BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JAMES P. WELLS, Claimant, v. DFA DAIRY BRANDS DISTRIBUTING WEST, LLC, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Surety, Defendants.	**IC 2023-000747** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED MAY 5, 2025** **IDAHO INDUSTRIAL COMMISSION**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John Hummel, who conducted a hearing in Boise, Idaho on October 17, 2024. Claimant, James P. Wells, was present in person; Taylor Mossman-Fletcher, of Boise, represented him. Eduardo Barreda, of Boise, was present and represented Defendants, Employer DFA Dairy Brands Distributing West, LLC, and Surety Indemnity Insurance Company of North America. The parties conducted post-hearing depositions and later submitted briefs.[1] The matter came under advisement on March 13, 2025.

ISSUES

1. Whether Claimant sustained an injury from an accident arising out of, and in the course of, employment.
2. Whether the condition for which Claimant seeks benefits was caused by the industrial

[1] H. Chad Walker substituted as the attorney for Defendants on the brief.

accident.

3. Whether and to what extent Claimant is entitled to the following benefits:
    a. Medical care;
    b. Temporary partial and/or temporary total disability benefits;
    c. Permanent partial impairment; and
    d. Permanent partial disability.
4. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.[2]

CONTENTIONS OF THE PARTIES

On January 6, 2023, while working for Employer, Claimant sustained an injury to his lower back while lifting a stack of loaded milk crates out of a truck and slipped on the liftgate and fell. Surety denied compensability of the claim based upon an independent medical examination by Dr. R. David Bauer, M.D. Claimant obtained medical care on his own, including surgery, and now claims reimbursement for the full invoiced medical expenses under the *Neal* Doctrine. Claimant recovered from surgery and now claims benefits in the form of temporary disability benefits, medical care, permanent partial impairment, and permanent partial disability in the amount 40.6%. Claimant further claims attorney fees for alleged unreasonable adjustment of the claim.

Defendants' primary argument is lack of causation. Defendants do not deny that there was an accident on January 6, 2023. Defendants aver, based upon Dr. Bauer's IME, that Claimant received all benefits to which he was entitled and deny liability for any further benefits in the form of medical care, temporary disability benefits, permanent partial impairment, permanent partial disability and attorney fees. When Dr. Little performed the surgery in question,

[2] Claimant waived the noticed issue of permanent total disability at the hearing. Tr., 5:18-23.

he found a left sided facet hypertrophy with severe recess in stenosis impinging on the L4 nerve root. When 3 mm of degenerative arthritic bone was removed from the left facet, Claimant rapidly recovered. There was not an acute injury to the spine, and the bulging disc laminectomy was not caused by the industrial accident, which merely caused a muscle strain. Claimant does not explain how a right sided injury morphed to DDD on his left side. Def. Brief p. 2-3, 15.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The transcript of hearing conducted on October 17, 2024;
3. Joint Exhibits 1 through 35;
4. The post-hearing deposition of Robert Friedman, M.D., taken on November 19, 2024; and
5. The post-hearing deposition of Delyn Porter, taken on December 11, 2024.

FINDINGS OF FACT

1. **Claimant's Background**. Claimant was born on June 25, 1970 and was fifty-four years old at the time of hearing. Tr., 14:20-23. He resided in Boise since 1993. *Id*. at 15:24-15:2. He grew up in Moscow, Idaho and originally moved to Seattle/Tacoma in Washington before moving to Boise. *Id*. at 15:5-8. He graduated from high school in 1989 in Moscow. *Id*. at 15:12-14. In Boise he attended one semester of culinary school before briefly returning back to Moscow to work as a volunteer firefighter, which he also functioned as in Seattle/Tacoma. *Id*. at 16:7-20. He is married with two children. *Id*. at 20:24-21;6.

2. **Work History**. Upon returning to Boise in 1993, Claimant first worked removing asbestos and doing odd construction jobs. *Id*. at 16:23-24. Claimant had a commercial driver's

license (CDL) and used it going to work for Pepsi/Nagel Beverage as truck driver/deliverer. He worked in this job for six or seven years until he sustained a back injury. After recovering from the back injury, he drove a bus hauling firefighters for one fire season, then went to work at Micron for nineteen years. At Micron he worked shortly as a production operator and then in security and emergency services as a control room operator. *Id*. at 17:18-18:7. After leaving Micron, Claimant went to work for Life Flight Network in their communications/dispatch center for a short time. *Id*. at 19:22-20:2. Claimant then returned briefly to Micron as a contractor. *Id*. at 20:3-4. He then went to work for Darigold as a truck driver, hauling dairy products. *Id*. at 20:4-6.

3. **Prior Injury and Corresponding Medical Treatment.** In 1999, Claimant was working as a truck driver/deliverer for Nagel Beverage/Pepsi. Tr., 25:19-25. He was making a delivery of soda to a local convenience store. He felt a pinch in his back while he was moving a case of soda bottle; he fell to his knees. *Id*. at 26:3-10. He was treated for this injury through occupational health, *Id*. at 26:11-21. Upon referral from occupational health, Claimant came under the treatment of Dr. Timothy Doerr, M.D., an orthopedic surgeon, who recommended surgery. *Id*. at 26:21-27:3. Dr. Doerr performed a laminectomy and partial discectomy on Claimant. *Id*. at 27:6-9; Ex. 27:00001.

