BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KENNETH STEPHENS, Claimant, v. BARRET BUSINESS SERVICES, INC., Employer, and STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2010-018241** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED AUG 18 2023 INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Sonnet Robinson, who conducted a hearing on February 23, 2022. Claimant, Kenneth Stephens, was present in person and represented by Bryan Storer of Boise. James Ford of Boise represented Defendant/Employer. Paul Augustine of Boise represented Defendant/ISIF. The parties presented oral and documentary evidence. Post-hearing depositions were taken. The matter came under advisement on May 24, 2023 and is ready for decision.

ISSUES

The issues to be decided are:

1. Whether Claimant is entitled to:
    a. Past and future medical benefits;
    b. Temporary partial or temporary total disability benefits (TPD/TTD);
    c. Permanent partial impairment (PPI);
    d. Permanent partial disability (PPD), including total and permanent disability;
    e. Attorney's fees;
2. Whether Claimant suffered an accident and injury in the course and scope of employment as alleged;
3. Are the conditions for which Claimant seeks additional compensation (medical and related benefits and medical services and income benefits) caused by the alleged accident and injury at issue, if any, or are the conditions at issue caused by pre-existing or otherwise unrelated circumstances;
4. Apportionment of PPI and PPD for pre-existing conditions under Idaho Code § 72-406;
5. If Claimant is found to be totally and permanently disabled, whether ISIF is liable under Idaho Code § 72-332.

CONTENTIONS OF THE PARTIES

Claimant contends he is totally and permanently disabled as a result of the subject accident, and that Defendant/Employer is liable, but not ISIF, for total disability benefits. Claimant argues there is ample evidence to support the proposition that Claimant's condition is related to his industrial accident, and also related to two additional aggravations which occurred during physical therapy and an FCE evaluation for treatment of the industrial injury. Claimant is entitled to medical

care, temporary disability benefits, permanent disability benefits, and attorney's fees for Defendant/Employer's unreasonable denial.

Defendant/Employer contends Claimant is not totally and permanently disabled and that Claimant's medical care after March 2011 was not necessary, reasonable, or related to the industrial injury. Defendant Employer/Surety appropriately adjusted the claim.

ISIF contends that the pre-requisites for ISIF liability are not met, and that Claimant admits in briefing[1] that the elements of ISIF liability are not met; Claimant's pre-existing physical impairments were not subjective hinderances, nor do they combine with the subject accident, either as an aggravation or a new injury, to produce total and permanent disability. In the alternative, ISIF argues that Claimant is not totally and permanently disabled.

Claimant responds that Defendants' experts are not credible and that Dr. Radnovich's opinions should carry the most weight. Claimant suffered a lumbar injury and SI joint injury because of the industrial accident which has totally and permanently disabled him.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Claimant's Exhibits (CE) 1-11;
3. Joint Defendants' Exhibits (JE) 1-41;
4. Defendant/Employer's Exhibits (DE) 100-124;
5. The testimony of Claimant, Kenneth Stephens, Nicholas Stephens, and Deena Stephens, taken at hearing;

[1] Claimant's current counsel explained that Claimant's former counsel filed the complaint against ISIF. Defendant Employer/Surety also does not argue for ISIF liability.

6. The post-hearing depositions of:

   a. Richard Radnovich, MD, and Delyn Porter, taken by Claimant;

   b. Craig Beaver, PhD, Brian Tallerico, MD, and Christian Gussner, MD, taken by Defendant/Employer.

All outstanding objections 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 was 54 years old at the time of hearing and a resident of Boise, Idaho. Tr. 51:2-16. Claimant was born in California and moved to Idaho from Los Angeles in 1993. JE 100: 8, 13.

2. On May 16, 1996, Claimant was seen at Primary Health and reported "occasional back pain that seems fleeting." JE 1:1.

3. On March 10, 1997, Claimant was diagnosed with "depression with probable bipolar component." *Id.* at 12. The physician recorded a "long history of drug and alcohol abuse" and that Claimant "was drinking a case a day of beer on the weekends." *Id.* Claimant was started on Paxil. *Id.* Claimant's wife called on April 24, 1997 and reported that Paxil was not effective for anger control and Claimant's prescription was increased. *Id.* at 15. By January 7, 1998, Claimant had stopped taking Paxil and was taking St. John's Wort. *Id.* at 17. At hearing, Claimant specifically denied ever using IV drugs and denied that he was an alcoholic; however, it was "possible" he was cycling between drug binges and then depressive states at that time. HT 124:6-125:16; 139:23-140:4.

4. Claimant fractured his coccyx on December 24, 2001 when he slipped and fell down some stairs at home. JE 8:4; 100:14. Claimant eventually underwent a coccygectomy at UC Medical Center in Sacramento on March 3, 2003. JE 11:6.

5. On April 7, 2003, Claimant presented to John Whalen, DC. JE 12:1. Claimant reported he was currently disabled from work due to low back and neck pain which began when he fell down his stairs. *Id.* Claimant treated with Dr. Whalen until September 8, 2003 for his low back pain. *Id.* at 7.

6. On December 20, 2004, and December 29, 2004, Claimant returned to Dr. Whalen to treat low back pain from "driving a lot." *Id.*

7. Claimant returned to Dr. Whalen on August 26, 2005 and reported he was unloading lumber with a partner, when the partner dropped the load, injuring his neck. JE 12:7. At his August 30 appointment, Claimant indicated he still had some pain in his tailbone. *Id.*

8. Claimant saw Steven Eichelberger, MD, on September 26, 2005, and reported that he had injured his right shoulder and neck in an accident at work. JE 1:100. Dr. Eichelberger immediately referred Claimant for an MRI. *Id.* at 101. Claimant's C-spine MRI showed a disc protrusion at C-6 and mild cord impingement. *Id.* at 105.

9. Claimant saw Paul Montalbano, MD, and he recommended decompression and fusion surgery for Claimant's cervical spine at the C5-C6 level. JE 2:15. On October 11, 2005, Claimant proceeded with surgery. *Id.* at 21. On February 3, 2006, Claimant reported to Dr. Montalbano that his pre-operative symptoms were completely relieved by the surgery, and Claimant was released without restrictions. JE 14:16.

10. On February 8, 2006, GA Nicola, MD, examined Claimant and assessed a 15% impairment, with 50% apportioned to Claimant's pre-existing arthritis, for a total impairment

related to the injury of 7.5%. JE 16:1. Claimant recovered fully from this injury and reported in his 2012 deposition: "it doesn't bother me at all. Every now and again, it gets a little stiff. But that's it. I've had no problems with it since then." JE 100:22.

11. Claimant returned to Dr. Whalen on May 4, 2006 and reported mid back pain. JE 12:7. On October 16, 2006, Claimant reported low back pain. JE 12:7.

12. In November of 2006, Claimant began to experience shortness of breath, insomnia, and sinus issues without much relief from antibiotics. JE 17:1; 13:27. Claimant consulted with Mark Rasmus, MD, a pulmonologist, but his symptoms became so severe that he was off work by December of 2006. JE 17:1, 11. On April 4, 2007, Claimant returned to Dr. Eck and reported he was short of breath all the time, and that he couldn't even stand or carry on a conversation. JE 13:37. Dr. Eck referred Claimant to Thomas Coffman, MD, another pulmonologist, who assessed probable nocturnal aspiration secondary to reflux disease leading to chronic cough and "weakly positive cocci serology." JE 18:3.

13. On July 5, 2007, Claimant underwent Nissen fundoplication for gastroesophageal reflux disease. JE 19:12.

14. On July 13, 2007, Claimant saw PA Scott at Dr. Eck's office and reported a sharp pain in his left calf which he thought might be related to his surgery. JE 13:40. A straight leg raise created pain which radiated into the buttocks on his right side; PA Scott assessed sciatica and recommended physical therapy. *Id.*

15. Claimant returned to Dr. Rasmus on November 19, 2007 and reported his reflux improved dramatically after his Nissen fundoplication surgery, however, he continued to experience shortness of breath and chronic bronchitis and was still unable to work due to his

symptoms, at this point for almost a year. JE 17:18. Claimant reported at deposition that he eventually recovered and his "lungs have been fine since." JE 100:17.

16. Claimant returned to Dr. Whalen in late December of 2007 and reported mid back and low back pain. JE 12:8.

17. Claimant returned to Dr. Whalen on October 22, 2008 and reported low back pain. JE 12:8. Claimant returned on November 10, 2008 and Dr. Whalen noted that Claimant had bilateral numbness and swollen feet. *Id.* Claimant continued to treat his low back with Dr. Whalen on November 12, 13, 14, 17, 20, 21, 24, 26, and December 1st. *Id.* at 8-10. Claimant described his 2008 symptoms as follows: "I just had some low back pain…I had some nerve kind of firing down both of my legs and I was having some problems with my feet." HT 80:14-18. The medical records subsequent to this incident mention an injury but the initial records do not mention any specific low back injury.

18. On November 19, 2008, Claimant underwent a lumbar spine MRI ordered by Dr. Whalen due to his severe low back pain and bilateral foot numbness. CE 2:3. The MRI read as follows: "Mild spondylotic changes throughout the lumbar spine with straightening of the normal lumbar lordosis. Minimal retrolisthesis of L3 over 4. Multilevel disc bulging. L4-5 central annular fissure or tear. L5-S1 mild left neural foraminal stenosis. No significant lateralizing disc herniation or spinal canal compromise." JE 21:3.

19. On November 26, 2008, Claimant presented to Dr. Eck and complained of low back pain with bilateral numbness and tingling in his feet. JE 13:51. Dr. Eck started Claimant on Flexeril. *Id.* at 53.

20. Claimant started with Employer in December of 2009. JE 100:31. Claimant broke down pallets for Winco. *Id.* Claimant wore a back brace every day he worked to support his back. *Id.* at 32. Claimant testified he wore the back brace to try to be careful lifting. HT 174:12-18.

21. On Wednesday June 23, 2010, Claimant was breaking down yogurt pallets, and as he was finishing, he stood up and felt a sharp pain in his lower back. CE 1:1. Claimant worked the next two days, but took it easy, and spent the weekend just icing his back and not moving. JE 100:38-39. By Monday morning, Claimant's back had "locked-up" and he called out of work; Claimant has not worked since. *Id.* at 36, 40.

22. Claimant returned to Dr. Whalen to treat this industrial injury on June 30, 2010. JE 12:10. Claimant reported his low back pain had gradually worsened since the accident. *Id.* at 11. Claimant reported gradual improvement with treatment through June and July of 2010. *Id.* at 12-13.

