

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RAYMOND KIBLER,

Claimant,

v.

THE FAUSETT GROUP, INC.,

Employer,

and

IDAHO STATE INSURANCE FUND,

Surety,

Defendants.

IC 2012-016396

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

Filed April 14, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Coeur D’Alene, Idaho, on July 8, 2015. Claimant was represented by Starr Kelso, of Coeur D’Alene. James Magnuson, of Coeur D’Alene, represented The Fausett Group (“Employer”), and Idaho State Insurance Fund (“Surety”), Defendants. Oral and documentary evidence was admitted. Post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter came under advisement on March 11, 2016.

ISSUES

By agreement of the parties, the issues to be decided are:

1. Whether the condition for which Claimant seeks benefits was caused by an industrial accident;

2. Whether Claimant's condition is due in whole or in part to a pre-existing condition;
and

3. Whether and to what extent Claimant is entitled to the following benefits:

- a. Medical care;
- b. Temporary disability benefits, partial or total (TPD/TTD); and
- c. Permanent Partial Impairment (PPI).

The issues of disability and attorney fees are reserved.¹

CONTENTIONS OF THE PARTIES

Claimant asserts he injured his left hip, low back, and sacroiliac while lifting a heavy piece of equipment while in the course and scope of his employment with Employer. This accident also exacerbated, and rendered surgical, bi-lateral inguinal hernias. He is not yet at MMI. Claimant is entitled to all past and future medical costs associated with his industrial accident. He is also entitled to temporary disability benefits.

Defendants argue Claimant suffered a minor low back strain in the accident in question. He sought no medical treatment immediately thereafter. His hernias, and belatedly-generated hip and sacroiliac complaints, are not related to his work injury. Defendants owe Claimant no benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's testimony, taken at hearing;
2. The hearing testimony of witness James Striker;

¹ The issues of whether Claimant suffered an accident, and Claimant's AWW, were conceded, and stipulated to, respectively, at or before hearing, and thus were removed as issues for resolution herein.

3. Claimant's Exhibits (CE) A through I, K, N, P, Q, R – except for pages 468-472, 524-539, 557-601 – and S, admitted at hearing²;
4. Defendants' Exhibits (DE) 1 through 17, admitted at hearing;
5. The post-hearing deposition transcript of Merle Janes, M.D., taken on August 5, 2015;
6. The post-hearing deposition transcript of Jonathan Spitz, M.D., taken on September 18, 2015; and
7. The post-hearing deposition transcript of Jeffrey Larson, M.D., taken on November 9, 2015.

All objections preserved during the depositions are overruled, with the exception of the objection to the introduction of Exhibits 2 and 3 to the deposition of Dr. Janes, which was sustained in a separate previously-filed order.

Claimant's Objection and Motion to Strike

Claimant also filed an Objection and Motion to Strike all or a portion of Defendants' post-hearing brief (with a request for attorney fees), based upon the allegation that the Defendants' brief is tainted with references, citations, and quotations pertaining to the excluded Exhibits 2 and 3 to Dr. Janes' deposition, referenced above. However, after Dr. Janes stated he was not familiar with the exact insurance document identified as Exhibit 2, he went on to discuss the concept behind insurance documents such as Exhibit 2. There was no motion to strike his voluntary statement. Furthermore, his statement

² Defendants objected to those of Claimant's exhibits which are not admitted herein; Claimant withdrew many of the contentious pages, and the Referee sustained the Defendants' objection to others. Defendants' objection to exhibits L and M were taken under advisement, and after review, the objection is sustained and those exhibits will not be admitted.

discussed his general awareness concerning insurance companies refusing to cover his proposed prolotherapy treatment. Reference to the doctor's statement is permissible.

The Referee will not consider the questions and answers in Dr. Janes' deposition starting on page 73, line 1, and continuing to page 74, line 17. Also, the dialog beginning at page 75, line 24, and continuing to page 76, line 11 is also stricken. The stricken lines are directly related to the specific documents proposed as Exhibits 2 and 3 to Dr. Janes' deposition. In their briefing, Defendants made no citation or reference to the doctor's responses contained within that stricken portion of the deposition.

Defendants permissibly asked general questions, independent of their proposed introduction of a related document, concerning Medicare and Medicaid's refusal to accept the treatment proposed by Dr. Janes. The doctor testified he was familiar with Medicare and Medicaid's prohibition. The line of questioning was proper; the introduction of specific documents not timely provided under the Rules was not.

