BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MOLLY ADAMSON, Claimant, v. LOWE'S HIW, INC, Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Surety, Defendants.	**IC 2018-024690** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED MARCH 11, 2024 IDAHO INDUSTRIAL COMMISSION**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Sonnet Robinson. A hearing was conducted on March 9, 2023 in Boise, Idaho. Claimant, Molly Adamson, was represented by Taylor Mossman-Fletcher of Boise. Nathan Gamel of Boise represented Defendants. The parties presented oral and documentary evidence. Post-hearing depositions were taken. The matter came under advisement on December 22, 2023 and is ready for decision.

ISSUES

1. Whether Claimant suffered an accident and injury per Idaho Code § 72-102(17);
2. Whether Claimant's claimed conditions are the result of a pre-existing condition;
3. Whether Claimant is entitled to medical care; and,
4. Whether Claimant is entitled to temporary partial or temporary total disability (TPD/TTD).

CONTENTIONS OF THE PARTIES

Claimant contends Defendants are estopped under the doctrine of quasi-estoppel from now denying compensability for Claimant's condition as her condition is a compensable consequence of a surgery Defendants directed and approved. Even if Defendants are not quasi-estopped, Claimant has proven her current lumbar condition is related to the 2018 industrial accident as a re-aggravation of her pre-existing condition. Claimant suffered a new disc protrusion post-accident which caused new left sided symptoms whereas previously, Claimant only had right sided symptoms.

Defendants respond that the issue of quasi-estoppel is not properly before the Commission as it is an affirmative defense which was not noticed for hearing. If quasi-estoppel is taken up by the Commission, Defendants argue they have not taken an inconsistent position, gained an advantage, induced Claimant, nor would it be unconscionable to maintain their position. If quasi-estoppel does apply, it should be equally applied to Claimant's inconsistent claims for medical care. Defendants' Answer was not a binding judicial admission, and this issue is also not before the Commission as it was not noticed for hearing; if it does apply, it should be applied to Claimant's Complaint. Claimant lacks substantive credibility, and her denial of a pre-existing condition is why the claim was accepted in the first place. Dr. Montalbano changed his causation opinion based on new records which showed Claimant was symptomatic prior to the industrial accident, and Dr. Hansen, Claimant's expert, did not have all the pertinent information in rendering his opinion.

Claimant replies that quasi-estoppel is inherent in the noticed issues similar to *Wilson*, and the Commission is a court of equity. Defendants attack Claimant's credibility, despite the fact that Claimant was transparent with her prior treatment and condition. Defendants' Answer is a binding

judicial admission. Claimant's Complaint does not qualify as a binding judicial admission; nor can quasi-estoppel or waiver be used to override the plain statutory language of Idaho Code § 72-432.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Joint exhibits (JE) 1-44;
3. The hearing testimony of Claimant, Molly Adamson;
4. The post-hearing deposition of Paul Montalbano, MD, and Stephen Hansen, MD, taken by Claimant.

All outstanding objections are OVERRULED.

Defendants Motion to Strike Claimant's Addendum A is GRANTED. Claimant argues it is not evidence, but merely a visual aid. Claimant cites *State v. Roman-Lopez*, 171 Idaho 585, 524 P.3d 864 (2023), which considered whether a visual aid was hearsay evidence and inadmissible, or to illustrate and explain live testimony, subject to cross-examination, and admissible. Claimant also cites to *Alcala v. Verbruggen Palletizing Solutions, Inc.*, 531 P.3d 1085, 1092 (Idaho 2023) and *Easterling v. HAL Pacific Properties*, L.P., 522 P.3d 1258, 1264 (Idaho 2023) where illustrations were utilized to explain the complicated relationships between the parties.

However, unlike as discussed in *State v. Roman-Lopez*, Addendum A was never utilized by a live witness and unlike *Alcala* and *Easterling*, Addendum A does not explain complicated relationships. Addendum A is essentially additional argument beyond the 30 pages permitted by JRP 11(A). Claimant does not limit herself to dates of surgeries and parts of the spine operated on, but instead offers additional argument about causal relationships. Addendum A is struck pursuant to JRP 11.

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

FINDINGS OF FACT

1. Claimant was 65 years old as of the date of hearing and was born in Kalispell, Montana. HT 14:1-6.

2. Claimant was hired by Employer on May 18, 2011. JE 1:1.

3. On April 11, 2012, Claimant presented to David Spritzer, MD, with back pain. JE 17:9. Claimant reported chronic problems with lower back pain; she related it to falling off a horse when she was a teenager and reported intermittent pain and pressure since then, but no radicular symptoms. *Id.* Claimant's pain was 6 out of 10. *Id.* Dr. Spritzer assessed degenerative change and opined medications would not help and that Claimant could not afford massage or chiropractic care, so no recommendations were made. *Id.* at 10.

4. On January 25, 2017, Claimant presented to her primary care physician, Brandon Tanner, PA-C, with complaints of back pain. JE 19:59. Claimant reported she had experienced low back for 15 years in the context of being thrown from a horse and that the pain was aching and dull, but not radiating. *Id.* at 59-60. PA-C Tanner ordered X-rays and prescribed Flexeril. *Id.* at 60. Claimant also reported right leg pain. *Id.*

5. On March 9, 2017, Claimant returned to PA-C Tanner and further explained the initial accident and sequalae: when she was 17 she had fallen off a horse into a culvert and she did fine at first but developed low back pain for the last 15 years which had worsened and now radiated down her right leg. JE 19:66. PA-C Tanner recorded her x-rays showed significant signs of degenerative disc disease; he ordered more x-rays and suspected nerve impingement, but noted they

were awaiting notes from Dr. Christiansen's[1] office. *Id.* PA-C Tanner began Claimant on Norco and Claimant agreed to a contract for controlled substances. *Id.* at 68.

6. On March 29, 2017, Claimant presented to the emergency room with complaints of shortness of breath she related to pain medication changes for her back pain. JE 18:135. Claimant's back pain "goes from the groin down her leg and into the shin area. She tells me that L4-L5 [are] completely destroyed, the pain is coming from pinching of the nerve at L2 and L3." *Id.* Dr. Cassidy wrote:

> Patient's workup is essentially negative. She did improve with Valium. This and [sic] I think this may be more of an anxiety attack, could also be withdrawal from the medication that she is on[.] I believe it's most likely gabapentin. I asked her to slowly withdraw off that medication. [And] to follow up with intermountain spine for follow-up regarding that.

JE 18:138.

7. On April 11, 2017, Claimant's lumbar MRI was read as follows: (1) moderate-sized right paracentral/foraminal disc protrusion at L3-L4 significantly impinges upon the existing right L3 nerve root in the far lateral aspect of the right neural foramen; (2) degenerative disc disease and facet hypertrophy both contribute to mild bilateral lateral recess narrowing at L3-L4 with mild impingement on the transiting L4 nerve roots, right side slightly greater than left; (3) moderate to severe spinal canal stenosis at L4-L5 related to degenerative disc disease, facet hypertrophy and ligament flavum laxity; (4) moderate impingement on the transiting L5 nerve roots at the L4-L5 level related to degenerative disc disease and facet hypertrophy; (5) minimal impingement on the transiting S1 nerve roots in the lateral recesses at L5-S1. JE 21:17.

8. In April and May of 2017, Claimant underwent a series of ESI shots which "were

[1] Claimant saw David Christensen, MD, and Joseph Frampton, PA, at Intermountain Spine and Orthopedics per this record and others (See JE 18, 19, 21, 22), however, their complete records do not appear in the joint exhibits.

helpful to a degree" for her low back pain, although surgery was still planned. See JE 21, JE 19:74.

9. Claimant saw Justin Dazley, MD, on referral from Dr. Christensen on August 23, 2017. JE 24:3. Claimant reported neither ESI shots, nor physical therapy had helped and that she had low back pain and right leg pain. *Id.* Dr. Dazley read her April MRI, which showed a foraminal disc herniation on the right at L3-L4 causing foraminal stenosis and noticeable central canal stenosis at L3-4 and L4-5. *Id.* at 7.

10. Claimant passed her pre-surgery nicotine test on September 28, 2017. JE 24:39.

11. On October 12, 2017, Claimant underwent an L3-L4 spinal fusion and L3-L5 decompression performed by Dr. Dazley. JE 24:96. Claimant was discharged on October 14, 2017. *Id.* at 683. At follow-up on October 25, Claimant was still having right leg pain but reported her pain had continued to improve since the surgery. *Id.* at 708.

12. On November 20, 2017, Claimant reported some back pain and now had some left groin and hip pain, but felt her symptoms were continuing to improve. JE 24:723.

