BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERRY CAVAZOS, Claimant, v. DIAMOND PEAK PROVISIONS, Employer, and AUTO-OWNERS INSURANCE COMPANY, Surety, Defendants.	**IC 2021-000314** **FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER** FILED DEC 26 2023 INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Sonnet Robinson. Claimant requested an emergency hearing, which was conducted on November 30, 2022. Claimant, Terry Cavazos, was represented by Brad Eidam of Boise. Bradley VandenDries of Boise represented Defendants. The matter came under advisement on September 8, 2023. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law, and order, giving different treatment to the claim for attorney's fees.

ISSUES

1. Whether Claimant is still within a period of recovery from his industrial injuries;
2. Whether Defendants are responsible for medical benefits to include evaluation and treatment of injuries to Claimant's cervical spine;

3. Whether Claimant is entitled to:

    a. Temporary partial or temporary total disability (TPD/TTD);

    b. Attorney's fees.

CONTENTIONS OF THE PARTIES

Claimant contends he suffered an industrial injury on December 3, 2020, to his low back and right hamstring; subsequently, a right gluteal tendon tear was identified, which Claimant avers occurred in the December 3 accident. Thereafter, Claimant suffered a C5-C6 disk herniation, which Claimant contends is a compensable consequence of physical therapy ordered following his lumbar spine surgery. Claimant seeks medical care for his hamstring injury, lumbar spine injury, right gluteal tendon tear, and cervical spine injury, associated temporary disability benefits, and attorney's fees.

Defendants respond that Claimant's gluteal tendon tear and cervical spine injury are unrelated to the industrial accident. Claimant declined a valid offer of light duty from his Employer in February of 2022 and TTDs were appropriately suspended on March 6, 2022. Claimant is not still in a period of recovery because neither of the claimed additional injuries are related to the industrial accident. Claimant is not entitled to attorney's fees as Defendants appropriately and reasonably adjusted this claim.

Claimant replies that the cervical injury he suffered during physical therapy is clearly a compensable consequence and the fact that it occurred during palliative care for a compensable injury, post-MMI, is not relevant. Further, Dr. Lawler's opinion clearly explains how and why the gluteal tendon tear was missed on the femur MRI and why it was related to the industrial accident. Claimant is still in a period of recovery for his lumbar spine injury, cervical spine injury, gluteal tendon tear, and hamstring tear and Defendants' light duty offer was not reasonable or legitimate.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Joint exhibits 1-19;
3. The hearing testimony of Terry Cavazos, Claimant;
4. The post-hearing deposition of Christopher Lawler, MD, taken by Claimant;
5. The post-hearing depositions of Matthew Booth, DPT, and Timothy Doerr, MD, taken by Defendants.

All outstanding objections are OVERRULED.

FINDINGS OF FACT

1. Claimant was injured on December 3, 2020, while delivering product; Claimant was pulling a six wheel dolly, when a box fell off and became stuck under the middle wheel of the dolly. Tr. 45:12-9. Claimant attempted to kick the box away, but the dolly kept rolling towards him and he pushed back on the cart and "heard a pop." *Id.* The dolly weighed anywhere from 600 pounds to 1300 pounds. *Id.* at 38:43-39:2.

2. Claimant presented to Andrea Metzler, PA-C, on December 5, 2020. JE 1:1. Claimant was diagnosed with a hamstring injury and referred for an MRI. *Id.* at 2. Claimant underwent a femur MRI on December 30th which was read as follows "complete tear of the right conjoined and semimembranus tendons at/near the ischial origin with 2.5 centimeters distal retraction of the torn tendon fibers. Surrounding soft tissue edema/hemorrhagic products with an 8.3 centimeter fluid collection/hematoma deep to the semitendinosus muscle. Mild reactive edema within the visualized biceps femoris, semitendinosis, and semimembranous muscles." JE 5:132.

3. Claimant was examined by Mark Spelich, MD on January 5, 2021. JE 2:11.

Dr. Spelich recommended physical therapy (PT) and restricted Claimant to sedentary work. *Id.*

4. Claimant presented to Laura Schlag for a PT evaluation on January 11, 2021. JE 3:53. On February 25, 2021, PT Schlag recorded Claimant had attended 14 PT appointments and wrote Claimant had made good progress, but still had significant tenderness. PT Schlag observed "his symptoms at this time seem more related to lumbar pathology with increased nerve tension in his sciatic nerve. He is very stiff with lumbar flexion at this time as well but also with significant hamstring tightness." JE 3:68.

5. On February 25, 2021, Claimant reported tenderness to the right of his SI joint to Dr. Spelich, who recommended a lumbar MRI to evaluate Claimant's right sided sciatica after an X-ray showed "a high degree of angulation at L5-SI." JE 2:15.

6. On March 8, 2021, Claimant underwent a lumbar MRI, which was read as follows: "post operative changes L4-5 compatible with partial right hemilaminectomy and discectomy. There are superimposed spondylitic changes at L4-5 resulting in moderate to severe right sided foraminal narrowing and mild-to-moderate left sided foraminal narrowing along with a mild degree of overall spinal canal stenosis. More mild spondylitic change within the remainder of the lumbar spine as detailed sequentially in the full report." JE 5:135.

7. At follow-up on March 16, 2021, Dr. Spelich explained to Claimant that the MRI did not show any pressure on the nerves, nerve roots, or spinal cord and recommended Claimant continue physical therapy for his right sided sciatic. *Id.* at 18. On April 13, Claimant continued to complain of bilateral hip and right leg radiculopathy, with burning and numbness. Dr. Spelich prescribed Medrol. *Id.* at 21-22.

8. On April 27, 2021, after Claimant continued to complain of right lower extremity radiculopathy, Dr. Spelich recommended a referral to a neurosurgeon. JE 2:24-25. On May 14,

2021, Claimant was examined by Michael Hajjar, MD, regarding his industrial injuries. JE 4:114. Claimant reported a prior microdiscectomy at L4-L5 in 2003. *Id.* Dr. Hajjar noted Claimant's spine showed extensive degenerative findings, and a broad-based disc herniation "with potential narrowing of the segment for the transversing right L5 nerve root." *Id.* at 115. Dr. Hajjar recommended a nerve conduction study and noted Claimant may be a surgical candidate for a lumbar fusion. *Id.*

9. At follow-up on May 28, 2021, Dr. Hajjar noted the nerve study was relatively normal, as expected. He wrote this result suggested the issue was more radicular type pain than a peripheral nerve issue. JE 4:116. Dr. Hajjar continued to recommend a fusion, and Claimant agreed. *Id.*

10. On June 14, 2021, Claimant underwent "redo" L4-5 bilateral laminectomies, medial facetectomies, foraminotomies, neural decompression, and L4-L5 fusion. JE 4:120. Claimant followed up with Dr. Hajjar on July 7, 2021, and reported he had less right leg pain and was doing well. JE 4:123. On August 13, 2021, Claimant continued to report he was doing well, although he had "a little bit of residual neuropathic symptoms." *Id.* at 124.

11. On September 15, 2021, Claimant returned to Dr. Hajjar and reported neuropathic pain "distally in his right leg" which Dr. Hajjar opined was probably related to the "recovery of the effected L5 nerve root." Claimant also had paraspinal pain and core pain, which Dr. Hajjar opined was probably muscular. Further, Claimant had hamstring pain and pain at his bone graft site on his hip. JE 4:126. Dr. Hajjar recommended Claimant increase his Lyrica and utilize Voltaren gel on his hamstring. *Id.*

12. On October 5, 2021, Dr. Spelich observed that it would be difficult for Claimant to resume his delivery job due to his low back and hamstring issues and wrote "given this, job

retraining is advised or a less demanding position… [for his] lumbar spine and legs." JE 2:33.

13. On December 2, 2021, Dr. Spelich referred Claimant to a physical medicine and rehabilitation physician for his hamstring and lumbar injuries. JE 2:37.

14. On December 30, 2021, Dr. Hajjar rated Claimant's lumbar spine condition at 12% inclusive of his prior 2003 surgeries, with no additional impairment for his 2021 fusion. JE 4:129. Dr. Hajjar issued restrictions of no repetitive bending, twisting, stooping, standing, exposure to vibrations or lifting above 50 pounds. *Id.* at 127.

15. On January 4, 2022, Claimant reported to Dr. Spelich he had fallen and had further pain in his hamstring area. JE 2:39.