Claimant's objection to Defendants inserting a definition from *Mosby's Medical Dictionary* in their brief without prior admission into evidence based upon proper foundation is well taken; that definition, describing the Health Care Financing Administration, its responsibilities and purpose, will be stricken from Defendants' brief and not considered when rendering a decision in this matter. The remainder of Claimant's motion, including his request for attorney fees in conjunction with the motion, is denied.

Having considered the evidence and briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. In the course and scope of his employment on March 12, 2012, Claimant and his supervisor, James Striker, were attempting to lift a piece of mining equipment known as a tugger onto a timber truck.³ The tugger weighed between 200 and 250 pounds. Immediately after loading the tugger onto the truck, Claimant dropped to one knee. Claimant told Mr. Striker he had hurt his low back. It was apparent to Mr. Striker that Claimant was in pain. The two men discussed the injury and concluded Claimant must have pulled a muscle.

2. Claimant's left-sided low back pain was most intense at the moment of injury, but slowly began to feel better. Claimant did not seek immediate medical care. He continued to work.

3. Claimant noticed left-sided groin pain within a week after the March 12 accident. He also noticed a bulge in his right groin area about six or seven weeks thereafter.⁴

4. Claimant saw his family practice physician, John Torquato, M.D., on June 4, 2012, primarily for testing related to Claimant's ongoing thyroid condition. On this visit, Claimant mentioned his lifting accident, and the fact he thought he might have a hernia from it. Dr. Torquato found a large right-sided reducible inguinal hernia, and a left-sided

³ The timber truck was a piece of rail equipment, like a flat car, which operated on a track. Its bed was about 18 to 20 inches off the ground. It was used at the Star mine, where Claimant was working at the time, to move equipment, such as the tugger, which is like a winch, into and out of the mine.

⁴ There are various accounts of when Claimant developed the right-sided bulge. At hearing, Claimant testified he noticed the right-sided bulge within two weeks after the accident; in his earlier deposition, he testified it was about six or seven weeks post-accident. Since Claimant's deposition was closer in time to the event (June 2013) than the hearing (July 2015), it is assumed his memory was more accurate in 2013 concerning events in 2012 than at the time of hearing.

inguinal bulge, but not an actual hernia. Dr. Torquato referred Claimant to surgeon Timothy Quinn, M.D., for hernia evaluation.

5. Surety denied Claimant's injury claim, but Claimant, through his personal health insurance, eventually proceeded to surgery on November 6, 2012, with Dr. Quinn, to repair his bi-lateral hernias. The surgery was successful.

6. On or about November 26, 2012, Claimant returned to work, at first with light-duty restrictions. Claimant had been working his regular job until the date of surgery. On December 6, 2012, Claimant was laid off.

7. Despite attempting to find other work, Claimant was unemployed from December 6, 2012 until he found a fabrication job in November 2014 with Bunker Hill Mining in Kellogg.

8. While Claimant's hernias by-and-large healed with only occasional uncomfortable sensations, he continued to complain of issues concerning his low back and left hip. He told his new employer about these issues, and when heavy lifting is required, he utilizes the help of a younger co-worker. With that accomodation, he is able to perform his current work duties.

9. Claimant currently complains of left hip, lumbosacral, and sacroiliac (SI) joint pain and discomfort, all of which he attributes to the industrial accident of March 12, 2012.

DISCUSSION AND FURTHER FINDINGS

Causation

10. Claimant has the burden of proving, by a preponderance of the evidence, all facts essential to recovery to his claims. He carries the burden of proving that

the condition for which compensation is sought is causally related to an industrial accident. *Duncan v. Navajo Trucking*, 134 Idaho 202, 203, 998 P.2d 1115, 1116 (2000). The proof required is “a reasonable degree of medical probability” that Claimant’s injury was caused by an industrial accident. *Anderson v. Harper's Inc.*, 143 Idaho 193, 196, 141 P.3d 1062, 1065 (2006). In determining causation, it is the role of the Commission to determine the weight and credibility, and to resolve conflicting interpretations, of testimony.

11. The first two issues to be determined can be summarized as a disagreement over whether Claimant’s hernias, low back, left hip, and SI joint complaints stem from the industrial accident or were simply the natural progression of pre-existing conditions. When deciding this question, it is important to recall that to be compensable, the work-related accident need not have *caused* the condition in question, it is sufficient to find the accident aggravated or rendered symptomatic a previously asymptomatic condition. A preexisting disease or infirmity does not preclude a workers’ compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983).

