BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRUCE LONG, Claimant, v. JI MORGAN, INC., Employer, and WORKERS COMPENSATION EXCHANGE, Surety, Defendants.	**IC 2014-015521** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED SEP 15 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 August 16, 2022. Claimant, Bruce Long, was present in person and represented by Bryan Storer of Boise. Paul Augustine of Boise represented Defendants. The parties presented oral and documentary evidence. Post-hearing depositions were taken. The matter came under advisement on June 29, 2023 and is ready for decision.

ISSUES

The issues to be decided are:

1. Whether the condition for which Claimant seeks benefits is causally related to the industrial accident;
2. Whether Claimant's benefits should be suspended pursuant to Idaho Code 72-434.

CONTENTIONS OF THE PARTIES

Claimant contends he suffers from PTSD and hip, neck, and low back injuries as a result of the subject accident. Claimant's symptoms are temporally related to the accident, and Claimant did not have any pre-existing relevant mental or physical diagnosis which can otherwise explain his injuries and need for treatment. Claimant did not unreasonably refuse to attend an IME with Craig Beaver, PhD, because he is not a physician or surgeon, and Defendants are entitled to only one IME, which they had with Dr. Cox.

Defendants contend Claimant did not complain of hip pain until five and half months after the accident, that his lumbar imaging showed no compression, and Claimant does not meet the diagnostic criteria for PTSD. Claimant's benefits were appropriately suspended pursuant to Idaho Code § 72-434 and *Brewer* in 2014; Claimant was aware and understood the consequences of not attending the IME and still did not attend the IME. Defendants maintain Claimant lacks credibility due to numerous contradictions between his records, deposition testimony, and hearing testimony and a surveillance video.

Claimant responds that his experts are more credible than Defendants' experts and Claimant has consistently complained of hip pain since the initial accident. Defendants suspended Claimant's benefits in excess of *Arreola v. Scentsy*, 531 P.3d 1148 (2023) and were required to pay Claimant's benefits unless and until they secured an order from the Commission.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Joint Exhibits (JE) 1-45;
3. The testimony of Claimant, Bruce Long, and Kyle Kerby, taken at hearing;

4. The post-hearing depositions of:

a. Richard Radnovich, DO, taken by Claimant;

b. Rodde Cox, MD, Paul Montalbano, MD, and Camilla Lacroix, MD, taken by Defendant/Employer.

All outstanding objections are OVERRULED.

Claimant's counsel offers his experience and opinion regarding Dr. Montalbano: "Every Claimant with whom Claimant's counsel has discussed Dr. Montalbano's IME examinations has responded in the same manner, albeit using less colorful language - Dr. Montalbano is unlikely to have performed the examinations he claims to have performed. If Dr. Montalbano is so quick to fabricate examination findings in his report, as Bruce swore was the case, then every aspect of Dr. Montalbano's testimony should be considered suspicious." *Id.* at 10. It is inappropriate for Claimant's counsel to make himself a witness via his reply brief by offering his personal opinion of Dr. Montalbano based on his clients' experience. Claimant's counsel is admonished per JRP 16.

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 born in Boise and was 57 years old at the time of hearing. Tr. 26:16-18.

2. On May 2, 2004, Claimant was transported by ambulance to McCall Memorial Hospital after a horse rolled over on him. JE 10:8. Claimant reported pelvic, hip, and groin pain; Claimant was initially diagnosed with a hairline fracture of his sacrum, "? diastasis [sic]" of his left SI joint, and trace hematuria. *Id.* at 9. Claimant reported he was on Prozac. *Id.* at 7. Claimant was discharged on May 7, with a final diagnosis of "acute fracture of Sx-Sy [sic];" Claimant was still tender over his SI and sacrum. *Id.* at 10.

3. On July 18, 2004, Claimant returned to McCall Memorial Hospital for scans related to his May 2 injury; Claimant reported he was anxious about the MRI and was given Valium. JE 10:12, 17. Claimant underwent an MRI of his lumbar spine because of radicular pain and symptomology and CT scan of his pelvis. *Id.* at 13. At L5-S1, Claimant had a "broad-based disk annular bulge, desiccated and degenerated disk with mild bilateral foraminal narrowing." JE 10:14. The radiologist's impression was: "mild spondylosis at L5-S1 with annular bulging and mild foraminal narrowing. no focal evidence to suggest protrusion at this time." *Id.*

4. Claimant underwent counseling from April 2008 to December 2009 for issues related to his divorce and custody; Claimant's counselor explained on May 1, 2020 that Claimant was treating for severe depression. JE 2:4.

5. On April 30, 2011, Claimant presented to McCall Memorial Hospital ER after having his left hand kicked by a horse. JE 10:18. Claimant reported he was taking medication for anxiety. *Id.*

6. On June 25, 2013, Claimant passed his DOT physical. JE 31:11.

7. On June 2, 2014, Claimant was driving his semitrailer when a Toyota Camry carrying three teenagers crossed the center line into Claimant's lane causing a head-on collision and the death of at least one of the occupants on site. JE 39:8. Claimant was examined at the scene by paramedics after they attended to the passengers in the car. JE 9:2. The report notes that Claimant had right knee pain, but that a physical exam "revealed nothing notable." *Id.* Claimant was "shaken up from the MVA and it was obvious he needed professional mental guidance." *Id.* Claimant was transported to St. Luke's in McCall. *Id.*

8. Claimant was examined by Todd Arndt, MD, at St. Luke's. JE 20:30. Claimant reported mild right lower leg pain in his shin and knee and noted he was able to get out of the

vehicle without difficulty. *Id.* Claimant denied back pain, headaches, and spine pain, however his intake form notes "lower back stiffness." *Id.* at 30, 32. Claimant's thoracolumbar spine and neck were both palpated and were nontender. *Id.* Dr. Arndt assessed mild right knee strain and emotional stress from the MVA; Claimant declined counseling services. *Id.* at 31. Claimant was also assessed by a social worker, William Thomas. *Id.* at 37. Claimant reported he did have emotional issues previously due to a divorce, and panic attacks, and had been hospitalized, but he has not had any issues since then. *Id.* Claimant stated: "his biggest fear was having an accident like this." *Id.*

9. Claimant returned to work on June 9 and worked a full day that day, and worked a full day on June 10, and June 11; on June 12, Claimant returned to the shop after about an hour and a half of work and did not work for Employer again. JE 32:1-3.

10. On June 12, 2014, Claimant presented to St. Luke's in McCall again and was examined by Caitlin Gustafson, MD. JE 20:45. Claimant's presenting problems were his neck stiffness and right lower back pain. *Id.* at 53. Dr. Gustafson assessed cervical and lumbar strain and noted that Claimant was at high risk for developing PTSD. *Id.* Claimant was referred to physical therapy, prescribed Flexeril, and instructed to take two weeks off work. *Id.* at 54, 59.

11. On June 19, 2014, Claimant presented to the ER at St. Luke's in Nampa for low back and neck pain and was examined by Soni Neeraj, MD. JE 22:1. Dr. Neeraj noted Claimant had sciatica symptoms but that "this was not an entirely new issue for the patient." *Id.* Dr. Neeraj ordered a cervical spine CT to detect nondisplaced fractures and lumbar X-ray, both of which were read as normal. *Id.* at 3. Dr. Neeraj assessed (1) cervical spine strain; (2) low back muscle strain; (3) back muscle spasm; Dr. Neeraj prescribed Valium and referred Claimant to the Spine Wellness Center. *Id.* at 5-7.

12. On June 25, 2014, Claimant was examined by Eric Hall, DO. JE 21:1. Dr. Hall noted Claimant had radicular symptoms down his right leg and referred Claimant for a lumbar MRI and to counseling for his PTSD. Dr. Hall also prescribed Flexeril and Voltaren and took Claimant off work for four weeks. *Id.* at 3. Claimant's lumbar MRI was read as showing a small central broad-based disc protrusion at L5-S1 without central canal or foraminal stenosis. *Id.* at 7.

13. On July 2, 2014, Claimant met with Mark Diechler, MA, LMFT, LPC, CSC for counseling. JE 4:1. Claimant reported recurrent flashbacks to the face of the teenager he comforted after the accident. *Id.* Claimant treated with Diechler for almost two years for PTSD, anxiety, and depression. See JE 4.

14. On July 3, 2014, Claimant returned to Dr. Hall. JE 21:8. Dr. Hall noted Claimant's imaging was within normal limits except a "mild disc bulge" at L5-S1. *Id.* Dr. Hall recommended Claimant continue physical therapy. *Id.* at 9. Dr. Hall noted Claimant "denie[d] any groin paresthesias." *Id.* at 8. On July 25, Dr. Hall took Claimant off work for two months due to his low back and neck pain and anxiety and depression. *Id.* at 10. On August 1, Dr. Hall referred Claimant for a neurosurgery consult at Claimant's request and after Claimant still had neck and low back pain. *Id.* at 12.

15. Claimant's cervical spine MRI was read on August 6, 2014 in relevant part as showing (1) no significant central or foraminal narrowing at any level; (2) no traumatic abnormality. *Id.* at 14. On August 28, Dr. Hall refilled Claimant's hydrocodone prescription, started him on gabapentin, and recommended he restart physical therapy, noting that was likely to be the first recommendation of a neurosurgeon. JE 21:18-19. Dr. Hall wrote Claimant continued to suffer from PTSD and increased his dosage of Celexa and refilled his Xanax prescription. *Id.*

16. Surveillance was conducted on Claimant on August 27, August 28, August 30. The August 27 video shows Claimant carrying a full paper grocery bag, conversing with a woman, and both of them driving away in separate vehicles. JE 36. The August 28 video again shows Claimant driving. JE 36. The August 30 videos show Claimant generally getting ready to four-wheel. Claimant is shown getting out of his truck, unstrapping the four-wheeler in the back, pouring bags of ice into coolers, putting on boots while standing and leaning against his truck, driving his truck again to a separate location, and riding four-wheelers briefly. Claimant is putting the four-wheelers back on the truck when he is seen riding them (the video jumps from 3:30pm to 6pm). The video also shows Claimant carrying multiple items assisted and unassisted; Claimant shared the load of large cooler between him and another man, but all other items, Claimant carried himself, including a gas can, pillows and bag together, a small BBQ and stand, amongst other items. There are three adults and one child with Claimant during this outing and three adult-sized four-wheelers.

