BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DANIEL SHARP, Claimant, v. THOMAS BROTHERS PLUMBING, Employer, and TRUCK INSURANCE EXCHANGE, Surety, Defendants.	**IC 2015-033733** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed September 8, 2020**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Coeur d'Alene on March 11, 2019. Claimant, Daniel Sharp, was present in person and represented by Stephen J. Nemec, of Coeur d'Alene. Defendant Employer, Thomas Brothers Plumbing [Thomas Brothers], and Defendant Surety, Truck Insurance Exchange, were represented by Emma R. Wilson, of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on January 9, 2020.

ISSUES

The issues to be decided were narrowed by the parties and include:[1]

[1] Although listed in the Notice of Hearing and confirmed at hearing, Defendants did not brief the application of Idaho Code § 72-406 hence this issue is considered abandoned.

1. Claimant's entitlement to additional medical care pursuant to Idaho Code §72-432, and the extent thereof.

2. The extent of Claimant's permanent disability, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine, or otherwise.

3. Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

All parties acknowledge Claimant suffered an industrial accident on August 22, 2015, and has sustained a permanent impairment of 14% of the whole person due to his industrial accident. Claimant asserts he is entitled to additional medical benefits and is totally permanently disabled. Furthermore, he requests an award of attorney fees for Defendants' unreasonable denial of benefits. Defendants assert Claimant has sustained permanent disability of 21% inclusive of his 14% permanent impairment, has not shown entitlement to additional benefits, and their denial of benefits was reasonable.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file.
2. Claimant's Exhibits A through F and Defendants' Exhibits 1 through 20, admitted at hearing.
3. The post-hearing deposition testimony of John McNulty, M.D., taken by Claimant on April 23, 2019.
4. The post-hearing deposition testimony of Scott Magnuson, M.D., taken by Claimant on April 26, 2019.

5. The post-hearing deposition testimony of Denise Love, ARNP, taken by Claimant on April 26, 2019.
6. The post-hearing deposition testimony of Douglas Crum, CDMS, taken by Claimant on May 22, 2019.
7. The post-hearing deposition testimony of Rodde D. Cox, M.D., taken by Defendants on June 25, 2019.
8. The post-hearing deposition testimony of Nancy J. Collins, Ph.D., taken by Defendants on September 25, 2019.

All outstanding objections are overruled and motions to strike are denied.

The undersigned Commissioners have reviewed the proposed decision authored by the Referee and disagree with the treatment given by the Referee to the application of Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012), to these facts. Accordingly, the Commission hereby issues its own findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. **Background**. Claimant was born in 1976 and was raised in central Oregon. He was 42 years old and resided in Post Falls at the time of the hearing. He is right-handed.

2. Claimant graduated from Crook County High School in Prineville, Oregon in 1994. After high school he worked for a lumber company pulling green chain, planer chain, and operating a sticker stacker, resaw, and edger. In 2004, Claimant began attending a community college. He attended four years of technical school and on-the-job training to become a plumber. In approximately 2006, he moved to Idaho where he completed his certification as a journeyman plumber. Thereafter he worked as a plumber in Idaho, Oregon, and briefly in Alaska. Claimant

was unemployed and received unemployment benefits from August 2008 until December 2010, and in 2013 and 2014.

3. In July 2014, Claimant began work for Thomas Brothers as a plumber. His responsibilities included all aspects of plumbing and required lifting over 100 pounds. He supervised as many as four employees. Claimant interacted with customers daily, prepared hand-written invoices, and provided similar paperwork.

4. **Industrial accident and treatment.** On August 22, 2015, Claimant was finishing a residential shower valve change out. He stood up and turned and felt a pop and immediate pain in his low back that radiated into his right leg. At the time of the accident he was earning approximately $17.00 per hour and $717.92 per week. He timely reported the accident. Claimant has not worked since the day of his accident.

5. On August 23, 2015, Claimant sought medical treatment. Robert Brinton, M.D., examined Claimant and diagnosed lumbosacral strain/sprain. Claimant was five feet six inches tall and weighed 250 pounds. Dr. Brinton noted morbid obesity. Exhibit 3, p. 9. A subsequent lumbar MRI revealed a large L5-S1 disc protrusion. Claimant was referred to neurosurgeon, William Ganz, M.D.

6. On September 4, 2015, Dr. Ganz examined Claimant and recommended immediate surgery. Dr. Ganz performed a right L5-S1 hemilaminotomy and microdiscectomy that same day. He noted that Claimant was five feet six inches tall and weighed 257 pounds. Claimant attended physical therapy post-surgery and his pain and mobility improved. On October 7, 2015, Claimant reported his acute pain had resolved and he had occasional discomfort in the right lower extremity and new left leg numbness to the knee consistent with the distribution of the left lateral femoral cutaneous nerve. At physical therapy in October and November he reported he was walking better.

In December 2015, he reported increasing low back and bilateral lower extremity pain. He underwent a repeat lumbar MRI on December 13, 2015, that showed enhancing epidural tissue surrounding the exiting right S1 nerve root but no recurrent disc protrusion or right neural foraminal encroachment.

7. On January 7, 2016, Claimant attended his final appointment with Dr. Ganz, reporting chronic low back pain and bilateral lower extremity pain. Dr. Ganz noted Claimant's lower extremity pain complaints did not follow an anatomic radicular distribution and observed: "Even mild palpation of his low back causes disproportionate pain response." Exhibit A, p. 1. Dr. Ganz noted Claimant was five feet six inches tall, weighed 284 pounds, and recorded:

> Mr. Sharp returns to neurosurgery office today in follow-up now four months following his emergency right L5-S1 hemilaminectomy and microdiscectomy for large disc herniation causing early symptoms of cauda equina on 09/04/15. Before surgery I told him the importance of losing weight after surgery. Unfortunately he did not lose weight and, in fact, he has gained weight significantly, now 30 lbs. more than when we did the surgery. Today he complains of low back pain and pain going down the back of both legs, worse on the left than the right. It does not follow a specific radicular distribution and the majority of the pain is in his low back.
>
> ….
>
> Mr. Sharp has chronic low back and bilateral lower extremity pain due to severe muscle spasm. The problem is that he will not lose weight. Since surgery he has gained over 30 lbs. and has made no significant effort to help himself try losing weight despite this advice. …. I have again explained the importance of serious immediate weight loss or he is going to end up with a complication to his surgery, most likely a subluxation of the L5 to S1 level because of his obesity. He does understand this clearly. I did explain it bluntly to him what he was facing if he did not deal with his weight problem in a constructive manner.

Exhibit A, p. 1.

8. On February 9, 2016, Claimant was examined by Spencer Greendyke, M.D., at Defendants' request. Dr. Greendyke diagnosed pre-existing morbid obesity, twisting lumbar spine injury, right L5-S1 hemilaminectomy and discectomy, and persistent subjective complaints of low back and bilateral radicular lower extremity pain unsubstantiated by repeat lumbar MRI of

December 13, 2015. Claimant weighed 280 pounds. Dr. Greendyke recorded Claimant's weight contributed to his subjective complaints of low back pain and apportioned 60% of his ongoing pain complaints to his obesity and 40% to the industrial accident. Dr. Greendyke concluded Claimant had not reached maximum medical improvement and recommended core strengthening, pain management, and weight loss. Claimant continued with physical therapy.

9. On February 10, 2016, Claimant presented to Shaun Brancheau, D.O., for pain management. Dr. Brancheau noted that regarding Claimant's back pain "the problem is fluctuating. It occurs persistently. Location of pain is lower back. There is no radiation of pain. The patient describes the pain as an ache. Context: bending over. …. Has been taking his wife's cyclobenzaprine, which he feels helps better than Methocarbamol and would like to change. …. [R]ecommend weight loss for symptoms management." Exhibit C, pp. 26, 28. A board of pharmacy review indicated Claimant had received eight prescriptions for controlled substances from eight different providers in the past six months, including tramadol, oxycodone, and hydrocodone. Claimant demonstrated inconsistent muscle strength in his lower extremities. Dr. Brancheau recorded:

> When testing lower extremity strength patient could not move his legs below the knees in flexion or extension, but then I applied pressure and he was able to fully resist my pressure in both planes of flexion and extension. I feel this is mont [sic] consistent with malingering on this part of the exam. Patient later fully extended his legs on his own while sitting at the table not being examined.
> ….
>
> Not sure why patient would have inconsistent muscle strength in LE> concerning for feigned weakness. Will proceed with caution.

