BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MATTHEW WILSON, Claimant, v. BERT'S MANUFACTURING & SALES, INC., d/b/a BERT'S PORTABLE MINI STORAGE, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2012-031070** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed December 8, 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 October 1, 2015. Claimant was represented by Starr Kelso, of Coeur D'Alene. James Magnuson, also of Coeur D'Alene, represented Bert's Manufacturing & Sales, dba Bert's Portable Mini Storage, ("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 August 29, 2016. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their

own findings of fact, conclusions of law and order. The Commission disagrees with the Referee's assessment of Claimant's lumbar spine condition.

ISSUES

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

1. Whether Claimant is medically stable, and if so, the date thereof; and
2. 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. Attorney fees.

The issue of permanent disability is reserved.

CONTENTIONS OF THE PARTIES

On December 7, 2012, Claimant fell ten to twelve feet from a ladder while in the course and scope of his employment with Employer, landing on his feet. The fall resulted in injuries to Claimant's back and left knee, as well as a cut on his left elbow. Claimant asserts he is not yet at MMI with regard to his back and left knee. Claimant is entitled to all unpaid past and future anticipated medical costs associated with his industrial accident. He is also entitled to temporary disability benefits, and attorney fees.

Defendants argue Claimant suffered injury to his back and left knee in the accident in question, but received all the reasonable and necessary medical treatment to which he is entitled. Claimant has no impairment, and needs no further medical treatment related to his work injuries. Defendants do not owe Claimant any attorney fees.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's testimony, taken at hearing;

2. The hearing testimony of witness Angelena "Kate" Ahlers;

3. Claimant's Exhibits (CE) A through P, admitted at hearing;

4. Defendants' Exhibits (DE) 1 through 14, admitted at hearing;

5. The post-hearing deposition transcript of Merle Janes, M.D., taken on December 15, 2015;

6. The post-hearing deposition transcript of J. Sorin Ispiriscu, M.D., taken on February 22, 2016; and

7. The post-hearing deposition transcript of Dennis Chong, M.D., taken on May 9, 2016.

All objections preserved during the depositions are overruled, with the exception of the objection raised, beginning on page 22, and continuing onto page 23, of the deposition of Dr. Chong, which is sustained. Lines 10 through 22 of Dr. Chong's deposition at page 23 are stricken, and will not be considered.

FINDINGS OF FACT

1. In the course and scope of his employment on Friday, December 7, 2012, Claimant injured his back and left knee, and cut his left elbow, when he slipped off a ladder. As he fell, he positioned himself so that he landed on his feet, and rolled to his side upon impact with the ground. He took the remainder of the day off.

2. Claimant was quite sore the next day. His hips, low back, and left knee hurt the worst. The following Monday Claimant sought medical care at Sandpoint Family Medicine and Urgent Care, where he was first seen by Mark Hernandez, M.D.

3. At this initial visit, Claimant complained of pain in his left elbow, left knee, lower abdomen, hips, low back, and upper back/neck area. Dr. Hernandez ordered x-rays

of Claimant's left elbow, left knee, bilateral hips, and lumbar spine. The doctor noted x-ray evidence of a disc protrusion at L5-S1, and bilateral hip osteoarthritis. Dr. Hernandez ordered MRI films due to his concern that Claimant may have fractured his spine at L5. Claimant was given a knee brace, and told to use crutches with no weightbearing on his left leg until instructed differently. Claimant was taken off work.

4. MRIs of Claimant's left knee and lumbar spine were performed on December 18, 2012. Claimant's left knee MRI showed a possible small corner fracture along the anteromedial margin of his medial tibial plateau, and small joint effusion, in addition to osteocartilaginous degenerative changes. Claimant's lumbar spine MRI ruled out fracture, but noted a disc protrusion in the left paracentral region at L4-5. Additionally, the MRI showed widespread degenerative changes throughout Claimant's lumbar spine, with particular note made of spinal stenosis at L1-2, L2-3, and L3-4.

5. On December 20, 2012, Claimant saw Kathy Robertson, FNP, at Sandpoint Family Medicine. She provided a left knee injection for pain. She also referred Claimant to Michael DiBenedetto, M.D., for further knee care, and to J. Sorin Ispirescu, M.D., for continuing lumbar spine treatment.

6. Between January 9, 2013, and March 18, 2013, Dr. Ispirescu treated Claimant's lumbar spine complaints with a series of three spinal epidural steroid injections. The first was an interlaminar injection at L3-4. The next was a transforaminal injection at L2-3. Claimant's last injection with Dr. Ispirescu was at L4-5. Only the final injection had any significant effect, and even then the L4-5 injection provided Claimant with pain relief for only a day or two.

7. Noting Claimant's continuing severe low back pain with radicular symptoms, his significant degenerative changes at multiple levels, and lack of benefit from steroid injections, Dr. Ispirescu, at his final visit with Claimant on April 17, 2013, recommended Claimant consult with Dr. DiBenedetto on the possibility of spine surgery.

