BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHRISTOPHER LUNA, Claimant, v. LKQ FOSTER AUTO PARTS, INC., Employer, and ACE AMERICAN INSURANCE COMPANY, Surety, Defendants.	**IC 2012-024093** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed January 27, 2017

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John C. Hummel, who conducted a hearing in Boise on May 3, 2016. Bryan S. Storer represented Claimant, Christopher Luna. R. Daniel Bowen represented Employer, LKQ Foster Auto Parts, Inc. ("LKQ"), and Surety, Ace American Insurance Company, collectively "Defendants." The parties presented oral and documentary evidence at hearing and took post-hearing depositions. The matter came under advisement on January 9, 2017.

ISSUES

By agreement of the parties at a pre-hearing telephone conference held on April 28, 2016, and at hearing, the issues are as follows:

1. Whether and to what extent Claimant is entitled to medical care;

2. Whether and to what extent Claimant is entitled to temporary partial and or temporary total disability benefits (TPD/TTD); and

3. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant had an accident in LKQ's auto salvage yard on September 13, 2012. An automobile he was dismantling for spare auto body parts shifted on its mounts, injuring his back, neck, and right knee. Claimant received treatment covered by Surety until November 27, 2012, when he requested a full release and his treating physician determined that he was at maximum medical improvement ("MMI") with no impairment rating. In January 2015, Claimant contacted Surety and requested a return to treatment. Further treatment covered by Surety then ensued until Claimant received a recommendation for cervical surgery that Surety denied as unreasonable.

Claimant seeks medical coverage of his cervical spine condition and specifically claims entitlement to a two-level cervical disk replacement surgery as medically necessary and reasonable. He also seeks temporary disability benefits from February 29, 2016 until he reaches MMI following surgery. Claimant further alleges that the denial of the requested surgery was unreasonable, justifying an award of attorney fees.

Defendants dispute that Claimant's need for cervical surgery is causally related to the industrial accident. Defendants further dispute that cervical disk replacement surgery is reasonable and that Claimant is entitled to temporary disability benefits. Defendants aver that they have reasonably adjusted the claim and that attorney fees are not owed.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. Claimant's Exhibits ("CE") 1 through 14, admitted at hearing, and Exhibit 15 admitted by post-hearing order dated November 16, 2016;

3. Defendants' Exhibits ("DE") 1 through 16, admitted at hearing;

4. The testimony of Claimant taken at the hearing and at his deposition held on August 18, 2015; and

5. The post-hearing deposition testimony of the following witnesses: Daniel Marsh, M.D., taken on May 18, 2016; Edward Wallace, taken on May 18, 2016; William Beringer, M.D., taken on August 12, 2016; and Paul Montalbano, M.D., taken on August 24, 2016.

OBJECTIONS

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

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

FINDINGS OF FACT

1. **Claimant's Background; Education**. Claimant was 30 years old and resided in Caldwell at the time of hearing. Claimant was born and raised in Nampa. He attended high school in Nampa and Othello, Washington. During high school, Claimant was active in athletics, including wrestling, cross country racing, track, and football, but did not sustain any injuries from those activities. He graduated from Nampa High School in 2004. Following high school, Claimant enrolled in a two-year medical assistant program at the Milan Institute, from which he received a certificate, however he did not pursue a career in health care. In May 2011, Claimant

graduated from a two-year aircraft maintenance program at Idaho State University. He obtained an associate of arts degree at the College of Western Idaho ("CWI") in May 2015. After that, he transferred to Boise State University ("BSU") to work on a bachelor's degree in political science; he attended classes at BSU during one semester in the summer of 2015. Tr., 11:8-13:18; 70:18-23; 46:15-17; 46:25-47:22.

2. **Vocational History**. Claimant's first job was delivering newspapers when he was 12 or 13 years old. As a teenager he worked on farms and in a restaurant. Claimant also had positions with Subway and Nampa Parks and Recreation Department. After graduating from the aircraft maintenance program, he applied his training by working as an aircraft mechanic for Greg Poe Air Shows and AvCenter. *Id*. at 13:19-15:11; 47:21-25.

3. **Prior Injuries and Medical History**. In 1999, when he was 13 years old, Claimant had a mild low back injury. He was jumping on a trampoline when the injury occurred. The back strain resolved after a week. He received minor medical attention at Mercy Medical Center in Nampa but no further treatment. *Id*. at 15:15-18. Cl. Dep., 34:1-20.

4. Claimant sprained his ankle on an unspecified date after his 1999 back injury. The injury was a mild one. He underwent physical therapy to recover from it. Tr., 15:22-25.

5. On September 14, 2007, Claimant injured his left shoulder in a work accident at his maintenance job with the Nampa Department of Parks and Recreation. While completing some concrete work, Claimant was using a 2 x 4, pulling it toward him to even out the concrete, when he felt a pulling sensation and then pain in his left shoulder. An X-ray and MRI revealed a superior labral tear with a paralabral cyst. On November 8, 2007, Clark Robinson, M.D., opined that Claimant's left shoulder condition likely had been developing for some time but that he may have aggravated it while at work. Dr. Robinson recommended a shoulder arthroscopy and slap

lesion debridement. He performed that surgery on November 27, 2007. While Claimant initially recovered well from the procedure, he returned to Dr. Robinson in 2008 with continued complaints of shoulder pain. A follow-up MRI showed a persistent SLAP tear with biceps tear. On July 1, 2008, Dr. Robinson performed a diagnostic arthroscopy and debridement of Claimant's left SLAP tear and biceps tenodesis. Claimant recovered well from this second surgery; he underwent a course of physical therapy to rehabilitate. On September 18, 2008, Dr. Robinson declared Claimant at MMI, with a 2% upper extremity impairment (1% whole person impairment), and released him to return to full work. DE 3:66-84; Tr., 15:18-21, 16:12-17. Claimant felt that his shoulder "has done pretty well since then" and that he did not have any physical limitations related to it prior to his industrial accident. Tr., 16:21-17:1.

6. **Subject Employment.** LKQ operated a salvage business and maintained an automobile junkyard. Claimant worked for LKQ following his employment with AvCenter. His duties included extracting auto parts from salvaged vehicles. This involved cutting sections out of automobiles and pulling them for use by auto body shops. *Id*. at 71:3-4; Cl. Dep., 20:2-10.

7. **Industrial Accident.** On September 13, 2012, Claimant was at work in LKQ's salvage yard. He was cutting out a quarter panel section from a 2006 Toyota Corolla, which did not have its engine block and transmission in it. The vehicle was suspended approximately two and a half feet off the ground on tire rims. Claimant was standing up, leaning inside the door frame of the vehicle with his head inside the door, while he cut the quarter panel. The vehicle shifted on its car rim mount stands, fell toward the ground, knocked Claimant backwards, and partially pinned him. He folded on his knees to the ground as he tried to push himself out of the way. The vehicle struck his back and neck. Claimant's head was pinned under the roof of the vehicle and the vehicle's doorway came to rest on his neck and upper back. The quarter panel he

was cutting, which he estimated weighed 400 pounds, hit his right knee. He estimated that the bulk of the vehicle that struck his neck and upper back weighed 1,700 pounds. Claimant extracted himself from the vehicle. He recalled that, "I had just enough room after I got smashed down to push out." He immediately felt a "lot of pain" in his neck, back and right knee. He then informed his supervisor of the accident. His supervisor sent him to Primary Health in Nampa for evaluation. Someone from LKQ drove him to the clinic. Tr., 17:2-19:25; 71:24-73:1.

8. **Medical Care.** Daryn J. Barnes, P.A., evaluated and treated Claimant at Primary Health Occupational Medicine in Nampa on September 13, 2012. Claimant reported that "a car fell and injured his knee, shoulder and neck." P.A. Barnes noted "some tenderness posteriorly in Claimant's neck/vertebral spine and upper back. An inspection of his right knee showed "no swelling or redness, nor erythema on the joint, no ecchymosis." There was tenderness with palpation superiorly. P.A. Barnes assessed shoulder pain, neck pain, knee pain, contusion of shoulder region, sprain of the neck, and sprain of the right knee. He ordered X-rays of Claimant's shoulder, cervical spine, and right knee. He also prescribed Etodolac and Flexeril for pain and swelling. He released Claimant to return to work with restrictions of lifting no more than 15 pounds, no pushing/pulling in excess of 20 pounds, no work requiring looking up or down, no reaching above or below the left shoulder level, and no shoulder or arm push/pull in excess of 20 pounds. DE 1:4-6; 12.