23. The FROI indicates Claimant first notified his Employer on July 19, 2010. CE 1:1.

24. Claimant saw PA Alex Casebolt that same day. JE 24:3. Claimant reported feeling a sudden, sharp pain while breaking down pallets; Claimant also reported he had been off work for three weeks per his chiropractor's instructions. *Id.* Claimant reported chiropractic treatment had been helping him, but that his symptoms had persisted. *Id.* He denied any previous low back problems but did report his cervical fusion and tailbone removal. *Id.* PA Casebolt assessed a lumbar strain, recommended Claimant discontinue chiropractic treatment, start physical therapy, and prescribed Flexeril and Medrol; PA Casebolt also put Claimant back on work with restrictions of no lifting in excessive of five pounds and no bending or stooping. *Id.* at 4.

25. On July 21, 2010, Claimant underwent a physical therapy assessment at St Luke's Elks Rehab. Claimant reported he had had low back pain prior to this injury and had worn a back

brace at work; there was also a notation that Claimant had used an inversion table prior to the injury. JE 25:9, 12, 14. Claimant did recall owning an inversion table prior to the 2010 accident. HT 146:17-147:2.

26. Claimant returned on July 28, 2010 and reported Medrol had helped "quite a bit" and that he had shown some improvement with physical therapy. *Id.* at 7. On August 11, 2010, Claimant reported he had worsened. JE 24:10. PA Casebolt ordered an MRI and prescribed Norco. *Id.*

27. On August 13, 2010, Claimant underwent an MRI which was read as follows: "Multilevel lumbar degenerative disk and facet disease is most pronounced at L3-4[.] [T]here is mild bilateral foraminal stenosis at L5-S1 where there is moderate left and mild right foraminal stenosis. The canal is patent at all levels." JE 7:18

28. Claimant saw Cody Heiner, MD, on August 23, 2010. JE 24:16. Dr. Heiner assessed subacute back pain with no radicular symptoms; he suspected that Claimant's SI joints were the most likely source of pain. *Id.* Dr. Heiner noted physical therapy had not improved Claimant's symptoms, but chiropractic care had and referred Claimant to another chiropractor, Mike Williams. *Id.* Claimant returned on September 2 and reported he was about the same. *Id.* at 21. Dr. Heiner noted Claimant was not improving with conservative measures and that he would consider a physiatrist referral. *Id.*

29. Claimant was discharged from Elks physical therapy on October 12, 2010 because Claimant had not shown any significant improvement of his symptoms. JE 25:30. Claimant later alleged that he had injured himself with a male physical therapist during a PT exercise. Careful review of the physical therapy records does not reflect an acute injury or event; the closest

description of a PT related injury is on July 23, 2010, wherein Claimant reported he was sore from overdoing it in therapy the day previous. JE 25:28; HT 123:6-20.

30. On October 28, 2010, Claimant underwent his first IME for this injury with Brian Tallerico, DO; Dr. Tallerico reviewed records, conducted a physical exam, and made diagnoses and recommendations. JE 25. Dr. Tallerico recorded Claimant's prior coccyx fracture and 2008 lumbar spine MRI; Claimant informed Dr. Tallerico about his coccyx fracture but explained that he had not had significant low back issues since 2002. JE 27:5. Claimant reported that his pain was getting more frequent and more intense and that he had not worked since the injury because his Employer could not accommodate his restrictions. *Id.* at 5-6. Dr. Tallerico diagnosed lumbosacral and sacroiliac sprain/strain, related to the industrial injury on a more probable-than-not basis. *Id.* at 8. Dr. Tallerico observed:

> He does have objective findings on examination with tenderness to palpitation, and what I presumed to be diminished dorsolumbar range of motion due to his rigid gait and his inability to participate in range of motion testing due to anticipated increase in discomfort. These appear to be consistent with his subjective complaints. However, I really have no orthopedic/neurologic explanation for his symptoms of buttock and leg numbness, nerve firing, and twitching when he gets into a supine position. His lumbar spine MRI from August of this year is rather unimpressive and certainly does not explain those symptoms. So, there may be some symptom magnification here.

JE 27:9. Dr. Tallerico found that the treatment to date had been reasonable and related to the industrial injury and that Claimant required further treatment, specifically aquatic physical therapy and possibly a sacroiliac injection. *Id.* at 11. Dr. Tallerico anticipated Claimant would reach MMI in six to eight weeks. *Id.*

31. Claimant first saw Dr. Gussner for this injury on November 18, 2010; Dr. Gussner referred Claimant for physical therapy and offered bilateral SI joint injections which took place that same day. JE 9:17-21. Dr. Gussner also recorded his prior interactions with Claimant, noting

the 2002 coccyx fracture and a 2008 lumbar MRI for "severe back pain." *Id.* at 26. Claimant reported that the injections increased his pain to PA Casebolt on December 1, 2010. JE 24:38.

32. Claimant underwent a second physical therapy evaluation on December 6, 2010; Claimant reported:

> [Claimant] reports sudden onset of low back pain on 6/23/10 when he was unloading a truck at work, bent to lift a box, and was unable to stand up again. Pain has progressed since then from low back to both SI joints, leg spasms B, tingling in the R thigh, and numbness in the B thighs. He has seen a chiropractor with little relief, taken a course of steroids, had SI injections which helped the R but not the L, and physical therapy which helped initially but then seemed to cause a flare up. Currently, he is receiving no other treatments except ice and Norco and doing no home exercises…He did have a previous back injury 2 years ago which resolved completely with chiropractic care, massage, and insoles.

JE 15:15.

33. On December 14, 2010, Claimant presented to Dr. Gussner post-SI joint injection and reported no relief. JE 9:27. Dr. Gussner assessed (1) low back pain; (2) SI joint pain; (3) strain/sprain lumbar; (4) sciatica; and (5) lumbosacral spondylosis. JE 9:28. However, under "SI joint pain" Dr. Gussner wrote: "unlikely SI joint pain since no relief with PT for SI joints and no pain relief from flouro guided SI joint injections." *Id.* Dr. Gussner repeated that Claimant's SI joints were unlikely to be the source of Claimant's pain or "NOT" (emphasis in original) the source of Claimant's pain throughout the rest of his records. JE 9:49, 61, 63, 78, 94. Dr. Gussner performed bilateral PSIS injections that same day. *Id.*

34. On December 15, 2010, Claimant reported to his physical therapist that he had had injections the day prior, and felt a little better. JE 15:23. On December 27, 2010, the physical therapist wrote that Claimant was in more pain and getting "sharp sudden pains" without movement. *Id.* at 32. That same day PA Casebolt observed "I do believe that there is some frustration with the patient which I think is starting to delay his healing to some degree." JE 24:41.

35. On January 11, 2011, Claimant presented to Dr. Eck for a routine physical; Claimant reported he was off work due to his industrial injury. JE 13:61. Dr. Eck recorded a normal exam of Claimant's back, musculoskeletal system, neurological system, and extremities. *Id.* On this same day, Claimant was examined by Dr. Gussner and reported "partial relief" on his right side from the prior injection, but still had deep and aching pain, and pins and needle sensations, right side worse than left. JE 9:34.

36. Claimant was discharged from physical therapy on January 12, 2011 per Dr. Gussner; the physical therapist noted: "Patient did not respond to several adjustments in treatment program. Symptoms continued to worsen." JE 15:45.

37. On January 12, 2011, Dr. Gussner responded to a letter from Surety asking him to explain why he disagreed with Dr. Tallerico's IME finding that Claimant would be MMI in six to ten weeks. JE 9:38-39. Dr. Gussner responded that the exact etiology of Claimant's pain remained unclear and that he had remained unresponsive to treatment to date, however, Dr. Gussner felt it was reasonable for Claimant to continue to pursue chiropractic treatment, ESI injections, facet nerve blocks, and nerve ablation. *Id.* at 39. Dr. Gussner wrote that if Claimant still had no pain relief after these treatment options were exhausted, then Dr. Gussner would consider Claimant at MMI. *Id.* Dr. Gussner concluded: "It is certainly possible that [Claimant] has symptom magnification and is complaining of more pain that he really has. Of course, it is impossible to know if this is the case. Hence, I feel it is reasonable to proceed with the above treatments." *Id.* at 40.

38. On January 13, 2011, Claimant underwent bilateral ESI injections in his lumbar spine. JE 9:41. On January 20, 2011, Claimant returned and reported no relief from the ESI injections. *Id.* at 47. On January 21, 2011, Claimant underwent fluoroscopically guided medial

branch blocks on his left and right side at the L4-L5 and L5-S1 levels. JE 9:52. At follow-up on February 1, Claimant reported 75% pain relief for the first four hours with a gradual return of pain. *Id.* at 60. That same day, Dr. Gussner again wrote to Surety to express his disagreement with Dr. Tallerico's IME report; Dr. Gussner continued to recommend chiropractic treatment and nerve ablation; he wrote Claimant's current pain was due to L4-L5, L5-S1 facet arthropathy, not his SI joints. *Id.* at 63. On February 17, 2011, Claimant underwent bilateral radiofrequency nerve ablation at his L4-L5 and L5-S1 joints. *Id.* at 69.

39. On February 15, 2011, Claimant was diagnosed with major depression. JE 28:10. Claimant's counselor recorded Claimant was drinking 40 bottles of beer a week. *Id.* at 9. Claimant's recollection was that he was treating for depression at this time because Defendant/Employer was treating him "wrong…they were convinced it was just a conservative problem and that I didn't have a real problem and they just wanted me out of their hair and wanted me away from them and it was very frustrating to not be believed." HT 107:11-17.

40. On February 25, 2011, Claimant reported to Dr. Whalen that he was "feeling quite a bit better." JE 12:23.

41. On March 3, 2011, Claimant reported a 50% decrease in back pain after the nerve ablation procedure; Dr. Gussner wrote that this relief, coupled with Claimant's relief from chiropractic care, meant that Claimant's pain was "probably the facet joints." JE 9:78. Dr. Gussner felt it was reasonable for Claimant to finish his course of chiropractic care, but that he had reached MMI with a 2% whole person impairment (WPI) with 1% apportioned to a pre-existing condition. *Id.* at 79. Dr. Gussner issued medium duty work restrictions. *Id.* at 81.

42. On March 31, 2011, Claimant's then attorney wrote to Richard Radnovich, DO requesting a permanent impairment rating and permanent restrictions for Claimant's industrial

injury. JE 29:1. However, Claimant wrote that he was seeing Dr. Radnovich to "see if there are more options for [his] low back injury." *Id.* at 6.

43. On April 28, 2011, Claimant returned to PA Scott and reported he had low back pain since the accident. JE 13:68. Claimant noted some relief from a previous nerve block, but that the pain had returned, was sharp traveling down into both legs, and his buttocks went numb if he sat for more than 20 minutes. *Id.* PA Scott prescribed Norco, Flexeril, and Lidoderm. *Id.*

44. Claimant was examined by Dr. Radnovich for the first time on May 17, 2011; Dr. Radnovich took a history, conducted a physical exam, and made diagnoses and recommendations. JE 29:14. Claimant reported PT had aggravated his back. *Id.* Dr. Radnovich prescribed steroids, and noted he wanted to reduce Claimant's Norco intake. *Id.* at 15. Claimant returned on May 24 and reported he was little better, but that his legs had gone completely numb and buckled since he last saw Dr. Radnovich; Dr. Radnovich recorded "good early response to treatment." *Id.* at 17-18. On June 7, Claimant again reported falling due to numbness, but was "better overall." *Id.* at 21. On July 26, Claimant reported he was worse and Dr. Radnovich recommended physical therapy and trigger point injections. *Id.* at 31.