Exhibit C, p. 28. Dr. Brancheau authorized refills of Claimant's medications substituting cyclobenzaprine for methocarbamol. Claimant did not return to Dr. Brancheau for approximately 18 months.

10. On May 16, 2016, Claimant began pain management treatment with Scott Magnuson, M.D. Dr. Magnuson performed lumbar epidural steroid injections that provided no relief. Claimant later reported that he could barely walk for several days after one such injection. Thereafter, Claimant was examined periodically by Dr. Magnuson's nurse Denise Love, ARNP, who provided prescription medications. Claimant continued with regular physical therapy.

11. On July 20, 2016, Claimant underwent an EMG that documented right S1 radiculopathy and no L5 radiculopathy. Claimant complained of right lower extremity pain and of "somewhat similar symptoms on the left but of lesser degree." Exhibit D, p. 182. However, the study found no evidence of any left-sided lumbar radiculopathy. Claimant continued receiving physical therapy.

12. On August 8, 2016, Dr. Magnuson referred Claimant to neurosurgeon Katie Huynh, D.O., for surgical consultation. On August 27, 2016, Claimant underwent another lumbar MRI that showed no evidence of recurrent disc protrusion, no central canal narrowing, and stable mild bilateral L5-S1 neural foraminal narrowing. Exhibit B, p. 7. On September 8, 2016, Dr. Huynh evaluated Claimant and noted he had gained significant weight since his previous lumbar MRI in December 2015—even though Dr. Ganz had instructed Claimant to lose 50 pounds. Dr. Huynh indicated that further surgical intervention was not indicated as the risk outweighed the possible benefits due to Claimant's morbid obesity. She encouraged weight loss.

13. On September 20, 2016, Claimant's physical therapy ceased. He continued treating periodically with Nurse Love for prescription medications and pain management. On September 27, 2016, Nurse Love noted Claimant's September 1, 2016 urine drug screen documented use of hydrocodone—a controlled substance for which he had no prescription. He could not account for this but she gave him "the benefit of the doubt." Exhibit D, pp. 34, 174-175.

14. On October 28, 2016, Claimant was examined by Rodde Cox, M.D., at Defendants' request. Dr. Cox diagnosed right S1 radiculopathy related to the industrial accident and also noted significant symptom magnification, chronic pain syndrome, and probable depression. Concerning Claimant's probable depression, Dr. Cox observed: "The examinee has significant morbid obesity and is extremely deconditioned. This is likely multifactorial but his obesity is likely a significant contributing factor." Exhibit 7, p. 20. Dr. Cox opined Claimant's physical therapy had been excessive. He concluded that Claimant had reached maximum medical improvement and rated his permanent impairment at 14% of the whole person. He recommended anti-inflammatories and weening off narcotics. Dr. Cox imposed permanent work restrictions of lifting no more than 50 pounds occasionally and avoiding repetitive bending, twisting, stooping, or prolonged exposure to low frequency vibration.

15. On November 30, 2016, Nurse Love recorded Claimant's report that he could walk only 30 yards and carry no more than 10 pounds. She noted Claimant was trying to lose weight as that seemed to be the only option for controlling his pain.

16. In January 2017, Claimant listed his weight as 315 pounds on a Social Security Disability application. His application was denied.

17. On June 1, 2017, Claimant reported to Nurse Love that he was moving around a bit better and had been walking every day. She discussed his need to continue his weight loss efforts:

> Losing weight is really the only option he has in trying to control his pain and worsening of his overall condition. He has already been seen by surgeon who has determined that no further surgery is indicated at this time. Patient is interested in either a dietitian or medical weight loss and I think this is a good idea as it is vitally important in getting some weight off for not only his overall health but preserving his spine and reducing pain for as long as possible. Patient is agreeable to this and will check with insurance and what type of program he is interested in. Will send RX or notes when he lets us know who he would like to see.

Exhibit D, p. 62.

18. Nurse Love's note of August 29, 2017, recorded:

> He reports he is on keto diet, but is not making consistent forward progress. He will lose some, then gain some. This is concerning to me, and I feel very important over the long term in not only his overall health but with long-term pain management, as excess weight is creating an extreme amount of added pressure to his injured spine. Patient is open to dietary consult. I will see if I can find where I can send him for this.

Exhibit D, p. 76. Claimant weighed 337 pounds.

19. On September 26, 2017, Claimant returned to Nurse Love who recorded:

> He reportedly has been trying several different things to lose weight without success. I had tried to send him to dietitian for consult to have this evaluated as clearly his weight is a problem in terms of contributing to his LBP [low back pain]. This was denied by his insurance.

Exhibit D, page 82. Claimant weighed 334 pounds.

20. On October 19, 2017, Claimant returned to Dr. Brancheau, who assessed hypertension and back pain. Dr. Brancheau noted that regarding Claimant's back pain "the problem is worsening. It occurs persistently. Location of pain is lower back. There is no radiation of pain. The patient describes the pain as an ache. Additional information: co worsening spasms." Exhibit C, p. 17. Doctor Brancheau again encouraged weight loss.

21. On November 3, 2017, Dr. Cox examined Claimant again at Defendants' request and diagnosed right S1 radiculopathy, symptom magnification, somatic pain disorder, probable depression, and morbid obesity. Dr. Cox reaffirmed that Claimant had reached maximum medical improvement as of October 28, 2016 and had sustained a 14% whole person permanent impairment. He reaffirmed permanent restrictions of lifting no more than 50 pounds occasionally and avoiding repetitive bending, twisting, stooping, or prolonged exposure to low frequency vibration.

22. Nurse Love's note of March 14, 2018, provides:

> The patient rates his current pain at a 8/10, and his PG score is a 9/10. To relieve his symptoms we're prescribing (1) 7.5/325mg hydrocodone QID PRN, Cymbalta 30mg BID, and (3) 300mg gabapentin TID. He reports that this analgesic regimen provides him with approximately 80% relief of his symptoms without any adverse effects. The patient reports improvement in function attributed to his medication regimen. He states, "usually helps to move around more."

Exhibit D, p. 90. Claimant weighed 346 pounds.

23. On April 4, 2018, Claimant presented to Nurse Love who recorded: "I had been hoping he would make more progress in weight loss by now, which would likely help him quite a bit." Exhibit D, p. 100. Claimant weighed 355 pounds.

24. On June 28, 2018, Dr. Brancheau counseled Claimant regarding his prescription medications including gabapentin, cyclobenzaprine, and ibuprofen. He noted Claimant weighed 358 pounds and encouraged weight loss.

25. On July 30, 2018, Nurse Love recorded "overall his pain medication really is [sic] about 40% of his symptoms allowing him to move around the house better and to his daily activities and chores. …. He reports that he is family [sic] able to get into a dietitian for consult. He hasn't [sic] scheduled for Aug 9." Exhibit D, p. 119. Claimant then weighed 364 pounds. Office notes of October 23, 2018 indicate that Claimant reported a 40% reduction in his pain due to his prescription medications and: "He is recently started walking program in a local park with family member. He is using a walker. He will have to stop and rest periodically due to both pain and being out of shape. He states the last session took him about 2 hours to go 1/2 mile." Exhibit D, p. 133. Claimant then weighed 360 pounds.

26. After two unsuccessful Social Security Disability applications, on October 30, 2018 Claimant attended a Social Security Disability hearing and was subsequently awarded Social Security disability benefits on November 19, 2018. One specifically named factor directly contributing to his Social Security finding of disability was his obesity. The administrative

law judge accorded great weight to the opinion of internist Lynn Jahnke, M.D., who concluded that "the claimant's extreme Level III obesity compounded the impairment from his lumbar spine." Exhibit 17, p. 64.

27. On January 15, 2019, Claimant reported to Nurse Love that he was on Social Security Disability and Medicare. Claimant weighed 370 pounds. Exhibit D, p. 145.

28. On January 30, 2019, Claimant was examined by John McNulty, M.D. Dr. McNulty recorded that Claimant was five feet seven inches tall and weighed 362 pounds. Dr. McNulty agreed with a 14% whole person permanent impairment rating attributable to Claimant's work injury. He further opined Claimant was limited to five minutes of continuous walking/standing, 20 minutes of continuous sitting, lifting no more than 10 pounds from waist to shoulder, and was unable to stoop, bend, crawl, or lift from floor level. He opined Claimant could only work four hours per day and needed an occupation that allowed him to change positions frequently.