Hernias

12. Claimant acknowledges his hernias were not technically *caused by* his lifting incident in question, but rather were pre-existing and developing with time. He argues the lifting exacerbated the hernias, causing them to become symptomatic. This argument is supported by medical testimony, as developed below. In contrast, Defendants’ medical expert on hernias testified that not only were the hernias not caused by the lifting incident, they were not aggravated by it either.

Dr. Quinn

13. Dr. Quinn was asked to opine on causation of Claimant's hernias. He responded "no" to the question of whether Claimant's bilateral hernias were *caused* by attempting to lift the tugger. In response to the question of whether the lifting *exacerbated* Claimant's "abdominal condition" resulting in the need for surgery, Dr. Quinn checked "yes". He went on to write;

no way to tell with absolute certainty – but I believe [Claimant] was probably gradually developing the herniae & the heavy tugging episode was the 'last straw' exacerbating the herniae to now become symptomatic. I obtained no history of the herniae being symptomatic or diagnosed prior to the 'event' of heavy lifting.

CE C 109.

14. Surety asked Dr. Quinn to review their medical expert's opinion and comment on whether he agreed or disagreed with those findings. Dr. Quinn responded by writing "I agree with Dr. Spitz's [Surety's medical expert] findings. Good recovery from hernia repairs. Hernias were not noted till post 3/12 event." CE C 130.

15. Subsequently, Dr. Quinn was again asked by Claimant's counsel to opine on causation in light of Dr. Quinn's response to Surety's letter discussed above, in which Dr. Quinn agreed with their expert to some degree. In clarifying his position, Dr. Quinn wrote,

Patient gave no history of having hernias prior to the "tugging" episode. After that episode in March 2012 he noted left groin bulge 10 days later. Then on the R side @ 6 weeks later.

I firmly believe that he was developing the hernia – but lifting the "tugger" exacerbated the herniae and caused them to become symptomatic.

The herniae were likely developing and small and asymptomatic – but exacerbated by the lifting at work to become symptomatic – requiring a surgical repair.

CE C 128.

Dr. Janes

16. Claimant sought an independent evaluation from Merle Janes, M.D., a Spokane physiatrist, who used to practice in eastern Idaho. In his written report and subsequent deposition, Dr. Janes opined on all of Claimant's conditions. With regard to the relationship between Claimant's hernias and his lifting accident, Dr. Janes wrote, "it is plain that these [hernias] were secondary to the heavy lifting. The medical literature is clear that such hernias can be the result of such activity, as they were in this case."

CE D 141. Under his diagnosis, Dr. Janes indicated the heavy lifting worsened Claimant's previously-asymptomatic right hernia, and caused a *de-novo* left-sided hernia.

Dr. Spitz

17. Defendants hired Jonathan Spitz, M.D., a surgeon specializing in bariatric or foregut surgery in the Spokane area, to evaluate the connection between Claimant's bilateral hernias and his work accident of March 2012.

18. Dr. Spitz discussed the various types of hernias, how they develop, and risk factors for their development. He noted Claimant suffered from direct inguinal hernias. Dr. Spitz indicated these hernias develop progressively as a consequence of gradual thinning of groin tissue. This progressive weakness eventually tears or herniates. As such, the "cause" of the hernias was the gradual weakening over a period of years, not a sudden, traumatic event such as lifting.

19. Dr. Spitz also opined that lifting events rarely cause a direct inguinal hernia, but acknowledged a sudden increase in pressure in the abdominal cavity can contribute to the creation or worsening of a hernia. However, Dr. Spitz opined that the lifting event did not contribute to the worsening of Claimant's hernias, which pre-dated the event, because if it had, the effect would have been immediate. He noted that since there was no change in Claimant's physical exam, i.e., no immediate bulging or hernia pain, there was no exacerbation of his hernias. Instead, according to Dr. Spitz, Claimant had hernias before the lifting event, which would continue to develop over time with or without the lifting accident, and would eventually need surgical correction in their natural course. At most, the lifting accident simply focused Claimant's attention to them, but the need for surgical repair was unrelated to the work accident.

20. The weight of the evidence establishes that Claimant had developing bilateral direct inguinal hernias prior to March 12, 2012. The issue is whether the accident of that date contributed to, or accelerated, the development of the hernias to the point where they became symptomatic, and thus necessitated surgical repair.

