BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHRISTOPHER MIKLOS, Claimant, v. L&W SUPPLY CORPORATION, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Surety, Defendants.	**IC 2019-033631** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED MARCH 4, 2024 IDAHO INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a bifurcated hearing in Boise, Idaho, on April 20, 2023. Ms. Taylor Mossman-Fletcher represented Claimant at the hearing. Mr. Nathan Gamel represented Defendants. The parties produced oral and documentary evidence at hearing and submitted post-hearing briefs. One post-hearing deposition was taken. The matter came under advisement on December 18, 2023.

ISSUES

The issues for resolution in this bifurcated hearing are:

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;
2. Whether Claimant's condition is due in whole or in part to a preexisting injury or condition;

3. Whether Claimant's condition is due in whole or in part to a subsequent injury or condition; and

4. Whether and to what extent Claimant is entitled to the following benefits;

   a. Medical care; and

   b. Temporary disability benefits, either partial or total.

The issues of permanent partial impairment, disability in excess of impairment, and attorney fees were reserved.

CONTENTIONS OF THE PARTIES

Claimant contends he injured his right foot and ankle on October 28, 2019, while in the process of carrying drywall panels at work. A subsequent MRI showed a severely torn peroneus brevis tendon. Claimant eventually underwent surgery to repair the tendon. Surgery did not eliminate Claimant's pain. A follow-up MRI requested by Claimant's physician was not initially authorized by Surety, but after considerable delay Claimant was finally able to obtain a repeat MRI, which showed a recurrent tear in the same tendon. Claimant seeks, and is entitled to, surgery to repair this recurrent tear, but Defendants refuse to authorize such surgery. Claimant is also entitled to time loss benefits during his period of recovery from the surgery. Benefits for disability (medical and from all causes), and attorney fees are reserved for subsequent determination.

Defendants assert that Claimant's initial surgery repaired the tendon and the recurrent tear occurred after Claimant stopped working for Employer. The subsequent tear was not related to Claimant's original injury or surgery. Claimant has failed to establish with medical evidence a connection between Claimant's industrial injury of October 28, 2019 and the subsequent tendon tear evidenced by the MRI taken in August of 2022. Due to a lack of medical evidence on causation, Claimant has failed to carry his burden of proof on the issue and his case fails to establish a right to further benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's testimony at hearing;

2. The post-hearing deposition testimony of witness Christopher Hirose, M.D., taken on August 18, 2023;

3. Joint exhibits (JE) 1-17 admitted at hearing.

FINDINGS OF FACT

1. At the time of hearing Claimant was 41 years old, married, with two children.

2. As part of his employment duties with Employer, Claimant delivered and unloaded drywall sheets to construction sites.

3. On October 28, 2019, while moving drywall sheets up a stairway with co-workers, Claimant twisted his right ankle. He was wearing boots at the time and felt only mild pain sensations at first. By the next day, however, his pain was increasing. Claimant sought medical treatment. X-rays of his right foot and ankle revealed mild to moderate degenerative joint disease in his right ankle without acute fracture. His right foot x-rays were read as normal.

4. Claimant attended physical therapy. Eventually, he underwent injection therapy.

5. An MRI taken March 17, 2020, revealed a high grade partial thickness 4 cm long tear of Claimant's right peroneus brevis tendon.

6. Claimant's pain continued to increase in spite of treatment. He commented to his treater that prolonged standing and walking seemed to exacerbate his discomfort. Claimant testified at hearing that during this time his ankle was swollen and he had trouble walking on it. He used ice on his ankle daily and took non-prescription pain medications.

7. Claimant was referred to an orthopedic surgeon due to his torn tendon. He was initially seen by Shane Haas, PA-C on April 3, 2020. By that time Claimant's pain was such that

he was unable to work, but his ankle swelling and bruising had resolved. Claimant was prescribed a non-weightbearing cast to use for four weeks.

8. After the casting failed to reduce Claimant's pain, surgical intervention was suggested. On May 28, 2020, Claimant underwent surgery as per the recommendation of his treating physician, Devon Nixon, M.D. The surgery consisted of a debridement of Claimant's distal tibia osteophyte, and osteochondral lesion and microfracture repair, together with repairs to his peroneus brevis, peroneus longus, and lateral ligament stabilization. Dr. Nixon described the surgery as "extensive." JE 5, p. 276.

9. Postoperatively, Claimant went from a pain level of 10/10 at the three-week mark to 4/10 by the three-month mark. Dr. Nixon counseled Claimant that peroneal tendon surgery takes a long time to recover, but with time and patience his pain level should get better. At this late-August visit, Claimant was released to light-duty desk work with frequent breaks, if any such job existed. Claimant continued off work through this time.

10. At his mid-October physician visit with Dr. Nixon, Claimant reported the physical therapy was helping, but he still had bad days and good days. Claimant indicated the areas of his ankle which had been operated on had greatly improved. He still had pain on the outside of his foot under the ankle joint. On examination, Claimant had no pain with movement to the areas which were painful prior to surgery but had "vague areas of tenderness to palpation along the anterolateral (front and outside) aspect of his ankle." Dr. Nixon was not able to localize what was causing Claimant's discomfort. He determined Claimant's ankle was significantly more stable post surgery. He also felt Claimant's condition would get better with time. JE 5, pp. 284, 285.

11. Claimant complained of pain within the ankle joint itself when he saw Dr. Nixon on December 16, 2020. Dr. Nixon suggested an injection into the tibiotalar joint, which was performed that day. Claimant's ankle was stable with no pain in the peroneal tendons. Claimant remained off work.

