimony of a medical expert. When deciding the weight to be given to an expert opinion, the Commission may 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*, 40 P. 3d 91, 136 Idaho 733 (2002); *Lorca-Merono v. Yokes Washington Foods, Inc.,* 137 Idaho 446, 50 P.3d 461 (2002).

63. In *Lorca-Merono*, the Commission was required to make a judgement about the weight to be given to certain medical evidence, similar to the task before the Commission in the instant matter. In that case, the claimant suffered an injury to her neck and right shoulder in 1995 as the result of lifting the contents of a garbage can. In a 1996 report, Dr. Linder, a physician who evaluated claimant at the instance of surety, proposed that claimant suffered a cervical strain and a probable right shoulder rotator cuff tear as a result of the lifting incident. Claimant later underwent shoulder surgery, but continued to experience neck discomfort. Pre-injury MRI studies from 1993 showed the presence of degenerative changes at the C5-6 level. An MRI conducted in 1998 demonstrated a disc herniation at C5-6. An anterior cervical discectomy was recommended by Dr. Hahn, claimant's treating physician. Surety denied authorization for the surgery.

64. The primary issue before the Commission was whether claimant's industrial accident aggravated claimant's pre-existing disease of the cervical spine. Dr. Linder proposed that the C5-6 disc herniation seen on the 1998 MRI was unrelated to the subject accident, and represented the natural progression of the degenerative changes seen on the 1993 MRI. Dr. Linder also stated that a lifting injury of the type described by claimant would not be expected to bring about a cervical disc herniation. The referee who heard the case sided with Dr. Hahn, proposing that the subject accident aggravated claimant's pre-existing neck problem. The Commission declined to adopt the referee's proposed decision, instead finding Dr. Linder's opinion to be more persuasive. The Commission ultimately ruled that claimant had failed to prove that the industrial injury did anything to aggravate claimant's pre-existing cervical spine condition.

65. On appeal, the Court first ruled that even though the case was heard by a referee, the Commission was free to determine the weight to be given to the various medical opinions. Therefore, the Commission was entitled to give more weight to the testimony of Dr. Linder. However, claimant argued that Dr. Linder's testimony did not constitute substantial and competent evidence sufficient to support the Commission's decision. In 1996, Dr. Linder proposed that the lifting incident described by claimant caused a "cervical strain", i.e., a stretching of soft tissues of the neck. However, at the time of his post-hearing deposition he testified that the lifting incident was not the type of activity that would be expected to injure the neck. He testified that "lifting does not strain the cervical spine." Claimant argued the Dr. Linder's testimony must be rejected as incredible since "if [claimant's] lifting could cause a cervical strain it could cause cervical disc herniation." Declining claimant's invitation to resolve the perceived conflict in the records/testimony of Dr. Linder in her favor, the Court stated:

> On cross-examination, Claimant did not ask Dr. Linder to explain this alleged inconsistency in his diagnoses. Claimant simply asks us to substitute our opinion for the Commission's regarding the weight to be given Dr. Linder's testimony and to reject it. We will not disturb on appeal the Commission's conclusions as to the weight and credibility of the evidence unless they are clearly erroneous. In this case, the Commission's conclusions as to the weight and credibility of the testimony of Dr. Linder are not clearly erroneous.

Lorca-Merono, 137 Idaho at 455, 50 P.3d at 470 (internal citation omitted).

66. Turning to the medical opinions before the Commission, Dr. Bates originally characterized the existence of a causal relationship between Claimant's L5-S1 disc injury and the work accident as a "slam dunk." He revisited this opinion after he was belatedly made aware of Claimant's deposition testimony. (Bates Depo 39:7-40:6). However, even though Dr. Bates acknowledged that there are now two plausible mechanisms of injury that might be entertained for

Claimant's L5-S1 disc injury, he continued to assert that the work accident is the more probable cause of Claimant's disc injury, as compared to the car incident:

> Q [BY MR. GAMEL]: But what I'm hearing from you in this deposition – and tell me if I'm wrong – it did change your opinion, because when you got to the deposition transcript and you read it you realized there was a second - second subsequently occurring accident and it was possible that she got hurt in that accident. And I'm talking about the car.
>
> A [BY DR. BATES]: I would not say that it – I would not say that it changed my opinion, but it gave me more information that I had to address and, then, look at what is the probability of – from one incident compared to the other when both of them were plausible.

Bates Depo. 48:7-18.

The conclusion we draw from this testimony is that even after being apprised of the substance of Claimant's deposition testimony, Dr. Bates still believes that even though there are two plausible mechanisms of injury, it is the subject accident that is the probable cause of the L5-S1 disc injury. He did not explain his reasoning, nor was he asked to.