16. On February 22, 2022, Mark Harris, MD, examined Claimant. JE 6:142. Dr. Harris assessed: (1) lumbago with sciatica, right side; (2) right leg pain; (3) spondylosis without myelopathy or radiculopathy, lumbosacral region; (4) intervertebral disc disorders with radiculopathy, lumbosacral region; (5) radiculopathy, lumbosacral region; (6) muscle spasm; (7) avulsion fracture of the right ischial tuberosity; (8) SI joint dysfunction; and (9) chronic pain syndrome. JE 6:145. Dr. Harris prescribed physical therapy, medication, recommended possible ESI shots, and issued work restrictions of light/medium duty, with maximum lifting up to 35 pounds occasionally, 20 pounds frequently, and limited bending, twisting, stooping, position change as needed, with no prolonged standing or walking. *Id.* at 153.

17. On February 25, 2022, Emily Martin, Surety's adjustor for this claim, emailed Claimant's counsel with a job offer from Employer. JE 13:366. Ms. Martin's email recorded Claimant's then current restrictions from Dr. Harris, Dr. Spelich, and Dr. Hajjar, and wrote "Larry is confident that they will be able to find [Claimant] continued work even as his work restrictions change, whether they get stricter or looser." *Id.* Claimant was directed to contact Employer directly

"to work out any concerns about the job offer and description." *Id.* Ms. Martin explained that TTDs would be suspended on March 7, as that was the new start date for this job offer. *Id.*

18. Ms. Martin noted a new requirement for a written employment contract which was now standard for all "new" hires since the company had been bought out. *Id.* The job title was "Order Writer/Account Maintenance, Training." *Id.* at 367. The contract also specified:

> the Employer may make changes to the job title or duties of the Employee where the changes would be considered reasonable for a similar position industry or business of the Employer. The Employee's job title and duties may be changed by agreement and with the approval of both the Employee and the Employer or after a notice period required under law.

JE 13:368. The contract also contained a non-compete clause:

> The Employee agrees that during the Employee's term of active employment with the Employer and for a period of two (2) years at the end of that term, the Employee will not, directly or indirectly, as employee, owner, sole proprietor, partner, director, member, consultant, agent, founder, co-venturer or otherwise, solely or jointly with others engage in any business that is in competition with the business of the Employer within any geographic area in or around Idaho, which Employer conducts its business, or give advice or lend credit, money or the Employee's reputation to any natural person or business entity engaged in a competing business in any geographic area in which Employer conducts its business.

Id. at 370.

19. At hearing, Claimant explained an Order Writer was constantly walking into and out of stores to check inventory, setting up displays, and collaborating with grocery managers; it required walking of up to two hours per store and up to four stores per day. Tr. 85:22-86:18. Account maintenance was essentially moving product and shelving within the store: "a lot of movement, bending, stooping… lifting." *Id.* at 86:19-87:2. Training involved constantly standing but did not require lifting over 10 pounds at a time. *Id.* at 87:3-12; 93:25-94:17. Claimant did not believe he could perform those job duties within his restrictions, specifically walking and limited stooping, bending, and lifting. *Id.* at 87:13-88:4. Claimant did not believe he could do any job for

Employer with his current symptoms. Tr. 93:1-9.

20. Claimant also explained that he objected to a number of terms within the written contract. First, he did not believe he could work full-time: "some people consider it to be 40, 45 hours. I have worked 67 and 80 hours. So, it all depends on what their explanation of permanent full-time would be." Tr. 84:21-7. Second, Claimant objected to the provision wherein his job title and duties could change at any time. *Id.* at 88:15-22. Third, Claimant objected to the provision wherein he could be required to work "any additional hours out of employees hours [as] would be deemed necessary," primarily because he was already worried that he could not work full-time. *Id.* at 89:6-17; JE 13:369. Lastly, Claimant objected to the non-compete clause. Claimant explained he had worked for five different distributors previously and was "confined" to working for Employer under the contract. *Id.* at 89:25-90:9.

21. On March 1, 2022, Dr. Spelich recommended a work hardening program and anticipated Claimant would be at maximum medical improvement (MMI) for his hamstring injury soon. JE 2:43. Dr. Spelich issued work restrictions of no prolonged walking, maximum two hours a day, and no lifting above 40 pounds. *Id.*

22. On March 2, 2022, Claimant's counsel emailed Ms. Martin relaying the following: "The offer of employment reflected in the Employment Contract is not considered to be a reasonable and legitimate offer of physically suitable work. The contract job description identifies 3 separate jobs, each of which exceeds [Claimant's] physical restrictions. [Claimant] was not employed at the time of this industrial accident under a written contract. The terms presented are onerous and not reasonable." JE 15:382. Claimant's counsel requested TTDs benefits be reinstated. *Id.* Thereafter, Claimant worked for UberEats and DoorDash, but could not tolerate repeatedly getting in and out of his car. Claimant then worked for Uber giving rides. Tr. 79:17-

80:19.

23. On March 9, 2022, Claimant attended a PT assessment at Therapeutic Associates. JE 7:210.

24. On April 5, 2022, Claimant returned to Dr. Harris. JE 6:154. Claimant was doing about the same; Dr. Harris prescribed ESI shots, continuing with PT, and referred Claimant for work hardening. He also continued Claimant's restrictions. *Id.* at 158-159.

25. On April 7, 2022, Claimant reported to Dr. Booth, his physical therapist, that he had tripped on a curb and that his hamstring pain had flared up. JE 7:198.

26. On April 26, 2022, Claimant had his final appointment with Dr. Spelich who noted he had nothing further to offer Claimant; his work restrictions remained the same (no prolonged walking, two hours a day maximum, no lifting above 40 pounds) and he was MMI for his hamstring tear with a 2% whole person impairment (WPI) with no apportionment. JE 2:48-51. Dr. Spelich also wrote a prescription for injections into Claimant's hamstring for his pain. *Id.* at 50, 52.

27. On June 7, 2022, Claimant underwent ESI shots at his right L4-5 and L5-S1. JE 6:163. On June 29, 2022, Claimant returned to Dr. Harris. JE 6:166. He reported no benefit from the ESI shot and was not able to get into a work hardening program. Dr. Harris recommended he continue physical therapy and referred Claimant for a hamstring injection. *Id.* at 169.

28. On August 9, 2022, Dr. Booth recorded Claimant was getting better relief with "stronger pressure for refolding (spinal compression)." JE 7:251.

29. On August 11, 2022, Claimant presented to Christopher Lawler, MD. JE 9:301. Dr. Lawler examined Claimant and noted hamstring tenderness, a positive straight leg test, and diagnosed persistent hamstring avulsion pain and persistent radiculopathy. *Id.* Dr. Lawler

recommended a right hip MRI and repeat lumbar MRI, noting that, depending on the results, Claimant could require a repeat lumbar diskectomy and platelet-rich-plasma ("PRP") shots for his hamstring. *Id.* at 302.

30. On August 18, 2022, Claimant's right hip MRI was read as follows: "1) severe right radius medius insertion tendinopathy with 70% partial thickness tear; 2) tiny right anterolateral labral tear. Correlate clinically as labral tears are observed in both symptomatic and asymptomatic patients; 3) left greater than right hamstring origin hyperintensity can be associated with tendinopathy but is observed in both symptomatic and asymptomatic patients. Correlate clinically." JE 9:305.

31. Claimant's repeat lumbar spine MRI, conducted that same day, was read as follows: "(1) Congenital short pedicles, prominent epidural fat, and discogenic/facet degenerative changes contribute to severe spinal canal stenosis at L3-L4 and moderate spinal canal stenosis at L2-L3. Multilevel neural foraminal narrowing as above. (2) Status post L4-L5 posterior fusion." JE 9:307.

32. On August 30, 2022, Claimant attended physical therapy with Dr. Booth. The physical exam portion notes Claimant underwent treatment including "CDs: hamstring origin bilat. HTPs: right QL. RFD lumbar spine in sitting." JE 7:239. Dr. Booth explained at deposition that "RFD" stands for "refolding distortion." Booth Depo., 24:15-23. Claimant described at hearing that Dr. Booth put both hands on either side of his neck and slowly pushed down. Claimant had undergone this therapy previously with good results, so that day the pressure and time of the compression was increased. Tr. 58:16-59:25. Dr. Booth confirmed this description of the therapy at his deposition, "with the patient seated, and then there is compression from the practitioner's hands through their shoulders that is meant to compress down through the spine that would target the lumbar spine." Booth Depo., 23:5-8.

33. Claimant described that after this PT session he felt tightness in the left side of his neck that same day about noon. The pain gradually got worse and worse, and spread through his shoulders, back, and into his left arm. Tr. 60:20-63:10.

34. On September 2, 2022, Dr. Booth noted "neck is flared from prior work on compression to the spine." JE 7:237. On September 6, 2022, Dr. Booth recorded "had a setback with compression to the lumbar spine aggravating his neck, which acts like a herniated disk." JE 7:236.