9. Claimant underwent X-rays on September 13, 2012. A cervical spine X-ray, as read by Lisa M. Scales, M.D., showed no fractures, normal alignment, and no significant arthropathy or degenerative disk disease. Soft tissues were unremarkable for findings. The report concluded that there was no evidence of acute fracture or malalignment. An X-ray of the left shoulder, as read by Ian Davey, M.D., showed no fracture or other osseous abnormality, joints

within normal limits, and soft tissues within normal limits. There were no abnormalities identified. An X-ray of Claimant's right knee, as read by Dr. Davey, showed no fracture or other osseous abnormality, joints within normal limits, and soft tissues within normal limits. Again, there were no abnormalities identified. CE 1:7-9.

10. Claimant remained off work for a "couple of days" following the industrial accident and returned to work at LKQ on the prescribed light duty thereafter. Tr., 20:18-22.

11. Claimant continued to treat with P.A. Barnes and Stephen C. Martinez, M.D., at Primary Health through October 26, 2012. On September 27, 2012, Claimant reported that his back and neck pain had increased but that his knees felt better. Claimant received a prescription of narcotic pain medication, Norco, for the first time on this date from P.A. Barnes. On September 28, 2012, Dr. Martinez referred Claimant for nine sessions of physical therapy at Saint Lukes – Elks Rehab.[1] Despite undergoing physical therapy, Claimant continued to report increasing neck pain to P.A. Barnes and Dr. Martinez, however his right knee continued to improve. MRIs performed on October 22 and 24, 2012 showed the following results: lumbar spine, an abnormality at L3-4 suggesting trauma and disk bulges; cervical spine, disc contour abnormalities at C5-6 and C6-7 slightly indenting the cord but no compression; and thoracic spine, no significant abnormalities. As of the October 26, 2012 office visit with Dr. Martinez, Claimant had prescriptions for Flexeril, Etodolac (an anti-inflammatory medication), and Norco (Hydrocodone). Dr. Martinez referred Claimant to Michael O. Sant, M.D., a physiatrist with Idaho Physical Medicine and Rehabilitation in Nampa, on October 26, 2012. DE 1:14-56; DE 6; CE 2-3.

[1] Claimant received a discharge from physical therapy on November 16, 2012, with a report that he had progressed well with reported pain at two to three out of 10. His cervical range of motion had improved to 95%, flexion was at 75%, lumbar range of motion improved to 90%. CE 1:26.

12. Dr. Sant examined Claimant first on October 31 and again on November 27, 2012. At the first visit, Claimant reported that his pain had continued to increase despite physical therapy and medication. He described his pain as a "constant ache between his shoulder blades with occasional sharp pain." Pain traveled up his neck on both sides and felt "unstable" at times. His low back pain was an occasional sharp pain with twisting movement. Dr. Sant observed that Claimant's disk bulges in his neck "may be new" but the other changes on his MRIs appear to be older. He advised Claimant that "there does not appear to be any problem that will require surgical intervention" and that he should continue with physical therapy. He suspected that Claimant had "significant muscle strains in his neck and mid back." Dr. Sant re-prescribed Claimant's medications, including Norco and Flexeril, and continued the same work restrictions. On November 27, 2012, Dr. Sant observed that Claimant was doing better, seemed to be moving OK, and had good gait and posture with no new weakness. He released Claimant from treatment to return to work with no permanent restrictions or impairment. He noted that Claimant had asked for a full release so that he could pursue a new job opportunity. On November 27, 2012, Dr. Sant reported to Surety that he had released Claimant from treatment after he had completed physical therapy, with no permanent restrictions and no impairment. He also noted that he would refill Claimant's medications once more and then "wean him off." CE 4:9-15; Wallace Dep., 7:20-8:2.

13. At hearing Claimant explained that he asked for a full release from Dr. Sant because LKQ had discharged him from employment and he was seeking work. "So, since I didn't really know that my injury was as bad as it was … I asked him to remove the restrictions so that I could accept – or take the job that I was offered at Nampa Valley Helicopters … I didn't

realize that the pain was going to be so severe once I wasn't on the pain medication anymore." Tr., 23:13-24.[2]

14. Claimant recalled that after his pain medication prescribed by Dr. Sant ran out in December 2012, he attempted to schedule another appointment but did not receive a call back from Dr. Sant's office.[3] Because he was still experiencing pain that was "difficult to handle," Claimant sought care with Saint Alphonsus Medical Group in Nampa. *Id*. at 24:12-22.[4]

15. Claimant sought treatment with the Urgent Care Clinic of Saint Alphonsus on December 20, 2012. P.A. Travis Smith noted that when Claimant was first released to return to work, his pain was doing better. "Now normal activities cause pain..." Smith renewed Claimant's prescriptions, including Hydrocodone and Flexeril. CE 5:12-14.

16. Claimant sought treatment in the emergency room of Saint Alphonsus Regional Medical Center in Nampa on April 5, 2013. Andrew Southard, M.D., evaluated his complaint of back and neck pain. Claimant reported that his problem began after having a car fall on him several months ago.[5] What brought him into the emergency room was an incident in which he was walking downstairs and developed back and neck pain, radiating into his chest and bilateral arms. The pain, however, had resolved by the time of the visit. Because of a family history of

[2] At his deposition, however, Claimant could not recall asking for a full release. Cl. Dep., 25:13-23.

[3] A record of a telephone call from Claimant to the office of Dr. Sant on December 19, 2012 showed that Claimant "would like to know if can come in and be seen as he is having some pain." Dr. Sant then instructed staff that because he had previously released him from care, if Claimant wanted to be seen under workers' compensation, that would have to be authorized by the Surety, otherwise he could be treated under his private insurance. A staff member returned Claimant's call the following day to apprise him of this; Claimant stated he would call his adjuster and obtain an authorization. There is no record that Claimant called back to schedule an appointment. CE 4:17.

[4] Meanwhile, Surety was unaware that Claimant had continued to seek treatment for his industrial condition after his release by Dr. Sant. Surety first became aware of Claimant's continuing to treat when he contacted Edward Wallace, Surety's Claims Adjuster on January 20, 2015. At that time, Claimant informed Wallace that he would like to resume treatment and that he had been treating with various providers since January 2013. Wallace Dep., 8:7-15. Consequently, the treatment that Claimant received in 2013 and 2014 related to his industrial condition occurred outside of the workers' compensation system. Claimant relied upon his private insurance and Medicaid to pay for the costs of this care. Tr., 30:5-9.

[5] Claimant apparently did not indicate that this was an industrial injury as the medical record for the April 5, 2013 visit reflects that the condition was not the result of a work injury. DE 10:487.

heart disease, Claimant received a chest X-ray to rule out a cardiac problem. Dr. Southard released Claimant with instructions to be reevaluated if symptoms returned. DE 10:482-485.

17. Cherese R. Severeson, DNP, of Saint Alphonsus Medical Group in Nampa, evaluated Claimant for continued neck and back pain on April 18, 2013. Severson noted that Claimant had sought treatment in the emergency department of Saint Alphonsus earlier in the month. She recorded numbness/tingling and extreme weakness as symptoms in his upper extremities. Severson advised Claimant that he would need to enroll in a controlled substances program if his Norco use became chronic. She diagnosed Claimant with cervicalgia and cervical disk disease and referred him to a spine specialist. CE 5:15-20.

18. Upon a referral from Ms. Severeson, Claimant received an evaluation by Rebekah E. Guy, M.D., of the Saint Alphonsus Comprehensive Pain and Spine Clinic on July 29, 2013. DE 11:512. Claimant signed a controlled substances agreement related to his prescriptions for narcotic pain medication. DE 11:515-517. Dr. Guy noted that the majority of Claimant's pain was in his neck and that it radiated up into his head and caused headaches. Claimant was also experiencing some numbness and tingling going into his arms bilaterally. Dr. Guy reviewed Claimant's 2012 cervical MRI and noted paracentral disk ridge complexes indenting the cord without signal change at C5-6 and C6-7. Dr. Guy took over prescribing Claimant's medications at the same doses and scheduled him for a C7-T1 epidural steroid injection. DE 11:520-523.