12. Defendants arranged for Claimant to be seen by orthopedic surgeon George Nanos, M.D., for an independent medical examination on January 22, 2021. Dr. Nanos took a history, reviewed medical record and examined Claimant. Dr. Nanos found no objective evidence of ankle instability or ongoing work injury deficits. He opined that Claimant was at MMI without need for any work accommodations or restrictions. Dr. Nanos gave Claimant a 3% WP PPI rating.

13. When Claimant next saw Dr. Nixon on February 16, 2021, he reported his pain at 4/10 over multiple areas along the peroneal tendons. He exhibited no instability. Claimant noted the injection had provided 100% pain relief, at least temporarily. Claimant relayed that he had undergone an IME at Surety's request. In line with the opinions of George Nanos, M.D., Dr. Nixon's office notes of that day indicated Claimant had been able to return to work full time.[1]

14. Dr. Nixon reasoned that since the intraarticular ankle injection provided pain relief, Claimant's ongoing pain might not be due to his peroneal tendons. The pain might have a more intraarticular pathology. He wanted to perform an MR arthrogram to evaluate Claimant's osteochondral lesion as well as the state of healing on his peroneal tendons. The study could also look for "any other intraarticular or extraarticular sources." JE 5, p. 298.

15. Surety denied the request for an arthrogram on the basis that Dr. Nanos had previously declared Claimant at MMI. Subsequently, Dr. Nixon reviewed the IME report at Claimant's request and disagreed with Dr. Nanos' opinion that there were no objective findings to direct further treatment. Dr. Nixon felt the arthrogram was a reasonable treatment option.

16. Thereafter, Claimant retained counsel. Eventually, Surety authorized an additional MRI, which was performed on August 4, 2022.

---

[1] The reference in Dr. Nixon's office notes of February 16, 2021 to the fact Claimant claimed he "had been able" to return to full duty work prior to that date find no support anywhere else in the record that Claimant had actually begun working full time prior to mid-February, 2021. The parties both use a May 2021 time frame for Claimant's return to work. Also, Claimant testified at hearing he went back to work in May, 2021.

17. Between the time Dr. Nixon first recommended a follow-up MRI in February 2021 and when the study was completed in August 2022, Dr. Nixon moved to Utah. Claimant's medical file was taken over by Ben Hirose, M.D., and Michael Haas, PA, of the same medical office.

18. The MRI showed some displaced fibers of Claimant's right peroneal brevis along with mild tibiotalar degenerative changes and a tibiotalar ganglion cyst. PA Haas described the findings as "a recurrent tear of his peroneal tendon [and] mild ankle joint arthritis." JE 11, p. 416. He also noted the MRI visualized the expected post-surgical changes from Claimant's previous surgery.

19. On October 26, 2022, Dr. Hirose discussed the MRI results with Claimant. Claimant was complaining at that time of numbness from his right foot to his knee, with pain in his lateral and anterior aspects of his right ankle and forefoot which negatively impacted his daily lifestyle. On examination, Claimant was tender over his anterior tibiotalar (ankle) joint and had reduced flexion mobility in that ankle. Dr. Hirose diagnosed Claimant with a distal tibial spur and a peroneal tendon tear.

20. Claimant felt he could not live with the pain and limitations and wanted something done. Dr. Hirose noted that removing the spur would not be a long-term solution. The tear in Claimant's peroneal tendon warranted surgical inspection and repair. During surgery, Dr. Hirose would also remove the spur and "clean out" the ankle joint. Dr. Hirose warned the surgery might not resolve all of Claimant's pain, especially pain associated with the spur, as it would likely grow back.

21. Dr. Nanos was asked to review the MRI from August 2022 and opine on whether the findings contained therein would change his opinion. Dr. Nanos stuck with his prior opinions. While brushing off the findings of displaced fibers in the peroneus brevis (recurrent tear of the tendon), Dr. Nanos noted the August 2022 MRI looked "improved" when compared to Claimant's pre-operative MRI.

22. In response to a "check the box" letter from Claimant's attorney dated November 29, 2022, Dr. Hirose agreed that the recommended surgery was related to Claimant's October 28, 2019 accident. He supported his position with the statement "[Claimant] had no ankle pain prior to his work comp injury as documented by Dr. Nixon."

23. The Surety did not approve the requested surgery.

DISCUSSION AND FURTHER FINDINGS

24. The first, and most contested issue, is whether Claimant has proven his need for a second surgery on his right ankle (for which Claimant seeks benefits) was caused by the industrial accident.

25. Causation and medical care benefits are interwoven. While Idaho Code § 72-432(1) mandates that an employer provide for an injured employee such reasonable medical, surgical or other treatment as may be reasonably required by the employee's physician, Defendants are only obligated to provide such reasonable and necessary medical treatment if it is necessitated by the industrial accident. Defendants are not responsible for medical treatment, even if reasonable and necessary, not related to the industrial accident. *Williamson v. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d 1365 (1997).

26. Proof of a possible causal link is not sufficient to satisfy Claimant's burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 901 P.2d 511 (1995). Claimant must provide *medical testimony* that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995) (Emphasis added). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). The Commission may not decide causation without opinion evidence from a medical expert. *Anderson v. Harper's Inc.*, 143 Idaho 193, 141 P.3d 1062 (2006).

27. In the present case only Dr. Hirose was deposed. Both parties rely on his testimony in briefing.[2] Claimant's success or failure on the present issues of medical care for surgery and temporary disability during Claimant's period of recovery from that surgery depends on medical records and the testimony of Dr. Hirose.