13. On November 22, 2017, Claimant reported to PA-C Tanner her back pain had lessened since the surgery. JE 19:95.

14. On December 8, 2017, Claimant reported she was doing well with her back pain and felt decreasing the amount of Norco she was prescribed (10/325 2-3 times daily) was appropriate; she wanted to get off pain medication entirely but understood her pain would increase when she went back to work in a month. JE 19:101. PA-C Tanner reduced her prescription from 75 pills a month to 60. *Id.* at 103. On March 6, 2018, the same note is repeated. *Id.* at 111.

15. On January 8, 2018, Claimant reported that she was sore with activity and still had some right leg pain, but overall had an improvement in symptoms. JE 24:737.

16. On April 9, 2018, Claimant denied any back or leg pain or numbness. JE 24:756.

Dr. Dazley updated her restrictions to "gradually increase her work hours as tolerated." *Id.* at 765.

17. On June 5, 2018, Claimant was down to two Norco a day to treat her back pain and she had returned to work in a limited capacity. JE 19:117. Her "pain is now less than following surgery and she is doing very well." *Id.* PA-C Tanner prescribed three months of Norco, each with a time limit of when they could be refilled ("do not fill until 6/5/18)"; one set that day, one on July 5, and one August 5. *Id.* at 122.

18. On August 22, 2018, Claimant picked up a ceiling fan box and felt pain on the "left side of back [sic] runs down the leg and around the front to the ankle." JE 1:1; JE 2:1. Claimant notified her Employer that day. *Id.*

19. On September 2, 2018, Claimant went to the ER and reported that prior to the recent industrial accident her back and leg pain had "diminished substantially;" her right leg pain had completely resolved. JE 26:4. Since she lifted a ceiling fan, she had developed left low back pain and left leg pain. *Id.* Claimant was still on 60 Norco a month from PA-C Tanner and had refilled it three days prior (August 30, 2018). *Id.* at 5; JE 44:1. X-rays showed no new findings, and the ER physician diagnosed acute lumbar radiculopathy. JE 26:8. Dr. Rhead recorded:

> The patient already has anti-inflammatories and narcotic analgesics at home. She states the only way she can get through the day has been taking her narcotics. She cannot work while taking these, so I have written her for time off work until she can follow up with occupational health on Tuesday.

JE 26:8.

20. On September 4, 2018, Claimant saw Todd Hastings, DO. JE 28:1. Claimant reported pain since lifting the ceiling fan and not improving. *Id.* at 4. Claimant was taking hydrocodone "from previous back injuries," but reported that she'd had no issues since her October 2017 fusion; she had been working full duty "as long as she is standing on a mat rather than the hard floor." *Id.* Dr. Hastings diagnosed chronic left-sided low back pain with left-sided sciatica. *Id.*

at 7. Dr. Hastings recommended a home strengthening program and to stay away from opiate medication. *Id.*

21. On September 5, 2018, Claimant returned to PA-C Tanner. JE 29:1. The same note is repeated from June 5 verbatim with the addition that Claimant had "tweaked" her back lifting a ceiling fan and had radicular symptoms. *Id.* PA-C Tanner refilled her Norco. *Id.* at 5.

22. On September 11, 2018, Claimant saw Dr. Hastings again. JE 28:22. Claimant complained of increased pain in her left leg and that not even Norco was helping her. *Id.* Claimant was referred to orthopedics, prescribed Flexeril and a steroid burst, and again told that chronic opiate medications should not be relied upon for low back pain. *Id.* at 25. Claimant returned the next day after her supervisor sent her home due to the amount of pain she was in; Dr. Hastings observed she appeared improved from the day prior, however, Dr. Hastings updated her restrictions from light duty to sedentary. *Id.* at 35.

23. On September 17, 2018, Claimant saw PA-C Stevenson, an associate of Dr. Dazley. JE 30:4. Claimant reported her recent accident and that she had initial improvement of her back pain and previous right sided radicular complaints after her L3-L4 fusion. *Id.* at 6.

24. On October 16, 2018, Claimant's lumbar MRI showed no complication at her L3-L4 fusion. JE 27:4. However, Claimant's L2-L3 showed advanced degenerative disease with moderate spinal canal stenosis and moderate left lateral recess narrowing with minimal left neural foraminal narrowing. There appeared to be mild impingement on the left L3 nerve root "without definitive impingement on the exiting L2 nerve root." *Id.* In addition, there were degenerative changes at L4-L5 with mild left neural foraminal narrowing with minimal impingement on the exiting left L4 nerve root. *Id.*

25. On October 24, 2018, Claimant underwent an ESI shot at L2-L3. JE 31:1.

26. On November 19, 2018, Claimant returned to PA-C Stevenson. JE 30:49. She reported the ESI shot at L2-L3 had not helped her lower back and left leg pain. *Id.* PA-C Stevenson ordered an EMG. *Id.* at 52. Claimant's EMG showed no definitive evidence of radiculopathy or peripheral neuropathy; there were some findings suggestive of a prior or resolving left L4-L5 radiculopathy. JE 32:4.

27. On December 10, 2018, Claimant saw Dr. Dazley. JE 30:71. Based on Claimant's imaging and failure of conservative treatment, Dr. Dazley recommended an L2-L3 fusion. *Id.* at 74.

28. On January 14, 2019, Surety requested Dr. Montalbano complete a records review and attached "the surgery request, emg/ncs, MRI, and anything else I thought Montalbano would need. Let me know if he needs any other records." JE 9:98. Surety requested Dr. Montalbano complete his review by the 16th as Claimant was scheduled for surgery on the 17th. *Id.* Surety requested Dr. Montalbano answer whether the proposed L2-L3 fusion was related to the accident, noting Claimant had a prior fusion on 10/12/2017 at L3-L4 and asked whether there was additional conservative treatment that could be considered. *Id.* at 100.

29. On January 15, 2019, Surety sent Dr. Dazley a request for all prior records and industrial accident-related records. JE 9:125-129.

30. Also on January 15, 2019, Dr. Montalbano issued his report. JE 34:1. At the time of his opinion, Dr. Montalbano had reviewed Claimant's September 2 X-rays, October 16 MRI, and November 29 EMG studies, and was aware Claimant had a prior fusion at L3-4 for a degenerative condition. *Id.* In essence, Dr. Montalbano disagreed with Dr. Dazley's proposed single-level surgical approach and preferred a more extensive fusion and decompression. He did recommend surgery, but first wanted a CT scan to assess her L4-L5 level. *Id.* at 2. Regarding causation, Dr. Montalbano opined that he needed additional records regarding whether Claimant had sought

out any treatment in the six months prior to the work injury. If she sought out treatment for low back pain or left lower extremity symptomology in that time frame it was his opinion that the etiology of her symptoms at L2-L3 and L4-L5 was related to next segment degeneration from her prior L3-L4 fusion. *Id.*

31. The surgery was denied on January 16, 2019. JE 9:102.

32. On February 20, 2019, a file was sent to from Dr. Dazley's office to Surety marked "AdamsonMolly LTR" with the date of the prior fax. JE 9:130.

33. On March 7, 2019, Dr. Montalbano reviewed unspecified additional records and opined that the L2-L3 disc protrusion was related to her industrial injury, and therefore surgery at that level was related to the industrial injury, however, Claimant also required re-fusion at L3-L4 because it was pseudoarthric and extension of her fusion to L4-L5, which was related to the prior L3-L4 fusion. JE 34:3.

34. Dr. Montalbano saw Claimant on March 12, 2019. JE 34:4. Claimant reported her prior surgery with Dr. Dazley and that she "returned to full duty at work without any leg pain. She did experience minor occasional low back discomfort." *Id.* Dr. Montalbano continued to recommend surgery, but wanted a bone scan, for Claimant to stop smoking, and for Claimant to wean off narcotics first. *Id.* at 5.

35. On April 26, 2019, Claimant underwent L2-S1 decompression, fusion, and instrumentation performed by Dr. Montalbano and paid for by Defendants. JE 35:1.

36. On May 8, 2019, Claimant reported to Dr. Montalbano she was doing well post-surgery. JE 34:15. She was to remain off work and start physical therapy; Dr. Montalbano recorded that Claimant was taking no narcotics. *Id.* On May 29, Claimant was released to part-time, light duty work. *Id.* at 17.

37. On June 4, 2019, PA-C Tanner reduced Claimant's Norco medication and wrote Claimant "is anxious to start getting her dosage of pain medication lower." JE 29:50. Claimant was smoking 1-9 cigarettes a day. *Id.* at 52. At physical therapy the next day, Claimant reported feeling really good. JE 36:11.

38. Claimant returned back to work part-time at Lowe's on June 17, 2019. JE 9:181. Claimant returned full-time by the end of September.

39. On June 26, 2019, Dr. Montalbano predicted Claimant would reach medical stability in one month and that she "was off narcotics." JE 34:19. On August 21, 2019, Dr. Montalbano rated Claimant at 12% PPI without apportionment, but later updated his opinion to apportion 25% of his rating to her prior fusion. *Id.* at 23, 26.