35. Also, on September 6, 2022, Claimant presented to the St. Luke's Emergency Department for "upper back pain, left arm pain, and headache. Pt states this started last Tuesday." JE 10:327. Claimant reported that after his physical therapist compressed his neck and shoulders for about 60 seconds, that the next day he woke up left sided neck pain. *Id.* at 328. Claimant was prescribed methylprednisolone and discharged. *Id.* at 332. Claimant was also restricted from lifting, pulling, or pushing anything greater than 5 pounds, and to avoid activities which required twisting or bending. *Id.* at 334.

36. On September 7, 2022, Claimant returned to Dr. Lawler. JE 9:309. Claimant reported the August 30 PT incident and explained he only found relief of his neck discomfort "with reaching his left arm over and behind his head." JE 9:309. Dr. Lawler diagnosed: (1) right gluteus medius tear; (2) degenerative disc disease of the lumbar spine; (3) left cervical radiculopathy. *Id.* Dr. Lawler was concerned that Claimant had developed a disc herniation in his neck and recommended a cervical MRI. *Id.* at 310.

37. On September 11, 2022, Claimant's cervical spine MRI was read as follows: "congenitally narrow spinal canal with superimposed degenerative changes and resultant stenosis as above, most pronounced at C5-C6." JE 9:313.

38. On September 13, 2022, Claimant reported he had been hit in his right hip and that he "fell into a cart." On September 16, Claimant again reported "ever since getting hit by the cart a few weeks ago has felt debilitating pain." JE 7:232, 230. Claimant's neck continued to bother him. *Id.* At hearing, Claimant explained that a St. Luke's employee shoved him while he was trying to get an MRI, and he fell into a cart which "jammed into the same soft spot that I have a problem with." Tr. 104:11-105:1. Claimant reported his condition had returned to baseline from that injury. *Id.* at 112:11-16.

39. Claimant was surveilled on September 16, 2022. JE 19. Claimant drove his Jeep, smoked cigarettes, and balanced on his left leg to squash a bug with his right foot. *Id.*

40. On September 21, 2022, Dr. Lawler reviewed Claimant's cervical spine MRI and referred Claimant to neurosurgery for his cervical radiculopathy and herniated disc and to Dr. Beckmann for surgical options for his hip. JE 9:315-316. He also took Claimant completely off work from August 11, 2022, the date of his first evaluation, forward. *Id.* at 318.

41. On September 26, 2022, Claimant's counsel requested reinstatement of TTD benefits with attached documentation from Dr. Lawler's office showing Claimant was off work again from August 11 forward. JE 11:339.

42. On October 13, 2022, Dr. Lawler wrote "my medical opinion with regard to the patient's symptoms with regard to his cervical pathology I would recommend urgent consultation with neurosurgery before he develops permanent neuropathy or longstanding weakness and atrophy." JE 9:320. Dr. Lawler recorded Dr. Beckman had examined Claimant and he did not feel Claimant's gluteal tear was surgical in nature. *Id.*

43. On October 20, 2022, Dr. Lawler responded to a letter from Claimant's counsel wherein he opined Claimant was not at MMI for his lumbar spine or his hamstring injury. JE

9:323-324. Dr. Lawler recommended repeat injections and possible surgery for Claimant's lumbar spine and injections and physical therapy for his hamstring injury. Dr. Lawler opined that Claimant's cervical spine injury was caused by his physical therapy. *Id.*

44. On October 24, 2022, Claimant's counsel forwarded Dr. Lawler's responses to Defense counsel. JE 12:362.

45. On November 15, 2022, Timothy Doerr, MD, examined Claimant for an independent medical exam (IME) at Defendants' request. JE 18:398. Dr. Doerr reviewed records and conducted a physical exam. Dr. Doerr noted Claimant was a good historian with no signs of pain behavior. *Id.* at 420. Dr. Doerr reviewed the surveillance footage and opined that none of the activities seen on the video were inconsistent with Claimant's presentation during his exam. *Id.* at 422.

46. Dr. Doerr issued several causation opinions. Dr. Doerr opined that "if the physical therapist confirms that there was no manipulation or compression of the cervical spine" during Claimant's physical therapy, the C5-C6 herniation would be unrelated to physical therapy. *Id.* Dr. Doerr recorded Claimant's 2003 lumbar injuries and opined it was more medically probable than not that Claimant suffered a recurrent herniation at L4-L5. Dr. Doerr recommended a CT myelogram of Claimant's lumbar spine to confirm his lumbar fusion was solid before he would declare him at MMI. *Id.* at 423. If the fusion was solid, Claimant's impairment should be apportioned 50% to his pre-existing condition and 50% to his industrial injury. *Id.* Dr. Doerr opined that right proximal hamstring rupture was clearly caused by the industrial accident, and recommended Claimant undergo an MRI of the right femur with contrast to delineate any scarring/involvement of the sciatic nerve and repeat EMG due to Claimant's continued symptoms. *Id.* Dr. Doerr did not believe PRP injections were indicated for the hamstring tear because the

proximal hamstring tendons "are distally displaced and have no potential to heal." *Id.* Dr. Doerr opined the gluteal tear was unrelated to the accident as the femur MRI taken 12/30/20 did not reveal an acute injury to that area; PRP or percutaneous needle tenotomy ("PNT") injections would be reasonable to treat the glute tear, but again, unrelated to the accident. *Id.* Dr. Doerr issued temporary work restrictions while Claimant underwent the recommended additional studies of no lifting greater than 10 pounds and no bending, twisting, stooping, or crouching. *Id.*

47. Dr. Lawler was deposed on January 11, 2023. Dr. Lawler is board certified in emergency medicine and fellowship trained in orthopedics and has been practicing for 18 years at St. Luke's Orthopedics. Lawler Depo. 5:25-6:22. Dr. Lawler reviewed the lumbar, femur, and hip MRI images as well as the reports. *Id.* at 18:18-19:6.

48. Regarding the hamstring tear, Dr. Lawler agreed with Dr. Spelich that Claimant was at MMI: "at this time with the retraction, the scarring down of those tendons, he's reached the maximum improvement of those tendons." *Id.* at 42:1-14. Dr. Lawler also agreed with Dr. Doerr's recommendation for an additional MRI with contrast to delineate whether there was any involvement with sciatic nerve: "as a matter of full completeness sake, that would not be unreasonable." *Id.* 49:12-24. If the MRI did show scar tissue around the sciatic nerve, a neurolysis and debridement of the scar tissue would be necessary; however, if the MRI came back without scar tissue around the sciatic nerve, Dr. Lawler opined this would point back to Claimant's lumbar spine as the explanation for his ongoing symptoms. *Id.* at 50:2-51:18.

49. Regarding the lumbar spine, Dr. Lawler explained that he requested a second lumbar MRI because Claimant's lumbar radiculopathy had not resolved after his fusion with Dr. Hajjar, and he was concerned about the surgical level and the adjacent levels of his lumbar spine. *Id.* at 12:25-16:6. The lumbar MRI showed Claimant's fusion and compression of the nerve

roots at several levels which explained Claimant's lumbar radiculopathy. *Id.* at 22:16-23:2. Dr. Lawler's diagnosis was degenerative disc disease. *Id.* at 28:17-20. Dr. Lawler explained that potential treatments for Claimant's lumbar spine included injection therapy and possible fusion revision or other surgery. *Id.* at 38:18-39:12. Claimant's lumbar spine was not at MMI. First, Claimant's fusion needed to be evaluated to see whether the bones had actually fused together; second, Claimant had additional disc herniations above and below his fused level which needed to be addressed. *Id.* at 42:15-44:7. Dr. Lawler agreed with Dr. Doerr's recommendation for a CT myelogram to confirm a solid fusion. *Id.* at 49:2-11. If the fusion was solid, with no nerve impingement or nerve root compromise, no looseness or instability, then Dr. Lawler would treat Claimant "symptomatically" versus surgically. *Id.* at 53:10-54:13. Dr. Lawler remarked: "there is [care] for some things, especially more arthritic damage. For compressed nerves, it's pretty - - if it's still compressed, it's compressed. There is not a lot to do." *Id.* at 53:11-19.

50. Regarding the gluteal tear, Dr. Lawler confirmed he had reviewed the previous femur MRI and was aware Claimant was already diagnosed with a torn hamstring. *Id.* at 12:4-24; 17:20-22. Dr. Lawler ordered the hip MRI to assess Claimant's level of healing and get a better "field of view" of the area of injury:

> Reason I did that is field of view, or what we call field of view, what you are going to be able to see on that MRI. So where the start and end point of that MRI is. Femur extends from the knee to the top of the femur. Typically kind of catching some of the lower ischial tuberosity where the hamstrings attach. So mostly the posterior leg. The hip MRI is more beneficial for the buttocks area, the gluteus muscles as well as extending below that is ischial tuberosity so you can see the hamstrings as well, and so a better field of view of that area that is painful, less field of view down by the knee, which we didn't need.