Dr. Hirose Deposition Testimony

28. Dr. Hirose is not one of the worker's compensation "regulars" who appear in multiple cases and are accustomed to providing testimony for the Commission to consider. As such, it is worth noting that he is a fellowship trained and board-certified orthopedic surgeon specializing in foot and ankle orthopedics. He completed his orthopedic residency in 2003 and undertook additional training in foot and ankle orthopedics thereafter. In 2004, Dr. Hirose began his private practice in Denver. In 2009, he joined the Coughlin Clinic in Boise, which he described as being "internationally known for foot and ankle orthopedic injuries." Hirose Depo. p. 5.

29. Dr. Hirose does no forensic work, rather his practice is 100% devoted to clinical foot and ankle orthopedics, including surgeries. Likewise, he does not do independent medical examinations.

30. Dr. Hirose endorsed the proposal that Claimant's initial surgery performed by Dr. Nixon was likely causally related to an industrial accident suffered by Claimant.[3]

31. Dr. Hirose summarized the notes he reviewed as showing Claimant had pain immediately after surgery which then lessened, and eventually worsened. That summary

---

[2] While Defendants hired Dr. Nanos to conduct an IME and author a report, they do not ground their arguments herein on his reports and conclusions. Furthermore, his opinions were convincingly rebutted by Dr. Hirose in deposition. Dr. Nanos' opinions carry no weight; Dr. Hirose's opinions serve as the sole medical basis for determination of Claimant's right to medical benefits as argued for herein.

[3] Claimant first injured his ankle in October 2019. Subsequently, he had an accident where his foot broke through a roof, but apparently that was not the initiating event for his ankle injury. Dr. Hirose was under the impression that it was the roof accident which initially injured Claimant's ankle, but this misunderstanding is not material to his opinions as both parties agree Claimant first hurt his ankle delivering sheetrock.

is supported by Dr. Nixon's records as set out *supra.* Dr. Hirose pointed out that Claimant underwent a post-surgical injection into the area around Claimant's ankle without lasting improvement. The most recent MRI shows Claimant has a new tear in his peroneal brevis tendon which had been previously repaired by Dr. Nixon. Dr. Hirose opined that this torn tendon, coupled with the fact Claimant experienced ongoing pain in the area of the tendon, suggests the torn tendon may be the source of Claimant's continuing pain complaints.

32. Dr. Hirose testified that the torn tendon represents a different injury to the same part of Claimant's ankle which was previously repaired by Dr. Nixon. Specifically, he stated, "[s]o long as Dr. Nixon had a very good repair of that tendon, then we don't normally see this. But sometimes the tendon re-tears, and so that's why I say it's a different injury, because I know for a fact that Dr. Nixon is a very good surgeon, and he's [a] very thorough, careful surgeon." Hirose Depo. p. 18. Dr. Hirose repeatedly ruled out the idea that Claimant's current torn tendon was the result of Dr. Nixon's surgery. He called such a notion "highly unlikely." *Id* at p. 20.

33. After ruling out an incomplete repair by Dr. Nixon as being the source of Claimant's current tendon tear, a focus of Dr. Hirose's deposition questioning dealt with whether Claimant's torn tendon was due to an "industrial injury." It is at this point in the deposition that his testimony must be carefully analyzed to determine just what Dr. Hirose did and did not say about causation between Claimant's initial industrial injury of October 28, 2019, and the tear shown on the August 4, 2022 MRI.

34. When asked if he could say "that the recurrent tear more likely than not is related back to the original industrial injury," Dr. Hirose testified "I would say that it is more likely than not related to *the injury that caused the tear."* (Emphasis added.) *Id* at pp. 20-21. He further stated "[w]hether or not it was on-the-job injury or not, I'm not 100 percent clear on." *Id.* He did reiterate his position that the current injury was not related to Dr. Nixon's surgery.

35. Claimant's counsel followed up that response by asking the doctor "[a]ssuming that he did have an injury at work that tore his peroneal tendon, could you say on a more likely than not basis that the recurrent or subsequent tear is related to that injury?" Dr. Hirose responded, "I would say exactly what you said, I would agree with." Hirose Depo. p. 21. A bit later in his testimony Dr. Hirose stated, "[Claimant] has continued peroneal tendon pain because of the recurrent tear." *Id* at p. 26.

36. Both in direct and cross examination, Dr. Hirose clarified that the term "revision surgery" as he uses it, simply means another surgery at the same location or similar area where a previous surgery has taken place. It does not mean the surgery has to be in the exact place of a previous surgery, nor does it mean the revision surgery is necessarily done to correct or amend a prior surgical result.

37. Dr. Hirose felt a revision surgery was reasonable based on Claimant's MRI findings and subjective pain complaints. The surgery would encompass the site of the original tear as well as an additional section of the tendon.

38. Dr. Hirose multiple times in testimony commented on how unreliable Claimant was as an historian, how imprecise his answers were to medical and chronological timing questions, and how difficult it was to piece together an accurate picture of when, where and how an injury occurred.

39. When asked if he had any evidence Claimant sustained an acute injury which would explain the recurrent peroneal tendon tear, Dr. Hirose stated, "I would need to go through this in detail again, but it sounds like he's had several instances where he did something that flared up his pain around his ankle, but I wasn't paying direct attention to the dates at which they occurred and how it related to the date from his surgery." *Id* at pp. 33, 34.

40. Dr. Hirose was asked if it was possible that Claimant was suffering pain after a day's work with his various employers not due to an acute injury "but just simply he's having pain because he's having subsequent symptoms post-surgery?" His response was it could "absolutely" be the case. *Id* at p. 56.