40. On June 17, 2020, Claimant returned to Dr. Montalbano and reported an increase in her low back pain and numbness, tingling in her right lower extremity. JE 34:27. Dr. Montalbano ordered another MRI and issued light duty work restrictions. *Id.* On August 12, Dr. Montalbano recommended a bone scan and noted Claimant's MRI showed a solid arthrodesis from L2-S1 but also showed facet arthropathy at L1-L2; Dr. Montalbano counseled Claimant regarding her use of tobacco products and recommended conservative treatment at this time. *Id.* at 30. On October 7, 2020, Dr. Montalbano recorded Claimant had done reasonably well with physical therapy and that her symptoms were relieved with diclofenac as well as Lidoderm patches; he would see her again for follow-up in three months. *Id.* at 33.

41. On November 24, 2020, Claimant reported an increase in back pain to PA-C Tanner. JE 29:124. PA-C Tanner increased her Norco prescription. *Id.* at 130.

42. On December 8, 2020, Claimant reported to Dr. Montalbano she had an increase in back pain; he recommended a CT scan and bone scan. JE 24:35. Dr. Montalbano wrote it was

possible she had a failed fusion despite her solid fusion on X-rays given her current symptomatology and continued use of tobacco products. *Id.* Claimant's bone scan demonstrated increased uptake at her L1-2; Dr. Montalbano ordered an MRI of thoracic spine and noted surgical intervention could address this issue, but it would be a last resort. *Id.* at 38.

43. On January 7, 2021, Claimant reported the increase to her Norco prescription did not have much of an impact on her pain levels; PA-C Tanner changed her medication to Percocet. JE 29:133, 138.

44. On January 27, 2021, Dr. Montalbano recommended an extension of her fusion and noted the need for surgery was "a direct result of her prior construct from L2-S1." JE 34:42.

45. On February 24, 2021, PA-C Tanner switched Claimant back to Norco and increased her dosage again. JE 29:147.

46. On April 17, 2021, Claimant returned to the ER. JE 26:37. Claimant reported acute back pain; Claimant reported she was on hydrocodone but that it had not been helping. *Id.* Claimant was given IV pain medication, prescribed a small dose of oxycodone, and referred to pain management. *Id.* at 42. On April 20, 2021, Claimant reported her ER visit to PA-C Tanner, who switched her to oxycodone per her request. JE 29:154.

47. On May 11, 2021, R. David Bauer, MD, conducted an IME on behalf of Defendants. JE 14. Dr. Bauer reviewed records, took a history from Claimant, and examined Claimant. *See* JE 14. Dr. Bauer did not have any records from PA Tanner but did have Dr. Dazley's 2017 records. JE 14:5-6. On physical exam, Claimant had a non-physiologic motor exam with giveaway in all myotomes, although her sensory exam was normal. *Id.* at 16. There was no spasm and very light touch increased her pain. *Id.* "[I]n fact, I did not even push in and she complained of increased pain complaints." *Id.* Dr. Bauer assessed: (1) status post lumbar decompression infusion in 2017, which

has resulted in adjacent segment degeneration; (2) status post decompression and extension of the fusion with ongoing subjective pain complaints; (3) lumbar strain, brought about by the incident of 08/22/2018; (4) documented history of anxiety, depression, and nicotine use; (5) chronic opioid use. *Id.* at 17.

48. Dr. Bauer opined that Claimant's industrial accident was merely a straining incident and her present condition was the result of having undergone an extension of her fusion in 2019, not the industrial accident. JE 14:17-18. Dr. Bauer explained in his opinion that the lifting of the ceiling fan was not sufficient to cause Claimant's symptoms and there was no evidence of any aggravation of her underlying condition. *Id.* at 18. The pseudarthrosis diagnosed by Dr. Montalbano may have come to his attention by virtue of the straining incident but was not caused by it. *Id.* Claimant's physical exam showed no objective findings and was notable for fairly significant symptom exaggeration. *Id.* at 19. It was Dr. Bauer's opinion that the original proposed surgery by Dr. Dazley of a lateral fusion at one level "could have averted the adjacent segment degeneration and need to further recommend surgery in 2021." *Id.* However, Dr. Bauer still thought that surgery had a very low likelihood of helping alleviate Claimant's symptoms because her symptoms currently were non-radicular and global. Further, until Claimant was nicotine and opiate free any further surgery was likely to fail. *Id.* Dr. Bauer believed Claimant was at MMI, fixed and stable, and ratable at 12% whole person impairment, wholly pre-existing. *Id.* at 21. Dr. Bauer added that although there was an argument to perform surgery based on the imaging, he wouldn't recommend it as it would not help and would lead to further impairment and narcotic dependence. *Id.*

49. On May 25, 2021, Dr. Montalbano responded to Dr. Bauer's IME. JE 34:51. Dr. Montalbano agreed that Claimant's narcotic usage was problematic, but narcotics were the only thing that was helping her pain, and she had an objective reason to be in pain. *Id.* Dr. Montalbano

was not the prescriber of these narcotics so any discussion about coming off of them needed to be had with her prescriber. *Id.* Dr. Montalbano wrote that Claimant told him she was asymptomatic prior to the industrial injury, but Dr. Montalbano did agree with Dr. Bauer that Claimant had a pre-existing condition. He opined that 80% of her condition was due to her pre-existing condition and 20% related to the accident. *Id.* Dr. Montalbano continued to recommend surgery. *Id.* at 52.

50. Claimant was deposed on August 23, 2021. JE 5:1. Claimant recalled she had applied for social security disability 25 or 30 years ago for trouble with the "upper part of [her] spine," but was denied. *Id.* at 4. Claimant could not really recall how she felt prior to the industrial accident:

> Q: [By Mr. Gamel] What symptoms were you having at the time in the -- let's say in the -- because I understand it takes a long time to recover from a fusion. I've seen hundreds of these. What kind of symptoms were you having from your 2017 fusion surgery in, let's say, the week leading up to your industrial accident at Lowe's?
>
> A: Well, I don't know. Probably pain, probably my -- the nerves sometimes, you know, they feel like needles and you will have a spasm, you know. I mean, it's not fun, yeah. And then hopefully it just gets better and better, goes away and heals so you don't have that.
>
> Q: Let's say, like, in that week leading up to the industrial accident, where were you experiencing pain and the kind of spasms?
>
> A: When I got hurt at Lowe's?
>
> Q: No. In the timeframe -- no. No. No. Hold on. Listen to my question. I'm talking about in, like, let's say the one week leading up to that accident. Not including the Lowe's accident, but in that short timeframe before.
>
> A: Oh, I don't know. I don't know. I don't remember what kind of pain I had that week. Maybe I didn't have really hardly any. I mean -- or I didn't have none. I must have been pretty happy. I was still working and even just figured I was healing. I mean, it's -- I thought I was doing good. I'm not understanding what I -- I -- I don't know. I was healing. I was hoping that I was all good.

JE 5:11-12. Claimant did recall taking Norco prior to the industrial accident; bending at work aggravated her low back pain, but not her leg pain which had resolved after the first surgery. She occasionally took a Norco to get through her workday:

> Q: [By Mr. Gamel] Prior to the Lowe's accident, what were some of the activities that you would do at Lowe's that would cause your back to hurt?
>
> A: Probably bending over a lot because you have -- the way their check stands are set up, and - they don't have much counter so you have to go around to the cart and scan each and every item, and -- just a lot of bending. More bending than lifting, I would say. But there are times when nobody's around that can help you lift if it's heavy, and customers are kind of rude sometimes, you know. They don't do it. They think they're too good. Yeah.
>
> Q: And when you were having to bend over a lot or lift these heavy things, what sort of symptoms in your low back would you have?
>
> A: Pain, and shooting pain after I hurt it.
>
> Q: And I'm talking about beforehand. So I'm talking about when you were take this Norco.
>
> A: Okay. Just pain. Just -- yeah, it would start hurting. A throbbing type pain, uh-huh.
>
> Q: And would that pain just be in your back or would it shoot down one of your legs?
>
> A: No. Mainly then, after my surgery, it was just in my back.
>
> Q: And would you then need to take one of your Norco?
>
> A: Well, yeah. If it was hurting really bad, you bet I would. Got to work. Got to make money.
>
> Q: Oh, for sure. I agree with you. Would you actually just kind of, like, need to take a break and take the Norco or would you take it when you got home?
>
> A: Sometimes I would have to take one at work. Not -- and then if it continued at night. It just depended on how bad my back was hurting.

JE 5:13. Claimant denied hurting her back falling off a horse: "No, I don't think so. I think I would always get back up and get back on." *Id.* at 15.