4. Two years later in 2001, the same L-5 disc for which Claimant was operated on in 1999 re-herniated. Tr., 27:20-26. Claimant returned to Dr. Doerr, who performed a repair surgery on the disc. *Id*. at 28:1-15. After the second surgery in 2001, Claimant did not return to work at Nagel Beverage/Pepsi. *Id*. at 29:18-20.

5. Claimant felt that he "did great" following the 2001 surgery. *Id*. at 30:5-7. He stated that he had no issues with his back for "20-plus years." *Id*. at 30:8-9. He does not recall what the medical restrictions were at that time. Tr 30:5-17. Claimant did not seek any type of

follow-up care for his lower back and remained asymptomatic until his industrial injury with Employer in January 2023. *Id*. at 31:23-25. There are no medical records in the record of any back treatment during this period.

6. Pre-injury medical records involving back pain are sparse and low-level in specificity. They include the following:

- Yearly Check-up at St. Luke's December 17, 2015 - "some chronic pain is stable – hx of L4-5 lami." Ex 28, p. 58.
- St. Luke's nutritional assessment regarding bariatric surgery for weight loss on February 24, 2016 – The reasons Claimant provided for seeking weight loss surgery were "to feel better, less back pain, improve sleep apnea, . . . "and to be a better example for his daughter. He weighed 319 pounds and measured 5'5" at the time. Ex 30, p. 4.
- St. Luke's Bariatrics and General Surgery visit on April 12, 2016 for morbid obesity – "Low back pain, unspecified back pain laterally, unspecified chronicity, with sciatica presence unspecified." Ex. 29, p. 27. Bariatric surgery happened August 15, 2016. Low back pain remained on Claimant's active problems list until September 27, 2016, and the last visit occurred on February 14, 2020. Ex. 29, pp.36, 43, 73, 78, 88, 153.
- St. Luke's Sleep Medicine Institute on March 12, 2018, for sleep study – Under "Reason for Test" heading, it is noted "The medical history includes. . . back pain. . . ." Ex. 28., p 151.

7. **Subject Employment**. After working for Micron for approximately 19 years, Claimant went to work for Employer hauling and delivering dairy products. *Id*. at 20:1-6. In this job he was required to lift pallets of dairy products onto a truck, strap it in, and then complete his delivery route, which was usually between 15 and 20 stops. *Id*. at 33:1-11.

8. **Industrial Accident**. On January 6, 2023, Claimant was at his first stop at St. Luke's Regional Medical Center. *Id*. at 32:3-5. It started to rain and sleet while Claimant was dragging the stacks of dairy products onto the liftgate of his truck. *Id*. at 33:24-34:2. He slipped and tried to save the stack of milk products from falling over but immediately felt a twinge in his back. Tr., 34:2-6. He notified his supervisor and took Advil. *Id*. at 34:10-12. Claimant's

supervisor joined him at his second stop and did all of the wheeling of dairy products for the remainder of the day. *Id*. at 35:L2-4. Claimant remained symptomatic and in pain for the rest of his shift. *Id*. at 36:8-11.

9. **Medical Treatment**. On January 13, 2023, Claimant received an evaluation from occupational physician Dr. Stephen Martinez, M.D. Symptoms were located in L4-5 paraspinal muscles, left SI joint, positive left straight leg raising, restricted lumbar extension and rotation bilateral, with normal side bending. Ex. 15:00034. Dr. Martinez recommended conservative treatment in the form of anti-inflammatories, rest, ice and light duty. *Id*. at 36:23-25:21; Ex. 15:00018-19. Claimant was released to return to work on light duty. *Id*.

10. Dr. Martinez referred Claimant for an MRI of his lumbar spine. According to Dr. Martinez the February 11, 2023, MRI revealed "multilevel degenerative disk disease but no surgically amenable abnormalities." Dr. Martinez ordered physical therapy on February 15, 2023. Ex. 15:00034. Dr. Martinez referred Claimant to a neurosurgeon, Dr. Manning. However, Surety did not authorize the referral and instead scheduled Claimant for an independent medical examination (IME) with Dr. R. David Bauer, M.D., an orthopedic surgeon. Ex. 15:00051; Tr., 41:1-7.

11. **Bauer IME**. On March 23, 2023, Dr. Bauer performed an IME of Claimant. Ex. 32. Dr. Bauer's credentials are known to the Commission. As a result of the physical examination, review of Dr. Martinez's records, prior medical records, and the MRI, Dr. Bauer opined that Claimant had a low-grade overexertion strain of his lower back, causally related to the industrial accident, and lumbar degenerative disease "progressive over the years, not related to the incident in question. There is no evidence of aggravation, acceleration, or any change due to this incident." Ex. 32:00008. Dr. Bauer further found that the MRI findings are a "pre-existing

degenerative condition." *Id*. at 00009. "On a more probable than not basis, the lumbar discs did not bulge, deform or herniate from this incident." *Id*. at 00010. Dr. Bauer did not recommend any surgery. *Id*. at 00012. He further opined that Claimant would benefit from the completion of the ordered 8 sessions of physical therapy, but no further medical treatment was necessary. Ex. 32:00012. There was no indication that Claimant could not return to work, according to Dr. Bauer. *Id*. at 00013. Claimant was at MMI upon completion of his physical therapy. *Id*. Claimant had no impairment from the industrial injury, but a preexisting 8 percent whole person impairment due to his preexisting condition and prior surgery. *Id*. No permanent work restrictions were necessary. *Id*.