45. On August 8, 2011, Dr. Radnovich issued an impairment rating of 3% for facet joint pain; Dr. Radnovich considered Claimant's prior history of low back treatment, but because Claimant was unrestricted and unrated prior to the 2010 injury, he felt 0% apportionment was appropriate. *Id.* at 45. Dr. Radnovich wrote that Claimant required work restrictions, ongoing medication management, and was a possible surgical candidate if his symptoms persisted or worsened. *Id.*

46. On August 9, 2011, Claimant again reported that physical therapy was aggravating his back. JE 29:46. Dr. Radnovich performed a trigger point injection, which Claimant reported

provided temporary, marginal relief. *Id.* at 47, 51. On August 23, Claimant underwent another trigger point injection and reported that it did not help at all. *Id.* at 52, 55. On August 29, Claimant reported that the medication was not helping, and he was not improving; Dr. Radnovich noted that Claimant was not an "ideal surgical candidate but we are running out of options." *Id.* at 56.

47. On September 14, 2011, Dr. Radnovich recommended another MRI and a surgical consultation after Claimant failed to improve. JE 29:59, 62.

48. On December 13, 2011, Defendant/Employer's counsel wrote to Dr. Gussner to confirm his opinions to date, namely that Claimant was at MMI, required no further treatment including a surgical consult, an MRI, or opioid pain management. JE 12:83-87. Dr. Gussner agreed that Claimant was at MMI and confirmed his prior opinions without comment. *Id.*

49. On December 22, 2011, Dr. Radnovich responded to Dr. Gussner's letter explaining that he was requesting another MRI because St. Luke's imaging was not as detailed as Intermountain Medical Imaging. JE 29:88. Dr. Radnovich also justified his surgical consult recommendation by simply stating neither he, nor Dr. Gussner, were surgeons and that the standard of care in the region required a surgical consultation once conservative care had failed. *Id.* at 89.

50. Dr. Gussner saw Claimant again on January 24, 2012. JE 9:91. Claimant reported his condition was "much worse" and Dr. Gussner recommended a neurosurgical consult with Dr. Montalbano. *Id.* at 94.

51. On February 8, 2012, Claimant saw Dr. Montalbano on referral from Dr. Gussner for an IME; Claimant reported he had no low back pain prior to the June 23, 2010 accident. JE 14:19. Dr. Montalbano recommended another lumbar MRI and bone scan. *Id.* at 20. Claimant underwent this MRI on February 14, 2012, which noted the findings were essentially unchanged from the 2010 MRI. CE 2:6. On February 24, Dr. Montalbano wrote that Claimant's MRI showed

no significant stenosis, that his bone scan showed no significant uptake, and that the x-rays showed no instability. *Id.* at 25. Dr. Montalbano also opined Claimant was at MMI, not a surgical candidate, and had no restrictions or permanent impairment related to the injury. *Id.*

52. On February 29, 2012, Claimant underwent a lumbar MRI ordered by Dr. Radnovich which was read as follows: "Diffuse spondylotic changes with interval decrease in the L5-S1 disc height and slight progression of degenerative end plate changes. No new significant lateralizing disc herniation or spinal canal compromise. Mild neural foraminal stenosis as detailed above." JE 21:5.

53. On March 20, 2012, Tyler Frizzell, MD, conducted an IME on behalf of Claimant. JE 30:1. Dr. Frizzell recommended an FCE for restrictions and wrote that Claimant was not "a surgical candidate given the four levels of degenerative disk disease. Any attempt to address the likely symptomatic level at L5-S1 would probably fail in a short period of time because of the adjacent level degenerative changes." JE 30:2. On June 27, 2012, Dr. Frizzell agreed with the restrictions as found by the FCE. JE 30:6.

54. On April 4, 2012, Dr. Montalbano indicated that he agreed with Dr. Frizzell that Claimant was not a surgical candidate and that an FCE was necessary. JE 14:29.

55. Claimant was deposed for the first time on April 19, 2012; Claimant laid flat on his back with his feet up and his head on a pillow during the deposition. JE 100. At the time, Claimant described his condition as follows:

> I have extreme back pain. And I get nerve firing more in my right leg than my left leg. That's what I call it. It's like a pins and needles kind of it feels like a nerve firing down my legs. And I get numbness in my butt. And I get the firing in my butt. And then sometimes if I move wrong way it's like - - it almost feels like I'm being electrocuted in my back. You know I can't explain it. You know if I reach the wrong way, it's like somebody - - it's like somebody hitting you with a 1/10 socket kind of thing. It's kind of like getting a jolt. It doesn't feel really good.

JE 100:18-19.

56. Dr. Gussner declined to endorse a recommendation for an FCE on April 16, 2012 because his "extreme pain complaints are in excess of the objective findings." JE 9:97.

57. On May 3, 2012, Dr. Gussner explained that the medium duty work restrictions he issued were related to Claimant's prior cervical fusion and not Claimant's 2010 industrial injury; Dr. Gussner further opined that after reviewing more medical records it was now his opinion that Claimant suffered from a lumbosacral sprain. JE 9:98. Dr. Gussner reiterated that there were no objective findings to support Claimant's progressive, severe back and leg symptoms. *Id.*

58. On May 10, 2012, Dr. Radnovich recorded that Dr. Hart at OSU was "not interested in doing surgery as there is not stenosis." JE 29:116.

59. On June 18, 2012, Claimant underwent an FCE as recommended by Claimant's IME physician, Dr. Frizzell. JE 31:1. The FCE noted Claimant showed valid, full effort in testing; Claimant took several breaks, requested the FCE be rescheduled, and declined to perform "chair to floor lifts, squats, and standing activity. He declined to perform the third and last iteration of resistance dynamometry testing (pulling)." *Id.* The FCE results showed Claimant was capable of working at a light level. *Id.* The FCE examiner recorded multiple pain complaints from Claimant throughout testing: "My back is extremely painful; I'll pay for it tomorrow; it's lit up real bad; I'm sweating, I'm shaking." *Id.* at 4. Claimant did not recall any activity in particular that injured him during the FCE: "it was just an accumulation of the whole task in general." HT 111:1-5.

60. On July 2, 2012, Claimant reported to Dr. Radnovich that the FCE had increased his pain and that it "put him in bed for a few days." JE 29:133. On August 1, 2012, Dr. Radnovich formally responded to the FCE, noting that FCE's in general tend to overestimate a claimant's

abilities.[2] JE 29:139. However, Dr. Radnovich did "generally agree" with the FCE findings observing Claimant was only capable of light duty work with ad lib repositioning. *Id.*

61. On August 8, 2012, Dr. Montalbano wrote that the FCE findings did not correlate with objective findings and did not change his previously stated opinions. JE 14:30. On August 9, 2012, Dr. Gussner wrote that the FCE findings did not change his opinions and that the results of the FCE did not correlate with objective findings. JE 9:100.

62. On November 12, 2012, Claimant reported that since the FCE "he cannot even sit on the toilet without left low back pain." JE 29:168. Dr. Radnovich again performed a trigger point injection. *Id.* at 169. On December 21, 2012, Claimant reported some relief with the last injection and sought another. *Id.* at 183.

63. On December 28, 2012, Dr. Radnovich issued a second impairment rating and second set of restrictions. JE 29:187. Dr. Radnovich assigned 8% whole person impairment to Claimant's injury with 2% apportioned to pre-existing conditions and noted Claimant had difficulty performing light and moderate work duties and needed further treatment. *Id.* at 188.

64. On January 25, 2013, Claimant was evaluated by Richard Manos, MD. JE 32:10. Claimant reported his leg pain had increased since the FCE. *Id.* Dr. Manos reviewed Claimant's 2012 and 2008 MRIs and noted "[the] most significant finding is significant disk space collapse at L5-S1 and this is significantly worse than his MRI in 2008." *Id.* at 11. Dr. Manos diagnosed "(1) opioid dependency with probable opioid-induced hyperalgesia. It is somewhat disheartening to see him on these many medications.[3] It is contributing to his overall pain pattern. (2) Foraminal

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[2] There is a handwritten note on a different copy of this letter: "His Condition worsened after this FCA [sic]. and he is pretty much bedridden now." JE 29:213. This does not appear to be Dr. Radnovich's writing (compare with JE 29:405-407). It is not clear who wrote this, when, or what the purpose of the note was.

[3] At this appointment, Dr. Manos recorded Claimant was taking: "Kadian 600 mg twice a day, Welchol 625 mg 6 a day, diazepam 5mg one to two every 4-6 hours, Savella 50-75mg two to three times a day, doxazosin 4 mg a day, morphine immediate release 30 mg one to two every 4-6 hours, Benicar 40 mg a day, Ambien, baclofen 10mg 1-

stenosis L5-S1. (3) Degenerative instability, L5, S1 based upon bone scan, x-rays, and MRIs findings." *Id.* Dr. Manos wrote it would be difficult to assess Claimant's true pain level while he was on so many opioid medications and he recommended Claimant be admitted to an inpatient center to wean off of them or begin a slow weaning. *Id.* at 11. Dr. Manos also recommended transforaminal injections. *Id.*

65. On February 1, 2013, another lumbar MRI was performed at Intermountain Medical Imaging order by Dr. Radnovich which showed "multilevel lumbar spondylosis without central spinal canal stenosis. There is moderate right foraminal stenosis at the L5-S1 level." JE 29:199.

66. On that same day, Claimant underwent ESI shots at his L5/S1 level, which Claimant reported "really helped." *Id.* at 200, 207. Claimant later reported to Dr. Manos that he had 95% relief for both his legs and back pain for five days; based on this, Dr. Manos recommended a fusion after Claimant was weaned off his medications. JE 32:14.

67. On February 25, 2013, Dr. Radnovich noted that Dr. Manos had requested Claimant reduce his pain medication in anticipation of surgery; Dr. Radnovich wrote:

> specifically discussed Dr. Manos' OV note – that meds contributed to pain. Reviewed pharmacy records. Patient, SOP and records indicate that pain meds were very helpful in maintaining what little function he has and allowing him at least to get sleep. There is no suggestion in the records of hyperalgesia from opioids.

JE 29:208. Nevertheless, Dr. Radnovich indicated that he would reduce medications in anticipation of the surgery. *Id.*

68. On March 25, 2013, Dr. Manos responded to Claimant's counsel's inquiries. JE 32:16. Dr. Manos opined that the proposed fusion was related to Claimant's 2010 industrial injury and that all Claimant's treatment to date had been reasonable and related to the industrial injury.