19. Claimant received the epidural steroid injection and reported temporary pain relief from it. Dr. Guy encouraged Claimant to resume home exercises he had previously learned in physical therapy. On October 2, 2013, Claimant reported improvement in his overall pain and discomfort. DE 11:533-534. On December 2, 2013, Claimant reported an increase in pain and Dr. Guy approved an increase in his Norco dosage. DE 11:536-537. On January 28, 2014,

Claimant reported an increase in numbness in his arms bilaterally. Russell Harmony, N.P., ordered another epidural steroid shot and noted the last one provided Claimant with approximately two months of relief. DE 11:540-541. On March 24, 2014, Claimant reported an adverse reaction to the anesthetic in the epidural. Mr. Harmony refilled his Norco prescription with an increase of four times per day; he also prescribed an anti-inflammatory medication, Mobic. DE 11:544-545.

20. On February 28, 2014, Claimant had a consultation with Lawrence E. Green, M.D., a neurologist, regarding a complaint of chronic headaches, two to four per week. Dr. Green noted that Claimant was a regular user of narcotic medication and that the Saint Alphonsus Comprehensive Pain and Spine Clinic was managing his medication. After conducting a physical exam and taking Claimant's medical history, including the industrial accident, Dr. Green advised him that his chronic migraine/daily headaches were associated with medicine overuse, primarily narcotic medication. He further advised Claimant that no migraine prevention therapy would work as long as he was a habitual narcotic user. He recommended that Claimant seek other pain management therapies with his physicians. Claimant did not return to Dr. Green. DE 12:601-603.

21. Mr. Harmony continued to treat Claimant in ten additional office visits from June 23, 2014 until August 18, 2015. During that time Mr. Harmony continued to prescribe Norco for Claimant and added Morphine to his prescriptions. Claimant continued to complain of neck pain and also pain in his right knee. Claimant received a third epidural steroid injection into his cervical spine on February 25, 2015. The epidural provided only temporary relief. On May 27, 2015, Claimant reported to Mr. Harmony that his right knee had been bothering him since the original accident. Mr. Harmony then ordered a right knee X-ray performed on June 9,

2015. As read by Howard Schaff, M.D., the study was negative for significant arthropathy, acute abnormality, or soft tissue swelling. At his last appointment with Mr. Harmony on August 18, 2015, Claimant's "pain seem well controlled." He then discharged Claimant from the care of the Comprehensive Pain Clinic of Saint Alphonsus due to frequent no-shows and same day cancellations. DE 11:547-600.

22. On January 20, 2015, Claimant contacted Edward Wallace, the adjuster on his claim with Surety, to express his desire to resume treatment under his workers' compensation claim. Mr. Wallace authorized a one-time visit for Claimant to return to Dr. Sant to determine if the need for treatment was related to his industrial injury. Wallace Dep., 8:13-19; Tr., 30:9-17.

23. Claimant returned to Dr. Sant on February 11, 2015. Claimant denied any new injuries after his workers' compensation claim was closed, but reported that his neck and back pain had continued. Claimant described his pain as "deep achey pain" between his shoulder blades with occasional sharp pains into his trapezius. He also reported frequent numbness in his arms and hands when he wakes up, and one episode where his right leg went numb. Symptoms were worse with activity and lifting. Dr. Sant's physical examination of Claimant was normal and unremarkable, including a normal straight leg raising test. Claimant did have some tenderness in the upper trapezius and rhomboids. Dr. Sant noted that when he treated him in 2012 that "some of the disk bulges may have been new and there were some preexisting issues as well." Because Claimant's condition was difficult to assess, Dr. Sant ordered updated MRIs of his cervical and lumbar spine. DE 8:380-381. Surety authorized the MRIs. Wallace Dep., 10:1-3.

24. Claimant underwent a cervical spine MRI on February 25, 2015, as ordered by Dr. Sant. The conclusion of the study, as read by John Jackson, M.D., was that Claimant had multilevel degenerative changes from C4 to C7; disk bulges at C5-6 and C6-7; mild central canal

narrowing at C5-6 with ventral cord abutment and slight deformity of the ventral right cord surfaces; no abnormal cord signal; C6-7 moderate left neural foraminal stenosis secondary to disc/osteophyte complex extending into the neural foramen. Compared with the previous study of October 22, 2012, there was "interval evolution" of the findings described at C6-7. There was also further disc desiccation at C5-6 and C6-7. A lumbar MRI, also performed on February 25, 2015, as read by Dr. Jackson, showed mild T12-L1 and L3-4 degenerative disk disease, with no focal disc herniation, central canal, or neural foraminal stenosis, and chronic mild anterior deformities from T11 to L4. DE 11:573-575.

25. Claimant returned to Dr. Sant on March 4, 2015 to review the results of his MRIs. Claimant reported that he was having more pain in the past couple of days that waxed and waned. Dr. Sant advised Claimant that his lumbar back MRI was relatively unchanged from before and did not demonstrate any neural compression. His cervical MRI, however, showed some progression of disk desiccation at the prior levels with some left neural foraminal narrowing and some new findings at C5-6. Dr. Sant opined that these findings appeared to be an aggravation and progression of his prior cervical injury. He noted that Claimant was currently being treated at Saint Alphonsus Comprehensive Pain and Spine for his pain and noted "I will not step into that arena." DE 8:387.

26. Surety reauthorized Claimant for treatment for his cervical pain, pursuant to Dr. Sant's recommendation. Surety gave Claimant the choice of treating with Dr. Sant or the providers at Saint Alphonsus Comprehensive Pain and Spine, which was already providing pain management for him. Claimant chose continuing treatment with the latter. Dr. Sant then provided him with a referral to that clinic so that his treatment would be covered by Surety. DE 8:389-392.

27. Claimant returned to physical therapy treatment at Saint Alphonsus Rehabilitation Services ("STARS") on April 16, 2015, upon referral from Mr. Harmony. Claimant reported to his therapist that he was unable to work due to residuals of his industrial accident and cervical pain. Claimant further stated that he would have "neck surgery at some point but was doing PT to prolong the surgery."[6] Claimant continued with physical therapy until his discharge on July 15, 2015. Upon discharge, his therapist stated in pertinent part as follows: "In my professional opinion, this client exhibits a fair prognosis at time of discharge from skilled rehabilitative therapy in conjunction with a home exercise program." Claimant had reduced pain to 2/10 and attained 100% range of motion improvements to his cervical region. DE 9:410-439. Thereafter, Claimant received physical therapy to treat his right knee from July 16, 2015 until August 26, 2015, when he was discharged for non-compliance. DE 9:440-456.

28. On July 15, 2015, P.A. Scott Ward of the Spine Institute of Idaho examined Claimant. DE 13:604. Claimant received a referral to this clinic from Mr. Harmony. Tr., 33:7-9; CE 15.[7] Mr. Ward conducted the initial examination on behalf of William F. Beringer, D.O., an orthopedic surgeon. Claimant reported his average pain rating at 6/10. He reported that he had been doing well after his industrial accident, however his cervical pain complaints had increased significantly approximately six months prior "after increasing his activity level." Claimant reported the location of his pain as the posterior back of neck and between shoulder blades, radiating into the cervical trapezium, deltoid and forearm with minimal symptoms in the hands bilaterally. Claimant experienced tingling when holding arms at shoulder level. Mr. Ward noted Claimant's medications included Hydrocodone and Morphine. Upon physical examination,

[6] As of April 2015, Claimant had not yet received a medical recommendation for surgery.

[7] Claimant's referral was originally to Richard Manos, M.D., who was unavailable, thus Dr. Beringer and Mr. Ward accepted Claimant as a patient. Tr., 33:12-17.

Claimant demonstrated normal motor strength, but decreased neurological sensation bilaterally of the radial forearm, thumb, middle finger, fourth and fifth digits, ulnar hand, and distal forearm. Mr. Ward made the following assessment:

> Pt is having bilateral cervical radiculopathy as well as interscapular pains. He has had three steroid injections which have not given him significant relief. He is also requiring Morphine and Norco without complete relief. He has been avoiding surgery as long as possible, but states the pain is severe enough that he is ready to proceed with surgery at this point. I have discussed his symptoms and reviewed his imaging with Dr. Beringer. We recommend a 2 level artificial disk in order to treat his symptoms but also decrease the possibility of adjacent segment disease down the line since he is young.

DE 13:604-607.