51. On September 30, 2021, Dr. Montalbano responded to a letter from Defense Counsel. JE 15:1. Dr. Montalbano represented in the letter that he had reviewed new medical records which showed Claimant was symptomatic prior to her industrial accident and that it appeared neither he nor the Surety had any of these records. Dr. Montalbano had recommended Claimant's 2019 surgery based on her imaging and its correlation with her symptoms, but the etiology of the condition was based on the medical records provided by Claimant. *Id.* Dr. Montalbano thought Claimant's present need for surgery was related to next segment degeneration from her 2019 surgery and that her 2019 surgery was related to a degenerative condition and not her industrial accident. *Id.* at 1-2. Dr. Montalbano disagreed with Dr. Bauer that Claimant was showing non-radicular, global symptoms, but did agree she should be taken off narcotics, particularly with a history of depression and anxiety. *Id.* at 2. Dr. Montalbano maintained his opinion that Claimant required surgery, but that it was unrelated to the accident and Claimant was not entitled to an impairment rating. *Id.*

52. On January 31, 2022, Claimant saw PA-C Steven Nelson for her low back on referral from PA-C Tanner. JE 38:4. PA-C Nelson ordered an MRI and EMG. *Id.* At follow-up, PA-C Nelson recommended bilateral SI joint injections as that was the location of her most concerning symptoms at the time of his evaluation; he also thought she may benefit from a spinal cord stimulator. *Id.* at 12.

53. On June 2, 2022, Claimant saw Stephen Hansen, MD. JE 38:14. Dr. Hansen also recommended diagnostic bilateral SI joint injections and wrote that if she was not a candidate for SI joint fusion, he would recommend a spinal cord stimulator. He also opined that this treatment should be part of her workers compensation claim as either the fusion or the initial injury caused the additional strain on her SI joints. *Id.* at 17. A fusion from her T10-illium would improve her

sagittal balance but her SI joints needed to be addressed first. *Id.* Claimant underwent SI joint injections. *Id.* at 22; JE 39:6. On August 4, Claimant reported no relief from the injections and did not want any additional injections. *Id.* at 24. Dr. Hansen recommended a spinal cord stimulator. *Id.* at 27.

54. On August 10, 2022, Claimant saw Richard Runyan, MD on referral from Dr. Hansen for evaluation for a spinal cord stimulator. JE 40:1. Dr. Runyan recommended a thoracic MRI and psychological evaluation prior to trialing a spinal cord stimulator. *Id.* at 3.

55. On August 15, 2022, Dr. Hansen responded to a letter from Claimant's Counsel. JE 16:1. Claimant's Counsel had previously called and summarized Claimant's care to date and this letter posed questions to Dr. Hansen. *Id.* Dr. Hansen indicated that Claimant's 2019 surgery pre-disposed her to suffer lumbar radiculopathy and sacroiliitis. *Id.* Claimant's injections to date had been related to her industrial accident and Dr. Hansen's recommendation for a spinal cord stimulator was also related to her industrial accident. Dr. Hansen did not believe that Claimant's smoking or narcotic use were contraindications to a spinal cord stimulator because most patients who received a spinal cord stimulator were on narcotics previously. *Id.* at 2. Claimant could require ongoing injections, but he no longer believed Claimant had sacroiliitis "after negative blocks I performed on 7/15/22." *Id.* Dr. Hansen ended confirming his opinion that Claimant's condition and need for further medical treatment was related to the industrial accident and Claimant's 2019 surgery. *Id.*

56. Claimant saw Dr. Runyan's PA-C, Tyler Hepworth, on August 23, 2022. JE 40:5. He wrote she had tried many conservative measures to manage her pain, including radiofrequency ablation, with no relief. *Id.* at 6. She was tired of being on opiates; she would attempt to quit smoking. *Id.* Her psychological profile showed no barriers to a spinal cord stimulator trial, but her

thoracic MRI had not yet been completed. *Id.* at 7.

57. On September 21, Claimant reported she had cut down from two packs a day to half a pack. JE 40:10. PA-C Hepworth recorded that Claimant's MRI showed a disc bulge at T7-8 mild to moderate in size: "otherwise, I do feel like she could get a spinal cord stimulator to cover her low back pain and leg pain." *Id.* PA-C Hepworth wrote they would move forward with requesting a spinal cord stimulator trial *Id.*

58. On October 14, 2022, the spinal cord stimulator was implanted by Dr. Runyan for a trial. JE 40:15. On October 19, Claimant reported a greater than 80% reduction in her chronic low back pain and lower extremity pain. *Id.* at 17. Claimant wanted to proceed with permanent implantation. *Id.* at 20.

59. On November 23, 2022, Claimant reported to PA-C Tanner the oxycodone was no longer as effective and sought an additional referral for a pain specialist. JE 29:244, 251. PA-C Tanner switched Claimant back to Norco in the hopes that it would offer more relief. *Id.*

60. On November 29, 2022, Claimant requested PA-C Hepworth take over her pain management. JE 40:27. PA-C Hepworth agreed but explained he would not prescribe clonazepam and hydrocodone at the same time; he instructed her to start reducing that medication and he would prescribe her hydrocodone moving forward. *Id.* Regarding the spinal cord stimulator, PA-C Hepworth wrote the clinic had to resubmit the request due to Claimant changing insurance. *Id.*

61. On February 15, 2023, Dr. Runyan wrote that Medicare had denied the spinal cord stimulator as it was supposed to be the responsibility of workers compensation. JE 40:35. Claimant was on six 10mg of hydrocodone a day. *Id.*

62. At hearing, Claimant recalled falling off her horse at 17. HT 23:7-19. Claimant remembered feeling good after her first surgery with Dr. Dazley; at first, returning to work was

difficult but eventually she felt like she was doing really well. *Id.* at 26:10-19; 29:10-19. Claimant did recall being on pain medication at that time, and that it helped with feeling sore and helped her get through a full day of work. *Id.* at 31:1-22. Claimant recalled being "darn close" to weaned off pain medication at the time of her industrial accident. *Id.* at 33:7-16. After her surgery with Dr. Montalbano, Claimant initially felt really good. HT 46:2-5. However, she never felt totally recovered and eventually all the gains she made suddenly went away. *Id.* at 47:11-20.

63. Dr. Montalbano was deposed on August 3, 2023 via videoconference.[2] Dr. Montalbano testified he had never reviewed any of Dr. Dazley's records "except perhaps" his operative report. Montalbano Depo. 6:14-18. Dr. Montalbano still believed Claimant would benefit from the surgery he proposed and related the need for this next surgery to her 2019 surgery. *Id.* at 14:2-15:12. Dr. Montalbano opined that if the 2019 surgery was 100% related to her industrial injury, then the surgery he was now recommending was 100% related to the industrial accident. *Id.* at 17:18-18:2. Dr. Montalbano did recall reviewing records which documented low back pain prior to her industrial injury but could not recall the timeframe and would need to re-review those records. *Id.* at 20:14-21:10. He did not endorse a spinal cord stimulator as a next step in Claimant's treatment because she still had pain generators which could be treated surgically. *Id.* at 22:1-25.

64. On cross-examination, Dr. Montalbano testified that when he first saw Claimant, he was under the impression she had minor occasional low back discomfort but no leg pain. Montalbano Depo. 26:11-18. Dr. Montalbano was also aware Claimant was on Norco but did not know how much or how long she had been on it. *Id.* at 26:19-27:1. Dr. Montalbano became aware PA-C Tanner was prescribing the Norco when Defense Counsel sent him the records: "If she was

[2] Dr. Montalbano did not have the records he reviewed in 2021 in front of him during deposition. However, despite Claimant's assertion that these records are unknown (see Clt's Opening Brief, p. 17), Claimant's Counsel, Defense Counsel, and Dr. Montalbano all referred to PA-Tanner's records by name in discussing Dr. Montalbano's updated causation opinion. Montalbano Depo. 7:4, 8:23, 20:19, 20:20, 24, 25, 26:22, 27:3, 20, 21, and 28:12.

taking the Norco for the back pain, it would tell me that she symptomatic prior to the industrial injury if she was taking narcotics during that period." *Id.* at 27:2-11. Regarding the conclusions he reached in his September 30, 2021 letter, Dr. Montalbano asked to see PA-C Tanner's records again before he would comment:

> Q: [Mr. Gamel] In reviewing Tanner's records - - you were asked a question earlier that Tanner's records maybe they don't necessarily reflect that she was symptomatic in the time frame leading up to the accident. It sounds like you reviewed the same records and come [sic] to a different conclusion.
>
> A: Do you have those records that I could review? If I'm being asked to comment on those I would like to take a look at them.
>
> Q: I would have to resend them I can tell you I'm looking at one from June where she's being prescribed Norco and diagnosed with chronic back pain. Is that something that you would typically see done in someone who's asymptomatic in your experience?
>
> A: No.