67. Against this testimony is the report of Dr. Montalbano. Dr. Montalbano acknowledged the occurrence of the subject accident, but believes it caused only a lumbar strain. He does not believe that the accident is implicated in causing or contributing to the L5-S1 disc injury, which he relates entirely to the car incident. His conclusions in this regard are apparently supported by the fact that a strong temporal relationship exists between the car incident and the onset of right sided radicular symptoms associated with nerve root compression. DE 9, p. 74. He did not address whether or not a lumbar strain of the type he believes Claimant suffered at the time of the subject accident, made her more susceptible to subsequent injury.

68. Both medical opinions can be criticized, but it is Claimant who bears the burden of persuasion. Dr. Bates places the sole responsibility for Claimant's current condition on the subject accident, but he failed to explain why he rejected the car incident as the cause, or a cause, of the

disc injury. His testimony makes his choice appear entirely arbitrary; both mechanisms of injury are plausible, yet Dr. Bates inexplicably elevated one over the other. The Commission gives this testimony little weight, particularly in view of the version of Claimant's testimony we find most persuasive. It may be that the car incident is entirely responsible for Claimant's L5-S1 disc injury, as proposed by Dr. Montalbano. It may be that the car incident aggravated a lumbar strain originally caused by the subject accident. Stated slightly differently, it may be that without the work accident, the car incident alone would not have resulted in the L5-S1 disc injury. However, neither Dr. Bates nor Dr. Montalbano endorse such a theory. We reject the opinion that we are left with that appears to ignore the car incident entirely and places blame for the disc injury on the subject accident. Dr. Bates did not explain why, in light of the version of events we find persuasive, the subject accident is nevertheless the probable cause of Claimant's L5-S1 disc injury. Here, as in *Lorca-Merono*, the Commission has the responsibility to determine the credibility and weight to be given to the testimony of a physician who has rendered an opinion on an issue central to the claim. Here, too, Claimant failed to elicit an explanation from Dr. Bates that might have satisfied the Commission's desire to understand why Dr. Bates identifies the work accident as the cause of Claimant's L5-S1disc injury instead of the also-plausible car incident. Dr. Bates' reasoning remains unexplained and this failure undermines his opinion. In reaching this conclusion we do not inappropriately substitute our medical judgement for that of a qualified medical expert. *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 302 P.3d 718 (2013). Rather, we give little weight to Dr. Bates' opinion because his reasoning is not explained. *Eacret,* supra.

69. When the totality of the evidence is considered, Claimant has proven by a preponderance of the evidence she suffered an accident as defined by Idaho Code § 72-102(17)(b), resulting in a lumbar strain.

70. When the totality of the evidence is considered, and credibility issues are resolved, Claimant has failed to prove by a preponderance of the evidence that her L5-S1 disc injury was caused by an accident arising out of and in the course of her employment, as opposed to an unrelated cause.

Medical Care Analysis

71. An employer is only obligated to provide medical treatment necessitated by the industrial accident and is not responsible for medical treatment not related to the industrial accident. *Williamson v. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d 1365 (1997). Thus, Claimant must prove not only that she suffered an injury, but also that the injury in controversy was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). Claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

72. Claimant requested past, current, and future medical care associated with her lumbar disc protrusion. In briefing, Claimant did not argue for any particular unpaid medical expenses. No testimony was solicited regarding past medical expenses. It is unclear which, if any,

medical charges were paid by Surety. However, given the conclusions of law reached herein, such information is not necessary.

73. Claimant suffered a low back strain in her work accident of May 1, 2020. She testified the strain was of a type she thought she would either sleep off or walk off. In other words, she thought it was transient and not sufficiently significant to seek medical treatment. Dr. Montalbano felt that this injury would resolve with 4-6 weeks of medical care. Claimant neither sought nor received any medical care before she went shopping on May 2nd, and by the time she sought medical treatment, she had suffered a subsequent injury which the Commission finds responsible for her L5-S1disc injury.

74. Claimant has not established any unpaid past medical expenses related solely to her work-related back strain as opposed to those expenses related to her subsequent L5-S1 disc injury, which she failed to prove was related to her employment.

75. When the totality of the evidence is considered, Claimant has failed to prove by a preponderance of the evidence that she is entitled to benefits for past, current, or future medical expenses stemming from her work accident of May 1, 2020.

