BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY D. PICKENS, Claimant, v. PETERSEN STAMPEDE DODGE, Employer, and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Surety, Defendants.	**IC 2013-032785** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed August 12, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to John C. Hummel, who conducted hearings in Boise on January 29 and February 16, 2016. Bryan S. Storer represented Claimant, Gary D. Pickens, who was present. Susan R. Veltman represented Defendants, Petersen Stampede Dodge ("Petersen"), Employer, and Insurance Company of the State of Pennsylvania, Surety. The parties presented oral and documentary evidence at hearing and took post-hearing depositions. The matter came under advisement on July 26, 2016.

ISSUES

The issues noticed for hearing were as follows:

1. Whether the industrial accident caused the condition for which Claimant seeks benefits; and

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

a. Medical care, including, but not limited to, proposed surgery;

b. Temporary partial and/or temporary total disability benefits (TPD/TTD); and

c. Attorney fees.

All other issues were reserved.

CONTENTIONS OF THE PARTIES

Claimant suffered an industrial accident in Petersen's employment on December 4, 2013. Upon exiting a vehicle in Petersen's parking lot, Claimant fell, grabbed the car door to keep from falling, and injured his lower back.

Claimant asserts that lumbar surgery proposed by Dr. Manning is reasonable, necessary and causally related to the subject accident. He further asserts that he is entitled to temporary disability benefits until he reaches maximum medical improvement following surgery. Finally, he argues that he is entitled to attorney fees for unreasonable denial of benefits.

Defendants assert that Claimant's industrial injury was limited to a lumbar strain and sprain that resulted in only a temporary aggravation of his preexisting condition. They assert that Claimant has already received appropriate, conservative treatment for his injury and that the proposed lumbar surgery is not causally related to the subject injury but rather is the result of a preexisting condition. Defendants argue that Claimant reached maximum medical improvement on March 18, 2014 and that no temporary disability benefits are owed. If, however, the Commission rules that the proposed lumbar surgery is compensable, they argue that temporary disability benefits will not be owed until Claimant is taken off work for the surgery. Defendants further argue that certain medical expenses incurred by Claimant are not compensable because Claimant obtained such care outside of the chain of referral. Finally, Defendants argue that they did not act unreasonably in denying Claimant benefits, thus no attorney fees should be paid.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. Claimant's Exhibits ("CE") 1 through 10, admitted at hearing;

3. Defendants' Exhibits ("DE") 1 through 15, admitted at hearing;

4. The testimony of Claimant, Tanner Pickens, Trevor Knesal, and Charles Mattson, taken at the February 16, 2016 hearing; and

5. The post-hearing deposition testimony of Daniel Marsh, M.D., taken on February24, 2016, and David Price, D.C., taken on March 1, 2016.

OBJECTIONS

All pending objections raised in the post-hearing depositions are overruled.

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's Background**. Claimant was born and raised in Boise. He graduated from high school in 1977. He graduated from Boise State University with a bachelor of arts in marketing and advertising in 1994. Apart from living in McCall, Idaho for two years, Claimant spent his entire life and career in Boise. He was 56 years old at the time of hearing. Tr., 14:13-15:4[1]; DE 3:4 (5:14-6:24) (Claimant Dep.).

2. **Prior Injuries and Medical History**. After graduating from high school in 1977, Claimant and several friends were involved in a serious vehicular accident near Notus, Idaho. The driver of the van was killed. Claimant sustained the following injuries: three broken toes on

[1] All citations to the transcript of hearing are to the February 16, 2016 hearing. No testimony was received at the January 29, 2016 hearing.

his right foot that required surgery; a shifted metatarsal on his right foot, also requiring surgery; a fracture of his left hip requiring total hip arthroplasty; a dislocated right arm; internal injuries; and a concussion/traumatic brain injury. Claimant's injuries were serious enough that he recalled that medical providers "gave me a three percent chance through the first night to make it." Claimant spent a month recovering from the accident in Saint Alphonsus Regional Medical Center and then several months rehabilitating in the Idaho Elks Rehabilitation Hospital in Boise. After his discharge from the Elks, He did not have any limitations regarding his back following this accident and his recovery from it. Nevertheless, he was left with limited rotation in his left hip and a slight limp in his left leg. Tr., 24:6-26:21; DE 3:7-9 (19:7-25:12); DE 5:2.

3. On March 10, 1987, while working for KBCI TV Channel 2, Claimant sustained an eye injury due to flying debris, from which he recovered. He apparently received no medical treatment related to this injury, nor did he receive any time loss benefits. Tr., 27:8-17; DE 1:3.

4. On July 29, 1989, while in the employ of Bear Valley River Company, Claimant broke his ankle during a river rafting trip. Claimant missed 63 days of work due to the accident. He recovered fully from this accident with no record of any impairment. Tr., 27:18-28:10; DE 1:4; 1:28.

5. On October 31, 1991, Claimant injured his low back while working for United Artists Cable. The injury occurred when Claimant and another worker were lifting a very heavy spool of audio video cable out of a van. Claimant experienced a sudden onset of low back pain radiating into his left buttock and left lower extremity. Joel Hesby, M.D., evaluated Claimant's condition on November 1, 1991. He ordered X-rays of Claimant's lumbrosacral spine, assessed a lumbar strain and ordered light duty. As later interpreted by Eric Stowell, M.D., the X-rays showed probable spondylosis with minimal grade I spondylolisthesis at L5-S1. There was also

minimal retrolisthesis at L4-5. Claimant received chiropractic adjustment treatments for his back injury from David N. Price, D.C., of Price Chiropractic Center, from November 19, 1991 until August 1992. Claimant reported to Dr. Price that the pain began as an onset of burning pain in his lower back and spread into his left leg down the posterior lateral aspect. Upon referral from Dr. Price, Dr. Stowell treated Claimant from February 10, 1992 until September 1, 1992. By March 30, 1992, Claimant reported to Dr. Stowell that he continued to have low back pain, however he denied tingling, numbness, weakness or radiation of symptoms in his lower extremities. A straight leg test on May 1, 1992 was negative for radicular signs. Dr. Stowell referred Claimant for a course of physical therapy and also prescribed progressive work restrictions from light to medium duty. Tr., 28:15-29:2; DE 1:27; 4:1-6; 5:1-12.

6. Upon releasing Claimant from his care on September 1, 1992, Dr. Stowell's final impressions were as follows: lumbrosacral muscular strain, symptoms significantly improved during treatment; L5-S1 grade I spondylolisthesis; and small midline L5-S1 disk herniation with no definitive evidence of lumbrosacral radiculopathy. Claimant reported to Dr. Stowell that he was tolerating his current employment with the Idaho Department of Fish and Game, for which he carried approximately 110 pounds of gear upon occasion. While finding that Claimant was medically stable, nevertheless Dr. Stowell opined that Claimant would "likely have difficulty with intermittent back pain related to activity." Dr. Stowell assessed a 9% whole person impairment for Claimant's back condition, to which 3% was attributable to preexisting spondylolisthesis, resulting in a 6% whole person impairment related to the injury of October 31, 1991. DE 5:9-12.

7. On February 8, 1994, Claimant sustained an aggravation of his 1991 industrial back injury. He was exiting his vehicle when his foot slipped on ice, and he momentarily jerked

to regain his balance. He felt immediate pain in his low back at the lumbrosacral junction. He sought chiropractic treatment from Dr. Price, whom he had not seen for a year and a half. Upon examination, Claimant demonstrated "marked lumbrosacral pain but no radiation." After a course of chiropractic treatment, Claimant did not see Dr. Price again for approximately eleven years. Tr., 32:9-34:10; DE 4:6.

8. On November 2, 2005, Claimant was in an auto accident. He was sitting in his truck on the side of the interstate in a line of vehicles on a ramp exit when another vehicle collided with a car behind him, shoving the car into his truck. Claimant recalls that his injuries were "kind of like whiplash, you know, neck, back." He returned to Dr. Price for chiropractic treatment on November 9, 2005. Dr. Price noted that Claimant had an immediate onset of pain after the accident, localized in his low back. After a few days he developed pain in his left shoulder, mid-back area, and also a feeling of numbness/tingling in his right foot, at first involving the entire foot, but later clustered in the heel. Dr. Price diagnosed sprains/strains to Claimant's cervical thoracic, lumbrosacral/sacroiliac, and left shoulder areas, together with posttraumatic cervicogenic cephalalgia and lower right extremity paresthesia, all attributable to the automobile accident. Dr. Price treated Claimant with a series of chiropractic adjustments, galvanic stimulation and microcurrent therapy. He prescribed an exercise rehabilitation regime, hot and cold pack therapy, and acupuncture treatment. Dr. Price treated Claimant through February 20, 2006. Tr., 34:11-37:4; DE 4:8-4:20.