41. Dr. Hirose was asked to render an opinion as to causation for the current tear and the need for surgery. He responded, "[i]t really appears as if this injury was a work-related injury when he fell through the roof at that first time that caused all this pain. Now, even then, [Claimant] can't remember entirely if that's what caused it, which I'm concerned about, but we have a real problem here and he's symptomatic." *Id* at pp. 37, 38.

42. In cross examination, Dr. Hirose admitted he could not pinpoint when the re-tear occurred. He acknowledged Dr. Nixon's surgery took place on May 28, 2020. Dr. Hirose was unaware that Claimant had stopped working for Employer well before that surgery. He was aware that after the surgery Claimant began working for "a lot" of different companies over time.

43. Dr. Hirose testified that anyone can get a recurrent tendon tear after corrective surgery, but to re-tear the peroneal tendon, there must either be weight on the tendon due to activity or an external force impacting the ankle. Logically, if Claimant was not working for Employer at the time of the recurrent tear, he could not have been performing any duties for Employer which could cause that recurrent tear. Dr. Hirose also agreed that it was *possible* Claimant could have suffered the recurrent tear while working for any of his post-surgical employers. Dr. Hirose could not state it was more probable than not that Claimant re-tore his peroneal tendon while working for any given employer.

44. After being subjected to multiple questions regarding the fact that Claimant might have re-torn his tendon while working for one employer or another, Dr. Hirose summarized his

thoughts on causation analysis by stating, "**I think what you really need to do is … try to figure out exactly when he had his recurrent tear and correlate that with where he was working …. I think that's not my job to figure that out.**" Hirose Depo. p. 55. (Emphasis added.)

45. Under further defense questioning, Dr. Hirose testified;

> Q. *** If it took an activity and Claimant wasn't working for [Employer] when that activity or blow to the ankle occurred, would you agree with me that it's more than possible, in fact, it's on a more probable than not basis, that the subsequently occurring activity or blow to the ankle post-surgery is what caused the tear, regardless of who he was working for at the time?
>
> **A.** I think you're on the right track. I mean, **I think it probably took at least one injury after his surgery that caused the recurrent tear, and it's up to, not me, but somebody to figure out where he was when that happened.**

Id at p. 60. (Emphasis added.)

46. Toward the end of his deposition testimony, Dr. Hirose was asked if the recurrent tear was caused by the industrial accident in 2019, and he answered "[n]o, that wouldn't be the recurrent tear. That would be the initial tear that occurred in 2019." He further elaborated, "[a] recurrent tear is when that happens after an initial tear." *Id* at p. 61.

Causation Arguments

47. The parties recognize Claimant has a recurrent tear in his peroneus brevis tendon. Put simply, the issue for resolution centers on how and why that tear occurred. The "how" remains a mystery, as no one has pointed to any singular particular event which would account for the tear. Dr. Hirose specifically ruled out the possibility of a failed initial surgery. Instead, the parties are bound to the notion that Dr. Nixon properly repaired Claimant's peroneus tendons and left no frayed or fraying fibers. Therefore, some unknown cause which occurred post-surgery

must account for Claimant's MRI finding of a recurrent peroneus brevis tendon tear. Claimant must prove the recurrent tear is related in some way to the initial work injury of October 28, 2019.

Claimant's Arguments

48. Claimant's arguments of merit focus on the following points;

- Claimant undeniably tore his right peroneal brevis tendon in an industrial accident;
- Claimant's current tear is in approximately the same location as his previous, repaired tendon tear;
- Per Dr. Hirose, Claimant will always be at a heightened risk of a re-tear after his initial injury;
- Dr. Hirose agreed in late November 2022 (JE 10, p. 413) that Claimant's need for surgery was related to his October 28, 2019 industrial accident;
- The record is devoid of evidence that Claimant suffered an acute event which would explain a separate cause for his recurrent tear.

49. Claimant also submits arguments in his briefing which are disputed and must be addressed. Those issues include his arguments that Dr. Hirose "consistently" attributed Claimant's need for revision surgery to the initial industrial accident, and the true meaning of Dr. Hirose's deposition testimony, specifically his testimony on causation.

Defendants' Arguments

50. Defendants' argument may be summarized with the following sequential events coupled with deposition testimony from Dr. Hirose.

- Claimant tore his peroneal tendon while working for Employer on October 28, 2019.
- Claimant stopped working for Employer in March 2020.

- The torn tendon was surgically repaired in May 2020 by Dr. Nixon.
- After this surgery, Claimant went on to work for several other employers, including Pavement Specialties (PSI), where he often used a backpack-mounted leaf blower while cleaning properties on foot, and at other times drove street sweepers.
- After leaving PSI, Claimant worked for T-Bone Express Trucking, where he drove a truck.[4]
- While working for these employers Claimant complained of increasing pain, swelling, and numbness of his right foot/ankle.
- Claimant would need to ice his foot after work on a regular basis. Also, while working for PSI he noticed on one occasion his right foot became discolored.
- Claimant's pain complaints increased from 4/10 after surgery, up to 7/10 while at PSI, and 10/10 while driving for T-Bone.
- According to Dr. Hirose, Claimant's current peroneal tendon tear represents a new injury, a second tear, and not a failed attempt at repair by Dr. Nixon.

51. Defendants argue that because Claimant suffered a second tear to his peroneal tendon *after* it was properly repaired by Dr. Nixon, and *after* Claimant stopped working for Employer, whatever event or accident resulted in the second tear cannot be Defendants' responsibility. Simply because no one knows when this second tear occurred does not defeat this argument because whenever it happened, and whomever Claimant was working for (if it happened at work, which is speculation), it was not while Claimant was working for Employer herein.