12. **Closure of Claim**. On April 7, 2023, Surety notified Claimant that his claim had been closed. "Reason: According to the medical opinion of Dr. Bauer, IME dated 3/23/2023, he finds your medical condition for the 1/6/2023 injury to your back a sprain/strain that has resolved. He opines that there is no impairment. You are able to return to work full duty with no restrictions and that there is no need for any future medical care as related to your injury of 1/6/2023." Surety further notified Claimant that Dr. Bauer found that he had lumbar degenerative disease, that may over time progress, but it was not related to the incident of 1/6/2023. Treatment for lumbar degenerative disease would need to be sought under Claimant's private medical insurance. Ex. 9:00002.

13. **Further Medical Treatment**. After his claim with Surety was closed, Claimant sought additional treatment outside of the workers compensation system. Tr., 41:19-24. He received a referral to Dr. Kenneth Little, M.D., a neurosurgeon with Northwest Neurosurgery Associates. *Id*. at 42:3-10.

14. Dr. Little evaluated Claimant on August 23, 2023, and recommended surgery,

specifically an L3-L4 laminectomy with left medial facetectomy, due to persistent pain into Claimant's lower back, left buttock, anterolateral thigh and lateral calf. He had paresthesia in a similar distribution. Ex. 19:00007-38. Claimant consented to the surgery. *Id*.

15. A second MRI was performed on October 18, 2023. This MRI revealed disc bulges at L2-L3, L3-L4, L4-L5, and L5-S1. Ex. 19:000035-36. Claimant had "left L4 radiculopathy secondary to left L3-L4 subarticular recess stenosis. Onset of the symptoms with work-related injury occurring January 6, 2023." Ex. 24:000010.

16. Dr. Little performed the lumbar L3-4 laminectomy with facetectomy surgery on November 9, 2023. Ex. 24:000095; Tr. 45:1-5. Claimant recovered well from the surgery and felt "great" at the time of hearing. Tr., 46:6-17.

17. **Return to Work at Micron**. During the course of his treatment with Dr. Little, Claimant's employment with Employer ended. Tr., 43:3-16. Thereafter, Claimant returned to work as a contractor at Micron, doing work similar to his prior employment with Micron, dispatching emergency services and facilities to emergency situations. *Id*. at 23:5-11. The position was sedentary and did not require lifting. Claimant spent most of his workday sitting down. *Id*. at 24:L3-5. He continued to work in this position at the time of hearing. *Id*. at 22:18-20.

18. **Functional Capacity Examination (FCE).** On February 9, 2024, Dr. Little recommended obtaining a Functional Capacity Examination (FCE) prior to assigning Claimant permanent work restrictions. Ex. 35:00027. Claimant underwent an FCE on April 11, 2024, at Wright Physical Therapy with Therapist Xavier Beckham, PT, MSPT, SCS, CIDN. Ex. 33. PT Beckham concluded that Claimant gave maximum effort on all tests. Ex. 33:00002. Due to lumbar weakness, and signs and symptoms consistent with lower back pain, PT Beckham

concluded that Claimant was limited in the following activities: lifting waist to ground, forward bending, kneeling, pushing/pulling and carrying. *Id*. at 00003. PT Beckham concluded his report with the following summary of functional limitations:

> Due to his lower back injury sustained on January 6, 2023, James would do best with the requirements that match the limitations and recommendations found in today's FCE grid. These are as such: limit lifting waist to ground to no more than 30 pounds frequently or 60 pounds occasionally or 70 pounds rarely; limit carrying to no more than 60 pounds rarely or 45 pounds occasionally or 25 pounds frequently; limit pushing./pulling to documented weight limit; forward bending to low level (34-35% of day) of frequent performance; and limit mid level (45-55% of day) of frequent performance.

Ex. 33:00003.

19. **IME with Dr. Friedman.** On June 17, 2024, Claimant underwent an IME with Dr. Robert H. Friedman, M.D. Ex. 34. Dr. Friedman's qualifications are known to the Industrial Commission.

20. Dr. Friedman opined that Claimant was "Status post L2-3 laminectomy and facetectomy, work-related" with a "History of a previous L4-5 decompression x2, stable." Ex. 34:00004.

21. Dr. Friedman opined that no further treatment was indicated or necessary, but he did warn that Claimant "is at increased risk for having degenerative disease above and below the level of his laminectomy. This is consistent with normal natural postsurgical intervention and directly related to his surgery." *Id*.

22. Dr. Friedman stated on more probable than not basis, Claimant's lumbar symptoms and need for additional treatment by Dr. Little was related to the industrial injury of January 6, 2023. *Id*. He stated specifically as follows:

> Based on Mr. Wells' history, he was asymptomatic until the injury. Postinjury care including physical therapy and anti-inflammatories did not resolve the issue. Follow-up MRIs identified abnormalities at L3-4 requiring surgical intervention.

This is above the level of his previous surgery.

Based upon history provided by Mr. Wells and the medical records review, it is my medical opinion on a more probable than not basis and to a reasonable degree of medical certainty that his lumbar symptoms and need for additional treatment by Dr. Little are as a result of the January 6, 2023 injury.

Id. at 00005.