Id. at 27:20-28:10. Dr. Montalbano confirmed that after reviewing additional records showing Claimant was symptomatic prior to the industrial injury, his updated opinion was that Claimant's current need for surgery was 100% related to the prior surgery with Dr. Dazley in 2017. *Id.* at 31:1-9. Dr. Montalbano recalled regarding leg pain: "I believe she did have some leg pain prior to that injury of 2018, and therefore, I attributed her symptoms to be related to the original ball that set things in motion, which was the surgery of 2017." *Id.* at 31:10-24. Regarding next segment degeneration, Dr. Montalbano opined that it did not matter what side symptoms were on prior to the first fusion; the symptoms for the next segment degeneration could be on either side of the body: "could be low back pain, left leg pain, right leg pain, no pain but gallbladder difficulty, numbness, tingling." *Id.* at 31:25-32:23.

65. Dr. Hansen was deposed on October 24, 2023, remotely. Hansen Depo. Dr. Hansen had not reviewed any of Dr. Montalbano's records and was not aware of Claimant's 2017 surgery

with Dr. Dazley. Hansen Depo. 11:9-21. Dr. Hansen knew Claimant had an industrial injury but was unaware of the details. *Id.* at 12:14-13:3. Dr. Hansen initially believed that Claimant's pain could be coming from her SI joints; the SI joint injections did not alleviate her pain, so that was ruled out as the cause of her pain. *Id.* at 13:4-21. Dr. Hansen opined that the next two options for Claimant's treatment would be an extension of her fusion or a spinal cord stimulator. *Id.* at 13:24-15:4. Dr. Hansen was unaware of whether Claimant underwent a spinal cord stimulator trial, but opined that it was a the "simpler treatment" than another fusion "which may not alleviate her pain." *Id.* at 15:14-24. Dr. Hansen agreed Claimant had next segment degeneration, but referred to it as a kyphosis, a hunchback and "significant collapse." *Id.* at 18:11-24. Dr. Hansen maintained his opinion that another fusion would be due to or caused by the prior S1-L2 fusion done under her workers compensation claim. *Id.* at 24:8-23. Dr. Hansen had only seen Claimant three times but never got the impression her pain was due to opioid dependency vs. the biomechanical causation seen in her imaging. *Id.* at 26:5-27:8.

66. On cross-examination, Dr. Hansen reiterated he had never seen any of her medical records from prior to the accident, did not know what her symptoms were prior to the accident, was not familiar with the details of the accident, and had not reviewed any other medical records besides his own. Hansen Depo. 28:2-29:2. Similarly, Dr. Hansen had never reviewed Claimant's deposition or the hearing transcript or Dr. Montalbano's deposition. *Id.* at 29:3-30:2.

67. **Credibility.** Claimant admitted to being bad with dates and frequently mixed-up time frames in both deposition and at hearing but attempted to testify to the best of her ability. Where her testimony contradicts the medical records, the medical records will be relied upon.

68. **Condition at Hearing.** At the time of hearing, Claimant was still numb in both feet and had pain in her back and legs. HT 45:3-19.

69. **Relevant Procedural History.** On September 13, 2018, Claimant signed the Surety's authorization for release and use of medical information and listed "Dr. Dazley" and "Dr. Tanner" as her treaters who could disclose information about her treatment. JE 9:24. Claimant disclosed their addresses as well. *Id.* at 26.

70. On September 29, 2018, Claimant's claim was accepted for a lumbar strain. JE 10:1.

71. On June 7, 2021, Claimant signed her complaint and blanket authorization for disclosure of health information. JE 2:2, 3.

72. On June 30, 2021, Defendants answered Claimant's complaint and checked "admitted" regarding "4. That the condition for which benefits are claimed was caused partly by an accident arising out of and in the course of Claimant's employment." JE 3:1. Defendants indicated that whether they "concede[d]" any benefits due to Claimant was "under investigation." *Id.* Defendants affirmatively alleged that Claimant's injury was the result, in part, of the progression of a pre-existing condition and Claimant was owed no additional medical care. *Id.* at 2.

73. On July 28, 2021, Claimant requested an emergency hearing due to Dr. Montalbano's then pending recommendation for an extension of her fusion. On that same day, Defendants filed a response. Within that response, Defendants summarized the history of the case, including the prior 2017 fusion, the pre-injury narcotic usage prescribed by "Dr. Tanner," Dr. Bauer's opinion, and objected to the hearing citing Defendants own lack of medical records, need to depose Claimant, and explained this was not an emergency hearing case but a case wherein two doctors (Dr. Montalbano and Dr. Bauer) differed on whether surgery was related to the accident and necessary. A telephone conference was conducted on August 2, 2021, and the request for emergency hearing was denied but hearing was set for September 21, 2021.

74. On September 2, 2021, Defendants filed a motion to vacate the hearing. The basis

given was the newly provided discovery, namely PA-C Tanner's records which detailed Claimant's claims of back pain that were 15 years old. Defendants averred "This is new information discovered by the Defendants as of September 1, 2021." (Def's Motion to Vacate, p. 3). Defendants argued they needed time to have their experts review these records. On September 13, 2021, Claimant objected and noted that they had served PA-C Tanner's records on June 30, 2021 and Defendants had had plenty of time to review the records and get expert opinions in those two months. A telephone conference was conducted on September 14, which granted Defendants motion to vacate and moved the hearing a month to October 19, 2021. On October 6, 2021, the parties filed a stipulation to vacate the hearing as it was not ripe.

75. The original September 21, 2021 notice for hearing listed: (1) Whether Claimant is entitled to additional medical care; and (2) Whether Claimant is entitled to temporary partial or temporary total disability benefits (TPD/TTD). On September 8, 2022, Claimant requested a telephone conference to reset the hearing. A telephone conference was conducted on September 15, 2022 and the case was set for hearing with the issues as noticed in this decision, including issues (1) and (2) above, namely whether Claimant suffered an accident/injury and whether Claimant's condition was due to a pre-existing condition.

DISCUSSION

76. **Quasi-Estoppel.** The doctrine of quasi-estoppel applies when: (1) the offending party took a different position than his or her original position, and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in. *Vawter v. UPS*, 155 Idaho 903, 318 P.3d 893 (2014).

77. *Vawter* was a three-party case between the employer UPS, ISIF, and the claimant. The claimant was a long-time employee of UPS and had previously suffered an injury in UPS's employ in 1990 and then a subsequent injury in 2009; UPS had asserted in claimant's 1990 case that Claimant suffered no impairment related to that injury. In the 2009 case, UPS argued that claimant **had** suffered impairment in the 1990 injury such as to implicate ISIF liability. Claimant argued that UPS was quasi-estopped from asserting that 1990 impairment as part of a case against ISIF and UPS did not respond to the quasi-estoppel argument in their briefing. The Commission held that UPS was quasi-estopped from asserting that the 1990 injury caused impairment as it was inconsistent with its previous position in 1990 and would be ("unconscionable") to the detriment of ISIF. *Vawter v. UPS*, IIC 2010-000114 (September 28, 2012).

78. On appeal to the Idaho Supreme Court, UPS asserted that quasi-estoppel was not properly noticed for hearing. The Court disagreed, noting that:

> the Commission is required to give parties notice of the issues to be decided but does not need to state each individual issue…The issue of apportionment was listed in the 2012 Notice of Hearing, and inherent in that issue was the 0% rating issued by Dr. Knoebel. Therefore, UPS had sufficient notice of the quasi-estoppel issue.

Id. at 911, 901. The Court also noted that because UPS had failed to address the quasi-estoppel issue in briefing, they could not now do so on appeal.

79. In *Wilson v. Conagra Foods* 160 Idaho 60, 368 P.3d 1009 (2016), the Commission declined to apply the doctrine of quasi-estoppel as urged by the claimant. In that case, claimant was fired from her position for failing to report an alleged industrial injury. In the workers' compensation case, employer denied that claimant suffered an injury. Claimant claimed the doctrine of quasi-estoppel applied because employer had adopted the position that claimant had suffered an injury at work in the unemployment proceeding and were now claiming she had not suffered an

injury. The Commission declined to apply quasi-estoppel because they found the positions were not inconsistent:

> During the unemployment proceedings, Employer did not have to establish, nor did it contend, that Claimant had actually suffered an injury while working for Employer. It only asserted that if such injury occurred, as Claimant reported to the doctor, she failed to comply with Employer's policy requiring that she report it to a supervisor and the nurse. The Commission did not err in rejecting Claimant's quasi-estoppel argument.

Id. at 1014, 71. Claimant sent Defendants a letter informing them that claimant would be arguing quasi-estoppel and argued quasi-estoppel at hearing, although it was not a noticed issue. However, the Commission did find that the issue of quasi-estoppel was subsumed within the issue of whether the accident occurred:

> Here, the threshold issue is whether Claimant suffered an injury caused by an accident arising out of and in the course of her employment. Inherent in that issue is whether Employer should be estopped from arguing that the subject mishap/event did not occur, when it allegedly argued that such a mishap/event did occur in an earlier proceeding for unemployment compensation benefits.