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2 tabs 3 times a day." JE 32:10.

Id. at 17. Dr. Manos wrote: "If this was a lumbosacral strain, I would expect him to have fully recovered; however, certainly based upon two and half years of treatment with a reasonable degree of medical certainty that his injury was more substantial than a lumbosacral strain." *Id.* Dr. Manos also observed that while Claimant did have pre-existing degeneration in his spine: "it is not uncommon for people to be asymptomatic and then having [an] injury that becomes debilitating for them." *Id.* Regarding imaging, Dr. Manos wrote "his MRI from 2/1/13, was compared to a previous MRI from 2/29/12. It is my opinion that this MRI does show some worsening changes with increasing stenosis as well as Modic endplate changes." *Id.*

69. On March 28, 2013, Defendants wrote Dr. Tallerico a letter summarizing their conversation and offering a check-the-box style response to Defendants' questions. JE 27:12-20. In relevant part, Dr. Tallerico disagreed with Dr. Radnovich that Claimant needed opioid treatment, disagreed with Dr. Manos that Claimant needed another MRI, and agreed that the progression seen between the 2008 and 2010 MRIs was "typical degenerative progression." JE 27:16. According to Dr. Tallerico, Claimant was not a surgical candidate, did not require further treatment, had no impairment or restrictions related to the 2010 injury, and had reached MMI in March of 2011. *Id.* at 18.

70. Dr. Manos performed an L5-S1 fusion on June 27, 2013 with a pre-operative diagnosis of (1) degenerative spondylolisthesis L5-S1 and (2) L5-S1 foraminal stenosis with radiculopathy. JE 7:35; JE 32:30. At the time of the surgery, Claimant was still taking opioids and Dr. Manos noted Claimant was opioid dependent. JE 32:29-30.

71. On July 12, 2013, Claimant followed up with Dr. Manos and reported that his back pain had significantly decreased, and his leg pain had also decreased; Claimant was still taking pain medications but had decreased them and stopped taking baclofen. JE 32:41. When Claimant

returned on July 24, he reported bilateral buttock pain and that he felt physical therapy was aggravating his symptoms. Dr. Manos noted Claimant was tender over his SI joints and performed an SI joint injection, which provided Claimant with 50% immediate relief. *Id.* at 44. On August 30, Claimant continued to complain of SI joint pain and Dr. Manos performed another SI joint injection. JE 32:45.

72. On September 24, 2013, Claimant told Dr. Radnovich that he was mildly improving but having SI joint pain and upper back pain: "back has been going out." JE 29:218.

73. On October 4, 2013, Claimant reported "not much improvement" to Dr. Whalen. JE 12:30. On October 22, 2013, Claimant underwent another trigger point injection with Dr. Radnovich and reported his SI pain was worse. JE 29:228-229.

74. On December 18, 2013, Dr. Manos found Claimant was at MMI post fusion surgery for his degenerative spondylolisthesis, noting that while Claimant still had chronic pain, opioid dependency, and SI joint arthritis, the surgery had given Claimant functional improvement in that he was more active and less dependent on pain medications. Dr. Manos performed another SI joint injection and assigned restrictions of no lifting above 20 pounds, no repetitive lifting above 10 pounds, stand/sit limited to 15 minutes, and no bending or twisting. JE 32:48, 50.

75. On December 30, 2013, Dr. Radnovich wrote that Claimant had significant residual symptoms and would "need medical care for the rest of his life due to this injury" including a possible surgical revision, ongoing medications, and possible injections. JE 29:235. Dr. Radnovich issued a third impairment rating for 13% with no apportionment. *Id.* at 236.

76. Claimant returned to Dr. Radnovich on February 18, 2014 and reported the generic Kadian was not working as well, that his pain had "exponentially worsened," and that his insurance

would not pay for more than six a day. JE 29:247. Dr. Radnovich attributed Claimant's significant worsening to "Blue Cross Idaho arbitrary quantity limits." *Id.* at 248.

77. On March 20, 2014, Claimant saw Beth Rogers, MD. JE 32:53. Dr. Rogers recorded Claimant was in a significant amount of pain; Dr. Rogers administered an SI joint injection and wrote they would investigate ablation. *Id.* On June 4, Claimant underwent another SI joint injection. *Id.* at 55.

78. On April 16, 2014, Claimant was deemed totally and permanently disabled by the Social Security Administration (SSA). CE 10.

79. On May 30, 2014, Claimant was deposed for the second time, this time by ISIF. JE 101. At the time of that deposition, Claimant described his condition as follows: [my pain is] usually worse on the left than the right, but there are days where the right is worse…the lower back part is better [but] my SIs are worse." JE 101:6-7, 8. Claimant spent the deposition lying down on the floor with a pad and pillow. JE 101:4.

80. Dr. Tallerico conducted a second IME on July 17, 2014. JE 27:21. Claimant reported his surgery with Dr. Manos had improved his leg pain, but not his back; Claimant reported his back pain was still "present, significant, and severe…constant sharp stabbing and a deep ache in the lower back and it radiates into his pelvis…he simply cannot sit for more than a few seconds." *Id.* at 32. Claimant reported he had had improvement of pain with SI joint injections. *Id.* Dr. Tallerico opined that Dr. Manos' surgery was not related to the industrial accident, but to Claimant's pre-existing degenerative spine condition. *Id.* at 35. In addition to being unrelated to the industrial accident, Dr. Tallerico opined the surgery was not reasonable or necessary. *Id.* Dr. Tallerico concluded:

> This is obviously a very difficult situation for the examinee given the pervasiveness of his symptoms, even now. This is compounded by the fact that he has had multiple

> differing opinions regarding causality and treatment plan for his subjective complaints which, per the medical record, have continuously been out of proportion to objective findings. Although the examinee states that he is better "after the surgery," this is only in regard to his bizarre nonanatomic leg symptoms and not for his back pain. This is supported by the fact that he is still on a significant amount of opioid medications, albeit at a reduced level compared to the past.

JE 27:36.

81. On August 4, 2014, Claimant reported to Dr. Radnovich that he was still having SI joint pain but that his leg pain was reduced after his surgery; he noted the SI injections did help with his pain and Dr. Radnovich thought SI joint fusion surgery may be advisable. JE 29:275, 276. Dr. Radnovich conducted trigger point injection into Claimant's SI joints which provided "good results." *Id.* at 276.

82. On August 25, 2014, Craig Beaver, PhD issued a neuropsychological evaluation at the behest of Defendant/Employer. JE 36. Dr. Beaver conducted a personal interview with Claimant and his wife, administered psychological testing, and reviewed extensive records including medical records, Claimant's deposition, and vocational records. JE 36:1-2. Claimant's neurocognitive function was in the normal range, except for his memory function which was poor, and Dr. Beaver suspected that was because of his medication use. JE 36:21.

83. Dr. Beaver noted Claimant's results showed evidence of symptom magnification and that there was a strong somatization component of his current pain presentation. *Id.* Dr. Beaver observed that Claimant viewed himself as significantly disabled and wrote "[p]atients with similar profiles are very difficult to motivate in therapies because of their level of perceived disability." Dr. Beaver opined in relevant part that Claimant had (1) major depressive disorder, recurrent and mild; (2) moderate to moderately severe opiate use pattern or dependency; (3) somatic symptom disorder with predominant pain, persistent and severe. *Id.* at 23-24. Dr. Beaver found Claimant's somatic symptom disorder likely did affect his treatment: "It does appear to have played some role

in his presentation and his persistence in seeing multiple surgeons before he could locate one who was willing to do his surgery." *Id.* at 27.

84. On November 21, 2014, Claimant attended a neurosurgery consult with William Beringer, DO. JE 30:58. Claimant underwent another SI joint injection. Ablation and an SI joint fusion were discussed as possible next steps. *Id.*

85. On February 13, 2015, Claimant saw Dr. Beringer who recommended at least one more SI joint injection to ensure that his SI joints were the pain generator; if Claimant got relief from that injection, then a left SI joint fusion would be recommended. JE 30:60. On February 16, 2015, Claimant's pelvis CT showed no acute findings, and mild bilateral SI joint and hip degenerative joint disease. JE 35:6.

86. On March 4, 2015, Dr. Beringer recorded Claimant had SI joint pain relief with the last injection. Dr. Beringer wrote: "the patient's symptoms seemed to be very focused on the left SI joint which is not unusual at all after people get L5-S1 fusions. Interestingly, his fusion was a work-related issue and now he has SI joint pain which is also probably related to the work issue." *Id.* at 62. Dr. Beringer recommended left SI joint fusion surgery. *Id.* Claimant struggled to get this surgery approved by his insurance. *See* JE 32.

87. On March 12, 2015, Claimant reported to PA Poly that he was in "significant" pain which was worse with sitting. JE 13:95. On July 21, 2015, Claimant underwent a CT scan of his lumbar spine ordered by Dr. Beringer due to "new onset left leg numbness and tingling;" the conclusions were that Claimant's lumbar fusion was solid and the rest of his spine showed "stable spondylotic changes." CE 2:22. On January 20, 2016, Claimant underwent another SI joint injection. CE 4:3.

88. On March 29, 2016, Dr. Beringer performed a left SI joint fusion surgery. JE 32:74. On April 11, 2016, Claimant reported the SI joint pain was gone. JE 32:80. On May 13, 2016, Dr. Beringer recorded "This is like night and day for him and his family. This is the first time I have seen him standing and walking around in the exam room." JE 32:77. On July 8, 2016, Claimant reported that his relief was at 90% and his pain was completely gone. Dr. Beringer recorded that Claimant was "not likely to be able to have a physical job" but that he was much better since the left SI joint fusion. JE 32:76.

89. On July 27, 2016, Claimant reported to Dr. Radnovich that he was very happy with his surgery and that the sharp pain in his SI was gone immediately after surgery. JE 29:295. However, Claimant was still having a dull ache in his low back and was not sleeping. *Id.*

90. On October 26, 2016, Claimant was experiencing pain in his upper-mid-lower back and right hip. *Id* at 297.

91. On November 3, 2016, Claimant underwent another FCE evaluation by Rulin Hawks, PT, at Claimant's attorney's request. JE 38. PT Hawks interviewed Claimant and his wife, reviewed records, and conducted physical testing of Claimant. *Id.* Claimant reported the June 2012 FCE made his back pain more severe: "he reported he was basically bed ridden after the FCE 'for years' and really only got out of bed for personal hygiene and to eat." *Id.* At the time of the evaluation, Claimant still had mid and low back pain, left gluteal pain and left leg pain and numbness into his foot, he was in pain 100% of the time, and could not sit, stand, or walk for a long period; nevertheless "his symptoms are a lot better since his surgeries." *Id.* PT Hawks found Claimant's effort valid, with no symptom magnification, and that Claimant was capable of light duty work, but not full-time work. *Id.* at 10.