17. On September 2, 2014, Claimant presented to Rodde Cox, MD, for an independent medical exam (IME). Dr. Cox reviewed imaging, conducted a physical examination, took a history from Claimant, and reviewed the surveillance footage. JE 14. Claimant reported that his pain had worsened over time; Claimant had pain down the back of his neck and in his low back down his lower right extremity into his foot. JE 14:1, 2. Claimant reported he did not drive far, could only sit in a vehicle for 30 minutes at a time, and "can only drive about 3-5 minutes to therapy." *Id.* Claimant noted he liked to four-wheel for recreation but had not gone since Memorial Day weekend. *Id.*

18. Dr. Cox's physical exam was as follows:

> On inspection his pelvis is level. He carries himself in a very slow, guarded fashion. He has marked restricted range of motion in his neck and lower back with complaints of pain with all arcs of motion. On manual muscle testing he's able to do 10 toe raises on each foot. He was able to squat and rise and heel walk. On

> individual manual muscle testing he had giveaway weakness involving the upper and lower extremities bilaterally. He did not have any motor function loss that approximated an anatomic distribution. On sensory testing he had diminished sensation to pinprick in the right upper and lower extremity, again in a nonanatomic, nondermatomal distribution. His deep tendon reflexes were 2 plus and symmetric at the biceps, triceps, brachioradialis, knee jerk and ankle jerk. Straight leg raise was negative when seated, positive when supine. Waddell's findings were positive for simulation, overreaction, regional presentation, tenderness and distraction.

JE 14:2-3.

19. Dr. Cox reviewed the same surveillance footage as summarized above wherein he observed Claimant riding four-wheelers, driving "comfortably," carrying a gas can "which seemed to be of some significant weight as he had to lean somewhat to the left to carry it," and moving much more fluidly through his neck and low back than he had on exam with Dr. Cox that day. JE 14:3. Dr. Cox's impression was cervical and lumbar strain at maximum medical improvement with no restrictions or impairment. Dr. Cox based his opinion on Claimant's thorough work-up to date, lack of radiculopathy, marked inconsistencies and non-physiological findings, and the more fluid movement Dr. Cox observed on the surveillance video. *Id.* Regarding Claimant's PTSD, Dr. Cox noted Claimant had driven comfortably, and he was awaiting further information regarding whether Claimant had driven on a recent trip out of town, but that it was his opinion Claimant's PTSD was "overstated." JE14:3. He wrote that if Claimant had driven out of town on a recent trip, he was at MMI with regard to his PTSD with no impairment and restrictions.

20. On September 16, 2014, Dr. Cox responded to a letter from Surety reaffirming his opinions regarding Claimant's PTSD: "It appears Mr. Long did do a significant amount of driving." *Id.* at 4. Based on this information, Claimant was at MMI with no restrictions or impairment for his PTSD. Dr. Cox later added an undated addendum recommending a psychological evaluation. *Id.*

21. On September 19, 2014, Claimant returned to Dr. Hall. JE 19:20. Dr. Hall wrote that he had contacted Dr. Cox personally about the surveillance tape mentioned in his IME report and that he had contacted Surety as well and been informed Claimant was no longer covered by workers' compensation based on Dr. Cox's examination. *Id.* Dr. Hall discussed the report with Claimant and his then girlfriend who noted he may have backed a four-wheeler off a truck but had not ridden for extended periods of time. *Id.* at 21. Dr. Hall's final diagnoses were (1) cervical strain; (2) low back pain; and (3) PTSD. *Id.*

22. On October 7, 2014, Richard Radnovich, DO, evaluated Claimant. JE 5:10. Claimant reported constant, daily pain; pain in his neck, primarily right sided, shoulders, bilaterally, low back pain, knee pain, and headaches; Claimant had nightmares and intrusive thoughts. Dr. Radnovich assessed PTSD, cervicalgia, and lumbalgia. *Id.* at 11. Dr. Radnovich noted spine and "possible" hip joint pathology. *Id.* at 12. Dr. Radnovich prescribed medications for Claimant's pain and mood. *Id.* On October 22, Dr. Radnovich took Claimant off work for his accident-related injuries. *Id.* at 20.

23. On October 27, 2014, Surety wrote to Claimant:

> Enclosed is a copy of Dr. Rodde Cox, MD addendum to his September 2, 2014 exam you had with him. Due to this addendum I received today from Dr. Cox, I've decided to continue paying you total temporary disability benefits started from where it left off on September 17th 2014. I have also scheduled you with a licensed psychologist doctor Craig Beaver, PhD … for an Independent Medical Exam of your June 2, 2014 post-traumatic stress disorder.

JE 35:1.

24. On November 5, 2014, defense counsel wrote to Claimant's former counsel, Alan Morton. JE 33:1. Defense counsel wrote: "last week when we spoke about this case, you indicated that you were refusing to allow your client to be seen by Dr. Beaver for an IME of his alleged

PTSD. As a result of your representation, we have cancelled the IME and your client's workers' compensation benefits will be suspended accordingly." *Id.*

25. On November 11, 2014, Mr. Morton responded in relevant part:

> As to your [sic-contention] that I am refusing to allow Mr. Long to be seen by Dr. Beaver for a Defense Medical Examination, I wish to clarify any misunderstanding you may have pertaining thereto. Accordingly, it was Mr. Long who decided not to attend the defense medical examination mentioned in your letter with the understanding that if he failed to attend the same, the surety would likely suspend the payment of any workers compensation benefits thereafter…I trust this clarifies any misunderstanding you may have regarding this matter. It is my understanding that Mr. Long will not be pursuing any benefits for workers compensation at this time; and that Mr. Long intends once the third party and UIM claims are concluded to engage in dialogue/negotiations to reach a lump sum settlement to close out the workers compensation claim as well.

JE 34:3. At hearing, Claimant did not recall this discussion with his former attorney. Tr. 103:17-105:2.

26. On November 19, 2014, Dr. Radnovich noted Claimant's right sided pelvic pain had continued, worsened, and that Claimant had groin pain when sitting in his car; Claimant reported severe depression. JE 5:30. Dr. Radnovich added a diagnosis of "pain in joint involving pelvic region and thigh." *Id.* at 31.

27. On December 17, 2014, Claimant presented to Grant Belnap, MD, on referral from Dr. Radnovich. JE 3:1. Claimant reported flashbacks, nightmares, anxiety, depression; Claimant also reported he had a previous panic attack in 2008 during his divorce but had not had any panic symptoms since then until after the subject accident and only counseling for his depression, no medication. *Id.* Claimant denied a history of abuse or trauma. *Id.* Dr. Belnap concluded that Claimant met the diagnostic criteria for PTSD based on his nightmares, flashbacks, anxiety, and depression. *Id.* at 3. Regarding causation, Dr. Belnap wrote: "[t]he timing corresponds to the

accident only. He had limited premorbid symptoms only several years ago that are unrelated to the current anxiety." *Id.*

28. On June 5, 2015, Claimant underwent cervical, lumbar, and hip MRIs. Claimant's cervical spine showed mild spondylotic changes, no significant canal or neural foraminal narrowing, and normal cord morphology and signal. JE 5:54. Claimant's lumbar spine showed a right eccentric disc extrusion which mildly narrowed the right lateral recess, which was "unchanged from prior." *Id.* at 56. Claimant's right hip showed moderate/severe degenerative joint disease and partial-thickness undersurface tearing. *Id.* at 57. On June 24, Dr. Radnovich referred Claimant to Dr. Holley for his hip and Dr. Manos for his spine. *Id.* at 59.

29. On July 17, 2015, Claimant underwent a mental health evaluation on referral from Idaho Disabilities Determination Services with Ryan Hulbert, PhD. JE 15. Dr. Hulbert reviewed records, interviewed Claimant and his fiancé at the time, and conducted cognitive testing. Claimant reported nightmares, flashbacks, ("I see that kid all the time. I'll be in Wal-Mart and see that kid."), anxiety attacks, very limited driving, depression, disturbed sleep, and pain in his neck, shoulders, low back, and his right leg and foot; he reported he had not worked since the accident and his doctor did not want him sitting for more than 15 minutes at a time. JE 15:1-5. Claimant recalled he had one anxiety attack prior to the accident. *Id.* at 5. Dr. Hulbert diagnosed PTSD and major depressive disorder, moderate to severe. *Id.* at 7. Dr. Hulbert noted other relevant factors to his diagnosis were Claimant's father's harsh treatment of him, his special education programming in school, the fatality he witnessed during the industrial accident, being unemployed after years of work, and his neck, back, and leg pain. *Id.*

30. On August 5, 2015, Claimant presented to Keith Holley, MD, on referral from Dr. Radnovich for his right hip pain. JE 19:1. Claimant "report[ed] jamming on the brakes and

impacting his right hip at the time of the collision." *Id.* Claimant was limping and utilizing a cane. *Id.* Dr. Holley noted Claimant's right hip MRI showed advanced degenerative changes and a degenerative labral tear. *Id.* at 2. Dr. Holley recommended a total right hip arthroplasty because his arthritis was "much too advanced" for arthroscopy to help. *Id.*

31. On November 19, 2015, Claimant presented to Paul Barrus, DO, at Terry Reilly to establish care after an insurance change and receive an orthopedic referral. JE 23:1. Dr. Barrus assessed in relevant part (1) degenerative joint disease; (2) chronic back pain; and (3) PTSD. *Id.* at 4-5.