29. Claimant believes Dr. McNulty's restrictions are consistent with his abilities. Claimant testified he cannot lift 50 pounds, that a gallon of milk is about all he can lift—and not from floor level. He testified that he could sit continuously for only approximately 20 minutes.

30. **Condition at the time of hearing.** At the time of hearing in March 2019, Claimant continued to receive Social Security Disability benefits and was presenting periodically to Dr. Brancheau for ongoing pain management medications.

31. At hearing Claimant used a cane. No physician has prescribed the use of a cane. Claimant testified he continued to suffer back pain and was unable to work. He complained of burning stabbing pain in his back and down his left leg to the knee. He testified he exercised daily by walking the length of his 3400 square foot house. Claimant testified he had difficulty sleeping

and slept two hours at a time from approximately 4:00am until noon. He spent his day watching TV while lying on his stomach to relieve his back pain.

32. Although Dr. McNulty opined, and Claimant concurred, that he was limited to 20 minutes of continuous sitting, Claimant testified at hearing:

> A. …. I have hunted the last few years with my dad, but that mainly consists of me sitting in a chair watching for something to come by.
>
> Q. (by Ms. Wilson) And have you been able—have you shot anything?
>
> A. I have.

Exhibit 14, p. 15.

33. Claimant has gained substantial weight since his accident. He was critical of Dr. Ganz who performed his lumbar surgery:

> Q. (by Ms. Wilson) How did you like the treatment that Dr. Ganz provided?
>
> A. I didn't.
>
> Q. Can you explain for me, like how you felt about him?
>
> A. Dr. Ganz tried to—he said that my symptoms were by being overweight, and didn't want to–he didn't seem to want to help anything else to get done.
>
> ….
>
> Q. So, it sounds like Dr. Ganz recommended that you lose weight.
>
> A. Yes.
> ….
>
> Q. Have you had any success?
>
> A. No.
>
> Q. What type of things are you doing to try to lose weight?
>
> A. I've tried different dieting techniques. And I'm unable to exercise, so I've--that kind of puts that out. So, basically, diet is all I have, and I'm not very good at that, myself, obviously.

Q. How much do you weigh currently?

A. I don't know.

Exhibit 14, p. 13.

34. While being critical of Dr. Ganz's refusal to consider further surgery and recommendation for weight loss, Claimant testified of his visit to Dr. Huynh for a second opinion:

Q. (by Ms. Wilson) What did she tell you about what's going on?

A. She told me that I had a reherniated disc[2] and scar tissue surrounding both nerve roots at the L5-S1 and that I was, of course, overweight, as all doctors say—if you're overweight, they tell you—and that there really wasn't anything to be done.

Q. She didn't recommend surgery?

A. No.

Q. Did she recommend weight loss?

A. Yes.

Exhibit 14, p. 13. Thus Dr. Huynh essentially confirmed Dr. Ganz's conclusion that nothing else could be done surgically to help Claimant and that he needed to lose weight.

35. At hearing, Claimant admitted he weighed in excess of 350 pounds. From the records of Nurse Love and Dr. McNulty on January 15 and 30, 2019 respectively, the Commission concludes that at the time of hearing Claimant weighed approximately 370 pounds.

36. **Credibility.** Several items in the record reflect poorly on Claimant's credibility. Dr. Ganz, Claimant's treating surgeon, recorded lower extremity pain complaints that did not follow a specific radicular distribution. Dr. Brancheau noted Claimant had been taking his wife's cyclobenzaprine and demonstrated inconsistent muscle strength in his lower extremities to such a

[2] Claimant's December 2015 and August 2016 lumbar MRIs did not show any recurrent disc herniation.

degree that Dr. Brancheau felt it was consistent with malingering, was concerned about feigned weakness, and determined to proceed with caution. Claimant complained post-surgery of both right and left-sided lower extremity symptoms, however the 2016 EMG found no left-sided radiculopathy, only right. Nurse Love noted in September 2016 that Claimant's urine drug screen documented use of hydrocodone not prescribed and for which he could not account. Dr. Cox recorded significant symptom magnification both times he examined Claimant.

37. Claimant was evasive when questioned about his work history:

> Q. (by Ms. Wilson) Any periods that you weren't working that were longer than three months [since high school]?
>
> A. Yes.
>
> Q. What were the circumstances surrounding that?
>
> A. I don't recall.
>
> Q. I saw that you've --
>
> A. It's been a long time ago.
>
> Q. --you've received some unemployment benefits over the years, is that--
>
> A. Right.
>
> Q. --correct?
>
> A. Yes.
>
> Q. And do you recall kind of the periods of time when you were receiving those benefits?
>
> A. I don't recall.
>
> Q. And have you been fired from any jobs?
>
> A. Yes.
>
> Q. What job was it?
>
> A. Mike Patterson Plumbing. I believe another one or two, I don't remember.

….

Q. What were the circumstances surrounding the termination?

A. Missing work, I believe is what it was.

Exhibit 14, p. 9.

38. Claimant's Social Security earnings history shows he had minimal earnings in 1992, 1993, 2005, 2009, and 2012; and no earnings in 2010 and 2011. Dr. Nancy Collins observed that at the time of the accident, Claimant: "wasn't even making a median wage for a plumber. He has kind of a sporadic work history. He didn't have a lot of tenure with any one employer and that may be the reason he wasn't at a median wage earning capacity at the time he was injured." Collins Deposition, p. 12, ll. 2-7.

39. Claimant was also evasive when questioned about his driving both pre- and post-accident:

Q. (by Ms. Wilson) When you go run errands with your wife, do you drive?

A. I have sometimes.

Q. And do you have a driver's license currently?

A. No.

Q. How long have you not had one?

A. I don't recall. I don't know.

Q. What's the reason you don't have one?

A. Can't afford to go get the—pay for the—an SR-22 and then for the renewal and stuff.

Q. And how did you--

A. Reinstatement fee, I guess it's called.

Q. How did you end up without a license? Did you just not renew it or was it taken away from you?

A. I don't recall.

Q. But you are able to drive physically?

A. Short distances.

Exhibit 14, p. 15.

40. Only when directly confronted at hearing did Claimant admit that he had a driver's license when he started working for Thomas Brothers, but it was thereafter suspended for nonpayment of child support in Oregon. Nevertheless, he continued driving a work vehicle, never notified Thomas Brothers that his license had been suspended, and at the time of hearing continued to drive at times even though he had no license. Claimant responded at hearing to questions about several potential employment opportunities by emphasizing that he could not drive. Only when further questioned did he acknowledge that no doctor has restricted him from driving and his lack of a valid license is due to child support issues pre-existing his industrial accident.

41. Having observed Claimant at hearing and compared his testimony with other evidence in the record, the Referee found that he is not an entirely credible witness. To the extent Claimant's representations are contrary to other evidence of record, his representations are unpersuasive. The Referee found Claimant's credibility to be suspect and the Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

DISCUSSION AND FURTHER FINDINGS

42. 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).

43. **Medical benefits.** The first issue is Claimant's entitlement to additional medical benefits for his industrial accident. 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. Claims for medical treatment must be supported by medical evidence establishing causation. A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995).

44. In the present case, Claimant asserts Defendants are liable for additional medical benefits including consultation with a dietician and refills of prescription medications.

45. *Dietitian referral*. Claimant requests referral to a dietician at Defendants' expense. He asserts that Nurse Love referred him to a dietician. Defendants allege Nurse Love recommended Claimant lose weight and talked with him about a dietician but never provided Surety with a referral to a dietician. Exhibit D, p. 62. Moreover, Defendants dispute Claimant's request for medical treatment for conditions unrelated to his industrial accident and assert he has not established his need for a dietitian referral is reasonable and necessary medical treatment related to his industrial accident.

46. Claimant, who at five feet six inches tall was already 250 pounds and morbidly obese at the time of his accident, gained a total of approximately 120 pounds post-accident and when examined by Nurse Love on January 15, 2019, he weighed 370 pounds. Exhibit D, p. 145.

47. No medical expert has attributed Claimant's post-accident 120-pound weight gain to his industrial accident. Dr. Cox specifically declined to do so. Claimant has not proven that his post-accident weight gain was caused by his industrial accident. He requests consultation with a dietitian; however, Defendants are only liable for reasonable medical care related to the industrial accident. Dr. Cox emphasized Claimant did not need a dietician referral on an industrial basis. Cox Deposition, p. 32. An "employer cannot be held liable for medical expenses unrelated to any on-the-job accident or occupational disease." Henderson v. McCain Foods, Inc., 142 Idaho 559, 563, 130 P.3d 1097, 1102 (2006). Claimant has not proven he is entitled to a dietitian referral at Defendants' expense.