9. **Claimant's Condition Prior to the Industrial Accident**. Prior to December 4, 2013, Claimant regularly participated in the following activities: golf, tennis, hiking, skiing, ice skating, kayaking, whitewater rafting, hiking, hunting, fishing, mountain biking, swimming, and basketball. Claimant took his "biggest elk" in 1994, and packed the elk carcass out from an

elevation in the mountains of 9,000 feet. Claimant was still active physically, playing sports and hunting, after his industrial back injury in 1991 up to the time of his industrial accident in December 2013. In the summer of 2013, he went hunting and hiking with his sons in Moab, Utah. They hiked in Arches National Park and in the Grand Canyon. They participated in a bow shoot in Stanley, Idaho that summer. Claimant and his sons also hunted in November 2013. Claimant states that he did not have any physical limitations in performing any of these activities. Tr., 38:12-41:21.

10. Claimant denies that he sustained any injuries in the course of participating in any physical or outdoor activities like hunting or hiking in the last 10 to 15 years prior to his industrial accident. *Id*, at 63:21-64:15. Additionally, the record contains no evidence of medical records related to any such injuries.

11. Claimant's son, Tanner Pickens, testified concerning his father's condition prior to the industrial accident. He recalls that between 2000 and 2013, he and Claimant were "workout buddies." They swam laps together at the YMCA. They enjoyed camping and fishing. They went backpacking and hunting in the mountains, walking miles into the mountains from the truck and packing out game. They would go on 10 mile bike rides on the Boise Greenbelt. During that time Tanner Pickens did not observe that his father had any physical limitations in any of the sports or outdoor activities that they engaged in together. He did not hear Claimant complain about his back. *Id*. at 71:24-73:21.

12. Trevor Knesal was Claimant's coworker at Petersen. They worked together for approximately two years. Knesal recalled that prior to the industrial accident, Claimant "probably had the most active position in the dealership as far as being physically demanding. He photographed every vehicle on the premises and did videos and was constantly on the go."

Knesal stated that Claimant did not have "any kind of limitation" in performing his duties. He also did not hear Claimant complain of leg or back pain prior to the accident. Tr., 76:19-77:22.

13. Charles Mattson was the business development manager at Petersen and was familiar with Claimant. He observed that prior to his work injury, Claimant walked with a limp throughout his four years of employment with Petersen. Mattson recalls that Claimant offered an explanation for his limp as being due to a "bad back." *Id*. at 86:21-87:4.

14. **Subject Employment.** Petersen hired Claimant as an internet marketing manager in November 2009. *Id*. at 67:13-22; DE 2:9. In this position he was responsible for maintaining two company websites, shooting video and photographs of the vehicles for sale on Petersen's lots, placing video and photographs on the website, writing content for the websites, and creating banner ads for the websites. DE 3:10 (31:9-19). Claimant remained in this position for four years, until approximately November 2013. At that time, Petersen determined that position was no longer required and would be replaced with a lesser-compensated position of internet marketing assistant. Instead of accepting a demotion and pay cut, Claimant chose to transfer to become an auto sales associate with an opportunity to earn a higher salary through sales commissions. Claimant was involved in sales training for his new position at the time of his industrial accident. DE 3:11 (32:23-34:16).

15. **Industrial Accident.** On December 4, 2013, Claimant was involved in sales training in the morning. He and three other sales associates-in-training were trying out vehicles as part of their training. They returned to Petersen's lot in mid-morning. After they parked, Claimant proceeded to exit the vehicle. He was seated behind the driver in the backseat. As he was exiting the vehicle, his feet became caught underneath the driver's seat. Claimant began to fall and as he was falling he grabbed the car door, which "jerked and wrenched" his lower back

when he caught himself on the door while his feet were still inside the vehicle. Claimant's back was a "little sore" at the time and it bothered him the rest of the workday. He mentioned to his sales manager that day that he had hurt his back. When he got home from work, upon stepping out of his truck, Claimant experienced "the most excruciating pain" down his left leg. He could not put weight on his left leg and he could not walk. His son had to come out of the house and physically assist him into the house. That night Claimant sat up in a chair because he could not lie down to sleep. On the next morning, he called Dr. Price's office to schedule an appointment. Tr., 42:13-46:20.

16. **Medical Care.** Dr. Price examined Claimant on December 5, 2013. Claimant described his work injury. Dr. Price noted that the last time he treated Claimant was on February 20, 2006 and "since that time he has not had ongoing back problems. He has previously been an active individual with hiking, climbing, mountain biking, and so forth, but now is virtually immobilized." Claimant was "in painful distress and has great difficulty ambulating, or even standing or carrying weight on his low back. He leans heavily to the right and side because of this." After examining Claimant and taking X-rays, Dr. Price diagnosed his condition as follows: lumbrosacral facet impingement with lumbrosacral and sacroiliac sprain/strain injury and muscular spasming; possible disk herniation at L5-S1 and/or L4-5 causing nerve root irritation and creating radiculitis in his left lower extremity; radiculitis/radiculopathy in his left lower extremity; possible hip trauma (sprain strain with TFL and IT band tightness); piriformis induced sciatic neuralgia; and compensatory thoracolumbar mechanical strain/sprain. Dr. Price received approval from Petersen to treat Claimant and planned to treat him with chiropractic manipulation procedures, exercise rehabilitation protocols, and ice pack therapy. He stated that it would be "difficult to give an accurate prognosis on this patient, as his pain and incapacitation

are substantial at this time." Dr. Price also referred Claimant for evaluation by Jacob W. Kammer, M.D., of the St. Alphonsus Occupational Medicine Clinic. CE 2:27-28.

17. Claimant made Dr. Price aware of his participation in outdoor activities such as hunting, hiking, and biking when he examined Claimant on December 5, 2013. Price Dep., 13:10-12. Nevertheless, Claimant did not tell Dr. Price that any of those activities had injured or otherwise affected his back. *Id*. at 13:13-15. Dr. Price opined that Claimant's condition on December 5, 2013 was not related to the back condition for which he had previously treated Claimant in 2005, and that during the intervening eight years, Claimant was doing well. *Id*. at 13:19-14:15. Dr. Price opined that Claimant's condition was a traumatic injury superimposed on preexisting spondylolisthesis. *Id*. at 17:4-7.

18. Dr. Kammer also examined Claimant on December 5, 2013. Claimant reported his injury and also told Dr. Kammer that he "had no recent problems with the back or hip." Dr. Kammer diagnosed the following: pain, hip left; and sprain, lumbar spine. Dr. Kammer reviewed the X-rays taken by Dr. Price which showed "significant arthritis and [sic] the low back." He observed that "[m]ost of the pain appears to be coming from the hip and radiating down the left leg and left buttocks." He referred Claimant back to Dr. Price for two weeks of chiropractic treatment and prescribed Diclofenac and Cyclobenzaprine for pain relief and muscle relaxation. Dr. Kammer discussed the possibility of referring Claimant to an orthopedist if he did not respond to chiropractic care after two weeks. Dr. Kammer recommended restricted work duty, with sitting duties only and work limited to four hours per day. CE 1:7-8.

19. At a follow-up appointment on December 12, 2013, Dr. Kammer noted that Claimant was "now able to walk without problem. He still has a little bit point tenderness in the low back left side and in the left hip, but nowhere near what it was at our last visit." He

continued to restrict Claimant to lifting 25 pounds or less, and recommended that he continue with chiropractic treatment. CE 1:10-11.

20. On December 19, 2013, Claimant reported that his "hip is doing well. He still experiences sharp pains, similar to shin splints in the lower left extremity and buttocks region. The pain in the calf and thigh area usually begins when he starts walking … The pain may also be related to having to walk very carefully over slippery surfaces in the parking lot at Petersen motors." Claimant planned to get a gym membership to strengthen his lower extremity. Dr. Kammer released Claimant to full time work, continued his 25 pound lifting restriction and advised him to continue with chiropractic care. CE 1:13-14.

21. Claimant returned to Dr. Kammer for follow-up on January 8, 2014. He reported that activity increased pain in his left hip and leg; at the end of the day, Claimant's pain was up to eight out of 10. Claimant felt that his condition was unimproved. He had completed 12 chiropractic sessions with Dr. Price. Dr. Kammer recommended discontinuing chiropractic treatment and referred Claimant for treatment by a physiatrist. CE 1:19-21.