Id. at 16:21-17:1. Dr. Lawler explained that the femur MRI did not capture the gluteal tear because that was "not the appropriate study to fully visualize that muscle." *Id.* at 19:8-14. Dr. Lawler disagreed with Dr. Doerr's opinion that the femur MRI showed no evidence of acute injury to the

gluteus medius insertion because "that imaging of the femur and posterior femur doesn't incorporate the full rectus and the full gluteus… it does give you a brief picture of it, but it doesn't give you the ideal or fully test for that." *Id.* at 19:19-20:8. Dr. Lawler opined that the gluteal tear occurred in the same accident as the hamstring tear for several reasons: (1) that the gluteal tear showed no hematoma or fluid collection which would correspond to a newer tear; (2) the inflammation at both sites, the gluteal and hamstring tear, showed chronic inflammation "consistent [at] almost the same level." *Id.* at 20:15-21:7. Regarding treating the gluteal tear, Dr. Lawler testified that the first option was "benign neglect," the second was surgery (which Dr. Beckman did not recommend), and third, platelet rich plasma injections (PRP) to promote healing along with physical therapy. *Id.* at 30:7-23; 37:1-11; 54:25-55:18. Dr. Lawler elaborated that the goal of the injections and physical therapy would be to improve Claimant's walking, standing, and return to normal strength with his hip. *Id.* at 45:12-24. Dr. Lawler did not believe Claimant was at MMI for his gluteal tear and further added that the physical therapy Claimant had had to date was not for the gluteal tear. *Id.* at 46:6-17

51. Regarding the cervical spine, Dr. Lawler recalled that Claimant first presented that complaint at his September 7 appointment. *Id.* at 23:12-24:2. Claimant reported his physical therapist had performed compression therapy and Dr. Lawler observed he had limited cervical range of motion and spasms and was "very uncomfortable." *Id.* at 24:11-26:11. Dr. Lawler reiterated Claimant's diagnosis of cervical radiculopathy and herniated disc and his opinion that he suffered a cervical spine injury during physical therapy. *Id.* at 31:24-33:13. Dr. Lawler explained:

> A: Anywhere in the spine we have discs that are between vertebra. When either a direct load is placed on them or an increased pressure load such as pushing against resistance with contraction of our core musculature, neck musculature, it can put pressure on the disc. And if there is just a weak spot, a wear and tear spot, just in

> general the discs are not perfect. You can create pressure and kind of like squeezing the jelly out of a jelly doughnut as the analogy I give patients where that disc kind of bulges out and pushes on the nerve root.
>
> Q: [Mr. Eidam] So in this instance the pressure on the shoulders that the therapist was applying is that the push you were talking about?
>
> A: That was the pressure applied, and then his physiological pressure, kind of bearing down, pushing up against doing the resistant exercise created that pressure is why I say yes.

Id. at 33:21-14. Regarding the "urgent" neurosurgery consult Dr. Lawler requested, he elaborated that the risk of not getting timely intervention was developing significant weakness, injury to the nerve, and "just not fully recover[ing.]" *Id.* at 39:21-40:17. Claimant was not at MMI for his cervical injury and needed a surgical consultation. *Id.* at 46:18-25. Dr. Lawler did believe Claimant going to the ER for his cervical spine was reasonable and that the treatment given was reasonable and necessary. *Id.* at 48:2-17.

52. Dr. Lawler explained that he took Claimant off work from August 11 forward because they had discussed Claimant's job duties and Dr. Lawler felt Claimant should not be doing heavy lifting; he could not speak to whether Claimant should have been off work prior to August 11. Lawler Depo. 34:25-35:19. Dr. Lawler elaborated that Claimant could do a light duty position that did not require heavy lifting, lifting with his legs, any exertion with his neck, or "manual" work with his left arm. *Id.* at 47:2-18. If Claimant's cervical spine was out of play, Claimant would still be restricted from lower body lifting, but could do more upper body work "sitting at a table." *Id.* at 57:9-19. With regard to the gluteal injury and hamstring injury, "activities of normal living…are completely reasonable." *Id.* at 58:12-59:1.

53. Dr. Booth was deposed April 20, 2023. Dr. Booth has a doctorate in physical therapy and is an Idaho licensed physical therapist. Booth Depo. 32:15-33:6. Dr. Booth opined regarding the gluteal tear, "it would be very reasonable that someone with a hamstring injury, low

back injury, that the gluteus medius could also be involved either at the time of injury or as a sequelae of that in the healing process and body compensation patterns that would result from that." *Id.* at 35:4-12. If Dr. Booth had been aware there was a gluteal tear, he would have treated that area directly, however, some of the treatment to the hamstring would have benefited the gluteal tear. *Id.* at 41:18-42:13.

54. Dr. Booth explained he had started lumbar compression therapy with Claimant because, by history, Claimant had reported lumbar traction therapy had not worked. *Id.* at 11:17-13:7; 40:3-14. Dr. Booth confirmed Claimant's description of the compression therapy: "with the patient seated, and then there is compression from the practitioner's hands through their shoulders that is meant to compress down through the spine that would target the lumbar spine." Booth Depo., 23:5-8. Dr. Booth explained that at Claimant's September 2 appointment: "he felt like the neck was having more pain. And it doesn't happen very normally, but it made sense that from that treatment, there was pain to the neck." *Id.* at 23:15-25. Dr. Booth confirmed he changed his style of compression therapy after Claimant reported neck pain. *Id.* at 28:17-29:1. Dr. Booth explained the potential for the compression therapy he employed to impact the cervical spine: :

> A: If we compress down, straight down, there's enough of a pull, just the angulation of the upper trapezius, that you're pulling through the upper trapezius, you're compressing from the head down. Just the physics of that scenario would be pulling into the head and compressing the cervical spine. And some patients give us feedback that that doesn't feel good on their neck, and we want to be directing it into thoracic and lumbar spine.
>
> Q [Mr. Eidam]: So that downward pressure creates an abnormal tension on the trapezius of sorts?
>
> A: Yes
>
> Q: Even with trying to give it slack, there's still some additional tension on the trapezius, right?
>
> A: Correct

Q: And the concern is that it could injure the cervical spine?

A: The concern would be it could flare things that are already there.

Q: Okay. Pre-existing things that nobody knows about?

A: Right.

Id. at 47:17-48:13. Dr. Booth did "vaguely" recall Claimant mentioned something felt not right after his August 30 appointment. *Id.* at 50:14-22. Dr. Booth elaborated on his prior point that he had adjusted his compression therapy because he was concerned he aggravated a herniated disc in Claimant's cervical spine from his prior method of compression therapy. *Id.* at 53:3-55:1. Dr. Booth did not believe he exerted enough force to herniate a disc, but rather irritated the disc enough to cause it to become symptomatic. *Id.* at 55:3-21. Dr. Booth clarified he was not a physician and was not intending to make a diagnosis of herniated disc in his notes, but more to make a physician aware that Claimant's symptoms fit that diagnosis and recommend further work-up. *Id.* at 59:19-61:3.

55. Dr. Doerr was deposed on April 27, 2023. Dr. Doerr is a board-certified orthopedic surgeon and has practiced medicine for 26 years. Doerr Depo. 7:16-8:13. Dr. Doerr had reviewed Dr. Lawler's deposition, but not Dr. Booth's deposition. *Id.* at 11:21-23; 44:24-45:2. Dr. Doerr, similar to Dr. Lawler, had reviewed the femur and hip images and reports. *Id.* at 34:12-18.

56. Regarding the hamstring injury, Dr. Doerr reiterated his opinion that it was clearly related to and caused by the accident. *Id.* at 10:5-10. Dr. Doerr agreed with Dr. Lawler's opinion that Claimant's hamstring injury was at MMI. *Id.* at 22:13-19. However, Dr. Doerr later clarified that he did not declare Claimant at MMI in his report regarding the hamstring tear because there could still be scarring over the sciatic nerve caused by the hamstring tear; the hamstring tear itself could not be improved but because the sciatic nerve and hamstring tear were part of the same

injury, Claimant was not at MMI for that injury. *Id.* at 33:8-34:10.