29. On October 28, 2015, Mr. Ward documented that Claimant's pain symptoms "have continued to increase. He is having increased radicular pains. He has been unable to continue school due to his pain." Mr. Ward refilled Claimant's prescriptions and referred him to Daniel Marsh, M.D., for pain management. Claimant followed up again with Mr. Ward on November 16, 2015. Claimant reported that he went to the emergency room twice since his last visit for shoulder pains. Claimant believed his symptoms had increased. Mr. Ward noted that Claimant's neck pain and cervical radicular symptoms are "continuing to increase." He further noted that the clinic was continuing to work with Surety "to get his surgery approved." Meanwhile, Claimant's "symptoms have gotten to the point that he is needing disability." Mr. Ward refilled Claimant's prescriptions for the next month, including Norco, Morphine, Meloxicam, Metaxalone, Prochlorperazine and Suatriptan. Mr. Ward assessed the following: knee pain, cervical spondylosis with radiculopathy, neck pain, cervical radiculopathy, low back pain, spasm of back muscles, and numbness. Dr. Beringer followed up with Claimant on April 10, 2016. Dr. Beringer reviewed Claimant's cervical MRI of January 21, 2016, which showed "DDD C567 and right C5-6 disc bulge and left C6-7 foraminal disc herniation. Pt

describes loss of grip in left hand with numbness in middle forearm and back of hand (C7). Right arm pain goes to deltoid region and spine of scapula. Hurts to turn neck/extend/flex." DE 13:609-624.

30. Dr. Marsh of the Exodus Pain Clinic evaluated Claimant on December 7, 2015. He took Claimant's medical history and noted his current pain medications. Claimant denied any numbness/tingling at this visit. Claimant's physical examination was remarkable for pain upon cervical extension and relief in flexion. Dr. Marsh assessed the following: degenerative disk disease, cervical; cervical pain; low back pain; right knee pain; and chronic, continuous use of narcotics. He renewed Claimant's prescriptions for Norco and Morphine. Dr. Marsh noted that Claimant "may have cervical facet disease or combined pain. Cervical disk replacement would not address the facet joint pain." Claimant met with Dr. Marsh again on January 4, 2016. Dr. Marsh noted that Claimant had "continuing neck pain and his migraines are worse. The first 2 years he did OK, but the last year has been horrible." Dr. Marsh recommended new imaging of the cervical and lumbar spine "as he had episodes of numbness from the waist down." Dr. Marsh also recommended block of the cervical facets at C6-7 "to rule them out as a pain generator before he has a surgery." CE 12:2-6.

31. Claimant continued to treat with Dr. Marsh prior to the hearing with office visits on February 1, February 29, April 7, and April 25, 2016. On March 23, 2016, Dr. Marsh performed facet joint steroid injections (with anesthetic) into Claimant's prone right C5-6 and C6-7 facet joints. Claimant "had immediate substantial reduction of his right sided neck pain." At a follow-up appointment on April 25, 2016, Dr. Marsh noted that "Pain in the right neck may be facet mediated as he responded to the Right C56 and C67 facet blocks, but he has intermittent weakness in the left hand and needs evaluation for that." He described Claimant's neck pain as

"work related neck pain. It is worse in extension and initially relieved in flexion. He may have facet mediated pain at C567. There was no history of any pre-existing neck pain." Dr. Marsh continued to prescribe narcotic pain medications for Claimant. On February 29, 2016, he noted in pertinent part as follows regarding Claimant's ability to work:

> His impairments have lasted and over 3.5 years. There is hope to improve his symptoms, but he has a permanent condition resulting in permanent impairment.
> He has chronic pain and takes chronic medication. His pain is a large distraction and prohibits him from focusing due to pain. He will be off task at least 50% of the time at work and also has sleepiness with the medications and chronic pain.
> If Chris is working he will require 15 min breaks every 30 min due to pain.
> If Chris goes into a competitive work environment he will miss work several days a week based on current activity tolerance.
> Lifting is very limited. He cannot lift anything frequently or occasionally and rarely lift 15 lbs.
> His sitting tolerance in an 8 hr work day is limited to 4 hrs.
> Stand tolerance is the 8 hr day is 1 hr.
> Walking tolerance in an 8 hr day is 1 hr.
> Chris has numbness in both hands and is limited with the use of his hands and is prohibited from using both hands for fine dexterity activities.

CE 12:10-21.

32. **Independent Medical Examination**. After receiving the report from Mr. Ward and Dr. Beringer and their recommendation for a two-level disk cervical disk replacement surgery for Claimant, Surety determined that further investigation was necessary to determine whether the procedure was reasonable. Mr. Wallace explained in pertinent part as follows: "They're [disk replacements] not very common. And the only experience that I really have is we have some requests for them on claims we have in Utah. And in Utah, their labor commission does not allow them as a medical procedure, because they determined it was experimental…" Wallace Dep., 12:6-10. Mr. Wallace explained further that he had never seen a request to Surety in Idaho for a cervical disk replacement. *Id.* at 19-22. He thus determined that further research on the procedure was necessary because "it's not something that comes across my desk that often.

And knowing that it's something that there's not a lot of medical evidence, based upon what I've been told, that we would just go ahead and authorize it without looking into it more." Wallace Dep., 12:25-13:4. Wallace then proceeded to schedule Claimant for an IME with Paul Montalbano, M.D., a Boise neurosurgeon. *Id*. at 13:5-10. Dr. Montalbano's IME was delayed because Surety experienced difficulties in obtaining records of Claimant's treatment while his claim was closed during 2013 and 2014. *Id*. at 14:5-25.

33. Claimant met with Dr. Montalbano for the IME on January 13, 2016. Dr. Montalbano took Claimant's medical history, including the progression of his condition since the industrial accident. Claimant reported neck pain as well as bilateral upper extremity pain involving his shoulder as well as left deltoid. Claimant reported that his "pain moves around in his arms independently depending upon what he is doing on a daily basis." He rated his pain at 5/10. Dr. Montalbano reviewed prior imaging studies for Claimant. He concluded that due "to time disparity between his prior radiographic workup and my current examination, I have recommended an MRI scan of cervical and lumbar spine." He also recommended X-rays. Dr. Montalbano diagnosed Claimant with cervical spondylosis without myelopathy/radiculopathy. Final conclusions of the examination were pending radiographic studies. DE 16:638-639.

34. Imaging studies ordered by Dr. Montalbano took place on January 21, 2016. The findings of the lumbar MRI, as read by Moiz Vohra, M.D., were as follows: mild degenerative disc disease at L3-L4 and T12-L1; mild spondylosis without significant stenosis; minimal chronic loss of height from T11 through L4; no acute compression fracture; and limbus type vertebra at L4. The findings of the cervical MRI, as read by Dr. Vohra, were as follows: straightening of the normal cervical lordosis, which may be related to positioning, muscle spasm,

or spondylosis; degenerative disc disease at C5-C6 and C6-C7; C5-C6: small right paracentral disc protrusion causes slight hemicord impingement – there is a central/right paracentral annual fissure – there is mild left neural foraminal stenosis secondary to uncovertebral hypertrophy; C6-C7: disk osteophyte complex with left paracentral/proximal foraminal extension and uncovertebral hypertrophy causes effacement of the thecal sac and moderate left neural foraminal stenosis; and C4-C5: small superiorly migrated central disk extrusion/herniation effaces the thecal sac. The results of an anteroposterior cervical X-ray with views of lateral, lateral flexion and lateral extension, as read by Paul Grooff, M.D., found that Claimant had degenerative disc disease at C5-C6 and C6-C7. DE 16:642-644.

35. Claimant returned to Dr. Montalbano on January 27, 2016. Dr. Montalbano reviewed the results of his imaging studies with him. Dr. Montalbano read the cervical MRI and X-ray as showing that Claimant had a mild to moderate lateral recess stenosis on the left at C6-7 with central disk/osteophyte complex. He also concluded that there was no evidence of cord compression and flexion/extension X-rays of the cervical spine demonstrated no evidence of gross instability. Dr. Montalbano's concluding assessment was as follows:

> Mr. Luna's symptomatology does not follow dermatomal distribution and clearly it does not correlate with the left C7 radiculopathy. Therefore, I would not recommend any type of surgical intervention, whether it was a disc replacement or decompression, fusion and instrumentation at any level of his cervical spine. Mr. Luna from my perspective have [sic] reached maximal medical stability. He experienced a cervical strain. He is neurologically intact and once again his symptomatology does not follow any know anatomic patterns. I would not recommend any further treatment/workup to address his current issues.

DE 16:645.