21. While Dr. Quinn surgically repaired the hernias, there is no indication in the record that his visual inspection allowed him any additional insight as to the cause of the tissue tears. Therefore, even as a treating physician, he is not uniquely positioned to render the most convincing opinion. Having said that, his opinion nevertheless carries the most weight in this circumstance due to its persuasive logic. Dr. Quinn correctly noted that Claimant had no prior history of hernia symptoms, but noticed a left bulge, and was feeling left-sided groin pain, within two weeks post-accident. Six weeks from the left-sided hernia's appearance, the right-sided hernia developed. Dr. Quinn's firm belief was

that the hernias were small and asymptomatic prior to the accident, and exacerbated by the strain of lifting the heavy equipment to the point where they soon became symptomatic and needed surgical repair. Much like a hole in a pair of jeans, once the abdominal tissue tears, it will never get better. It grows with time and movement, as testified to by Dr. Spitz.

22. Dr. Spitz's theory that the lifting would have necessarily caused immediate bulging and pain if it had exacerbated the hernias carries less weight. Given the proximity of the injuries, it is not difficult to imagine that whatever pain was associated with Claimant's groin tissue tears merged with the general pain of his left-sided low back strain, so that it was not noticeable as a distinct discomfort until the pain from the back strain lessened. Within days of the accident, Claimant felt left-sided groin pain. Then, over the next several weeks, the tissue tears continued to grow to the point where enough intestinal material pushed through the hernias to be noticeable as bulges under Claimant's skin.

23. When the totality of the evidence – including medical records and medical testimony from all sides of the issue – is examined, Claimant has established on a more probable than not basis a causal connection between the industrial accident of March 12, 2012 and the development of his bi-lateral hernias to the point where they required surgical repair.

Lumbosacral strain/sprain and SI joint injury

24. By all accounts, Claimant strained his low back while lifting the tugger on March 12, 2012. The issue is whether that strain has continued through the date of hearing, or was merely a temporary aggravation of a pre-existing condition which resolved in the natural course of healing with no time loss, impairment, or disability. A related issue is

whether Claimant injured his SI joint to the point where it remained symptomatic through the date of hearing.

25. Claimant previously injured his low back in an industrial accident in September 2000, while working in Washington State. He was diagnosed with degenerative disc disease with a broad-based disc herniation at L4-5, impinging the L4-5 nerve root, but without radicular pain, and a right-sided disc herniation at L5-S1. Claimant underwent a series of three epidural steroid injections. He returned to work at a brake assembly plant by April 2001. At the time of his August 2001 IME, Claimant continued to have right-sided low back and right hip pain at a level of 2 or 3/10, which was well tolerated. He was determined to be stable and given an impairment award.

26. Claimant did not continue to treat for his low back after the injections. His back did not bother him to the point of missing work since early 2001. He noted a history of back trouble when he first presented to Dr. Torquato in 2011, but was never treated by the doctor for back issues.

27. The evidence supports the fact that Claimant's low back condition, including his degenerative disc disease with a broad-based disc herniation at L4-5, was not symptomatic as of the date of the 2012 industrial accident in question, nor had it been a significant issue for nearly a decade. The record also supports the fact that Claimant strained his low back in the 2012 accident. The issue is whether that strain was a temporary aggravation of a pre-existing condition, or a continuing injury.

28. Claimant testified that the pain he felt at the moment of injury was quite severe. However, after a few minutes the intense pain subsided somewhat and Claimant was able to get to his feet and move around. He felt a shooting pain from

his low back into his buttocks. Claimant believed he had pulled a muscle and would start getting better in a few days. As anticipated, his low back pain began slowly going away. Claimant was able to continue working in a job classified as “very heavy” until his hernia surgery, when he was off work during recovery and then returned to light duty status for a week, and then his regular duties. Claimant was laid off shortly thereafter.

29. While Claimant told Dr. Torquato about his hernia pain, he did not seek treatment for ongoing back pain. By his own admission, Claimant’s post-accident back pain was often between 0 and 3/10.