Wilson v. Conagra Foods, IIC 2011-009875 (February 20, 2015).

80. Here, the threshold issue is whether Claimant's claimed conditions are the result of a pre-existing condition or the industrial accident. Claimant argues that Defendants are quasi-estopped from arguing that Claimant's claimed conditions are the result of a pre-existing condition; per Claimant, Defendants had accepted "all causation" and are now denying "all causation." See Clt's Opening Brief, p. 21. Essentially, although a threshold issue is whether or not the claimed conditions are related to a pre-existing condition, Defendants should be estopped from arguing that Claimant's condition is related to her pre-existing condition.

81. There are a few key differences here from *Vawter* and *Wilson*. In *Vawter*, the defendants did not address quasi-estoppel in briefing and the court essentially ruled they acquiesced

in its inclusion by not arguing it. In *Wilson*, claimant sent a pre-hearing letter that they would be arguing quasi-estoppel and argued it at hearing.

82. Here, Claimant has waited until her opening brief to argue that Defendants should be estopped from arguing whether Claimant's condition is a result of a pre-existing condition. As the procedural history above outlines, Claimant has been aware since Defendants' Answer that they were arguing Claimant's condition is at least in part based on a pre-existing condition. Defendants are correct that they would be highly prejudiced if they were prevented from arguing about Claimant's pre-existing condition and its impact on medical causation.

83. Defendants make an additional point regarding the development of evidence in aid of quasi-estoppel arguments: "Defendants are being highly prejudiced by being given mere weeks to respond to such an argument being made as a matter of first impression in a post-hearing brief and without the ability in the post-hearing setting to conduct any discovery or generate or obtain any evidence in response." Def's Responsive Brief, p. 5. Neither party here has dug into the details of what Surety knew and when they knew it; joint exhibit 9, the claims file, does not unequivocally support either parties' position regarding the pre-existing records and neither party deposed the adjustor or nurse case manager. Notably, Defendants asserted in 2021 in the motion to vacate that PA-C Tanner's records were "newly discovered." Whether or not Defendants discovered "new" evidence which caused their denial is highly relevant to a theory of quasi-estoppel. *Christensen v. Hecla Mining Company*, IIC 2010-012816 ("Assuredly, Defendants now take a position in this case different then they initially did, but only because they have discovered new facts in the course of this proceeding which support that change of position.")

84. Dr. Montalbano reviewed "additional records" on March 7, 2019 which are unknown[3] and could have aided either party. Dr. Montalbano was not asked at deposition what these "additional records" were and whether they included the September 2019 ER report or Dr. Hastings's records. During his deposition, it is clear that neither Claimant nor Defendants were aware that drilling down what those records were was critical in evaluating how PA-C Tanner's records supported his position on causation in 2021 vs. his position on causation in 2019. As noted above, whether a change in position is based on "new facts" is highly relevant to a theory of quasi-estoppel. Defendants are correct when they argued:

> This is actually a very good example of why waiting until post-hearing briefing to work up an equitable estoppel argument is bad for the workers' compensation system. Instead of Claimant being forthcoming during the pre-hearing pendency of litigation about this issue resulting in pre-hearing discovery efforts to obtain evidence of the veracity of these arguments and then utilizing that evidence as a hearing exhibit with properly noticed hearing issues—instead, Claimant is bogged down in her brief with a bundle of accusatory statements lacking in any proper foundation or exhibit.

Def's Responsive Brief, p. 11. In other words, not only is it highly prejudicial to Defendants to allow a quasi-estoppel argument which would prevent them from arguing essentially what the entire bifurcated case is about, but due to the fact that Claimant waited until briefing to argue the issue, the evidence itself is underdeveloped.

85. Assuming without deciding that quasi-estoppel does apply here, the first question is whether Defendants have taken an inconsistent position. Defendants accepted a claim for "lumbar strain" and approved a fusion surgery to treat an L2-L3 disc herniation which Dr. Montalbano opined was caused by the industrial accident; however, even at that time, Dr. Montalbano opined that his proposed operation at the L3-L4 and L5-S1 was <u>not related</u> to the industrial accident, but

[3] Timing and joint exhibit 9 suggest these records were Dr. Dazley's records of some variety, although Dr. Montalbano denies he reviewed any of Dr. Dazley's records other than his 2017 operative report.

to her prior fusion. Post-surgery, Dr. Montalbano apportioned his impairment to 75% related to the industrial accident and 25% related to the pre-existing condition, which Defendants paid. Then after Dr. Bauer's IME, Dr. Montalbano, although still believing the accident contributed in some way, apportioned causation 80% to the pre-existing condition and 20% to the accident. Defendants (and Dr. Montalbano) always knew Claimant had a prior surgery at L3-L4; Defendants mentioned it in their very first letter to Dr. Montalbano when asking him about Dr. Dazley's proposed surgery. Defendants, relying on Dr. Montalbano, did not accept "all causation" of the injury or proposed surgery. They paid the entirety of the surgery, but it cannot be said based on the factual and procedural history that Defendants accepted all back related claims of Claimant. Claimant even admits as much in her briefing: "Here, Surety takes an inconsistent position by denying all causation between the 2018 industrial accident and the 2019 fusion—when it previously accepted all causation (**subject to any apportionment**) and expressly approved the 2019 fusion as compensable." (emphasis supplied). The apportionment Claimant refers to is apportionment related to Claimant's pre-existing condition. Defendants have not taken an inconsistent position from their position at the beginning of the claim.

86. Even assuming that Defendants have taken an inconsistent position, Claimant has not met the second step in applying quasi-estoppel: (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in. Claimant argues both that she was induced to change positions and that it would be unconscionable to allow Surety to take a contrary position which was the result of their own negligence.

87. Regarding the first argument, Claimant was not induced to change physicians from Dr. Dazley to Dr. Montalbano. It is a long-established right of Surety to direct medical care and their responsibility to provide medical care per Idaho Code § 72-432(1). The employer may direct employees to a designated provider and employees do not have a statutory right to choose their medical provider. *Davis v. 45th Parallel Electric LLC*, IIC 2007-043709 (November 24, 2009). Claimant could not be induced to change physicians when it was never her right to choose her physician.

88. Claimant's arguments regarding unconscionability are circular. Claimant merely refers back to the Defendants' position being inconsistent and therefore unconscionable. If Defendants' position is not inconsistent, it is not unconscionable and Claimant points to no benefit that Defendants gained by taking this inconsistent position. Claimant does correctly point out that Defendants could have and should have requested PA-C Tanner's records in 2018 when Claimant first disclosed them. (See ¶ 69). However, it is Defendants who have paid the price[4] for that lack of due diligence in the amount of a 2019 fusion, physical therapy, and related medication.

89. Claimant argues that Dr. Bauer's opinion shows unconscionability. Namely, that if Claimant had not been stopped from receiving Dr. Dazley's recommended surgery, Claimant may not be in the position of needing an extension of her fusion: "the original treatment plan for a far lateral fusion at only one level **possibly could have** averted the adjacent segment degeneration and need to further recommend surgery in 2021." JE 14:19 (emphasis supplied). However, this was speculation by Dr. Bauer and not expressed to a reasonable degree of medical probability. Dr. Bauer's comment was not subject to cross-examination, no other physician supports his

[4] Idaho Code § 72-316 only applies to income benefits.

opinion, and Dr. Bauer did not have the benefit of Claimant's records showing that she had complained of low back pain with a 15 year history.

90. In sum, quasi-estoppel is not properly before the Commission. Although it is clear from case law it does not always need to be affirmatively pled to be an issue, Defendants had no notice until briefing (*Wilson*) and are appropriately objecting to its inclusion (*Vawter*); further, Defendants would be highly prejudiced by its inclusion as the evidence which would have supported quasi-estoppel was not developed in discovery or post-hearing depositions. Second, if quasi-estoppel was properly at issue, it is not shown by these facts. Defendants never accepted "all causation" of all back claims of Claimant; it was, as admitted by Claimant, always subject to apportionment for Claimant's pre-existing condition, namely her prior L3-L4 fusion by Dr. Dazley in 2017. Defendants did not take an inconsistent position. Further, Claimant was not induced to change physicians, it is Defendants right to direct medical care. Any lack of due diligence shown by Defendants' actions has resulted in Defendants payment for medical care which they are unable to recoup.

91. Defendants also argue quasi-estoppel should be applied to Claimant if it is properly before the Commission regarding her assertion of medical benefits. Their argument is that Claimant has taken inconsistent positions on the medical care she wants; first, the fusion by Dr. Montalbano in pre-hearing communication, then a spinal cord stimulator at hearing, and finally in briefing, all medical care she may be entitled to. This has caused a disadvantage to Defendants by causing them to focus specifically on a spinal cord stimulator in post-hearing deposition and in briefing.