32. On November 30, 2015, Claimant underwent a right total hip arthroplasty with a pre-operative diagnosis of right hip osteoarthritis. JE 17:2. Claimant was discharged on December 2, 2015. *Id.* at 315.

33. On January 20, 2016, Claimant reported to Dr. Holley he had ongoing low back pain and groin pain bilaterally. JE 19:22.

34. On March 22, 2016, Claimant was evaluated by Shane Andrew, DO. JE 19:24. Dr. Andrew noted Claimant's cervical spine was "relatively benign" appearing, but that his lumbar spine had significant degenerative disc disease at L5-S1. *Id.* Dr. Andrew assessed spinal stenosis, lumbosacral region, sciatica, right sided, and other intervertebral disc displacement, lumbosacral region.

35. On May 13, 2016, Claimant underwent an ESI injection by Shane Andrew, DO for his low back pain. JE 17:327. Claimant reported to Dr. Radnovich that the injection only lasted for four days and that he now had left leg pain. JE 5:90.

36. On July 18, 2016, Claimant underwent a CT of his lumbar spine which was compared to his previous lumbar MRI taken June 6, 2015. JE 17:334. The radiologist noted no

new findings. *Id.* On July 28, 2016, Claimant followed up with Dr. Andrew regarding his CT and X-rays results. Dr. Andrew wrote Claimant had bilateral foraminal stenosis and degenerative disc disease with a "vacuum disc phenomenon" at L5-S1; he opined "really the only option he has that would work would be a transforaminal lumbar interbody fusion at L5-S1." JE 19:31. On September 22, Dr. Andrew opined that Claimant's need for a lumbar fusion was related to the accident: "my opinion is more likely than not that his injury with the motor vehicle crash aggravated his [sic-already] degenerative level to the point where he was the [sic] symptomatic and needed surgery." JE 19:34.

37. Claimant had his last appointment with Mr. Dietchler on November 3, 2016. JE 4:16. Claimant was still struggling with driving and flashbacks. *Id.*

38. On December 17, 2016, Claimant was transported to the ER with acute hypoxic respiratory failure. JE 17:334. Claimant was admitted. *Id.* Claimant's attending physician was Steven Cary Von Flue, MD. Dr. Von Flue noted Claimant's respiratory failure was caused by a combination of his COPD, sleep apnea, opioid use, and a recent fall on his chest; Dr. Von Flue reduced Claimant's narcotic and benzodiazepines dosages and noted Claimant was opioid dependent. JE 17:733. Claimant was discharged on December 21, 2016 with a recommendation to wean off narcotics. *Id.* at 747, 750.

39. On January 10, 2017, Claimant reported to Dr. Radnovich he had been hospitalized. JE 5:104. On February 7, Dr. Radnovich recorded that he had reviewed the hospital records and wrote "no motivation to change pain meds. Anticipate lumbar surgery ASAP after pulmonology clears. Will make wholesale changes post-op." JE 5:108. On February 10, Claimant underwent a sleep study and was diagnosed with severe complex sleep apnea. JE 17:763.

40. On March 31, 2017, Claimant presented to Stuart Black, MD, to establish care. JE 23:52. Claimant was depressed; Dr. Black assessed degenerative joint disease of the hip and COPD. *Id.* at 52-53. At follow-up on April 19, Claimant reported his depression felt 30-50% better after a new medication. *Id.* at 58.

41. On July 27, 2017, Claimant followed up with Cary Jackson, MD, for his obstructive sleep apnea and COPD and reported he was still smoking a few cigarettes a week. JE 19:54-55. Dr. Jackson wrote "patient is not really cooperating with attempts to get him optimized for back surgery with regard to smoking habit and use of inhaled medications." *Id.* at 55.

42. On August 13, 2017, Claimant underwent a repeat sleep study which found no improvement of his sleep disturbances with BPAB and ASV vs. CPAP and noted "the central events are probably due to narcotic therapy." JE 17:827. Dr. Jackson recommended he minimize narcotics, lose weight, and sleep semi-upright. *Id.*

43. On October 9, 2017, Claimant presented to Dr. Black and reported he was in constant back pain with radiation down both legs, had neck pain, and was taking about seven 30mg oxycodone a day in addition to tizanidine, duloxetine, and clonazepam. JE 23:85. Dr. Black wrote he strongly recommended Claimant quit smoking if he wanted surgery. *Id.*

44. On October 20, 2017, Claimant was examined by Stephanie Mooney, NP, on referral from Dr. Radnovich. JE 24:24. Claimant reported low back pain which radiated down his legs, right worse than left. *Id.* at 26. Claimant also reported Dr. Andrew had previously recommended a fusion but declined to operate due to Claimant's obstructive sleep apnea. *Id.* Claimant's physical exam showed tenderness at the L5 and limited, painful range of motion. *Id.* at 27. NP Mooney recommended a repeat lumbar MRI. *Id.*

45. On October 26, 2017, Dr. Jackson wrote:

> it is now 10 months since I have been working with patient to try and get him optimized for possible back surgery. I have made no progress in getting him to quit smoking or use his inhaled medications regularly. His severe complex sleep apnea syndrome is compensated but not fully treated on CPAP with oxygen, due to his narcotics. I think this is as good as he is going to get. I would estimate his risk of pulmonary complications after back surgery in the moderate range. Patient indicates that he would want to go ahead and do the surgery and accept the risk of possible complications related to his pulmonary status.

JE 19:58. On November 8, Claimant called "disgruntled" because he had been taking his inhalers recently; the telephone notes clarify Claimant had picked up his inhalers in October, but not September. *Id.* at 59.

46. On November 17, 2017, NP Mooney recorded that Claimant's lumbar MRI showed mild-moderate degenerative disc disease, a small caudal right central disc extrusion L5-S1 without stenosis and mild right foraminal narrowing at L4-L5. JE 24:24. Claimant saw William Bradley, MD on November 29, 2017. *Id.* at 17. Dr. Bradley wrote that there was no clear surgical indication, and that Claimant did not have significant stenosis or instability on imaging; Dr. Bradley wrote that after a discussion with Claimant that they would wait to hear a third opinion from Dr. Manos. *Id.* at 20.

47. On February 6, 2018, Claimant saw Richard Manos, MD. JE 24:13. Dr. Manos discussed treatment options with Claimant, and Claimant indicated he would like to proceed with surgery. *Id.* at 16. Claimant reported he was weaning down on his oxycodone and was down to four pills a day whereas before he had been taking eight a day. *Id.* at 16. Dr. Manos recommended Claimant completely wean off oxycodone and stop smoking before the surgery. *Id.* Dr. Manos wrote the indications for surgery were (1) progressively worsening pain for more than three years; (2) degeneration of the lumbar intervertebral disc; (3) severe bilateral lumbar radiculopathy correlated with MRI findings; (4) failure of conservative measures; (5) severe impediments to daily activities. *Id.* at 16-17.

48. On March 13, 2018, Claimant followed up with Dr. Jackson. Dr. Jackson wrote "he does drive occasionally and I have advised him and his mother that based on his history of saying things inappropriately and not using the CPAP regularly suggesting increased somnolence and/or abnormal mental status on the narcotics and clonazepam, he should not drive… I recommend he discontinue driving until his mental status is better." JE 19:62.

49. On June 13, 2018, Dr. Manos performed an anterior lumbar interbody fusion at L5-S1. JE 27:38. Claimant was still on opioids at the time of the surgery. *Id.* at 49.

50. On June 27, 2018, Claimant followed up with NP Mooney post-lumbar fusion. JE 24:4. Claimant reported his pain was improved from where it was prior to surgery but that he was having muscle spasms and numbness in his feet. JE 24:5-6.

51. On that same day, Claimant followed up with Dr. Radnovich and reported spasm in his legs and back and that his pain was different than it was before surgery. JE 5:138. Dr. Radnovich started him on baclofen. *Id.* at 139.

52. On August 7, 2018, Claimant saw Dr. Jackson. JE 19:73. Claimant reported to Dr. Jackson he had not been using his inhalers "because nobody has been sending him any," however, upon inquiry to his pharmacy, Dr. Jackson learned that Claimant himself directed his pharmacy not to fill the prescriptions because they were $45 and $64 per month. JE 19:73. Claimant was still smoking a few cigarettes a day. *Id.*

53. On August 21, 2018, Claimant followed up with Dr. Manos. JE 24:1. Dr. Manos wrote: "back pain improving, still with numbness in feet, but has known neuropathy. Still on opioids. Thinks he is 30% improved." *Id.* at 3. Dr. Manos continued to recommend Claimant wean off his pain medications to avoid opioid induced hyperalgesia. *Id.* at 4.

54. On August 29, 2018, Claimant reported back pain, right leg pain, and weakness to Dr. Radnovich. JE 5:142. Claimant saw Dr. Black that same day and reported he had done reasonably well post-surgery, still needed 180mg of oxycodone daily for his pain, but had stopped taking clonazepam and tizanidine. JE 23:142. Claimant reported his mood was "okay." *Id.* at 141. Dr. Black referred Claimant for mental health services. *Id.* at 147.

55. On September 26, 2018, Claimant reported to Dr. Radnovich that he was better overall and was thinking about going back to work. JE 5:144.