30. At Claimant’s request, on December 3, 2013, Dr. Janes performed an IME on Claimant. Regarding Claimant’s low back and SI joint, Dr. Janes found Claimant suffered from an ongoing lumbosacral sprain/strain with spasm and tilted pelvis, a left SI sprain, and chronic low back pain. Claimant presented to Dr. Janes with a reported pain level of 2/10, and described, according to Dr. Janes’ report, a “nearly constant” aching pain in his left SI region, which became worse with flexion and extension. Dr. Janes observed in Claimant myospasm, tilted pelvis, tilted shoulders, twisted spine, altered rest posture, reduced spinal motion, all attributed to the industrial accident. Dr. Janes felt the accident aggravated Claimant’s pre-existing low back degenerative disc disease, but also caused a new stretch/tear injury to his left SI ligaments. The doctor recommended further treatment for these conditions (as well as for Claimant’s hip, discussed below), and felt Claimant was not medically stable.⁵

31. Claimant underwent a functional capacity evaluation (FCE) on January 10, 2014. Subjectively, Claimant noted difficulty in bending to tie his left shoe due to

⁵ Dr. Janes prepared several “addendums” and commentaries, critiquing other medical providers’ work product and opinions, but his opinions did not change. Those addendums are not material to this specific analysis.

left hip pain. By history, standing or turning too quickly produced pain, and sometimes Claimant's leg would "give out" and/or be very stiff for his first few steps. Mowing his yard increased his pain, and he was uncomfortable when sitting or standing for more than a few minutes. Claimant rated his pain specific to his left hip and low back from a 1 or 2/10 up to 7/10. On the day of testing he rated his pain at 1 or 2/10 prior to beginning.

32. After the full-body FCE was completed, evaluator Virginia Taft summarized her findings and observations. She noted Claimant cooperated and gave appropriate effort, appearing highly motivated. Ms. Taft noted limitations in Claimant's range of motion in his hips, with the need for constant position changes to reduce pain. His pain increased with extended standing, sitting, lifting objects to the front, and with forward reach. Claimant's tolerance was from 10 to 30 minutes depending on the task. Ms. Taft opined that Claimant could not return to his former employment. She felt he had a sedentary to light duty limitation.

33. On January 28, 2014, Defendants sent Claimant for an IME with Jeffrey Larson, M.D., a Coeur d'Alene neurosurgeon. Claimant's provided history included the fact that he was not hurting much at the time of examination, his pain was intermittent, and earlier that week he had four pain-free days. He described his current pain as being in his left lower back, left hip, and left groin, although on his pain diagram he indicated pain only in his low back. Dr. Larson found no abnormalities in Claimant's gait, speech, cognitive functions, flexion and extension range of motion, muscle strength, abduction and external left hip rotation. Dr. Larson found only two tests which elicited pain from Claimant; palpation of the left paralumbar region above the iliac crest, and left-sided groin pain with adduction and internal rotation of Claimant's left hip.

34. Dr. Larson determined that Claimant had suffered a low back strain, which had resolved. In his opinion, the injury was a temporary exacerbation of a pre-existing condition. Dr. Larson specifically found no ongoing injury to Claimant's left SI joint. All testing for such condition was negative. While the adduction and internal rotation elicited pain, Dr. Larson noted that was indicative of a hip capsule condition, not SI joint injury. He felt no further medical treatment was necessary regarding Claimant's industrial injury, and Claimant had no permanent impairment or work restrictions needed.

35. More recently, Claimant sought out John McNulty, M.D., for another IME, which took place on March 9, 2015. By that time, Claimant was working again. He complained of persistent hip pain at a level of 2-3/10, which radiated into his groin, as well as left-sided low back pain. Claimant indicated he had trouble bending over to put on socks and tie his shoes, difficulty sitting for prolonged stretches, and difficulty straightening up when rising from a seated or prone position. He was not required to do heavy lifting at his employment. He denied radiating pain into his legs. His condition was stable.

36. Dr. McNulty reviewed Claimant's past medical records. He conducted a physical examination. He found Claimant walked normally and was able to sit for the interview without much discomfort. His lower extremity reflexes were normal. Claimant was tender over the left SI joint. He could almost touch his toes with forward flexion and locked knees. Claimant had some limitation in lumbar extension, and FABER testing was positive on left, negative on right. Claimant also had limitations on both his right and left hip flexion. Dr. McNulty found that Claimant suffered from a chronic left SI joint

sprain/strain, and advanced bilateral osteoarthritis in his hips. The doctor noted Claimant sought no medical treatment for any condition other than his bi-lateral hernias.

37. Dr. McNulty felt Claimant's chronic SI joint sprain/strain was a new and distinct injury, separate from his 2000 low back injury. Dr. McNulty felt Claimant was at MMI and assigned him a 2% whole person impairment for his class 1 SI joint dysfunction, using the AMA Guides, 6th edition.

38. In addition to the medical opinions, Claimant's history and post-accident behavior must be examined. To begin, the accident caused immediate pain sufficiently severe to drop Claimant to his knee. While the pain soon began to lessen and continued to improve over time, there is no indication in the record that the pain originating in Claimant's lower back area ever fully resolved. At best, it was intermittent, and when present, the pain was rather mild. In his October 2013 chart notes, Dr. Torquato lists mild back pain as an ongoing complaint.