22. Dr. Kammer referred Claimant to Kevin R. Krafft, M.D., a physiatrist, who first examined Claimant on January 21, 2014. Dr. Krafft took Claimant's medical history and noted his 1977 auto accident, which resulted in a reconstructed left hip. He observed that Claimant "has had intermittent symptoms since that time with decreased range of motion and an altered gait. More recently, he injured himself getting out of a car, noting that he caught his left foot but was able to stop himself from falling. He had increasing pain and has been seen by chiropractic with some benefit but has now plateaued." Claimant rated his pain as eight out of 10 and told Dr. Krafft that he could no longer hike, bike, hunt, sled, ski, or golf as a result of the injury. X-rays revealed significant lumbar spondylosis. Upon examination, Claimant showed a markedly

abnormal gait pattern with ongoing left low back, hip and leg symptoms. Dr. Krafft ordered physical therapy "for normalization of his gait as much as possible along with stabilization and work simulation activities." Dr. Krafft did not state a diagnosis. He ordered restrictions of no lifting in excess of 35 pounds, no squatting/kneeling, no walking on rough, uneven ground, and no jumping. DE 7:1-4.

23. Claimant returned to Dr. Krafft for evaluation and treatment on February 12, February 26, March 11, and March 18, 2014. During this time period Dr. Krafft prescribed Naproxen and Gabapentin for Claimant's pain and monitored his progress in physical therapy. On March 18, 2014, Dr. Krafft noted that Claimant had undergone strength and endurance as well as range of motion training in physical therapy. Although Claimant's posture and gait continued to fluctuate, Dr. Krafft determined that he was "independent with a flare-up plan." Dr. Krafft noted that upon Claimant's discharge from physical therapy, he had reached a functional plateau, was 70% to 80% better, and was independent with his exercises and activities of daily living. Dr. Krafft recommended a three month gym membership. On March 18, 2014, Dr. Krafft determined that Claimant was ready for discharge from his care and had reached maximum medical improvement for his "low back and left hip injury," for which he did not provide any further specific diagnosis. Dr. Krafft performed a permanent impairment evaluation in accordance with the *Guides to the Evaluation of Permanent Impairment*, Sixth Edition. He concluded that Claimant fit into a Class 0 for his lumbar and hip strains, resulting in a 0% whole person impairment "in the setting of pre-existing history of significant arthritis; no acute or new findings." He concluded that no further diagnostic testing was currently indicated, however if Claimant's radicular symptoms returned, he would conduct EMG studies. Dr. Krafft released Claimant to work with no restrictions. DE 7:5-14.

24. Claimant received physical therapy from Saint Alphonsus Rehabilitation Services from February 4 through March 14, 2014 for a total of 15 visits. Physical Therapist Peggy S. Wilson recorded the following observations upon his discharge: posture within normal limits; patient was able to abolish lower left extremity symptoms 80% of the time; normalized sciatic and femoral neurotension achieved; increased spinal range of motion to within functional limits achieved; improved functional capacity 90%; and patient returned to work full duty. Claimant indicated that he was functional in all activities of daily living, working full-time and full duty. Ms. Wilson discharged Claimant from physical therapy and instructed him to continue with a home exercise program. DE 8:33-34.

25. Claimant returned to Dr. Krafft on August 19, 2014 to report ongoing low back and left leg pain. He described it as "a dull constant pain radiating down the left leg ranging from a five to 10. It worsened with standing, stepping wrong, sitting, and clutching. It is improved with Ibuprofen." Dr. Krafft performed electrodiagnostic testing on Claimant. The result of the testing was as follows: "Largely normal study. There is a mildly superficial neuropathy without evidence of entrapment or radiculopathy." Dr. Krafft observed that Claimant may benefit from restarting Gabapentin. DE 7:15.

26. Claimant continued to treat with Dr. Krafft and returned to him on September 9, September 30, October 28, and November 25, 2014. On September 9, 2014, Dr. Krafft noted that Claimant had atrophy of his left thigh muscle. Claimant repeated his complaints of low back and left leg pain, ranked at five to nine out of 10, which improved with Gabapentin. Claimant complained of cognitive impairment, however, while taking Gabapentin. Dr. Krafft provided Claimant with a trial TENS unit for his low back pain. At the last office visit on November 25, 2014, Dr. Krafft noted that Claimant's low back pain was "constant." Claimant described it as "a

dull pain with standing and reports the pain shoots down his left leg with walking." Claimant continued to take Gabapentin, however Surety denied a permanent TENS unit. Claimant continued to go to the gym. Dr. Krafft discussed with Claimant the importance of keeping his spine in neutral position, avoidance of twisting, and posture stabilization with his gait. Throughout this period, Dr. Krafft referred simply to Claimant's "low back and left leg pain," while continuing to not provide a specific diagnosis for his symptoms. Dr. Krafft also did not order an MRI. DE 7:16-23.

27. Claimant first sought treatment with an acupuncturist of Wang Medical on August 28, 2014. Claimant reported pain located above left hip and in the back and into the buttock down the side of the leg into the calf just above the ankle. Claimant received three acupuncture treatments. He felt continued pain after the last treatment, although less intense than before. DE 9:1-2.

28. Daniel R. Marsh, M.D.,[2] of Exodus Pain Clinic, examined Claimant on February 17, 2015. Dr. Marsh noted that Claimant currently had "pain at L4-5. It is sharp pain. It goes into the left lateral hip, left buttock, lateral buttock, and into the left lateral calf. He has some numbness in the lateral thigh. He notes weakness in the leg generally. When he steps on occasion he will get sharp pain and his leg will collapse. The pain severity is 5-6/10, it hurts like heck, moderately severe." Dr. Marsh assessed a work-related injury with no history of limitations previously. Claimant's pain was radicular in nature and had responded to Gabapentin. He further assessed a severe trauma to Claimant's left hip from the 1977 auto accident with reconstructive surgery, but Claimant returned to a high level of functioning with no limitations. The hip was

[2] Dr. Marsh graduate from Oakland University William Beaumont School of Medicine residency program in physical medicine and rehabilitation in 2001. He served a fellowship with Buffalo Spine and Sports Medicine in 2001. He is board certified in physical medicine and rehabilitation as well as pain medicine. His medical practice focuses on spinal cord injuries, traumatic injuries, musculoskeletal, rehabilitation, and pain management. He has practiced physical medicine and rehabilitation in Boise and Caldwell since 2005. Marsh Dep., 4:20-6:19.

unrelated to the industrial injury. He further assessed intermittent lumbar pain without radiculopathy which reoccurred every few years and was asymptomatic at the time of the industrial injury. Dr. Marsh's plan of care included a prescription for Prednisone, an MRI of the lumbar spine, and continued Ibuprofen alternated with Aleve. CE 6:145-146.

29. Dr. Marsh ordered an MRI of Claimant's lumbar spine without contrast, which study took place on February 23, 2015. The findings, as read by Michael J. Modica, M.D., were as follows: right L5 pars interarticularis defect; 3 mm anterolisthesis of L5 over S1; moderate intervertebral disc height loss at this level with associated degenerative endplate marrow signal. The conclusion of the study was bilateral L5 pars interarticularis defects with resultant 3-4 mm of anterolisthesis of L5 over S1; severe bilateral neural foraminal stenosis L5/S1. DE 11-1.

30. Claimant returned to Dr. Marsh on March 24, 2015. After reviewing the February 23, 2015 MRI, Dr. Marsh made the following assessment:

1. Work related injury with no history of limitations previously. His pain is radicular in nature and has responded to gabapentin and he has numbness and mod to severe pain with sig limitations in function. Pain is radicular. MRI shows bilateral spondylosis and spondylolisthesis which is chronic with severe bilateral neuroforaminal stenosis.
   His leg pain is clearly work related, since he was asymptomatic prior to injury and was highly functional. He clearly had a chronic condition that predisposed him to this injury, but it was the work injury that caused the exacerbation of a chronic yet asymptomatic condition.
2. H/O severe trauma to the left hip with reconstructive surgery, but returned to a high level of function with no recreational or occupational limitation and no history of pain in that hip. His hip is unrelated to this injury. The leg length is ½ cm difference with the right leg long.
3. H/O intermittent lumbar pain without radiculopathy which occurred every few years and was asymptomatic at the time of the injury.