---

[4] Claimant was working for T-Bone at the time of hearing. He worked for them for a stint after PSI, then worked for two other intervening employers, including Service Partners, where he drove truck. At that employment he strained his low back and made a worker's compensation claim. He then worked for Leonard's Express for a short time, and then returned to T-Bone as a truck driver. He testified his ankle hurt throughout this entire timeframe.

52. Defendants also argue that any causation opinion rendered by Dr. Hirose would be inadequate or even inaccurate due to Claimant's poor memory and imprecise history of events. As noted by Dr. Hirose, Claimant could not even remember precisely how the work accident happened or the mechanism of injury. As the result, Dr. Hirose felt because of Claimant's "lack of accurate recollection of what happened, our (Dr. Nixon's and Dr. Hirose's) records aren't that accurate." Hirose Depo. p. 33. Defendants argue one cannot render an accurate, informed opinion on causation when relying on inaccurate records. Because Claimant is such a poor historian, it is not possible to determine if Claimant did, or did not, have a post-surgical acute injury, either at work or outside of work.[5]

53. Defendants also argue Claimant made inaccurate assumptions when interpreting Dr. Hirose's testimony. Analysis of those assumptions will be discussed hereinafter.

54. Next, Defendants point out that Dr. Hirose unequivocally testified that one cannot tear the peroneal tendon without activities which put weight on the ankle, or by an external force applied to the ankle. The tendon will not begin tearing spontaneously of its own accord. Defendants use this fact to argue Claimant could not have been exerting any level of activity *for Employer*, nor could he have been hit by an external force while working *for Employer*, when in fact Claimant was not working for Employer at the time of the recurrent tear. Therefore, the recurrent tear could not have arisen out of and in the course of Claimant's employment with Employer and Defendants cannot possibly be responsible for surgery to correct the recurrent tear.

---

[5] The undersigned Referee, after reviewing Claimant's deposition and hearing testimony, concurs with Dr. Hirose when it comes to questioning Claimant's recall accuracy. When medical records note Claimant's current impressions, such as his pain level, such communications are afforded weight, as they did not rely on Claimant's recall of past events. Records and testimony relying on Claimant's accurate recall are also afforded weight unless inconsistent with the record as a whole. Having said this, the outcome of this decision does not hinge on Claimant's credibility.

55. Finally, Defendants argue that when Dr. Hirose testified that Claimant's ongoing pain he felt while working for other employers could be related to an aggravation of the original injury, such testimony did nothing to answer the issue on the table – Claimant's request for medical benefits to repair his recurrent tendon tear. Surgery is contemplated for repair of a recurrent tear, not for ongoing residual pain from the first surgery. A new tear is not an aggravation. A tear which Defendants point out could only have occurred as the result of activity or a blow to the area at a time when Claimant was no longer working for Employer. While residual pain might be relevant to the issue of permanent partial disability, the current hearing focused only on medical benefits for surgery and related care, and temporary disability benefits for the time Claimant would be unable to work without restrictions during his period of recovery.

56. Dr. Hirose does not believe Claimant's torn peroneal tendon is an aggravation of his initial injury. Instead, he testified that in his opinion, it probably took "at least one injury after his surgery that caused the recurrent tear...." Hirose Depo. p. 60. That injury did not occur on Employer's watch. When and where and under what circumstances the injury occurred is not Defendants' job to figure out; it is enough to note that it did not happen while Claimant was working for Employer.

Causation Analysis

57. Having considered the various arguments of the parties, the contested issue of causation is examined from a "totality of the record" perspective.

58. Claimant first argues that Dr. Hirose's opinions on causation, evidenced in his "check-the-box" response in November of 2022 and during his deposition, coupled with common sense analysis, establishes Claimant's right to medical benefits for the contemplated surgery.

Granted, Dr. Hirose did check the box, although his explanation for why he did so fails to establish any support greater than a temporal relationship, i.e. "he didn't hurt before and now he does."

59. Additionally, in his deposition Dr. Hirose testified that Claimant's complaints of severe pain in October 2022 "suggests" Claimant was not medically stable from the October 2019 industrial accident. Hirose Depo. p. 23. Further on in his deposition, he also testified that it "really appear[ed]" to him that Claimant's ongoing pain was caused by his original work injury. Dr. Hirose also testified that Claimant was a surgical candidate based on the MRI findings and his pain level, which was more than Claimant felt he could live with.

60. The Commission has consistently held that the proof needed to establish causation, when contested, must be something greater than proximity in time. Borrowing language from the recently decided decision in *Pool v. Basic American Foods,* IIC 2017-053186 (Dec 4, 2023);

> While a qualified physician's opinion that a particular work accident caused a particular injury to the worker is sufficient to establish a prima facie case for causation, without elaboration on how or why the accident caused or contributed to the resultant injury, such a conclusory opinion carries little weight when analyzing the conclusion in light of a contrary opinion from another qualified physician. As noted in *Eacret v. Clearwater Forest Industries*, 136 Idaho 733,737,40 P.3d 91,95 (2002), "[w]hen 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."
>
> ***
>
> In order to prevail on her claim, Claimant is required to establish more than just a temporal relationship between the onset of pain and a work accident. See, e.g., *Swain v. Data Dispatch, Inc.*, IIC 2005-528388 (February 24,2012), (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.).
>
> ***
>
> There has always been a requirement that Claimant prove causation by a preponderance of the evidence, which requires something more than simply a temporal relationship. While Claimant is correct in noting

> a physician need not point to a specific acute finding in order to render an opinion on causation, for Claimant to prevail on her claim she needs to show medical evidence beyond simply a temporal association between Claimant's complaints and the accident in question.

