BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSEPH STALFORD, Claimant, v. TRUGREEN LAWN CARE, Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Surety, Defendants.	**IC 2020-017464** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** **FILED JULY 12, 2024** **IDAHO INDUSTRIAL COMMISSION**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Sonnet Robinson. A hearing was conducted on August 8, 2023. Claimant, Joseph Stalford, was represented by Todd Joyner of Boise. Chad Walker of Boise represented Defendants. The parties presented oral and documentary evidence and took post-hearing depositions. The matter came under advisement on February 14, 2024, and is ready for decision.

ISSUES[1]

1. Whether Claimant's current physical issues are the result of an alleged industrial accident on June 1, 2020;

[1] Defendants withdrew the issue of "Whether Claimant's claim is barred by Idaho Code § 72-701, § 72-702, and/or § 72-706" in briefing. *See* Def's Brief, p. 14.

2. Whether Claimant is entitled to:

    a. Medical care;

    b. Temporary partial or temporary total disability benefits (TPD/TTD);

    c. Permanent partial impairment (PPI);

    d. Permanent partial disability (PPD);

    e. Attorney's fees.

CONTENTIONS OF THE PARTIES

Claimant contends he suffered a new and different low back injury during a fall at work on June 1, 2020 from his prior 2017 low back injury. Claimant timely reported his accident and timely filed his complaint. Claimant is entitled to payment for both his ESI shots and Surety ordered bone scan, in addition to temporary total disability benefits when off work and permanent partial impairment per Dr. Williams' rating. Mr. Porter's vocational opinion is entitled to more weight than Mr. Barton's. Claimant is also entitled to attorney's fees for Defendants' failure to pay for the bone scan requested by their expert, Dr. Montalbano, and for Defendants' failure to pay temporary disability benefits after Dr. Montalbano restricted Claimant to light duty work.

Defendants argue Claimant is not credible and his medical records contradict much of his testimony. Defendants concede notice to Employer but argue the very nature of the report of injury calls into question whether Claimant suffered a "new" injury at all. Claimant sought care (ESI shots) outside the chain of referral and is therefore not entitled to that care. Defendants also concede some TTDs are owed but dispute Claimant's calculations. Claimant is not entitled to impairment or disability. Regarding attorney's fees, the unpaid bone scan was the result of provider error and not Surety's neglect; therefore, attorney's fees are not warranted.

Claimant did not file a reply brief.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. Joint exhibits (JE) 1-19;

3. The post-hearing depositions of Delyn Porter, MA, and Mark Williams, DO, taken by Claimant;

4. The post-hearing deposition of Paul Montalbano, MD, taken by Defendants.

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

FINDINGS OF FACT

1. Claimant was born April 18, 1980, and was 43 years old at the time of hearing. Claimant was medically discharged from the Navy in 1999 due to an arthritic left hip; when Claimant began working for TruGreen ("Employer"), his Employer did not assign him to larger properties so he would not get "burned out" due to his left hip. HT 14:2-15:22.

2. **Pre-Injury Medical Records.** Claimant presented to Kasey Griffith, DC, on May 22, 2020, and reported "acute complaint in the front of pelvis, back of lower left back, back of left hip and back of left buttock since 12/21/2017" which occurred after a fall on that date and occasionally radiated down his right leg. JE 6:49. Claimant reported the pain was 9/10, that he did have "past episodes" of this pain, and had received chiropractic care, OTC medications, and physical therapy previously. *Id.* Claimant reported that "employment has become difficult while bending over, reaching overhead, standing, walking and lifting objects." *Id.*

3. Claimant explained at hearing that he had a 2017 fall on the ice, which was not a work injury, and that he had pain "a little bit in the lower back, but it was mostly in the front pelvis

area, left-hand side," but not his left hip. HT 14:13-15:10. In May of 2020, he had low back pain and groin pain. *Id.* at 17:6-13. Claimant later testified his low back pain and lower left extremity pain did not begin until after the industrial accident. *Id.* at 27:6-28:12.

4. **Subject Injury** – On June 1, 2020, a Monday, Claimant texted his boss: "back therapy apt @ 12 on Friday" and later: "Just took a slide down a muddy hill. Was side hiking but still slid. Back aches more but I'm good." JE 17:287.

5. On June 5, 2020, a Friday, Claimant returned to Dr. Griffith. JE 6:54. Claimant's pain was 6/10. *Id.* There is no mention of a June 1 fall. Claimant testified at hearing that he did mention the fall to his physician, but also told him it was not work related at that time "because I was just going to try to do therapy." HT 20:5-22.

6. On June 19, 2020, Dr. Griffith wrote he was treating Claimant for acute low back pain and requested he be put on light duty for two weeks. JE 6:60. At hearing, Claimant did not know why Dr. Griffith did not put down his June 1 fall in the letter. HT 22:25-23:4.