48. *Prescription refills*. Claimant requests payment of pain management medication prescribed by Nurse Love. "Due to the failure of the surety to timely authorize prescription medication refills, Claimant has had to use Medicaid to obtain refills for hydrocodone, methocarbamol, gabapentin, ibuprofen, cyclobenzaprine, and Butrans patches, all of which have been prescribed by treating physicians at Pain Management of North Idaho." Claimant's Opening Brief, p. 10. He requests payment at the full invoiced rate pursuant to Neel v. Western Construction, Inc., 147 Idaho 146, 206 P.3d 852 (2009). Defendants deny that Neel is applicable to medical expenses Claimant incurred for which Defendants were never billed because such expenses were not denied by Defendants. Defendants' Responsive Brief, p. 2.

49. At hearing Claimant testified:

> Q. (by Mr. Nemec) OK. And during the course of this claim, did you ever have difficulty refilling those prescription medications?

> A. Numerous times.
>
> Q. OK. Can you describe that?
>
> A. I'd call in for my prescription refill, or the doctor would call in the prescription refill, and then my pharmacy would contact me and told me that—that the insurance denied the claim on them and that I needed to call the number on the back of my prescription card, either that or they had told me that there was a note stating to call the claims manager. And they couldn't get ahold of the claims manager most of the time. Or when I called on the back of the—the number off the back, they told me that the claims manager had to be notified, and yet I couldn't reach them, either.
>
> Q. OK. Do you have an estimate as to how many times you had to go through this process?
>
> A. 20 or more.

Transcript, p. 31, l. 10 through p. 32, l. 3.

50. Nurse Love's April 4, 2018, note recorded:

> [W]e're prescribing (1) 7.5/325mg hydrocodone QID PRN, Flexeril 10mg pid PRN, Cymbalta 30mg QID, and (3) 300mg gabapentin TID. He reports that this analgesic regimen provides him with approximately 10% relief of his symptoms without any adverse effects. The patient reports improving and function attributable to his medication regimen. .... The patient received a letter of notice that his workers comp insurance is no longer going to be covering his pain medication. He has a lawyer that he said is helping him in handling his workers comp.

Exhibit D, p. 97. However, at hearing the following exchange ensued:

> Q. (by Ms. Wilson) I'm going to ask you about a chart note from Miss Love. And it's dated April 4th, 2018. …. In this report, it states, "patient received a letter of notice that his workers comp insurance is no longer going to be covering his pain medication. He has a lawyer that he said is going to help him with handling work comp." Is that something that you told Miss Love?
>
> A. It could have been. I don't recall.
>
> Q. And did you receive some sort of letter in the mail stating that your pain medication would not be covered?
>
> A. No. I just received from all my pharmacies that kept trying to put it through, through CorVel, and was denied.
>
> Q. Who told you that it was denied?

A. The pharmacy.

Transcript, p. 55, ll. 9-25. The record establishes that Defendants paid for one prescribed medication on April 7, 2018. Transcript, p. 57; Exhibit 9, p. 2.

51. Claimant testified he directed his pharmacy to bill Medicaid for refills prescribed by Nurse Love when he was unable to reach Defendants' claims manager:

> Q. (by Ms. Wilson) There's a note in Miss Love's chart note from May 8th of 2018—and this is Claimant's Exhibit D, page 108—where it states, "as I understand it, his workers' comp is no longer paying for his medication for him and will be processing through his regular insurance, Medicaid." And so what you're saying is you didn't talk with Nurse Love about processing your medication through Medicaid?
>
> A. She doesn't—she—all she does is call in the prescriptions or send the prescriptions via email, I believe, to the pharmacy. And the pharmacy is who fills them and bills—who--
>
> Q. Whoever?
>
> A. –whichever—whoever will pick it up.
>
> Q. OK. And so based on what I read to you, is it your understanding that Nurse Love was talking to the pharmacy about who to bill?
>
> A. No. It was me speaking with the pharmacy.
>
> Q. OK. So you told the pharmacy to bill Medicaid, then?
>
> A. If—after numerous attempts to contact the insurance—the workers' comp insurance company, if that fails, I can't sit and wait for weeks waiting to try to get ahold of somebody for medications I need now.
>
> Q. Well, again, at the time of your April 4th appointment, it does reflect that medications on that date were authorized.
>
> A. Certain---certain ones were. There's certain ones—namely, at this point, my Cymbalta comes to mind as to we were trying for almost 2 weeks to get the insurance company to pick it up. And I ended up having withdrawal symptoms, which I—I didn't realize there was withdrawal symptoms, because it felt like I was—hadn't like—my equilibrium was off. I was extremely dizzy I was extremity [sic] dizzy, couldn't hardly stand up. So I actually went to the emergency room, because I thought there might be something wrong with my inner ear. And at that point—that point, they couldn't figure out—they never even figured out in the emergency room what it was. But they'd set an appointment with my

> family practitioner. And I—as soon as I went and seen Dr. Brancheau, he had stated and looked and said, “oh, you're going through, basically, withdrawals from being off the Cymbalta for so long.” And he went—he prescribed another one that Medicaid would pay for. And, thankfully, at that time, Medicaid actually started, picked up my Cymbalta one on that same day that he had prescribed the other medication. So I was able to get back on my medication.

Transcript, p. 57, l. 22 through p. 59, l. 22.

52. Claimant’s account is corroborated by April 15, 2018 emergency room records confirming he was diagnosed with benign positional vertigo. Exhibit 4, p. 217. His account is further corroborated by Dr. Brancheau’s office notes of April 16, 2018, which provide: “The patient presents with depressed mood. Additional information: insurance deneid [sic] cymbalta, wound up in ER durring [sic] withdrawal. …. Patient Plan unable to get cymbalta for chronic pain and subsequent mood DO w insurance will change to venlafaxine, please take daily, return 1-2 months for recheck mood and pain.” Exhibit C, pp. 5, 8.

53. February 20, 2019 correspondence from Defendants’ counsel indicates:

> Following Mr. Sharp's deposition last month, I looked into the issue of payment for his medical treatment. As you recall, Mr. Sharp did not know whether the surety or Medicaid was paying for his ongoing pain management. I determined the surety has paid for recent treatment with Denise Love, who is prescribing his pain medications, but I confirmed they have not been paying for any prescription medications. Prescriptions related to his injury that are being prescribed by Denise Love are not denied, but it appears they are being billed directly to Medicaid. We contacted Mr. Sharp’s pharmacy to authorize payment for the medications that Denise Love outlined in her 1/14/2019 letter, and while we were able to authorize future medications, the pharmacy said it could not bill us for past prescriptions he filled that were paid for by Medicaid.
>
> In reviewing the prior Medicaid ledger you sent, I see that it contains treatment for personal conditions unrelated to Mr. Sharp’s industrial injury, including an emergency department visit on 10/19/2017 for a non-industrial motor vehicle accident, an ingrown toenail, and obstructive sleep apnea, including various medical supplies related to this condition. Therefore, I do not concede the total amount outlined in the 7/10/2018 letter from the Department of Health and Welfare is an accurate representation of past expenses owed that are related to Mr. Sharp’s injury for the time period identified.

Exhibit 15. p. 2.

54. Defendants assert: "the full list of charges from Medicaid that Claimant had provided was not an accurate representation of past expenses related to his claim because it included numerous unrelated charges." Defendants' Responsive Brief, p. 4.

55. Defendants are not responsible for past medical charges unrelated to the industrial accident. However, Defendants are responsible for reasonable medical treatment including prescription medications related to Claimant's industrial accident. Claimant's testimony that the claims manager failed to respond to calls requesting refill authorization is corroborated in part by Dr. Brancheau's records. Defendants acknowledge they did not pay for some of the pain medications related to Claimant's industrial accident prescribed by Nurse Love, part of which—unbeknownst to Defendants at the time—were billed directly to Medicaid as a consequence of Defendants' delay in authorizing refills. Defendants' failure to pay the past pharmacy charges related to Claimant's industrial accident appearing in the list they have acknowledged receiving no later than February 20, 2019, constitutes a denial. Pursuant to Neel, Defendants are liable at the full invoiced rate for the listed prescription refills for which they have not paid and which are related to Claimant's industrial accident.