39. Importantly, when Claimant was seeking new employment, he told his potential employer about his back pain. He was able to procure work with adequate accommodations made for him to avoid heavy lifting. While by all accounts, Claimant's continuing low back pain is tolerable, even without pain medication, Claimant has only been sporadically asymptomatic since his accident. More days than not, he experiences at least some discomfort and inconvenience.

40. Of the competing medical opinions offered regarding existence and/or causation of Claimant's low back and SI joint injury, Dr. McNulty's is afforded the most weight. His opinion that Claimant suffers from a chronic left SI joint sprain/strain injury caused by his industrial accident of March 12, 2012 is adopted.

41. Dr. McNulty made no finding that Claimant suffered a continuing lumbosacral spine injury. Claimant has had degenerative disc disease for well over a decade, and apparently Dr. McNulty found no evidence that Claimant's spine was further injured in the accident in question. Instead, Claimant suffered a new injury in the form of an SI joint sprain/strain which continued to bother him through the date of hearing.

42. While Dr. Janes likewise had the same opportunity to review all the medical records and FCE by the time of his last report (June 18, 2015), his opinions are given less weight due to the appearance, both in his reporting and at his deposition, that he was acting as an advocate, not only for Claimant, but also for prolotherapy – his recommended method of treatment. His rambling and at times confrontational narrations discredited him as an independent evaluator, the assignment for which he was hired.

43. Dr. Larson made it clear in his deposition that he felt a pain level of 3/10 was trivial, and having to examine and opine on a person with such minimal complaints was a waste of his time. While that might affect the focus and thoughtfulness of his examination, the main reason Dr. Larson's opinion is not given more weight is the fact that he did not explain the basis for Claimant's ongoing left-sided low back pain other than to say it was a pre-existing condition. While Claimant admittedly had prior back issues, his lower back had been asymptomatic until his work accident, and symptomatic since. Dr. Larson did not offer a convincing explanation for why the continuing pain was unrelated to Claimant's work injury. While two other examining doctors found SI joint symptoms, Dr. Larson did not. The reason for this inconsistency is not developed in the record. The Referee recognizes, but has no explanation for, this point of contention. It is one piece of evidence among several which must be considered and weighed during the analysis.

44. When the totality of the evidence is examined, Claimant has established on a more probable than not basis a causal connection between the industrial accident of March 12, 2012 and his chronic left SI joint sprain/strain injury. Claimant did not prove a continuing injury to his lumbosacral spine from his work-related accident. In line with Dr. McNulty's opinion, it appears more likely Claimant's low back pain results from his SI joint injury than his lumbosacral spine.

Hip injury

45. Claimant also alleges he injured his left hip while lifting the tugger on March 12, 2012. There is little evidence to support such a claim. His best argument is that the left-sided groin pain was actually hip pain. Dr. Torquato's office note of October 20, 2012 indicated Claimant was wondering if his left groin pain might be coming from his left hip. The doctor made the observation that Claimant was at that time taking shorter steps due to discomfort. Dr. Torquato felt the problem was most likely the hernia, but would address the matter after surgery. The next entry in Dr. Torquato's office notes indicating Claimant's ongoing hip pain was a year later, in October 2013. Therein it states that Claimant has had hip pain ever since his hernia repair, along with mild back pain. No other mention of hip pain is found in any of Dr. Torquato's office notes thereafter.

46. In discussing the matter with Surety, Claimant testified the adjuster at one point thought Claimant's back injury was going to be accepted, and his hernias denied. No mention was ever made of a hip injury. Likewise at his deposition in June 2013, Claimant made no mention of a symptomatic hip.

47. While Dr. Janes felt Claimant's left hip pain was related to the industrial accident, the doctor does not explain how Claimant's hip was injured in the lifting

accident. Claimant did not complain of hip pain immediately after the accident. He did not include a hip injury in his initial claim with Surety. While his hip may or may not have been hurting by October 2012, (Dr. Torquato felt Claimant's pain in that region was most likely due to his inguinal hernia), even if Claimant's hip pain in October was not due to his hernia, it does not automatically follow that his hip was injured in the lifting accident.