56. On October 30, 2018, Claimant saw Bethany Taylor-Spillett, PA-C, at Dr. Jackson's office. JE 19:76. Claimant had brought his DOT paperwork for them to sign to verify that Claimant was compliant with his sleep apnea treatment; PA Taylor-Spillett declined to sign the form because he had not been complaint for the past 90 days, but noted they could revisit the paperwork in two months if he showed good compliance. *Id.* at 77.

57. On January 9, 2019, Claimant reported to Dr. Radnovich that he was better overall and had a job offer to haul cows, which he would start in about a month. JE 5:152. Dr. Radnovich noted "no impairment or SE." *Id.* On February 19, Claimant was worse, with increased back and left leg pain; Claimant was not working. *Id.* at 154. Claimant felt his medication was not as effective at controlling his pain. *Id.*

58. On July 16, Dr. Radnovich observed Claimant was not doing well; he had increased pain at night, which woke him up. JE 5:167-168.

59. On August 17, 2019, Claimant presented to the ER with shortness of breath and was examined by Olawale Olaniyi, MD. JE 17:867. Claimant reported he was not compliant with his CPAP machine due to claustrophobia and not compliant with his oxygen use either. *Id.* Dr. Olaniyi wrote "The patient was also complaining of exacerbation of his chronic back pain and

asking for his oxycodone. Of note, he picked up 168 tablets of oxycodone recently on 08/14/2019 with a prescription for Narcan given to him by his pain management physician and this was recorded on the PMP AWARxE program for opiate monitoring." *Id.* Claimant was admitted. *Id.* Claimant was discharged on August 19 with diagnoses of acute on chronic respiratory failure with hypoxia/hypercapnia, COPD with acute exacerbation, acute bronchitis, acute kidney injury on chronic kidney disease, leukocytosis, morbid obesity, obstructive sleep apnea, tobacco use, and chronic diastolic congestive heart failure. *Id.* at 903.

60. On November 16, 2019, Claimant applied to Corder, LLC as a truck driver. JE 30:9-10. Claimant worked for a week. *Id.* at 3. Claimant testified in 2020 that he quit because his "back hurt too bad." JE 1:5.

61. On December 18, 2019, Claimant was examined by Collin Struble, DC, who certified Claimant met the federal motor carrier safety regulations. JE 25:1. On his application, Claimant did not list any medications and denied chronic breathing problems, denied sleeping disorders, and denied taking any sleep tests. *Id.* at 4-5. On February 3, 2020, Claimant applied to Off-Spec Solutions, LLC, as a trucker driver. JE 29:1. On February 7, 2020, Claimant tested negative for opiates, hydrocodone, and oxycodone. *Id.* at 42. Claimant worked for Off-Spec for two weeks. *Id.* at 20, 24.

62. On February 25, 2020, Claimant was referred to the ER by his primary care physician for shortness of breath and was examined by Jonathan Bowman, MD. JE 17:906. Claimant reported he had recently attempted to return to work and believed the return to work is what caused his worsening respiratory symptoms; Dr. Bowman recommended Claimant not return to work. *Id.* at 906-907. Claimant was admitted. Claimant was discharged on February 29, 2020 with diagnoses of acute on chronic hypoxic hypercarbic respiratory failure with COPD with

exacerbation, hypertension, chronic pain disorder, chronic kidney disease, chronic mood disorder with anxiety and depression, morbid obesity with obstructive sleep apnea, and tobacco use. JE 17:941.

63. On March 5, 2020, Claimant resigned from Off-Spec Solutions. JE 29:23. An email from Shiloh Johnson, the fleet manager, notes "[Claimant] will not be coming back. I spoke with him today[.] He has COPD and is now on oxygen all of the time." *Id.* at 24.

64. On March 23, 2020, Claimant saw Joel Nielson, LPC, via telehealth for a mental health intake evaluation. JE 23:234. Claimant was diagnosed with depression and a treatment plan was made for Claimant to attend therapy once a week for a year. *Id.* at 239. Claimant reported his father was abusive. *Id.* at 237. On April 6, LPC Nielson noted Claimant's goals included processing the trauma of the industrial accident and his father's physical abuse. *Id.* at 245.

65. Claimant was deposed on August 20, 2020 by Alaska National Insurance Company regarding the accident, for a separate lawsuit. JE 38. Claimant denied any pre-existing health problems and any prior accidents. *Id.* at 6. Claimant testified he fell when he got out of his truck on his knees, hands, and on his butt. *Id.* at 7. Claimant said he felt back pain, hip pain, and knee pain after the accident, but that he was more worried about his back. *Id.* at 11. Claimant noted the last dream he had had about the accident was a couple months ago; the dreams were frequent for a couple months after the accident, but then became less frequent, and now he has dreams about once every couple of months. *Id.* at 11, 19. Claimant had not had flashbacks in a long time, but Claimant still had some anxiety while driving. *Id.* at 20.

66. Claimant felt the spinal fusion had not improved his condition; further, none of the treatment he received had helped his low back except pain pills. *Id.* at 17-18. Claimant testified he stopped seeing Mr. Dietchler after workers compensation stopped paying for therapy in 2014, but

that he would not return to therapy now anyway. *Id.* at 19, 20. Claimant testified when he attempted work in 2019, but he stopped due to hip and back pain and swelling; Claimant later clarified it was also because if a driver has COPD they cannot drive truck and that his doctor told him it was illegal for him to drive while on oxycodone. *Id.* at 22, 27. Claimant denied having depression before the accident, but did note he was on an antidepressant for mood swings prior to the accident. *Id.* at 6, 28.

67. On September 22, 2020, Claimant was brought to the ER when he was found unresponsive; Narcan was administered which helped improve his mental status. JE 17:948. Claimant reported "large dose[s]" of pain medications every four hours for his low back pain. *Id.* Claimant was admitted. Claimant was discharged on September 26, with the note that his respiratory failure was partially caused by an unintentional opioid overdose. JE 17:1004-1005.

68. On October 29, 2020, Claimant returned to Dr. Radnovich and reported increased back pain, but that his PTSD symptoms had lessened. JE 5:169. Dr. Radnovich wrote he would request Claimant's records from his recent hospitalization, noting it was "not an issue related to pain meds." *Id.* at 170. Dr. Radnovich rated Claimant's conditions as follows: (1) total hip 10% of the lower extremity; (2) lumbar spine L5-S1 fusion 7% of the whole person; (3) cervical spine symptomatic degenerative joint disease 2% of the whole person; (4) PTSD 5%. Dr. Radnovich opined apportionment was not appropriate because Claimant had no pre-existing symptoms or treatment. *Id.*

69. On August 15, 2021, Dr. Cox issued an updated IME report. JE 14:6. Dr. Cox summarized records from the date of the accident through February 2020 and reviewed imaging from 2004 to 2020. *Id.* at 6-19. Dr. Cox reaffirmed his opinions as stated in 2014. *Id.* at 20. He did not recall Claimant reporting hip pain in 2014 and felt the hip replacement was due to severe

degeneration, unrelated to the accident. Dr. Cox opined the fusion was unrelated to the accident: Claimant's imaging did not show significant narrowing, and Claimant did not have signs of radiculopathy when he examined Claimant in 2014. *Id.* at 22.

70. Claimant presented to Ryan Townsend, DO, on August 12, 2021. JE 16:1. Dr. Townsend treated Claimant for multiple conditions and noted he wanted Claimant to wean down on his opiates because they were contributing to his somnolence and encephalopathy. *Id.* at 6. Dr. Townsend noted Claimant "continue[d] to complain of low back pain even on his high opiate doses" through his treatment. *Id.* at 11, 19, 27, 33, 98.

71. On August 18, 2021, Paul Montalbano, MD, authored a letter to defense counsel after reviewing 2000+ pages of medical records. JE 13:1. Dr. Montalbano agreed with Dr. Cox that Claimant only suffered a lumbar and cervical strain in the accident. *Id.* Dr. Montalbano disagreed with Dr. Manos that a lumbar fusion was indicated, opined that the fusion was unrelated to the subject accident, and that Claimant would have no impairment or restrictions related to his strains from the subject accident. *Id.*

72. On September 24, 2021, Mark Williams, DO, examined Claimant for an IME at Claimant's request. JE 8. Dr. Williams reviewed records, took a history from Claimant, and examined him. Dr. Williams did not have Claimant's pre-accident medical records or the initial accident records; Dr. Williams' record review starts with Dr. Cox's IME. *Id.* Dr. Williams assessed (1) work related PTSD; (2) work related herniated L5-S1; (3) pre-existing DDD of the lumbar spine with work related aggravation; (4) pre-existing DJD of the right hip with work related aggravation. JE 8:7. Dr. Williams rated Claimant's PTSD at 15% WPI, un-apportioned and totally caused by the accident, his herniation at 12% WPI and 7% for this lumbar spine DDD, with 30%

related to the accident, and 10% WPI for his right hip, with 80% related to the accident, for a WPI of 26% relating to the accident. *Id.*

73. Claimant was deposed by Defendants on March 2, 2022. JE 1. Claimant testified he no longer wanted to drive truck because he was scared. JE 1:16. Claimant relayed he was taking Paxil prior to the accident for depression, but he took it mostly for his wife, and that he'd stopped taking it. *Id.* at 30, 31. When asked how hard he braked during the accident, Claimant replied "not very hard." *Id.* at 35. Claimant noted the running board was gone when he got out of the truck so he fell and hurt his knees and hip and limped around the scene. *Id.* at 38, 40. Claimant said his back hurt at the time of the accident, but then said it hurt the next day. *Id.* Claimant recalled his boss told him to go the hospital to get checked out and that he told his boss he fell and hurt his back. *Id.* at 46. Claimant did not think he hurt his neck as a result of the accident. *Id.* at 47. Claimant recalled he only made one trip with Employer after the accident. *Id.* at 52.