92. On January 25, 2017, Claimant was still reporting significant back pain in his SI joint and middle back to Dr. Radnovich. JE 29:301. On March 1, Claimant reported he was "better but still cannot sit through a meal if [the] chairs are too hard. Same pain. SI pain. Still gets locked up and miserable." *Id.* at 303. On April 5, the problem was "a little worse." *Id.* at 305. On May 24, Dr. Radnovich recorded Claimant continued to have increased pain in his low back and left leg, was getting steadily worse, and was using more medication, opioids, and adjuvants: "everything is feeling worse." JE 29:307. On June 26, Claimant again reported the problem was "worsening" and Dr. Radnovich recorded "no doubt that it is SI pain." *Id.* at 309. Claimant received a left SI joint injection. *Id.* at 310.

93. On July 7, 2017, Claimant saw NP Stephanie Mooney and requested a left SI joint injection from Dr. Spackman for left buttock pain, which was performed on August 10. JE 32:114, 107.

94. On September 6, 2017, Claimant reported he was "getting worse again" to Dr. Radnovich. JE 29:316. Claimant received another left SI joint injection. *Id.* at 318.

95. On October 10, 2017, Shane Andrew, DO, evaluated Claimant for his ongoing SI joint pain after an SI joint fusion. JE 39:1. Dr. Andrew recommended a CT scan to see if the fusion had loosened. *Id.* At follow-up on October 31, Dr. Andrew noted the SI joint fusion was solid and that there was nothing he could do for Claimant at that time.

96. On November 13, 2017, Claimant saw Dr. Spackman again for a caudal ESI injection and discussion of ablation and possibly a spinal cord stimulator. JE 32:105-106. Claimant underwent the injection on November 22 and another on January 18, 2018. *Id.* at 101, 95.

97. On February 28, 2018, Claimant reported he was stable to Dr. Radnovich and underwent bilateral trigger point injections. JE 29:329. Claimant reported the problem was stable

or the same until August 15, 2018, when Claimant reported the problem was worse again and requested injections. *Id.* at 343. On November 14, the problem was "worsening" and Claimant was having increased pain at night. *Id.* at 348. This pattern repeated until August 2019; Claimant would report he was worse and receive an SI joint injection. See JE 30:355-365.

98. On September 12, 2019, Claimant was admitted to the ER after being tased by the police following an incident with his wife. JE 40:5. The ER physician noted a "history of methamphetamine use." *Id.* During a psychosocial assessment related to this incident, Claimant reported he was in bed the majority of the time due to severe and acute pain, that he suffered a psychotic break, and that he was still in "horrible pain." JE 41:1. Claimant was diagnosed again with major depression and also diagnosed with post-traumatic stress disorder, chronic and acute by Lori Johnson, LCSW. *Id.* at 2. Claimant continued to treat with this provider over the next few weeks; Johnson eventually wrote that she believed Claimant suffered a psychotic break due to lack of sleep and changes in his pain medications and that he was not intentional in his behavior during the incident, nor did he have a typical batters' mindset. JE 41:10.

99. On September 16, 2019, Dr. Radnovich reviewed Claimant's restrictions at the time which were: No repetitive lifting greater than 10 pounds. No bending, stooping, crawling, squatting, kneeling, climbing or twisting. No lift and carry. No exposure to low frequency vibration. No prolonged standing or sitting. Must have ad lib repositioning. JE 29:371. Claimant reported the problem was "manageable." *Id.* at 370. On September 30, the problem was worsening, and Claimant underwent another left SI joint injection.

100. On October 21, 2019, Claimant was admitted to St. Luke's for a hernia repair and mass excisions. JE 40:50. PA Peterson recorded on Claimant's discharge papers: "[f]ollowing surgery he had difficulty controlling his postoperative pain and was therefore admitted. This is

most likely due to his chronic morphine use for back pain." *Id.* at 56.

101. On November 18, 2019, Claimant's appointment was the same: he reported the problem was worse and underwent a left SI joint injection. *Id.* at 378. On February 11, 2020, Claimant reported the problem was the same, but that he couldn't even sit through church service and was having more back pain and numbness into his left leg. *Id.* at 384. On November 2, 2020, Claimant reported to Dr. Radnovich that the problem was worse and that he was having increased pain in his back. JE 29:392. On March 18, 2021, Claimant again reported to Dr. Radnovich that the problem was worse, although Dr. Radnovich recorded "patient is doing well." *Id.* at 396. There are similar nonconcordant notes for April 15, 2021. *Id.*

102. On July 21, 2021, Claimant was deposed for the third and final time. JE 102. Claimant reported the morphine he was taking was not as effective as it used to be in controlling his pain; Claimant reported the frequent injections he received helped a "little bit." JE 102:16. Claimant thought he could do a "little more" after his SI joint fusion surgery than before. *Id.* at 35. Claimant testified he had had SI joint pain since the initial accident and that "it's always been like that. Since I was initially injured." *Id.* at 41. Regarding his leg pain, Claimant recalled he still had leg pain before the SI joint fusion: "as far as I can remember I've had problems with [my right] leg." *Id.* at 42.

103. On September 21, 2021, Dr. Tallerico again responded to Defendants' check-the-box style inquiries. JE 27:46. Dr. Tallerico was provided with additional records for his review. Dr. Tallerico agreed that the SI joint fusion was reasonable and necessary, however, it was not related to the 2010 industrial accident, but to Claimant's SI joint arthritis. Dr. Tallerico noted neither the surgery nor injection therapy had improved his function and done very little for his pain

complaints. *Id.* at 46. Dr. Tallerico concluded with: "he seems no better (subjectively) than before, spanning over a decade and including extensive conservative and surgical treatment." *Id.* at 49.

104. On October 28, 2021, Claimant returned to Dr. Radnovich and reported the problem was worse and that he was not doing well; Claimant reported falling recently which increased his pain in his thoracic spine. CE 3:19.

105. On November 12, 2021, Dr. Radnovich responded to Claimant's check-the-box style inquiries and confirmed that Claimant's treatment to date was related to the 2010 injury, that it was a traumatic, not degenerative injury, that Claimant still required additional, ongoing treatment in the form of medication and injections, and that Claimant still had significant restrictions and was unable to return to work. JE 29:406-407.

106. Dr. Radnovich was deposed on May 25, 2022. Dr. Radnovich thought Claimant's injury was the result of "lifting repetitively for several hours." Radovich Depo. 14:16-21. Dr. Radnovich described the course of Claimant's condition as "not linear by any means" meaning Claimant would get a little bit better, a little bit worse, have a procedure, feel better, and then have a setback, however, Claimant was "better now that he was immediately after the [2012] FCE." Radnovich Depo. 21:14-22:4. Dr. Radnovich felt that Claimant's SI joint problems were caused by either the industrial accident or the lumbar fusion. *Id.* at 40:18-21. Dr. Radnovich reiterated his opinions from his November 2021 letter that all of Claimant's treatment, including his surgeries, were related to the June 2010 accident. See Radnovich Depo. 38-39. Dr. Radnovich agreed that, in general, delays in getting treatment tend to increase the chances of a poor outcome and lead to deconditioning. *Id.* at 41:2-42:2. Regarding somatic symptom disorder, Dr. Radnovich did not think Claimant met the full diagnostic criteria because Claimant had objective injuries; nevertheless, Dr. Radnovich testified: "I do think that there is a legitimacy to the - - potentially at

least to the degree of pain and to that extent there might be a - - a somatic symptom disorder." *Id.* at 45:20-46:9. Dr. Radnovich did not have any ongoing or future treatment recommendations for Claimant but did think ongoing medication usage was appropriate. *Id.* at 49:14-24.

107. Regarding the August 13, 2010 MRI, Dr. Radnovich opined that the results were "potentially" consistent with Claimant's low back and leg pain. *Id.* at 125:5-25. Dr. Radnovich agreed that "facet hypertrophy" was a degenerative condition and that Claimant's 2008 MRI was "similar appearing" to his 2010 MRI but noted that it was not an apples-to-apples comparison because of different MRI machines and different radiologists. *Id.* at 127:16-129:17.

108. Dr. Gussner was deposed on January 31, 2023. Dr. Gussner noted that Claimant's 2010 MRI did not correlate with his complaints and only showed mild degenerative changes. Gussner Depo. 25:18-24. Dr. Gussner explained he ruled out SI joint pain as the cause of Claimant's symptoms because Claimant did not report any relief with the fluoroscopic guided SI joint injections. *Id.* at 28:21-29:25. Dr. Gussner opined that Claimant's ultimate diagnosis was a lumbosacral strain and that Claimant "may have had some exacerbation of his essentially degenerative arthritis spondylosis at the joints." *Id.* at 51:7-16.

109. On cross-examination, Dr. Gussner explained that he and Dr. Montalbano disagree about whether a cervical fusion requires restrictions; Dr. Gussner is of the opinion that a cervical fusion requires medium duty restrictions to prevent next segment degeneration. Gussner Depo. 75:5-76:4. Dr. Gussner did agree Claimant suffered an industrial injury, specifically a lumbosacral strain. 78:2-25. Dr. Gussner was questioned about his statement that a lumbosacral strain should resolve in three to 12 weeks, but Dr. Gussner was treating Claimant for this injury seven months after the injury:

> in hindsight, Dr. Tallerico was correct. I mean, hey, a lumbosacral strain, and the treatment should have been completed before he even got to me. But I wanted to

> give [Claimant] the benefit of the doubt and keep looking for something that might possibly be contributing to his severe pain complaint.

Id. at 94:23-95:13. Dr. Gussner testified that the treatment he gave Claimant was reasonable based on the information Dr. Gussner had at the time; however, Dr. Gussner's opinion was now that Claimant "had a lumbosacral strain, had this symptom magnification disorder, and had a psychiatric condition that probably converts psychological or psychiatric stress into severe physical complaints and severe complaints of loss of function that cannot be backed up by any objective findings." *Id.* at 102:15-23. Dr. Gussner had reviewed Claimant's recent appointments[4] with Dr. Radnovich detailing his prescription regime and opined as follows: "So based on those records, it does not appear to me that he is doing any better. His pain is severe. He is on extreme amounts of opiate medications and there is no indication that he's functioning any better or that he had returned to work." *Id.* at 120:19-24.

110. Upon cross-examination from ISIF's counsel, Dr. Gussner clarified that the epidural steroid injections and nerve blocks were done diagnostically to rule out or in causes for Claimant's pain but that the nerve ablations were therapeutic and prescribed due to the success of the nerve blocks. Gussner Depo. 126:17-127:5; 131:10-21.