8. Claimant first saw Dr. DiBenedetto on January 10, 2013. Dr. DiBenedetto's impression after examination was tibial plateau fracture and left knee sprain, L4-5 HNP (herniated nucleus pulposus) from a "significant fall," and L3-4 and L2-1 degenerative disc disease with Modic changes. CE D, p. 81. Dr. DiBenedetto discussed the fact that Claimant's tibial plateau fracture should recover with range of motion and strengthening exercises. Claimant received a prescription for water therapy, and the doctor encouraged him to increase his weight bearing on his left leg, as the fracture was not of a type that would result in progressive diminution of function if Claimant increased his use of that leg. Dr. DiBenedetto also stressed the importance of continuing back evaluation and treatment, including injection therapy. Claimant was kept off work.

9. Claimant next presented to Dr. DiBenedetto on January 25, 2013. Claimant was using a crutch to assist in ambulation, and complained of pain in his left leg. Claimant also complained of significant pain when he leaned to his left side. He had not been involved in physical therapy, but found that being in a pool helped his symptoms.

10. Dr. DiBenedetto stressed to Claimant the importance of getting into an exercise program on an "aggressive basis." Failure to do so would increase Claimant's chances of continuing physical problems. CE D, p. 84. Dr. DiBenedetto felt that Claimant had suffered an exacerbation of his pre-existing degenerative disc disease in the accident. Claimant was encouraged to discontinue chewing tobacco, as it could impede his recovery.

11. On his next visit with Dr. DiBenedetto, Claimant exhibited "variable" pain symptoms. For example, the doctor noted at times Claimant walked with a limp; at other times he did not. Also, while Claimant demonstrated tenderness on certain range of motion tests, he did not show the same limitations when putting on his socks. Dr. DiBenedetto felt an EMG and nerve conduction study was needed to look for objective evidence of Claimant's variable weakness demonstrated in testing. Claimant was again reminded that tobacco use increased his pain, and retarded his recovery. Dr. DiBenedetto was unsure of how much of Claimant's complaints were due to his "fairly significant stenotic spine" and how much was due to the industrial injury. CE D p. 88. Claimant was kept off work.

12. On April 16, 2013, Claimant presented to Dr. DiBenedetto in followup. Claimant was walking with a definite limp, but not using a crutch. His chief complaint was persistent left thigh pain, extending into his left buttock and low back. Claimant's neck and upper extremities were asymptomatic. Claimant had obvious differences in the size of his calves, with his left calf smaller than his right.

13. Dr. DiBenedetto was unable to review the EMG and nerve conduction study results with Claimant, as they had not been delivered to the doctor's office. When Dr. DiBenedetto spoke with the neurology office where the testing was done, he discovered the physician who did the testing, Robert Price, M.D., no longer worked at the clinic. The clinic was only able to locate notes of the nerve conduction study, but promised to track down the consultation and EMG notes and forward them to Dr. DiBenedetto the following day. The EMG notes were never located. Dr. Price's testing conclusions were sent to Dr. DiBenedetto.

14. When he next returned to Dr. DiBenedetto on April 26, 2013, Claimant complained that his life was miserable and he was in constant pain. He was disgruntled over the fact he was not improving. Conversely, Dr. DiBenedetto noted that Claimant was smiling when the doctor first entered the room, and appeared to be sitting comfortably. However, when Claimant stood, he assumed a severely hyperflexed posture. Claimant would not allow a femoral stretch test, but alternate testing of the same area did not elicit pain responses. Other tests were positive. Dr. DiBenedetto felt Claimant's examination was markedly inconsistent.

15. Dr. DiBenedetto discussed with Claimant that the doctor had nothing more to offer. He explained that the EMG/nerve conduction findings came back normal. While Dr. DiBenedetto understood Claimant's frustration with the fact that before the accident he could work, and now could not, the doctor did not feel Claimant was a surgical candidate for his knee or back. Dr. DiBenedetto suggested a repeat left knee MRI, an IME, and a functional capacity evaluation. Claimant was not satisfied with these suggestions, and felt he had not received appropriate treatment.

16. Instead of authorizing a repeat MRI, Surety scheduled Claimant for an IME with Dennis Chong, M.D., a Seattle-area physical medicine and rehabilitation doctor. The examination took place on May 22, 2013.

17. Dr. Chong diagnosed a lumbar sprain/strain, and a left knee small medial tibial plateau corner fracture, as well as a resolved left elbow contusion, all related to the industrial accident. Findings unrelated to the industrial accident included multilevel lumbar spine degenerative disease, left knee osteocartilaginous degenerative changes, and significant history of depression with suicidal ideation. Finally, Dr. Chong noted

Claimant exhibited extensive pain behavior with symptom magnification throughout the examination.

18. In answer to specific questions from the Surety, Dr. Chong opined that Claimant's ongoing complaints were not causally related to his industrial accident of December 7, 2012. Dr. Chong noted the examination was "rife with anatomical and physiological inconsistencies, overlaid with substantive pain behavior." DE 10 p. 247. He felt Claimant's soft tissue back injury and "very minor" tibial plateau fracture should have resolved long before May 2013.