36. **Claim Processing**. Upon receiving the IME report of Dr. Montalbano, Surety denied Claimant's request for the cervical disk replacement surgery. Mr. Wallace explained the basis of Surety's decision as follows:

Q. We put the question to him [Dr. Montalbano], what he thought about surgery and artificial disc surgeries.
A. Correct.
Q. What did he say?
A. He said that he didn't agree with the need for it, and that he hadn't really seen many of those, I believe is what he said. And that he didn't think that surgery was necessary for the claimant, anyway, in regards to his injury.
Q. So then you were put in a position of having to pick between Paul Montalbano's opinion and Dr. Beringer?
A. Correct.
Q. And you, apparently, picked Paul Montalbano. Why?
A. I'm not familiar with Dr. Beringer, and we have several injured workers who treat with Dr. Montalbano on a regular basis, with several different employers, so we're very familiar with him.
Q. You were more familiar with him and his opinions?
A. Definitely.

Wallace Dep., 13:8-14:4.

37. Surety also had concerns regarding the cost of a two-level cervical disc replacement surgery. Mr. Wallace had difficulties in obtaining information from Dr. Beringer's office or from other sources what the cost of such a procedure would be. Counsel for Surety then inquired of Dr. Beringer regarding the cost. Dr. Beringer replied in a letter on October 23, 2015, stating in pertinent part as follows: "I would like to give you the cost of this procedure but unfortunately there are so many factors involved I would only be able to give you our cost and the hardware at an estimate only. This is an estimate only for our office, $68,928.00. I am sure there are many other entities involved that will be billing the surety besides the hospital." DE:13:608.

38. After receiving a letter from Dr. Beringer's office that the surgical fee and cost of the hardware would be "60,000-plus," Wallace concluded as follows: "Just an assumption, based on a hospital fee, most likely inpatient, we would be looking at over $100,000, which seems very high for a procedure like that." Wallace Dep., 17:2-5.

39. **Claimant's Post-Injury Employment**. After missing several days due to his industrial accident on September 13, 2012, Claimant returned to work at LKQ on light duty. He remained employed with LKQ until LKQ terminated his employment in or about November 2012. Cl. Dep., 24:19-25:9. After asking Dr. Sant for a full release to work,[8] Claimant obtained employment as a mechanic ("component overhaul technician"), a heavy work position, with Nampa Valley Helicopters in or about November or December 2012. *Id*. at 25:9-26:10; Tr., 49:5-53. Claimant remained in the position with Nampa Valley Helicopters until in or about September 2014, when his employment was terminated. Tr., 50:4-9; Cl. Dep., 32:16-20. Claimant remained unemployed for six weeks and then obtained employment at a computer board fabrication business, MicroSil; this employment lasted six weeks until December 29, 2014. Claimant agreed that this was "bench" rather than heavy work. Nevertheless, he believes he was unable to physically perform the tasks of the job because the pain from extending his arms became too much. Tr., 51:4-15; Cl. Dep., 31:13-32:15. Claimant was not employed through the date of the hearing after his job with MicroSil ended. *Id*. at 31:7-9.

40. Instead of seeking work after his job with MicroSil, Claimant returned to school full-time at CWI in January 2015. He completed credits for an associate's degree in liberal arts in May 2015. After his semester at CWI, Claimant attended BSU for the summer semester of 2015. Although he enrolled for the fall semester at BSU, he withdrew without completing the school term. Tr., 51:18-52:13; Cl. Dep., 35:14-36:12.

41. **Claimant's Condition at Hearing**. Claimant stated that "the pain issue for even typing is one of the reasons I only went to school for the summer of … 2015 at BSU." He stated that his pain became so severe that he could not attend school three days per week, leading to his

[8] At his deposition, Claimant could not recall asking Dr. Sant for a work release but at hearing he admitted that he had sought one. Cl. Dep., 25:13-23; Tr., 23:6-24.

withdrawal from school. His migraine headaches became worse in the past year. When Claimant tried to extend his arms or reach overhead, that experience was difficult and painful. Claimant could not "lift much of anything;" even grabbing a gallon of milk from a shelf in the refrigerator hurt him. His pain radiated into his arms and hands. He was required to take a testosterone supplement because his pain medication decreased his testosterone level. Sometimes he did not shower "for four days," because he did not feel stable enough to stand in the tub and going up and down the stairs to his bedroom is difficult. Claimant did not feel like he could return to work with his current symptoms. "[I]t's not feasible for me to return to work at all because – I mean, for instance, like today I couldn't even drive myself here. I had to have help to get here and it became so bad that when I'm having pain in my back like it just puts me down or the migraines are a really bad problem, too." Tr., 39:19-23; 40:13-18; 42:6-25; and 77:13-21.

42. **Claimant's Credibility**. There was a significant instance in which Claimant's hearing testimony diverged from his deposition testimony. At his deposition Claimant had no recollection whatsoever of asking Dr. Sant for a full release to work in November 2012, despite being reminded of the circumstances, whereas at hearing he admitted that he himself asked for such a release rather than it coming from Dr. Sant *sua sponte*, as his deposition testimony had suggested. Cl. Dep., 25:13-23; Tr., 23:6-24. Further, at hearing Claimant asserted that Dr. Sant's office did not return his calls when he sought further pain medication in December 2012, which is why he claimed that he then sought care outside of the workers' compensation system. The records of Dr. Sant's office, however, show that his staff promptly returned Claimant's call and relayed a reply from Dr. Sant. Tr., 24:12-22; CE 4:17. These testimonial discrepancies are troubling as it appears in the first instance that Claimant demonstrated a reluctance to admit verifiable facts where it might cast his claim in an unfavorable light. In the second instance,

Claimant's recollection is inconsistent with a clinical record that appears to be a thorough account of communications with Claimant. Although Claimant's demeanor at hearing was such that he appeared to testify credibly, nevertheless the factual discrepancies in his testimony cast doubt upon his symptoms, especially in light of his documented habitual narcotic use, as will be elaborated upon further.

DISCUSSION AND FURTHER FINDINGS

43. 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).

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

45. No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). The Industrial Commission, as the fact finder, is free to determine the weight to be given to the testimony of a medical expert. *Rivas v. K.C. Loggin*g, 134 Idaho 603, 608, 7 P.3d

212, 217 (2000). "When deciding the weight to be given an expert opinion, the Commission can certainly consider whether the expert's reasoning and methodology has been sufficiently disclosed and whether or not the opinion takes into consideration all relevant facts." *Eacret v. Clearwater Forest Industries,* 136 Idaho 733, 737, 40 P.3d 91, 95 (2002).

46. *Dr. Beringer.*[9] When Claimant first presented to P.A. Ward in Dr. Beringer's clinic on July 15, 2015, his primary complaints were neck pain, migraines, and numbness in bilateral arms; he reported that his symptoms began following the industrial accident "when a car shifted and hit him in the shoulder blades." Claimant had an "aching pain" with occasional "sharp stabbing pain." Beringer Dep., 10:15-20. Dr. Beringer concluded that Claimant's MRI showed a "disk bulge on one side at C5-6 and another site at C5-7." *Id.* at 11:9-11. Neurological findings showed as follows:

> He had "decreased sensation on the right C-6 pattern, including the thumb and index finger, C-7 middle finger. And then, C-8, fourth and fifth digits, distal forearm. And on the left he had C-6 decreased sensation, C-7 decreased sensation into the middle finger and, then, C-8 sensation decreased in the fourth and fifth digits. And he had a positive Spurling's sign on both sides. When he turned his neck to the right he would have radicular symptoms that would get worse down the right side and when he would turn his neck to the left he had worsening sensations in this left upper extremity.

Beringer Dep., 11:24-12:10.

47. Dr. Beringer diagnosed Claimant with a mild right C5-6 spinal stenosis, moderate left C6-7 foraminal stenosis, and cervical radiculopathy, based upon his MRI, reported symptoms, and physical examination. *Id.* at 13:10-19. He opined that Claimant's pain and

[9] Dr. Beringer completed undergraduate studies at the University of California, graduate studies in biology and physiology at the University of West Georgia, and medical school at Nova Southeastern University, from which he graduated as a doctor of osteopathic medicine in 2001. He completed an internship in Detroit, one year of trauma surgery in Chicago, a five year residency at Central Illinois Neuro Health Sciences, and a one year complex spine fellowship with the Indianapolis Neurosurgical group. He initially practiced in Oklahoma City and relocated his practice to Boise in 2013. His credentials as a spine surgeon include removing spine tumors, repairing fractures, placing spinal hardware, performing radiosurgery for spinal tumors, and performing minimally invasive spine surgery. He has performed artificial disk surgeries for 13 years. Beringer Dep., 5:16-8:12.

symptomology were consistent with an injury resulting from a car body weighing 1,700 pounds falling on Claimant's shoulders and upper back. Beringer Dep., 13:21-14:5. Dr. Beringer summarized his opinion on causation as follows:

> Here is what I would look at. This patient since 2012 signed up for three epidural – at least epidural steroid injections for his neck pain that was radiating in his arms, down to his hands. He was hurting and he had these three epidural steroid injections and it seems like neither – none of them gave him lasting relief and people don't sign up for three needles – big, long needles to be put in their neck unless they are hurting and they think they are going to get some kind of benefit from that. Given the patient's symptoms, given what was already done with him and what didn't work, it is consistent with C5-6 and C6-7 herniated disk work related.