Dr. Marsh opined that "the injury is related to his work. His normal EMG in the past [performed by Dr. Krafft] is not unexpected and does not indicate in any way that he does not have a problem." He observed that Claimant had atrophy of the left thigh due to disuse from pain, which

was evidence of neural compromise. Dr. Marsh recommended referral to a neurosurgeon and noted that at the very least Claimant might benefit from transforaminal epidural steroid injections, however with his left leg weakness Claimant probably should be considered for surgical decompression of the L5 nerve roots. CE 6:159-160.[3]

31. Dr. Marsh opined that Claimant's MRI findings, symptoms, and objective findings from his examinations demonstrated the following:

> [I]n his particular case when he wrenched his back he seems to have somehow caused a radicular – radiculitis – radiculopathy involving the left L-5 nerve root and that's consistent with his history and consistent with his exam and it is also consistent with his MRI, which shows the L-5 nerve root on the left being compressed in the lateral recess of L4-5 and in the foramen at L-5 as well.

Marsh Dep., 13:10-17.

32. Dr. Marsh concluded that Claimant's industrially-related radiculopathy should be distinguished from the underlying chronic degenerative disease in his lumbar spine, in pertinent part as follows:

> We distinguished between pathology that you see on an MRI and every doctor who deals anything with spine, whether it's a radiologist, an orthopedist, a spine specialist, and PM&R doctor, a chiropractor, everybody knows that when you look at an MRI scan you see all kinds of degenerative findings. All the time. You see asymptomatic pinched nerves. You see asymptomatic bone spurs. You see people walking around with – a man that only had a prostate problem and they got an MRI and they said, oh, by the way, did you know you have severe spinal stenosis. Although these things exist they are not necessarily symptomatic and that's been used either way. Some people say, ah ha, you know, you – you had that existing and other people will say – I mean *I just take the perspective the guy didn't have any radicular symptoms prior to this*. Yeah, he has got abnormalities on his imaging. Everybody does.

Marsh Dep., 15:7-24 (emphasis added).

[3] Dr. Marsh acknowledged that the reports he generated concerning Claimant in February and March 2015 were made without the benefit of any of Claimant's medical records prior to his December 4, 2013 injury. Marsh Dep., 39:16-19. The first time that Dr. Marsh reviewed prior medical records was the date of his deposition. *Id*. at 39:10-15. Nevertheless, he testified that nothing in Claimant's prior medical records changed his opinion regarding causation or treatment needs. *Id*. at 40:22-41:1.

33. Dr. Marsh disagreed with Dr. Krafft's release of Claimant to return to work with no restrictions and no impairment on March 18, 2014. He explained as follows: "Well, I obviously saw him – I saw him in February 2015. So, I saw him considerably after that and he was having ongoing problems. It doesn't make sense to me that he would be released to return to work with no – no restrictions." Marsh Dep., 19:12-16.

34. Dr. Marsh distinguished the diagnostic value of Claimant's electrodiagnostic study by Dr. Krafft on August 19, 2014, which had a finding of "largely normal study," in the following manner:

> Well, sensory studies with a pinched nerve are very common – are always going to be normal. Sensory studies are useless for radiculopathy. They are always normal. You can have – a completely compressed nerve root can totally have normal sensory studies. So that's not something you study in order to diagnose radiculopathy. Motor studies – in this case he said the amplitudes were normal. So that means that the axon is not being crushed sufficiently to cause atrophy in the muscle and the needle EMG shows no abnormalities in insertional activity … So, that's simply means that the motor nerve is not being crushed. It does not mean that he can't have sensory radiculopathy, but once again, the sensory nerve conduction studies will be normal and that has to do with the location of the cell body, which are outside the spine so, it's a very detailed, confusing aspect, but he could have had abnormal EMG or abnormal motor studies. In this case he didn't. It doesn't rule out a pinched nerve or radiculopathy or radiculitis, but it failed to rule it in.

Id. at 22:7-23:3.

35. Dr. Marsh opined that Claimant's prior medical history did not change his opinion that Claimant's radiculopathy as a result of the December 4, 2013 accident was a new finding and industrially-related. He explained as follows: "I mean if he [Claimant] told you, oh, yeah, I've had that pain in my leg ever since so – that would be one thing. But it's the opposite. He says he hasn't had any of that ever since. So I take him at his word." Marsh Dep., 26:2-5.

36. **Independent Medical Examination.** At Surety's request, Claimant underwent an independent medical examination by Roman Schwartzman, M.D., an orthopedic surgeon, on

June 9, 2015. Dr. Schwartzman took Claimant's history and examined him personally. He received and examined medical records from Dr. Kammer, Dr. Krafft, Dr. Price, and Dr. Marsh, as well as records from Claimant's physical therapy, X-rays and the MRI of February 23, 2015. Dr. Schwartzman noted Claimant's history of episodic low back pain, for which he had received chiropractic treatment. He also noted that Claimant "was no longer complaining of just low back pain, but was complaining of low back pain with left leg radiation, which was a new finding for him since injury of 12/04/13." He further noted that Claimant's current symptoms had not improved despite chiropractic adjustments and conservative management by Dr. Krafft and Dr. Marsh. Dr. Schwartzman's impression was as follows: 1. Left L5 radiculopathy; 2. Chronic nonindustrial L5 pars defect with grade 1 anterolisthesis of L5 on S1. 3. Status post left hip reconstruction with secondary posttraumatic degenerative joint disease in the left hip – nonindustrial. Dr. Schwartzman concluded in pertinent part as follows:

> Based on best available evidence the radicular pain in the left leg is a new finding. The patient had a prior central non-radiating back pain treated by his chiropractor according to records, with good success. However, the radicular pain is a new finding based on all available evidence today would be related to the twisting event of 12-04 when the patient exited the car and caught himself on the doorframe to keep himself from falling. As such treatment for the radicular symptoms would be on an industrial basis whereas treatment for the hip, which is a pre-existing nonindustrial degenerative condition would be on a nonindustrial basis.

DE 12:1-3.

37. Dr. Krafft received and reviewed a copy of Dr. Schwartzman's IME report. On September 16, 2015, he advised Surety that he agreed with the report's conclusions. DE 7:24.

38. **Surgical Consultation.** On October 23, 2015, Thomas C. Manning, M.D., a neurosurgeon, examined Claimant upon referral from Dr. Krafft. He took Claimant's history and noted that Claimant has been "active in multiple sports-type activities" over the years despite his

injuries sustained in the 1977 automobile accident. Dr. Manning further noted that Claimant developed low back pain that "started going down into the left leg" following the December 4, 2013 accident that continued to the present. Upon physical examination, he observed that Claimant "walks with a very antalgic gait, favoring the left leg." He noted atrophy in the left quadriceps. Dr. Manning reviewed the February 2015 MRI. His impression was that Claimant had left-sided L5 distribution nerve pain, since the 2013 injury. Dr. Manning noted Claimant's "left L5 distribution, radiculopathy as related to his injury and with the pars defects being pre-existing conditions so the entire low back problem represents then a permanent aggravation of a pre-existing condition with additional disk material perhaps at the L4-L5 playing a contributing role in why this flared up so badly in 2013 and why it has not gone away since that time." Dr. Manning noted that Claimant "used to hunt elk in the mountains of Idaho around the White Clouds and has taken more than 15 bull elk out of the mountains and he hunted up to 9000 foot elevation in 2013 before his December industrial injury." Dr. Manning ordered another MRI and a CT of the lumbar spine, and then scheduled Claimant for another office visit. He noted that it "is pretty clear at this point that he has failed conservative management and I do think this is going to benefit from surgery." DE 13:1-2.

39. On November 2, 2015, Claimant underwent an MRI of his lumbar spine without contrast. Alfonzo Rivera, M.D., interpreted the MRI as showing at L4-5, a small central disk protrusion. There was mild central canal and mild bilateral stenosis. At L5-S1, there was a grade I spondylolisthesis resulting in severe bilateral foraminal stenosis and compression of the exiting L5 nerves. DE 14:1-2.

40. On November 2, 2015, Claimant underwent a CT scan without contrast. John A. Jackson, M.D. interpreted Claimant's CT scan as showing the following: Grade 1

anterolisthesis L5 over S1. Chronic appearing unilateral right L5 pars interarticularis defect with chronic fracture line extending into the right lamina traversing the midline into the paramedian left lamina. Severe degenerative disc disease at L5-S1. Combination of these factors causes moderate to severe left and severe right L5-S1 neural foraminal stenosis. L4-L5 degenerative disc and facet disease and small central disc protrusion resulting in mild central canal stenosis. Finally, the CT scan showed severe osteoarthritis of the left hip. DE 14:3-4.