Pool at 14, 15.

61. The parties dispute the significance of Dr. Hirose's deposition testimony on several points. Claimant argues that at page 20, when counsel asks if the recurrent tear is more likely than not related to the original industrial accident, and Dr. Hirose responds by saying Claimant's recurrent tear is related to the injury that caused the tear, he was actually relating the recurrent tear to the same accident that caused the original tear. Claimant also argues that when his counsel asked if one were to assume Claimant tore his tendon at work, the recurrent or subsequent tear is "related to that injury," and Dr. Hirose agreed with that statement, he was endorsing a causal connection between Claimant's initial tendon tear and the subsequent tear. Defendants argue that Dr. Hirose was saying no such thing, and when looking at his testimony as a whole, the true meaning of his responses becomes clear.

62. Citing Dr. Hirose's deposition testimony at pages 60 to 61, Claimant argues that the doctor opined the cause of the recurrent tear was the initial work accident, regardless of where or when the subsequent tear occurred. Defendants argue that in reality, Dr. Hirose rendered no such opinion, at least not in the way Claimant argues. Instead, Dr. Hirose, on those pages, acknowledged that the recurrent tear was caused by some post-surgery activity or blow to Claimant's ankle, regardless of where Claimant was working at the time of the activity or blow to the ankle.

63. Dr. Hirose's deposition testimony is confusing at best. When one sentence or another is viewed in isolation, as both parties have done, he seems to support both the position that Claimant's current condition relates back to his original industrial injury, but also that his

current condition is the result of one or more subsequent injuries which occurred after his surgery with Dr. Nixon. However, his testimony must be read as a whole and put into the context of the overall record.

64. In *Chavez v. Stokes*, 158 Idaho 793, 797, 798 353 P.3d 414, 418, 419 (2015), the Idaho Supreme Court clarified that "[t]he Commission's review of the reasonableness of medical treatment should employ a totality of the circumstances approach." That same admonition applies to any determination the Commission reaches – the conclusions must be made after considering the record as a whole and not by picking one statement or another out of context.

65. Dr. Hirose's comments in his deposition –that Claimant's complaints of severe pain in October 2022 "suggests" Claimant was not medically stable from the October 2019 industrial accident, that it "really appear[ed]" to him that Claimant's ongoing pain was caused by his original work injury, and that Claimant was a surgical candidate based on the MRI findings and his pain level – are subject to further scrutiny.

66. Dr. Hirose's testimony that the fact Claimant was complaining of severe pain when the doctor first saw him in late 2022 "suggests" Claimant was not at MMI from the October 2019 industrial accident fails to consider that while Claimant may have been in severe pain in the area of his peroneal brevis in the autumn of 2022, Dr. Nixon's notes from December 2020 indicated Claimant's ankle was stable, his peroneal tendons were "relatively quiet" i.e., not much pain, and had been that way for "quite some time." In fact, Dr. Nixon noted Claimant's complaints were over his anterior ankle joint. His lateral pain, which he suffered from before surgery, was "occasional" and "minimal."[6] JE 5, p. 287. Further, Dr. Hirose's opinion did not touch on the fact that not only was Claimant's lateral ankle complaints minimal by the end of 2020,

[6] Dr. Hirose had access to Dr. Nixon's records and indicated he had reviewed them prior to his deposition, as well as when treating Claimant prior to hearing.

his lateral pain made a comeback, and in fact became significantly worse once he began working for various employers after the surgery. The idea that Claimant's complaints in October 2022 were the same as Claimant had experienced consistently since 2019 is not accurate.

67. Next, when Dr. Hirose testified that Claimant was "not medically stable from the October 18, 2019 incident," he simply could have been parroting the exact language used by Dr. Nanos in his report. Dr. Hirose's statement came in response to an inquiry as to whether he agreed with Dr. Nanos, who had opined that Claimant was "medically stable from his October 18, 2019 incident." Dr. Hirose's verbatim recitation of Dr. Nanos' opinion with the simple insertion of the word "not" appears to reflect his disagreement with Dr. Nanos more than a thought-out opinion as to the date of origin for Claimant's complaints in late 2022. (For the contextual framework of this analysis see Dr. Hirose Depo. p. 23.)

68. Further support for this proposition comes from Dr. Hirose himself when he subsequently testified that it would be difficult to rule out a second injury while working for a post-surgery employer because "[Claimant] has had a lot of different jobs, and … a lot of different injuries…. That, coupled with the fact that his answers to the questions leads me to the conclusion that it's … hard to tell exactly what happened and when," due to Claimant's poor memory and imprecise recollection. Hirose Depo. pp. 32, 33. Furthermore, Dr. Hirose testified Claimant has "had several instances where he did something that flared up his pain around his ankle," but Dr. Hirose was not paying attention to the dates when the flare ups occurred, so he could not correlate any particular flare up with any particular post-surgical employer, or any post-surgical non-industrial incident. *Id.*

69. Dr. Hirose's opinion that it "really appeared" to him that Claimant's ongoing pain was caused by his original work injury suffers from the same lack of context. Claimant's history

is more complex than the straight-line analysis suggested by such a statement. Claimant's peroneal complaints waned and all but disappeared after surgery, only to blossom again after his return to full time employment.[7] According to Dr. Hirose's testimony, Claimant experienced "flare ups" and had several post-surgical "incidents" which increased his pain. Also, as noted by Defendants, the issues at this bifurcated hearing did not address Claimant's ongoing pain complaints but were limited to whether Claimant's need for surgery to repair his peroneal tendon was related to his 2019 industrial accident and time loss associated with the surgery. Defendants argue it is possible Claimant's ongoing pain could have its genesis in the 2019 industrial accident, but his need for a specific surgical repair might not.