Id. at 36:12-24.

48. Dr. Beringer observed that Claimant's symptoms have remained the same and his physical examination findings have remained the same throughout Claimant's visits to his clinic from July 15, 2015 through April 18, 2016, and further that his MRI imaging corroborates the symptoms and findings. *Id*. at 69:1-14.

49. Dr. Beringer did not meet with Claimant upon his initial consultation with his clinic on July 15, 2015; rather, his P.A. Ward met with Claimant. *Id*. at 48:14-18. Dr. Beringer testified in his deposition that he believed that he first personally examined Claimant on October 28, 2015.[10] *Id*. at 49:5. For prior medical treatment of Claimant, Dr. Beringer had available to him "an extensive document list of other doctors who have seen the patient from the files that were sent to me," however he could not confirm that he read "absolutely every single document." *Id*. at 51:6-15. Claimant reported to Mr. Ward and Dr. Beringer that "he was doing

[10] Nevertheless, the clinical records of Dr. Beringer do not show that he met with Claimant on October 28, 2015; rather, it was Mr. Ward who examined him again on that occasion. CE 9:7. The only medical visit in which the documentation shows that Claimant personally met with Dr. Beringer was that of April 18, 2016. *Id*. at 16.

well, but the pain increased significantly approximately six months prior to the July 15, 2015 evaluation and after increasing his activity level." Beringer Dep., 59:16-19.

50. When asked at deposition to provide a medical opinion with a reasonable degree of medical probability as to the causation of Claimant's cervical condition and the need for disc replacement surgery, Dr. Beringer did not state such an unequivocal opinion, but rather demurred that he did not evaluate Claimant until July 2015. Instead, he stated that Claimant's "symptoms seem to be fairly consistent, but I wasn't there." Counsel for Claimant re-asked the causation question, as did counsel for Defendants, with the same results – rather than state that Claimant's cervical condition was industrially related, Dr. Beringer qualified that the accident was in 2012 but he first evaluated Claimant in 2015. *Id*. at 34:11-35:1; 35:13-36:4; 60:11-61:1.

51. Dr. Beringer admitted that he was unaware of what Claimant's work activities were from 2012 onward. *Id*. at 61:13-17.

52. *Dr. Marsh*.[11] Dr. Marsh first evaluated Claimant on December 7, 2015. Marsh Dep., 10:2. Claimant reported the following primary symptoms:

> [H]is biggest pain was at the base of the neck where he described a constant sharp pain down low, C6-7, and at the base of the spine, C7-T1, and he said he had a severe pain, a dull ache, that was rated seven of ten and a sharp pain with a constant component to it being four out of ten. He noted his neck was worse with neck flexion, which to me is generally indicative that a patient has a disk problem. He noted that his neck would pop and that he had some pain into his upper extremities, the right and left.
> …
> And he had pain into his lateral arm and with tingling into the fingers on the right – the third, fourth, and fifth digits on the right and on the left all four fingers.

Marsh. Dep., 11:4-14; 17-20.

[11] Dr. Marsh completed pre-medical training, medical school (graduated in 1997), and residency (2001) at the University of Alabama. His residency was in physical medicine and rehabilitation, for which he is board certified. He completed a spine and sports medicine fellowship at Buffalo Spine and Sports Medicine in New York. He also holds board certification in pain medicine. Marsh Dep., 5:1-14. After practicing as a physiatrist for Saint Alphonsus Medical Group, Dr. Marsh opened Exodus Pain Clinic in 2012. *Id*. at 7:3-5.

53. Dr. Marsh distinguished Dr. Montalbano's opinion that Claimant's symptoms did not follow dermatomal distribution, as follows:

> Well, there is a lot of overlap. I mean, you know, when you look at dermatomes, we typically learn C-6, C-7, C-8, but there is an overlap and when you really learn EMG's elctro-diagonostic, that's when you come to realize that not everybody follows the same pattern. In fact, some people will be – their muscle innervaton would be – for the brachial radialis C-6 dominant or C-7 dominant or C-6 and C-7 equally. So, I wouldn't get too excited. It's always nice when someone fits the perfect pattern that you see, but you have to recognize that there is some variability between individuals.

Marsh Dep., 12:23-13:9. Because Dr. Marsh "definitely could see that the C6-7 disk with neuroforaminal stenosis could cause left-sided hand symptoms really in any distribution involving the second and third finger" and concluded that Claimant "does have those symptoms," he disagreed with Dr. Montalbano's opinion that Claimant does not follow a dermatomal distribution relative to the left C6-7. *Id*. at 23:14-23.

54. Upon cross examination regarding the issue of dermatomal distribution, the following exchange between counsel for Defendants and Dr. Marsh ensued:

> Q. Well, he [Claimant] had symptoms that go beyond what we would normally see if we were going to trust this so-called theory of dermatomal distribution, does he not?
> A. I wouldn't call it the so-called theory. I think you would be misrepresenting the reality. There is myotomal pain, schleretomal pain, and dermatomal pain and there is a lot of overlap in all of those, so –
> …
> Q. [B]ut this gentleman's complaints if I understand them correctly, at least with respect to the – the left, don't necessarily match up with some stripped application of dermatomal distribution.
> A. If you look up schlerotomal distribution they are much wider and there is absolute correlation.

Id. at 35:24-36:5; 36:12-17.

55. Dr. Marsh opined that Claimant's symptoms were consistent with his review of Claimant's MRI. *Id*. at 17:17; 18:2-4. He specifically noted that the cervical MRI showed "C4-5

disk extrusion, C5-6, a right annular fissure with flattening of the cord. C6-7, left paracentral protrusion with moderate neuroforaminal stenosis." Marsh. Dep., 17:23-18:1.

56. Dr. Marsh concluded that Claimant "clearly has a disk problem. When I look at the MRI of the neck … he has two, three, four, five, six and six-seven with disk bulges and tears and my feeling in this particular case is given the absence of those symptoms prior that these findings are related to his pain and related to his [industrial] injury." *Id*. at 22:24; 23:2-6.

57. Other than prior medical imaging records (with the exception of the 2012 MRI) and records related to epidural steroid injections that Claimant received, Dr. Marsh did not review prior providers' medical records concerning Claimant, including those of Dr. Sant, Dr. Guy, and Dr. Martinez. *Id*. at 38:1-41:24. He admitted that reviewing the 2012 cervical MRI of Claimant "would have been very educational for me," *Id*. at 43:11, and conceded that that it would also have been helpful to have reviewed medical records from 2012. *Id*. at 43:16. Further, Dr. Marsh did not have information regarding Claimant's work history following his industrial accident in September 2012. *Id*. at 43:20-25.

58. *Dr. Montalbano*. [12] Prior to preparing his IME report, Dr. Montalbano reviewed Claimant's previous medical records from Saltzer Medical Group, Dr. Terry, Dr. Robinson, Saltzer Physical Therapy, Saint Alphonsus Medical Group Urgent Care and Family Medicine, Primary Health, Elks Rehabilitation, Saint Luke's Nampa Medical Center, Dr. Sant, STARS, Saint Alphonsus Medical Center in Nampa, Saint Alphonsus Medical Group Pain Management Clinic, and the Spine Institute of Idaho. Montalbano Dep., 10:17-23. He did not review the records of Dr. Marsh, however he reviewed them prior to his deposition. *Id*. at 11:6-15.

[12] Dr. Montalbano is a neurosurgeon who has practice in Boise for 16 years. He is board certified in neurosurgery and also has received training in artificial disk surgeries, which he has performed. He has frequently testified in workers' compensation cases before the Commission. Montalbano Dep., 4:21-5:25.