74. Claimant testified that he was commuting to Boise for better treatment for at least a couple months after the accident. *Id.* at 54, 55. Claimant had no trouble physically making the drive to Boise from Pollock but did have a "little bit" of a psychological issue with making the commute; it did not affect his ability to drive. *Id.* at 57, 58, 60. Claimant recalled he took a trip to Lowman in the summer of 2014 with his girlfriend and her son to four-wheel and testified that four-wheeling had bothered his back. *Id.* at 60, 61. Claimant testified that Dr. Cox did not examine him only asked him questions. *Id.* at 62. Claimant did not recall being asked to see Dr. Beaver; Claimant thought it was his former attorney who decided that Claimant should not attend Dr. Beaver's exam and he did not understand it would suspend his benefits. *Id.* at 63, 64, 65. Claimant did not notice any improved function following his hip replacement or low back fusion. *Id.* at 79. Claimant had weaned down from eight pills to six pills in the last year. *Id.* at 83. Claimant

had nightmares about once a month. *Id.* at 84. Claimant testified he never worked for Corder. *Id.* at 90. Claimant recalled he was not diagnosed with COPD at the time of his work for Off-Spec and that he quit due to flashbacks. *Id.* at 92, 93. A 2016 motor vehicle accident did not aggravate his PTSD. *Id.*

75. On April 7, 2022, Dr. Hulbert issued an updated report. JE 15:8. Claimant reported he still had nightmares about once or twice a month and had pain in his back and hips. *Id.* at 9. Claimant reported he worked briefly in 2016 but had no other employment. Claimant also reported he had been hospitalized for mental/emotional difficulties in 2013 while going through a divorce. *Id.* at 10. Dr. Hulbert concluded Claimant still had PTSD, now mild, and major depressive disorder, moderate. *Id.* at 12.

76. On April 13, 2022, Claimant presented to Dr. Montalbano. JE 13:2. Claimant reported he had low back pain and bilateral lower extremity pain and denied any previous low back and lower extremity symptoms. *Id.* Claimant refused to fill out the forms provided by Dr. Montalbano regarding his history, current medications, and review of his symptoms. *Id.* Dr. Montalbano recorded Claimant had an antalgic gait, but that his muscle strength was 5/5 in both his upper and lower extremities. *Id.* Dr. Montalbano noted he had no imaging at the time of the examination and recommended a number of scans to confirm Claimant's fusion was stable. *Id.* at 3. At hearing, Claimant denied Dr. Montalbano examined him. Tr. 73:15-20.

77. On May 25, 2022, Camilla LaCroix, MD, issued an IME report. JE 28. Dr. LaCroix reviewed medical records, deposition transcripts, vocational records, and interviewed Claimant twice, once for an hour on March 18 which was cut short due to a medical emergency (Claimant later explained the emergency was because he was not using his oxygen) and for one and a half hours on April 29. JE 28:1, 22.

78. In her interview with Claimant, he reported he could not do physical work due to his COPD; he did not currently have any depressive symptoms, panic attacks, or symptoms of generalized anxiety disorder. JE 28:20. Claimant reported his sleep was better. *Id.* Claimant did not recall being asked to do an examination with Dr. Craig Beaver or refusing to attend the examination. *Id.*

79. Dr. LaCroix opined Claimant did not meet the diagnostic criteria for PTSD as it related to his work accident. JE 28:25. Claimant did have intrusive thoughts, but they were infrequent and did not impair his function, which is a requirement of a PTSD diagnosis. Claimant did not endorse avoiding driving and drove immediately after the accident, was able to drive in trucking jobs since the accident, and drove to the interview. *Id.* at 26. Claimant did not show altered reactivity; Claimant reported he had been in two other motor vehicle accidents since the 2014 accident and experienced no exacerbation of symptoms. Claimant did not have chronic mood symptoms related to the accident and any symptoms he did have were related to his significant co-morbidities. In sum, Claimant did not meet the criteria for PTSD related to the accident. *Id.* at 26.

80. Dr. LaCroix further opined that the issues contributing to Claimant's mood and present disability were: (1) chronic high level opioid use which could cause depression, confusion, and falls; (2) untreated sleep apnea which could cause depression, fatigue, and concentration difficulties; (3) heart disease, which directly correlates with depression and anxiety; (4) coping with significant limitations due to his acute respiratory symptoms and need to wear oxygen full-time; (5) low testosterone, which can cause depression, fatigue; (6) relationship stressors such as living with his formerly abusive father; (7) treatment noncompliance "to the point of being high risk for mortality…and referring him to a palliative care specialist." *Id.* at 27. Dr. LaCroix opined Claimant had likely developed addiction to opioids "as evidenced by developing tolerance and

dependence and taking it for a longer period of time than expected despite reporting that it's ineffective and after repeated medical consequences including episodes of overdosing, respiratory depression requiring Narcan administration, and falling." *Id.*

81. On June 21, 2022, Dr. Holley wrote to defense counsel: "it is my opinion that Mr. Long's need for a hip replacement was due to the underlying primary arthritis of the hip, and was not caused by any motor vehicle accident." JE 45:3.

82. On October 31, 2022, Dr. Radnovich was deposed. Dr. Radnovich opined that the disc extrusion shown on the June 2015 MRI was more likely than not caused by the industrial accident because it would be unlikely for Claimant to have such a pre-existing extrusion without symptoms. Radnovich Depo. 20:13-21:16. Dr. Radnovich opined that Claimant's lumbar fusion was reasonable and necessary. *Id.* at 27:22-28:7. Dr. Radnovich believed the labrum tear shown on Claimant's hip MRI was new and caused by the accident, and that Claimant's pre-existing hip arthritis had been permanently aggravated by the accident to the point that surgery was reasonable and necessary. *Id.* 29:23-31:21, 43:17-21. Dr. Radnovich agreed that groin pain was indicative of hip pathology. Dr. Radnovich testified that Claimant's PTSD was more probably than not caused by the accident; similarly, Dr. Radnovich believed Claimant's neck pain was more probably than not related to the accident. *Id.* at 38:24-39:2; 39:16-25. Claimant needed ongoing medication management, possibly injections, but was at MMI. *Id.* at 43:4-10. Dr. Radnovich disagreed that Claimant only had a cervical strain, because that diagnosis did not match Claimant's imaging, symptoms, or response to treatment. *Id.* at 47:23-48:8. Dr. Radnovich did recall Claimant's PTSD was improving based on the last time he saw him. *Id.* at 50:5-11.

83. On cross-examination, Dr. Radnovich confirmed he had not reviewed numerous pre-accident and post-accident records related to Claimant's treatment. *Id.* at 53:19-55:7.

Dr. Radnovich opined that if the labrum tear was caused by the accident, Claimant would have symptoms almost immediately, a week at the longest. *Id.* at 77:19-78:6. Dr. Radnovich did believe Claimant had improved over the course of treatment, becoming more functional. *Id.* at 84:14-85:3.

84. Dr. Rodde Cox was deposed on December 12, 2022. Dr. Cox noted Claimant's lumbar MRI showed no neurological compromise. *Id.* at 16:19-25. Claimant's complaints of leg and foot pain did not correlate with his MRI because the MRI did not show nerve root impingement or compromise. *Id.* at 17:18-19:5.

85. Dr. Cox reiterated that Claimant's range of motion on exam was much more limited than Claimant's range of motion on the surveillance footage. *Id.* at 25:10-26:5. Dr. Cox explained that Claimant's giveaway weakness on exam was "not the type of weakness you would expect to see if someone has true neurologic injury" and that the only conditions that would explain that type of weakness would be lesions on both sides of the spine or brain, which Claimant did not have. *Id.* at 27:4-28:8. Claimant's diminished sensation did not match a normal anatomic or dermatomal distribution. *Id.* at 28:9-29:3. Dr. Cox explained that Claimant had multiple positive Waddell's findings including inconsistent leg raise, simulation, regional presentation, overreaction, and tenderness. *Id.* at 31:9-32:22. Waddell's findings are used to predict outcomes from surgery, and more than three findings correlated to very poor outcomes from surgery. 32:23-33:8. Claimant lacked findings of radiculopathy such as reflex changes, dermatomal sensation loss, loss of strength that matched the corresponding nerve in the spine, and pathology on imaging. *Id.* at 34:25-35:22.

86. Dr. Cox reiterated that he felt a PTSD diagnosis was possible based on the nature of the accident but "overstated" based on his review of the surveillance video which showed Claimant driving comfortably. *Id.* at 36:13-22. Dr. Cox disagreed with Dr. Radnovich about

Claimant's hip pathology and noted Claimant did not complain of hip pain to him; however, he did agree with Dr. Radnovich that Claimant should have had immediate hip pain if his degenerative hip arthritis was aggravated by the accident and that hip pain usually presents as groin pain. *Id.* at 40:24-42:5. Dr. Cox agreed with Dr. Holley that Claimant's hip replacement was due to his pre-existing degenerative arthritis and Claimant's later complaints of left hip pain supported that opinion. *Id.* at 44:10-45:15. Regarding Claimant's low back, Dr. Cox expected Claimant would complain of low back pain immediately after the accident if it had aggravated his degenerative low back condition. *Id.* at 49:11-20. Claimant's 2014 MRI showed natural progression of his arthritis, not a traumatic injury. *Id.* at 49:5-10.

87. On cross-examination, Dr. Cox agreed Claimant did suffer injuries in the accident, namely lumbar and cervical strains. Cox Depo. 67:21-24. Dr. Cox would defer to Dr. LaCroix regarding whether Claimant suffers from PTSD. *Id.* at 70:6-13. Dr. Cox agreed that positive Waddell's signs were not an indication of malingering. *Id.* at 80:3-10.