70. Claimant's pain chart for his peroneal tendon would not show a consistent and unbroken straight line (even at an upward angle) since his surgery until the time of Dr. Hirose's deposition. His opinion on Claimant's "ongoing pain" did not take that fact into account.

71. Claimant further notes that Dr. Hirose's opinion was that Claimant's MRI findings, coupled with his current pain complaints, warrant surgery. That may well be true, but it does not touch on the reason Claimant's MRI findings are what they are. The fact that the MRI taken in 2022 showed fraying in the peroneal tendon does not mean that the fraying is the result of Claimant's 2019 work accident.

72. Claimant also argues that Dr. Hirose, when asked point blank if the recurrent tear was related back to the original industrial injury, agreed it was. In reality, Dr. Hirose did not respond yes or no, but instead said, "I would say that [the recurrent tear] is more likely than not

---

[7] Certainly, an argument could be made that it is only logical that Claimant's peroneal pain would wane when he was not exerting himself and increase once he became more active due to employment demands, but unfortunately that medical conclusion is not in the record and it would be improper for the fact finder to assume that is what happened, as discussed below.

related to the injury that caused the tear." Hirose Depo. p. 21. Claimant asserts that Dr. Hirose, with that answer, related the recurrent tear back to the original tear.

73. Defendants argue this answer can be fairly read as "the injury (accident) that caused the recurrent tear is the injury (accident) that caused that recurrent tear" – an obvious and factually accurate statement. Defendants argue that in reality, Dr. Hirose was saying if Claimant suffered a new post-surgery injury to his peroneal tendon while at work, the second tear would be industrial with regard to whichever employer Claimant was working for at the time of the second accident.

74. Perhaps sensing Dr. Hirose's answer was ambiguous, Claimant attempted to clarify his position by asking the doctor to assume Claimant *suffered an accident at work which tore his tendon*, and "with that assumption in mind, is the tear related to the particular accident which created the second tear?" Dr. Hirose agreed it would be. However, Dr. Hirose's agreement with the question is based on the assumption that the injury which tore the tendon would be the injury which tore the tendon, which is simply circular reasoning. Stated another way, whatever accident caused Claimant's second tear would obviously be the accident which caused Claimant's second tear. The answer does not speak to any particular accident, but whatever accident caused the tear, it had to do so after the first surgery and after Claimant stopped working for Employer herein.

75. Claimant's counsel assumed she had in effect asked – "If Claimant tore his peroneal tendon at work (in October 2019 and surgically repaired thereafter) and then two years later he was diagnosed with a recurrent tear to that same general location on his same peroneal tendon, would you say the recurrent tear was related to some degree back to the original accident and initial tear from two years earlier?" In reality, she asked an ambiguous question which led to Dr. Hirose's answer discussed above. Dr. Hirose's answer did not render an opinion to a reasonable medical probability standard that in fact, Claimant's subsequent peroneal tendon tear discovered by MRI

in 2022 was caused, at least to some degree, by his 2019 industrial accident. Therefore, Dr. Hirose's answer to the hypothetical question does not help Claimant establish the requisite causation for surgical benefits.

76. Claimant notes Dr. Hirose established that Claimant is more susceptible to reinjuring his ankle after his first injury and surgery, so it is not surprising that due to his first injury he now has retorn his tendon. While Dr. Hirose did opine that Claimant would be more susceptible to reinjuring his tendon after the first surgery, that fact is not the same thing as saying subsequent fraying of the tendon would be due to the first injury. Dr. Hirose made it clear in his deposition that the tendon would not begin fraying on its own accord. Instead, there must be some activity or external force to fray the tendon once repaired by Dr. Nixon. Whatever force was involved in causing the tear, it occurred after Claimant stopped working for Employer.

77. While it could be argued that Claimant's activities of daily living, including working full time, could constitute the "activity" needed to re-tear Claimant's tendon which was made more susceptible to reinjury after the initial injury, unfortunately for Claimant medical testimony for that argument is lacking in the record and would require assumptions and speculation. Dr. Hirose was not asked if such could be the case. The Referee would need to take it upon himself to fill in gaps in Dr. Hirose's deposition testimony to reach that conclusion. As discussed below, as inviting as that proposition is, it is not within the boundaries of permissible conduct.

78. In his reply brief, Claimant argues his case is simple – he tore his peroneal tendon in a work accident in 2019, had surgery to repair the tear in 2020, remained symptomatic after the surgery, and an MRI taken two years later showed another tear in the peroneal tendon at the same location as the first tear. The Claimant needs surgery to fix this tear. Common sense,

coupled with Dr. Hirose's purported opinion that the anticipated surgery is related to and caused by the original injury, is all Claimant needs to prove entitlement to medical benefits for a second surgery.

79. Claimant's roadmap to benefits ignores key components, such as the fact his post-surgery symptoms have not always included the anatomical location of his first surgery, leading Dr. Nixon to question the nature of Claimant's ongoing complaints. While Claimant asserts that Dr. Hirose's testimony carries the day when analyzing whether Claimant's current need for surgery on his peroneus brevis tendon is a compensable consequence of his original ankle injury, Claimant's theory of recovery misconstrues much of Dr. Hirose's testimony, which is not nearly as clear cut as Claimant suggests. [8]

80. Even with Dr. Hirose's weak and/or ambiguous causation testimony, Claimant's argument is very inviting at first look. It appeals to common sense. Rhetorically, one might ask, "if not for the first accident, why would Claimant have a torn tendon without any perceptible acute accident?" The answer is not self-evident, but it is tempting to "naturally" attribute the need for the second surgery to the original injury in this case. Unfortunately, the allure of this type of argument leads to a "*Mazzone*" type trap.