7. On July 7, 2020, Claimant presented to Michael Gustavel, MD and reported low back pain which began in January 2018 "when he slipped on ice and landed on his back." JE 7:82. He described constant pain which increased with excessive use and that he had tried conservative treatment and was currently going to a chiropractor. *Id.* Claimant also reported left hip pain which began 20 years ago. *Id.* Dr. Gustavel assessed low back pain, left buttock pain, and recommended an MRI of the lumbar spine. *Id.* at 83. There is no mention of a June 1 fall.

8. On July 13, 2020, the lumbar MRI showed: "left paracentral disc extrusion at the L5-S1 level with effacement of the left subarticular recess and compression of the transversing left S1 nerve root. In addition, there is moderate to severe left neural foraminal stenosis at the L5-S1

level. No significant central spinal canal stenosis at any level." *Id.* at 84. The radiologist had a June 5, 2017, lumbar x-ray for comparison. *Id.*

9. A first report of injury (FROI) was filed on July 17, 2020, listing the injury as repetitive lifting and walking, which occurred on July 17 and was reported on July 17. Claimant's wage was $18.50, and his schedule was "other." JE 1:1. Claimant testified this was the day he told his boss that he needed to see a specialist and pursue treating his injury through workers compensation. HT 29:19-30:3.

10. Claimant's claim was denied on August 7, 2020, for no causal relationship and no injury: "EE had an existing herniated disc[2] in his back which is now requiring surgery," although the claim was still listed as "under investigation." JE 5:16-17.

11. On August 11, 2020, Claimant saw Paul Montalbano, MD, on referral from Surety. JE 8:85. Claimant reported his symptoms began in 2017 after a fall on the ice which was not work-related; Claimant reported he did physical therapy, was assigned restrictions, and "over time his restrictions were not followed (per the patient) and the pain continued to worsen." *Id.* Claimant reported an incident at the end of 2019 where both his legs went numb. *Id.* Claimant had pain in his lower back and left lower extremity. *Id.* Dr. Montalbano wrote:

> he does report a work injury at the end of 2019 in terms of lower extremity numbness. If the medical records demonstrate that he sought treatment in 2017 or 6 months prior to the 2019 left leg pain it would be my opinion that his lumbar radiculopathy is unrelated to his [2019] work related injury.

JE 8:86. Dr. Montalbano recommended x-rays and a bone scan and related the need for these additional studies to his 2019 work accident and issued work restrictions. However, if those studies were negative, it was his opinion he should return to gainful employment. *Id.* There is no mention

[2] This denial appears to rely on Claimant's July 13 MRI before his July 17 date of injury.

of a June 1 fall.

12. Claimant disputed that he said anything about a 2019 injury to Dr. Montalbano at deposition and at hearing. Claimant Depo. 18:20-19:13. HT 31:10-32:6. Claimant testified he did tell Dr. Montalbano about both the 2017 injury and the 2020 injury at this appointment. HT 31:10-14.

13. After this appointment, Claimant was off work per Dr. Montalbano's restrictions, which Employer was unable to accommodate. HT 32:23-33:4.

14. On September 30, 2020, Claimant reported a work-related injury to Dr. Montalbano as occurring on June 2, 2020[3] "rolling down a hill" while spreading fertilizer. JE 8:90. Claimant reported his left lower extremity symptoms had resolved. *Id.* Claimant had refused to undergo a bone scan and Dr. Montalbano noted he would call on October 2, 2020 to see if Claimant still refused; Dr. Montalbano continued work restrictions. *Id.* On October 2, Dr. Montalbano recorded Claimant had consented to the bone scan during a phone call. *Id.* at 92.

15. On November 18, 2020, Dr. Montalbano reviewed the bone scan, opined it was normal, and found Claimant at MMI and released him to work without restrictions. *Id.* at 102. Dr. Montalbano wrote "he understands if he has recurrent left leg pain he will contact me." Dr. Montalbano also wrote that Claimant's low back pain was not supported by his objective radiographic studies. *Id.*

16. Claimant testified at hearing that Dr. Montalbano told him he couldn't do anything for him and did not know what was causing his pain. Further, at the time of this appointment, his

[3] There are numerous records which refer to June 2 as the date Claimant had his accident, but per the text message sent by Claimant, the fall occurred June 1.

pain had not changed. However, Claimant did note the left leg pain went away eventually and at the time of hearing, he no longer experienced left leg pain. HT 36:4-37:9.