59. Dr. Montalbano's records review led him to conclude that Claimant had "improved with conservative measures" and that he then "returned to work." Montalbano Dep., at 12:11-12. He concluded further that there was no consistency between Claimant's symptomology, his presentation and examination results over time. *Id*. at 13:7-13. He based this conclusion upon the following findings:

> When I saw him [Claimant] he had a normal neurological exam. The exam dictated or transcribed by several care physicians demonstrated normal exam. His MRI scan that was done within 30 days after this accident … that MRI scan was October 22, 2012, demonstrated degenerative changes at C5-6 and C6-7, there was no evidence of spinal cord or nerve root compression. And then he underwent a follow-up MRI scan in 2015 that demonstrated similar degenerative changes, but again, no spinal cord or nerve root compression.

Id. at 13:13-23. He further read Claimant's January 21, 2016 cervical MRI, which he ordered, to similarly show no spinal cord compression: "The spinal cord is not distorted, nor any of the nerve roots, so it's a degenerative finding." *Id*. at 14:25-15:3. Dr. Montalbano observed in pertinent part as follows: "But when you look at these degenerative changes, as I did back on the October 22, 2012 MRI, there's no evidence of any traumatic injury to the neck. There's no fracture, there's no ligamentous injury, there's no hematoma, there's no traumatic disc herniation; it's all degenerative in nature. And that's reflective of all the MRI scans that follow." Id. at 16:4-10.

60. Dr. Montalbano opined that Claimant's degenerative cervical spine changes predated and were not the result of the September 2012 accident. *Id*. at 16:19-17:14. Further, when Dr. Montalbano examined Claimant he found that Claimant had a normal neurological exam; Dr. Montalbano could not find anything that could be explained neurologically. *Id*. at 17:18-18:1.

61. When asked to explain the discrepancy between his own examination findings and those of Dr. Beringer's P.A., Dr. Montalbano stated in pertinent part as follows:

> The sensory exam performed by the PA [Mr. Ward] is inconsistent with any objective studies, i.e., the MRI scan. There's no nerve root compression, but, yet, he has sensory loss bilaterally at C6, C7, C8, T1. You would have to have pretty significant findings on the MRI scan on both sides to see it, and you'd have to have either multiple nerve roots being compressed, i.e., C6, C7, C8, T1, or you'd have to have spinal cord compression with a bruise in the spinal cord, and we just don't see that on the MRI scan.
> And if he did have sensory loss at C8-T1, that wouldn't really be addressed with surgery at 5-6 or 6-7. So the plan of surgery is inconsistent with those symptoms, and those symptoms are not supported by an objective study, i.e., the MRI scan. So there's no correlation.

Montalbano Dep., 20:11-21:1. Because he did not see a causal connection between Claimant's symptoms, neurological examination, and radiological imaging, Dr. Montalbano did not believe that surgery of any kind was indicated, whether it be a two-level disc replacement or cervical discectomy stabilization. *Id*. at 21:11-22:18.

62. Dr. Montalbano explained Claimant's pain symptoms as follows: "Well, his symptoms do not follow normal anatomic pathway, and his symptoms aren't supported by his radiographic studies. Those – that situation is consistent with a high functional overlay." *Id*. at 23:8-11.

63. In cross examination, counsel for Claimant asked Dr. Montalbano to comment on the automobile body that fell upon Claimant during the industrial accident. He replied as follows:

> Like I said, it's irrelevant. He got MRI scans almost immediately after this injury that showed that there was no traumatic injury to his cervical spine.
> In addition, if he had 1,700 pounds of automobile fall on him, I would expect to see, given the magnitude of that force, that he would have to have some type of injury to his cervical spine, whether it be a traumatic disc herniation, whether it be a hematoma, whether it be a ligamentous injury, whether it be instability of his neck, whether it be some facet disruption of his cervical spine.

Id. at 36:24-37:10.

64. *Weighing the Medical Evidence.* Claimant relies upon the opinions of Dr. Beringer and Dr. Marsh to meet his burden of proof on causation for his cervical condition. The respective foundations of these physicians' opinions, however, are questionable and thus are insufficient to meet Claimant's burden of proof. The opinion of Dr. Montalbano that there is no reasonable causal link to the industrial accident is entitled to greater weight, for the reasons discussed below.

65. Both Dr. Beringer and Dr. Marsh formed their opinions primarily upon Claimant's descriptions of his symptoms, rather than also relying upon a review of the records of his medical treatment prior to their care. They began treating Claimant, however, three years following his industrial accident in 2012. As Dr. Beringer stated to Claimant's counsel when asked to provide a causation opinion, "I missed out on the first three years of evaluating this patient. I'm sorry, but that's the way it is." Beringer Dep., 36:2-4. While Dr. Beringer represented that he had access to Claimant's prior medical records, it is not clear from his testimony that he in fact reviewed them. Rather, he could not positively affirm that he had reviewed the records. *Id*. at 52:5-21. Dr. Marsh, for his part, admitted that he did not review Claimant's prior medical records, Marsh Dep., 38:1-10. In particular, Dr. Marsh had not reviewed Claimant's 2012 cervical MRI, even though he admitted that it would have been "very educational." *Id*. at 43:11.

66. As Defendants correctly highlight, when "asked whether he felt Claimant's cervical problems and his need for surgery were due to a September 13, 2012 accident, *Dr. Beringer hedged*." Defendants' Brief at 16 [emphasis added]. At three different points during his deposition, in response to questions from both counsel for Claimant and counsel for Defendants, Dr. Beringer failed to provide a clear answer to the causation question. Rather than answer the

question, he equivocated by pointing out the length of time since the industrial accident and the previous care Claimant had received. Beringer Dep., 34:11-35:1; 35:13-36:4; 60:11-61:1.

67. Dr. Beringer was under the impression from Claimant's prior medical treatment that Claimant's symptoms had remained fairly consistent since 2012. *Id*. at 34:13-16 ("[I]f you look at this guy's notes from the other physicians that have seen him, the symptoms seem fairly consistent, but I wasn't there. Okay? But if you read through it, the symptoms have stayed the same.") Nevertheless, Dr. Beringer was mistaken on this point and his assertion betrayed his lack of familiarity with Claimant's medical records. A review of Claimant's medical treatment beginning with his industrial accident on September 13, 2012 does not reflect a consistency of symptoms over time. Rather, Claimant's symptoms varied widely. When Dr. Sant originally released Claimant from his care on November 27, 2012, at Claimant's request, he stated that "he is a bit sore but not the kind of pain he had before;" upon exam, he was "moving OK. He has good gait and posture. No new weakness." CE 4:13. By April 2013, however, when he was seeking to have his narcotic prescriptions renewed, Claimant's pain, numbness and tingling symptoms had increased to include radiculopathy symptoms. DE 10:482-485; CE 5:15-20. When Claimant returned to physical therapy in April 2015 upon referral from P.A. Harmony, Claimant reported to his physical therapist that he was unable to work due to his cervical pain. He also stated that he would have "neck surgery at some point," despite the fact that he had yet to receive a recommendation for surgery from any physician. Upon release from physical therapy on July 15, 2015, however, Claimant had reduced his pain to 2/10 and had 100% range of motion improvement in his cervical region. DE 9:410-439.

68. July 15, 2015 was also the date of Claimant's first evaluation by P.A. Ward of Dr. Beringer's clinic. Significantly, on the same day that he received a positive release from

physical therapy for his neck for which the therapist recorded excellent progress for Claimant on both a significant reduction of pain and excellent neck mobility, Claimant reported to Mr. Ward that his average pain was 6/10 and had many other symptoms including bilateral tingling and numbness in his upper extremities, including "pain severe enough that he is ready to proceed with surgery at this point." DE 13:605-607. This significant discrepancy of reported symptoms recorded on the same date by different health care providers, combined with the other troubling aspects of Claimant's testimony that cast doubt upon his credibility, undermines Claimant's overall credibility regarding his condition as well as the reliance of Dr. Beringer and Dr. Marsh upon his descriptions of his symptoms for their respective opinions.

69. Had either Dr. Marsh or Dr. Beringer reviewed Claimant's prior medical records since 2012, they would have had to reckon with the February 28, 2014 evaluation of Dr. Green, a neurologist. Dr. Green evaluated Claimant for his migraine headaches, which Dr. Marsh observed in January 2016 were getting worse. CE 12:5. Dr. Green, however, associated Claimant's migraine headaches with narcotic pain medication overuse and recommended that Claimant seek other pain management therapies. Unsurprisingly, Claimant did not return to Dr. Green. DE 12:601-603.