81. In *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 302 P.3d 718 (2013), our Supreme Court cautioned fact finders for the Commission from leaving the record and venturing

---

[8] Claimant also argues that when Dr. Hirose was asked if any cross-examination questioning "changed [the doctor's] original causation opinions that you were asked" he responded "No. I haven't flipped-flopped on any of the opinions that I have said here or the facts that I believe to be true." Hirose Depo. pp. 60, 61. Unfortunately, Claimant's question did not specifically ask Dr. Hirose if he was still of the opinion that Claimant's current need for surgery was due in whole or in part to his initial industrial injury. Whether Dr. Hirose actually tied the two events together with a causative link is not shown in the clear manner asserted by Claimant.

out to engage in making their own medical diagnosis. Referees are not medical experts and cannot fill in a missing element in the medical record with self-generated medical opinions, even ones purported to be based on "common sense." After all, many times what appears to be a logical connection between two events turns out either not to be self-evident when pressed, or simply incorrect.

82. The undersigned recognizes that by emphasizing certain parts of the record while ignoring or minimizing other facts and testimony one could construct an argument allowing Claimant to recover benefits for his surgery and associated time loss. However, that argument is only possible by massaging and contorting the record to favor Claimant's theory of recovery by assigning different weight to equally weighty testimony from Dr. Hirose. While the longstanding mantra "the provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee" is still true, it is likewise the case that "[f]acts 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).

83. As noted above, the Commission must unwaveringly look to the entirety of the record, construing facts in a way most supported by the record and testimony, when deciding issues in controversy. In this case, when the record and Dr. Hirose's deposition testimony is carefully studied as a whole and not cherry picked to assist one party or the other, the weight of his testimony favors the findings that;

- Claimant's surgery with Dr. Nixon was successful and is in no way responsible for Claimant's current condition;
- Claimant's frayed peroneus brevis tendon is due to one or more injuries or activities which occurred post surgery;

- Dr. Hirose's unsupported opinions linking Claimant's condition with his 2019 industrial accident lack weight when compared to his more thorough testimony linking Claimant's condition with a post-surgical injury;
- Claimant's inability to accurately provide treating physicians with his medical history colors any opinion on causation from Dr. Hirose;
- Dr. Nixon, at the time he last saw Claimant, felt Claimant's complaints post surgery were likely due to an interarticular issue based on the nature of the complaints and the fact the injection into the ankle joint resulted in pain relief, albeit temporary;
- Claimant's presentation of continuing tendon complaints post-surgery was atypical, and while not unprecedented, nevertheless indicated a new injury and not an aggravation of the initial injury which was surgically corrected.

84. When the totality of the record is carefully considered, Claimant has failed to prove by a preponderance of the evidence that the condition for which he seeks medical benefits was caused by his industrial accident which occurred on or about October 28, 2019.

85. When the totality of the record is carefully considered, Claimant has failed to prove by a preponderance of the evidence that he is entitled to ongoing medical treatment, including surgery to his right ankle as a result of his industrial accident on or about October 28, 2019.

86. All remaining issues for resolution at hearing are moot.

CONCLUSIONS OF LAW

1. When the totality of the evidence is considered, Claimant has failed to prove by a preponderance of the evidence that the condition for which he seeks medical benefits was caused by his industrial accident which occurred on or about October 28, 2019.

2. When the totality of the evidence is considered, Claimant has failed to prove by a preponderance of the evidence that he is entitled to ongoing medical treatment, including surgery to his right ankle as a result of his industrial accident which occurred on or about October 28, 2019.

3. All remaining issues for resolution at hearing are moot.

RECOMMENDATION

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

DATED this 12th day of February, 2024.

INDUSTRIAL COMMISSION

/s/ Brian Harper

Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March 2024, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by email transmission and regular United States Mail upon each of the following:

TAYLOR MOSSMAN-FLETCHER
611 W. Hays
Boise, ID 83702
taylor@mossmanlaw.us

NATHAN GAMEL
PO Box 140098
Garden City, ID 83714
nathan@gamellaw.com

jsk

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHRISTOPHER MIKLOS, Claimant, v. L&W SUPPLY CORPORATION, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Surety, Defendants.	**IC 2019-033631** **ORDER** FILED MARCH 4, 2024 IDAHO INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Brian Harper submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation.

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, IT IS HEREBY ORDERED that:

1. When the totality of the evidence is considered, Claimant has failed to prove by a preponderance of the evidence that the condition for which he seeks medical benefits was caused by his industrial accident which occurred on or about October 28, 2019.

2. When the totality of the evidence is considered, Claimant has failed to prove by a preponderance of the evidence that he is entitled to ongoing medical treatment, including surgery to his right ankle as a result of his industrial accident which occurred on or about October 28, 2019.

3. All remaining issues for resolution at hearing are moot.

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

DATED this the 4th day of March, 2024.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Claire Sharp, Commissioner

Aaron White, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 2024, a true and correct copy of the foregoing **ORDER** was served by email transmission and regular United States Mail upon each of the following:

TAYLOR MOSSMAN-FLETCHER
611 W. Hays
Boise, ID 83702
taylor@mossmanlaw.us

NATHAN GAMEL
PO Box 140098
Garden City, ID 83714
nathan@gamellaw.com

jsk