17. Claimant went back to work for Employer that spring until July of 2022 in a light duty capacity as a trainer. Claimant Depo. 24:14-25:1. HT 38:3-10. Claimant did not return to work in November when released by Dr. Montalbano as Employer was already shut down for the winter. *Id.*

18. On February 11, 2021, Surety wrote Dr. Montalbano a letter recounting that Claimant had a non-industrial injury in 2017, the Employer had worked with him to accommodate his restrictions, but in 2019 they had started scheduling him for longer routes; at the end of June 2020, Claimant reported to his Employer that he was in a lot of pain and treating with chiropractic care and Dr. Gustavel. JE 8:104. The Surety then posed a series of questions regarding Claimant's treatment. *Id.* On February 12, 2021, Dr. Montalbano responded. He wrote that Claimant carried diagnoses of (1) lumbar strain and (2) left SI radiculopathy, both of which had resolved and reached MMI in November, with no need for further treatment. JE 8:105. The "work related injury of July 17, 2020" did not aggravate his 2017 nonindustrial injury and his complaints of low back pain were not supported by his imaging. *Id.*

19. At hearing, Claimant disputed this history and testified that he was "back to normal" in 2019 and that he had no problems from the 2017 injury. HT 41:6-22.

20. On September 21, 2021, Claimant saw his primary care physician Mark Johnson, DO. JE 9:108. Claimant reported chronic low back pain for which he had received physical therapy and an MRI. *Id.* On September 22, 2021, Dr. Johnson referred Claimant to Mark Harris, MD, for consideration of ESI shots. JE 9:107.

21. Claimant explained that the 10-month gap in seeking treatment from November 2020 until September 2021 was due to a family emergency. Claimant Depo. 23:12-24:6; HT 42:17-25.

22. Claimant saw Dr. Harris on October 20, 2021. JE 10:112. On his intake forms, Claimant reported that his pain began on June 2, 2020, after he slid down a hill. *Id.* Claimant indicated his pain was worked related but "not work comp." *Id.* at 114. Claimant reported that he had a "very long legal battle" related to his work comp injury and that physical therapy and chiropractic care gave him "more pain." *Id.* at 118. Dr. Harris recommended a repeat MRI and ESI shots. *Id.* at 121.

23. On November 26, 2021, Claimant's underwent a repeat lumbar MRI which was compared to his July 2020 MRI. JE 10:133. The MRI showed his left disc extrusion had resolved but he still had moderate to severe left neural foraminal stenosis at L5-S1. *Id.* On November 30, 2021, Dr. Harris reviewed the updated imaging and referred Claimant to Derek Martinez, MD, for consideration of surgery and recommended left sided ESI shots. *Id.* at 133, 135. Claimant reported he was "doing well with hunting and did lots of hikes. He did have to avoid some of the side hills and bigger inclines." *Id.* at 134.

24. On December 15, 2021, Claimant underwent the left sided ESI and on January 13, 2022, reported less pain in his low back and left leg. JE 10:146.

25. On February 10, 2022, Claimant saw Dr. Martinez. JE 11:169. Dr. Martinez reviewed his recent MRI and did not recommend surgery. JE 11:171; JE 10:150.

26. On March 10, 2022, Claimant returned to Dr. Harris and reported he was doing well with work accommodations not to lift over 10 pounds and was "doing well at home and is active." JE 10:150. However, the same note records he has the same pain, but that he had done well with

the ESI shot and requested a second. *Id.* at 152. On April 13, 2022, Claimant underwent a second ESI shot and reported on April 28, 2022, that he had less pain. *Id.* at 163. He also reported that he had been remodeling his home with his brother-in-law doing some of the light work; he had stopped working for Employer and had more pain with increased activity. *Id.*

27. On October 14, 2022, Claimant was examined by Mark Williams, DO, for an independent medical exam (IME) at his request; Dr. Williams reviewed records and interviewed and examined Claimant. JE 12:181. Dr. Williams did not have any pre-injury records other than the May 22, 2020 appointment, but did have post-injury records from Dr. Griffith, Dr. Gustavel, Dr. Montalbano, Dr. Harris, Dr. Martinez, and Claimant's 2020 and 2021 MRI reports. *Id.* Claimant reported to Dr. Williams that he fell on June 2 and that he had chronic low back problems related to a 2017 injury "but at the time of the work injury he was doing well and had no restrictions." *Id.* At the time of the exam, Claimant felt the ESI shot had worn off and he reported daily, constant low back pain. *Id.*

28. Dr. Williams assessed work-related L5-S1 disc herniation and chronic low back, degenerative changes. JE 12:185. Dr. Williams believed Claimant was at MMI but needed additional physical therapy and an ESI to "possibly" return to his pre-injury baseline and may need future ESIs. *Id.* Dr. Williams noted the work injury had aggravated Claimant's pre-existing degenerative low back condition and rated him at 12% whole person impairment, with 6% apportioned to his pre-existing condition and 6% to his work injury. *Id.* Dr. Williams issued work restrictions of: "No lifting greater than 35 lbs, no push or pull greater than 75 lbs, and no carrying greater than 35 lbs. Occasional crouching, climbing, balancing, kneeling, stooping. Occasional light machinery work, no heavy machinery work. Frequent change in positions, no standing greater than 45 mins at a time. May do unlimited walking if tolerated." *Id.* at 186.