70. Although no physician has directly attributed Claimant's pain complaints and cervical symptoms, either in whole or part, to narcotic abuse, nevertheless it is significant that Dr. Green's opinion was overlooked in the evaluations of both Dr. Beringer and Dr. Marsh. Claimant did not return to Dr. Green after he evaluated Claimant's migraine headaches as attributable to his narcotic dependency, nor does it appear that he advised his medical providers at Saint Alphonsus Comprehensive Pain and Spine Clinic that Dr. Green had recommended that

he discontinue his dual prescriptions for Norco and Morphine.[13] Dr. Beringer and Dr. Marsh, however, were remarkably untroubled by Claimant's three-plus year record of habitual narcotic use and thus did not consider whether it was a contributing factor in his pain complaints rather than his cervical condition. Dr. Marsh merely noted Claimant's "continuous use of opioids" but determined that Claimant's narcotic use was "stable with no evidence of abuse." CE 12:5. Dr. Marsh noted Claimant's narcotic use in noting only that he "is also requiring Morphine and Norco without complete relief." CE 9:4.

71. Neither Dr. Beringer nor Dr. Marsh inquired into Claimant's work history following the September 2012 industrial accident. Beringer Dep., 61:13-17 ("I have not read the summary on what his work activities were."); Marsh Dep., 43:20-25 ("He [Claimant] talked to me about the injury that he had and did not talk to me about what he was doing thereafter.") Thus, they did not consider the facts that Claimant returned to work at LKQ within a few days of his industrial accident, remained employed there until November 2012, worked in a heavy labor position at Nampa Valley Helicopters until September 2014 (over two years), and then worked at MicroSil until December 2014 in a bench position. Tr., 51:4-15; Cl. Dep., 31:13-32:15. The fact that neither physician took into account Claimant's work history following the industrial accident further undermined their evaluations.

72. While Dr. Beringer's testimony may be disregarded based solely upon the fact that he could not give an unequivocal opinion on causation, Dr. Marsh, on the other hand, testified on direct examination that he found a causal link between Claimant's industrial accident, his cervical condition, and the need for surgery. Marsh Dep., 22:24; 23:2-6.

[13] This also puts the fact that Claimant did not return to Dr. Sant in December 2012 or January 2013 into context. Claimant's story was that Dr. Sant's office did not return his call, however the medical record demonstrates that the office returned his call. Claimant then sought treatment outside of the workers' compensation system to continue receiving narcotic prescriptions, which Dr. Sant had earlier recommended be discontinued.

Nevertheless, Dr. Marsh's failure to consider Claimant's prior medical records as well as his work history after the industrial accident undermines the foundation of his causation opinion. Furthermore, on cross examination Dr. Marsh testified that Claimant's bilateral upper extremity problems "could be" explained by the pathology he identified on the 2016 cervical MRI, a qualification that undercuts his prior opinion testimony. Marsh Dep., 37:18-22. Dr. Marsh also could not rule out facet joint pain as a cause of Claimant's pain in the cervical spine rather than the disk bulges he had identified on the MRI. *Id*. at 34:19-22.

73. In contrast to the evaluations of Dr. Beringer and Dr. Marsh, Dr. Montalbano had reviewed all of Claimant's prior medical records prior to his IME. Montalbano Dep., 10:11-25. He was also aware that Claimant continued to work for a lengthy period of time following his September 2012 accident. *Id*. at 23:21-25. Based upon his review of all cervical imaging studies for Claimant (2012 X-ray and MRI, 2015 MRI, and 2016 MRI), the medical history he took from Claimant, Claimant's prior medical records, and vocational history, Dr. Montalbano unequivocally opined that the September 2012 accident was not the cause of Claimant's cervical condition nor was the need for disc replacement surgery related to the industrial accident. Rather, Dr. Montalbano attributed the pathology observed on the MRIs to degenerative changes. *Id*. at 16:19-17:14; 21:11-18.

74. It is not necessary to agree with Dr. Montalbano regarding his finding that Claimant's symptoms lacked expected normal dermatomal distribution to determine that his opinion is entitled to greater weight. Dr. Marsh, in fact, made a reasonable case in his deposition testimony that not all patients follow normal dermatomal patterns and that myotomal pain, schleretomal pain, and dermatomal pain overlap, which could account for Claimant's symptoms. Marsh Dep., 13:5:9; 35:24-36:5; 36:12-17. Nevertheless, the salient critique of Dr. Montalbano

of Dr. Marsh's causation analysis remains unrebutted – Claimant's cervical imaging following the 2012 industrial accident, including both an X-ray and MRI, did not demonstrate any traumatic injuries but rather only degenerative changes. The auto body that fell on Claimant may have indeed weighed 1,700 pounds, as he testified, but it does not follow that the full force of that weight traumatically impacted his cervical spine. Dr. Montalbano correctly concluded that "given the magnitude of that force," he would have expected to have seen some significant type of injury, such as a traumatic disc herniation, a hematoma, a ligamentous injury, or other trauma. Montalbano Dep., 36:24-37:10. Furthermore, Dr. Montalbano's opinion that subsequent MRIs merely demonstrated a progression of degenerative changes is reasonable and entitled to greater weight. Dr. Marsh, however, admitted that he did not read Claimant's 2012 MRI, even though he acknowledged that it would have been "educational." Marsh Dep., 43:11.

75. Dr. Marsh relied upon Claimant's self-report that he did not have any cervical pain symptoms or radiculopathy prior to the 2012 industrial accident for his causation opinion. *Id*. at 23:2-6. Given the lack of objective findings to support a traumatic injury to Claimant's cervical spine as shown by his imaging, however, it is reasonable to conclude that Dr. Marsh's reasoning is based upon correlation without an adequate basis to show causation.

76. For all the foregoing reasons, Claimant has failed to demonstrate, by a preponderance of the evidence, that his current cervical condition is causally related to the 2012 industrial accident. The evidence shows that Claimant sustained a temporary injury to his cervical spine which healed by November 27, 2012 when Dr. Sant found that he was at MMI. Thereafter, Claimant's cervical condition was, per Dr. Sant's opinion, due to degenerative changes rather than the industrial accident.

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

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

79. Because Claimant has failed to establish a causal link between his current cervical condition and the 2012 industrial accident, it is not necessary to determine the reasonableness of his request for coverage of the two-level cervical disc replacement surgery as proposed by Dr. Beringer. Claimant is not entitled to further medical benefits following November 27, 2012, the date Dr. Sant found him at MMI.

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

81. Claimant argues that he should receive TTD benefits retroactively from February 29, 2016, when Dr. Marsh determined that he was disabled from working, through MMI after the proposed cervical surgery. Claimant's Opening Brief at 23. Nevertheless, the evidence shows that Claimant reached MMI on November 27, 2012 per Dr. Sant's finding. Therefore, Claimant is not entitled to TTD benefits after that date.

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

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

83. Defendants reasonably relied upon the opinion of Dr. Montalbano in denying the proposed surgery to Claimant. Therefore, Claimant is not entitled to recover attorney fees.

CONCLUSIONS OF LAW

1. Claimant's current cervical condition is not causally related to his industrial accident of September 13, 2012.

2. Claimant is not entitled to medical benefits, including the proposed two-level cervical disk replacement surgery, beyond the November 27, 2012 MMI date.

3. Claimant is not entitled to temporary disability benefits.

4. Defendants are not liable for attorney fees pursuant to Idaho Code § 72-804.

RECOMMENDATION

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

DATED this 12th day of January, 2017.

INDUSTRIAL COMMISSION

___/s/_____
John C. Hummel, Referee

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of January, 2017, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

BRYAN S STORER
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___/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHRISTOPHER LUNA, Claimant, v. LKQ FOSTER AUTO PARTS, INC., Employer, and ACE AMERICAN INSURANCE COMPANY, Surety, Defendants.	**IC 2012-024093** **ORDER** Filed January 27, 2017

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

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

1. Claimant's current cervical condition is not causally related to his industrial accident of September 13, 2012.

2. Claimant is not entitled to medical benefits, including the proposed two-level cervical disk replacement surgery, beyond the November 27, 2012 MMI date.

3. Claimant is not entitled to temporary disability benefits.

4. Defendants are not liable for attorney fees pursuant to Idaho Code § 72-804.

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

DATED this 27th day of January, 2017.

INDUSTRIAL COMMISSION

___/s/_____
Thomas E. Limbaugh, Chairman

___/s/_____
Thomas P. Baskin, Commissioner

___/s/_____
R.D. Maynard, Commissioner

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of January, 2017, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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sjw

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