41. Claimant also had an X-ray, two views, of his lumbar spine on November 2, 2015, as interpreted by John McCormac, M.D. The impression was grade I spondylolisthesis at L5-S1. There was degenerative disc space narrowing at L5-S1 with anterior osteophyte formation. Facet arthrodesis at L4-5 and L5-S1 was moderate. DE 14:5.

42. After reviewing the new MRI, CT scan, and X-ray films and reports, Dr. Manning met with Claimant on November 6, 2015. He noted that a review of the radiographs showed that Claimant was "bone on bone at L5-S1 with extensive bony Modic endplate changes," among other findings. Dr. Manning observed that Claimant was almost two years out from his back injury and had not been able to rehabilitate to date, remaining highly symptomatic with back pain and left-sided generally L5 distribution radicular leg pain that radiated all the way down to his left foot. He advised Claimant that his condition "almost certainly … is going to require surgery and the operation to deal with this would be an L4-S1 decompression with instrumented fusion." Dr. Manning once again noted Claimant's history as a "very active outdoorsman" and that he was "clearly nowhere near where he was before the injury." At first, Claimant expressed an interest in "more aggressive physical therapy," then after further consideration following the appointment, he called Dr. Manning's office to state his preference for surgery. Dr. Manning

noted that "this is quite reasonable. I think the better use of physical therapy resources might be for after the surgery is done in order to help facilitate his recovery." DE 13:3-4.

43. Dr. Marsh concurred in Dr. Manning's opinion as to the need for Claimant's lumbar surgery, as follows:

> I felt that he should get the fusion that Dr. Manning recommended to decompress the L-5 nerve root and that's really it.
> Q. So, is it your opinion that the best course of treatment now would be the surgery that Dr. Manning recommended?
> A. Absolutely, I mean I hate to recommend that kind of surgery, but that's what he needs.
> …
> Well, I – he saw Dr. Manning and Dr. Manning recommended surgery and I completely agree with what Dr. Manning said. I think he was right on that the L-5 nerve root needs to be decompressed. If he doesn't get it decompressed he's in for trouble. He's going to end up with a weak foot, foot drop. He needs the surgery. It's related to the work injury.

Marsh Dep., 17:13-20; 34:23-4.

44. **Independent Medical Examination Revised**. On December 1, 2015, counsel for Defendants wrote to Dr. Schwartzman to request that he update his IME opinion. Counsel noted that Dr. Schwartzman's report "does not specify which prior records were available for review, but indicates that prior low back issues involved central non-radiating pain." Counsel attached to her correspondence prior medical records of Claimant which she represented were "related to radiculopathy" and asked Dr. Schwartzman to confirm whether the information impacted his opinions. DE 12:4-5.

45. On December 3, 2015, Dr. Schwartzman replied to counsel's correspondence. He stated in pertinent part as follows: "In response to your letter dated December 1, I have reviewed the additional records. I did not find anything in the records to contradict my previous opinion … No change in opinion based on the additional records." DE 12:6.

46. On December 7, 2015, counsel for Defendant again wrote to Dr. Schwartzman. She noted that after she had last written, she had received a copy of Dr. Manning's records and recommendation for L4-S1 decompression and instrumental fusion, together with a lumbar X-ray and MRI, which records she enclosed for Dr. Schwartzman's review. Counsel requested that Dr. Schwartzman review the updated records and asked whether he concurred with Dr. Manning's surgical recommendation, whether Claimant's current lumbar symptoms were causally related to his industrial injury, and whether the proposed surgery were causally related to the industrial accident. DE 12:7

47. On January 26, 2016, Dr. Schwartzman replied to counsel's correspondence of December 7, 2015. He stated that he had reviewed Dr. Manning's records and recommendations for surgery. Dr. Schwartzman stated that the recommendation for surgery "would be based upon multiple subjective and objective factors" and was "not related to any industrial conditions." Dr. Schwartzman opined that Claimant had "pre-existing conditions, which have a natural degenerative progression and as such, the cause of his underlying symptoms." He did not disagree with Dr. Manning on the need for lumbar surgery for Claimant, however he emphasized that causation "as it relates to the industrial events of 12/04/13 is not clearly established to a reasonable degree of certainty." With regard to preexisting conditions that are the more likely cause of Claimant's condition, Dr. Schwartzman notes that "Dr. Manning specifically makes mention … of the strenuous activity that the patient engaged in previously specifically hiking through the mountains, hunting bow elk, and extracting said bow elk out of those mountains after he hunted them. This is the type of activity that would certainly predispose someone with an underlying pars defect to develop significant degenerative changes to the point where they required surgery." Dr. Schwartzman thus opined that Claimant's physical activities pre-dating

his industrial accident "would appear to be based upon best available information more likely cause of his need for surgery and his current symptoms." DE 12:8-9.

48. Dr. Marsh testified that he disagreed with the revised opinion of Dr. Schwartzman, as follows:

> Then he [Dr. Schwartzman] flip flops and says the need for surgery is not related to any industrial condition. Totally don't agree with that. I don't know where he came up with that or why he changed. *You know, normally when somebody has a traumatic injury and goes on to do hiking and bow hunting we say, hey, good job. In this case we are holding it against him and it just doesn't make any sense that somebody who came back from a bad injury is now being – and was strong and physical and in condition and shape, that we are now going to now say that's actually what hurt you and now we are not responsible for your injury*. I just – that's nonsensical to me. That doesn't make any sense, why he would come back and say that. I totally agree with Dr. Manning. Dr. Manning is right in this case and there is no question that the spondylolisthesis at L4-S1 was present when he got injured. Sure it was there, but you know, it doesn't mean anything and like I said earlier, these degenerative findings are seen all the time … Dr. Manning's treatment and recommendations are completely reasonable. His causality is completely reasonable and you can't just treat one level when you have to treat two, otherwise you're going to have a significant problem. So I don't understand why Dr. Schwartzman changed. I don't agree with what he says. I completely agree with Dr. Manning.

Marsh Dep., 35:6-24; 36:16-23 (emphasis added).

49. On February 12, 2016, Dr. Marsh examined Claimant again for the first time in 11 months. Dr. Marsh noted in pertinent part as follows: "He clearly has a chronic condition that predisposed him to this injury, but it was the work injury that caused the exacerbation of a chronic yet asymptomatic condition … I think he should get a 2 level spinal fusion … I have not changed my opinion, but I am disappointed that he has not had the necessary care since I saw him last." CE 10:181-182.

50. **Post-Injury Employment**. Claimant remained employed with Petersen after his industrial accident until February 2014. Claimant states that he quit employment with Petersen for safety reasons, because it had snowed heavily that winter, nevertheless Petersen did not plow

the car lot. Claimant stated that he feared reinjuring himself on the snow and ice in Petersen's lot. He further explained that he could not earn a living because his job as a salesman required him to quickly get outside to the car lot to meet customers, but due to his condition, the limitations with his back and left leg, he was hampered from doing that, especially under the wintry conditions. An exit interview document of Petersen shows that Claimant's last day of work was February 7, 2014. The reason for termination was a voluntary quit. The stated reason for a voluntary exit from employment was as follows: "Health reasons from back injury 12/4/13 at work. Snowed 2/7/14 lot not plowed afraid of falling." Tr., 67:23-68:25; DE 3:12 (36:10-37:14); DE 2:14.

51. Immediately upon leaving Petersen's employment, Claimant went to work for Cutting Edge Log Homes in a position in sales marketing. There was no gap in employment because Claimant's new employer had been soliciting for him to come to work since October 2013. The employment with Cutting Edge Log Homes lasted approximately ten months. Claimant recalled that being "on gabapentin … it made me loopy, lethargic. I didn't perform to their standards, and so we just parted ways." Claimant explained also that he did not close a sufficient number of sales contracts to meet the employer's expectations. Tr., 65:23-66:6; DE 3:12 (38:4-39:18).

52. Claimant has not worked since his employment with Cutting Edge Log Homes ended in or about December 2014. Tr., 65:18-24. There is no evidence in the record whether he has sought any employment since December 2014.

53. **Claimant's Condition at Hearing**. At hearing Claimant was still experiencing pain in his lower back near the belt line that went down his buttock to the left side of his thigh, down his calf to his left ankle. He took Ibuprofen for pain. He described his pain level as a four

or five out of 10, which increases with activity. At times Claimant had difficulty walking because of the weakness and pain in his left leg. He exercised caution when standing and first walking for fear of falling. He stated that he did not have any of these symptoms prior to the injury of December 4, 2013. Tr., 64:16-65:17.