23. Dr. Friedman disagreed with Dr. Bauer's findings, as follows:

Dr. Bauer's findings do not address the issues of ongoing back pain, complete resolution and resumption of physical activities post prior injury. Although Mr. Wells may have been at increased risk for having a degenerative process and/or abnormality above or below his prior injury, medical records and the patient's history confirm he was asymptomatic until after his January 6, 2023 injury. This is consistent with a new injury and is neither preexisting nor is it a soft tissue myofascial difficulty.

MRI results note degenerative disease at L2-3 and L3-4 are new noting prior L4 microdiscectomy.

Ex. 34:00005.

24. Dr. Friedman opined that Claimant had reached MMI. *Id.*

25. Dr. Friedman opined as to an impairment rating for Claimant as follows:

Using the AMA Guide to Permanent Impairment Sixth Edition, table 17-4 on page 570, it would be best rated under motion segment lesions with intervertebral disc herniations and/or abnormalities at multiple levels (L3-4 and L4-5) with or without documented radiculopathy with or without surgery. He would, therefore, be a class 3 defaulting to a Grade C or 19% impairment of the whole person.

Apportionment is indicated. He has previously been given an 8% impairment for single level by Dr. Doerr. I would, therefore, subtract 8% from the 19% resulting in an 11% impairment of the whole person as a result of the January 6, 2023 injury.

Using net adjustment formula, he would receive as 1-3 for his functional history and a 1-3 for his clinical exam result in a net adjustment of -4… He was, therefore, decreased to a grade A or 15% impairment of the whole person. Subtracting the preexisting 8% results in a 7% impairment as a result of the January 6, 2023 injury.

Ex. 34:00005-6.

26. As for work restrictions, Dr. Friedman opined that Claimant, as a result of his second level surgery for January 6, 2023, should have identical restrictions previously provided by Dr. Doerr, i.e., medium work level 50 pounds and 25 pounds repetitive with no twisting or twerking maneuvers to his low back. *Id*. at 00006. These restrictions are the same as those noted in the Industrial Commission's Vocational Rehabilitation records dated January 10, 2000. Ex. 8, p. 44.

27. **Dr. Friedman's Deposition**. The parties took Dr. Friedman's deposition on November 19, 2024. Friedman Dep. at 1. Dr. Friedman's qualifications are known to the Commission.

28. Dr. Friedman was asked about the reasonableness of the Surety's denial of treatment, as follows:

> Q. So at this point, the surety denied additional medical treatment. Was the decision to deny additional medical treatment reasonable in your view?
>
> A. They had – I was aware they had opinions that indicated that it was a muscle problem. And so, I am not in agreement with that medical opinion, but I believe that's what the surety used to base their decision for no further treatment.
>
> So I don't know how to answer your question other than to say, was their decision reasonable? Probably, based on the information they chose. And it turns up in retrospect, it was not correct.

Friedman Dep., 20:4-17.

29. Dr. Friedman believed that Dr. Little's treatment of Claimant was reasonable and medically necessary and related to the industrial injury. *Id*. at 21:8-11. This is because Claimant had failed conservative measures such as PT and an injection, but was not successful in managing his pain. Also, the repeat MRI ordered by Dr. Martinez showed continued presence of an abnormality, so the treatment at that point would be surgical. *Id*. at 21:12-21.

30. Dr. Friedman found it significant that Claimant had immediate relief of his symptoms following surgery by Dr. Little: "Well, he had immediate relief in his symptoms, as you would expect, if you take the pressure off the nerve." *Id*. at 23:12-14.

31. Dr. Friedman noted that from 2001, to when Claimant had his second surgery with Dr. Doerr, until January of 2023, Claimant did not seek medical treatment for his low back. *Id*. at 26:20-27:4.

32. Dr. Friedman disagreed with Dr. Bauer's report for several reasons. First, Dr. Bauer did not perform any maneuvers to cause nerve root irritation. Second, Dr. Bauer said that it was musculoskeletal strain and that it was related to his degenerative disease, progressive over the years. Dr. Friedman did not find that to be supported by the medical records he reviewed. He also disagreed with Dr. Bauer's findings that Claimant was at MMI at that time because further treatment was indicated. *Id*. at 32:13-33:24.

33. Dr. Friedman opined that Claimant had a 7% impairment after apportionment for the prior 8%. *Id*. at 35:4-36:4.

34. Dr. Friedman assigned the same work restrictions to Claimant's 2023 injury that applied after his 1999 and 2001 surgeries. *Id*. at 36:5-13.

35. Dr. Friedman explained the difference between an FCE and work restrictions assigned by a physician. An FCE measures physical performance combined with motivation. It is a one-time assessment of capacity on the day of the assessment. Work restrictions are assigned by a physician to protect a person from re-injury and allow a worker to be as safe as a person who has never had the injury. *Id*. 36:21 – 25.

36. **Vocational Evaluation Report by Delyn Porter.** On September 25, 2024, Delyn D. Porter, M.A., CRC, CIWCS, delivered a vocational evaluation report to the attention of

Claimant's counsel. Ex. 35. Mr. Porter's qualifications are known to the Commission.