48. Radiographic film studies of Claimant's hip taken by Dr. McNulty showed advanced bi-lateral hip osteoarthritis, worse on the left. Dr. McNulty summed up the analysis on causation regarding Claimant's left hip claim very well when he noted;

After reviewing the medical records, it appears the main focus of Mr. Kibler's initial treatment was his bilateral herniae. Mr. Kibler's claim that hip symptoms persisted after treatment suggests he may have had a permanent aggravation of pre-existing left hip osteoarthritis. In the records available to me, I did not find an evaluation of his hips nor x-rays of either hip. There is insufficient evidence in the medical records to determine whether or not a permanent aggravation of his pre-existing hip condition occurred and if any future treatment for his left hip condition is attributable to his work-related injury on 3/12/2012.

CE E 156. Dr. McNulty's opinion and conclusion set forth above is an accurate and succinct rendition of the state of the record and highlights the lack of proof that more likely than not Claimant injured his left hip in the industrial accident.

49. Based on the state of the record and the totality of the evidence, Claimant has failed to prove that his pre-existing left hip osteoarthritis was aggravated by the work-related accident in question.

Medical Care, TTD and PPI

50. The final noticed issue for resolution herein was Claimant's entitlement to medical care, temporary disability, and permanent partial impairment benefits.

Medical Care, Past and Future

51. Idaho Code § 72-432(1) mandates that an employer shall provide for 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. If the employer fails to provide the same, the injured employee may do so at the expense of the employer.

52. Under the *Neel Doctrine*, *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 852 (2009), when Defendants fail or refuse to pay for compensable medical charges, leaving Claimant to incur such debt, Defendants must pay or reimburse such charges at the full invoiced amount.

Past Medical Care

53. In the present case Defendants denied Claimant's claim in its entirety and have paid no benefits. Defendants are liable for payment or reimbursement of all medical charges, including prescription medications, reasonably associated with Claimant's hernia injury, from diagnosis through surgical treatment and post-surgical care. Such medical benefit payments for past treatment are subject to the *Neel Doctrine*.

54. The record is devoid of any treatment Claimant obtained for his SI joint injury. Charges incurred procuring IME opinions are not compensable. It does not appear from the record Claimant has a claim for reimbursement for treatment of his SI joint injury.

Future Medical Care

55. Dr. McNulty opined that Claimant is medically stable. He did so after reading Dr. Janes' contrary opinion, reviewing all available medical record data,

and conducting a physical exam on Claimant. He was well aware of Dr. Janes' opinion that Claimant could reasonably experience long-term SI joint improvement with chiropractic, physical therapy, and/or prolotherapy treatments. For the reasons discussed previously when examining the conflicting opinions of Drs. McNulty and Janes, the opinion of Dr. McNulty is given more weight. Claimant is medically stable with regard to his hernias and SI joint strain, and not entitled to further medical care at this time.

Temporary Disability

56. Idaho Code § 72-102 (10) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on Claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 605 P.2d 939 (1980). The "period of recovery" ends when Claimant reaches maximum medical improvement. *Hernandez v. Phillips*, 141 Idaho 779, 781, 118 P.3d 111, 113 (2005).

57. Under *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986), once Claimant establishes by medical evidence that he is within a period of recovery from the industrial accident, he is entitled to TTD benefits *unless* and *until* evidence is presented that he has been medically released for light work *and* (1) Employer has made a reasonable and legitimate offer of suitable employment to him *or* that (2) there is employment available in

the general labor market which Claimant has a reasonable opportunity of securing, and which is consistent with his physical abilities.

58. Claimant underwent hernia repair surgery on November 6, 2012. Up to that point, he had continued working at his regular job. After surgery, Claimant did not work while recovering. On November 26, 2012, Dr. Quinn released Claimant to resume light duty work. While the doctor's medical records do not show it, apparently, based on Claimant's hearing testimony, the light duty restriction was for a period of seven days.

59. Claimant returned to work for Employer on or about November 26, 2012. His temporary light duty restrictions expired on December 4, 2012. On December 6, 2012, Claimant was laid off.

60. Defendants owe temporary total disability benefits to Claimant for the time he was off work for his hernia surgery and subsequent recovery.

61. Claimant was medically stable, and released to full-duty work prior to the date his employment terminated. As such, he is not entitled to temporary disability benefits for his hernia injuries after he was laid off on December 6, 2012.

62. Claimant also injured his SI joint when lifting the tugger on March 12, 2012. That injury did not require Claimant to miss any work. Accordingly, temporary disability benefits are not available to Claimant for his SI joint injury.

63. Claimant has proven his entitlement to temporary disability benefits for the time he missed work for his hernia surgery and subsequent recovery.