57. Regarding the lumbar spine, Dr. Doerr reiterated he could not confirm to any degree of medical probability that Claimant's lumbar spine was at MMI because there was no imaging confirming his fusion was solid. *Id.* at 31:25-32:9. Dr. Doerr still believed Claimant's lumbar spine condition was related to the accident. *Id.* at 10:11-18. Dr. Doerr disagreed with Dr. Hajjar that Claimant would not be entitled to more PPI for his lumbar spine fusion but could not calculate his impairment on the spot and did still agree it would be apportioned between this injury and his prior diskectomies. *Id.* at 35:21-38:7.

58. Regarding the gluteal tear, Dr. Doerr did agree that the study was not ordered to evaluate the gluteal muscle, but that the femur MRI visualized the insertion of that muscle and showed the area of concern. *Id.* at 23:13-24:21. It was Dr. Doerr's position that the femur MRI clearly did not show a gluteal tear present in December of 2020. *Id.* at 25:3-18. Dr. Doerr observed fluid in the tear, which supported the fact that it was a more recent tear because fluid would be absorbed back into a tear that was two years old. *Id.* 39:18-40:5. Dr. Doerr thought it was unlikely Claimant's altered gait or physical therapy could have caused the gluteal tear. *Id.* at 40:13-16. Dr. Doerr agreed with Dr. Lawler that three months of physical therapy was reasonable treatment for the gluteal tear. *Id.* at 33:1-7.

59. Regarding the cervical spine, Dr. Doerr explained that "manual pressure on the top of the shoulders" can be physical therapy to increase tolerance loads for the low back, but that type of therapy does not typically put pressure on the neck. *Id.* at 27:19-28:3. Dr. Doerr described the "shoulder depression test" where "you actually put your hands on the shoulder and push down on the shoulders. If they complain of neck pain, it's a sign that they are magnifying their symptoms because you aren't loading the cervical spine." Dr. Doerr performed this test on Claimant, and

Claimant did not report any pain. *Id.* at 28:4-23. Dr. Doerr agreed Claimant had cervical radiculopathy and herniated disc at his C5-C6 and multiple levels of degeneration. *Id.* at 41:1-25. Claimant's age meant Claimant was less likely to experience a disc herniation because his spine would be stiffer. At Claimant's age, bony impingement would be more likely. *Id.* at 43:1-44:23. Dr. Doerr was not aware of the exact mechanism of Dr. Booth's compression therapy. *Id.* at 45:7-46:11. Dr. Doerr opined that he could not "say with any degree of medical probability that the disk herniation was caused by physical therapy." The most common cause of cervical disc herniations were: (1) compression to the neck; (2) rotation or torquing of the neck; and (3) insidious onset unrelated to an injury, with insidious onset being the most common. *Id.* at 50:23-51:13. Dr. Doerr clarified that he did not have direct knowledge of what happened in the August 30 physical therapy appointment, so he did not think it was appropriate to comment on whether or not that caused an injury. *Id.* at 52:14-53:5.

60. **Condition at Hearing.** At the time of hearing, Claimant still had left arm pain, left sided neck pain, upper thigh pain, and low back pain. Tr. 74:20-75:23. Claimant needed to move constantly to feel comfortable. *Id.* at 76:4-16.

DISCUSSION

61. Idaho Code § 72–432(1) requires an employer to provide an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter.

62. A worker's compensation claimant has the burden of proving, by a preponderance of the evidence, all the facts essential to recovery. *Evans v. Hara's, Inc.*, 123 Idaho 473, 849 P.2d

934 (1993). Claimant must adduce medical proof in support of his claim, and he must prove his claim to a reasonable degree of medical probability. *Dean v. Dravo Corporation*, 95 Idaho 558, 511 P.2d 1334 (1973). Aggravation, exacerbation, or acceleration of a pre-existing condition caused by a compensable accident is compensable in Idaho Worker's Compensation Law. *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994).

63. 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).

64. Regarding whether an injury is a compensable consequence, "the basic test of employer liability is a causal connection between covered employment and a claimant's injury. Once this connection is established, our workers' compensation statutes do not distinguish between primary and secondary consequences, and to infer such a distinction would be inconsistent with the mandate that the law be interpreted liberally to ensure full compensation for employees… At bottom, whether a secondary injury is a "probable consequence" of an initial injury—in other words, a foreseeable consequence—is irrelevant. What matters is whether there is a demonstrable causal connection between the compensation sought and the work-connected injury." *Sharp v. Thomas Brothers Plumbing*, 170 Idaho 343, 354, 510 P.3d 1136, 1147 (2022). An employer is not liable for the aggravation of a compensable injury or secondary injury if it results from employee's rash or deliberate disregard for a material risk that harm will occur. *Id.*

65. **Hamstring Tear.** Claimant's hamstring tear is at MMI. Dr. Doerr, Dr. Lawler, and Dr. Spelich agree that there is no further treatment which could improve the hamstring tear or restore any additional function to that area.

66. However, as observed by Dr. Doerr in his report and at deposition, Claimant is not at MMI for the overall injury because the hamstring tear could have caused scarring around his sciatic nerve. Dr. Lawler agreed this was possible given his symptoms. He agreed with Dr. Doerr that additional imaging and possibly surgery was reasonable. If the additional imaging, specifically an MRI with contrast, shows scarring around the sciatic nerve, neurolysis and debridement of the scar tissue is related to the hamstring tear and compensable medical treatment per both Dr. Doerr's opinion and Dr. Lawler's opinion.

67. Claimant may be at MMI for this injury. It is possible that Claimant's symptoms are explained by his lumbar pathology and not sciatic nerve involvement per Dr. Lawler, but without the additional imaging recommended by Dr. Doerr, it is impossible to know at this point whether Claimant needs additional treatment. Claimant is entitled to the additional imaging recommended by Dr. Doerr, and if there is scar tissue entrapping Claimant's sciatic nerve, Claimant is entitled to neurolysis and debridement of that area as a direct result of his hamstring tear.

68. **Lumbar Spine Injury.** Dr. Hajjar, Dr. Lawler, Dr. Doerr, and Dr. Harris related Claimant's lumbar spine pathology to his industrial accident. Defendants paid for Claimant's lumbar fusion and do not contest that procedure as reasonable medical treatment for his industrial injury. Claimant was in physical therapy for his lumbar spine after his fusion, which was also paid for by Defendants.

69. Both Dr. Doerr and Dr. Lawler agree that a CT myelogram of Claimant's spine must be done before Claimant can be declared at MMI for his lumbar spine injury. Both agree that Claimant's fusion may be unstable, which could be causing his ongoing symptoms. Dr. Doerr was not asked and did not opine regarding what additional treatment Claimant could be entitled to if his fusion was stable or what treatment was appropriate if Claimant's fusion was unstable.

70. Dr. Lawler opined that Claimant could require additional surgery or injection therapy if the fusion was unstable; however, if the fusion was stable, Claimant would be treated "symptomatically." It's not clear from his testimony whether that would include the proposed injection therapy or additional physical therapy.

71. Regardless, Claimant is not yet at MMI for his lumbar spine injury until a CT myelogram confirms the fusion is solid. Depending on the results of the CT myelogram, Claimant may be entitled to additional medical treatment, either curative (if the fusion is unstable per Dr. Lawler) or palliative (if the fusion is stable, "symptomatic" treatment per Dr. Lawler). However, without the results of the CT myelogram, it is impossible to predict what medical treatment to which Claimant will be entitled. Claimant is still in a period of recovery for this injury.

72. **Gluteal Tear.** Dr. Lawler, Dr. Doerr, and Dr. Booth have all issued opinions regarding the gluteal tear. Dr. Booth's opinion was somewhat equivocal, essentially amounting to an opinion that the gluteus medius muscle could have been injured during the original industrial injury or injured as a result of the original injury: "it would be very reasonable that someone with a hamstring injury, low back injury, that the gluteus medius could also be involved either at the time of injury or as a sequelae of that in the healing process and body compensation patterns that would result from that." Booth Depo. 35:4-12.

73. Dr. Lawler unequivocally testified that the gluteal tear was caused in the original industrial accident. Dr. Lawler reviewed the femur and hip MRIs directly and the reports. Dr. Lawler described that the femur MRI did show the insertion point for the gluteal medius muscle, but only briefly and that it was not the ideal study to identify a gluteal tear. Dr. Lawler further supported his opinion by noting that fluid collection at the gluteal tear site, which would have indicated a newer tear, was not observed at the gluteal tear sight. Dr. Lawler further explained that the chronic inflammation at the gluteal tear was similar to the chronic inflammation at the hamstring tear, an injury that all medical experts agreed was caused in the initial accident and which indicated those injuries occurred at the same time. Lawler Depo 20:15 - 21:8.