88. Dr. Paul Montalbano was deposed on Wednesday April 19, 2023. Dr. Montalbano reviews all imaging studies himself in addition to the radiologist's report. Montalbano Depo. 9:17-10:9. Dr. Montalbano was not able to review the imaging for Claimant's 2004 MRI, only the report itself. *Id.* at 10:15-24. Dr. Montalbano noted there was no nerve root compression on any of Claimant's imaging. *Id.* at 14:23-15:1. Dr. Montalbano would expect a patient to be symptomatic within six weeks of an aggravation of their degenerative disc disease. *Id.* at 15:17-16:3. Dr. Montalbano opined that Claimant's June 1, 2014 MRI was basically the same as his 2004 MRI. *Id.* at 17:12-18:1. Dr. Montalbano opined that surgery was not indicated based on Claimant's MRI result and symptoms because there was no nerve root compression that matched his symptoms. *Id.* at 19:5-19. Dr. Montalbano testified that Claimant's MRI did not show a traumatic injury, only a

degenerative condition with no nerve root compression or instability. *Id.* at 21:1-15. Dr. Montalbano explained that "vacuum disc phenomenon" is a degenerative finding. *Id.* at 22:22-23:2. Dr. Montalbano recalled at the time of his examination Claimant still had pain at an eight out of ten which was sharp and dull in his low back and down the back of his right leg; Dr. Montalbano explained that Claimant's reports of pain are consistent with his opinion that surgery was never indicated as Claimant is still in the same kind of pain four years post-surgery. *Id.* at 30:19-32:1.

89. On cross-examination, Dr. Montalbano agreed that a lumbar strain should resolve in four to six weeks; if it had not resolved, more work-up would be indicated. Montalbano Depo. 35:9-25. Dr. Montalbano explained he had recommended additional imaging to see if Claimant had a degenerative condition or abnormality above the fused L5-S1 level due to Claimant's continued complaints of back and leg pain. *Id.* at 36:22-39:10. It was Dr. Montalbano's opinion that the difference between the 2004 "bulge" and 2014 "protrusion" was one of semantics between different radiologists: "it's one in the same." *Id.* at 53:20-55:19. The most important imaging finding was whether there was nerve root compression, which there was not. *Id.* at 56:6-9.

90. Dr. Camille LaCroix was deposed on March 3, 2023. Dr. LaCroix testified that the DSM has a number of requirements to qualify for a diagnosis of PTSD: (1) a traumatic event; (2) persistent, specific symptoms, such as avoiding places or things; (3) changes in perception, such as hyper-startle; (4) which cause an impairment of function. LaCroix Depo. 9:13-11:2. Dr. LaCroix clarified that if the impairment of function is due to other medical conditions, then the patient would not meet the full criteria for a PTSD diagnosis. *Id.* at 11:3-18. Dr. LaCroix noted that neither Mr. Diechler, nor Dr. Radnovich seemed to follow the DSM criteria or conduct mental status exams when diagnosing Claimant with PTSD. *Id.* at 19:21-21:18. Dr. LaCroix noted that Dr. Belnap was qualified to diagnosis PTSD, but that he did not list Claimant's other traumas and

that Claimant denied a history of abuse or trauma, which was contrary to reports he gave her and other providers. *Id.* at 22:1-23:19. Dr. LaCroix noted Claimant's other traumas included that Claimant's father abused him, that other children had tried to drown him as a kid, which resulted in lifelong fear of enclosed spaces, multiple accidents, and a "pretty traumatic" divorce proceeding. *Id.* at 23:1-25:1.

91. Dr. LaCroix testified that Claimant's case was the "most medically complex IME" that she had ever seen with the number of comorbidities that Claimant had, such as COPD, congestive heart failure, and others; further, that Claimant was on the highest amount of morphine milligram equivalents she had ever seen. *Id.* at 26:8-29:7; 32:25-33:8. Dr. LaCroix recalled Claimant did not think treatment for his PTSD would be helpful and was not interested in it. *Id.* at 38:23-39:17. Claimant's depression diagnosis was "unspecified" in Dr. LaCroix's report because Claimant did not meet the full criteria for the diagnosis, but that clinical labeling and intervention was appropriate, however, it was not related to the motor vehicle accident but to Claimant's multiple medical conditions. *Id.* at 41:15-42:17. Dr. LaCroix reiterated that while Claimant did experience a qualifying stressor and did endorse some PTSD symptoms early on, Claimant did not meet the full DSM criteria for PTSD both immediately after the accident and at present. *Id.* at 47:11-48:7; 49:19-51:3.

92. Regarding her report's conclusion that Claimant's reliability was poor, Dr. LaCroix explained:

> that's in regard to his inconsistency, the treatment noncompliance, and his versions of events that change multiple times depending on who he is talking to. In his most recent deposition with you, he stated he couldn't remember any of my evaluations or who I was, even though we met twice. He had, as I said, a very good memory of events dating back years. It is not a typical thing to have that type of memory lapse. So those factors, combined, speak to his reliability as what we call a historian and whether or not he is consistently reporting things.

Id. at 48:16-49:2. Claimant reported that his PTSD symptoms improved after about six months, which Dr. LaCroix opined was the natural course of trauma. *Id.* 50:15-19. Dr. LaCroix would not have restricted Claimant from driving during the six months he was experiencing some symptoms because the treatment for PTSD is to confront the stressor, not avoid it. *Id.* 52:13-53:9. Dr. LaCroix did not think anxiety, depression, or PTSD symptoms would currently prevent Claimant from driving truck, but his cognitive status and ability to be alert and multitask would prevent him from driving truck. *Id.* at 53:10-54:2.

93. On cross-examination, Dr. LaCroix agreed that the accident Claimant was in was a "significant event," which is one criterion for diagnosing PTSD. *Id.* at 66:13-67:1. Dr. LaCroix explained that the majority of people who experience trauma did not develop PTSD, so she could not opine whether it "reasonable" for the Claimant to have some degree of PTSD, but did agree a hypothetical person could experience PTSD after such an event. *Id.* at 69:11-70:1; 70:24-71:2. Dr. LaCroix agreed that pain could affect someone's mood, but added:

> when you say he has had pain, I think that that is an almost impossible analysis, based on the tremendously high level of opiates that he has been on for years. So whether he is in pain or not, if it's actual, physiological pain versus an expression of wanting or needing more opiates, it is not something that I believe can be ascertained… the fact that his pain complaints can't be objectively quantified, due to his opiate use disorder, is the issue.

Id. at 74:13-75:20; 76:8-11.

94. **Credibility.** There are two types of credibility in Commission findings: "observational credibility" and "substantive credibility." Observational credibility "goes to the demeanor of the appellant on the witness stand" and it "requires that the Commission actually be present for the hearing" in order to judge it. Substantive credibility, on the other hand, may be judged on the grounds of numerous inaccuracies or conflicting facts and does not require the

presence of the Commission at the hearing. *Painter v. Potlatch Corp.*, 136 Idaho 309, 63 P.3d 435 (2003).

95. Claimant's credibility issues can be split into three categories: (1) Claimant's very poor recall; (2) Claimant contradicting his own testimony; (2) numerous substantive inconsistencies.

96. Claimant admitted his memory was poor at hearing. Tr. 26:6-9. Claimant did not recall undergoing counseling during his divorce, until reminded by counsel. JE 1:31-32. Claimant did not recall getting any medical treatment prior the industrial accident, until reminded by counsel, both at deposition and at hearing. JE 1:22; Tr. 28:17-29:11. Claimant did not recall being interviewed by the police at the scene of the accident. JE 1:45. Claimant did not recall attending physical therapy after the accident. JE 1:54. Claimant did not recall seeing Dr. Andrew who originally recommended his fusion or receiving an injection from him. JE 1:76; Tr. 56:3-6. Claimant did not recall when he married his second wife. JE 1:82. Claimant did not recall working for Corder and then denied working for them but did remember and admitted he worked for them at hearing. JE 1:90-91; Tr.65:8-10. Claimant did not recall that he hurt his neck as a result of the accident. JE 1:47, 50. Claimant did not recall Dr. LaCroix at hearing in August 2022 after their March and April 2022 interviews. Tr. 121:19-21. This is not an exhaustive list of all the events Claimant failed to recall and which are well documented in the record.

97. Claimant contradicted himself within his own testimony more than once. In his 2022 deposition, Claimant testified that his hip replacement helped his pain and function and then denied that it improved his function. JE 1:71, 79, 80. Claimant testified he did not have hip pain until four days after the accident, then testified he did have hip pain immediately after the accident. Tr. 51:16-52:5; 86:23-87:20. Claimant testified he told the ER physician he had back pain and then

testified that he did not tell them he had back pain. Tr. 41:19-42:5; 88:10-25. Claimant recalled meeting with the social worker at the hospital but then did not recall meeting with the social worker at the hospital. Tr. 41:5-9; 89:15-17. Again, this is not an exhaustive list of Claimant contradicting himself within the same day's testimony.

98. The substantive inconsistencies in Claimant's statements are the most troubling. Claimant told various providers he could not drive for more than a short period of time and had great difficulty driving after the accident due to pain and flashbacks/anxiety; but he testified in 2020 that the accident did not affect his ability to drive physically and that his anxiety only affected him a little bit. In fact, Claimant testified he commuted regularly to Boise for medical treatment. Claimant reported many reasons for his decision to quit Off-Spec: because of his flashbacks when he was at deposition; because of COPD when he spoke to the dispatcher at Off-Spec, and because of low back and hip pain and COPD when he testified at hearing. Claimant insists that neither Dr. Cox nor Dr. Montalbano examined him, which is inconsistent with their reports and testimony. Claimant denied having any issue exiting his truck to providers at the time, but later said he fell out of his truck. Claimant inconsistently testified regarding how hard he braked during the accident at multiple points.