92. Claimant correctly points out that what medical care Claimant is entitled to is subject to Idaho Code § 72-432(1). It is for the physician to decide what medical care is required and the Commission's purview to decide whether it is reasonable and necessary. Physicians direct medical

care and Claimant has deferred requesting specific care and instead requests updated evaluations and imaging to determine what care should come next, assuming she has proven causation. Claimant cannot be "estopped" from requesting anything other than a spinal cord stimulator as it is not Claimant who decides what care is required. The doctrine of quasi-estoppel does not overcome the clear mandate of Idaho Code § 72-432.

93. **Binding Judicial Admission.** Both parties argue the other has made a binding judicial admission. Claimant argues that when Defendants filed an Answer admitting that Claimant's condition was partly caused by the industrial accident that this admission prevents them from now denying Claimant's condition was partly caused by the industrial accident. Defendants assert Claimant's Complaint contains a binding judicial admission by not including temporary disability benefits as an issue but then later adding it as an issue for hearing.

94. A judicial admission is a "deliberate, clear, and unequivocal statement of a party about a concrete fact within the party's knowledge." *Vanderford Co. v. Knudson*, 150 Idaho 664, 673, 249 P.3d 857, 866 (2011). Examples of judicial admissions include "statement[s] made by a party or attorney, in the course of judicial proceedings, for the purpose, or with the effect, of dispensing with the need for proof by the opposing party of some fact." *Sun Valley Potato Growers, Inc. v. Texas Refinery Corp.*, 139 Idaho 761, 765, 86 P.3d 475, 479 (2004). Generally, judicial admissions remove the admitted facts from the field of controversy. *Strouse v. K-Tek, Inc.*, 129 Idaho 616, 618, 930 P.2d 1361, 1363 (Ct. App. 1997).

95. Neither party's statements meet these standards. Defendants correctly point out that the rest of their Answer makes it clear they are not 'dispensing with the need for proof' of Claimant's current condition being related to the industrial accident. There is no indication they are deliberately, clearly, and unequivocally admitting that Claimant's 2018 injury caused the need for

her 2019 surgery, even in part. In line with the above quasi-estoppel analysis, Defendants are and have always been aware Claimant had a pre-existing injury and that some portion of her presentation, per their medical experts, was due to that pre-existing condition. Despite its inclusion as an issue for hearing, in briefing and in their Answer, Defendants admitted an accident and injury occurred on August 22, 2018. Defendants have never argued that Claimant did not suffer pain in her low back on August 22, 2018, rather, they have disputed its origin.

96. Similarly, Claimant's lack of inclusion of "temporary" when she included "disability" as an issue is hardly an unequivocal admission or statement that she has reached medical stability and is not entitled to temporary disability benefits; it did not clearly and unequivocally dispense with that fact and deliberately remove it from the field of controversy.

97. **Waiver.** Defendants argue Claimant has waived her right to any medical care other than a spinal cord stimulator. Under Idaho law, the traditional doctrine of waiver is an equitable one, based upon fairness and justice. Waiver is a voluntary, intentional relinquishment of a known right or advantage. Unlike federal law, Idaho law has historically required detrimental reliance in order for a party to succeed in asserting waiver: The party asserting waiver must have acted in reliance upon the waiver and altered the party's position. *Shake Out, LLC v. Clearwater Constr., LLC*, 172 Idaho 622, 535 P.3d 598, 604 (2023) (internal citations omitted).

98. This argument fails for the same reason it fails under quasi-estoppel. Idaho Code § 72-432(1) controls what medical care Claimant is entitled to. It is for the physician to decide what medical care is required and the Commission's purview to decide whether it is reasonable and necessary. Claimant cannot waive a right she has not proven she possesses.

99. Further, it is not clear that Claimant intentionally relinquished a claim to a fusion surgery when testifying that she preferred a spinal cord stimulator at hearing, nor that Defendants

detrimentally relied on this alleged waiver. Claimant's overall goal was reducing pain and it was her understanding that "there is no cure" for her pain, that she would be on pain pills the rest of her life, and that a fusion surgery "wouldn't help." See Tr. p. 88-91 Claimant's testimony was not an intentional relinquishment, but a statement of her understanding of her condition from what Dr. Hansen and her pain management team told her. Nor is it clear that Defendants altered their position. Defendants asserted that it was their understanding that only the stimulator was being requested, but pointed to no change in strategy or position or development of evidence that was caused by this understanding.

100. **Causation/Pre-Existing Condition.** 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). The permanent aggravation of a preexisting condition or disease is compensable. *Bowman v. Twin Falls Construction Company, Inc.*, 99 Idaho 312, 581 P.2d 770 (1978).

101. 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. Loggin*g, 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).

102. In *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 302 P.3d 718 (2013), the Court highlighted that the referee, as a fact finder, is not a medical expert. "When a referee exceeds his or

her role as a finder of fact and injects his or her own medical opinions into the proceedings" the findings might not represent the most competent adjudication. The *Mazzone* Court noted that while the Referee may use utilize his expertise to draw inferences from conflicting evidence presented at hearing, he may not use his expertise as a substitute for evidence presented at hearing.

103. As an initial matter, Dr. Hansen's opinion is discarded as it regards causation of the 2019 need for surgery. Dr. Hansen was not aware of Claimant's 2017 surgery, the method of injury, and had reviewed no records other than his own in rendering his opinions. However, Dr. Hansen's opinion that Claimant's current need for surgery is a consequence of her 2019 surgery is not contradicted by any other medical expert opinion and is accepted.

104. Dr. Bauer did not have PA-C Tanner's records and was therefore unaware of Claimant's reported 15-year history of low back pain, nor did he have Dr. Spritzer's 2012 record documenting the same. He also only saw Claimant once in the context of an IME vs. Dr. Montalbano who saw Claimant over the course of years (2019-2021) as her treater. Dr. Bauer was also not deposed and subject to cross-examination. Dr. Bauer's opinion is given less weight for these reasons.

105. Dr. Bauer's relevant opinions are that Claimant's imaging does show a surgical condition related to her 2019 surgery with Dr. Montalbano. However, any surgery would likely fail because she is opioid dependent and smokes cigarettes and her subjective complaints are global, non-radicular, and exaggerated. Claimant's August 2018 accident was merely a straining incident. Claimant did have pseudoarthrosis and next segment degeneration prior to the accident "which may have come to the attention of the medical professional because she professed to have a straining incident." JE 14:18. In sum, Dr. Bauer agreed with Dr. Montalbano's September 2021 opinion that

Claimant's need for 2019 surgery was related to her 2017 surgery and that her current need for surgery is related to the 2019 surgery.

106. Dr. Montalbano testified he never saw Dr. Dazley's records except "maybe the operative report." Montalbano Depo. 6:14-18. In January 2019, Dr. Montalbano reviewed Claimant's September 2 X-rays, October 16 MRI, and November 29 EMG studies, and was aware Claimant had a prior fusion at L3-4 for a degenerative condition. He reviewed "additional records" in March 2019, which are unknown, except that they were not PA-C Tanner's records; Surety had not requested those per the claim file and Defendants averred these records were new to them when they were provided by Claimant in discovery in June 2021. Dr. Montalbano reviewed those records in September 2021 when given them by Defense Counsel when issuing his updated causation opinion. See JE 15 and Montalbano Depo. Therefore, Dr. Montalbano has not reviewed Dr. Dazley's notes other than the operative report or Dr. Spritzer's 2012 record. It is unknown whether Dr. Montalbano reviewed Dr. Hasting's notes or Dr. Rhead's ER notes; those may have been the additional records he reviewed in March 2019. However, despite having fewer records than Dr. Bauer, Dr. Montalbano had an ongoing relationship with Claimant and was deposed and subject to cross-examination. His opinion is given weight.

107. As an initial matter, Dr. Montalbano stated in January 2019 that if Claimant had sought treatment for low back pain or left sided leg pain in the six months prior to her August 2018 injury, he would relate her condition to next segment degeneration and not to the industrial injury. When asked about this opinion at deposition, Dr. Montalbano confirmed that opinion and that at that time based on the records he had, he did not see any left lower extremity symptoms in the prior six months. See Montalbano Depo. 9:10-10:13. Claimant attempts to frame this exchange as

agreement with her position that if she experienced no left leg extremity symptoms in the prior six months[5] than her condition is related to the accident:

> Q: [By Ms. Mossman-Fletcher] You stated in your letter to Brittney Wheeler, who is the adjuster for the surety, or at least was at the time - - this is in your letter dated January 15th 2019. I'm quoting here "That in terms of causation, I would request additional medical records where Ms. Adamson sought out treatment six months prior to the work-related injury of August 22nd, 2018. If she sought out treatment for **low back pain or left lower extremity symptomology** within a six month period, it is my opinion that the etiology of her symptoms symptomology is related to the next segment degeneration at the L2-3 as well as L4-5" so my question is then: based on the review of the records, would it be correct to say that in the six months prior - - and this is presuming that you had a chance to review those records - - in six months prior to the 08-22-2018 injury, there was no indication of **left lower extremity symptomology**; is that correct?
>
> A: Correct
>
> Q: Okay. So in the **absence of left lower extremity symptomology** in the six months prior to the industrial injury, your opinion is that there was a causal connection to the industrial injury and those new symptoms related to the L2-L3 level; Is that right?
>
> A: Correct.