56. Claimant has not proven he is entitled to additional reasonable medical treatment for referral to a dietitian. Claimant has proven that, pursuant to Neel, Defendants are liable at the full invoiced rate for the listed prescription refills for which they have not paid and which are related to Claimant's industrial accident.

57. **Permanent disability**. The next issue is the extent of Claimant's permanent disability, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent

impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995). The proper date for disability analysis is, generally, the date of the hearing, not the date that maximum medical improvement has been reached. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012).

58. All parties herein agree Claimant has suffered a permanent impairment of 14% of the whole person due to his industrial accident. Claimant agrees with Dr. Cox's opinion that he reached maximum medical improvement by October 28, 2016. To evaluate Claimant's permanent disability several items merit examination including the physical restrictions resulting from his permanent impairment and his potential employment opportunities—particularly as identified by vocational experts.

59. <u>Work restrictions.</u> Prior to the August 22, 2015 work accident, no medical provider had discussed or imposed any restrictions on Claimant's work or other activities. Following the accident several medical practitioners have addressed his work restrictions.

60. *Dr. Cox*. Rodde Cox, M.D., is a board-certified physiatrist who specializes in physical medicine and rehabilitation. He examined Claimant on October 28, 2016, and November 3, 2017, at Defendants' request. On both occasions Dr. Cox found Claimant reached maximum medical improvement by October 28, 2016 and provided permanent work restrictions of lifting no more than 50 pounds occasionally and avoiding repetitive bending, twisting, stooping, or prolonged exposure to low frequency vibration.

61. Dr. Cox determined restrictions based more upon objective medical evidence rather than Claimant's subjective complaints. Dr. Cox based his work restrictions on:

> past experience in dealing with injured workers, … the objective findings, which was the absent reflex on the right at S1, and based on expected outcomes from this type of injury; looking at other resources, such as official disability guidelines and those sorts of things, in terms of what would be an expected outcome in this type of scenario where someone had a lumbar spine surgery with residual radiculopathy.

Cox Deposition, p. 10, l. 23 through p. 11, l. 6.

62. During Dr. Cox's evaluations of Claimant, he noted diffuse give-way weakness in Claimant's legs not following an anatomic distribution, inconsistent straight-leg raise testing, overreaction, and back pain complaints with hip rotation. He diagnosed Claimant with symptom magnification and somatic symptom disorder. Exhibit 7, pp. 17-19, 43. Dr. Cox opined Claimant's subjective symptoms were "over and above what the objective findings were." Cox Deposition, p. 11, ll. 20-22. Dr. Cox noted that in the November 3, 2017 examination, Claimant continued to demonstrate absent right ankle jerk, diminished sensation in the right S1 distribution,

and non-physiologic findings of giveaway weakness and inconsistent straight leg raise testing. Cox Deposition, p. 12.

63. *Denise Love*. Denise Love, ARNP, first evaluated Claimant in mid-2016 and thereafter saw him periodically to manage his pain medications. In November 2016, she imposed restrictions of occasionally lifting 20 pounds and avoiding repetitive bending, twisting and stooping.

64. Nurse Love completed a check-the-box questionnaire on October 25, 2018, as part of Claimant's Social Security Disability application. She indicated Claimant "is unable to perform any type of sustained work activity during a normal workday/work week." Exhibit D, p. 155. She noted Claimant's report that in a typical day he alternated sitting and standing for two to three hours before having to lie down for one to two hours to relieve back pain. The supportive objective medical evidence she cited included Claimant's July 27, 2016 lumbar MRI, Dr. Magnuson's May 16, 2016 notes, and Dr. Huynh's September 8, 2016 description of scar tissue surrounding the S1 nerve root. Nurse Love reported:

> I have read Dr. Cox [sic] report. I agree with much of his assessment. I do agree he is at maximum medical improvement. I agree with his description of chronic pain and chronic pain disorder. I agree that the patient has a component of depression, as above. I agree that the patient has significant morbid obesity and deconditioning. Since this report in 2016 was done, this has only gotten worse.
>
> I don't agree that the patient could lift 50 pounds on an occasional basis, and I would not ask him to try. I believe this would put significant stress through his back, of which he is not conditioned to handle, and with a vulnerable back, could potentially cause further injury. I have no way to actually test weight loads/limits in my office, but I would think a reasonable amount of weight for Mr. Sharp to be able to lift on an occasional basis would be 20 pounds, in his current condition. I agree he should avoid repetitive bending, twisting, and stopping [sic] and avoid low frequency vibration.
> ....
>
> By your work criteria of sustainability of 8 hour days, 40 hours a week, in his current condition, I do not think he can do even sedentary work. He can do the tasks under your

> listing of sedentary work, but in 2 hour intervals with required rest breaks of potentially up to an hour.

Exhibit D, p. 157.

65. On January 14, 2019, Nurse Love wrote an Insurance Letter stating among other things:

> The objective evidence in this case is the known injury, surgical reports, post-surgical MRI findings that correlate well with office exams. He also has had a second opinion by Dr. Huynh, neurosurgeon. In her report she describes scar tissue around the surgical site that continues to irritate the nerve in question. No further surgery is indicated in this case at this time, as she has reported any improvement would be temporary, and likely will worsen his overall condition very quickly.

Exhibit D, p. 141.

66. During her post-hearing deposition, Nurse Love opined that Dr. McNulty's opinion more accurately stated Claimant's restrictions.

67. *Dr. Magnuson*. Scott Magnuson, M.D., is board certified in anesthesiology and pain management. He first examined Claimant in May 2016 and provided two epidural steroid injections which did not reduce his back pain. Dr. Magnuson testified that Claimant's MRI scans documented epidural scarring, and EMG testing demonstrated ongoing S1 radiculopathy consistent with Claimant's accident and epidural scarring. Dr. Magnuson testified Claimant had been referred for dietary counseling to help with weight control. Magnuson Deposition, p. 9. At the time of his post-hearing deposition, Dr. Magnuson essentially agreed with Dr. McNulty's IME and testified it most accurately reflected Claimant's status. Magnuson Deposition, p. 11. Dr. Magnuson did not recall any concerns with symptom magnification but readily acknowledged that he had not evaluated Claimant since June 2016. Magnuson Deposition, p. 16.

68. *Dr. McNulty*. John McNulty, M.D., is a board certified orthopedic surgeon who examined Claimant on January 30, 2019, at his counsel's request. Dr. McNulty restricted Claimant

to lifting 10 pounds from waist to shoulder level. He opined Claimant could work only four hours per day and should avoid bending, stooping, kneeling, and crawling. Dr. McNulty also imposed restrictions of five minutes of continuous walking/standing and 20 minutes of continuous sitting. He testified that the risk to Claimant from exceeding these restrictions was "Just increased pain, discomfort." McNulty Deposition, p. 15, l. 12. Dr. McNulty referenced Claimant's recent trips to Moscow and Oregon and testified that he could sit longer while driving if he chose:

> these trips are possible. It's a matter of—its the matter of how much discomfort, pain, that these people want to put up with to accomplish their goal of getting in the car and driving somewhere. And, again, there's going to be no permanent change in his—his condition. It's just a matter of how much discomfort they want to put up with.

McNulty Deposition, p. 19, ll. 9-15.

69. *Evaluating the restriction opinions.* Defendants correctly cite Bittick v. Hennis, Inc., 2010 WL 3070010 (Idaho Ind. Com. July 7, 2010), for the proposition that obesity is a temporary condition and not a disease. As such, it is not a basis for PPI or disability. However, review of other Commission decisions reflects that the Commission's treatment of obesity has been far from uniform.[3] We need not devote more attention to the general treatment of obesity in

[3] Cunningham v. State, Industrial Special Indemnity Fund, IC 2003-516713 (Idaho Ind. Com. February 23, 2007), was cited in Bittick as supporting the ruling in that case. In Cunningham, claimant suffered from persistent, longstanding obesity. The Commission recognized that while obesity is a medical condition which impacts health, it is not permanent and cannot therefore be the basis for an award of impairment. *Id.* at ¶28. The Commission's decision in this regard may have been influenced by the fact that in the year prior to hearing the claimant had managed to lose 68 pounds. *Id.*

In Robison v. J.R. Simplot Co., 90-698220 (Idaho Ind. Com. January 11, 1993), claimant suffered from longstanding obesity, recalcitrant to diet and surgery. Following a work injury, his entitlement to disability came before the Commission. The Commission treated claimant's obesity as a nonmedical factor:

> Claimant also has a severe weight problem, which we take into consideration as a nonmedical factor. Though obesity itself may not be a physical impairment, the associated conditions such as degenerative joint problems, cardiovascular and pulmonary complications, and diabetes, are physical impairments. Morbid obesity so compounds other impairments, that, as a personal, nonmedical factor, it significantly increases claimant's disability. Taking all these factors into account, as well as his permanent impairments, we conclude, as we explain below, that it would be futile for claimant to attempt to find suitable employment.