37. Mr. Porter's methodology was that of the RAPEL Method, which is a comprehensive approach to evaluating vocational evidence including loss of labor market access and loss of earning capacity, among other elements. Ex. 35:00002. Mr. Porter reviewed all relevant pre-injury and post-injury medical records, including the IME of Dr. Bauer but excluding the IME of Dr. Friedman. *Id*. at 00003-00004. He also reviewed relevant discovery answers and responses, the deposition of Claimant, the FCE, and various reference materials including but not limited to the Dictionary of Occupational Titles. *Id*. at 00004. He also interviewed Claimant by telephone on July 18, 2024. Ex. 35:00012.

38. Mr. Porter identified the following occupations relevant to Claimant's employment history: cook, short order; dining room attendant; driver, sales route; milk driver; truck driver, heavy; driver; fire fighter; emergency medical technician; asbestos removal worker; stock clerk; computer peripheral equipment operator; dispatcher, security guard; security officer; guard, security; and guard, chief. *Id*. at 00014-00020.

39. Based upon his past work experience, Mr. Porter determined that Claimant had transferable skills in commercial truck driving and transportation; security and monitoring; emergency services; light truck maintenance and repairs, and culinary arts. *Id*. at 00020.

40. Mr. Porter determined that Claimant had previously worked in occupations ranging from unskilled to skilled. His highest level of Specific Vocational Preparation (SVP) was SVP level 7, Skilled (over two years and including 4 years). *Id*. at 00021.

41. Mr. Porter noted that according to the opinion of Dr. Bauer, no permanent work restrictions would be necessary and Dr. Bauer did not assign any impairment rating for the January 6, 2023 industrial injury. *Id*. At 00022.

42. Mr. Porter noted that Dr. Little recommended a functional capacity examination before making return to work recommendations. *Id*. The FCE, dated April 2024, placed Claimant in a limited medium work capacity post-injury based upon both exertional and positional restrictions identified in the FCE. *Id*. at 00023.

43. Mr. Porter compared the job requirements of Claimant's time of injury position, which he rated as heavy to very heavy. *Id*. at 00026. "The required physical demands of the time of injury job exceed Mr. Wells' physical demand capacities post-injury." *Id*. at 00027. "Using the restrictions outlined in the FCE report as recommended by Dr. Little, Mr. Wells is unable to return to his time of injury job." Ex. 35:00028.

44. Mr. Porter conducted a labor market access analysis. "Based upon his vocational profile and work history, Mr. Wells has a pre-injury labor market of approximately 23,680 total jobs in the Boise City – Nampa labor market area." *Id*. at 00029.

45. Mr. Porter opined that based upon the medical opinions of Dr. Bauer, Claimant would continue to have access to 23,680 total jobs, thus his calculated post-injury job market loss would be 0.00%. *Id*.

46. Using the FCE recommended by Dr. Little, Claimant would have access to approximately 11,494, resulting in a calculated labor market loss of 51.5%. *Id*. at 00030.

47. Based upon his wage history, Mr. Porter determined that Claimant had an annual average wage $28.65 per hour prior to his industrial injury. In his current employment, Claimant earns $25.00 per hour. This results in a wage capacity earning loss of 12.72%, post-injury. *Id*. at 00032.

48. For a permanent partial disability (PPD) analysis, Mr. Porter noted that Dr. Bauer assessed 0% additional impairment resulting from the January 6, 2023 injury, and that no

permanent work restrictions were necessary. *Id*. at 00033. Nevertheless, Dr. Bauer's opinion was delivered prior to Claimant's 11/9/2023 laminectomy surgery, and had not been updated post-surgery. *Id*. Based upon Dr. Bauer's opinion, Claimant had not sustained any labor market or wage capacity loss, thus his calculated PPD would be 0.00%. *Id*.

49. Based upon the FCE findings recommended by Dr. Little, Claimant had a calculated 51.5% labor market loss and 12.7% wage capacity loss, resulting in a PPD of 32.1% inclusive of impairment. *Id*. at 00033-34.

50. Mr. Porter opined that Claimant's labor market loss should be weighted at 1.33% and wage loss at 1.0% due to the disparity in the two factors. This would result in a PPD of 40.6% inclusive of impairment. Ex. 35:00034.

51. **Porter Deposition**. The parties took Mr. Porter's deposition on December 11, 2024. Porter Dep. at 1.

52. Mr. Porter did not review Dr. Friedman's report as part of his vocational analysis. *Id*. at 20:9-12.

53. Based upon the FCE, Mr. Porter placed Claimant in the limited medium physical demand category. Claimant had a 35 pound restriction from waist to crown, which is less than the full medium physical demand category. *Id*. at 22:15-23:15. This was significantly less than the heavy physical demand job Claimant was performing at the time of his industrial injury. For that Claimant had to push and pull crates on carts or hand-trucks weighing up to 288 pounds full of milk crates. *Id*. at 23:16-24:5. *See also*: Hrg. Tr. p. 33:13-24.

54. Based upon the restrictions identified in the FCE report, Claimant had a calculated labor market loss of 51.5%. This was based upon the difference between the jobs available to Claimant pre-injury and those available to him post-injury based upon the FCE

restrictions. *Id*. at 25:12-20. This is because Claimant was excluded from performing the jobs in the full medium heavy or very heavy work categories, and that reduced his overall employability. *Id*. at 25:21-26:12.

55. Mr. Porter determined that Claimant "was pretty accurate in defining his perception or interpretation of his physical demand capacities with the restrictions that were identified in the Functional Capacity Examination." *Id.* at 28:5-9.