29. Dr. Williams was deposed on September 8, 2023. Dr. Williams has been a physician for 30 years and practices sports medicine. Williams Depo. 4:5-8. Dr. Williams has conducted IMEs for workers compensation claimants and defendants. *Id.* at 7:2-15. Dr. Williams explained that although Claimant's MRI findings had improved from 2020 to 2021, he still had moderate to severe left neural foraminal stenosis at L5-S1, which could cause periodic pain issues. *Id.* at 14:7-23. Dr. Williams agreed that epidural injections to relieve stenosis in the lumbar spine was reasonable treatment and that it would "relieve some of the pressure off the nerve." *Id.* at 15:2-22. Dr. Williams reiterated that Claimant's MRI did show chronic degenerative changes, which was why he apportioned Claimant's impairment rating. *Id.* at 19:17-22; 24:8-20.

30. On cross-examination, Dr. Williams testified that the fact that Claimant's left leg pain had resolved would not change his impairment rating because his rating was based on his presentation at the time he saw him. Williams Depo. 34:11-23. He did think that Claimant's left hip would have qualified for an apportioned impairment rating. *Id.* at 33:17-23. Dr. Williams explained that stenosis is just "narrowing" in the spine, which could have a variety of causes, in this case: "the more common issues with someone who has an injury and then stenosis is it's somewhat related, not all related." *Id.* at 36:2-13. The degenerative changes in his back were essentially arthritis: "those discs were narrowed some based on just living life and working hard for a living," although degenerative changes were very common in even asymptomatic individuals *Id.* at 36:17-37:3.

31. Dr. Montalbano was deposed on November 9, 2023. Dr. Montalbano is a neurosurgeon and has been in practice since 2000. Montalbano Depo. 5:14-25. Dr. Montalbano explained that the negative bone scan, lack of instability on x-rays, and the fact that Claimant's left leg pain resolved is why he did not recommend surgery. *Id.* at 10:40-13:21. Dr. Montalbano

explained that the fact that his left leg symptoms improved meant that "more likely than not his disc herniation reabsorbed." *Id.* at 18:24-19:12. Dr. Montalbano did not recall reviewing any of Claimant's medical records other than the 2020 MRI. *Id.* at 26:15-25. The lack of aggravation of a pre-existing injury that Dr. Montalbano referred to in his February 2021 letter was the 2017 injury that the Claimant relayed to him by personal history. *Id.* at 27:1-28:1. Dr. Montalbano explained that the disc herniation was what was responsible for the leg pain, not the back pain, and the natural history of a disc herniation getting better would be the resolution of his leg pain. The bone scan and x-rays were what Dr. Montalbano used to evaluate Claimant's back pain, which were negative. *Id.* at 32:12-33:24.

32. **Vocational Records.** Claimant made $36,891 in 2017 working for BlueCross and Employer and $30,522.09 in 2018 working for Employer. JE 15:246, 247. Claimant's 2019 W-2 was not provided. Claimant made $6,069.31 in 2020. *Id.* at 258. Claimant did not work for Employer from November through the end of February due to the seasonal nature of his work. HT 16:7-13. He testified he made between $18-$19 an hour. *Id.* at 50:2.

33. On July 25, 2023, Delyn Porter issued a vocational report on behalf of Claimant. JE 13:187. Mr. Porter reviewed medical and vocational records and interviewed Claimant. *Id.* The Claimant graduated high school and has certificates in Child Development as well as General Human Psychology and completed business courses and manager training while employed by Radio Shack. *Id.* at 193. Claimant was in the Navy for approximately seven months. *Id.* at 195. Mr. Porter opined that Claimant's time of injury occupation was in the Heavy strength category, requiring lifting up to 100 pounds. Claimant had moved to Clinton, Iowa in August of 2022 and Mr. Porter used that labor market to calculate Claimant's disability. *Id.* at 208-209.

34. Per Dr. Montalbano's opinion, Claimant had no restrictions related to the accident

and therefore Claimant lost no labor market or wage-earning capacity, which resulted in no disability referable to the accident. *Id.* at 210. Dr. Williams' restrictions put Claimant in a limited light-medium strength capacity, which resulted in 65.9% labor market loss. Mr. Porter wrote that the average wage for a Boise area lawncare worker is $17.90 an hour. *Id.* at 213. However, per Claimant's report of working 55-60 hours weekly, and Claimant's reported wage from his complaint, $1,038.95 a week, Mr. Porter calculated his average hourly wage at $25.97. *Id.* at 213. Mr. Porter then compared his time of injury wage with the average Iowa wages in Claimant's remaining labor market to come up with wage loss of 31.4% per Dr. Williams' restrictions. Mr. Porter then averaged the labor market loss and wage loss, which resulted in permanent partial disability of 48.7% inclusive of impairment. *Id.* at 215.