64. Claimant has failed to prove he is entitled to temporary disability benefits for his time of unemployment after he was laid off work.

Permanent Partial Impairment

65. Permanent impairment is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and a claimant's position is considered medically stable. *Henderson v. McCain Foods*, 142 Idaho 559, 567, 130 P.3d 1097, 1105 (2006). Idaho Code § 72-424 provides that the evaluation of permanent impairment is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and other activities. The Commission can accept or reject the opinion of a physician regarding impairment. *Clark v. City of Lewiston*, 133 Idaho 723, 992 P.2d 172 (1999). "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, 40 P.3d 91 (2002). The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989).

66. Dr. McNulty is the only physician to rate Claimant's permanent impairment. In doing so, he followed the guidelines found in the *AMA Guides to Evaluation of Permanent Impairment*, 6th edition. He attributed a 2% whole person impairment to Claimant's SI joint injury, and no impairment for Claimant's hernias.

67. Dr. McNulty's analysis and methodology took into account all relevant facts, and was reasonable. It is adopted herein. Claimant has proven he is entitled to 2% whole person PPI benefits for his chronic left SI joint sprain/strain injury.

CONCLUSIONS OF LAW

1. Claimant has proven his pre-existing bi-lateral hernias were exacerbated, and rendered symptomatic, by the industrial accident of March 12, 2012, resulting in the need for surgical repair.

2. Claimant has proven he suffered a chronic left-sided SI joint sprain/strain injury by the industrial accident of March 12, 2012.

3. Claimant has failed to prove his pre-existing lumbosacral degenerative disc disease was exacerbated by the industrial accident of March 12, 2012.

4. Claimant has failed to prove his left-sided pre-existing degenerative arthritic hip condition was exacerbated by the industrial accident of March 12, 2012.

5. Claimant has proven a right to reimbursement at the full invoiced rate for reasonable and necessary medical charges associated with Claimant's bi-lateral hernia treatment and surgical repair.

6. Claimant has proven a right to temporary total disability benefits for the time he was unable to work due to his hernia surgery and subsequent recovery.

7. Claimant has failed to prove he is entitled to temporary disability benefits after he was laid off on December 6, 2012.

8. Claimant has proven he is entitled to 2% whole person permanent partial impairment benefits for his left-sided SI joint sprain/strain injury.

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 25th day of March, 2016.

INDUSTRIAL COMMISSION

/s/
Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of April, 2016, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

STARR KELSO
PO BOX 1312
COEUR D ALENE ID 83816

JAMES MAGNUSON
PO BOX 2288
COEUR D ALENE ID 83816

/s/

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RAYMOND KIBLER,

Claimant,

v.

THE FAUSETT GROUP, INC.,

Employer,

and

IDAHO STATE INSURANCE FUND,

Surety,

Defendants.

IC 2012-016396

ORDER

Filed April 14, 2016

Pursuant to Idaho Code § 72-717, Referee Brian Harper submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. 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 proven his pre-existing bi-lateral hernias were exacerbated, and rendered symptomatic, by the industrial accident of March 12, 2012, resulting in the need for surgical repair.

2. Claimant has proven he suffered a chronic left-sided SI joint sprain/strain injury by the industrial accident of March 12, 2012.

3. Claimant has failed to prove his pre-existing lumbosacral degenerative disc disease was exacerbated by the industrial accident of March 12, 2012.

4. Claimant has failed to prove his left-sided pre-existing degenerative arthritic hip condition was exacerbated by the industrial accident of March 12, 2012.

5. Claimant has proven a right to reimbursement at the full invoiced rate for reasonable and necessary medical charges associated with Claimant's bi-lateral hernia treatment and surgical repair.

6. Claimant has proven a right to temporary total disability benefits for the time he was unable to work due to his hernia surgery and subsequent recovery.

7. Claimant has failed to prove he is entitled to temporary disability benefits after he was laid off on December 6, 2012.

8. Claimant has proven he is entitled to 2% whole person permanent partial impairment benefits for his left-sided SI joint sprain/strain injury.

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

DATED this 14th day of April, 2016.

INDUSTRIAL COMMISSION

/s/
R.D. Maynard, Chairman

/s/
Thomas E. Limbaugh, Commissioner

/s/
Thomas P. Baskin, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of April, 2016, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

STARR KELSO
PO BOX 1312
COEUR D ALENE ID 83816

JAMES MAGNUSON
PO BOX 2288
COEUR D ALENE ID 83816

jsk

/s/