74. Dr. Doerr also unequivocally testified that the gluteal tear was not caused in the original industrial accident. Dr. Doerr reviewed the femur and hip MRIs directly and the reports. Dr. Doerr agreed that the femur MRI was not the perfect study to visualize the gluteal muscle but opined that the gluteal insertion point was clear on the femur MRI and showed no tear. Unlike Dr. Lawler, Dr. Doerr observed fluid at the site of the gluteal tear, indicating it was a newer tear. Dr. Doerr was not asked to compare the inflammation levels between the hamstring tear and gluteal tear.

75. The weight of the medical evidence supports that the gluteal tear was caused in the industrial accident on a more probable than not basis. Dr. Lawler's description of what each MRI visualizes in its "field of view" and his observations regarding the similarities of the chronic inflammation ever so slightly tip the scales in favor of this finding. This is the rare case where two physicians both viewed the images directly and both had diametrically opposed interpretations of the results.

76. Regarding treatment for the gluteal tear, Dr. Lawler and Dr. Doerr agreed that three months of physical therapy was reasonable treatment. Dr. Lawler testified regarding PRP injections and described the purpose of those injections was to promote healing of the muscle and increase Claimant's function. Dr. Doerr wrote that PRP or PNT injections "could be considered" for the gluteal tear, but that that injury was unrelated to the industrial accident. As noted above, Dr. Doerr's causation opinion regarding the gluteal tear is rejected.

77. Dr. Doerr summarized a record from Dr. Beckman which was not included in the hearing exhibits. He wrote that Dr. Beckman recommended "physical therapy and percutaneous needle tenotomy (PNT) vs. platelet-rich plasma (PRP) injections." JE 18:416, 423. Dr. Lawler wrote "patient was seen by Dr. Beckman on 10/3/22, at that visit patient elected to proceed with conservative management including referral for consideration of PNT vs. PRP injection and formal physical therapy." Dr. Lawler then wrote that PRP injections were the indicated treatment. JE 9:319-320. Claimant asks for both in briefing. *See,* Clt's Brief, p. 14.

78. Claimant is entitled to physical therapy for the gluteal tear; Claimant is also entitled to a referral for consideration of PNT vs. PRP injection to treat his gluteal tear. This may be a misreading of the records, i.e. Dr. Lawler may have only intended PRP injections, not PNT injections, but nevertheless, Claimant is entitled to some form of injection therapy per Dr. Lawler and Dr. Doerr. Claimant is not at MMI for this condition.

79. **Cervical Spine Injury.** Claimant argues his cervical spine injury is a compensable consequence of his original injury. Claimant was treating for his compensable lumbar spine injury in physical therapy when he experienced a feeling of "not quite right" which progressed to pain, numbness, and eventually resulted in an emergency room visit, C-spine MRI which showed a

herniated disc, and an urgent referral to neurosurgery. Defendants argue Claimant was in "work hardening" and not treating for his lumbar spine.

80. Dr. Lawler related Claimant's cervical spine pathology to his physical therapy appointment, both in writing and in deposition. Dr. Lawler explained that the herniation could have been caused by the physical therapy if Claimant already had a weak spot in his spine and the pressure during physical therapy just "squeezed it out." Dr. Lawler believed Claimant still required a surgical consultation for his cervical spine condition and noted that delays in treating it could cause permanent damage.

81. Dr. Booth opined that there was not enough force during his therapy to herniate the disc, but that neck pain "made sense" from the therapy he was administering and that it was possible to flare or irritate an already herniated disc with lumbar compression therapy. Essentially, pressure on the trapezius muscle could pull or put pressure on the cervical spine, even when precautions were taken to allow "slack" in the trapezius muscle. Dr. Booth acknowledged he was not a physician but concluded he had aggravated a herniated disc based on Claimant's symptoms.

82. Dr. Doerr agreed that Claimant suffers cervical radiculopathy and a herniated disc and that he did need treatment for those conditions. In his initial written report, Dr. Doerr wrote "if the physical therapist confirms that there was no manipulation or compression of the cervical spine during these sessions" then the cervical herniated disc/radiculopathy would not be related to the physical therapy. JE 18:422. Dr. Doerr did not have the benefit of reviewing Dr. Booth's deposition but explained that "manual pressure on the top of the shoulders" can be physical therapy to increase tolerance loads for the low back, but that type of therapy does not typically put pressure on the neck. Doerr Depo. 27:19-28:3. Dr. Doerr was given an approximate description of what Dr. Booth's compression therapy was, including pressure on the shoulders, but did not feel it was

appropriate to comment on whether the physical therapy caused Claimant's cervical spine to become symptomatic as he did not have direct knowledge of the mechanism Dr. Booth utilized in performing physical therapy.

83. The weight of the evidence supports that physical therapy caused Claimant's cervical spine to become symptomatic; it is less clear whether Claimant's cervical spine had a pre-existing herniation which was aggravated or whether the physical therapy caused Claimant's cervical spine herniation. Dr. Booth's opinion that there was not enough pressure to herniate a disc was not given to Dr. Lawler to review; Dr. Lawler's testimony that tissue inside the disc pushes out and impinges on a nerve root when the disc is weak or "just not perfect" leaves the reader with the impression that an already herniated disc could have been made worse or could have been caused by the physical therapy in an already weakened cervical spine. Dr. Lawler's opinion leaves one with the impression that there is obviously pre-existing pathology, but not to what degree or extent. However, the crux of his opinion is that the physical therapy caused Claimant's neck to become symptomatic whereas before it was not. An aggravation of a pre-existing condition is compensable. *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994).

84. Defendants' argument that the physical therapy was work hardening and not physical therapy for Claimant's lumbar spine is legally irrelevant and factually incorrect. Dr. Harris's notes make it clear that Claimant was already in physical therapy for his lumbar spine with Dr. Booth while they were exploring a referral for work hardening; Claimant was not able to get into a work hardening program but was recommended to still continue with physical therapy. See Ex 6.

85. More importantly, as *Sharp* made clear, the critical question is whether there is causal connection between the injury and the employment, and the law does not distinguish between primary and secondary consequences. Claimant was treating for his compensable lumbar spine injury and was injured while treating for that compensable injury; whether the treatment was "work hardening" or physical therapy is legally irrelevant; both are treatment types related to the accident and injury. Further, Defendants do not argue that Claimant took a rash or deliberate risk with a deliberate disregard for material harm to occur.

86. Claimant's cervical spine condition is causally related to the subject accident. Claimant is entitled to a surgical consultation for his neck. Claimant is not at MMI for this condition.

87. **Temporary Disability Benefits.** Once a claimant establishes by medical evidence that he is within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits under Idaho Code § 72-408. Entitlement to TTD benefits is not without caveat. In this regard, Idaho Code § 72-403 provides:

> **72-403. Penalty for malingering – Denial of compensation.** – If an injured employee refuses or unreasonably fails to seek physically or mentally suitable work, or refuses or unreasonably fails or neglects to work after such suitable work is offered to, procured by or secured for the employee, the injured employee shall not be entitled to temporary disability benefits during the period of such refusal or failure.

Therefore, if, while in a period of recovery, an injured worker is medically released to work with certain physical restrictions, he is nevertheless entitled to TTD benefits, unless employer can demonstrate (1) that the injured worker has refused or unreasonably failed to search for suitable employment, or (2) that he has unreasonably failed to accept suitable work offered to him. *Roberts v. Portopros*, IC 2019-008048 (Issued October 11, 2019).

88. There are two time periods for temporary disability benefits that must be examined. The first is the time period between March 7, 2022, and August 11, 2022, and concerns whether Claimant unreasonably failed to accept the employment offered by Employer. Subsumed in that inquiry is the question of whether the job that was offered was "suitable." The second is the time period after August 11, 2022, when Dr. Lawler took Claimant completely off work.

89. As noted above, Claimant has met his burden of showing he is in a period of recovery for compensable injuries starting August 11 when Dr. Lawler took him off work completely. Dr. Doerr and Dr. Lawler both agree Claimant needs a CT myelogram before he can be declared MMI for his lumbar spine, both agree he needs an additional MRI and EMG scan to see if there is scarring and nerve entrapment of his sciatic nerve caused by his hamstring tear before he can be declared MMI, both agree Claimant needs additional treatment for his gluteal tear, and both agree Claimant needs additional treatment for his cervical spine. As explained above, Dr. Doerr's opinion that these last two conditions are unrelated to the industrial accident is rejected. Therefore, Claimant is entitled to total temporary disability benefits from August 11 forward until he reaches MMI for his accident-related conditions or Defendants meet the requirements of *Roberts* and Idaho Code § 72-403.