Id. The Commission found claimant to be totally and permanently disabled. Thereafter, it considered whether ISIF bore some responsibility for claimant's disability. Claimant's obesity was not considered as a pre-existing condition implicating ISIF liability because there was no showing that the condition was permanent. Therefore, obesity could not be a "permanent physical impairment" under Idaho Code § 72-332. The Commission summarized its conclusion as follows:

> Because claimant and employer presented no evidence regarding the permanence of his condition, other than evidence which requires the factfinder to speculate and draw inferences, we find that the burden of proof was not met. Though we consider claimant's obesity as a nonmedical factor in determining disability, it is not a permanent, preexisting physical impairment for which the ISIF is liable. Where the only diagnosis of claimant's obesity is in his medical records, and those records indicate that his obesity is due to overeating, we conclude that claimant's condition is not permanent because the medical records imply that he could control his overeating and lose weight.

Id.

Different treatment of obesity was given by the Commission in two other ISIF cases. In Shepherd v. Star Cedar Sales, Inc., 89-656614 (Idaho Ind. Com. June 10, 1992), the Commission found that claimant suffered a 10% impairment due to a work related low back injury, and that his pre-existing impairments totaled 28%, consisting of a pre-existing low back condition and pre-existing obesity. Claimant was eventually found to be totally and permanently disabled. On the question of ISIF liability, the Commission found that obesity was a pre-existing impairment and that it was manifest prior to the work accident. However, ISIF was not held liable for the condition since claimant failed to show that his obesity constituted a subjective hindrance to employment prior to the work accident.

Finally, in Andreason v. State, Industrial Special Indemnity Fund, 84-484053 (Idaho Ind. Com. March 13, 1990), claimant had been adjudged permanently and totally disabled in a previous decision of the Commission. On the question of whether ISIF should share responsibility for claimant's disability the Commission considered whether claimant's pre-existing obesity satisfied the requirements for ISIF liability. The Commission found that claimants pre-existing obesity warranted a 25% PPI rating. Though not addressed in the opinion, the Commission presumably found the condition to be manifest, i.e. known to claimant, on a preinjury basis. The Commission expressly found claimant's obesity to be a subjective hindrance to claimant's employability prior to the subject accident and that her obesity combined with the work accident to contribute to claimant's total and permanent disability. All elements of ISIF liability were satisfied for the pre-existing condition.

From the foregoing, obesity has been variously treated by the Commission as a nonmedical factor, a medical condition which cannnot qualify as a rateable impairment, and as a medical condition which cannot only be rated, but which can also qualify for ISIF liability. It is difficult to articulate a basis upon which to argue that obesity can be appropriately treated as a nonmedical factor when it has profound health consequences for many individuals. The Robison decision recognized the physical impact of obesity on the health of injured workers, yet somehow concluded that obesity should be treated as nonmedical, on par with a claimant's education, transferable skills, and place of residence. Idaho Code § 72-430. And yet, it is possible to imagine that medically benign obesity (assuming there is such a thing) could be appropriately treated as a nonmedical factor owing to whatever unfair stigma may attach to obese people in the eyes of potential employers. It is somewhat easier to understand how obesity may not qualify as a

the evaluation of disability since, as developed *infra*, we conclude that the debilitating aspect of Claimant's increasing obesity post MMI cannot fairly be charged to Defendants, because it is unconnected to the subject accident and is the equivalent of a subsequent intervening event.

70. In the present case, Claimant has become increasingly obese since his accident when he weighed 250 pounds. At five feet six inches tall, he has gained approximately 120 pounds since his accident until he now weighs approximately 370 pounds. The differing opinions regarding Claimant's permanent restrictions focus attention on the impact of his obesity, especially his post-accident weight gain, on his work restrictions.

71. No medical expert has attributed Claimant's obesity, including his post-accident 120-pound weight gain, to his industrial accident. Dr. Cox specifically declined to do so. He opined that Claimant's accident did not cause his obesity; rather, "the major contributing factor to obesity is diet" and he was obese and perhaps morbidly obese before his accident. Cox Deposition, p. 16, ll. 12-13. Dr. Cox did not conclude that Claimant's accident accelerated his weight gain, but his "being sedentary and sitting home where he's close to food all the time is probably a big factor in his weight gain" more than inactivity. Cox Deposition, p. 27, ll. 11-13. Dr. Cox agreed that Claimant has gained approximately 100 pounds since his accident and a dietician potentially may help educate him regarding weight loss; however, he emphasized Claimant did not need a dietician on an industrial basis. Cox Deposition, p. 32.

72. Nurse Love opined that Claimant suffers from depression, which is causally related to the work accident, and which, in turn, led to his post-accident weight gain. In a chart note dated January 14, 2019, she wrote: "…[Claimant's] depression is multifactorial now. But it was brought

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permanent impairment under Idaho Code §§ 72-422 and 72-332. It is generally not recognized by the AMA Guides to the Evaluation of Permanent Impairment as a rateable condition, and the criteria relied upon by evaluating physicians who gave ratings for obesity in the cases discussed above are not clear.

on by the injury in question, and perpetuated by his inability to return to work and support his family. There is [sic] clear, well documented correlations between obesity and depression, and one likely perpetuates the other. However, he did not have depression symptoms before this injury. I believe he needs continued treatment." Exhibit D, p. 140. The Commission finds this opinion unpersuasive. First, Nurse Love appears to acknowledge that Claimant's depression is multifactorial. However, she did not opine that the work accident is the predominate cause, as compared to all other causes combined, of Claimant's depression. See Idaho Code § 72-451(1)(c). More problematic, no foundation has been provided to establish that Nurse Love is a "psychologist or psychiatrist duly licensed", such that she is qualified to render an opinion that Claimant suffers from depression. See Idaho Code § 72-451(1)(e). Finally, her testimony does not constitute clear and convincing evidence that Claimant's depression is causally related to his work accident. See I.C. § 72-451(1)(f).

73. Based on the foregoing reasons, Claimant has not proven that his post-accident weight gain was caused by his industrial accident. It follows that the limitations and restrictions resulting from Claimant's post-accident weight gain are not caused by his industrial accident.

74. Dr. Greendyke opined in February 2016: "I do not have any doubt that the claimant's weight contributes to his subjective complaints of low back pain. While this is difficult to quantify, I would recommend apportioning 60% of his ongoing complaints to his obesity and 40% to his industrial injury." Exhibit 6, p. 10. Claimant then weighed 280 pounds. Exhibit 6, p. 7. He went on to gain another 90 pounds before Nurse Love and Dr. McNulty assigned him restrictions.

75. Nurse Love's case notes indicate that she discussed Claimant's need to continue his weight loss for preserving his spine and reducing pain for as long as possible. Exhibit D, p. 62.

She emphasized it was very important for Claimant to lose weight for long-term pain management, as excess weight was creating an extreme amount of added pressure to his injured spine and was clearly a problem contributing to his low back pain. Exhibit D, pp. 76, 82.

76. Dr. Magnuson testified that even were Claimant to lose weight now he would likely have residual nerve pain. Magnuson Deposition, p. 13. He addressed the impact of Claimant's obesity:

> Q. (by Susan Veltman) And in your initial evaluation, there is an indication the patient acknowledges that his weight is a contributing factor to pain. Does obesity or morbid obesity contribute to pain symptoms in general?
>
> A. The overall feeling is that, yes, it does. However, there was a recent study, and don't ask me to quote it, just a recent study that looked at obesity as an independent risk factor for ongoing pain after spine surgery, and actually they found that there really wasn't. Now, you know, carrying that extra weight we know produces more excessive loads on the spine, and it would stand to reason that having that extra weight certainly would have an impact on their pain. However, Mr. Nemec is right that I think the ongoing nerve issues that he had—that he has would be there regardless of his weight. But ideally, yes, weight control is part of the treatment plan, and I think would improve things.