111. Dr. Gussner further explained his prior written opinion of May 2012 that Claimant's medium duty work restrictions were unrelated to the industrial injury, but to the cervical spine fusion and degeneration in Claimant's low back:

> and that permanent restrictions related to both his back condition and his cervical spine fusion… what really we're dictating by restrictions here, because there's not a great anatomical reason to continue restrictions for his low back. He doesn't have a disk herniation, doesn't have a fracture, doesn't have severe stenosis. But I was hoping returning to a medium duty job after a cervical fusion, he would probably

[4] These records were admitted at hearing and per JRP 10(E)(4), Dr. Gussner may testify to his opinion. Claimant's objection to testimony based on these records is specifically overruled.

> tolerate that better…and I will comment that [his restrictions] are related to his back and cervical spine fusion as documented in my report.

Id. at 48:15-49:7; 108:13-19.

112. Dr. Tallerico was deposed on February 10, 2023. Dr. Tallerico explained that there were no acute findings on the 2010 MRI, and that the 2008 and 2010 MRIs were very similar, with Claimant's degenerative condition only "slightly advanced" from 2008 to 2010. Tallerico Depo. 30:2-37:15. Dr. Tallerico agreed with Dr. Gussner's impairment rating of 2% WPI, 1% apportioned, and he agreed with his medium duty restrictions, but emphasized that those restrictions were for the degenerative condition of the back, not his industrial injury. *Id.* 54:5-21. Dr. Tallerico did agree that Claimant had a lumbar sprain/strain due to his industrial accident. 62:16-63:4. However, Dr. Tallerico opined that the lumbar sprain/strain did not cause the degenerative condition in Claimant's back and that his symptoms were related to the degenerative condition. 63:21-64:5. Dr. Tallerico further explained that in his opinion Dr. Manos' lumbar fusion was unrelated to the injury because the indications for surgery were degenerative disk disease and minimal retrolisthesis, which were not caused by the June 2010 strain/sprain. 64:10-65:12. Dr. Tallerico's logic for the SI joint fusion surgery was the same, the surety was for SI joint arthritis, which was not caused by his lumbar strain/sprain. 67:19-69:4.

113. On cross-examination from Claimant's counsel, Dr. Tallerico repeatedly explained that he did not conduct a more thorough physical examination in 2010 or 2014 due to Claimant's discomfort and at Claimant's request. See 82-84; 92-94. Dr. Tallerico agreed that someone with pre-existing degenerative disc disease would be more susceptible to injury. 98:13-99:17. Dr. Tallerico clarified that he did not believe Claimant's pre-existing degenerative disk disease was aggravated by the accident. 100:24-101:5.

114. Dr. Beaver was deposed on February 23, 2023. Dr. Beaver did remember Claimant eight years after his evaluation because Claimant's pain was such that it required three days to do what would normally take six hours in one day: "it was very dramatic." Beaver Depo. 12:10-13:6. Regarding Claimant as a chronic pain patient, Dr. Beaver observed that Claimant "present[ed] himself as totally disabled with pain totally in control of his life, and wanting either more narcotics or some kind of procedure to resolve it." *Id.* at 19:15-23.

115. Regarding Dr. Beaver's diagnosis of opioid dependency, Dr. Beaver testified:

> you can be on chronic opioids and not meet criteria for an opioid use disorder. And so the use disorder implies a dysfunction about this: that you are either using more than you need, or you have a strong psychological addiction to those medications that make you engage in behavior to make sure that you always have it available to you. And I felt that he met that criteria.

Id. at 39:12-40:12. Dr. Beaver explained his somatic symptom disorder diagnosis was based partially on Claimant's pre-industrial injury medical records which showed that it took Claimant longer than a usual patient to "get over it" and was very focused on his pain. Dr. Beaver also based this diagnosis on his observations of Claimant as "highly anxious and focused" on his pain. Dr. Beaver summarized as follows:

> I'm not arguing whether he did or didn't have pain or doesn't have some kind of, you know, physical injury, and he's had surgery and so on and so forth. But his level of dysfunction that he presents with, and the dramatic nature of the pain that he presents with, are better understood within the context of him, from my perspective and from my examination, having an addictive personality. So he's at high risk for becoming very addictive and demanding about narcotics and opioids. He has a prior history of struggles with depression, which also can feed into that passive, you know, 'Woe is me I'm totally disabled' attitude about pain. And he's very somatically focused, which also breeds and encourages that perspective with regard to chronic pain.
>
> ...
>
> The concern with him, not only does he show strong evidence of an addiction problem historically and an addictive personality, but he was on huge doses of pain

> medications, yet reported that his pain was still off the charts and that he was totally dysfunctional.
>
> So the pain meds weren't doing what they were supposed to do for him; they weren't making him any more functional, and they clearly weren't resolving his pain issues for him.

Id. at 43:10-44:1; 46:22-47:6.

116. On cross-examination, Dr. Beaver confirmed that there was not enough evidence to confirm a bipolar diagnosis for Claimant. 78:23-79:1. Dr. Beaver testified: "All I can tell you is that his pain behavior and display in our offices was more than I think I've seen with almost any other patients, in seeing thousands of pain patients over the years." 111:7-10.

117. **Vocational History.** Claimant did not graduate high school and does not have his GED. JE 100:9. Claimant did obtain his Class A CDL. *Id.* at 9, 10. Claimant knows how to use a computer and the Internet but is a one finger typist. *Id.* at 11. Claimant has worked in event set up, cashiering, building maintenance, product delivery, floor installation, house painting, and warehouse management. JE 100:12, 18, 19, 20, 23. Claimant's employment history shows at least two prior instances where Claimant was off work for more than a year due to an injury or condition, namely his coccyx injury in 2002-2003 and his lung/Valley Fever/gastric issues in 2007-2008.

118. Doug Crum issued his first vocational report on August 22, 2012 on behalf of Claimant. Mr. Crum reviewed medical records, interviewed Claimant over the phone, and conducted vocational testing. CE 6. Utilizing the 2012 FCE restrictions, Mr. Crum opined that Claimant would not be employable. CE 6:8. Utilizing Dr. Montalbano's restrictions, Claimant would have no disability. Utilizing Dr. Frizzell's restrictions as taken from the FCE, assuming Claimant could work full-time, Claimant suffered 60% permanent partial disability. CE 6:10.

119. On April 3, 2014, Delyn Porter issued a vocational report on behalf of Claimant. Mr. Porter reviewed records, interviewed Claimant, and reviewed vocational resources. Mr. Porter

reached the legal conclusion that Claimant was an odd lot worker based on Dr. Radnovich's 2013 restrictions and Dr. Manos' 2013 restrictions. CE 9.

120. On June 26, 2015, William Jordan issued a report on behalf of Defendant/Employer. JE 103. Mr. Jordan reviewed medical records, interviewed Claimant in person twice, discussed restrictions with Claimant's physicians, and conducted vocational testing. *Id.* Mr. Jordan opined that Claimant would be employable within his light duty restrictions as a driver, cashier, security guard, host, night concierge, customer care specialist, parking lot attendant, sitter, home care attendant, bus driver, mail worker, dispatcher, and customer service. JE 103:22. Within his medium duty restrictions, Claimant would be capable of work as a receptionist, male specimen collector, warehouse worker, courier, or yard supervisor. *Id.* Mr. Jordan opined that prior to his industrial accident, Claimant had access to 20% of the labor market. JE 102:24. Based on Dr. Manos' light duty restrictions post-fusion, Claimant lost access to 53% of his labor market and 25% wage loss, equating to permanent disability of 39%-40%. *Id.* at 25. Based on the opinions of Drs. Tallerico, Montalbano, and Gussner, Claimant suffered no disability as a result of the 2010, but if the medium-duty restrictions were utilized, Claimant lost 27% of his labor market and 2% wage loss equaled to 15-16% permanent disability. *Id.*

121. On November 6, 2019, Doug Crum issued an updated report. Mr. Crum reviewed the interim medical records and pre-injury medical records, his prior report, Claimant's deposition, and interviewed Claimant in July of 2017. CE 7:1. Mr. Crum maintained all his prior opinions and also opined that based on Dr. Radnovich's September 2019 restrictions, Claimant was totally and permanently disabled. *Id.* at 13. Mr. Crum did not realize or did not opine on Dr. Gussner's updated opinion regarding the origin of Claimant's medium duty restrictions.

122. Claimant's exhibit 8 consists of job applications. See CE 8. A number of applications appear to be only Claimant's resume attached to a blank email with the title of the job sought. *Id.* Most jobs required experience or qualifications that Claimant did not or does not possess; however, most were light duty or light duty compatible such as administrative assistant, customer service representative, or front desk clerk. *Id.* Claimant began listing his recent experience as "unemployed after on the job back injury & 2 back surgeries" after approximately two months of applying and being rejected. CE 8:71, 80, 96. Claimant's wife was the person who actually found and submitted Claimant's applications for these jobs. See CE 8; HT 132:1-13; 166:2-14.

123. Delyn Porter was deposed on September 13, 2022. Mr. Porter confirmed he used Dr. Manos' and Dr. Radnovich's restrictions to conclude that Claimant was unemployable as a result of the industrial injury. Porter Depo. 8:20-9:16. Mr. Porter did not examine Claimant's disability under Dr. Gussner's or Dr. Tallerico's restrictions and acknowledged if Dr. Montalbano's restrictions were used Claimant would have no disability in excess of impairment. *Id.* at 16:11-18:15.

124. **Credibility.** Even in 2012 at his first deposition, Claimant reported that his memory was "not what it used be" and Claimant reported his memory was still bad at the time of hearing. JE 100:31; HT 142:9-10. Claimant's memory was demonstrably poor during psychological testing with Dr. Beaver. Claimant testified sincerely, but where his testimony contradicts the written record, the written record will be relied upon.

125. Deena Stephens and Nicholas Stephens testified credibly.

126. **Claimant's Condition.** At the time of hearing, Claimant was still on pain medication and was still in pain, however, in his opinion, he was improved compared to where he

was prior to the lumbar and SI joint fusion surgeries, noting that without them, he would have been on the ground with a pillow similar to his presentation during prior depositions. HT 125:24-127:22.

DISCUSSION AND FURTHER FINDINGS

127. The provisions of the 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). A worker's compensation claimant has the burden of proving, by a preponderance of the evidence, all the facts essential to recovery. *Evans v. Hara's, Inc.*, 123 Idaho 473, 479, 849 P.2d 934 (1993).

128. 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). 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). While a temporal relationship is always required to support a finding of causation between an accident and the injury, the existence of a temporal relationship alone, in the absence of substantive medical evidence establishing causation, is insufficient to satisfy Claimant's burden of proof. *Swain v. Data Dispatch, Inc.* IIC 2005-528388 (February 24, 2012). 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. Logging*, 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).

129. Both parties agree an accident occurred and both parties agree a low back injury occurred on June 23, 2010. Where the parties diverge is the nature of the injury and the number of injuries. Claimant relies heavily on a temporal relationship between the accident and his symptoms; Defendants maintain that Claimant's symptoms are well explained by his pre-existing degenerative back condition.