19. Dr. Chong noted that due to Claimant's "significant history of mental health disorder," in the interest of "hypervigilance" a repeat left knee MRI, as recommended by Dr. DiBenedetto, was reasonable, even though not clinically indicated, prior to reaching the final determination that Claimant needed no further medical treatment for his left knee. DE 10 p. 247. Dr. Chong felt the MRI was primarily for reassurance as opposed to seeking an operative indication, and predicted the repeat film would show no additional findings from Claimant's previous MRI.

20. Assuming the repeat MRI showed nothing new, Dr. Chong felt Claimant had reached maximum medical improvement, with no restrictions. Dr. Chong opined Claimant suffered no permanent impairment regarding his lumbar spine, and deferred an impairment finding on Claimant's left knee until after the repeat MRI. The doctor felt that Claimant could return to his time-of-injury employment as a driver, should not take further narcotic analgesics, and would not do well in a functional capacity examination due to the observed self-limited effort and inconsistent behavior demonstrated during the IME.

21. On June 6, 2013, Surety sent Dr. Chong's report of May 22, 2013 to Dr. DiBenedetto for comment. Dr. DiBenedetto stated that he specifically agreed with Dr. Chong's opinions that the MRI was for reassurance and the FCE would be to document inconsistencies. Dr. DiBenedetto also agreed that there was nothing further he (Dr. DiBenedetto) could do for Claimant. Dr. DiBenedetto was silent on the other aspects of Dr. Chong's report.

22. Claimant returned for his last visit with Dr. DiBenedetto on June 24, 2013. Office notes of that date indicate Claimant was frustrated to the point of being agitated. Claimant complained that he could not do what he needed to do; instead he was lying around and gaining weight. Dr. DiBenedetto noted that Claimant "has the appearance of a beaten dog." CE D p. 94.

23. In testing, Claimant was "exquisitely tender to palpation along the entire medial side" of his left knee. *Id.* While the latest MRI still showed the small anterior corner fracture on Claimant's tibial plateau, Dr. DiBenedetto felt it was "resolving as expected." *Id.* There was no swelling, edema, or induration present in Claimant's left knee. There was no evidence of meniscal damage, nor any other abnormality. Dr. DiBenedetto had no explanation as to why Claimant's knee was so painful seven months post accident. He could think of no further treatment he would recommend for Claimant's knee condition.

24. Dr. DiBenedetto discussed Claimant's back condition with him, noting the multiple areas of degeneration. He discussed the EMG and nerve conduction studies done by Dr. Price. Dr. DiBenedetto acknowledged that Dr. Price perhaps had either medical or interpersonal skill issues, and was removed from his previous position. In light

of what Dr. DiBenedetto called the "bizarre nature of how this [EMG] test was done, and that it was not read by [Dr. Price] for several weeks thereafter," he felt it would be reasonable to schedule a repeat EMG/nerve conduction study. CE D p. 94. Finally, Dr. DiBenedetto let Claimant know that the doctor had no issue with referring Claimant to a different physician to see if some other doctor might have an explanation as to why Claimant was so miserable.

25. On July 23, 2013, Dr. Chong prepared a supplemental report, after having reviewed Dr. Price's electrodiagnostic records of Claimant's left lower limb, the followup MRI, and Dr. DiBenedetto's latest office notes from June 24. Dr. Chong noted the EMG records had never been located. Dr. Chong did not opine on Dr. DiBenedetto's suggestion for a repeat EMG/nerve conduction study. Regarding Claimant's left knee followup MRI, Dr. Chong noted the marrow edema at the fracture site had resolved, and there was incomplete healing of anterior corner fracture of the medial tibial plateau. Dr. Chong felt these findings confirmed his previous diagnosis that Claimant was at MMI and needed no further medical treatment.

26. After Dr. Chong's report of July 23, 2013, Surety stood on his opinion, and denied Dr. DiBenedetto's request for a repeat EMG/nerve conduction study. Surety also terminated Claimant's benefits.

27. After Surety terminated benefits and denied a second EMG/nerve conduction study, Claimant retained counsel who directed him to Merle Janes, M.D., a physical medicine and rehabilitation doctor in Spokane Valley.

28. At the time of his initial examination with Dr. Janes on March 4, 2014, Claimant complained of, in descending order of pain, constant low back pain, left hip

and limb pain, from buttocks to foot, neck aching pain, aggravated by turning, headaches, and left knee pain, which was least symptomatic at that time, but still a constant ache.

29. Dr. Janes formed a working diagnosis of cervical, thoracic, lumbosacral and bilateral sacroiliac sprain, and left piriformis syndrome. The back sprain/strain injury was overlaid on degenerative disc disease. Dr. Janes also noted Claimant's left knee tibial plateau avulsion fracture with incomplete healing.