Temporary Disability Analysis

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

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

77. While Claimant did receive medical releases from her time-of-injury employment, such releases were given after the car incident, and were related thereto. Claimant did not develop medical evidence to establish the fact that she would have been temporarily disabled from her time-of-injury employment due to the lumbar strain alone. In fact, the Referee determined that the weight of her credible testimony supports the argument that she was not intending to miss work until she suffered her L5-S1 disc injury in an unrelated mishap. She testified that she was able to finish her shift on the day of the work accident and did not feel her strain was something she could not walk off. As she noted, after the accident at work, she thought her sore back was "normal" and she could "walk it off." Given the nature of these complaints, the Referee concluded that there is no credible evidence that Claimant would have missed work if not for the subsequent car incident. The undersigned Commissioners so agree.

78. When the totality of the evidence is considered, Claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary disability benefits stemming from her work injury of May 1, 2020.

Attorney's Fee Analysis

79. The grounds for awarding of attorney's fees are governed by Idaho Code § 72-804. However, unless Claimant is a prevailing party at least in part, awarding attorney fees is not an option to be considered. *See Salinas v. Bridgeview Estates*, 162 Idaho 91, 394 P.3d 793 (2017) in which the Court pointed out that the plain language of Idaho Code § 72-804 states "there must be payment that is justly due and owing to allow an award of attorney's fees...." *Id.* at 93. Claimant

was not a prevailing party on any substantive issue before the Commission at this hearing. Therefore, the Commission concludes that Surety's denial of the claim was not unreasonable.

80. When the totality of the evidence is considered, Claimant has failed to prove by a preponderance of the evidence that she is entitled to attorney's fees under Idaho Code § 72-804.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has proven by a preponderance of the evidence she suffered an industrial accident on May 1, 2020, as defined by Idaho Code § 72-102(17)(b), resulting in a lumbar strain.

2. Claimant has failed to prove by a preponderance of the evidence that her L5-S1 disc injury was caused by the industrial accident.

3. Claimant has failed to prove by a preponderance of the evidence that she is entitled to benefits for past, current, or future medical expenses stemming from her work accident of May 1, 2020.

4. Claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary disability benefits stemming from her work injury of May 1, 2020.

5. Claimant has failed to prove by a preponderance of the evidence that she is entitled to attorney's fees under Idaho Code § 72-804.

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

DATED this 6th day of November, 2023.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

ATTEST:
Kamerron Slay
Commission Secretary

Commissioner Aaron White DISSENTING:

I. After careful review of this case with my fellow members of the Commission, I respectfully dissent from the majority opinion.

II. "A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability." *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Hartgrave v. City of Twin Falls*, 413 P.3d 747, 163 Idaho 347 (Idaho 2018) (internal citations omitted). The standard has been used interchangeably with preponderance of the evidence due to this definition. See *Tenny v. Loomis Armored United States, LLC*, 168 Idaho 870, 878, 489 P.3d 457, 465 (Idaho 2021).

III. Here, Claimant has presented medical evidence via the opinion of Dr. Bates that her injury was caused by her attempt to catch the toolbox at work. The majority rejects this evidence – not based on other medical evidence – but on the grounds that Dr. Bates' opinion does not discuss an alternative argument raised by Defendants.

IV. As a preliminary but significant point, Dr. Bates' opinion constitutes competent medical expert testimony. He is a licensed medical authority with complete knowledge of the injury's nature and the competing possibilities for its causation. He became a treating physician in

the case after a referral from Claimant's counsel; his knowledge consisted not only of record review but personal examination of the Claimant for purposes of treatment. Dr. Bates describes the mechanism of injury as a twist and lift commonly associated with disk protrusion, and states the progression of symptoms from back pain down to the right leg is consistent with disc injuries. *See* Ex. K, 18; Bates Depo. 9-10. The opinion that Claimant's L5-S1 disc injury was caused by the work accident is logical. Catching a 120lb to 170lb box at an odd angle, particularly when one is not an athletic individual, invites serious injury.

V. Dr. Bates was informed of all the facts material to causation in this case when he reaffirmed his opinion at deposition. He had already been aware that right sided radicular leg pain did not begin until Claimant exited her vehicle awkwardly the day after the work accident. Bates Depo. 34, 37. Dr. Bates was not informed of the details of the car incident until litigation was well underway and his opinion had already been issued, which is significant given the extreme and sudden presentation of pain. However, he ultimately reviewed these facts in a copy of Claimant's deposition transcript provided by defense counsel, who also presented several questions in a letter. Dr. Bates reviewed the ten pages with sections defense counsel had pointed out to him. Bates Depo. 24-25. Additionally, Dr. Bates stated "[t]owards the end there . . . I did not have adequate information to respond to the letter . . . so I read through some of [the deposition transcript]."[7]

VI. At his deposition, Dr. Bates stated the car incident gave a "plausible" explanation for the injury and gave him more information to consider than he originally possessed. Dr. Bates moderated his original statement that the case was a "slam dunk"; he acknowledged the car incident raised questions and could be considered a possible mechanism of injury for back strain.