35. On September 12, 2023, Lee Barton issued a vocational report on behalf of Defendants. JE 19:289. Mr. Barton reviewed medical and vocational records and interviewed Claimant. *Id.* Mr. Barton utilized an hourly wage of $17.74 utilizing Claimant's highest W-2 wages due to his testimony that he was laid off from November to February each year; he noted that this was significantly less than Mr. Porter's calculation as Mr. Porter did not account for the seasonality of Claimant's work. *Id.* at 293. Mr. Barton opined that Claimant had a good set of transferable skills including good recall, problem solving, excellent computer skills, people skills, and a personable and articulate personality. *Id.* at 295. Mr. Barton assumed that Claimant had medium duty capacity based on his report of prior injuries. Per Dr. Williams' restrictions, Claimant lost 31% of his Clinton, Iowa labor market and 3% of his wage-earning capacity; he therefore suffered disability of 17% inclusive of impairment. *Id.* at 296. However, Mr. Barton then halved this number to 8.5% due to Dr. Williams apportioning Claimant's impairment rating. *Id.* Utilizing Dr. Montalbano's restrictions resulted in no disability referable to the accident. *Id.*

36. Delyn Porter was deposed on October 30, 2023. Mr. Porter did not take Claimant's left hip condition into account in conducting his analysis because it was his understanding it did not affect Claimant's ability to work. Porter Depo. 15:14-16:7. Regarding the 2017 back injury, Mr. Porter testified that Claimant indicated he had no restrictions related to that injury, nor did the medical records he reviewed reflect restrictions. *Id.* at 16:8-19. Claimant relayed to Mr. Porter that he had no restrictions related to any injury prior to the 2020 injury. *Id.* at 30:5-10. Mr. Porter had not reviewed the hearing transcript or Claimant's deposition. *Id.* at 44:1-14. Mr. Porter confirmed that his wage loss calculations did not account for the seasonal nature of Claimant's work for Employer. *Id.* at 45:3-11.

37. **Condition at Hearing.** Claimant is currently a stay-at-home dad in Clinton, Iowa. HT 13:1-3. He still suffered low back pain, but no left lower extremity pain.

38. **Credibility.** The Commission's findings on credibility are bifurcated into two categories, "observational credibility" and "substantive credibility." As stated in *Painter v. Potlatch Corp.*, 138 Idaho 309, 63 P.3d 435 (2003):

> 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.

Claimant testified credibly. However, there are numerous substantive credibility issues.

39. The medical records of Dr. Griffith, Dr. Gustavel, and Dr. Montalbano do not reflect a June 1 injury as the source or cause of Claimant's complaints and it does not appear in any medical records until September 30, four months after the alleged injury. Claimant's explanation for the lack of documentation in all three physicians' records is that he did tell them about the fall and does not know why they did not record it. Arguably more problematic is that

each physician did consistently record a different cause for his complaints: a slip and fall on the ice in the winter of 2017. This post-injury explanation matches the pre-injury explanation in May of 2020 to Dr. Griffith, namely that Claimant was experiencing a resurgence of back pain (while working) which was related to that 2017 fall, just prior to the June 1, 2020 fall.

40. There is contemporaneous evidence that the June 1, 2020 fall occurred; the text message reporting it to Claimant's boss is excellent evidence. However, earlier that very same day Claimant relayed that he was already going to the chiropractor that Friday for "back therapy" and confirmed that he already symptomatic prior to the fall: "back aches more, but I'm good." JE 17:287.

41. Claimant's boss was obviously aware of the fall per this text conversation. Nevertheless, his boss reported the injury as reported and occurring on July 17 due to repetitive walking and lifting. This report more closely accords with the other contemporaneous medical records; namely the May 22, 2020 record where Claimant reported a resurgence in back pain while reaching, lifting, standing, and walking at work. This is the fourth contemporaneous record where there is no mention of a June 1, 2020 fall as the cause of Claimant's back symptoms.

42. There are other minor inconsistencies. Claimant told Dr. Montalbano that he had pre-existing restrictions from his 2017 injury, but denied pre-existing restrictions to Mr. Porter. Claimant testified at hearing that his Employer accommodated his left hip by not putting him on bigger properties, but did not relay that accommodation to Mr. Porter. At hearing, Claimant testified at one point consistent with the records that he did have low back pain in May 2020 but then later testified that his low back pain did not begin until after the 2020 injury.