30. Dr. Janes prescribed Tramadol for pain, magnesium citrate to reduce muscle spasm, a food supplement list to help with healing, and cold laser treatment to the SI joints to aid the piriformis. Dr. Janes scheduled a return visit for later that month. He anticipated with time he would also prescribe physical therapy, possible trigger point injections to any areas of spasm, perhaps Botox injections to the piriformis to temporarily paralyze the muscle, and prolotherapy of Claimant's entire spine to assist local healing.

31. Claimant returned to Dr. Janes on March 31, 2014. At that time, Dr. Janes performed an EMG and nerve conduction study. Based on those studies, Dr. Janes concluded that Claimant was afflicted with (all left sided) tarsal tunnel syndrome, focal peroneal neuropathy at the fibular head, piriformis syndrome, mild L4 chronic radiculopathy.

32. At the March 31 visit, Dr. Janes also noted Claimant had little positive benefit from using the cold laser, Tramadol decreased Claimant's pain slightly, Claimant's TNS unit continued to help reduce Claimant's complaints, the magnesium had a slight benefit, and the dietary supplements results were not known, since they take time to produce beneficial effects, if any. Dr. Janes' treatment plan remained largely unchanged,

but the cold laser treatment was eliminated, as it was ineffectual. Also, the Tramadol and magnesium prescriptions were not included in the doctor's modified treatment plan.

33. Dr. Janes did not treat Claimant after March 31, 2014, as such treatment was disputed by Defendants.

34. Claimant's counsel sent a letter to Dr. Ispirescu which in part asked the doctor to agree or disagree with Dr. Janes' working diagnosis of March 31, 2014, and Dr. Janes' treatment plan. Dr. Ispirescu responded that Dr. Janes' diagnosis seemed reasonable, but noted he (Dr. Ispirescu) had not recently examined Claimant. Dr. Ispirescu agreed with treatment plan of physical therapy, possible trigger point injections, and possible Botox treatment, but disagreed with food supplements and prolotherapy as being of questionable efficacy. Dr. Ispirescu felt the latter treatments were "low risk" and "probably worth trying" although he would not recommend them. DE 7 p. 190.

35. Surety sent Dr. Janes' records to Dr. Chong for review. Surety asked if Dr. Janes' findings and conclusions altered Dr. Chong's previous opinion on MMI. In his report of September 24, 2014, Dr. Chong noted that Claimant's expansion of symptoms to include leg, hips, and neck, and his pain diagram showing widespread body pain at or near a level 10 on the pain scale simply reinforced Dr. Chong's diagnosis of symptom magnification. Dr. Chong disagreed with Dr. Janes' conclusion that soft tissue injuries do not heal quickly, and can get worse if not properly treated. Dr. Chong rejected Dr. Janes' electrodiagnostic study results as being invalid due to fluctuating skin temperature, and argued that even if the results were accurate, given the fact a prior study

showed normal results, Dr. Janes' findings must logically represent a new injury, unrelated to the industrial accident. Dr. Chong did not change or alter his prior opinions.

DISCUSSION AND FURTHER FINDINGS

36. 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 condition 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.

37. Defendants do not dispute the fact that Claimant suffered a compensable accident on December 7, 2012.

MMI

38. The first issue is whether Claimant has reached maximum medical improvement (MMI). Maximum medical improvement is also known as medical stability. "MMI does not contemplate that Claimant must regain his pre-accident state to be considered medically stable, but only that his persisting condition is not likely to progress significantly within the foreseeable future. Of course, the persisting condition must be related to a compensable industrial accident." *Snider v. Empro Employer Solutions, LLC* 2013 IIC 0072.1, 0072.9 (Nov 2013). As noted by the Idaho Supreme Court, "… a person can be medically stable and still have symptoms and pain from her injury as long as no further material improvement is expected with time or treatment."

Shubert v. Macy's West, Inc, 158 Idaho 92, 102; 343 P.3d 1099, 1109 (2015), *overruled on other grounds by Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015).

39. Dr. Chong opined that Claimant had recovered from his accident-related injuries by July 23, 2013; any on-going complaints thereafter would not be industrially related.

40. Dr. Janes believed Claimant, with "proper" treatment, could be "nudged back on the path to healing." CE F p. 125. Some of the proposed treatments, namely cold laser, (Dr. Janes called it "laser photobiomodulation"), and nutritional supplements, have made no significant difference in Claimant's time-of-hearing condition. Dr. Janes' proposed trigger point injections, Botox injections, physical therapy, and prolotherapy have apparently not yet been attempted.

<u>*Analysis of Dr. Chong's Opinions*</u>

41. Dr. Chong gave three diagnoses related to Claimant's industrial accident – lumbar sprain/strain, left knee small medial tibial plateau fracture, and left elbow contusion. He also gave three unrelated diagnoses – preexisting multilevel lumbar spine degenerative disc disease, left knee osteocartilaginous degenerative changes, and significant history of depression with suicidal ideation, and extensive pain behavior with symptom magnification. As discussed in greater detail below, the Referee had no disagreement with Dr. Chong's unrelated diagnoses; the totality of the medical record and the Referee's personal observations of Claimant at hearing support those findings. The Commission does not disturb these findings. Likewise, Claimant's left elbow apparently healed without complications and is not an issue herein.