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[7] While this statement references a letter, Dr. Bates ultimately never responded to defense counsel when he was unable to obtain verification concerning the release of information. Bates Depo. 25.

With these qualifications, Dr. Bates reaffirmed his opinion finding the work accident was the probable cause of injury. Bates Depo. 49; Ex. K, 18. Specifically, Defense counsel confronted Dr. Bates by stating: "it [the deposition transcript] did change your opinion, because . . . you realized there was a second subsequently occurring accident." *Id.* Dr. Bates responded: "I would not say that it changed my opinion." *Id.*

VII. With this in mind, Dr. Bates's opinion meets baseline requirements for consideration. It is not inherently defective, such that it may be dismissed as lacking credibility. For instance, he does not rely upon inaccurate or incomplete information, lack review of relevant medical records, or simply give an opinion without foundation. The majority has rejected Dr. Bates' opinion as unpersuasive on the grounds that Dr. Bates did not explain why he thought that Claimant's injury was not caused at the time she experienced extreme pain exiting her vehicle. Yet the facts of the work accident were not altered by the car incident. Nor is there any inherent contradiction between Dr. Bates' explanation that the twist at work caused the L5-S1 disc injury and that Claimant first experienced extreme pain exiting the vehicle the day after. Claimant must only prove the "probable" cause of her injury. There is no requirement that Claimant disprove "plausible" alternatives. Dr. Bates' opinion is credible and must be considered as competent.

VIII. To reject Dr. Bates' opinion based on medical evidence, the majority would be required to rely on Dr. Montalbano, who is highly unpersuasive. Dr. Montalbano's causal explanation of the injury, that Claimant exiting the vehicle – as she had been doing for years and her entire life – suddenly caused the injury completely independent of the work accident, is based on the fact that severe right sided pain began at that point. Yet temporal relationship alone does not establish causation. *See Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996); *Castro v. College of Southern Idaho*, 040919 IDWC, IC 2016-033930 (Idaho

Industrial Commission Decisions, 2019). Further, Claimant already had pain in her left leg and some level of back pain, described as soreness at the very least, prior to the car incident. Dr. Montalbano also supported his opinion by pointing out the lack of nerve root compression, but did not explain the significance of this observation. Ex. 74. Meanwhile, Dr. Montalbano did not provide treatment in this case, he did not have a superior opportunity to examine Claimant contemporaneous to the incident, his examination was not more thorough, and his IME opinion does not identify the extent of his record review. Additionally, Dr. Montalbano was not deposed and subjected to cross examination. Dr. Montalbano's explanation that the contested lumbar injury is entirely unrelated to the work accident – even the lumbar strain he states was caused by the accident – is itself slightly implausible. Dr. Montalbano also did not provide a response to Dr. Bates' opinion. Such reasoning potentially could be relied upon even if Dr. Montalbano's causal explanation is unpersuasive. Ultimately the majority cites Dr. Montalbano but does not rely on him.

IX. Experience may well question whether the correct causal explanation has been presented by any of the medical testimony in this case. Nevertheless, the Commission cannot throw out competent medical testimony simply because it has doubts. "Case law holds that doubts about an injury arising out of and in the course of employment are resolved in favor of the claimant." *Page v. McCain Foods, Inc.*, 141 Idaho 342, 348, 109 P.3d 1084, 1090 (2005). Nor is it the role of the Commission to use its own medical understanding to conclude a person with specialized medical knowledge improperly made a diagnosis. *See Mazzone v. Tex. Roadhouse, Inc.*, 154 Idaho 750, 759-60, 302 P.3d 718, 727-28 (Idaho 2013). While it is entirely within the Commission's purview to make inferences from evidence, or to weigh and balance the opinions of different

medical experts, the Commission cannot rely on its own medical opinion. *See Corgatelli v. Steel W., Inc.*, 335 P.3d 1150, 1160, 157 Idaho 287, 297 (Idaho 2014).

X. If this case was decided by balancing the medical opinions in this case for comparative credibility and weight, Dr. Bates' opinion would satisfy Claimant's burden of proof. Instead, the majority rejects his opinion, relying on its own inferences regarding the significance of the car incident. For the above reasons, I dissent.

DATED this 6th day of November, 2023.

Aaron White, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of November, 2023, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by email transmission and regular United States Mail upon each of the following:

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