54. Dr. Marsh testified concerning Claimant's ability to work, as follows:

> Q. Do you feel like Gary Pickens could work currently with his condition as it is?
> A. If he were a food taster he could lie – he could recline on one side and eat grapes or something. But I mean, yeah, he could work. He could sit in a room and with a headset on and change his position all day long, gimp around. Yeah he could do something like that. But he's not going to go back to anything like lifting spools of wire and doing videography or – you know. Or anything physical.
> Q. Now, based upon the condition that you saw him in in the beginning of the month –
> A. Just recently.
> Q. Yes. A couple of weeks ago. Would you – would you feel comfortable sending him off to work at an eight hour job sitting all day with his back being as antalgic as he is?
> A. Well, I'm not sure how to answer that. He needs to get treatment before something gets worse and he has a foot drop and, then, we are going to be buying him ankle foot arthrosis and braces because he's going to lose neuromuscular function. So, it seems to me like the guy needs treatment and until he gets treatment he could presumably go and sit and work. I would imagine he's going to be very distracted by the constant pain. I wouldn't recommend that.

Marsh Dep., 36:24-37:24.

55. **Claimant's Credibility**. Having observed Claimant's testimony and demeanor at hearing, and having compared the same to the other evidence in the record, the Referee finds that Claimant was a credible witness.

DISCUSSION AND FURTHER FINDINGS

56. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical

construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

57. **Causation**. Claimant bears the burden of proving that the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). There must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. Claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his contention. *Dean v. Dravo Corporation*, 95 Idaho 958, 560-61, 511 P.2d 1334, 1336-37 (1973).

58. No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). 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).

59. Although Dr. Krafft determined that Claimant was at MMI on March 18, 2014, and that Claimant had no permanent impairment as result of his industrial accident, nevertheless Claimant continued to be highly symptomatic and returned to Dr. Krafft for five additional office visits between August 19 and November 25, 2014. While he never formally reversed his MMI finding during this time, Dr. Krafft noted that Claimant complained of "constant" pain in his

lower back and left leg, he re-prescribed Gabapentin for him, and he also started Claimant on a trial TENS unit. Although Dr. Krafft thought it would be "beneficial," Surety denied a permanent TENS unit. Dr. Krafft also noted the atrophy of Claimant's left thigh. DE 7:15-23. During this same time period Claimant also sought treatment by an acupuncturist to relieve his back and leg pain. DE 9:1-2.

60. It is reasonable to find that Dr. Krafft continued to treat Claimant because he determined that further medical care was necessary and that despite his earlier MMI conclusion, Claimant's lumbar back and radicular condition was not resolved. Furthermore, although Claimant had a "largely normal" electrodiagnostic study by Dr. Krafft on August 19, 2014, DE 7:15, the Referee agrees with Dr. Marsh's opinion that the electrodiagnostic testing was insufficient to rule in or rule out Claimant's radiculopathy. Marsh Dep., 22:7-23:3.

61. Furthermore, in 2014 Dr. Krafft did not have the benefit of later MRI and other radiographic studies ordered by Dr. Marsh and Dr. Manning in 2015 that demonstrated a further objective basis for Claimant's complaints. Indeed, given the continued severity of Claimant's pain symptoms and the objective evidence of the atrophy of his left hip that Dr. Krafft observed in September 2014, it is perplexing that Dr. Krafft did not order an MRI.

62. Although the record does not contain any response from Dr. Krafft to Dr. Manning's recommendation for lumbar surgery, nevertheless it is significant that Dr. Krafft referred Claimant to Dr. Manning for the surgical consultation. DE 13:1. Furthermore, on September 16, 2015, Dr. Krafft stated his agreement with Dr. Schwartzman's initial IME opinion that Claimant's left L5 radiculopathy was related to the industrial accident and that treatment related to that condition would be on an industrial basis. DE 7:24.

63. For all these reasons, despite Dr. Krafft's conclusions of March 18, 2014, Claimant's lumbar condition and lower left radiculopathy were not healed, but rather required further treatment. Regardless, the issue of a probable causal connection between Claimant's lumbar back condition and radiculopathy and the industrial accident must still be resolved. Two medical opinions favoring an industrial cause, those of Dr. Manning and Dr. Marsh, are compared to the opinion of Dr. Schwartzman, who reversed his opinion to conclude that causation as it relates to the industrial accident was not clearly established to a reasonable degree of certainty.

64. Dr. Manning and Dr. Marsh each recorded that prior to the industrial accident of December 4, 2013, Claimant was an avid outdoorsman who was very active physically with no radicular symptoms. Claimant had been "active in multiple sports activities," and "used to hunt elk in the mountains of Idaho around the White Clouds and has taken more than 15 bull elk out of the mountains of Idaho and he hunted up to 9000 foot elevation in 2013 before his December industrial injury," per Dr. Manning. DE 13:1-2. Dr. Marsh noted that "the guy just didn't have radicular symptoms prior to this," Marsh Dep., 15:22-23, and prior to the industrial accident had a "high level of function with no recreational or occupational limitations." CE 6:159.

65. Undeniably, Claimant's back injuries, back-related complaints and medical examinations prior to his industrial accident included some minor involvement of Claimant's lower extremities. His October 31, 1991 back injury at United Artist Cable, as reported to Dr. Price, resulted in lower back pain that spread into his left leg. DE 4:1. Claimant also reported low back pain from the accident that radiated into his left buttocks and left lower extremity to Dr. Stowell. DE 5:1. Nevertheless, upon Claimant being released from his care on September 1, 1992, Dr. Stowell concluded that there was "no definitive evidence of lumbrosacral

radiculopathy." DE 5:11. Claimant's November 2, 2005 automobile accident also resulted in both back pain and lower right extremity paresthesia. DE 4:8. Neither of those medical reports of lower extremity symptoms, however, developed into ongoing or significant radiculopathy complaints. These complaints resolved relatively quickly and were significantly remote in time from Claimant's December 4, 2013 industrial accident.

66. Both Dr. Marsh and Dr. Manning acknowledged that Claimant had a history of preexisting, episodic back pain, and that his radiographic imaging showed extensive chronic degenerative back disease. Dr. Marsh found that Claimant's "MRI shows bilateral Spondylosis and spondylisthesis which is chronic with severe bilateral neuroforaminal stenosis." CE 6:159. Dr. Manning also noted Claimant's "severe foraminal stenosis associated with isthmic spondylolisthesis." DE 13-3.

67. Despite Claimant's preexisting back condition and pathology demonstrating a chronic degenerative lumbar condition, Dr. Marsh and Dr. Manning both opined that Claimant's L5 radiculopathy was a new finding that was causally related to the industrial accident. Dr. Manning noted that Claimant's "left L5 distribution, radiculopathy as related to his injury and with the pars defect being pre-existing conditions so the entire low back problem represents then a permanent aggravation of a pre-existing condition with additional disc material perhaps at L4-L5 playing a contributing role in why this flared up so badly in 2013 and has not gone away since that time." DE 13:2. Similarly, Dr. Marsh found that when Claimant "wrenched his back he seems to have somehow caused a radicular – radiculitis – radiculopathy involving the left L5 nerve root and that's consistent with his history and consistent with his exam and it is also consistent with his MRI, which shows the L5 nerve root on the left being compressed in the lateral recess of L45 and in the foramen at L5 as well." Marsh Dep., 13:10-17. Thus, despite

Claimant's preexisting degenerative lumbar condition, both physicians concurred in the medical need for decompression/fusion lumbar surgery to correct Claimant's radiculopathy and its etiology as industrially-related. DE13:4; Marsh Dep., 17:13:20.

68. Dr. Schwartzman, in his initial independent medical examination, mirrored the findings of Dr. Marsh and Dr. Manning. After examining Claimant, taking his medical history, and reviewing the records of Dr. Kammer, Dr. Krafft, Dr. Price, and Dr. Marsh, as well as Claimant's physical therapy records and radiographic records, Dr. Schwartzman acknowledged the history of episodic low back pain, but noted that Claimant "was no longer complaining of just low back pain, but was complaining of low back pain with left leg radiation, which was a new finding for him since injury of 12/04/13." He thus concluded that the Claimant's radicular pain in the left leg was a new finding and was related to the twisting event of December 4, 2013, and that treatment for the same would be on an industrial basis. DE 12:1-3.