90. Regarding the time period of March 7 to August 11, the burden is on Defendants to show that they offered Claimant a suitable position compatible within his restrictions, but that he unreasonably failed to accept the same. Defendants argue that Claimant was offered light duty work which complied with his then-current restrictions and therefore is not entitled to time loss benefits from March 7 onward.

91. Claimant was offered a position with Employer on February 25, with the assurance that Employer would work with Claimant to accommodate his restrictions whether they became

more or less permissive. The position offered was "Order Write/Account Maintenance, Training" and Claimant was instructed to work with Employer directly to work out any concerns about the offer or job description. There was no job description contained within the offer. The offer listed Claimant's then-current restrictions from Dr. Hajjar, Dr. Harris, and Dr. Spelich which included: no lifting above 50 pounds, and no repetitive bending, twisting, stooping, standing, exposure to vibrations (Dr. Hajjar); maximum lifting up to 35 pounds occasionally, 20 pounds frequently, and limited bending, twisting, stooping, position change as needed, with no prolonged standing or walking (Dr. Harris); and no prolonged walking and no lifting above 40 pounds (Dr. Spelich). The offer noted Claimant's total temporary disability benefits would cease on March 7, the start date of the new offer.

92. Through his attorney Claimant declined the offer on March 2, noting that each of the individual jobs listed (order writer, account maintenance, and training) all exceeded his restrictions. Claimant testified in support of this assertion at the emergency hearing. He explained that an order writer continuously walks for up to two hours per store and does so in up to four stores a day. Account maintenance work requires repetitive bending, stooping, and lifting to move and shelve product within a store. Training duties require constant standing. Claimant's testimony in this regard is uncontradicted. Hrg. Tr. p. 85-87. The vague assurance that Claimant's restrictions, whatever they might be, would be accommodated by Employer, does not constitute an offer of a legitimate, physically suitable, job. Accordingly, Defendant have not met their burden of demonstrating that they made an offer of physically suitable employment such that Claimant's refusal of the same is grounds for the curtailment of time loss benefits during a period of recovery.

93. Further, we conclude that certain aspects of the contract of employment render the offer unsuitable. For two years after leaving employment, the non-compete clause of the

contract would prohibit Claimant from direct or indirect activity (solely or with others) which competes with Employer's business within any geographic area in or around Idaho in which Employer has a business or a financial presence. JE 13: 370. Defendants presented no evidence indicating a business reason for such a clause, yet they assert that Claimant's refusal to accede to this contract warrants the curtailment of TTD benefits due to Claimant's refusal of what they characterize as a suitable job. As amplified in the discussion of attorney's fees, below, the clause rendered the contract of employment unsuitable, and Claimant did not act unreasonably in declining the offer of employment made on these terms.

94. Defendants have not argued there was suitable employment for Claimant which he has a reasonable chance of securing that is regularly and continuously available in the general labor market pursuant to Idaho Code § 72-403. However, Claimant did some limited part-time work for UberEATS, DoorDash, and Uber during this time frame, and those earnings will impact the amount of time loss benefits owed.

95. Defendants have argued that there is not enough information in the record to calculate Claimant's entitlement to temporary disability benefits; Claimant testified to making around $6,683 as of March 2022, but noted that Uber had records of all the money he had earned. The Commission is not required to determine an exact dollar amount for past owed temporary disability benefits. See *Jordan v. Hecla Mining Company*, IIC 2012-027819 (Issued September 4, 2020). Claimant did not fail to prove entitlement. He only failed to provide information to determine an exact calculation of his entitlement.

96. Based on the above findings, the Commission finds Claimant is entitled to temporary partial disability benefits from March 7, 2022, until August 11, 2022, taking into account Claimant's income earned in his part-time employment for Uber and other

employment. Idaho Code § 72-408(2). Claimant is entitled to temporary disability benefits beginning on August 11, 2022, when Dr. Lawler took him completely off work, until he reaches MMI for his accident-related conditions or Claimant acquires another light duty work release during his period of recovery and Defendants meet the requirements of *Roberts* and Idaho Code § 72-403.

97. **Attorney's Fees.** Attorney's fees are not granted as a matter of right under the Idaho Workers Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804 which provides:

> **72-804. ATTORNEY'S FEES — PUNITIVE COSTS IN CERTAIN CASES.** If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding attorney's fees is a factual determination which rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976). It is axiomatic that a surety has a duty to investigate a claim in order to make a well-founded decision regarding accepting or denying the same. *Akers v. Circle A Construction, Inc.*, IIC 1998-007887 (Issued May 26, 1999). Defendants' grounds for denying a claim must be reasonable both at the time of the denial and in hindsight. *Bostock v. GBR Restaurants*, IIC 2018-008125 (Issued November 9, 2020).

98. Claimant's counsel argues Defendants unreasonably denied medical care for Claimant's cervical spine injury and unreasonably discontinued temporary total disability (TTD)

benefits. Defendants argue that *Poss v. Meeker Mach. Shop*, 109 Idaho 920, 712 P.2d 621 (1985) and *Wutherich v. Terling Co.*, 135 Idaho 593, 21 P.3d 915 (2001) support their denial regarding the cervical spine injury. Further, Defendants argue that their offer of light duty employment was reasonable because Employer offered to accommodate whatever restrictions Claimant may have.

99. In *Poss*, the claimant underwent a panel evaluation on February 7, 1983, at employer's request which rated claimant's conditions and found he could work but not at his prior job. On December 20, 1983, claimant underwent a second evaluation which found claimant's condition stable, agreed with the prior impairment ratings, and found no further treatment was necessary. Defendants initially stopped paying for claimant's treatment after the first evaluation but reversed course and paid for bills until October 12, 1983. They did not pay for bills between October 12 and December 20, 1983, the date of the second evaluation. The Commission declined to award attorney's fees, and the Supreme Court affirmed:

> The Commission concludes that the Claimant has failed to establish that the Surety acted unreasonably in terminating the payment of medical benefits to the Claimant upon receipt of the medical panel evaluation. The Commission recognizes that there is some uncertainty and doubt as to the responsibility of the Surety for such benefits in the period between the two medical panel evaluations and has given the Claimant the benefit of the doubt in this matter. However, the necessity of continued medication and physical therapy during this period is sufficiently uncertain that the Commission cannot find that the Surety unreasonably denied or delayed payment of such benefits. Therefore, the Claimant is not entitled to an award of attorney fees....

Poss, 109 Idaho 920, 925-926, 712 P.2d 621, 626-627.

100. In *Wutherich*, the Supreme Court wrote: "[w]e agree it is not unreasonable per se for a surety to rely on its own physicians when faced with legitimate but conflicting medical opinions, and to deny benefits based on these opinions." *Wutherich*, 135 Idaho 593, 595, 21 P.3d 915, 917.

101. Defendants argue that there was conflicting medical evidence at the time they denied treatment for the cervical spine injury. No later than September 26, 2022, Defendants learned that when seen by Dr. Lawler on September 7, 2022, Claimant related new onset cervical spine problems to the physical therapy he was receiving for his back. *See,* JE 11. Dr. Lawler wrote that Claimant needed an urgent consultation with neurosurgery. On October 13, 2022, Dr. Lawler wrote "Dr. Duckworth's office was contacted in regard to his [neurosurgery] referral and its status still as [sic-is] pending. They said that this is a work comp issue and they were waiting for approval from the case worker." JE 9:320. The physical therapy notes from Dr. Booth note that Claimant's neck was aggravated by physical therapy. The ER notes from September 6 detail the exact mechanism, Dr. Booth's hands on Claimant's neck and shoulders, which caused Claimant's neck pain. On November 3, 2022, Claimant's counsel was informed that Defendants were denying treatment for Claimant's cervical spine. IIC Legal File, Order Granting Motion to Add Issue; Order Vacating Hearing, (issued November 18, 2022).

102. Defendants secured their own medical opinion on November 15, 2022. Defendants' expert, Dr. Doerr, opined that as long as the physical therapist confirmed there was no manipulation of the cervical spine, then the condition would be unrelated. Defendants' first contact with Dr. Booth was at his deposition on April 20, 2023.

103. Defendants' assertion that there was conflicting medical evidence at the time of their denial is not supported by the record. It is understandable that an adjuster without medical training might assume that physical therapy intended to treat Claimant's low back could not possibly be implicated in causing a neck injury. However, a lay opinion is no substitute for a well-reasoned medical opinion, which Defendants did not have on November 3.

104. Defendants are obligated to investigate the claim in order to make a well-reasoned decision regarding denial or acceptance of benefits. After receiving Dr. Doerr's report, there was nothing preventing Surety[1] from asking Dr. Booth about the type of therapy he performed. The September 6 ER record includes Claimant's description that Dr. Booth pressed on his neck and shoulders. Dr. Lawler clearly opined that Claimant's neck was injured during physical therapy. The physical therapy notes similarly note a clear relationship between the physical therapy performed and Claimant's neck pain. These were the only records available on November 3, the time of Defendants' denial.