56. At the time of his report, Mr. Porter determined that Claimant was currently functioning in a sedentary or light physical demand occupation in his work for Micron. *Id*. at 29:1-11.

57. Mr. Porter did not find any evidence of secondary gain on the part of Claimant. "I think if he could go back to the day before the accident and not go to work that day and have his life back and be able to do what he could before, that he would do that in a heartbeat." Porter Dep., 30:21-31:1. Similarly, Mr. Porter did not find any evidence of malingering or exaggeration of symptoms on the part of Claimant. *Id*. at 31:16-21.

58. Because he considered the disparity between job market loss and wage capacity loss to be significant, Mr. Porter thought it was appropriate to weigh job market loss more "in order to avoid an unjust result." *Id*. at 36:13-21. "So in this particular case, he [Claimant] had a 51.5 percent labor market loss and only a 12.7 percent wage earning capacity loss, and based upon that difference, I felt it was appropriate to weight the labor market loss at 1.33 percent, and the wage loss at 1.0 percent." *Id*. at 36:22-37:2.

59. Mr. Porter did not review any records from Dr. Little imposing permanent work restrictions. He only considered the FCE. *Id*. at 40:16-23.

60. **Credibility**. Claimant testified credibly at hearing. Defendants attack Claimant's

credibility by criticizing him for a "singular determination to be right this has manifested in his assertion of being asymptompatic for 20 years prior to the industrial injury." Defendants' Brief at 14.

61. Defendants inaccurately argue that Claimant suffered from a chronic low back issue. The medical record is devoid, however, of treatment for Claimant's back between 2001 and 2023. This is consistent with Claimant's testimony and supports his credibility. The few references to back issues in Claimant's medical records are references to his prior treatment in his treatment for bariatric surgery. It does not demonstrate a long-standing and chronic low back condition for which he sought treatment and does not impeach Claimant's credibility.

FURTHER FINDINGS AND ANALYSIS

62. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

63. **Causation**. Causation is a question of fact for the Commission to decide. *Koester v. State Insurance Fund*, 124 Idaho 205, 208, 858 P.2d 744, 747 (1993). Proof of a possible causal link is insufficient to satisfy the burden. *Beardsley v. Idaho Forrest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 5123 (1995). There must be evidence of a medical opinion, whether by physician's testimony or written medical record, supporting the claim for compensation to a reasonable degree of medical probability. *Langley v. State Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995). No special formula is necessary when medical evidence

plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). A claimant is required to establish a probable, not merely a possible, causal connection between an injury and a claimed condition. *Dean v. Dravo Corporation*, 95 Idaho 558, 562, 511 P.2d 1334, 1337 (1974). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 528 P.2d 903 (1974).

64. For entitlement to workers' compensation benefits, an employee must show that they "suffered an injury as defined by Idaho Code Section 72-102." *Vawter v. United Parcel Service, Inc.*, 155 Idaho 903, 907, 318 P.3d 893, 897 (2014). "Injury" and "personal injury" are construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code Section 72-102(18)(c). Claimant has the burden to show proof "to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an accident occurring in the course of employment." *Buffington v. Potlatch Corporation*, 125 Idaho 837, 839, 875 P.2d 934, 936 (1994).

65. Defendants argue that Claimant has failed to produce substantial and competent evidence regarding causation. Nevertheless, the record establishes a specific, acute injury to Claimant's back with subsequent MRIs identifying clear "disc bulges" at the L2-L3, L3-L4, and L4-L5 level. Ex. 16, at 4; Ex. 23, at 2.

66. Defendants assert that the industrial injury and need for subsequent surgery was related to a degenerative condition, but are unable to point to any records establishing such. The record as it stands is devoid of twenty years of records pertaining to a degenerative condition prior to the industrial injury.

67. Dr. Friedman's testimony supports Claimant's claim of disability by establishing the causal link between his January 2023 industrial injury and his current physical limitations, as well as the necessity for the medical treatment Claimant received. Dr. Friedman explicitly stated that, on a more medically probable than not basis that Claimant's industrial injury caused his symptoms and the need for treatment. Friedman Dep., 29:11-25.

68. Dr. Friedman acknowledged Claimant's previous surgeries at L4-5, however he stated that these surgeries did not directly play a role in the causation of the current case, although indirectly the biomechanics of the spine were changed by the prior surgeries. *Id*. at 25:18-25 – 26:1-9. Dr. Friedman clarified that Claimant had been asymptomatic for over 20 years prior the 2023 injury, pointing out that Claimant did not seek medical care for his low back in those 20 years but did share having had the back injury and surgery. Dep. 26:24-28:23.

69. Dr. Friedman assessed that Claimant was credible in his testimony on the lack of symptoms for twenty years. *Id*. at 42:23-25. Dr. Friedman further noted that Claimant's work history was consistent with the medical records reviewed. *Id*. at 14:13-20.

70. In summary, Dr. Friedman's testimony provides strong medical evidence that Claimant's current limitations are a direct result of the 2023 industrial injury, and that his treatment has been both reasonable and necessary.

71. The evidence of Dr. Little supports Dr. Friedman's opinions. Dr. Little stated that Claimant had "left L-4 radiculopathy secondary to left L3-L4 subarticular recess stenosis. Onset of symptoms was with work-related injury occurring January 6, 2023. Dr. Little … recommended surgery, specifically, an L3-L4 laminectomy with left medial facetectomy. . . . " Ex. 19:38.