43. In sum, where Claimant's testimony contradicts the medical record, the medical record will be relied upon.

DISCUSSION

44. 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).

45. **Causation.** 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, 849 P.2d 934 (1993). Claimant must adduce medical proof in support of his claim, and he must prove his claim to a reasonable degree of medical probability. *Dean v. Dravo Corporation*, 95 Idaho 558, 511 P.2d 1334 (1973). The permanent aggravation of a pre-existing condition is compensable. *Bowman v. Twin Falls Construction Company, Inc.*, 99 Idaho 312, 581 P.2d 770 (1978). The Industrial Commission, as the fact finder, is free to determine the weight to be given to the testimony of a medical expert. *Rivas v. K.C. Loggin*g, 134 Idaho 603, 608, 7 P.3d 212, 217 (2000). "When deciding the weight to be given an expert opinion, the Commission can certainly consider whether the expert's reasoning and methodology has been sufficiently disclosed and whether or not the opinion takes into consideration all relevant facts." *Eacret v. Clearwater Forest Industries*, 136 Idaho 733, 737, 40 P.3d 91, 95 (2002).

46. Claimant argues that he suffered an aggravation of his pre-existing degenerative back condition. Claimant relies on Dr. Williams' opinion to support his causation argument. Unfortunately, Dr. Williams did not take into account all the relevant facts when relating Claimant's current low back complaints to his June 1, 2020 injury.

47. Dr. Williams relied on Claimant's history of the injury in reaching his conclusions, but did not review Claimant's deposition or the hearing record and relied on his original examination. Williams Depo. 28. Dr. Williams knew about the 2017 injury but recorded that at the time of the June 1, 2020 injury, Claimant did not have any symptoms. Dr. Williams recorded the May 22, 2020 appointment in his record review, including Claimant's report of feeling lower left-sided pain in his back, hip, and leg since 2017, with cervical and thoracic pain as well. JE 12:182. However, Dr. Williams relied on Claimant's self-reporting for his assessment; "we have to assume that he was being honest, that he didn't have any symptoms before his injury." Williams Depo. 19. Dr. Williams related the herniation to the June 1, 2020, work injury because "that's when his symptoms started… he didn't have any symptoms before his injury, and then he had a herniated disc, that's how I directed that as a work-related herniated disc." Williams Depo. 19:9-16. This is plainly contradicted by the records, including the May 22 appointment and further, that Claimant already had a follow-up appointment scheduled at the time of his injury to continue to treat his back pain. Dr. Williams' reliance on Claimant's reported history vs. his contemporaneous medical records, without any accompanying explanation discounting those records, renders his opinion less credible on causation.

48. Dr. Williams' impairment rating also relies on Claimant's left leg radiculopathy symptoms existing in 2022. However, in 2020 Claimant denied experiencing any left leg pain to Dr. Montalbano; Claimant confirmed his leg pain had resolved in his 2023 hearing testimony. It appears Dr. Williams was unaware of this prior to his deposition. Williams Depo. 28:8-11. At his deposition, Dr. Williams was asked whether Claimant's reports that his left leg pain had resolved changed his opinion. Dr. Williams explained that his rating was based on Claimant's presentation at the time of his exam. As an additional oddity with Dr. Williams' impairment rating, at the time

of Claimant's 2022 examination, Claimant's herniation had resolved per MRI imaging diagnostics. JE 12:184; JE 10:133. At his deposition, Dr. Williams stated that the disc seemed to be healing, and Claimant could experience relief for many years with epidural injections and back exercises if "we could keep" the pressure off the nerve. Williams Depo. 20:19-21:1. He attributed Claimant's ongoing pain to a stenosed foramen where the nerve exited the canal, rather than the disc. Williams Depo. 14:10-16. Nevertheless, Dr. Williams still rated a single level disc injury in his impairment rating. Dr. Williams was not asked and did not explain why Claimant was rated for a single level disc injury, i.e., the herniation, when it had already resolved by the time Claimant saw Dr. Williams in 2022. If Dr. Williams was basing the disc injury on Claimant's condition at the time of the first MRI, it is unclear why he rated Claimant's radiculopathy as of the date of the examination.