99. The most notable inconsistency is Claimant's observed behavior on surveillance compared with what he reported at the time to his providers. Claimant bent over, carried things, rode four-wheelers, and moved fluidly as observed by this Referee and Dr. Cox. However, Claimant's presentation to Dr. Hall at the time was so severe, he had taken Claimant off work for his low back and neck pain and anxiety and referred him to neurosurgery. Claimant denied he had four-wheeled to Dr. Cox but admitted to four-wheeling in his 2022 deposition, and again denied

he had four-wheeled at hearing. Again, this is not an exhaustive list of the substantive inconsistencies.

100. Claimant's testimony lacks substantiative credibility and is given very little weight.

101. Kyle Kerby testified credibly.

DISCUSSION AND FURTHER FINDINGS

102. 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).

103. 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).

104. Psychological injuries, disorders, or conditions are not compensated under workers compensation unless the elements of Idaho Code § 72-451 are met. Idaho Code § 72-451 provides:

> (1) Psychological injuries, disorders or conditions shall not be compensated under this title, unless the following conditions are met:
> (a) Such injuries of any kind or nature emanating from the workplace shall be compensated only if caused by accident and physical injury as defined in section 72-102(17)(a) through (17)(c), Idaho Code, or only if accompanying an occupational disease with resultant physical injury, except that a psychological mishap or event may constitute an accident where:
> (i) It results in resultant physical injury as long as the psychological mishap or event meets the other criteria of this section;
> (ii) It is readily recognized and identifiable as having occurred in the workplace; and
> (iii) It must be the product of a sudden and extraordinary event;
> (b) No compensation shall be paid for such injuries arising from conditions generally inherent in every working situation or from a personnel-related action including, but not limited to, disciplinary action, changes in duty, job evaluation or employment termination;
> (c) Such accident and injury **must be the predominant cause as compared to all other causes** combined of any consequence for which benefits are claimed under this section;
> (d) Where psychological causes or injuries are recognized by this section, such causes or injuries must exist in a real and objective sense;
> (e) Any permanent impairment or permanent disability for psychological injury recognizable under the Idaho worker's compensation law must be based on a condition sufficient to constitute a diagnosis **using the terminology and criteria of the American psychiatric association's diagnostic and statistical manual of mental disorders, third edition revised, or any successor manual** promulgated by the American psychiatric association, and must be made by a psychologist or psychiatrist duly licensed to practice in the jurisdiction in which treatment is rendered; and
> (f) **Clear and convincing evidence that the psychological injuries arose out of**

> **and in the course of the employment** from an accident or occupational disease as contemplated in this section is required. (emphasis supplied).

105. **Causation. – Low Back.** Claimant has failed to prove his degenerative disc disease was permanently aggravated by the accident. Dr. Radnovich, Dr. Manos, Dr. Williams, and Dr. Andrew plainly opined that the accident permanently aggravated his low back condition. However, these physicians did not have all the relevant information in forming their opinion. None of these physicians had Claimant's pre-existing medical records or the records generated immediately after the accident. Their opinions are severely weakened by not reviewing: (1) the 2004 MRI which showed a disc bulge at L5-S1; (2) the 2004 medical records wherein Claimant complained of sciatica and radiculopathy; (3) the initial 2014 ER evaluation and EMT evaluation where Claimant denied back pain and lacked physical findings; and (4) the June 2014 employment records which showed that Claimant worked for three full days after the industrial accident. Although Dr. Radnovich reviewed the August 2014 surveillance video the day of his deposition (Radnovich Depo. 75:15-25), Dr. Manos, Dr. Williams, and Dr. Andrew did not. Even without considering Defendants' physicians' opinions, Claimant's experts' opinions do not "take into consideration all relevant facts." *Eacret*, *supra*.

106. Claimant complained of radiculopathy in 2004 and again after the 2014 accident. Dr. Manos and Dr. Andrew both opined that Claimant's MRI findings matched with his complaints of radiculopathy such that surgery was necessary; however, Dr. Bradley, Dr. Montalbano, Dr. Cox, and Dr. Hall all disagreed that Claimant's imaging showed any stenosis which would explain his complaints of right, and eventually left leg pain. Neither Dr. Andrew nor Dr. Manos were deposed, and their opinions were well refuted by Dr. Cox and Dr. Montalbano.

107. Claimant argues that his improvement in function post-surgery shows that the surgery was reasonable and necessary. At a follow-up visit to Dr. Manos, Claimant reported he

had a 30% improvement of his pain, but that his feet were still numb. To Dr. Radnovich, Claimant also reported that he was improved and considering returning to work. However, Claimant denied the low back surgery helped him at both depositions and stated the only thing that helped his back pain was his pain pills. Eight months after surgery Claimant reported increased back pain and leg pain to Dr. Radnovich, and a year after the surgery, Claimant felt his pain medication was ineffective at controlling his back pain. Claimant continued to complain of high levels of back pain in his medical records up until the date of hearing and continued to take high levels of opiates for his pain. Lastly, per *Chavez*[1], whether treatment improved a claimed condition is relevant to whether treatment was reasonable, not whether it was related to the accident. Claimant's improvement or lack thereof only speaks to the reasonableness of the surgery, not to its relationship to the accident.

108. The two strongest pieces of evidence for Claimant's claim are the temporal relationship between the accident and Claimant's symptoms and that Claimant complained of "low back stiffness" at the ER.[2] A temporal relationship alone is insufficient to meet Claimant's burden of proof. The complaint of low back stiffness, accompanied by denials of back pain to both the EMTs and the ER physician and no physical findings at either exam, is insufficient to show an aggravation of Claimant's degenerative back condition. Further, none of Claimant's experts relied on this report of low back stiffness as they did not review it.

109. Defendants' experts have well explained that Claimant's low back condition reflects the natural progression of his degenerative disc disease. Claimant has failed to prove his

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[1] What constitutes reasonable medical care is to be determined by a totality of the circumstances approach. *Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015).

[2] Claimant mis-cites the record when he argues that Claimant complained of low back pain immediately after the accident; the quote Claimant cites to is from June 12, 2014, not from the date of the accident. Clt's Reply Brief, p. 4; JE 20:45.

degenerative low back condition was aggravated by the accident.

110. **Causation – Right Hip.** Claimant has failed to prove his right hip condition was caused or aggravated by the accident. Claimant's treating physician, Dr. Holley, opined Claimant's MRI only showed degenerative changes in 2015; when asked to give an opinion, Dr. Holley unequivocally opined that Claimant's industrial accident did not cause the need for surgery, but that Claimant's degenerative arthritis was the cause. Dr. Cox and Dr. Radnovich both agreed that if Claimant's degenerative hip arthritis was aggravated by the accident, he should have had immediate pain. Both physicians also agreed hip pathology presents as groin pain. Claimant did not complain of groin pain until November 2014.[3] Claimant's complaints of "upper leg" pain are noted as radiculopathy by his physicians at the time, not hip pathology.

111. Dr. Radnovich did not review Claimant's 2004 records of hip, pelvic, and groin injuries and pain, so Dr. Radnovich did not have all the relevant information in forming his opinions. Dr. Radnovich's opinion that the labral tear was new and caused by the accident is contradicted by Dr. Holley's, the surgeon who actually visualized the hip, who opined it was degenerative. In fact, Dr. Holley opined Claimant's hip was so degenerated at the time of his evaluation, only a total hip arthroplasty was appropriate.

112. Again, the strongest evidence Claimant has to prove his right hip condition was related to the accident is a temporal relationship between the accident and his symptoms. A temporal relationship alone is insufficient to prove causation. Further, the temporal relationship here is even weaker than Claimant's low back condition, as Claimant did not complain of groin pain until months after the accident. Claimant has failed to prove his right hip condition was caused

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[3] Claimant's citation to Dr. Hall's July 3, 2014 visit shows Claimant specifically denied groin paresthesia, and does not show "groin symptoms." Clt's Reply Brief, p. 3; JE 21:8.

by or aggravated by the accident.

113. **Causation – Neck**. Claimant argues in briefing that his neck condition has been a persistent and painful condition and was significant enough to be rated by Dr. Radnovich. Claimant has not complained of neck pain since 2017; Dr. Radnovich's records reflect a chief complaint of neck pain, but the actual notes themselves do not reflect complaints of neck pain after 2017. The following exchange at hearing is relevant:

> Q: [By Mr. Storer] Okay. Well, let me ask you this. Do you remember telling anybody at TI Morgan that while you were driving truck for them following the accident that your only complaint was neck pain?
>
> A: No.
>
> Q: Okay. Did you have neck pain following the accident?
>
> A: A little bit.
>
> Q: Okay. Did your neck pain continue up until today?
>
> A: No.
>
> Q: Okay. Did your neck pain continue for -- let's say a couple years after the accident?
>
> A: Sometimes.
>
> Q: Okay. And what would cause your neck pain?
>
> A: I don't know.
>
> Q: Did Dr. Radnovich ever tell you what was causing your neck pain?
>
> A: No.
>
> Q: Did he ever treat you for your neck pain?
>
> A: No.

[Hrg. Tr. 91, 3-23.]

Dr. Radnovich opined that Claimant's neck pain was related to the accident and rated him for

"symptomatic degenerative joint disease" in 2020. Per Claimant, he is no longer symptomatic. Claimant has failed to prove the accident caused symptomatic degenerative joint disease in his neck. At most, Claimant suffered a cervical strain without impairment or restrictions as opined by Dr. Cox, Dr. Montalbano, and Claimant's initial treaters, Dr. Hall and Dr. Neeraj.