72. Dr. Bauer's opinions, however, are contradicted by other medical professionals and evidence in the record. He stated that there was "no objective findings of radiculopathy." This is directly controverted by the later MRI results showing a disc bulge at L3-L4 compressing a nerve and Claimant's corresponding complaints of left-sided buttock and leg pain.

73. Dr. Bauer stated that no permanent restrictions were necessary. Ex. 32:12. Nevertheless, this opinion was premature because Claimant had not completed physical therapy; it took place before his lumbar surgery with Dr. Little and before an FCE was completed. Dr. Bauer did not provide updated opinions following the surgery and FCE.

74. In summary, the preponderance of the evidence establishes a probable causal relationship between the January 2023 accident and the surgery and other treatment.

75. **Medical Benefits**. Idaho Code § 72-432(1) provides that an employer is obligated to provide medical treatment if claimant's physician requires the treatment and the treatment is reasonable. It is for the physician, not the Commission, to determine whether treatment is required. *Chavez v. Stokes*, 158 Idaho 793, 797, 353 P3d 414, 418 (2015). The Commission decides whether the treatment was reasonable. *Id*.

76. When an injured worker's claim is denied, and the claimant is required to obtain medical care outside of the workers compensation system, and the medical care is later determined to be compensable, the claimant is entitled to payment of 100% of the invoiced amount of the bills. *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 8352 (2009); *Millard v. ABCO Const., Inc.,* 161 Idaho 195, 384 P.3d 958 (2016).

77. When Surety denied further treatment to Claimant based upon Dr. Bauer's opinion, Claimant was forced to obtain medical treatment outside of the workers' compensation system. The preceding section has established causation. His surgery by Dr. Little and

accompanying care is compensable, and according to *Neel*, Claimant is entitled to 100% of the invoiced amounts of the bills.

78. **Temporary Disability Benefits**. According to Idaho Code § 72-408, Claimant is entitled to income benefits for total and partial temporary disability during a period of recovery. After Claimant has reached maximum medical improvement, Claimant is no longer in recovery and is no longer eligible for temporary disability benefits. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001).

79. Claimant was off work from at least the date of his surgery, November 9, 2023, until Dr. Little released him to return to work on December 8, 2023 in his new sedentary position with Miccron. Claimant is thus entitled to TTD benefits during this time.

80. **Permanent Partial Impairment (PPI)**. Idaho Code §72-425 specifies that "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 permanent impairment and by pertinent non-medical factors as provided in § 72-430, Idaho Code." Permanent impairment is any anatomic or functional abnormality or loss after maximum medical rehabilitation has been reached and a claimant's position is considered medically stable. *Henderson v. McCain Foods*, 142 Idaho 559, 567, 130 P.3d 1097, 1105 (2006).

81. Dr. Friedman assigned a 15% impairment rating to Claimant for his new injury of January 2023, not the prior injury at L4-L5. Ex. 34:5. He clarified that he was aware of one 8% impairment rating assigned to Claimant for the prior L4-5 injury and surgery. Dr. Friedman's 15% impairment rating, less the 8% apportionment for his prior surgeries with Dr. Doerr, accurately reflects the medical impact of Claimant's L3-4 injury and subsequent surgery, and accounts for his prior L4-5 injury by subtracting the previous impairment rating. After

application of the net adjustment formula, Dr. Friedman found Claimant had 7% whole person impairment from the work injury. *See:* FOF 24.

82. **Permanent Partial Disability.** "Permanent disability" or "under a 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 permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430." Idaho Code § 72-425.

83. The test for determining whether Claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced Claimant's capacity for gainful employment." *Graybill v. Swift & Company,* 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on Claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

84. Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the advisory opinions of vocational experts. *See Eacret v. Clearwater Forest Industries,* 136 Idaho 733, 40 P.3d 91 (2002); *and Boley v. State of Idaho, Industrial Special Indemnity Fund,* 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon Claimant. *Seese v. Ideal of Idaho, Inc*., 110 Idaho 32, 714 P.2d 1 (1986).

85. The first requirement for determining whether Claimant has sustained disability in excess of impairment is to establish that Claimant has a permanent partial impairment. *See,* I.C. §

72-425. *See also*, *Urry v. Walker and Fox Masonry Contractors* 115 Idaho 750, 769 P2d 1122 (1989) ("…there must be impairment for disability to exist. *A fortiori,* there must be an increased level of impairment for a new, additionally compensable disability to exist." *Urry*, 115 Idaho at 753, 769 P.2d at 1125.)

86. Claimant has met the *Urry* bar. The record establishes that he has an 11% whole person impairment as a result of the January 2023 injury and subsequent surgery. Thus, if the nonmedical factors combine with the medical factors, Claimant will have sustained a permanent partial disability as well.

87. To assess PPD, we begin with Dr. Friedman's restrictions resulting from the L4-5 spine surgery. He testified in deposition that he reapplied the restrictions that had been issued after the 1999 and 2001 surgeries. PPI for the prior back surgeries at L4-5 was 8%; the current back surgery PPI rating was 7%.

88. Claimant hired Delyn Porter to conduct a vocational assessment. It is the only vocational assessment in the record, as Defendants have not produced their own vocational assessment to rebut it. *See*, Ex. 35.