49. Dr. Williams acknowledged that Claimant had pre-existing degenerative changes in his back and apportioned his rating because Claimant had back pain and treated it prior to the injury. However, per Dr. Williams' testimony, Claimant's stenosis was the degenerative condition he was rating as Claimant's pre-existing condition but also that the stenosis was caused by the injury and causing his current pain. *See* Williams Depo. 35:20-37:3. Dr. Williams straddles this line by explaining the stenosis "is [] somewhat related [to the injury,] not all related." *Id.* at 36:8-13. To explain how a preexisting condition caused the stenosis, Dr. Williams stated Claimant had been treated for back pain before, his discs were narrowed based on just living and working, and fifty percent of even asymptomatic people have degenerative change in their spine. *Id.* at 36:19-37:3. When explaining how an injury caused the stenosis however, Dr. Williams only gave a generic statement that "when someone has an injury, [the stenosis is] more likely related to the injury." *Id.* at 36:6-7. As to Claimant's condition specifically, Dr. Williams did not explain how the stenosis was caused by the injury, just that it was not caused by surgery or a bone spur.

50. In sum, Dr. Williams' explanations are not persuasive, and not supported by the other evidence of record. Dr. Williams' opinion does not prove Claimant's degenerative changes were caused or permanently aggravated by the injury. Claimant has not proven his current condition is related to the June 1, 2020 accident on a more probable than not basis.

51. **Medical Care.** Idaho Code § 72-432 provides that the employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital services, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter.

52. Claimant requests reimbursement for past ESI shots and ongoing future medical care in the form of ESI shots. Claimant has not proven his current condition is related to the industrial accident and is not entitled to reimbursement or further medical treatment.

53. Regarding the bone scan requested by Dr. Montalbano, Defendants have acknowledged liability for the cost, which is consistent with the rule that "reasonable diagnostic testing to determine whether the cause of an injury or condition is compensable is itself compensable." *Kimball v. Gooding County Memorial*, IIC 2001-018415 (March 8, 2004). Defendants do not know the bill's current status, whether it is paid or not, but have requested that any unpaid amounts be paid directly to the provider rather than to Claimant. Claimant requests the fully invoiced amount of the bone scan so he can pay St. Alphonsus as they have mistakenly billed him instead of Surety. Claimant's request will not be granted. This is not a situation where Defendants denied care and are therefore denied the ability to review medical costs for reasonableness. *See Neel v. Western Const., Inc.*, 206 P.3d 852, 147 Idaho 146 (Idaho 2009). Per Claimant's testimony, the hospital had Surety's approval for the bill on record. Claimant also

testified that after the initial bill was sent to him, St. Alphonsus explained to him that they were not going to hold him responsible for the bill because they knew it was Surety's responsibility. Therefore, Defendants must pay for the bone scan but may pay the provider directly.

54. **TTDs.** Once a claimant establishes by medical evidence that he is within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits under Idaho Code § 72-408.

55. Claimant was given work restrictions by Dr. Montalbano on August 11, 2020 for a 2019 injury. Claimant reported the June 1, 2020 injury at his next appointment and Claimant's work restrictions were continued until November 18, 2020 at which point Dr. Montalbano declared him at maximum medical improvement. Claimant seeks 14 weeks of TTDs based on Employer's inability to accommodate those restrictions and that Claimant was never paid TTDs during this time frame. Defendants concede TTD benefits are owed but dispute the amount claimed by Claimant.

56. Claimant did not prove his current condition was related to the industrial accident. However, Claimant was issued work restrictions by a Surety paid physician pending additional work up. Defendants concede 14 weeks of TTDs are owed.

57. Claimant's employment is seasonal and calculation of his average weekly wage is controlled by Idaho Code § 72-419(6) which provides: "In seasonal occupations that do not customarily operate throughout the entire year, the average weekly wage shall be taken to be one-fiftieth (1/50) of the total wages which the employee has earned from all occupations during the twelve (12) calendar months immediately preceding the time of the accident or manifestation of the disease." Claimant's 2019 W-2 was not provided, and therefore this methodology cannot be used.

58. Idaho Code § 72-419(10) provides: "When circumstances are such that the actual rate of pay cannot be readily ascertained, the wage shall be deemed to be the contractual, customary or usual wage in the particular employment, industry or community for the same or similar service."

59. Claimant's testimony and the first report of injury (FROI) indicate that Claimant earned $18.50 an hour. This will be utilized as his usual[4] wage for his particular employment. Therefore, Claimant is owed $6,941.20 in TTDs ($18.50 x 40 = 740; 740 x .67 = 495.80; 495.80 x 14 = 6,941.20).

60. **PPI.** Permanent impairment is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and a claimant's position is considered medically stable. *See* Idaho Code § 72-422; *Henderson v. McCain Foods*, 142 Idaho 559, 567, 130 P.3d 1097, 1105 (2006). Claimant has not proven his condition is related to the industrial accident and is not entitled to permanent partial impairment.