42. Dr. Chong opined that Claimant's lumbar spine sprain/strain resolved within three months. In support of his findings, Dr. Chong pointed at deposition to Dr. Price's EMG/nerve conduction studies, noting they were normal. He suggested that any subsequent

abnormal electrodiagnostic studies would indicate a more recent injury, but there is no evidence of such in the record.

43. The problem with Dr. Chong's opinion is that he relies, at least in part, on Dr. Price's EMG and nerve conduction studies, which were questioned by Dr. DiBenedetto and aptly criticized by Dr. Janes. Dr. Price's EMG records were never found, and thus it is not possible to verify their validity. While it is true there is a document from Dr. Price with his conclusions, *i.e.*, that the studies were normal, there is no way to confirm those findings. In short, he did not "show his work." While that fact alone does not invalidate Dr. Price's opinion, it severely limits the weight given to his findings.

44. Dr. DiBenedetto's request for a followup EMG/nerve conduction study should have been a red flag to Dr. Chong. To place weight on a study with missing raw data, (and that data must have been important, since Dr. Chong noted that he made strenuous attempts to locate it), diminishes the weight afforded to his opinion that Claimant was at MMI with no impairment or work restrictions with regard to Claimant's lumbar spine.

45. Furthermore, to simply dismiss Claimant's continuing pain complaints as symptom magnification invites a misdiagnosis. Dr. Chong agreed that "hypervigilance" was appropriate when considering Claimant's left knee complaints. That same level of attention would have been appropriate when considering Claimant's low back and lower extremity complaints, given his unrelenting frustration at not healing.

46. The record supports a finding that Claimant tends to exaggerate his symptoms. The Referee's personal observations at hearing, made well before

examining Dr. Chong's findings, included Claimant's exaggerated grunting, heavy breathing, pain-filled voice when talking, mannerisms denoting pain, odd posture, and unwillingness to use left arm. These manifestations, most noticeable early in the hearing, tended to decrease as Claimant became more involved in the questioning process. While the Referee found Claimant to be generally credible, his exaggerated pain manifestations were nevertheless noteworthy. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

47. From Dr. DiBenedetto's notes of inconsistent pain manifestations, to Claimant's self-described pain diagram in Dr. Janes' records, to Dr. Chong's findings, to the Referee's personal observations of Claimant at hearing, it appears Claimant is highly demonstrative of his discomfort. The record is not developed on why he behaves in this manner – for example, whether it is just his personality to be highly demonstrative, or if his chronic depression plays a role in how he projects himself in this regard, or if he is trying to exaggerate his symptoms for personal gain. Regardless, Claimant's behavior should have been cause for all physicians to double check to insure they were not missing a potential organic cause for Claimant's persisting pain and limitations. A repeat EMG/nerve conduction study in light of the situation presented in this case would have been appropriate, as reasonably suggested by Dr. DiBenedetto.

48. In line with Dr. DiBenedetto's recommendation, Claimant had the repeat EMG/nerve conduction study performed by Dr. Janes, who documented his findings. While Dr. Chong argued those findings were invalid due to temperature fluctuations during the study, Dr. Janes explained in his deposition that he remedied Claimant's

skin temperature inconsistencies using heat before beginning the testing, and monitored the temperature throughout the procedure. Furthermore, while Dr. Chong criticized the validity of the study, he did not testify that Dr. Janes misread the test results. In other words, Dr. Chong did not quibble with the accuracy of Dr. Janes' findings, but rather just the procedure utilized to obtain the findings. The Commission finds Dr. Chong's criticism of Dr. Janes' testing is without merit.

49. Dr. Chong's opinion that Claimant's left knee tibial plateau fracture was healed is a bit confusing. The MRI found "incomplete healing" of Claimant's medial tibial plateau. However, the MRI also showed that "all of the marrow edema at the fracture site had resolved" CE A p. 13, which finding Dr. Chong relied on when declaring the fracture healed. However, he did not explain in the record why "incomplete healing" was an insignificant finding, and why the resolved edema was the only important finding when determining if the fracture was healed. Without an explanation to the contrary, the finding that the fracture had incomplete healing seems, in layman's terms, to suggest the fracture was not fully healed.

Analysis of Dr. Janes' Opinions

50. As noted above, Dr. Janes' working diagnoses of Claimant includes cervical sprain, thoracic sprain/strain, lumbosacral sprain/strain overlaid on preexisting lumbar degenerative disc disease, bilateral sacroiliac sprain, left piriformis syndrome, and incomplete healing of left tibial plateau avulsion fracture. Also, as a result of the nerve conduction studies, Dr. Janes diagnosed tarsal tunnel syndrome, focal peroneal neuropathy at the fibular head, piriformis syndrome, and mild L4 chronic radiculopathy, all left sided. He felt Claimant was not at MMI regarding these conditions.

51. No other doctor has diagnosed cervical or thoracic sprain associated with Claimant's industrial accident. In fact, Dr. DiBenedetto specifically noted no continuing neck or thoracic spine complaints by mid-April 2013.