89. Although Mr. Porter did not review Dr. Friedman's report or deposition, Mr. Porter connected the medical findings with the impact on Claimant's earning capacity. The medical restrictions identified in the FCE directly impacted Claimant's access to the labor market. The restrictions on Claimant included restrictions on lifting, carrying, kneeling, and forward bending and impacted the types of jobs Claimant could perform. Mr. Porter concluded that Claimant had a "limited medium" work capacity post-injury, based on the FCE. Because of the documented lifting restrictions, Claimant was capable of more than light physical demand, but not full capacity for medium level work. Ex. 35:22-23.

90. According to Mr. Porter, Claimant's post-injury physical limitations prevent him from returning to his job as a route driver for Employer, which was classified as heavy to very heavy. Ex. 35:27.

91. Mr. Porter determined that Claimant sustained a 51.5% loss of access to the labor market because of his physical restrictions. Ex. 35:30. Mr. Wells also had a 12.7% wage earning capacity loss post-injury, based on the difference between his pre-injury wages and his current wages. Ex. 35:33. Based upon a standard analysis of adding the two factors and dividing by two, this results in a permanent partial disability (PPD) of 32.1%.

92. Claimant argues that Mr. Porter's weighting of the two factors is justified, resulting in a PPD of 40.6%. The Referee disagrees. A PPD of 32.1% accurately reflects Claimant's disability. The disparity between the two factors is not that great.

93. Only one vocational expert, Mr. Porter, has ascertained the number of jobs in Claimant's labor market that match his vocational profile. Furthermore, Mr. Porter concluded that Claimant has sustained a 51.5% loss of labor market access based upon the 8-hour-a-day/5-day-per-week limitations addressed in the FCE which Dr. Little ordered and Dr. Friedman endorsed, as well as Claimant's limited transferable skills, his age and his reasonable geographic locality in the Boise-Nampa labor market. Ex. 35:30. This opinion is not contradicted by any other evidence in the record.

94. The injury that Claimant sustained on January 6, 2023, has been a major vocational setback. Claimant's career had been focused on manual labor and his back surgery is significant in affecting that. Claimant also has an increased risk of developing degenerative disc disease above the level of his injuries and his surgeries as well as below. Freidman Dep., 40:22-25.

95. There is sufficient evidence to support loss of wage-earning capacity and labor market access based upon Claimant's physical injury and non-medical factors. There is no evidence of malingering; Claimant made a good faith effort to return to work and obtained employment at Micron.

96. For all the foregoing reasons, the evidence supports a finding that Claimant sustained a PPD of 32.1% inclusive of 7% PPI.

97. **Attorney Fees**. Idaho Code § 72-804 provides as follows:

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

98. Although it was later shown to be incorrect by later-gathered evidence, Defendants had a reasonable basis to deny compensability of Claimant at the time of Dr. Bauer's IME. The fact that there were two prior back surgeries in a nearby portion of the spine made the pre-existing degenerative condition a consideration despite the 20-year treatment-free span of time. The award of medical benefits at the *Neel* rate has compensated Claimant for the hardship of the surety's denial in this case. "Sure and certain relief" has been afforded. For these reasons, an award of attorney fees is not appropriate.

CONCLUSIONS OF LAW

1. Causality between the industrial accident and Claimant's injuries and surgical treatment has been established.

2. Claimant is entitled to recover medical expenses incurred outside of the workers' compensation system at the *Neel* rate.

3. Claimant is entitled to recover TTD benefits from the date of his surgery on November 9, 2023, when he was declared at MMI and released to return to work on December 8, 2023

4. Claimant is entitled to a permanent partial impairment (PPI) of 7%.

5. Claimant is entitled to permanent partial disability (PPD) of 32.1% inclusive of impairment.

6. Claimant is not entitled to recover attorney fees.

RECOMMENDATION

Based on 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 5___ day of **M a y**_____, 2025.

INDUSTRIAL COMMISSION

John C. Hummel

John C. Hummel, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 5 t h day of May, 2025, 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:

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Meagan Graves

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JAMES P. WELLS, Claimant, v. DFA DAIRY BRANDS DISTRIBUTING WEST, LLC, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Surety, Defendants.	**IC 2023-000747** **ORDER** **FILED MAY 5, 2025** **IDAHO INDUSTRIAL COMMISSION**

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

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

1. Causality between the industrial accident and Claimant's injuries and surgical treatment has been established.
2. Claimant is entitled to recover medical expenses incurred outside of the workers' compensation system at the *Neel* rate.

3. Claimant is entitled to recover TTD benefits from the date of his surgery on November 9, 2023, when he was declared at MMI and released to return to work on December 8, 2023.

4. Claimant is entitled to a permanent partial impairment (PPI) of 7%.

5. Claimant is entitled to permanent partial disability (PPD) of 32.1% inclusive of PPI.

6. Claimant is not entitled to recover attorney fees.

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

DATED this 1st day of ___ May_____, 2025.

INDUSTRIAL COMMISSION

Claire Sharp

Claire Sharp, Chair

Aaron White, Commissioner

Thomas E. Limbaugh, Commissioner

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

ATTEST:

Kamerron Slay

Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of May, 2025, a true and correct copy of the foregoing **ORDER** was served by Electronic mail and regular United States Mail upon each of the following:

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