105. Dr. Lawler predicted that Claimant could suffer permanent damage from lack of treatment in April of 2023. At the time of this decision, it is now more than a year since Claimant's cervical spine was aggravated during physical therapy. Defendants' lack of a contemporaneous medical predicate in denying this claim and lack of thorough investigation in denying this claim could result in permanent physical damage to Claimant. Defendants' denial was unreasonable at the time and particularly unreasonable in hindsight. Defendants unreasonably denied the claim for the cervical spine injury and Claimant is entitled to an award of attorney's fees.

106. Claimant has also asserted entitlement to attorney's fees because Defendants unreasonably discontinued TTD benefits on March 7, 2022. Defendants argue that their offer of employment was reasonable because it was offered on the condition that they would accommodate whatever restrictions Claimant had; Claimant's belief he could not perform the jobs listed is irrelevant.

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[1] Defense counsel did not receive Dr. Doerr's report until the day prior to hearing. This may explain his representation to this Commission that he could "affirmatively say Claimant is at MMI at this time" based on Dr. Doerr's report when Dr. Doerr's reports declines to declare Claimant at MMI for two already accepted conditions. Tr. 7:24-9:4; JE 18:423-424.

107. Claimant was still in a period of recovery for his hamstring injury until April 26, when Dr. Spelich declared him at MMI for that injury; however, Claimant was released to light duty work. Claimant acknowledged this in briefing and wrote "he does not seek attorney fees with regard to the failure to pay temporary disability benefits from the date Dr. Spelich declared maximum medical improvement (April 26, 2022) until the cervical spine injury was diagnosed by Dr. Lawler (September 7, 2022)." Clt's Reply, p. 11. Claimant does assert the original suspension was unreasonable because the job offer was unreasonable.

108. Defendants' offer of light duty employment was rejected by Claimant for two reasons. First, Claimant stated that the work was not physically suitable. Second, Claimant objected to certain other provisions of the contract, including the non-compete clause. As developed above, the Commission has concluded that an offer of physically suitable work was not made, and, further, that the offer was also unsuitable because of the inclusion of a non-compete clause in the contract of employment. The remaining question before the Commission is whether Defendant's suspension of TTD benefits following Claimant's rejection of the offer of employment constitutes the discontinuance of benefits justly due and owing "without reasonable grounds" pursuant to Idaho Code § 72-804.

109. Although the Commission has concluded that the offer of employment was not physically suitable, we do not conclude that Defendants acted unreasonably in premising their suspension of benefits, at least in part, on Claimant's rejection of the physical components of the job. However, the Commission does conclude that it was unreasonable for Defendant's to base their suspension of TTD benefits on Claimant's refusal to accede to the terms of a contract containing the subject noncompete clause.

110. The noncompete provision of the proposed contract is likely unenforceable under established Idaho law. To be enforceable, a noncompete provision must be "reasonable as applied to the covenantor, the covenantee, and the general public." *Taylor v. Taylor*, 504 P.3d 342, 350 (Idaho 2022). "The reasonableness of a noncompete provision, in turn, hinges on whether the provision extends only as far as is reasonably necessary to protect the legitimate business interest of the covenantee." *Id.* Reasonableness is "generally assessed by examining three essential terms: (1) time; (2) territory; and (3) scope of restricted activities." *Id.*[2]

111. The noncompete provision would have prohibited Claimant from "directly or indirectly" engaging in any business in competition with Employer "within any geographic area in or around Idaho" where Employer conducts business, including as an employee for such a business. Not only would it be nearly impossible to identify with any geographic certainty exactly where Claimant could not work afterwards, but barring Claimant from nondescript employment is unreasonable. "[A] covenant not to compete which prohibits an employee from working in any capacity or which fails to specify with particularity the activities the employee is prohibited from performing is too overbroad and indefinite to be considered reasonable." *Freiburger v. JUB Engineers, Inc.*, 141 Idaho 415, 420, 111 P.3d 100, 105 (2005); *also see Bybee v. Isaac*, 145 Idaho 251, 178 P.3d 616 (2008).

112. The length of the noncompete restriction is also unreasonable. Idaho Code § 44-2704(1) prohibits postemployment restriction of direct competition for a period in excess of eighteen months unless "consideration, in addition to employment or continued employment, is given." Here, the noncompete provision lasted for a term of two years and the contract does not

[2] Noncompete agreements restricting direct competition between employers and "key" employees and "key" independent contractors are governed by Idaho Code §§ 44-2701 to 44-2705, which is not at issue here given Claimant would not be considered a "key" employee. When the offer was extended, it was expressly stated that the contract was standard for all new hires. JE 13:366.

identify consideration beyond the salary paid "for the services rendered by Employee." JE 13:368. While Idaho Code § 44-2704 is written in context of agreements with "key employees" and "key independent contractors," there is even less reason to restrict a "non-key" employee such as Claimant. The facts of the case certainly do not present any reason why an order writer should be restricted from seeking employment with another wholesale company – or any business seen as in "direct or indirect" competition – for a longer period. The noncompete clause proposed here was broader than is reasonably needed to protect the employer's legitimate interests under established Idaho law.

113. Requiring Claimant to agree to a noncompete term that is contrary to the protections established for Idaho workers by law was unreasonable. As couched, the offer of employment forced on Claimant a nearly impossible choice; he must suffer the curtailment of TTD benefits or accept a contract of employment he would never otherwise entertain. We do not believe that the provisions of Idaho Code § 72-403 were intended to be construed to endorse this kind of conduct by an employer. The curtailment of TTD benefits based on Claimant's refusal to accede to the noncompete clause constituted an unreasonable discontinuance of benefits justly due and owing under Idaho Code § 72-804.

114. For the forgoing reasons, the Commission finds Claimant is entitled to attorney's fees incurred as a result of Defendants' unreasonable cessation of disability benefits on March 7, 2022.

115. Unless the parties can agree on an amount for reasonable attorney's fees, Claimant's counsel shall, within twenty-one days of the entry of the Commission's decision, file with the Commission a memorandum of attorney's fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof, with appropriate elaboration on

Hogaboom v. Economy Mattress,107 Idaho 13, 684 P.2d 990 (1984). The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney's fees in this matter. Within fourteen days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to the time expended or the hourly charge claimed, or any other representation made by Claimant's counsel, the objection must be set forth with particularity Within seven days after Defendants' counsel files the above-referenced memorandum, Claimant's counsel may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney's fees.

CONCLUSIONS OF LAW AND ORDER

1. Claimant is entitled to imaging and potentially medical treatment for his hamstring injury.

2. Claimant is entitled to imaging and potentially medical treatment for his lumbar spine injury.

3. Claimant's gluteal tear was caused by the accident, and Claimant is in a period of recovery and entitled to medical treatment for his gluteal tear.

4. Claimant's cervical spine injury is a compensable consequence of the original accident and injury, and Claimant is in a period of recovery and entitled to medical treatment for his cervical spine injury.

5. Claimant is entitled to partial temporary disability benefits from March 7, 2022, until August 11, 2022.

6. Claimant is entitled to total temporary disability from August 11, 2022 until he reaches maximum medical improvement or Defendants meet the requirements of *Roberts* and

Idaho Code §72-403.

7. Claimant is entitled to attorney's fees for Defendants' unreasonable denial of his cervical spine injury; Claimant is also entitled to attorney's fees incurred as a result of Defendants' unreasonable cessation of disability benefits on March 7, 2022.

8. Unless the parties can agree on an amount for reasonable attorney's fees, Claimant's counsel shall, within twenty-one days of the entry of the Commission's decision, file with the Commission a memorandum of attorney's fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof, with appropriate elaboration on *Hogaboom v. Economy Mattress*,107 Idaho 13, 684 P.2d 990 (1984). The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney's fees in this matter. Within fourteen days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to the time expended or the hourly charge claimed, or any other representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven days after Defendants' counsel files the above-referenced memorandum, Claimant's counsel may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney's fees.

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

DATED this 26th day of December, 2023.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

Aaron White, Commissioner

ATTEST:
Christina Nelson
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __26th____ day of __December____, 2023, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER** was served by regular United States Mail and *E-mail transmission* upon each of the following:

BRADFORD S EIDAM
PO BOX 1677
BOISE ID 83701-1677
beidam@eidamlaw.com
chris@eidamlaw.com

BRAD VANDENDRIES
PO BOX 1368
BOISE ID 83701
bvandendries@eberle.com

mm

Mary McMenomey