52. While not personally diagnosing sacroiliac sprain and/or piriformis syndrome, when confronted with those diagnoses from Dr. Janes, Dr. Ispirescu felt Dr. Janes' diagnoses were reasonable, albeit with the caveat that Dr. Ispriescu noted he had not examined Claimant in some time.

53. Dr. Chong was critical of Dr. Janes' piriformis syndrome diagnosis, on the basis that Dr. Janes testified he palpated Claimant's piriformis muscle and it went into spasm. Dr. Chong noted the piriformis muscle is located deep in the buttocks, and covered by thick gluteal muscles, thus making palpation of the piriformis impossible. While that may be true, the nerve studies done by Dr. Janes apparently support his theory, and coupled with Dr. Ispirescu's opinion on the reasonableness of the diagnosis, more weight on this diagnosis is given to Dr. Janes.

MMI Analysis and Findings

54. As previously noted, no physician diagnosed Claimant with cervical and/or thoracic sprain/strain from the industrial accident prior to Dr. Janes. Interestingly, when Claimant asked Dr. Ispirescu to comment on Dr. Janes' diagnoses, Claimant only included the diagnoses of bilateral sacroiliac sprain, and left piriformis syndrome.

55. All the physicians diagnosed Claimant as injuring only his *lumbar* spine in his industrial accident. Dr. DiBenedetto treated the condition until he reached a point where he could think of no further curative treatment.

56. Reviewing the record as a whole, the totality of the evidence does not support Dr. Janes' finding that Claimant suffered a cervical and thoracic sprain and/or strain in his industrial accident, and those findings will not be considered when reviewing the issue of MMI.

57. The Commission disagrees with the Referee's finding that the totality of the evidence supports a conclusion that Claimant's lumbar spine disc injury is at MMI. Claimant's treating physician, Dr. DiBenedetto recommended a repeat EMG which, for reasons discussed above, Surety denied based on Dr. Chong's opinion. The problem with Dr. Chong's opinion is that he relies, at least in part, on Dr. Price's EMG and nerve conduction studies, which were questioned by Dr. DiBenedetto and aptly criticized by Dr. Janes. After Surety's denial, Dr. Janes performed EMG testing in March 2013. Based on those studies, Dr. Janes concluded that Claimant was afflicted with (all left sided) tarsal tunnel syndrome, focal peroneal neuropathy at the fibular head, piriformis syndrome, mild L4 chronic radiculopathy. Dr. DiBenedetto gave his opinion on stability in conjunction with a request for additional EMG studies, which Surety did not provide. Dr. DiBenedetto may or may not have received Dr. Janes' EMG for review. The record is silent as to the impact, if any, that the study had on Dr. DiBenedetto's opinion that there was nothing more to offer Claimant. Notwithstanding Dr. Chong's criticism of the EMG testing, the Commission finds the diagnosis of mild L4 chronic radiculopathy validates the argument that Claimant's lumbar spine disc injury warrants further medical investigation, particularly because we do not know if Dr. DiBenedetto's opinion would remain the same after review of the study. Reviewing the record as a whole, the totality of the evidence supports a finding that Claimant is not at MMI with regard to his lumbar spine disc injury.

58. All physicians also agree Claimant received an avulsion fracture of his left tibial plateau when he fell from the ladder. Again, Dr. DiBenedetto could think of no further treatment for it, and found it was healing as anticipated. He also felt Claimant should use his leg as tolerated, as such activity would not further aggravate the condition.

59. Reviewing the record as a whole, the totality of the evidence supports a finding that Claimant's left tibial plateau avulsion fracture injury is at MMI.

60. Reviewing the record as a whole, the totality of the evidence supports a finding that Claimant's left elbow injury is at MMI, and resolved without complications.

61. The final two diagnoses, made by Dr. Janes and contested by Dr. Chong, are bilateral sacroiliac sprain, and left-sided piriformis syndrome. Dr. Janes opined that the EMG/nerve conduction studies supported the diagnoses. Dr. Chong was critical of Dr. Janes' process utilized in doing the study, but did not look at the raw data and opine contrary to Dr. Janes. Therefore, on the record, it appears Dr. Janes' interpretation of the raw data was accurate, so that if his process was valid, so too would be his findings.

62. While he did not review the EMG/nerve conduction studies, and conceded he had not seen Claimant in some time, Dr. Ispirescu nevertheless felt Dr. Janes' diagnoses regarding these two issues were reasonable, and felt some treatment, as discussed below, was appropriate for the conditions.

63. In light of Dr. Janes' EMG/nerve conduction studies, and Dr. Ispirescu's supporting opinion and lack of any treatment of the above conditions, it is reasonable to allow further treatment specifically aimed at a potential bilateral sacroiliac sprain

and left-sided piriformis syndrome to see if such treatment will produce significant improvement in Claimant's condition.

64. Reviewing the record as a whole, the totality of the evidence supports a finding that Claimant is not at MMI with regard to his bilateral sacroiliac sprain and left-sided piriformis syndrome.