Magnuson Deposition, p. 19, line 9 through p. 20, l. 2.

77. Dr. McNulty assigned Claimant a 10-pound lifting restriction; however, he did not examine Claimant until more than two years after he reached maximum medical improvement and had gained 120 pounds following his accident. Dr. McNulty confirmed that Claimant's obesity increased the stress on his back and affected his functioning:

> Q. (by Ms. Wilson) Are—and are any of the restrictions that you assigned impacted by his obesity?
>
> A. I would say probably, yes. The—the major basis for the restrictions are the MRI and electrodiagnostic findings, as well as the physical exam findings. So, certainly, a gentleman who is 360 pounds is going to put more stress on his back, rather than if he was 160 pounds. He's only—he's five-seven. So, yes, the obesity does—does have an effect on his ability to function.

McNulty Deposition, p. 18, ll. 1-10.

78. The records and opinions of Dr. McNulty, Nurse Love, Dr. Greendyke, and Dr. Ganz establish that Claimant's excessive weight creates excessive stress and pressure on his injured spine, contributes to and increases his low back pain, and limits his functionality. This constitutes a change in Claimant's condition not caused by his industrial accident.

79. The differing opinions and lifting restrictions of the medical experts are reasonably explained by the passage of time and the intervening condition of Claimant's 120-pound post-accident weight gain. Dr. Cox evaluated Claimant's functional ability at the time he achieved maximum medical improvement in 2016. Nurse Love and Dr. McNulty evaluated Claimant's functional ability two years later. The observations of these three practitioners vary because during the ensuing two years after reaching maximum medical improvement, Claimant ceased attending physical therapy, did not return to any type of work, became increasingly deconditioned, and gained approximately 70 more pounds. It is not altogether surprising therefore that Dr. Cox restricted Claimant to lifting 50 pounds whereas Nurse Love and Dr. McNulty restricted him to lifting 20 pounds and 10 pounds respectively when they evaluated Claimant two year later after he had gained 70 more pounds.

80. Claimant criticized Dr. Ganz for focusing on weight loss to relieve his back pain. However, Dr. Greendyke, Dr. Brancheau, Nurse Love, Dr. McNulty, and Dr. Huynh all recommended Claimant lose weight to manage his back pain. At the time of surgery, Dr. Ganz admonished Claimant to lose 50 pounds. Instead Claimant gained 30 pounds in four months. Dr. Ganz then expressly warned him to lose weight or suffer a complication to his surgery. Claimant, who at five feet six inches tall was already 250 pounds and morbidly obese at the time of his accident and surgery, did not heed his surgeon's warning and instead gained a total of approximately 120 pounds by January 15, 2019.

81. Claimant emphasizes Dr. Magnuson's and Nurse Love's assertions that weight loss now may not improve his back pain because of permanent nerve damage. These assertions are tacit acknowledgements that weight loss earlier would have reduced his back pain and avoided nerve damage. It is tragic that Claimant, having ignored his surgeon's express warning and the recommendation of virtually every medical provider that has examined him since his accident, may now suffer permanent nerve damage due to his 120-pound post-accident weight gain. However, Claimant has not proven that Defendants are responsible for his post-accident weight gain or its sequela. Claimant's 120-pound post-accident weight gain constitutes a subsequent intervening condition not caused by his industrial accident and for which Defendants are not responsible.

82. The restrictions imposed by Dr. McNulty and Nurse Love are less persuasive because they rely significantly upon Claimant's subjective complaints which have been increased by the subsequent intervening condition of Claimant's excessive post-accident weight gain for which Defendants are not responsible. The restrictions assigned by Dr. Cox are more persuasive as they were determined at the time Claimant reached maximum medical improvement and prior to the majority of his 120-pound post-accident weight gain. The Commission finds that due to his industrial accident, Claimant is restricted to lifting no more than 50 pounds occasionally and avoiding repetitive bending, twisting, stooping, or prolonged exposure to low frequency vibration.

83. Opportunities for gainful activity. At hearing Claimant testified he does not believe he could work 40 hours per week, walk more than 50-80 feet without stopping, or bend over. He testified he could not sit for long periods and cannot stand hardly at all.

84. The record indicates Claimant's pre-accident work history was sporadic. At hearing Claimant implied he had sought work. Only after close cross-examination did Claimant admit he

had only reviewed job openings online and had not applied for any jobs. Claimant does not believe he could drive for Uber and Lyft, but he does not have a driver's license. Claimant does not believe he could work at plumbing warehouse because he could not sit, stand, and walk up and down aisles to retrieve plumbing parts. Claimant looked for jobs online but did not apply for any jobs. Claimant acknowledged he was contacted by a Commission rehabilitation consultant who offered to assist in his job search; however, Claimant told the consultant that he was not interested in looking for work. Claimant has not applied for any jobs since his accident. The record indicates Claimant is not motivated to return to work.

85. Two experts have evaluated Claimant's capacity for gainful employment. Their opinions are addressed below.

86. *Doug Crum.* Vocational expert Doug Crum, CDMS, interviewed Claimant on November 19, 2018, and evaluated his disability at his counsel's request. Mr. Crum considered Claimant's education, training, and work history and opined that applying the restrictions determined by Dr. Cox, Claimant had suffered a 50% loss of labor market access and a 36% wage earning loss. He concluded that applying Dr. Cox's restrictions, Claimant had suffered a permanent disability of 43%, inclusive of his 14% permanent partial impairment. Mr. Crum utilized the permanent restrictions assigned by Dr. McNulty, with which Dr. Magnuson and Nurse Love agreed, and determined that Claimant had lost 100% access to the labor market and therefore also sustained a 100% wage earning loss and would be unemployable. Mr. Crum concluded that applying the restrictions of Dr. McNulty it would be unavailing for Claimant to seek employment and he was totally permanently disabled pursuant to the odd-lot doctrine.

87. Mr. Crum acknowledged that he did not consider Claimant's customer service skills in his disability evaluation. He also admitted he considered Claimant's labor market to be just

Kootenai County, and acknowledged that the heart of the Spokane Valley would be a 15 to 20 minute drive from Post Falls and would also be within Claimant's labor market. Mr. Crum testified that the minimum wage in Washington was $11.00 per hour and acknowledged that entry level jobs in Washington would pay higher than what he had listed in his report. Crum Deposition, p. 20.

88. *Dr. Collins*. Vocational expert Nancy Collins, Ph.D., was retained by Defendants to evaluate Claimant's disability. She interviewed Claimant, reviewed his medical records and work restrictions, and opined regarding his employability. Dr. Collins observed that Claimant had transferable skills in customer service and prior work experience in production, plumbing, and machine operation. She noted that Claimant's labor market included Post Falls, Coeur d'Alene, and Spokane—probably the biggest labor market in Idaho. Dr. Collins noted that the minimum wage in Washington was $12.00 per hour and would soon increase to $13.50 per hour. Mr. Crum had testified the hourly minimum wage was $11.00; however, Dr. Collins researched and confirmed it was $12.00. Dr. Collins confirmed that no medical practitioner had imposed upper extremity or driving restrictions. Dr. Collins commented regarding Claimant's work history:

> Q. (by Susan Veltman) … As far as Mr. Sharp's prior work history, how was his longevity? What was his typical retention for any given job?
>
> A. He really didn't work very long for any one employer--maybe a year. He did have a number of periods of unemployment. He was actually on unemployment for a couple of years in 2009 and '10, I think—I can't remember. Even after he got his plumbing license, he went to work for an employment staffing agency doing some machine operation, packaging, laborer kinds of jobs. So, you know, he didn't work for any one employer very long.

Collins Deposition, p. 14, l. 24 through p. 15, l. 11. She confirmed that Claimant had not applied for any jobs since his accident.

89. Utilizing Dr. Cox's 50-pound medium duty work restrictions, Dr. Collins opined Claimant had lost access to 42% of the labor market but had no loss of earning capacity and suffered a 21% permanent disability inclusive of his 14% permanent impairment.

90. Utilizing Nurse Love's 20-pound lifting restriction, Dr. Collins opined Claimant had lost access to 84% of the labor market but would experience no loss of earning capacity and would suffer a permanent disability of 42%. However, Dr. Collins also acknowledged that Nurse Love's October 25 2018 note indicated that Claimant was unable to perform any type of sustained work activity eight hours a day 40 hours a week in his current condition and did not believe he could perform even sedentary work.