114. **Causation – PTSD.** Claimant must prove that the industrial accident was the predominant cause for his PTSD compared to all other causes, that it was caused by the accident by clear and convincing evidence, and that it was diagnosed according to the DSM's criteria by a licensed psychologist or psychiatrist.

115. Dr. Radnovich is not a licensed psychiatrist or psychologist. He did not opine to a "clear and convincing" standard of evidence, only on the "more probable than not" standard. He did not clearly or cogently follow the criteria of the diagnostic and statistics manual (DSM) standard in making his PTSD diagnosis. Dr. Radnovich's opinion does not meet the statutory requirements of Idaho Code § 72-451.

116. Mr. Dietchler is not a licensed psychiatrist or psychologist. He, did not opine to a clear and convincing standard of evidence., And he did not clearly or cogently follow the criteria of the DSM diagnostic standard in making his PTSD diagnosis. Mr. Dietchler's opinion does not meet the statutory requirements of Idaho Code § 72-451.

117. Dr. Belnap is a licensed psychiatrist. He clearly opined that Claimant's PTSD was related to the accident only. And he did reference the DSM criteria in making his diagnosis of PTSD. However, one problem with Dr. Belnap's opinion is that he wrote that Claimant denied any history of abuse or trauma. Claimant reported to Dr. LaCroix, Dr. Hulbert, and LPC Neilson that he had been abused by his father, physically, emotionally, and verbally. Claimant reported to Dr. LaCroix that his lifelong fear of enclosed spaces was due to other students trying to drown him in

a canal when he was younger. Both Dr. Hulbert and Dr. LaCroix found Claimant's involvement in special education relevant to their discussion of PTSD, which it also appears Dr. Belnap was unaware of.

118. Another problem with his opinion is that Claimant also told Dr. Belnap that he had not previously been on medication, only counseling; this is contradicted by the records and by Claimant himself, who was on Prozac in 2004 and Paxil, for an unknown time, for "mood swings" or "depression" or "anxiety" or because his wife wanted him on it, depending on when Claimant was asked. Dr. Belnap did not have all the relevant information in making his PTSD diagnosis, which renders it unreliable. Dr. Belnap's opinion is insufficient to support a diagnosis of PTSD related to the accident.

119. Dr. Hulbert is a licensed psychiatrist and clearly followed the DSM criteria in making his diagnosis of PTSD. However, Dr. Hulbert did not opine that the accident was the predominant cause of Claimant's PTSD. Dr. Hulbert wrote regarding the diagnosis of PTSD: "other relevant factors include a history of harsh treatment by his father as a child, history of special education programming in school, experienced a car accident with a fatality while driving a truck, unemployed after many years of hard work, and the physical problems of back, neck, and leg pain." Dr. Hulbert did not have the history of the attempt to drown Claimant. Nor did Dr. Hulbert understand that Claimant denied he had previously been hospitalized for psychological issues, despite reporting that numerous times elsewhere in the record,. Dr. Hulbert did not appear to know that Claimant was previously on Prozac or Paxil, only that Claimant underwent counseling related to his divorce. Dr. Hulbert's opinion does not consider all relevant information. He also did not opine the accident was the predominant cause of Claimant's PTSD. Dr. Hulbert's opinion is

insufficient to support a diagnosis of PTSD related to the accident.

120. No single opinion meets the required standard and even all these opinions combined do not rise to the level of clear and convincing evidence or show that the accident was the predominant cause of Claimant's PTSD. Claimant has not met his burden of showing he has PTSD that was clearly caused by the accident or that the accident was the predominant cause of his alleged PTSD.

121. Dr. LaCroix clearly explained that Claimant did not meet the DSM criteria for PTSD either at the time of the accident or when she examined him in 2022. Dr. LaCroix noted that Claimant did have some symptoms of PTSD initially, but that his symptoms resolved over the course of six months, which was the natural course for recovering from a traumatic event. Dr. LaCroix was the only licensed psychiatrist with all the relevant information for diagnosing Claimant with PTSD according to the DSM, and she opined he did not meet that criterion in 2014 or 2022. Dr. LaCroix's opinion is accepted.

122. **Idaho Code § 72-434.** Idaho Code § 72-434 reads in relevant part as follows:

> If an injured employee unreasonably fails to submit to or in any way obstructs an examination by a physician or surgeon designated by the commission or the employer, the injured employee's right to take or prosecute any proceedings under this law shall be suspended until such failure or obstruction ceases, and no compensation shall be payable for the period during which such failure or obstruction continues.

The corollary statute is Idaho Code § 72-433, which reads:

> After an injury or contraction of an occupational disease and during the period of disability the employee, if requested by the employer or ordered by the commission, shall submit himself for examination at reasonable times and places to a duly qualified physician or surgeon.

123. Claimant did not attend an examination scheduled by Surety to evaluate his PTSD with Craig Beaver, PhD. Claimant argues that it was an unreasonable examination because it was

purportedly examining for a condition Defendants had already denied (PTSD), Dr. Beaver is not a physician, Defendants are entitled to only one examination, and the recent case of *Arreola v. Scentsy* 531 P.3d 1148 (2023) is controlling.

124. Claimant's arguments are unconvincing. Claimant's claim that Defendants relied on Dr. Cox to deny the PTSD claim is contradicted by the record. When Defendants received Dr. Cox's addendum recommending Claimant be evaluated by a mental health professional for his PTSD, Defendants started paying total temporary disability benefits for that condition from the date they had cut them off. Defendants did not deny or refuse to pay Claimant's TTD benefits for his alleged PTSD until Claimant's then counsel, Alan Morton, represented Claimant would not attend the IME with the understanding that it would cut off his benefits and that he was no longer pursuing workers compensation benefits at that time.

125. Claimant's argument that Dr. Beaver is not a physician is contrary to statute. Idaho Code § 72-434 requires a "physician or surgeon" for an examination. Idaho Code § 72-102(24) defines physician as a number of specific professions with the catch-all including any: "members of any other healing profession licensed or authorized by the statute of this state to practice such profession within the scope of their practice as defined by the statutes of this state and as authorized by their licenses." Craig Beaver, PhD, at the time was a licensed psychologist. Claimant makes no argument that Dr. Beaver was practicing outside the scope of his practice or outside the authorization of his license. Dr. Beaver was a physician for purposes of an Idaho Code § 72-433 exam.

126. Claimant's argument that Defendants are entitled to only one examination per the language of the statute ignores the recent declaratory ruling in *Coray v. Idaho Regional Hand & Upper Extremity Center, PLLC*, IIC 2018-034888, issued February 3, 2023. There is no specific

prohibition against the use of different physicians to perform repeat examinations of an injured worker, subject to the reasonableness requirement of Idaho Code § 72-433. Claimant has not argued that the examination was at an unreasonable time or place and Claimant's argument that Dr. Beaver is not a duly qualified physician has already been rejected.

127. Claimant urges the retroactive application of *Arreola v. Scentsy, Inc*, 531 P.3d 1148 (2023) which was issued on June 23, 2023, after Defendants had already submitted their reply brief. *Arreola* holds in relevant part that when suspending benefits pursuant to Idaho Code § 72-434, a surety must first have an order of suspension from the Industrial Commission and cannot unilaterally determine that a claimant has unreasonably refused to attend an IME.

128. *Arreola* specifically notes that it applies "only prospectively." *Arreola,* 531 P.3d 1148, 1158. The retroactive application of *Arreola* to Defendants' 2014 decision making would contradict the Supreme Court's direction that it applies only prospectively and would be fundamentally unfair. Nevertheless, Claimant is entitled to due process. Claimant is in the same position as the claimant in *Arreola.* In *Arreola,* the Commission was ordered to evaluate Claimant's entitlement to past benefits owed subsequent to the surety's curtailment of benefits under Idaho Code § 72-434. The evaluation includes a retrospective analysis of whether the IME was set at a reasonable time and place before a duly qualified physician, and whether Claimant unreasonably failed to submit, or in any other way obstructed, the examination. As noted above, the Commission concludes that Claimant's then-attorney acceded to the curtailment of benefits, that Dr. Beaver is a "physician" for purposes of Idaho Code § 72-433, and that nothing in Idaho law explicitly limits Defendants to one, and only one, Idaho Code § 72-433 exam. Defendants did not act inappropriately in curtailing benefits under Idaho Code § 72-434, per *Brewer v. La Crosse Health & Rehab*, 138 Idaho 859, 71 P.3d 458 (2003), the relevant applicable law at the time.

Claimant is not entitled to additional temporary disability benefits.

CONCLUSIONS OF LAW

1. Claimant has failed to prove his alleged low back, hip, and neck conditions are related to the accident on a more probable than not standard;

2. Claimant has failed to prove his alleged PTSD was related to the industrial accident per the requirements of Idaho Code § 72-451;

3. Claimant's benefits were appropriately suspended per Idaho Code § 72-434 by Defendants in 2014;

4. All other issues are 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 14th day of August, 2023.

INDUSTRIAL COMMISSION

Sonnet Robinson

Sonnet Robinson, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September, 2023, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail and *E-mail transmission* upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRUCE LONG, Claimant, v. JI MORGAN, INC., Employer, and WORKERS COMPENSATION EXCHANGE, Surety, Defendants.	**IC 2014-015521** **ORDER** FILED SEP 15 2023 INDUSTRIAL COMMISSION

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. Claimant has failed to prove his alleged low back, hip, and neck conditions are related to the accident on a more probable than not standard.

2. Claimant has failed to prove his alleged PTSD was related to the industrial accident per the requirements of Idaho Code § 72-451.

3. Claimant's benefits were appropriately suspended per Idaho Code § 72-434 by

Defendants in 2014.

4. All other issues are moot.

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

DATED this 15th day of September, 2023.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

Aaron White, Commissioner

ATTEST:

Christina Nelson
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September, 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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