69. After being asked to review and update his medical opinion, not once but twice, Dr. Schwartzman first declined in writing to change his opinion, but then changed it on January 26, 2016, three days prior to the first hearing in this matter. After reviewing the records of Dr. Manning, Dr. Schwartzman concluded that the recommendation for surgery was "not related to any industrial conditions." He then opined that preexisting conditions, not the industrial accident, caused Claimant's condition, specifically the "strenuous activity that the patient engaged in previously specifically hiking through the mountains, hunting bow elk, and extracting said bow elk out of those mountains after he hunted them. This is the type of activity that would certainly predispose someone with an underlying pars defect to develop significant degenerative changes to the point where they require surgery." DE 12:8-9.

70. Dr. Schwartzman's revised opinion is not persuasive nor do the circumstances under which it was obtained inspire confidence. Unlike Dr. Marsh, Dr. Schwartzman was not subject to cross examination in a post-hearing deposition. More importantly, however, his revised theory of the cause of Claimant's condition does not find support in the factual record. The last time Claimant sought treatment for his lower back prior to the December 2013 industrial accident was in 2005, following a car accident; thereafter Claimant underwent a brief series of chiropractic treatments that resolved his complaints. There is no evidence that between 2006 and 2013 Claimant sought any medical treatment or care related to his back. During this time he indeed engaged in a great deal of strenuous outdoor sporting activity, however there is no evidence that he injured his back during any of these pursuits.

71. There was nothing new in Dr. Manning's records or the patient history he took from Claimant that sufficiently explains Dr. Schwartzman's reversal of opinion. The patient history upon which Dr. Schwartzman relied, Claimant's participation in vigorous outdoor and other sporting activities, similarly appeared in the histories of other medical records that Dr. Schwartzman should have already reviewed, including those of Dr. Price, Dr. Marsh, and Claimant's physical therapy records. Nevertheless, Dr. Schwartzman purports to have read about such activities for the first time when he reviewed Dr. Manning's records. His late-breaking discovery thus appears pretextual.

72. In *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983), the claimant's "life had been very physically active, including recreational activities as a rodeo performer and hence his spine had, through repeated trauma, become predisposed to the injury which he ultimately sustained." 105 Idaho at 104, 666 P.2d. at 631. The Idaho Supreme Court held that such evidence did not preclude an award because an "employer takes an employee as he finds

him." *Wynn*, 105 Idaho at 104, 666 P.2d. at 631. Similarly, in this case, Claimant's vigorous physical lifestyle and his preexisting back pathology do not preclude a finding that the industrial accident was, on a more probable than not basis, the cause of his lumbar back and lower left radiculopathy condition requiring surgery by permanently aggravating his preexisting back degenerative condition.

73. The medical opinions of Dr. Marsh and Dr. Manning are entitled to greater weight and credibility than the revised opinion of Dr. Schwartzman. Claimant has proven that his lumbar condition and left radiculopathy, as well as his need for lumbar decompression/fusion surgery, are causally related to the industrial accident of December 4, 2013.

74. **Medical Benefits.** Idaho Code § 72-432(1) requires an employer to provide an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer.

75. In *Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015), the Idaho Supreme Court held that the "Commission's review of the reasonableness of medical treatment should employ a totality of the circumstances approach." *Id*., 158 Idaho at 798, 353 P.3d at 419.

76. There was no dispute among the medical authorities regarding Claimant's medical need for surgery. Dr. Marsh, Dr. Manning and Dr. Schwartzman all agreed that Claimant's lumbar condition and left lower extremity radiculopathy require or would benefit from decompression/fusion surgery. Furthermore, the evidence shows that conservative treatment, including chiropractic care, physical therapy, medication, acupuncture, and a TENS unit trial, all

failed to effectively treat Claimant's condition. Under the totality of these circumstances, therefore, it is reasonable to find the proposed surgery, and any related medical care associated with it, are reasonable and compensable.

77. Unlike the proposed surgery which has not yet been performed, Claimant sought and obtained medical treatment, palliative care and diagnostic procedures related to his industrial injury, such as the acupuncture treatments from Wang Medical, certain chiropractic treatments, and the MRI of February 23, 2015. He argues that Defendants unreasonably refused to cover these medical expenses. *See*, Claimant's Opening Brief at 15-16.

78. Defendants, however, argue that they should not be liable for any expenses associated with evaluations and treatment by Dr. Marsh because Claimant did not seek approval for Dr. Marsh from Surety, nor did he seek a referral from his treating physician, Dr. Krafft, to Dr. Marsh. Furthermore, Claimant did not petition the Commission for a change of physician to Dr. Marsh. *See*, Defendants' Responsive Brief at 7-8. Thus, they argue that medical expenses that Claimant incurred outside of the "chain of referral" are not compensable pursuant to Idaho Code § 72-432.

79. Defendants are correct that Claimant did not seek Surety or Petersen's approval for his evaluations by Dr. Marsh, nor did he obtain a referral from Dr. Krafft to Dr. Marsh. Claimant also did not petition for a change of physician. Their argument, however, ignores that Dr. Krafft tried out a TENS unit which he determined was "beneficial" for Claimant in November 2014, but Surety then denied approval for a permanent unit. DE 7:23.

80. In *Reese v. V-1 Oil Company*, 141 Idaho 630, 115 P.3d 721 (2005), the Idaho Supreme Court held that the claimant was not required to obtain permission from surety or employer prior to changing physicians, after they had refused authorization for the only

treatment recommended by claimant's treating physician, a spinal cord stimulator, for his continued pain following his back surgery. The Court stated in pertinent part as follows: "Once it refused to authorize the treatment recommended by Dr. DuBose, V-1 was, in effect, no longer providing a physician for Reese … Once V-1 had ceased providing a physician, Idaho Code § 72-432(1) authorized Reese to obtain medical care at V-1's expense. He was not required to seek permission to change physicians because V-1 was no longer providing a physician who could treat him." *Reese*, 141 Idaho at 634, 115 P.3d at 725.

81. Similarly, in this case, at the time of his last visit with Claimant on November 25, 2014, Dr. Krafft had already offered Claimant various treatments for his lumbar back and radiculopathy, including Gabapentin, heat/ice, exercise, and posture recommendations. DE 7:22. The only remaining treatment that Dr. Krafft recommended, a permanent TENS unit, did not receive approval from Surety. DE 7:23. Under these circumstances, like the claimant in *Reese*, 141 Idaho 630, 115 P.3d 721, Claimant was not obligated to seek approval from Petersen and Surety for a change of physician to Dr. Marsh in February 2015, or approval from Surety or Petersen for the MRI ordered by Dr. Marsh that occurred on February 23, 2015. Pursuant to Idaho Code § 72-431(1), Claimant was authorized to obtain these medical services at the expense of Petersen and Surety. Additionally, any unreimbursed chiropractic expenses of Dr. Price should have been paid because Dr. Price was already within the chain of referral, having been approved by Petersen as a treating physician shortly after Claimant's industrial injury in December 2013.

82. Medical expenses associated with Claimant's acupuncture treatment by Wang Medical, which began on August 28, 2014, however, are distinguishable and non-compensable, according to the standard articulated in *Reese*, 141 Idaho 630, 115 P.3d 721. Claimant had

already returned to Dr. Krafft for further treatment on August 19, 2014, before he sought this acupuncture therapy. Dr. Krafft could have referred Claimant for acupuncture, if he had requested it, however there is no evidence that Claimant requested such a referral, nor is there evidence that he sought approval for the acupuncture from Surety. Because his treatment by Wang Medical occurred before Surety denied him treatment recommended by Dr. Krafft in November 2014, this treatment was outside of the chain of referral and Claimant is not entitled to reimbursement of these expenses.

83. The medical expenses that Claimant incurred in connection with treatment by Dr. Price, evaluations by Dr. Marsh, and the MRI of February 25, 2014, were reasonable and necessary to treat his lumbar back and radicular condition. These expenses are compensable pursuant to Idaho Code § 72-432. Pursuant to *Neel v. Western Construction, Inc.*, 147 Idaho 146, 149, 206 P.3d 852, 855 (2009), Claimant is entitled to recover 100% of the invoiced amounts of these medical expenses. The expenses associated with acupuncture treatment by Wang Medical are not compensable.

84. **Temporary Disability Benefits**. The next issue is Claimant's entitlement to temporary disability benefits. Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to the disabled employee during a period of recovery. The burden is on Claimant to present expert medical evidence of the extent and duration of the disability to recover income benefits for such disability. *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980.