Montalbano Depo. 9:10-10:13 (emphasis supplied). Claimant ignores the context of this exchange in making her argument. While reading the direct opinion from 2019, she omits a critical part of this original opinion: whether Claimant experienced left sided leg pain or low back pain in the six months prior to her industrial injury.

108. Regarding low back pain, Dr. Montalbano confirmed that he was aware Claimant had minor occasional lower back pain and was on narcotics in 2019; what he learned from PA-C Tanner's records was that she was prescribed 60 Norco a month for her low back pain: "If she was taking Norco for the back pain, it would tell me that she was symptomatic prior to the industrial

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[5] Claimant also attempts to make the claim that she never experienced left sided leg pain prior to the August 2018 accident; while technically true, Claimant reported left sided groin pain in November 2017 which per her left side/right side theory, is also relevant. See ¶ 12.

injury." Montalbano Depo., 27:6-11. It does not appear from Dr. Montalbano's March 12, 2019 records that he was aware Claimant's Norco usage and "minor occasional low back pain" were linked, i.e. that she was taking the Norco for the low back pain vs. some other condition. JE 34:4-5. The overall thrust of Dr. Montalbano's opinion when reading his records and his deposition is that if Claimant suffered low back pain to the point she was treating it with narcotics at the time of the accident, then she was symptomatic and therefore her symptoms on August 22, 2018 were related to her pre-existing condition and not the accident.

109. The June 5, 2019 record with PA-C Tanner and Claimant's deposition testimony both confirm that Claimant was on some narcotics at the time of her industrial injury for her low back pain, although probably less than two Norco a day. Claimant did not refill her August 5 prescription for 60 Norco until August 30, 2018, post-injury. Claimant was indeed "darn close" to weaning off the Norco as she testified to and as the prescription records/PA-C Tanner's records reflect. However, she was symptomatic, she did sometimes take Norco to get through the day at Lowe's and at night after a difficult day at the time of her injury. Ultimately, her records and her testimony reflect she had low back pain, although not leg pain, at the time of her injury.

110. Claimant points to two facts she argues support an aggravation of her pre-existing symptoms vs. just a continuation of her pre-existing symptoms. First, Claimant's prior leg pain was right sided and after the accident, it was left sided. Second, Claimant's post-accident imaging showed a left sided herniation whereas previous imaging showed a right sided herniation. Claimant's suggestion that these facts are significant is without medical support, i.e., no physician endorses these facts as key to a causation analysis where Claimant prevails. Dr. Montalbano previously opined Claimant's symptoms in 2019 would be next segment degeneration if she had left leg or low back symptoms in the prior six months and testified:

Q: [Mr. Gamel] In your experience with next level degeneration, when next level degeneration happens, does it always stay consistent in terms of symptoms to the pre-surgery? In other words, if you do a fusion for a right sided symptoms and then you have next level degeneration post-surgery, is it always going to be expected that those symptoms to remain on one side or can those symptoms change over time?

A: Those symptoms could change over time. The symptoms prior to the surgery would be completely independent of the symptoms related to the next segment degeneration.

Q: So … for each person, then, who experiences next level degeneration, there's really no way of knowing before the surgery is done and then you know they're going to start having that next level degeneration? There's really no way of knowing what those symptoms will end up being until they occur?

A: Correct. **They could be low back pain, left leg pain, right leg pain, no pain but gallbladder difficulty, numbness, tingling.**

Montalbano Depo. 31:25-32:23. In other words, the fact that Claimant's leg pain was right sided in 2017 and left sided in 2019 post-accident does not provide proof that it was accident related vs. next segment degeneration related to her pre-existing condition.

111. Dr. Montalbano was not asked about the significance of Claimant's change in imaging, and as noted above, it does not seem as though Dr. Montalbano was provided with Claimant's pre-injury imaging from Dr. Dazley to comment on whether the change was significant. With the imaging that he did have, Dr. Montalbano opined in January 2019 that if she had sought out treatment for low back pain or left leg pain then the findings at both L2-L3 and L4-L5 would be next segment degeneration. In other words, Claimant's insistence that this L2-L3 left sided herniation must be a new injury is contradicted by Dr. Montalbano's opinion and requires other medical opinion to support its significance. See JE 34:2-3. Claimant's attempt to differentiate Montalbano's opinions in January 2019 vs. March 2019 is not supported by the records. It is tempting as the finder of fact to assume that the change in imaging was significant. However, per *Mazzone*, it is improper for the Referee to form their own medical opinion. Again, no physician has

commented that the change in imaging is significant to the question of causation. Claimant did not meet her burden to show the significance of this fact by way of medical opinion.

112. Claimant has not proven she has an aggravation of a pre-existing condition caused by her August 2018 work accident. The medical evidence and particularly Dr. Montalbano's opinion supports that Claimant suffered next segment degeneration from her prior fusion. Claimant had pseudoarthrosis and degeneration related to the 2017 fusion, which led to the 2019 fusion, which then in turn led to further next segment degeneration at her L1-L2 level per Dr. Hansen, Dr. Montalbano, and Dr. Bauer.

113. The compensable consequences doctrine is recognized in Idaho. A subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if there is a demonstrable causal connection between the compensation sought and the work connected injury. *Sharp v. Thomas Brothers Plumbing*, 510 P.3d 1136 (2022).

114. Claimant's argument that her current need for treatment is a compensable consequence of her 2018 injury requires "a demonstrable causal connection between the compensation sought and the work connected injury." The compensable consequence logic fails at the first step because the 2019 surgery treated an injury which was not connected to work. Claimant failed to prove her 2019 surgery was related to the industrial injury as an aggravation of her pre-existing condition. Although all the medical experts agree that Claimant's need for an extension of her fusion is related to the 2019 surgery, the primary injury must be related to the industrial accident.

115. The *Sharp* Court chided the Commission for conflating tort concepts of fault with workers compensation which is about "allocating costs, not remedying wrongs." It is again tempting to enter the province of medical expertise (*Mazzone*) and apply tort conceptions of fault (*Sharp*) and conclude that it is Defendants' fault that Claimant needs an extension of her fusion and is in a

worse position than she would have been had Defendants denied this claim in 2019 or, per Dr. Bauer, allowed her to proceed with a single level surgery with Dr. Dazley. However, this would be both inappropriate and speculative. All the example cases cited in *Sharp* were based on compensable claims; the primary injury was always work related. Holding Defendants responsible here for the consequences of her 2019 surgery would be applying concepts of torts and assuming, without firm medical evidence, that Claimant would be in a better position without the 2019 surgery. This conclusion would be in contravention of the most salient holding in *Sharp,* which is that any consequences, secondary or primary, must have "a causal connection between the covered employment and a claimant's injury." The injury that required surgery was Claimant's pre-existing degenerative condition and not work related. Claimant has failed to sustain her burden.

116. **Temporary Disability Benefits.** Income benefits during periods of temporary disability are payable to an injured worker pursuant to the provisions of Idaho Code § 72-408.

117. Claimant's is not entitled to temporary disability benefits from January 2021 onward as requested because she has failed to show her condition was caused by the 2018 accident.

CONCLUSIONS OF LAW

1. Claimant has failed to prove by a preponderance of the evidence that the August 22, 2018 work accident caused a permanent aggravation of her pre-existing condition;

2. Claimant's current condition is due to her pre-existing condition;

3. Claimant has not proven she is entitled to additional medical care;

4. Claimant has not proven she is entitled to additional temporary disability benefits.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 21st day of February, 2024.

INDUSTRIAL COMMISSION

Sonnet Robinson

Sonnet Robinson, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of March, 2024, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail and *E-mail transmission* upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MOLLY ADAMSON, Claimant, v. LOWE'S HIW, INC, Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Surety, Defendants.	**IC 2018-024690** **ORDER** **FILED MARCH 11, 2024** **IDAHO INDUSTRIAL COMMISSION**

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

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

1. Claimant has failed to prove by a preponderance of the evidence that the August 22, 2018 work accident caused a permanent aggravation of her pre-existing condition.
2. Claimant's current condition is due to her pre-existing condition.
3. Claimant has not proven she is entitled to additional medical care.

4. Claimant has not proven she is entitled to additional temporary disability benefits.

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

DATED this 7th day of March, 2024.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Claire Sharp, Commissioner

Aaron White, Commissioner

ATTEST: Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of March 2024, a true and correct copy of the foregoing **ORDER** was served by *E-mail transmission* and by regular United States Mail upon each of the following:

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