Medical Benefits

65. The next issue is Claimant's entitlement to medical care. 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. *Reese v. V-1 Oil Co.*, 141 Idaho 630, 634, 115 P.3d 721, 725 (2005). Of course an employer is only obligated to provide medical treatment necessitated by the industrial accident, and is not responsible for medical treatment not related to the industrial accident. *Williamson v. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d 1365 (1997).

66. In the present case, Claimant obtained a repeat EMG/nerve conduction study as recommended by his treating physician. Defendants refused to authorize the study, or to pay for it once completed. Given the facts surrounding the initial EMG/nerve conduction study and Claimant's ongoing complaints, Dr. DiBenedetto's recommendation was reasonable and necessary, and should have been authorized.

67. Defendants are obligated to pay for Dr. Janes' charges at invoice rate, as per *Neel v. Western Construction, Inc.,* 147 Idaho 146, 206 P.3d 852 (2009), of the EMG/nerve conduction study he conducted in March 2013.

68. In a footnote, Claimant indicated the study done by Dr. Price was billed to Claimant. If that bill has not been paid by Defendants, they are obligated to pay that invoice.

69. The weight of the evidence, when the whole of the record is examined, supports the following future treatment as reasonable to treat Claimant's suspected bilateral sacroiliac sprain and left-sided piriformis syndrome – physical therapy, trigger point injections, and Botox injections into Claimant's piriformis muscle, if deemed necessary by the treater. The EMG results also suggest that further evaluation of Claimant's lumbar spine disc injury is warranted to identify the appropriate course of treatment, if any.

70. Dr. Ispirescu opined, and later testified at deposition, that he could not endorse food supplements or prolotherapy as suggested by Dr. Janes. While he felt such treatments were low risk, he would not recommend them. His opinion on these treatments carry more weight, in that the food supplements, with the benefit of hindsight, did not provide any benefit, and prolotherapy therapy suggested by Dr. Janes would include Claimant's entire spine when the weight of the evidence does not support the theory that Claimant injured his entire spine in the accident in question. Also, Dr. Ispirescu testified as to the questionable efficacy of injecting sugar water (prolotherapy) into areas of injury. The fact that a proposed treatment is "low risk" does not mean that it is "reasonable and necessary."

71. In reviewing Claimant's Exhibit J, consisting of "unpaid" charges, to the extent Defendants have not paid for the following charges, they are obligated to do so at invoice costs; TNS unit, which provided substantial pain relief to Claimant and was prescribed by Claimant's physician, Tramadol pain medication, which provided some relief to Claimant and allowed him to function at a higher level, and Dr. Janes' charges incurred in March 2013.

72. Costs associated with cold laser treatment, and vitamins suggested by Dr. Janes are not recoverable, as they proved inefficacious in providing any benefit to Claimant, and were not reasonable under the totality of the circumstances, including Dr. Ispirescu's testimony.[1] There is a billing from Bonner General Hospital for physical therapy set up. On the record provided, it is not possible to determine the causal relationship between Claimant's industrial accident and the charges. Such charge has not been proven to be related to the industrial accident in question and is denied. Finally, there are charges for a maple MA roller and a sacroiliac belt, which were not discussed in the record. These charges are denied, as there is no medical evidence in the record regarding the causal connection between these items and Claimant's accident in question. While a connection may be inferred, medical evidence is necessary to establish causation.

Temporary Disability Benefits

73. Idaho Code § 72-408 provides for income benefits for total and partial disability during Claimant's period of recovery. The burden is on Claimant to establish through expert

[1] While in *Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015), the Idaho Supreme Court made it clear that the so-called three-factor test of reasonableness referenced in *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989), should not be rigidly and universally applied, the reasonableness of medical care required by the Claimant's physician is a question of fact to be supported by substantial and competent evidence. The Commission's review of the reasonableness of medical treatment should employ a totality of the circumstances approach. Nothing in *Chavez* precludes the assessment of the efficacy of any given treatment when deciding whether the treatment was reasonable under the totality of the circumstances.

medical testimony 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). Once Claimant reaches medical stability, he is no longer in a period of recovery, and temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001).

74. Initially, Claimant was taken off work by his treating physician. Employer was holding Claimant's position open, but eventually had to fill that spot with someone else. In effect, Claimant was laid off from work with Employer due to his industrial injuries. He is still in a period of recovery. Claimant is entitled to temporary disability benefits from the date he was unable to work until such time as he no longer qualifies for them.

Attorney Fees

75. Claimant asserts entitlement to attorney fees pursuant to Idaho Code § 72-804 which provides:

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

The decision that grounds exist for awarding a claimant attorney fees is a factual determination which rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

76. In the present case, Surety relied upon the opinions of Dr. Chong to terminate Claimant's benefits.

77. Dr. Chong's opinions stemmed from his conclusion that at the time of his examination, Claimant had no significant abnormal findings specific to his back and lower limbs. Dr. Chong testified that he could find no objective sources of Claimant's pain complaints from diagnostic testing or physical examination. While Dr. Chong acknowledged Claimant had suffered a lumbar soft tissue injury, in the doctor's opinion soft tissue injuries heal in a matter of two to three months unless there is a reason for delayed healing. Dr. Chong could find no reason for delayed healing in this case.