130. **Injury – 2012 FCE.** As a matter of clarity and efficiency, the FCE injury claim will be dealt with first. Claimant alleges that the 2012 FCE requested by his IME physician, Dr. Frizzell, and later endorsed by Dr. Montalbano, caused an injury. Claimant alleges his condition was permanently aggravated by the FCE and caused Claimant to become surgical.

131. No physician has endorsed this theory of causation and Claimant requires medical evidence on this point. Dr. Radnovich merely agreed that Claimant was "worse" after the FCE at his deposition and did not opine the FCE aggravated Claimant's degenerative condition. Dr. Manos recorded Claimant's report that his leg pain increased after the FCE but did not mention it in his causation letter or later records. Claimant's citation to exhibit 21, page 7 does not contain the causation statement Claimant writes on page 8 of his brief; no physician opined the differences between Claimant's 2012 MRI and 2013 MRI were due to the FCE. There is no medical opinion supporting a relevant claim to a matter of medical probability related to this alleged injury.

132. **Injury – 2010 PT.** Similar to the FCE injury, no physician has opined Claimant's claimed physical therapy injury permanently aggravated his underlying low back condition.

Further, Claimant's cite to exhibit 24, page 7 does not reveal a PT injury: "He has had some improvement upon doing physical therapy. They were able to manipulate or palpate an area in his right low back and buttock that sent numbness, tingling and pain down his right leg… denies any new problems or concerns." JE 24:7. It is certainly possible to conclude there was an injury if the second sentence is read without context, but when bracketed by the notation that physical therapy has been helpful and that Claimant had no new problems or concerns, Claimant has not shown it is more probable than not that an acute injury or aggravation took place based on this chart note, and again, no physician has opined as such.

133. **Injury – June 23, 2010.** Dr. Manos opined Claimant's pre-existing low back condition was aggravated by the accident; Dr. Beringer similarly opined Claimant's SI joint condition was related to the work accident. Dr. Radnovich opined Claimant's chronic pain and SI joint pain was caused by the accident. Drs. Montalbano, Gussner, and Tallerico opined that Claimant suffered a lumbar strain, and all other symptomologies are explained by Claimant's pre-existing condition.

134. *Dr. Manos.* Dr. Manos was the orthopedic surgeon who conducted the lumbar fusion surgery on June 27, 2013; Dr. Manos was not deposed. Dr. Manos treated Claimant from January 2013 to December 2013. Dr. Manos was the fifth surgeon to evaluate Claimant and the only surgeon who opined that Claimant had surgical findings. Dr. Manos' final diagnosis was degenerative L5-S1 spondylolisthesis, post-fusion, stable and L5-S1 foraminal stenosis with radiculopathy. Dr. Manos did not issue an impairment rating but did restrict Claimant to limit lifting up to 20 pounds, sit/stand for 15 minutes, no bending or twisting, and no repetitive lifting over 20 pounds.

135. Dr. Manos unequivocally opined that Claimant suffered a work-related injury,

namely aggravation of his pre-existing arthritis. Dr. Manos based this opinion on imaging and on the fact that Claimant had been treating for two and a half years prior to his consultation with Claimant. Dr. Manos had Claimant's 2008 MRI and opined that the most significant difference between the 2008 MRI and 2010 MRI was L5-S1 disk collapse, a degenerative finding; Dr. Manos also observed further advancement of Claimant's degenerative condition between the 2012 and 2013 MRIs but noted no acute findings. In other words, Dr. Manos seemed to agree with the other physicians in this case that the MRIs showed only degenerative, but progressive, findings.

136. The second basis for Dr. Manos' opinion that Claimant suffered an aggravation of his degenerative condition was that Claimant had been treating for two and a half years. Dr. Manos essentially put together the fact that Claimant had a degenerative condition on his imaging and was still symptomatic two and a half years post-injury to conclude that Claimant suffered a permanent aggravation of his degenerative back condition in the accident.

137. Dr. Manos' opinion is unpersuasive. Claimant's MRI findings do support Dr. Manos' diagnosis of degeneration; no physician alleges there are or were acute findings. Therefore, the second leg of Dr. Manos' logic becomes the necessary linchpin to support his opinion.

138. Dr. Manos wrote: "If this was a lumbosacral strain, I would expect him to have fully recovered; however, certainly based upon two and half years of treatment with a reasonable degree of medical certainty that his injury was more substantial than a lumbosacral strain." This statement does not well explain the significance of Claimant's two and half years of treatment to Dr. Manos' causation opinion. Dr. Manos rationalizes Claimant must have suffered more than a lumbar strain because he was still symptomatic. However, this does not support that the symptoms are related to the industrial accident, only that Claimant's symptoms persisted past when a lumbar

strain should have resolved.

139. Dr. Manos is essentially relying on Claimant's continued symptoms to support his causation opinion. This is problematic for a few reasons. First, Dr. Manos does not address other physicians' explanations, namely that Claimant's progressive degenerative condition is causing his symptoms, not the alleged work-related aggravation of his degenerative condition. Second, Dr. Manos relies on Claimant's continued symptoms, but also notes at the outset that he wanted Claimant off opioids so he could have a clear picture of Claimant's symptoms; Claimant never went off opioids during this time frame. Dr. Manos never got a clear picture of Claimant's symptoms without opioids, which severely weakens his opinion. Third, Dr. Manos never addresses that Dr. Gussner released Claimant at MMI with 50% relief; Dr. Gussner acknowledged Claimant was still in pain but at MMI because no further treatment would be expected to improve his condition. In other words, Dr. Gussner found Claimant at MMI despite ongoing pain and symptoms, but Dr. Manos did not, and in fact based his whole opinion that Claimant's injury was related to the accident based on Claimant's continued symptoms. Dr. Manos' conclusion that Claimant suffered a work-related injury because of ongoing symptoms requires more explanation when other physicians who observed those same symptoms concluded the opposite.

140. There are other problems with Dr. Manos' opinions. Dr. Manos knew Claimant treated a year and a half prior to the injury for "low back discomfort" but wrote that Claimant was asymptomatic in 2010; it is not clear if Dr. Manos was aware of Claimant's history of low back complaints in 2004, 2006, or 2007 to Dr. Whalen and Dr. Eck, his daily use of a back brace while working for Employer, or use of an inversion table. Dr. Manos did not address Dr. Tallerico's opinion because he did not have it; nor did he address Dr. Gussner, Dr. Montalbano, Dr. Hart, nor Dr. Frizzell's opinions or records.

141. Dr. Manos released Claimant at MMI before Dr. Beaver's report, and it was Dr. Manos' understanding that Claimant continued to have chronic pain and would continue to wean off his medication. Dr. Manos' assumption that Claimant would eventually wean off his medication because of the surgery he performed was not borne out. Dr. Manos issued his causation opinion prior to the surgery and never updated his opinion after the fact with consideration of Claimant's continued opioid usage and continued low back symptomatology. Dr. Manos never had the opportunity to address Dr. Beaver's comments about somatic symptom disorder or Claimant's opiate use, which would have been particularly helpful due to Dr. Manos' initial concern with Claimant's opiate use and his understanding that he would wean off his medication.

142. In sum, Dr. Manos' opinion is not well reasoned or well explained and does not consider all the relevant information. Dr. Manos' opinion summarily attributes Claimant's symptoms to the accident because he was still symptomatic when Dr. Manos saw him. Dr. Manos' opinion does not adequately address Claimant's pre-existing symptoms, or other physician's opinions and their records. Dr. Manos did not have the opportunity to update his opinion after Claimant's surgery where he continued to present with debilitating pain and opioid dependency. Dr. Manos' opinion is insufficient to show that it is more probable than not that Claimant suffered a permanent aggravation of his degenerative condition.

143. *Dr. Beringer.* Dr. Beringer was Claimant's surgeon for his SI joint fusion and saw Claimant from November 2014 to April 2016. If Dr. Beringer was aware of or reviewed Claimant's other medical records, he did not indicate as such. Dr. Beringer related Claimant's SI joint pain to his lumbar fusion surgery, and by that route, to his industrial accident. Dr. Beringer's opinion relies solely on the L5-S1 fusion to conclude the SI joint fusion is industrially related. As noted above, Dr. Manos' opinion that Claimant suffered an aggravation of his pre-existing

degenerative condition related to the accident which required the fusion was rejected. Therefore, Dr. Beringer's opinion is also rejected.

144. *Dr. Radnovich.* Dr. Radnovich is a pain management physician and board-certified in pain management; Dr. Radnovich was deposed and subject to cross-examination. Dr. Radnovich has been Claimant's treating physician from May 2011 up until the present time. Dr. Radnovich has also reviewed voluminous medical records of Claimant. Dr. Radnovich's final diagnoses were: (1) lumbar post-laminectomy syndrome, (2) long-term current use of opiates; (3) chronic pain; (4) SI joint pain. Dr. Radnovich rated Claimant at 13% impairment on December 30, 2013 for his lumbar spine, with no apportionment, after the lumbar spine fusion but before the SI joint fusion and no impairment rating thereafter. Dr. Radnovich issued restrictions in 2019 of: no repetitive lifting greater than 10 pounds; no bending, stooping, crawling, squatting, kneeling, climbing or twisting; no lift and carry; no exposure to low frequency vibration; no prolonged standing or sitting; must have ad lib repositioning.

145. Dr. Radnovich's opinion that Claimant's condition was caused by the industrial accident is not well explained either in his deposition, or in his records. Dr. Radnovich admitted that all the findings on all radiographic imaging were degenerative and/or also appearing on the 2008 MRI; his only caveat being that different MRI machines and radiologists means an apples-to-apples comparison is difficult. Even more damaging, when given the opportunity to confirm that the 2010 MRI was consistent with Claimant's symptoms, Dr. Radnovich merely opined that the MRI was "potentially" consistent with Claimant's symptoms. Despite issuing restrictions in 2019 for Claimant's injury, at deposition Dr. Radnovich also agreed that the 2016 restrictions were reasonable "now," despite the 2019 restrictions specifying "no lift and carry" and the 2016 restrictions allowing overhead lifting and carrying up to 10 pounds and 15 pounds, respectively.

Dr. Radnovich also agreed with Claimant's 2012 restrictions in a letter to Claimant's counsel in November of 2021, which allowed up to 25 pounds of frequent lifting. Dr. Radnovich never updated his impairment rating after Claimant's SI joint fusion surgery, or his multiple SI joint injections, or Claimant's multiple complaints of worsening to him after both surgeries. Dr. Radnovich did admit that some component of Claimant's pain was due to somatic symptom disorder: "I do think that there is a legitimacy to the - - potentially at least to the degree of pain and to that extent there might be a - - a somatic symptom disorder." Dr. Radnovich described Claimant's injury as repetitive twisting and bending for hours, not a singular event when Claimant stood up at the end of breaking down yogurt boxes.