91. Dr. Collins concluded that utilizing Dr. McNulty's less than sedentary restrictions, Claimant was totally disabled.

92. *Evaluating the vocational opinions.* Defendants assert Claimant is employable pursuant to the medium work restrictions assessed by Dr. Cox and the opinion of Dr. Collins.

93. In evaluating Claimant's disability under the restrictions imposed by Dr. Cox, Mr. Crum found a 50% loss of labor market access which was similar to Dr. Collins' 42% labor market access loss. However, Dr. Collins testified Mr. Crum had then determined earnings loss by relying upon jobs that paid lower wages than the jobs that Dr. Collins had included in her analysis. Mr. Crum excluded Spokane area jobs that paid Washington State's $12.00 per hour minimum wage. Consequently Mr. Crum concluded Claimant had a more extensive permanent disability than that calculated by Dr. Collins. The determination reached by Dr. Collins is thorough, well-reasoned, supported by the restrictions of Dr. Cox, and persuasive.

94. Based on Claimant's impairment of 14% of the whole person due to his industrial accident and his 50-pound medium duty work restrictions, and considering his non-medical factors

including his age of 39 at the time of the accident and 42 at the time of hearing, formal education, transferable skills, and inability to return to his previous position as a plumber, Claimant's ability to engage in regular gainful activity in the open labor market in his geographic area has been reduced. The Commission concludes that Claimant has suffered a permanent disability of 21% inclusive of his 14% whole person permanent impairment.

95. In making this determination, the Commission is mindful of the direction given by the Court in Brown v. The Home Depot, *supra*. Read narrowly, Brown stands for the proposition that the labor market that should be considered when evaluating an injured worker's disability is the labor market that exists as of the date of hearing. *Id.* at 609, 581. Otherwise, the Commission's evaluation would not do service to the statutory requirement that disability be a measure of the Claimant's "present and probable future" ability to engage in gainful activity. The Commission has adopted the restrictions recommended by Cox, over those given closer to the date of hearing by Dr. McNulty and Nurse Love. These more recent restrictions may accurately reflect Claimant's functional ability as of the date of hearing, but are not an accurate representation of the restrictions causally related to the subject accident. Rather, the restrictions adopted by Dr. McNulty and Nurse Love are referable to Claimant's ongoing weight gain, a condition which the Commission has expressly found to be unrelated to the subject accident. Nevertheless, it might be argued that in evaluating Claimant's present and probable future ability to engage in gainful activity, the Commission must rely on the restrictions in place as of the date of hearing. We do not believe that Brown requires consideration of the most recent restrictions when a subsequent superceding event changes the nature of Claimants functional ability. We considered just this issue in Green v. Green, IC 2006-007698 (Idaho Ind. Com. January 29, 2014). In that case, the claimant suffered work related injuries to his lumbar and cervical spine in 2006. The Commission determined that claimant

reached medical stability from his work injuries in April 2008. He was also given certain restrictions for these work related conditions. Thereafter, however, claimant went on to develop further medical problems, which were ultimately found to be unrelated to the 2006 accident. For these subsequent medical problems, his restrictions were increased. Reviewing Brown, the Commission noted the Court's recognition that depending on the circumstances of a particular case it might not always be appropriate to evaluate an injured workers disability by only considering medical and nonmedical factors as they existed as of the date of hearing. Such a rote application of the rule of Brown might be unfair in certain situations. In Green, the Commission determined to evaluate Claimant's disability by considering the accident related restrictions as they existed as of the date of MMI, without consideration of subsequent restrictions from non-work related conditions. This was thought to accurately measure the disability relating to the 2006 accident. Claimant's labor market was considered at the time of hearing, per Brown.

96. This application of Brown is sensible. Suppose that a hypothetical worker suffers a work injury to his knee in 2010. He undergoes surgery, is eventually pronounced medically stable and is given permanent restrictions against performing heavy labor. However, before his claim for disability can be heard, he suffers severe injuries in a non-work related automobile accident. This accident leaves him with restrictions against performing anything but sedentary work in the future. Obviously, by the time of the eventual hearing, the worker is profoundly disabled, yet no one would argue that his disability should be measured based on restrictions extant as of the date of hearing. To do so would saddle employer with the effects of a subsequent injury for which it is not responsible. The worker's disability should be measured by consideration of the restrictions he was given for the work accident, notwithstanding that these are not the restrictions that exist as of the date of hearing.

97. Applied to the instant matter, Claimant's disability should not be evaluated based on the restrictions that exist as of the date of hearing. To do so would saddle Defendants with liability for a subsequent condition we have determined is not related to the subject accident. It is appropriate to evaluate Claimant's disability based on those restrictions given to him as of his October 28, 2016 date of medical stability by Dr. Cox.

98. Odd-lot. Claimant herein asserts he is an odd-lot worker. A claimant who is not 100% permanently disabled may prove total permanent disability by establishing he is an odd-lot worker. An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable "in any well-known branch of the labor market - absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of establishing odd-lot status rests upon the claimant. A claimant may satisfy his burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways: (1) by showing that he has attempted other types of employment without success; (2) by showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or (3) by showing that any efforts to find suitable work would be futile. Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

99. In the present case, Claimant did not attempt to return to his time of injury job. He did not attempt any other kind of work after his accident. He has not proven he made any significant search for work. He has presented the expert opinions of Mr. Crum and Dr. Collins

supporting the conclusion that it would be futile for him to search for work if the restrictions assigned by Dr. McNulty or Nurse Love are accepted. However, Dr. McNulty's and Nurse Love's opinions are not persuasive as they are founded on Claimant's condition more than two years after he reached maximum medical improvement and had gained 120 pounds post-accident. Claimant has not established a prima facie case that he is an odd-lot worker, totally and permanently disabled, under the Lethrud test.

100. **Attorney fees.** The final issue is whether Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804. Attorney fees are not granted as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804 which provides:

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

The decision that grounds exist for awarding attorney 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).

101. In the present case, Claimant asserts entitlement to attorney fees for Defendants' allegedly unreasonable denial of referral to a dietitian. Inasmuch as Claimant has not proven he is entitled to treatment by a dietitian at Defendants' expense, denial thereof was not unreasonable.

102. Claimant also requests attorney fees for Defendants' failure to pay for some medications prescribed by Nurse Love. As determined previously, Claimant has proven that Defendants are liable at the full invoiced rate for the listed prescription refills for which they have not paid and which are related to Claimant's industrial accident. Claimant's testimony that Surety's claims manager failed to respond to calls requesting refill authorization and thereby prevented Claimant from obtaining Cymbalta and other medications prescribed by Nurse Love is largely corroborated by Dr. Brancheau's records. Under the circumstances presented, Defendants' failure to timely authorize these refills constituted an unreasonable delay and effectively an unreasonable denial of medical care.

103. Claimant has proven that Defendants are liable for attorney fees for their unreasonable failure to pay past pharmacy charges related to Claimant's industrial accident. Within 21 days of the date of this order, Claimant shall submit his memorandum in support of his claim for attorney fees, with particular attention to the factors enumerated in *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984).

CONCLUSIONS OF LAW AND ORDER

1. Claimant has not proven he is entitled to additional reasonable medical treatment for referral to a dietitian. Claimant has proven Defendants are liable at the full invoiced rate, pursuant to Neel, for the listed medication refills prescribed by Nurse Love for which Defendants have not paid and which are related to Claimant's industrial accident.

2. Claimant has proven permanent disability of 21% inclusive of his 14% permanent impairment. He has not proven he is totally and permanently disabled pursuant to the odd-lot doctrine.

3. Claimant has proven that Defendants are liable for attorney fees for their

unreasonable failure to pay past pharmacy charges related to Claimant's industrial accident. He shall submit his memorandum in support thereof within 21 days of the date of this order.

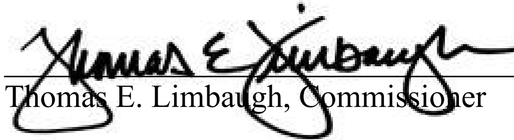
Pursuant to Idaho Code § 72-218, this decision is final and conclusive as to all matters adjudicated.

DATED this 8th day of September, 2020.

INDUSTRIAL COMMISSION

Thomas P. Baskin, Chairman

Aaron White, Commissioner



Thomas E. Limbaugh, Commissioner

ATTEST:

Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of September, 2020, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular email upon each of the following:

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