78. Likewise, Dr. Chong found no edema at the site of Claimant's left knee tibial plateau fracture. While the MRI showed "incomplete healing," Dr. Chong opined that the lack of edema was proof of no ongoing left knee injury. As noted previously, the "edema v. incomplete healing" relationship was not developed, but nevertheless, Dr. Chong's opinion of no ongoing left knee injury was provided to, and relied upon, by Surety.

79. Dr. Chong felt Claimant's symptom magnification was significant in that Claimant might be self-limiting his functional ability and exhibiting pain symptoms for non-existent injuries. Thus Claimant's subjective complaints could not be used to determine his medical status. Instead, Dr. Chong relied on Dr. Price's EMG/nerve conduction findings to demonstrate that Claimant had no lower limb abnormalities.

80. For the most part, Surety was not unreasonable in relying on Dr. Chong's opinions. The one area of concern flows from the fact that Surety knew that Dr. DiBenedetto, and subsequently Dr. Chong, did not have Dr. Price's raw data, and thus his EMG studies were suspect. Dr. DiBenedetto called the testing "bizarre" and suggested a repeat study

to confirm Dr. Price's findings. Surety knew Dr. Chong in part relied on those findings when reaching his final conclusions.

81. When a surety knows an expert is relying on questionable data to support opinions favorable to surety's position, the surety is not free to blindly accept those opinions without further inquiry into the questionable data. This might mean, such as in the instant case, the questionable study has to be re-done in order to confirm or rebut the original findings.

82. It would have been reasonable to have a qualified doctor re-do the EMG/nerve conduction study to either confirm or refute Dr. Price's findings. Dr. DiBenedetto, the treating physician, suggested as much. Surety knew of the infirmities of Dr. Price's study, but nevertheless presented the findings to Dr. Chong, who relied on those findings to render his ultimate opinions. This conduct was not reasonable. At a minimum, Surety should have authorized repeat EMG/nerve conduction studies, and allowed Dr. Chong to review the same prior to terminating Claimant's benefits.

83. Claimant also argues that Dr. DiBenedetto recommended Claimant be seen by another physician to help determine the nature of his back problems, and Surety was unreasonable in not allowing Claimant to seek additional medical care. Claimant's argument appears to be a tortured reading of the record. From the totality of the evidence, it appears that what Dr. DiBenedetto was saying was that he could find no reason for Claimant's ongoing complaints. If Claimant was not satisfied with that conclusion (and Dr. DiBenedetto's notes indicate Claimant was not at all satisfied), Claimant was always free to seek a second opinion elsewhere, and that the doctor would assist in the referral. The Commission is simply unsure what Dr. DiBenedetto's treatment recommendation would be, if any, following the repeat EMG Dr. DiBenedetto requested, but Surety denied.

84. Claimant has proven a right to attorney fees expended in obtaining a repeat EMG/nerve conduction study pursuant to Idaho Code §72-804.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has proven he is not medically stable with regard to his suspected bilateral sacroiliac sprain, left-sided piriformis syndrome, and lumbar spine disc injury.

2. Claimant has failed to prove he is not medically stable with regard to his left tibial plateau avulsion fracture, and left elbow injury.

3. Claimant has proven a right to reimbursement at the invoiced rate for reasonable and necessary past medical charges associated with Claimant's electrodiagnostic studies performed by Dr. Janes, as well as charges for Tramadol previously prescribed by Dr. Janes, a TNS unit, Dr. Janes' medical charges from March 2013, and if still owing, the charges from Dr. Price's EMG/nerve conduction studies. *Neel v. Western Construction, Inc.,* 147 Idaho 146, 206 P.3d 852 (2009),

4. Claimant has failed to prove he is entitled to reimbursement for food supplements, cold laser therapy and/or equipment, the billing for physical therapy set up, an MA roller, and a sacroiliac belt.

5. Claimant has proven a right to reasonable future medical treatment to treat a suspected bilateral sacroiliac sprain and left sided piriformis syndrome, to include physical therapy, trigger point injections, and if deemed necessary by the treater, Botox injections into Claimant's left piriformis muscle.

6. Claimant has proven a right to temporary total disability benefits for the time he was unable to work due to his industrial accident until he no longer qualifies for them.

7. Claimant has proven a right to attorney fees under Idaho Code § 72-804 for the legal fees incurred in obtaining an EMG/nerve conduction study with Dr. Janes. Unless the parties can agree on an amount for reasonable attorney 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. In particular, the parties *must* discuss the factors set forth by the Idaho Supreme Court *Hogaboom v. Economy Mattress,* 107 Idaho 13, 684 P.2d 990 (1984). The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. 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 object 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.

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

DATED this 8th day of December, 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 8th day of December, 2016, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND 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

___/s/____________________________