146. Overall, Dr. Radnovich's opinion is very flawed. Dr. Radnovich never explained and was never asked which set of restrictions for Claimant, 2012, 2016 or 2019, were appropriate and has endorsed all of them when asked. He also attributes some part of Claimant's presentation to somatic symptom disorder but was never asked to quantify or explain that statement. He misstates or misunderstood the Claimant's claimed mechanism of injury as a repetitive injury. He also agreed Claimant only had degenerative findings on his imaging and that Claimant's symptoms were "potentially," not probably, consistent with Claimant's symptoms. Dr. Radnovich's opinion that Claimant's condition is related to his industrial accident is rejected.

147. *Dr. Gussner*. Dr. Gussner is a board-certified specialist in physical medicine and rehabilitation and was formerly board-certified in pain medicine for approximately 20 years until 2021; Dr. Gussner was deposed and subject to cross-examination. Dr. Gussner treated Claimant in 2002 for his coccyx fracture, was Claimant's treating physician from November 2010 to March 2011, examined Claimant again in January 2012, and reviewed voluminous records of Claimant's treatment. Dr. Gussner's final diagnosis was a lumbar strain which was caused by the industrial

accident, resulting in a 2% permanent impairment, with 1% apportioned to Claimant's pre-existing degenerative back condition, and medium duty work restrictions originating from Claimant's cervical fusion and degenerative back condition, not the industrial injury. Dr. Gussner opined that Claimant "may have had" some exacerbation of his low back arthritis.

148. Dr. Gussner's opinion that Claimant suffered only a lumbar strain was based on the fact that Claimant's subjective complaints did not correlate with objective findings and that Dr. Gussner had tried to treat, and ruled out, several other possible pain generators in Claimant's lumbar spine. Of particular note, Dr. Gussner ruled out Claimant's SI joints as the source of Claimant's pain on day one of his treatment; Claimant claimed no relief from fluoroscopically guided SI joint injections closest in time to the claimed SI joint injury. Dr. Gussner did consider and reject the proposition that Claimant's pre-existing arthritis was permanently aggravated by the industrial accident because Claimant's mild degeneration did not match his dramatic subjective complaints. Dr. Gussner's opinion is well reasoned, well explained, and entitled to more weight than Dr. Radnovich's or Dr. Manos' opinion.

149. Claimant's criticisms of Dr. Gussner's opinions are without merit. Dr. Gussner well explained why SI joint pain continued to appear in his records after he ruled it out as the cause of Claimant's pain; it is also explained in the records themselves. Claimant's claim that Dr. Gussner contradicted his own records, that he did record pain relief from the fluoroscopic SI joint injections, is also without merit: Claimant cites to a record where Dr. Gussner injected the PSIS ligament that resulted in "partial relief," not the fluoroscopically guided SI joint injections which resulted in "no relief." See JE 9:27-35. Dr. Gussner advocated for Claimant with the Surety when Defendants wanted to go with Dr. Tallerico's opinion and cut Claimant off; Dr. Gussner insisted that not all options to alleviate Claimant's pain had been explored. It is certainly possible to infer a financial

incentive from Dr. Gussner's advocacy as alleged by Claimant but viewing the record as a whole gives the opposite impression.

150. *Dr. Tallerico*. Dr. Tallerico is a board-certified orthopedic surgeon; Dr. Tallerico was deposed and subject to cross-examination. Dr. Tallerico conducted two independent medical exams at Defendant/Employer's request on October 28, 2010 and on July 17, 2014; Dr. Tallerico conducted two limited physical examinations of Claimant, and reviewed voluminous medical records. Dr. Tallerico's final diagnosis was a lumbar sprain/strain caused by the industrial accident. Dr. Tallerico agreed with Dr. Gussner's opinions regarding impairment and restrictions, including that the restrictions were related to Claimant's degenerative low back condition, not the industrial injury. Dr. Tallerico specifically opined that Claimant's degenerative low back condition was not aggravated by the accident.

151. Dr. Tallerico's opinion that Claimant only suffered a lumbar strain was based on the lack of acute findings on the 2010 MRI, minimal advancement of the degenerative changes in the 2010 MRI as compared to the 2008 MRI, and Claimant's subjective complaints being out of proportion to and not correlated with objective findings. Dr. Tallerico's opinions mirror Dr. Gussner's opinions and are accepted to that extent.

152. There is a temporal relationship between the injury and Claimant's symptoms, however, the other evidence of record does not support that Claimant suffered any permanent aggravation or new condition caused by the industrial injury. Claimant has failed to prove his pre-existing degenerative condition was aggravated by the industrial accident or that his chronic pain/SI joint pain are related to his industrial accident on a more probable than not basis.

153. **Medical Care.** 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.

154. This decision finds Dr. Gussner's opinion most credible; Claimant reached MMI on March 3, 2011. Claimant is not entitled to receive reimbursement for any medical care received thereafter. Claimant is not entitled to ongoing opioid medication management. Claimant did not argue for opioid cessation treatment or argue that his opioid dependency was related to the accident.

155. **TTD/TPD.** Claimant was paid temporary disability benefits until March 2011 when he reached MMI and is not entitled to additional temporary disability benefits.

156. **PPI.** "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of evaluation. Idaho Code § 72-422.

157. Dr. Gussner rated Claimant at 2% whole person, with 1% apportioned to his pre-existing condition and 1% to his industrial accident. Claimant is entitled to the 1% permanent impairment found by Dr. Gussner related to the accident.

158. **Permanent Disability** 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 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 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 cumulative effect of multiple injuries, the age and occupation of the employee at the time of the accident causing the injury, consideration being given to the diminished ability of the 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). Generally, the proper date for disability analysis is the date of the hearing. *Brown v. Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012). Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. See, *Id.* at 136 Idaho 733, 40 P.3d 91; *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997).

159. **Apportionment.** Where a claimant's disability from an industrial accident is increased or prolonged by a pre-existing impairment, Idaho Code § 72-406 anticipates that an employer may only be held responsible for accident caused disability. That section provides: "(1) In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease." In assessing apportionment of disability, a two-step process is employed: (1) evaluating the claimant's permanent disability in light of all of his physical impairments, resulting from the industrial accident and any pre-existing conditions, existing at the time of the evaluation; and (2) apportioning the amount of the permanent disability attributable to the industrial accident." *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008); *Horton v. Garrett Freightliners, Inc.*, 115 Idaho 312, 772 P.2d 119 (1989).

160. Here, the medical evidence supports the conclusion that Claimant has pre-existing impairments of 15% for his cervical spine and 1% for his low back. Claimant has a 1% impairment related to the subject accident. Dr. Gussner explained that Claimant has medium duty restrictions, but that these restrictions are entirely related to Claimant's pre-existing cervical spine condition and his pre-existing degenerative low back condition. Dr. Gussner did not give Claimant any restrictions for his accident-related impairment. As explained above, this Referee finds Dr. Gussner's opinions persuasive.

161. Relying on the medium duty restrictions proposed by Dr. Gussner, Mr. Jordan opined that Claimant has disability in the range of 15-16%. *See* ¶120, *supra*. There is no need to quantify Claimant's disability from all causes with any greater specificity, since none of that disability, over and above the 1% PPI established by Dr. Gussner's testimony, is referable to the subject accident. This conclusion follows from Dr. Gussner's opinion that all of Claimant's restrictions derive from his pre-existing impairments. Therefore, this Referee concludes that of Claimant's disability from all causes, only his 1% PPI is shown to be related to the subject accident.

162. **ISIF Liability.** No party argued ISIF liability; therefore, any ISIF issues are moot.

163. **Attorney's Fees.** Claimant claims Defendants unreasonably denied this claim for benefits. 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:

> 72-804. ATTORNEY'S FEES — PUNITIVE COSTS IN CERTAIN CASES. 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). It is axiomatic that a surety has a duty to investigate a claim in order to make a well-founded decision regarding accepting or denying the same. *Akers v. Circle A Construction, Inc.*, IIC 1998-007887 (Issued May 26, 1999). Defendants' grounds for denying a claim must be reasonable both at the time of the denial and in hindsight. *Bostock v. GBR Restaurants*, IIC 2018-008125 (Issued November 9, 2020).

164. Claimant has not proven Defendants unreasonably denied this claim for benefits. Claimant did not meet his burden of proof to show that the claimed condition denied by Defendants was related to the industrial accident.

CONCLUSIONS OF LAW

1. On June 23, 2010, Claimant suffered an accident and injury in the course and scope of employment.

2. Claimant reached MMI on March 3, 2011 and is not entitled to receive reimbursement for medical benefits received thereafter.

3. Claimant was paid temporary disability benefits (TPD/TTD) until he reached MMI on March 3, 2011 and is not entitled to additional temporary disability benefits.

4. The conditions for which Claimant seeks additional compensation were not caused by the accident and injury at issue.

5. Claimant is entitled to a permanent partial impairment (PPI) rating of 1% for a lumbar strain caused by the industrial accident.

6. Claimant suffers disability from all causes in the range of 15-16% of the whole person.

7. None of Claimant's current disability, aside from a 1% PPI rating, is causally related to the subject accident. Defendants are entitled to a credit for PPI previously paid.

8. Claimant has not proven entitlement to attorney's fees.

9. The issue of ISIF liability is moot.

RECOMMENDATION

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

DATED this 19th day of July, 2023.

INDUSTRIAL COMMISSION

Sonnet Robinson

Sonnet Robinson, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of August, 2023, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by *E-mail transmission* and regular United States Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KENNETH STEPHENS,

Claimant,

v.

BARRETT BUSINESS SERVICES, INC.,

Employer,

and

STATE INSURANCE FUND,

Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,

Defendants.

IC 2010-018241

ORDER

Pursuant to Idaho Code § 72-717, Referee Sonnet Robinson submitted the record in the above-entitled matter, together with her recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with 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. On June 23, 2010, Claimant suffered an accident and injury in the course and scope of employment.

2. Claimant reached MMI on March 3, 2011 and is not entitled to receive reimbursement for medical benefits received thereafter.

3. Claimant was paid temporary disability benefits (TPD/TTD) until he reached MMI on March 3, 2011 and is not entitled to additional temporary disability benefits.

4. The conditions for which Claimant seeks additional compensation were not caused by the accident and injury at issue.

5. Claimant is entitled to a permanent partial impairment (PPI) rating of 1% for a lumbar strain caused by the industrial accident.

6. Claimant suffers disability from all causes in the range of 15-16% of the whole person.

7. None of Claimant's current disability, aside from a 1% PPI rating, is causally related to the subject accident. Defendants are entitled to a credit for PPI previously paid.

8. Claimant has not proven entitlement to attorney's fees.

9. The issue of ISIF liability is moot.

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

DATED this _17th_____ day of ___August_____, 2023.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

Aaron White, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of August 2023, a true and correct copy of the foregoing **ORDER** was served by *E-mail transmission* and by regular United States Mail upon each of the following:

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