61. **PPD**. Permanent disability results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. Evaluation (rating) of permanent disability is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the

[4] Claimant's reported weekly wage of $1,038 is not utilized. Claimant's reported weekly wage in that amount translates to 55 hours a week at $18.50. As Claimant is seasonal, Claimant's three months off work would be averaged at 1/50th per the statute. In other words, it would result in a similar amount: 1,038 x 36 = 37,386/50 = 747.36 x .67 = 500.73 x 14 = 7,010.23.

employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). Claimant has not proven his condition is related to the industrial accident and is not entitled to permanent partial disability.

62. **Attorney's Fees.** Attorney's fees are not granted as a matter of right under the Idaho Workers Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804 which provides:

> 72-804. ATTORNEY'S FEES — PUNITIVE COSTS IN CERTAIN CASES. If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding attorney's fees is a factual determination which rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133(1976). It is axiomatic that a surety has a duty to investigate a claim in order to make a well-

founded decision regarding accepting or denying the same. *Akers v. Circle A Construction, Inc.*, IIC 1998-007887 (Issued May 26, 1999). Defendants' grounds for denying a claim must be reasonable both at the time of the denial and in hindsight. *Bostock v. GBR Restaurants*, IIC 2018-008125 (Issued November 9, 2020).

63. Claimant argues for attorney fees for Defendants not paying TTDs and not paying for the bone scan requested by Dr. Montalbano, but which was billed to Claimant.

64. As explained above, Defendants concede Claimant was owed TTDs. Defendants do not argue against attorney's fees for their neglect or refusal to pay TTDs. The Surety denied the claim on August 7, 2020 based on the July 17, 2020 first report of injury (FROI) which merely recorded the injury as "repetitive walking and lifting," i.e., no accident/injury. Dr. Montalbano took Claimant off work on August 11, 2020 pending x-rays and a bone scan. At the time, Dr. Montalbano related Claimant's condition to a 2019 injury. There is no FROI or complaint with the 2019 date of accident. Surety presumably only referred Claimant to Dr. Montalbano for the "further investigation" noted in its original denial, essentially to cover their bases. Defendants complied with IDAPA 17.01.01.305.11.a, which required them to accept or deny the claim within 30 days, and they did get Claimant to a competent medical professional promptly. Defendants did not act unreasonably in declining to pay TTDs when the original FROI was based on a July 17, 2020 date with no accident, and Dr. Montalbano's medical restrictions reported on August 11, 2020 cited an unreported 2019 injury. Claimant did not report anything that would contradict the original denial until September 30, 2020.

65. On September 30, 2020, the Surety was made aware that Claimant's work restrictions from Dr. Montalbano were now associated with a June 1, 2020 fall. JE 8:90. Similar to their prior denial, there was no first report of injury with this date filed by Employer. At this

time, Defendants had no indication or evidence that the June 1, 2020 fall was any more compensable than the 2019 accident reported to Dr. Montalbano or the July 17, 2020 manifestation of symptoms reported by the FROI. Defendants did not act unreasonably in declining to pay TTDs at that time, despite later conceding they are owed.

66. Claimant also requests attorney fees for Defendants not paying for a bone scan that Dr. Montalbano ordered. Defendants argue this is the result of a provider error, not Surety acting unreasonably. Claimant testified at hearing that after the imaging company sent him the bill and he contacted them, he was told "approval for the scan was on file from Gallagher Bassett." HT 60:13-14. This supports the finding that this was a provider error. There is no evidence that supports that the Surety acted unreasonably; only evidence that Claimant was mistakenly billed. Attorney's fees will not be awarded for the bone scan.

CONCLUSION OF LAW

1. Claimant has not proven his current condition is related to an accident occurring on June 1, 2020;

2. Claimant is entitled to $6,941.20 in total temporary disability;

3. Defendants must pay the bills related to the bone scan, but may pay the medical provider directly;

4. Claimant is not entitled to additional medical care, permanent partial impairment, or permanent partial disability;

5. Attorney's fees are not awarded;

6. All other issues are moot.

RECOMMENDATION

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

DATED this 21st day of June, 2024.

INDUSTRIAL COMMISSION

Sonnet Robinson

Sonnet Robinson, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of July, 2024, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail and *E-mail transmission* upon each of the following:

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Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSEPH STALFORD, Claimant, v. TRUGREEN LAWN CARE, Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Surety, Defendants.	**IC 2020-017464** **ORDER** **FILED JULY 12, 2024** **IDAHO 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 not proven his current condition is related to an accident occurring on June 1, 2020.

2. Claimant is entitled to $6,941.20 in total temporary disability.

3. Defendants must pay the bills related to the bone scan, but may pay the medical provider directly.

4. Claimant is not entitled to additional medical care, permanent partial impairment, or permanent partial disability.

5. Attorney's fees are not awarded.

6. All other issues are moot.

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

DATED this _12th___ day of __July___, 2024.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Claire Sharp, Commissioner

Aaron White, Commissioner

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

ATTEST:
Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of July 2024, 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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