85. In his opening brief, Claimant argued that he should receive total temporary disability benefits beginning on October 23, 2015, when Dr. Manning first opined that his condition required surgery. *See*, Claimant's Opening Brief at 27-28. In his reply brief,

however, Claimant argued that "it would also be reasonable to argue that such payments should have begun on June 9, 2015, the date Dr. Schwartzman agreed the radiculitis was related to the injury of record." *See*, Claimant's Reply Brief at 12. Nevertheless, a medical opinion in favor of surgery or causation is not necessarily the same as a medical appraisal that Claimant was temporarily disabled and thus prevented from working either totally or partially due to his industrial injury during the time periods in question.

86. After his industrial accident on December 4, 2013, Claimant was on restricted duty of four hours per day from December 5 until 12, 2013, pursuant to Dr. Kammer's order. Thereafter, Claimant continued to work for Petersen until February 7, 2014, apparently full-time. After that, he worked full-time for Cutting Edge Log Homes until approximately November 2014. There is no evidence concerning any efforts by Claimant to obtain work since December 2014, when he lost his last job, nor is there any medical evidence that since that time that he has been disabled either in part or in whole from working.

87. Dr. Marsh testified that as of February 2016, Claimant could not perform any physical work, although he might be able to perform sedentary, desk work. While doubtful of Claimant's ability to work, Dr. Marsh did not expressly opine that Claimant was disabled from working for any particular time period. Marsh Dep., 36:24-37:24.

88. With the exception of a brief period of time from December 5 to 12, 2014, during which Dr. Kammer restricted Claimant to working four hours per day, no other physicians have opined that Claimant should be fully or partly restricted from working due to his industrial injury. While he established that he has been in a period of recovery at least since his diagnosis by Dr. Marsh on March 24, 2015, nevertheless Claimant's proof failed to establish that he was

also disabled, either totally or partially. Under these circumstances, Claimant is not entitled to receipt of temporary disability benefits. He may be entitled to temporary disability benefits in the future, however, during a period of recovery connected to the contemplated surgery.

89. **Attorney Fees**. The final issue is Claimant's entitlement to attorney fees. Attorney fees are not granted as a matter of right, but may be recovered only under the circumstances set forth in Idaho Code § 72-804, which provides as follows:

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

90. Claimant severely criticized his medical treatment by Dr. Krafft. Claimant argued that Dr. Krafft failed to properly diagnose him and improperly declared him at MMI on March 18, 2014, despite his "obvious decline and functional loss of his left leg including atrophy that would have been visible to a lay person." *See*, Claimant's Opening Brief at 28. Thus, Claimant argued that it was unreasonable for Petersen and Surety to rely upon Dr. Krafft's March 18, 2014 findings to deny further treatment and compensation. *Id*. at 29.

91. There is no evidence, however, that Petersen and Surety had available contemporaneous medical opinions other than that of Dr. Krafft in or about March 2014. It was not until a year later that other physicians found that Claimant's lumbar and left radicular condition required surgical treatment and that it was related to his industrial accident. First, Dr. Marsh, after reviewing the first MRI that had been ordered for Claimant since his industrial

accident, determined on March 24, 2015 that Claimant's lumbar L5 left radiculopathy was industrially related and would likely benefit from surgery. DE 10:11. Second, Defendants' IME physician, Dr. Schwartzman concluded on June 9, 2015 that Claimant's lumbar L5 left radiculopathy was industrially related and that medical treatment for it was on an industrial basis. DE 12:2. Third, on September 16, 2015 Dr. Krafft agreed with Dr. Schwartzman's first opinion on causality and that treatment related to Claimant's condition would be on an industrial basis. DE 7:24. Fourth, on November 6, 2015, Dr. Manning opined that Claimant's industrially-related radiculopathy required surgery in the form of decompression and fusion surgery. DE 13:3-4.

92. As of November 6, 2015, therefore, Defendants had knowledge of or access to the opinions of four physicians that Claimant's condition was industrially-related and/or required treatment in the form of surgery. As of that date, therefore, Defendants had no medical basis upon which to deny Claimant further medical treatment in the form of the proposed surgery. They persisted, however, in denying Claimant such treatment and sought to have Dr. Schwartzman reverse his opinion, which he at first declined to do on December 3, 2015. That Dr. Schwartzman later revised his opinion, questionably, on January 26, 2016, only three days prior to the first hearing, does not insulate Defendants from the unreasonableness of their actions in continuing to deny Claimant treatment and taking this matter to hearing. Defendants had at their disposal a significant body of medical evidence that Claimant's condition was industrially-related and reasonably required further treatment, including the proposed surgery. It was not reasonable to force Claimant to take this matter to hearing under these circumstances.

93. In summary, Defendants did not have reasonable grounds to deny Claimant compensation in the form of medical treatment, thus they are liable for attorney fees pursuant to Idaho Code § 72-804.

CONCLUSIONS OF LAW

1. Claimant has proven that his need for the proposed lumbar and radicular surgery, and any medical care related to it, is causally related to his industrial accident, reasonable and compensable.

2. Defendants are liable for Claimant's unreimbursed medical expenses, pursuant to Idaho Code § 72-432. This specifically includes the medical care that Claimant received from Dr. Marsh, the MRI of February 23, 2015, and any unreimbursed chiropractic expenses of Dr. Price related to Claimant's industrial condition. Pursuant to *Neel*, 147 Idaho 146, 206 P.3d 855, Claimant is entitled to recover 100% of the invoiced amounts of these medical expenses. Defendants, however, are not liable for Claimant's acupuncture treatment by Wang Medical.

3. Claimant has failed to prove his entitlement to temporary disability benefits from June 9, 2015 through the date of hearing.

4. Defendants are liable for attorney fees pursuant to Idaho Code § 72-804 because they did not have reasonable grounds to deny Claimant compensation in the form of medical treatment, including surgery, related to his industrial condition. Unless the parties can agree on an amount for reasonable attorney's fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees and costs in the matter. *See, Hogaboom v. Economy Mattress*, 107 Idaho 13, 18, 684 P.2d 900, 995 (1984). Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants

may file a memorandum in response to Claimant's memorandum. If Defendants objects to any representation made by Claimant, the objection must be set forth with particularity. Within seven (7) days after Defendants' response, Claimant may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees and costs.

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 1st day of August, 2016.

INDUSTRIAL COMMISSION

___/s/_____
John C. Hummel, Referee

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of August, 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:

BRYAN S STORER
STORER & ASSOCIATES
4850 N ROSEPOINT WAY STE 104
BOISE ID 83713

SUSAN VELTMAN
BREEN VELTMAN WILSON
1703 W HILL ROAD
BOISE ID 83702

___/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY D. PICKENS, Claimant, v. PETERSEN STAMPEDE DODGE, Employer, and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Surety, Defendants.	**IC 2013-032785** **ORDER** Filed August 12, 2016

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

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

1. Claimant has proven that his need for the proposed lumbar and radicular surgery, and any medical care related to it, is causally related to his industrial accident, reasonable and compensable.

2. Defendants are liable for Claimant's unreimbursed medical expenses, pursuant to Idaho Code § 72-432. This specifically includes the medical care that Claimant received from

Dr. Marsh, the MRI of February 23, 2015, and any unreimbursed chiropractic expenses of Dr. Price related to Claimant's industrial condition. Pursuant to *Neel v. Western Construction, Inc.*, 147 Idaho 146, 149, 206 P.3d 852, 855 (2009), Claimant is entitled to recover 100% of the invoiced amounts of these medical expenses. Defendants, however, are not liable for Claimant's acupuncture treatment by Wang Medical.

3. Claimant has failed to prove his entitlement to temporary disability benefits from June 9, 2015 through the date of hearing.

4. Defendants are liable for attorney fees pursuant to Idaho Code § 72-804 because they did not have reasonable grounds to deny Claimant compensation in the form of medical treatment, including surgery, related to his industrial condition. Unless the parties can agree on an amount for reasonable attorney's fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees and costs in the matter. *See, Hogaboom v. Economy Mattress*, 107 Idaho 13, 18, 684 P.2d 900, 995 (1984). Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants objects to any representation made by Claimant, the objection must be set forth with particularity. Within seven (7) days after Defendants' response, Claimant may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees and costs.

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

DATED this 12th day of August, 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 12th day of August, 2016, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

BRYAN S STORER
STORER & ASSOCIATES
4850 N ROSEPOINT WAY STE 104
BOISE ID 83713

SUSAN VELTMAN
BREEN VELTMAN WILSON
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sjw

___ /s/_____